

Case No. 2012-0070

**In the
Supreme Court of Ohio**

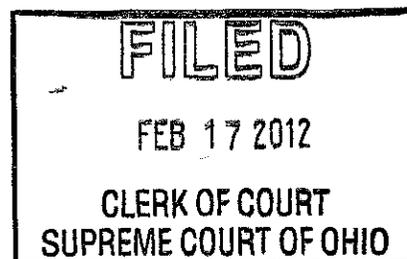
STATE EX REL. HEALTHY FAMILIES OHIO, INC., et al.,
Relators,

v.

OHIO BALLOT BOARD, et al.,

Respondents.

**RELATORS' MEMORANDUM CONTRA
MOTION TO DISMISS**



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I. STATEMENT OF FACTS

The operative facts are not in dispute.

Relator Healthy Families Ohio, Inc. is a nonprofit corporation, organized pursuant to Section 501(c)(4) of the Internal Revenue Code, and chartered in the State of Ohio. [Complaint, ¶7.] Relator Garrett M. Dougherty is the Treasurer of Relator Healthy Families Ohio, Inc., and a qualified elector of the State of Ohio. [Complaint, ¶8.]

Personhood Ohio is a political action committee that seeks, through the petition process, to submit a constitutional amendment to Ohio 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 terms "person" and "men," as those terms are used in only these two sections of the Constitution. [Complaint, ¶16; *citing* Proposed Amendment.]

On December 21, 2011, Personhood Ohio submitted their Proposed Amendment and Summary to the Attorney General under Ohio Rev. Code 3519.01(A). [Complaint, ¶15.] On December 27, 2011, Relators transmitted a letter to Respondent Attorney General asserting four grounds why Petitioners' summary was defective. [Complaint, ¶17.] On December 31, 2011, Respondent Attorney General, without addressing Relators' arguments, determined that the Petitioners' summary of the Proposed Amendment was a fair and truthful statement of the measure and issued his certification pursuant to Ohio Rev. Code §3519.01. [Complaint, ¶18.]

On January 9, 2012, the Ohio Ballot Board held a public meeting to determine whether the Proposed Amendment contained only one amendment. [Complaint, ¶20.] At this hearing, Relators' counsel urged the Ballot Board to divide the Proposed Amendment into two separate initiatives, a proposed constitutional amendment to Sec. 1, Art. I (inalienable rights) and a second proposed constitutional amendment to Sec. 16, Art. I (access to courts for redress), of the Ohio Constitution. [Complaint, ¶20.] Relators' counsel submitted a legal memorandum to Respondent Ohio Ballot Board which advanced arguments that the Proposed Amendment contained more than one constitutional amendment. [Complaint, ¶20.] Despite Relators' arguments, Respondent Ohio Ballot Board voted 3-2 to find that the Proposed Amendment contained only one constitutional amendment. (*Id.*)

Four days later, on January 13, 2012, Relators commenced the instant action.

LAW AND ARGUMENT

I. INTRODUCTION

The instant action raises four substantive challenges to the Personhood Amendment Initiative Petition ("Petition"), namely: it fails to include the text of Art. I, § 1 of the Ohio Constitution; it contains more than one proposed constitutional amendment; the summary was not properly submitted to the Attorney General; the summary approved by the Attorney General is not a fair and truthful summary of the proposed amendment(s) for several reasons. The Complaint sets forth three bases for the Court's

jurisdiction to hear and determine these challenges: the grant of original, exclusive jurisdiction in Art. II, § 1g of the Constitution with regard to all four challenges; the Court's original jurisdiction to issue writs of mandamus and prohibition with respect to all four grounds; and the grant of original, exclusive jurisdiction in Ohio Rev. Code 3519.01(C) with respect to the third and fourth grounds.

The State Respondents have filed a Motion to Dismiss for lack of jurisdiction under Art. I, § 1g and Ohio Rev. Code 3519.01(C) and for failure to state a claim upon which relief may be granted under the Court's authority to issue writs of mandamus and prohibition. For the reasons set forth herein, the motion to dismiss should be denied.

