

ORIGINAL

IN THE SUPREME COURT OF OHIO

HEALTHY FAMILIES OHIO, INC., et al.

Relators,

v.

OHIO BALLOT BOARD, et al.,

Respondents.

Case No. 2012-0070

Original Action in Mandamus
and Prohibition

**MOTION TO DISMISS OF RESPONDENTS
OHIO BALLOT BOARD, SECRETARY OF STATE JON HUSTED,
AND OHIO ATTORNEY GENERAL MIKE DEWINE**

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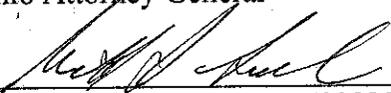
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AND OHIO ATTORNEY GENERAL MIKE DEWINE**

Pursuant to Ohio R. Civ. P. 12(b)(1), Respondents, the Ohio Ballot Board, Ohio Secretary of State Jon Husted, and Ohio Attorney General, move for dismissal of Relators' claims because this Court does not have jurisdiction to hear Relators claims to the extent they are brought pursuant to Section 1g, Article II of the Ohio Constitution and R.C. 3519.01(C). Additionally, Respondents move for dismissal of Relators' petitions for writ of mandamus and writ of prohibition pursuant to Ohio R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. A memorandum in support of this motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

The right of the people to amend the Constitution by means of the initiative process is a reserved right that this Court must interpret broadly. *State ex. rel. Hodges v. Taft*, 64 Ohio St.3d 1, 5, 591 N.E.2d 1186 (1992). In this case, a committee of individuals has sought to exercise that right by proposing certain amendments to Article I Sections 1 and 16 of the Ohio Constitution. They submitted the proposed amendment and summary, along with sufficient signatures, to the Attorney General. The Attorney General performed his statutory duty in certifying the summary as fair and truthful. Pursuant to the statutory requirements, the Attorney General then forwarded that information to the Ballot Board. The Ballot Board, pursuant to its statutory obligations, held a meeting where it certified the proposed summary as a single issue.

After the Attorney General, Secretary of State, and Ballot Board faithfully performed their statutory obligations, the Relators filed this original action. This Court should dismiss this case for four separate reasons. First, this Court is without original jurisdiction to hear many of the Relators' claims. Second, the Relators are not "aggrieved part[ies]" because they have not suffered any actual injury in fact. Third, Respondents have not acted in a quasi-judicial manner, such that Relators failed to state a claim upon which a writ of prohibition may issue. Finally, none of the Respondents have violated any of their clear legal responsibilities, such that Relators failed to state a claim upon which a writ of mandamus may issue. Therefore, for the reasons more fully articulated below, the Respondents respectfully request this Court to issue an order dismissing Relators' Complaint.

STATEMENT OF FACTS

I. Summary of the Pre-Petition and Petition Processes.

Before placing a proposed constitutional amendment on the ballot, the submitting party must first complete a (1) pre-petition process, which is defined by statute, and then a (2) petition process, which is defined by the Ohio Constitution. Under the statutory pre-petition process, whoever seeks to place a proposed constitutional amendment on the ballot must first submit a proposed petition to the Attorney General, which must include: (1) a copy of the proposed constitutional amendment, (2) with a preliminary petition signed by 1,000 qualified electors, and (3) a summary of the proposed constitutional amendment. R.C. 3519.01(A). Immediately upon receiving a proposed petition, the Attorney General forwards the submitted signatures to their respective boards of elections for verification that there is 1,000 valid signatures. R.C. 3519.01(A); R.C. 3501.38; R.C. 3501.11(K). Within ten days of receiving the proposed petition, the Attorney General is charged with determining whether the summary of the proposed constitutional amendment is a “fair and truthful” summary of the proposed constitutional amendment. *Id.* After the Attorney General has determined that the summary is fair and truthful, he must certify the proposed petition and forward it to the Ohio Ballot Board. *Id.*

Within ten days of receiving the proposed petition from the Attorney General, the Ballot Board must determine whether the proposed constitutional amendment contains “only one proposed . . . constitutional amendment.” R.C. 3505.062; R.C. 3519.01(A). If the Board so determines, it shall certify its approval to the Attorney General. R.C. 3505.062. Upon receipt of the Ballot Board’s certification, the Attorney General must then file, with the Secretary of State, “a verified copy of the proposed constitutional amendment together with its summary and the attorney general’s certification.” R.C. 3519.01(A). The Secretary of State’s receipt of the

Attorney General (and Ballot Board) certification completes the statutory pre-petition process. It is at this point that the committee named on the pre-petition is permitted to proceed with the second step of the process, which includes circulating part-petitions and gathering signatures in accordance with Section 1g, Article II of the Ohio Constitution.