This is a case of first impression, which raises critical jurisdictional and procedural issues. Until these issues have been determined by this Court, Relators must proceed as they have in the instant matter, *to wit*:

1. Filing the 1g, Art. II challenge at the earliest possible date that a defect upon the petition is known to avoid a later claim of laches, risking that respondents will claim, as they do herein, that such a claim is premature and/or that no duty enforceable in mandamus has occurred until the petition has ultimately been filed;
2. Seeking alternative relief in mandamus and prohibition for all claims related to the petition and the petition process.

3. Ensuring that all known claims related to the petition are included in the first action filed challenging the petition or the petition process. In *Essig*, this Court held that Relators' claims of a fatal defect in a statewide petition were barred by *res judicata* because the claims could have been litigated in a prior writ action brought against the petition. *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, ¶¶ 30-31. Also see, *State ex rel. Rust v. Lucas Cty. Bd. Of Elections*, 100 Ohio St.3d 204, 2003-Ohio-5643, ¶ 9.

Without additional clarity, Relators must bring every possible claim at the earliest possible date, setting forth every possible theory of relief or risk losing the opportunity to do so in the future.

II. THE COURT HAS JURISDICTION TO DECIDE THESE CHALLENGES TO THE PETITION UNDER ART. I, § 1G OF THE CONSTITUTION

At the general election in November 2008, the people of Ohio adopted amendments to Sections 1a, 1b, 1c, and 1g of the Ohio Constitution, making long overdue changes to the statewide initiative and referendum process. The most significant change was to replace an antiquated statutory process for challenging statewide initiative and referendum petitions county by county, leading to inconsistent decisions by the courts of common pleas and the appellate district courts with respect to the same petition and involving the same legal and factual issues. The process did not serve the interests of

petitioners or of judicial economy and inevitably placed extreme stress upon the the boards of elections and voters with decisions coming close to and even after the the commencement of voting. In 2008, the voters wisely replaced this system by requiring in Art. II, Sec 1g that:

The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. Any challenge to a petition or signature on a petition shall be filed not later than ninety-five days before the day of the election.” (Emphasis added).

Plainly, “petitions . . . under this section” refers to statewide initiative, referendum and supplementary petitions, which are referenced in the opening sentence of the section. The question that is squarely presented by this case, and is one of first impression, is twofold: Does this plenary grant of original, exclusive jurisdiction to decide “all challenges” include defects in the petition resulting from the statutorily mandated requirements for the petition and, if so, must such a challenge wait until the petitioners collect the required hundreds of thousands of signatures and file them with the Secretary of State? Relators submit that the Court does have the constitutional authority to decide these challenges at this time. Quite simply, “all” means “all” and while Art. II, Sec. 1g has a deadline for bringing such challenges, it does not specify that such challenges must wait until after the petition is filed with the Secretary of State. The nature of the defects in the Personhood petition are ones that presently exist as a result of the state processes leading to this point in time for circulation of the petition.

The same section of the constitution that grants the Court exclusive jurisdiction to decide challenges against statewide initiative and referendum petitions also provides that: “The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.” Thus, the General Assembly has constitutional authority to enact laws that facilitate the exercise of the rights of initiative and referendum. It has done exactly that by prescribing that a summary of a proposed law or amendment must be provided by petitioners, certified as fair and truthful by the Attorney General, and be printed on the face of the petition along with the Attorney General's certification. Ohio Rev. Code 3519.05. It has also provided that each initiative petition may only propose one amendment, that the Ohio Ballot Board must determine if that is the case and that the full text of the proposed single amendment must be printed on each part-petition. Ohio Rev. Code 3505.062(A), 3519.01(A), and 3519.05. The requirement that each part-petition must contain the full text of the proposed amendment is also in Art. II, Sec. 1g of the Constitution. If the Ballot Board determines that a petition contains more than one proposed amendment, it must divide the petition into individual petitions containing only one proposed amendment each and the petitioners may submit summaries for each to the Attorney General.¹ If the Attorney General

¹ The General Assembly in fact refers to this petition as an “initiative petition” in Ohio Rev. Code 3505.062 and 3519.01.

certifies the summaries, each summary and certification is required to be printed on separate initiative petitions along with the full text of the separate proposed amendment. Ohio Rev. Code 3505.062(A), 3519.01(A) and 3505.05.