II. Summary of Relators' Allegations.

Personhood Ohio is a political action committee that seeks, through the petition process, to submit a constitutional amendment to Ohio's voters on a future general election ballot. (Complaint, ¶ 13). Specifically, Personhood Ohio seeks to amend Section 1, Article I, and Section 16, Article I, of the Ohio Constitution to define the words "person" and "men," as those terms are used in their respective sections, to include "every human being at every state of biological development, including fertilization." (Complaint, ¶16, quoting Proposed Amendment). In accordance with this mission, on December 21, 2011, Personhood Ohio submitted a copy of their initiative petition and a summary of the proposed constitutional amendment to the Ohio Attorney General, as required by R.C. 3519.01(A). (Complaint, ¶ 15). On December 31, 2011, the Ohio Attorney General determined that the proposed summary was a fair and truthful statement of the proposed constitutional amendment. (Complaint, ¶ 18). The Attorney General memorialized this decision in a letter dated December 30, 2011, which he forwarded to the Ohio Ballot Board with a copy of the proposed constitutional amendment enclosed. (Complaint, ¶ 18).

Pursuant to the Revised Code, the Ohio Ballot Board held a public meeting on January 9, 2012, to determine whether the proposed amendment contained only one proposed amendment. (Complaint, ¶ 20). At the January 9 hearing, Relators' counsel, urged the Ballot Board to divide the initiative petition into two separate initiatives, citing R.C. 3505.062(A). (Complaint, ¶ 20).

After hearing Relators' counsel's comments, the Ballot Board determined that the initiative petition contained only one proposed constitutional amendment. (Complaint, ¶ 20).

In response to the decisions made by the Attorney General and the Ballot Board, Relators, Healthy Families Ohio, Inc., a non-profit corporation, and its Treasurer, Garrett M. Dougherty, brought this action on January 13, 2012. Through several different avenues, including a writ of mandamus and/or a writ of prohibition, Relators seek an order declaring that the Attorney General erred in finding that Personhood Ohio's proposed summary was "fair and truthful" and/or that the Ballot Board erred in finding that the proposed initiative contains a single constitutional amendment. (Complaint, ¶¶ 38, 43, 69, Prayer for Relief).

LAW AND ARGUMENT

I. This Court Lacks Jurisdiction to Hear Relators' Claims Brought Under Section 1g, Article II, and R.C. 3519.01(C).

While not clearly articulated, Relators appear to bring this action on four distinct bases: [1] Section 1g, Article II of the Ohio Constitution, [2] R.C. 3519.01(C), [3] Section 2, Article IV, original action writ of mandamus, and [4] Section 2, Article IV, original action writ of prohibition. This Court, however, does not have jurisdiction to hear an action brought pursuant to Section 1g, Article II of the Ohio Constitution or under R.C. 3519.01(C).

A. Section 1g, Article II authorizes original actions to challenge invalid petitions, but not alleged errors in the pre-petition process set forth in R.C. 3519.01(A) and R.C. 3505.062.

Relators misinterpret the scope of Section 1g, Article II of the Ohio Constitution, which gives the Ohio Supreme court "original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section." However, that section only applies to the **petition** process, which is a separate process that commences subsequent to the pre-petition process described in R.C. 3519.01(A) and R.C. 3505.062. In other words, to the

extent Relators bring this action pursuant to Section 1g, Article II, they mistakenly rely on the presumption that the process provided for by R.C. 3519.01(A) is part of the initiative process.