These statutory requirements for the initiative petition are presumed to be a proper exercise of the General Assembly's power under Art. II, Sec. 1g and certainly the State Respondents would not argue otherwise. However, the State Respondents seek to distance these petition requirements from the initiative petition by describing them as a separate pre-petition process. This is a distinction without a difference because the pre-petition itself and the signatures on it are not the issue—rather the submitted summary and text of the proposed amendment or amendments and the Attorney General's certification that become, and in fact have become, part of the initiative petition for circulation are what is being challenged here. It is not a challenge under Art. II, Sec. 1g to the “pre-petition,” but to the actual initiative petition authorized by the constitution and amplified by the General Assembly.

The Court's resolution of the jurisdictional issues raised by the State Respondents' Motion to Dismiss will determine the scope and import of the 2008 amendment to Art. II, Sec. 1g granting this Court exclusive, original jurisdiction over “all challenges” to such petitions and will be of great consequence to those seeking to exercise the rights of initiative and referendum going forward, as well as to those citizens who seek to insure that

the integrity of the electoral process for those rights is protected by adherence to legal requirements. Either the challenge process will return to one involving challenges before multiple courts at multiple points during the petition process by treating errors in the petition resulting from the pre-petition process as not being within the scope of Art. II, Sec. 1g, which would be the outcome of the State Respondents' position; or it will be as the people intended it to be, requiring "all challenges made to petitions" be brought before this Court in the first instance for a prompt and final resolution.

Personhood Ohio admits that they are collecting signatures on the part-petitions for the purpose of placing the proposed amendment on the November 6, 2012 general election ballot. [Answer, ¶ 22.] With each such signature, the rights of another Ohio elector are implicated as are the rights of all Ohioans who would be subject to the proposed amendment if it is considered and passed at the November General Election. The relief sought by Relators is not theoretical, nor are the consequences to the petitioners. If Relators are forced to wait until the initiative petition is filed with the Secretary of State and these matters are adjudicated late in the process, it will be too late for Personhood Ohio to circulate another petition for this year's ballot if this petition is ruled invalid.

A. The Initiative Petition Proposes More Than One Amendment to the Ohio Constitution

Ohio Rev. Code 3519.01(A) expressly provides that:

Only one proposal of law or constitutional amendment to be proposed by initiative petition shall be contained in an initiative petition to enable the voters to vote on that proposal separately.

The proposed amendment seeks to “backdoor” a major amendment to the Ohio Constitution’s inalienable rights section through an amendment to the redress in courts section. While the full ext of the proposed amendment sets forth only the text of Article I, Section 16, of the Ohio Constitution, regarding redress in courts, it in fact contains an express amendment of a completely separate section of the Ohio Constitution relating to a completely different subject matter. It seeks to accomplish the amendment of two separate sections of the Ohio Constitution while setting forth the text of only one and referring to the other only through the legislative shorthand of cross-reference.

The relevant text of the proposed amendment provides:

(A) The words “person” in Article I, Section 16, and “men” in Article I, Section 1, apply to every human being at every stage of the biological development of that human being or human organism, including fertilization.

Article I, Section 1, of the Ohio Constitution currently states:

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Article I, Section 16, currently states, without the proposed amendment:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

In *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, ¶57, the Court set forth the test to be applied in determining if a proposed measure sets forth a single amendment to the constitution or more than one:

The Court held:

Because this separate-petition requirement is comparable to the separate-vote requirement for legislatively initiated constitutional amendments under Section 1, Article XVI of the Ohio Constitution, our precedent construing the constitutional provision is instructive in construing the statutory requirement. In *State ex rel. Wilke v. Taft* . . . we set forth the test for determining satisfaction of the separate vote requirement.

[T]he applicable test for determining compliance with the separate-vote requirement of Section 1, Article XVI is that ‘a proposal consists of one amendment to the Constitution only so long as each of its subjects bears some reasonable relationship to a single *general* object or purpose.’ . . .

Id. at ¶¶ 41 and 42.

In effect this is a two-part test, in that it must first be determined what the single object or purpose of the proposal is, so that it can then be

determined, if necessary, whether the proposal bears some reasonable relationship to that single object or purpose.

As the Court explained in *State ex rel. Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 495:

The one-subject rule was added to our Constitution in 1851. It was one of the proposals resulting from the efforts of the Second Constitutional Convention, of 1850-1851. See Kulewicz, *The History of the One-Subject Rule of the Ohio Constitution* (1997), 45 *Cleve. St.L.Rev.* 591, 591-93. The genesis of support for this rule had its roots in the same concerns over the General Assembly's dominance of state government that formed the most significant theme of the Constitution of 1851. These concerns, illustrated earlier in this opinion, resulted in the placement of concrete limits on the power of the General Assembly to proceed however it saw fit in the enactment of legislation. The one-subject rule is one product of the drafters' desire to place checks on the legislative branch's ability to exploit its position as the overwhelmingly pre-eminent branch of state government prior to 1851.

The rule derived from the antipathy toward the manner and means by which the General Assembly exercised its power to effectuate the purpose of passing special legislation. Special legislation could be assured passage in the General Assembly through this system of logrolling, *i.e.*, the practice of combining distinct legislative proposals that would assuredly fail to gain majority support if presented and voted on separately. By limiting bills enacted by the General Assembly to a single subject, "the one-subject rule strikes at the heart of logrolling by essentially vitiating its product." *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio 6777, ¶ 31.

Indeed, the Court has expressly declared the rule to be mandatory, rather than directory, meaning that a violation of the rule will result in the invalidation of a legislative enactment. The Court has been willing when necessary to impose such a harsh penalty on enactments of the General Assembly and approved by the Governor even despite concerns over the over the proper accord due to respective branches of government. Such concerns are not even existent before the Ohio Ballot Board. A finding that the proposed measure encompasses multiple subjects does not prevent its proponents from seeking to place the issues on the ballot as separate amendments. Application of the single subject rule is applied early in the process of gaining ballot access, before the considerable time and expense of circulating the actual initiative petitions. Further, while the concern over the respect due coordinate branches of government is not present, the value which the single-subject rule seeks to protect is heightened given that the proposal before this body would amend the Constitution, rather than enact a law. The Constitution cannot be easily amended. To do so requires a lengthy and expensive process. The power of the single subject rule would presumably be at its zenith when applied where: (1) there is no concern over separation of powers;(2) an even greater concern over the effect of logrolling when amending the Ohio Constitution; and (3) the need for voters to clearly understand what they are being asked to approve, *i.e.*, amendments to two

different sections of the constitution dealing with two different subject matters.

As for the petition at issue herein, there is no single object or purpose. It is not proposing definitions that would apply throughout the Constitution. Rather, the proposed amendment sets forth a definition for the word "person" as it is used only in Art. I, Sec. 1, having to do with inalienable rights, and a definition for the word "men" as it is used only in Art. I, Sec. 3, having to do with due process rights. Indeed, the Ohio Constitution contains over 100 references to the word "person" to which the proposed amendment does not purport to apply. For example, Section 2(B)(3), Article IV, of the Ohio Constitution provides that "No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court." The proposed amendment's definition of the word "person" to "apply to every human being at every stage of the biological development of that human being or human organism, including fertilization" would not on its face apply to Section 2(B)(3), Article IV. The definitional change with respect to the words "person" and "men" would not apply throughout the entirety of the Ohio Constitution, but are limited in their application by the express words of the proposal. Accordingly, there is no single object or purpose to the proposal because the concepts it reaches, *i.e.*, inalienable rights (Sec. 1, Art. I) and Due Process (Sec. 16, Art. I), are markedly different. As there is no single object or purpose, the Court need not reach the second

prong of the analysis, *i.e.*, to determine whether or not the proposal bears a reasonable relationship to that object or purpose.

The proposed definitional change to the word “men” in Article I, Section 1, alters the entire concept of the inalienable rights that belong to every Ohioan. Petitioners seek to apply inalienable rights to “every human being at every stage of the biological development of that human being or human organism, including fertilization.” It was misleading, either intentionally or inadvertently, for Petitioners to include the proposed definition for the word “men” in Article I, Section 16, the “redress in courts” section, instead of where the definition belongs, *i.e.* in Article I, Section 1. Indeed, the word “men” does not even appear in Article I, Section 16, yet that is where the Petition places the definition for the term. In fact, the proposed Amendment defines two terms, one of which appears only in Section 1 and the other only in Section 16. Neither section contains both terms. Each term relates only to its own section.