Ohio courts have recognized that “the statutory procedure under R.C. 3519.01 is merely a **preliminary proceeding prior** to the commencement of the initiative process” set forth in Section 1g, Article II of the Ohio Constitution. *State ex rel. Rankin v. Ohio State AG*, 161 Ohio App. 3d 521, 2005-Ohio-2717, 831 N.E.2d 438, ¶31 (10th Dist.) (citing *State ex rel. Durrell v. Celebrezze*, 63 Ohio App.2d 125, 127, 409 N.E.2d 1044 (10th Dist. 1979)) (emphasis added); *Cf. State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586 and *State ex rel. Schwartz v. Brown*, 32 Ohio St.2d 4, 288 N.E.2d 821 (1972), (jurisdictional nature of the Attorney General and the Ballot Board’s duties under R.C. 3519.01 not directly at issue). Section 1g, Article II limits this Court’s original jurisdiction to the petition process, which includes challenges regarding the circulated part-petitions that are circulated and the acquired signatures. Section 1g, Article II does not, however, grant this Court original jurisdiction over the pre-petition process set forth in R.C. 3519.01, which includes Attorney General’s certification of the summary of the proposed amendment. “Any alleged deficiencies in [the R.C. 3519.01(A)] process, which would presumably include an improper finding by the Attorney General that a submitted summary constitutes a fair and truthful statement of a proposed constitutional amendment, do not affect the constitutional initiative process.” *State ex rel. Rankin*, 2005-Ohio-2717 at ¶31.

Rankin held that the entire statutory procedure under R.C. 3519.01 is part of a preliminary pre-petition procedure. The Ballot Board determination became a part of that procedure in 2006, a year after the *Rankin* decision was issued, when R.C. 3519.01(A) was amended. Amended Sub. H.B. 3 (2006). To the extent Relators bring claims against the Ballot

Board pursuant to Section 1, Article II, this Court also lacks original jurisdiction to hear those claims.

B. This Court does Not have Original Jurisdiction to Pursuant to R.C. 3519.01(C).

Relators also allege that R.C. 3519.01(C) confers original jurisdiction upon this Court. In 2006, the General Assembly amended R.C. 3519.01 by adding a provision that “[a]ny person who is **aggrieved** by a certification decision under division (A) or (B) of this section may challenge the certification or failure to certify of the Attorney General in the supreme court, which shall have exclusive, original jurisdiction in all challenges of those certification decisions.” R.C. 3519.01(C) (emphasis added).

While the phrase “aggrieved party,” as it is used in R.C. 3519.01(C), has not been defined or interpreted, this Court has long held that if “a term is not defined in the statute, it should be accorded its plain and ordinary meaning.” *Rhodes v. City of New Philadelphia*, 129 Ohio St. 3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶17 (citing *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70, 525 N.E.2d 1386 (1988)). The word “[a]ggrieved” is commonly defined as “having legal rights that are adversely affected; having been harmed by an infringement of legal rights.” *Id.* at ¶ 18 (quoting Black’s Law Dictionary (9th Ed.2009) 77).

In this case, Relators cannot establish they are “aggrieved” persons as that term is used in R.C. 3519.01(C). Instead, Relators conclusively state they “are aggrieved by the Attorney General’s decision to certify the summary of the Proposed Amendment as fair and truthful and the Ohio Ballot Board’s decision that the initiative petition sets forth only one proposed amendment.” (Complaint, ¶ 60). However, they have not identified any “legal rights” that are adversely affected or infringed. See *Rhodes*, 2011-Ohio-3279, ¶¶ 26-27. Further, Relators have not even pled the bare essentials regarding the mission statement, purpose, and/or goals of Health

Families Ohio, Inc. Moreover, Relators cannot simply assert they are aggrieved because they are politically, philosophically, and/or religiously opposed to the passage of the proposed constitutional initiative. It is well-established that “[t]he emotional impact from, loss of faith in, or personal distaste for a particular situation, law, or governmental proceeding, without more, does not satisfy the legal concept of ‘adversely affected’ or ‘aggrieved’ for purposes of standing.” *Yost v. Jones*, 3rd Dist. No. 3-01-17, 2001-Ohio-2317, *8 (Nov. 15, 2001) (emphasis added). Political opposition to a particular statute, in the absence of particularized injury, is not sufficient to create standing or to be legally “aggrieved.” *Johnson v. Licking Cty. Bd. of Mental Retardation*, 5th Dist. No. 96 CA 00096, 1997 Ohio App. LEXIS 1921, at *5-6.

Even if this Court were to find that Relators are “aggrieved” persons under R.C. 3519.01(C), that statute unconstitutionally expands the original jurisdiction of this Court. “It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution.” *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, at ¶3. “This principle is grounded on the separation of powers provisions found in many American constitutions,” including Ohio’s. *Id.*

Under Section 2(B)(1), Article IV of the Ohio Constitution, this court has original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so admitted.