“Inalienable rights” and “redress in courts” are two distinctly different legal concepts. Inalienable rights is defined as “Rights which are not capable of being surrendered or transferred without the consent of the one possessing such rights; *e.g.*, freedom of speech or religion, due process, and equal protection of the laws.” Black’s Law Dictionary, 6th Edition, p. 759. Redress is defined as “satisfaction for an injury or damages sustained. Damages or equitable relief.” *Id.*, p. 1279.

The Court has stated that Article I, Section 1, regarding inalienable rights, “is a broad statement limiting the power of our state government to interfere with certain rights of individuals” and “is a statement of fundamental ideals upon which a limited government is created.” *State v. Williams* (2000), 88 Ohio St.3d 513, 521, 523. On the other hand, the Court stated that Article I, Section 16, regarding redress in courts, “contains several distinct guaranties.” *Stetter v. R.J. Corman Derailment Services* (2010), 125 Ohio St.3d 280, 287. “First, legislative enactments may restrict individual rights only ‘by due course of law,’ a guarantee equivalent to the *Due Process Clause of the Fourteenth Amendment to the United States Constitution.*” *Id.* (emphasis in the original). “Additionally, separate concerns are implicated by Section 16’s provisions that this state’s courts shall be open to every person with a right to a remedy for injury to his person, property, or reputation. ‘When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a reasonable manner.’” *Id.*

Voters could decide that they favor a human organism, as early as fertilization, having inalienable rights, but not redress in the courts until such time as they are actually born. Alternatively, voters may decide that they favor a human organism, as early as fertilization, to have redress in the courts, but not inalienable rights until such time as they are actually born. The Petition does not automatically share a common purpose simply because

both amendments involve human organisms after fertilization. The Petition contains two separate and distinct subject matters, inalienable rights and redress in courts, which requires the issues to be voted upon separately by Ohio voters. Indeed, Section 1, being the first section of the Bill of Rights, is intentionally significantly broader in subject matter than Section 16.

Ohio Rev. Code 3519.01(A) requires that “Only one proposal of law or constitutional amendment to be proposed by initiative petition shall be contained in an initiative petition to enable the voters to vote on that proposal separately.” Clearly, the present petition does not do so. It asks voters to vote once on amending two sections of the Constitution relating to different subjects.

The citizens of this State deserve better than to risk fundamental changes to our most important legal document with far reaching consequences over their daily lives and the lives of their families made solely as a result of an out of context cross-reference to a wholly different part of the Constitution.

B. The Initiative Petition Does Not Contain the Full Text of Art. I, sec. 1 of the Ohio Constitution That It Amends

Ohio Rev. Code 3519.01(A) requires that:

A petition shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted.

It is plain from the foregoing language that petitioners are required to include in their proposed measure the full text of any existing constitutional provision that would be amended or repealed. In the instant case, the petitioners propose to amend both Sections 1 and 16 of the Article I of the Ohio Constitution, but have only included the text of Section 16. The import of this failure is explained in the next portion of this memorandum.

C. The Attorney General Should Not Have Certified Petitioners' Summary When the Petitioners Failed to Submit the Full Text to the Attorney General as Required By R. C. 3519.01(A)

Ohio Rev. Code 3519.01(A), governing the process for submitting a petition and summary and text of a proposed amendment to the Attorney General to seek certification of the summary, requires that:

A petition shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted.

Whoever seeks to propose a law or constitutional amendment by initiative petition shall, by a written petition signed by one thousand qualified electors, submit the proposed law or constitutional amendment and a summary of it to the attorney general for examination.

It is plain from the foregoing language that petitioners are required to submit to the Attorney General the text of the proposed amendment and that the text of the proposed amendment must include any existing constitutional provision that would be amended or repealed. In the instant case, the

petitioners propose to amend both Sections 1 and 16 of the Article I of the Ohio Constitution.