Id. at ¶2. Other portions of Ohio’s Constitution have expanded the original jurisdiction of this Court. *See* Section 1g, Article II; Section 13, Article XI. None of these constitutional provisions, however, permits **statutory** expansion of the Supreme Court’s original jurisdiction. Therefore, “neither statute nor rule of court can expand [the Supreme Court’s] jurisdiction.” *Id.*

at ¶4 (internal citations omitted); see also *State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St.2d 120, 122, 296 N.E.2d 544 (1973) (“neither the Civil Rules nor statutes can expand this court’s original jurisdiction and require it to hear an action not authorized by the Ohio Constitution”).

Based upon this rationale, this Court, in *ProgressOhio.org v. Kasich*, held that Am.Sub. H.B. No. 1, Ohio’s 2011-2012 biennial budget, was unconstitutional “insofar as it attempt[ed] to confer exclusive, original jurisdiction on this court to consider the constitutionality of the act’s provisions.” 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶5. In so holding, this Court dismissed the cause for lack of subject-matter jurisdiction. *Id.* at ¶7. R.C. 3519.01(C) implicates similar separation of powers issues. However, this Court recognizes what is commonly referred to as the “constitutional avoidance doctrine” whereby “constitutional issues should not be decided unless absolutely necessary.” *Mayer v. Bristow*, 91 Ohio St.3d 3, 9, 740 N.E.2d 656 (2000). Because Relators are not “aggrieved” parties, this Court does not need to reach the constitutional questions that Relators assert. Nevertheless, to the extent that this Court finds that Relators are aggrieved parties, R.C. 3519.01(C) is not a constitutional conferral of original jurisdiction upon this Court.

For these reasons, this Court should dismiss this cause for lack of subject-matter jurisdiction, to the extent this action is brought pursuant to R.C. 3519.01(C).

II. Even if this Court has Jurisdiction Over Relators’ Claims, Relators Fail to State a Claim upon Which Relief can be Granted.

A. Relators Cannot Establish the Necessary Elements for a Writ of Prohibition to Issue because the Respondents did not Exercise Quasi-Judicial Power.

This Court should dismiss Relators’ request for a writ of prohibition because they cannot establish the necessary elements for a writ of prohibition. To be entitled to a writ of prohibition, the complaining party must establish that the respondent is “(1) about to exercise judicial or

quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law.” *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶7. It is clear that the Respondents did not exercise judicial power, nor do Relators allege that the Respondents acted in a judicial capacity. Instead, the viability of Relators’ prohibition claim turns on the whether the Respondents exercised “quasi-judicial” authority. As explained below, neither the Attorney General’s certification nor the Ballot Board determination is an exercise of “quasi-judicial” authority.

This Court has consistently defined “quasi-judicial authority as ‘the power to hear and determine controversies between the public and individuals that **require** a hearing resembling a judicial trial.’” *State ex rel. Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093, 895 N.E.2d 177, ¶16 (quoting *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*, 87 Ohio St.3d 184, 186, 718 N.E.2d 908 (1999)) (emphasis in original). “Prohibition will not lie to prevent an action by an election official or board when there is no requirement to hold a quasi-judicial hearing on the matter.” *State ex rel. Parrott v. Brunner*, 117 Ohio St.3d 175, 2008-Ohio-813, 478 N.E.2d 984, ¶6 (citing *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St.3d 238, 241-242, 736 N.E.2d 893 (2000); *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 72 Ohio St.3d 69, 72, 647 N.E.2d 769 (1995)). In fact, whether a party is required to appear is the “dispositive fact” in determining whether an act is quasi-judicial. *State ex rel. LetOhioVote v. Brunner*, 125 Ohio St.3d 420, 2010-Ohio-1895, 928 N.E.2d 1066, ¶15 (quoting *State ex rel. Scherach v. Lorain Cty. Bd. of Elections*, 123 Ohio St.3d 245, 2009-Ohio-5349, 915 N.E.2d 647, ¶23).