Ohio Rev. Code 3519.01(A) requires that “the attorney general shall conduct an examination of the summary.” But the Attorney General can not analyze a summary of a proposed amendment in a vacuum. He must have the full text of the proposed amendment, including existing language that is being amended, in order to be able to make a proper determination of whether the summary is “a fair and truthful statement of the proposed . . . constitutional amendment.” Ohio Rev. Code 3519.01(A). The clear purpose of this requirement is so that the Attorney General will be able to see exactly what is being proposed to be amended and evaluate the summary in the context of what the Petitioners seek to change in the Constitution. Amendment of a constitutional section by cross reference still results in an amendment of the affected section. The petitioners (and the Attorney General) can not argue that the proposed amendment does not affect the meaning of the word “men” as it appears in Art. I, Sec. 1 when it expressly states that it does.

This stage of the process is important for another reason because the summary, the Attorney General's certification of the same and the “full text” of the proposed amendment against which the Attorney General analyzed the summary are all then included on the initiative petition circulated to voters for signatures. However, the “full text” in the present case contains the

definitional change to Art. I, Sec. 1 without any context because of the failure of petitioners to comply with R. C. 3519.01(A) in what they submitted to the Attorney General. As a result, the text of Art. I, Sec. 1 does not appear in the initiative petition and signers of the initiative petition can only guess as to exactly what changing the definition of “men” as used in Article I, Section 1 affects.

The Attorney General acted improperly in proceeding to review the petitioners' summary when the petitioners had not first complied with the requirement to file the full text of any existing provision of the Constitution that would be amended. Logically, without the full text, the Attorney General can not make a determination that summary is a fair and truthful statement of the proposed amendment.

D. The Petitioners' Summary Is Not a Fair and Truthful Statement of the Proposed Measure

The legal standards that apply to ballot language provide guidance as to the standards that should apply to a petition summary. A voter has the right to know what he or she is being asked to vote on [or sign]. *State ex rel. Burton v. Greater Portsmouth Growth Corp.* (1966), 7 Ohio St.2d 34, 37. The use of language which is in the nature of a persuasive argument in favor of or against the issue is prohibited. *See Beck v. Cincinnati* (1955), 162 Ohio St. 473, 474-75. Ballot [summary] language must fairly and accurately present a statement of the question or issue to be decided in order to assure a free,

intelligent and informative vote by the average citizen affected. *See Markus v. Board of Elections* (1970), 22 Ohio St.2d 197.

The Petition's Summary's deficiencies include, but are not limited to, the following:

1. The Petition's Summary does not accurately explain the new definition being proposed for the terms "person" and "men." The Summary states that the proposed Amendment would define "person" and "men" to include "every human being at every stage of biological development, including fertilization." However, the full text of the proposed Amendment states that "person" and "men" will be defined to include "every human being at every stage of biological development of that human being *or human organism*, including fertilization." (Emphasis added).

The Petition Summary therefore does not accurately represent the text of the Amendment by failing to include "human organism" in the definitions for "person" and "men". This is a material omission in the Summary. The proposed Amendment treats "human being" and "human organism" as being different – which they are – by listing them separately, but the Summary only references "human being."

2. Next, the Summary states that the proposed Amendment would newly define the terms "person" and "men" in two separate sections of the Ohio Constitution: Article I, Section 1 and Article 1, Section 16. The Summary adds that the proposed Amendment will not affect "genuine contraception . . .;" "human 'eggs' or oocytes . . .;" and "reproductive technology or IVF procedures" In addition to the misleading nature of these so-called "exceptions" (which is discussed further below), the Summary misrepresents the actual text of the Amendment by overstating the reach of these "exceptions."

The text of the proposed Amendment expressly limits the three "exceptions" to Section 16 of Article I by stating "(B) Nothing *in this Section* [Section 16] shall affect" [Emphasis added.] Therefore, the "exceptions" do *not* apply to Section 1 of Article I, as the Summary wrongly states. This is a critical flaw in the Summary, as Section 1 and Section 16 deal with entirely different subject matters. Article I, Sec. 16 relates to due process and access to courts, while Article 1, Sec. 1 relates to inalienable rights. Therefore, it is not fair and truthful for the Petition Summary to state that the so-called

“exceptions” listed would apply to both Sections of the Constitution that are being newly amended.

3. The Summary is also not a fair “statement of the measure because it fails to provide would-be signers of the petition with any information regarding the subject matter of Sections 1 and 16 of Article I. It simply states that it the proposed Amendment would define the words “person” and “men” “as those terms are used” in those sections. But, how are voters to know how those words are used in those sections – or even what those sections are about? The Summary provides no context for voters to determine the import of the proposed definition. Furthermore, defining a term “as used” in a given section necessarily limits the definition to that section, and thus is not a change to the term as used throughout the Constitution. For that reason, it is that much more important to know the subject matter of the section that the new definition would be applied to.
4. Finally, the petition Summary does nothing to actually explain the meaning of the numbered “exceptions.”

The first “exception” states, “The proposed law would not . . . [a]ffect genuine contraception that acts solely by preventing the creation of a new human being.” But, a voter could interpret the term “genuine contraception” in several different ways, including to apply to common forms of hormonal birth control, such as “the pill” and/or IUDs. However, because the proposed Amendment would define “person” and “men” as “a human being at every stage of the biological development of that human being or organism, including fertilization,” the so-called “exception” in the proposed Amendment would *not* apply to these forms of hormonal birth control. This is because common forms of hormonal birth control may work in several different ways including by preventing implantation of a fertilized egg, which under the proposed Amendment would be a “person” or “m[a]n.” Thus, without a more accurate explanation of the reach of this exception, and in particular, what the exception would *not* reach, the petition Summary does not “assure a free, intelligent and informative vote by the average citizen affected,” *Markus v. Board of Elections* (1970), 22 Ohio St.2d 197.

The second “exception” in the Petition Summary states, “The proposed law would not . . . [a]ffect human ‘eggs’ or oocytes prior to the beginning of the life of a new human being.” This language is problematic for at least two reasons. First, the average voter does not know what an “oocyte” is. Moreover, because the proposed Amendment does not define when “the beginning of life” is (but rather

proposes a new definition for “person” and “men”), and because when “life begins” may be interpreted differently by different voters depending on one’s political, religious, medical, and philosophical viewpoints, the petition Summary, at a minimum, should inform voters that the proposed Amendment does not define “when life begins” and will likely have to be construed by the courts.

The third “exception” in the petition Summary states, “The proposed law would not . . . [a]ffect reproductive technology or IVF procedures that respect the right to life of newly created human beings.” This language is also problematic for several reasons. First, because not all voters are familiar with the acronym “IVF,” the Petition Summary should instead use the terms “in vitro fertilization.” Second, in vitro fertilization almost invariably involves the destruction of some very early embryos. Voters should be made aware of this critical fact in order for them to truly understand the potential limitations of this “exception.” Moreover, the text of the proposed Amendment does not define what it means to “respect the right to life” – language that has different meaning for different people, including couples that choose to undergo in vitro fertilization treatment. Thus, voters should also be made aware of this fact, and that this language will likely have to be construed by the courts.

In conclusion, for each of the deficiencies listed above, the Petition’s Summary is not a “fair and truthful” statement of the Full Text of the Amendment.

III. THE COURT HAS JURISDICTION TO DECIDE THE CHALLENGES TO THE ATTORNEY GENERAL'S CERTIFICATION DECISION UNDER R. C. § 3519.01(C)

A. The Grant of Original, Exclusive Jurisdiction by the General Assembly in R. C. § 3519.01(C) is Constitutional

Respondents argue that Ohio Rev. Code 3519.01(C) is an unconstitutional expansion of the original jurisdiction of this Court. [Respondents' Motion, p.8.] However, the State Respondents' position is not well taken.²

Ohio Rev. Code 3519.01(C) provides that:

(C) Any 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.

Recently, this Court observed that “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. This principle is grounded on the separation of powers provision found in many American constitutions.” *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101, ¶ 3 (citations omitted).

Despite the State Respondent's claims to the contrary, however, it is possible to expand the original jurisdiction of this Court via statute when there is an independent constitutional basis for doing so. The question,

² In an ironic twist, the State Respondents are arguing that the state law is unconstitutional and Relators are defending its constitutionality.

presented by this Court's holding in *ProgressOhio*, is whether a jurisdictional expansion is authorized under the Ohio Constitution. As noted earlier, Art. II, Section 1g of the Constitution, applicable to all statewide initiative and referendum petitions, expressly provides that, "Laws may be passed to facilitate" the operation of the constitutional provisions governing statewide initiative and referendum. Ohio Rev. Code 3519.01(C) is precisely such a law, passed pursuant to that provision to facilitate the operation of Sections 1b and 1g of the Ohio Constitution. *See, State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, ¶28.