The Attorney General's certification under R.C. 3519.01(A) requires no hearing or testimony and no parties are required to appear to give testimony. In fact, Relators do not allege that they were required to appear before the Attorney General, or that they were in any way part of the Attorney General's decisional process. Rather, in a conclusory fashion, Relators only allege that the Ohio Attorney General's "determination that the summary of the Proposed Amendment was fair and truthful pursuant to Ohio Rev. Code 3519.01 was a quasi-judicial determination." (Complaint, ¶¶ 31, 45, 61). While this Court is required to assume all factual statements as true for purposes of a motion to dismiss, this Court is not required to do the same with respect to legal conclusions like those alleged by the Relators. *Sweet v. City of N. Ridgeville*, 2005 Ohio 871, ¶11 (citing *Hodge v. City of Cleveland*, 8th Dist. App. No. 72283, 1998 Ohio App. LEXIS 4963, *22). As a matter of law, the Attorney General's certification is not an exercise of quasi-judicial authority.

Similarly, Relators also claim that "[t]he Ohio Ballot Board's determination that the Proposed Amendment consists of one issue was a quasi-judicial determination." (Complaint, ¶ 20, 62). Unlike the Attorney General's certification, which is made without any outside input, the Ballot Board made its decision in a public meeting, as required by any public body under Ohio's Open Meetings Act. *See* R.C. 121.22. While the Ballot Board permits testimony from anyone that attends the public meeting, R.C. 3519.01(A), R.C. 3505.062, do not require parties to appear and provide testimony. *See* (duties of the Ohio Ballot Board). In fact, none of the Ballot Board's governing statutes even requires the Ballot Board to hold testimonial sessions. Rather, the Ballot Board developed a process over time that allows such testimony in the interests of giving the electorate an opportunity to participate in the initiative process. For example, Relators' counsel's testimony that was provided at the January 9, 2012 public meeting

(see Complaint, ¶ 20) was purely voluntary. The Board did not require his attendance or require him to testify. Accordingly, the Ballot Board's determination is not an exercise of quasi-judicial authority.

Finally, at no point do the Relators allege that the Secretary of State performed a quasi-judicial function in accepting the petition thus; Respondents assume that the Relators do not seek a writ of prohibition against Secretary Husted. Because Relators did not allege nor can they establish that neither the Attorney General nor the Ballot Board exercised quasi-judicial power would be sufficient to dismiss Relators' claim for a writ of prohibition. However, because there was no exercise of quasi-judicial power, Relators also cannot show that the Attorney General or the Secretary of State exercised power that is unauthorized by law such that denying the writ will result in injury for which no other adequate remedy exists. For these reasons, this Court should dismiss Relators' request for a writ of prohibition for failure to state a claim upon which relief may be granted.

B. Relators Cannot Establish the Necessary Elements for a Writ of Mandamus to Issue Because the Respondents Have no Legal Duty to Act as Relators Request.

In order for the Court to grant a writ of mandamus, Relators must satisfy three requirements: (1) the relators must have a clear legal right to the requested relief; (2) the respondents must be under a clear legal duty to perform the requested act; and (3) the relators must have no plain and adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm'n*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶13. Relators' Complaint fails to meet these requirements because [1] the Attorney General properly discharged his mandatory duties under R.C. §3519.01(A) by determining the summary language of the initiative petition was a fair and truthful statement of the proposed constitutional amendment, [2] the Secretary of State complied

with his duty to accept the certification from the Attorney General, and [3] the Ballot Board properly decided that the proposed initiative petition contained only one proposed constitutional amendment.

1. **Relators Claim 1 – Relators are not entitled to a writ of mandamus because the Attorney General properly executed his only duty to certify the summary of the proposed constitutional amendment and Relators cannot show that the Secretary of State had a duty to reject the proposed Attorney General’s certification.**
 - a. **The Attorney General has no duty to ensure that the full text of the constitutional provision to be amended is included in the proposed petition or the summary.**

In their first claim, Relators allege that the Attorney General had a clear legal duty, under R.C. 3519.01, to ensure that Personhood Ohio submitted a fair and truthful summary but that he breached that duty because the proposed petition did not include the full text of Section 1, Article I. (Complaint ¶¶23-38). Relators look to Section 1g, Article II and R.C. 3519.01(A) as two separate sources for this duty. In doing so, however, Relators’ first claim conflates the requirements set forth in Section 1g, Article II with those contained in R.C. 3519.01.

R.C. 3519.01 requires that “[a] petition shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed . . . constitutional amendment is adopted.” However, the only duty conferred upon the Attorney General, at issue in this case, is the duty to “conduct an examination of the **summary**,” and to certify whether “the **summary** is a fair and truthful statement” of the proposed amendment. R.C. 3519.01(A) (emphasis added). Nowhere in the statute is the Attorney General required to examine the petition itself to ensure that it contains the text of the existing constitutional provision. Absent such a duty in the plain language of the statute, Relators’ claim for a writ of mandamus against the Attorney General fails as a matter of law.

Relators also unsuccessfully attempt to shoehorn their claim into R.C. 3519.01. They do so by alleging that the Attorney General breached his duty under R.C. 3519.01(A) when he approved the summary of the proposed constitutional amendment as fair and truthful, when the petition did not include the full text of Section 1, Article I. (Complaint, ¶¶27, 30, 32, 34). However, the **summary** is not required to contain the full text of the existing constitutional provision. In fact, the summary, by definition, should not include a full recitation of the constitutional provision that the initiative petition seeks to amend. *See State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 176 N.E. 664, (1931). The Supreme Court has long held that a petition summary is required to be “a short, concise, succinct summing up reduced into a narrow compass.” *Id.* at paragraph two of the syllabus. Such a short and concise description of the proposed amendment would certainly not include a full recitation of the actual constitutional provision that the proposed initiative petition seeks to amend. Thus, the Attorney General’s certification was not an abuse of discretion.

To the extent this claim is brought pursuant to Section 1g, Article II of the Ohio Constitution, Respondents reiterate that this Court is without jurisdiction to hear Relator’s claims as the Attorney General’s determination of the summary, and his subsequent duty to file with the Secretary of State, are a procedural predicate to the petition process set forth in Section 1g, Article II. *See* Section I(A). Nevertheless, even if this Court had jurisdiction to hear a claim brought pursuant to Section 1g, Article II, it only requires that the petition contain a full and correct copy of the actual **proposed amendment**. Relators appear to confuse this requirement with the one in R.C. 3519.01, which requires a full copy of the **constitutional provision as it exists prior to the proposed amendment**. A critical distinction must be drawn between the proposed amendment itself (as referred to by Section 1g, Article II) and the text of the existing

constitutional provision (as referred to by R.C. 3519.01). At no point do Relators allege that the petition does not contain a copy of the full proposed amendment itself. Rather, Relators base their first claim solely on the absence of Section 1, Article I's full text. (Complaint, ¶¶ 27, 38(c)). Thus, not only does this process not fall under the ambit of Section 1g, Article II of the Ohio Constitution, but also, to the extent that it does, Relators fail to plead facts sufficient to establish a cause of action under that section.

b. The Secretary of State has no duty to reject the proposed initiative petition and its summary.

Similarly, this Court should refrain from issuing a writ of mandamus compelling the Secretary to reject the proposed initiative petition because Relators cannot identify any cognizable duty that the Secretary of State breached. Relators only make one fleeting reference to the Secretary of State in their Complaint, alleging that “[t]he Secretary of State has a clearly legal duty to not accept for filing and/or to not certify as valid and sufficient or to reject as invalid and insufficient an initiative petition that does not comply with Ohio Rev. Code 3519.01 or Section 1g, Art. II, of the Ohio Constitution.” (Complaint, ¶35).

By the plain language of R.C. 3519.01(A), the Secretary of State has no discretion in accepting the certification from the Attorney General. Once “the ballot board returns a submitted petition to the attorney general with its certification . . . the attorney general **shall** then file with the secretary of state a verified copy of the proposed law or constitutional amendment with its summary and the attorney general’s certification.” R.C. 3519.01(A). The Secretary of State has no authority to analyze the proposed petition and/or second-guess the Attorney General’s certification, much less a duty to reject the certification. Thus, Relators fail to establish that the Secretary of State has a duty under R.C. 3519.01.

Similarly, the Secretary of State does not have a duty to consider the validity of the Attorney General or Ballot Board's certification under Section 1g, Article II of the Ohio Constitution. Under Section 1g, Article II, the Secretary of State's duties are limited to determining the sufficiency of the signatures submitted in support of a proposed initiative petition. Nowhere in that constitutional provision is the Secretary charged with a duty of examining the certification submitted to him by the Attorney General. Because Relators can point to no duty placed upon the Secretary to review the Attorney General's certification, under Section 1g, Article II or R.C. 3519.301, a writ of mandamus should not issue against the Secretary of State and Relators' first claim should be dismissed.

2. Relators' Claim 2 - the Attorney General did not abuse his discretion in certifying the summary of the proposed constitutional amendment as "fair and truthful."

The Attorney General properly executed his duty under R.C. 3519.01(A) by reviewing the summary and certifying the summary circulated by petitioners as fair and truthful. Once petitioners have collected one thousand signatures in support of a statute or constitutional amendment, they must submit these signatures along with the text and a summary of the proposed legislation to the Attorney General. R.C. 3519.01(A). After reviewing the summary, the statute mandates that "[i]f, in the opinion of the attorney general, the summary is a fair and truthful statement of the proposed law or constitutional amendment, the attorney general shall so certify." *Id.* The extent of the Attorney General's review of a summary is limited to making the "factual determination" of whether the summary is "a fair and truthful statement" of the proposed legislation. *State ex. rel. Barren v. Brown*, 51 Ohio St.2d 169, 171, 365 N.E.2d 887 (1977). For example, the Attorney General cannot refuse to certify the summary of a petition if he "believes that the matters are not subject to referendum." *Id.* at 170. Because the Attorney

General's authority is limited to conducting a "factual determination," it is impermissible for the Attorney General to engage in legal analysis of the issues presented in the proposed legislation. *Id.* at 171.

In challenging the Attorney General's certification of the summary, Relators misconstrue the narrow scope of the review that the Attorney General is permitted to conduct. The Attorney General has no duty to deny certification of a summary if petitioners fail to use the clearest language or the best choice of words in summarizing the content of an amendment. After all, this Court has advised that the power of initiative "should be liberally construed to effectuate the rights reserved." *State ex. rel. Hodges*, 64 Ohio St.3d 1, 5, 591 N.E.2d 1186 (1992); *Hilltop Realty, Inc. v. South Euclid* 110 Ohio App. 535, 539, 164 N.E.2d 180 (8th Dist. 1960). Moreover, this Court has defined the form of the summary to be circulated by petitioners as "a short, concise, succinct summing up reduced into a narrow compass." *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 176 N.E. 664 (1931), paragraph two of the syllabus. The purpose of this summary is to "advise those who are asked to either sign the petition or to support the amendment at the polls of the character and purport of the amendments without the necessity of perusing them at length." *Bettman*, 124 Ohio St. at 24. In effect, potential signers can read the summary as a substitute for reading the text of the amendment. The summary is not meant to be a verbatim recitation of the amendment but instead a tool to "help[] potential signers understand the content of the law more efficiently than if they had to rely solely on a review of the entire law, especially where the law sought to be repealed is lengthy, complicated or difficult to navigate." *Schaller v. Rogers*, 10th Dist. No. 08AP-591, 2008-Ohio-4464, ¶46.

Relators' second and third claims¹ disregard this Court's precedent regarding the Attorney General's limited duty in conducting a "factual determination" of whether the summary presented is a "fair and truthful statement" of the amendment. *Brown*, 51 Ohio St.2d at 171. The Attorney General has no duty to ensure that the summary contains an explanation of the subject matter of the sections affected by the proposed amendment. Nor does not the Attorney General have a duty to ensure that the summary contains an explanation of the meanings or exceptions contained in the amendment. As discussed, the Attorney General is not permitted to conduct a legal analysis of the text or summary presented by petitioners. The meaning of any exceptions contained in the amendment, if it were to become law, would be undertaken by courts or legislators, but certainly not by the Attorney General in his limited role of conducting only a factual review of the summary and proposed amendment.

Similarly, Relators' allegation that the summary is not a fair and truthful statement, because it fails to include several phrases contained in the amendment, (Complaint, ¶ 40), is also not supported by this Court's precedent. To require that the summary include a verbatim repetition of the proposed amendment would likewise contravene this Court's stated purpose for the summary to serve as a substitute for, and not a replica of, the amendment's text. Such specificity that would require the summary to contain the entire text of an amendment, an explanation of the subject matter contained in each section affected by the amendment, and an analysis of the exceptions contained in the amendment, would undermine the requirement of limiting it to a "short, concise statement." At most, Relators allege "mere technical irregularities" which should not interfere with "the right of the initiative." *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 20, 368 N.E.2d 838 (1931). Because the Attorney General properly

¹ Relators' third claim also alleges that the Attorney General breached his duty by certifying the proposed summary. To the extent the third claim is redundant, the arguments set forth in this section are hereby adopted in relation to Relators' third claim as well.

certified the summary as a fair and truthful statement of the proposed legislation, this Court should dismiss Relators' request for a writ of mandamus for failure to state a claim upon which relief may be granted.

3. Relators' Claim 3 – The Ballot Board did not abuse its discretion in finding that the initiative petition contained a single constitutional amendment such that a writ of mandamus should not issue.

Relators' final claim against the Ohio Ballot Board should be dismissed because the Board did not abuse its discretion in finding that the proposed constitutional amendment, which amends two separate sections of the Ohio Constitution, bears a reasonable relationship to defining what constitutes human life. In extraordinary actions seeking a writ of mandamus against the Ballot Board, the standard is whether it "engaged in fraud, corruption, or abuse of discretion or acted in clear disregard of applicable legal provisions." *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St. 3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶30 (citing *State ex rel. Owens v. Brunner*, 125 Ohio St.3d 130, 2010-Ohio-1374, 926 N.E.2d 617, ¶ 26).

In determining whether the Ballot Board abused its discretion, this Court has held that "the ballot board has a clear legal duty to **liberally construe** the right of initiative," such that "as long as the citizen-initiated proposed amendment bears **some reasonable relationship to a single general object or purpose**, the board must certify its approval of the amendment as written without dividing it into multiple petitions." *Id.* at ¶57 (emphasis added). After establishing such a high standard for separating a proposed constitutional amendment, this Court, in *Ohio Liberty Council*, held that the proposed constitutional amendment "consist[ed] of one amendment because all the sections contained therein [bore] some reasonable relationship to the single general purpose of preserving Ohioans' freedom to choose their health care and health-

care coverage as it existed on March 19, 2010.” *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St. 3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶43.

The general purpose of the proposed amendment at issue in this case is to establish, in the Constitution, when human life begins. The proposed constitutional amendment does so by amending two terms, “men” and “person,” as they currently exist in the Ohio Constitution. Relators allege that because the two terms that the proposed amendment seeks to define appear in two separate sections of the Ohio Constitution, the Ballot Board abused its discretion and disregarded applicable law when it found that the proposed amendment contained only a single proposal of law. (Complaint, ¶¶ 55-58). However, this Court should focus exclusively on whether the proposed constitutional amendment relates to a single general subject, irrespective of how many sections are affected. *See State ex rel. Ohio Liberty Council*, 2010-Ohio-1845 at ¶43. The proposed constitutional amendment at issue in this case would amend two sections of the Ohio Constitution in order to establish that the fundamental rights guaranteed by Ohio’s Constitution are afforded at the time of conception. The Ballot Board did not abuse its discretion or disregard applicable law, which mandates that the Board liberally construe the proposed constitutional amendment as a single issue of law. For that reason, Relators’ third cause of action should be dismissed for failure to state a claim upon which relief may be granted.

4. Relators’ Petition for Writ of Mandamus Should be dismissed because Relators failed to properly caption their Complaint.

To the extent Relators are seeking mandamus relief, they failed to properly caption their complaint as a petition seeking a writ of mandamus. R.C. 2731.04 “requires that an action for a writ of mandamus ‘be * * * in the name of the state on the relation of the person applying.’” *Rust v. Lucas County Bd. of Elections*, 108 Ohio St. 3d 139, 2005-Ohio-5795, 841 N.E.2d 766, ¶16; *see also Martin v. Woods*, 121 Ohio St. 3d 609, 2009-Ohio-1928, 906 N.E.2d 1113, ¶1. If

“a respondent in a mandamus action raises this R.C. 2731.04 defect and relators fail to seek leave to amend their complaint to comply with R.C. 2731.04, the mandamus action **must be dismissed.**” *Rust*, 2005-Ohio-5795 at ¶16 (quoting *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶36) (emphasis added). On its face, Relators’ Complaint is not in the name of the state on relation of Healthy Families Ohio, Inc. and Garrett M. Dougherty. In the event Relators fail to amend their Complaint, this Court must dismiss Relators’ petition for mandamus.

CONCLUSION

For the foregoing reasons, this Court should deny the Relators’ request for a Writ of Mandamus, Writ of Prohibition and any other form of relief Relators seek.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Motion to Dismiss of Respondents Ohio Ballot Board, Secretary of State Jon Husted, and Ohio Attorney General Mike DeWine* was served on this 9th day of February 2012, by email and U.S. mail, postage prepaid, to:

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