The remedy left by the Court's holding in the *ProgressOhio* case was for the petitioners to institute an action in the Franklin County Court of Common Pleas. *ProgressOhio*, 2011-Ohio-4101, ¶ 6. This is precisely the kind of unworkable remedy that led to the citizen passed amendments to Sections 1a, 1b, 1c, and 1g of Article II in 2008. To require Relators herein to bring their claims relating to the Attorney General's certification of the summary in common pleas court would lead to multi-tiered and time consuming litigation. Many months could elapse between the filing of a challenge to the Attorney General's certification in the common pleas court and a final disposition by this Court. During this process, it would be difficult for an initiative effort to garner support, for if this Court were to ultimately determine that the summary was erroneously certified, the petitioners would be forced to go back to square one, and signatures gathered, money spent,

and time expended on the effort would all be lost. This process would do nothing to facilitate the right of initiative. Alternatively, petitioners who wait until a final disposition of the legal claims would be left with little or no time to gather the required signatures for the intended election.

To address these issues, the General Assembly acted pursuant its constitutional power to facilitate the right of initiative and to place such challenges in this Court in the first instance. Being constitutionally based, the grant of this jurisdiction can not violate the judicially created separation of powers doctrine, which is itself derived from the constitution.

B. Relators Have Standing to Bring an Action Under R. C. § 3519.01(C)

Ohio Rev. Code 3519.01(C) provides 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.” Ohio Rev. Code 3519.01(C)(emphasis added). Despite Respondents’ arguments to the contrary, Relators Healthy Families Ohio, Inc., and Garrett M. Dougherty are both aggrieved by the Respondent Attorney General’s decision to certify the summary of the Proposed Amendment as fair and truthful. [Complaint, ¶60.³]

3 Ohio Rev. Code 3519.01(C) does not limit challenges to certification decisions to individuals. It uses the term “person,” which under Ohio Rev. Code 1.59(C) includes corporations such as Relator Healthy Families Ohio, Inc.

Respondents suggest a very narrow interpretation of who qualifies as an aggrieved party pursuant to Ohio Rev. Code 3519.01(C). [Respondents' Motion, pp. 7-8.] However, Relators actively participated as the Proposed Amendment was being considered by Respondent Attorney General. Further, it is noteworthy that Ohio Rev. Code 3519.01(C) does not limit aggrieved parties to those who challenge the failure of the Attorney General to certify the proposed summary, but also those who seek to challenge the certification of a summary. Otherwise, Ohio Rev. Code 3519.01(C) would essentially be limited to petitioners whose proposed amendments were not certified. On its face, this is not the legislative intent. With regard to the certified summary, there are no other persons other than Relators who filed objections to the summary with the Attorney General. If Relators do not qualify as aggrieved parties, then no persons would qualify as aggrieved parties to the certification decision.

In *Schaller v. Rogers*, 2008 Ohio 4464 (10th Dist.), ¶12, the Tenth District Court of Appeals stated:

We conclude that R.C. 3519.01(C) is neither uncertain nor ambiguous. The subsection allows a person “aggrieved by a certification decision” relating to either an initiative or referendum petition to “challenge the certification or failure to certify” in the Supreme Court of Ohio and provides that the Supreme Court shall have exclusive jurisdiction “in all challenges of those certification decisions.” *Id.* This language obviously applies to challenges of specific certification decisions.

Relators are aggrieved parties because of the decision of Respondent Attorney General to certify the summary of the proposed amendment as fair and truthful despite Relators letter that was submitted in advance of the certification which detailed why the why the summary was defective. Further, this Court has held that electors have standing to enforce election laws. Relator Dougherty is a qualified elector who will be entitled to vote on the proposed amendment if it appears on the ballot. In *State ex rel Barth v. Hamilton County Bd. of Elections* (1992), 65 Ohio St. 3d 219, the Court summarized elector standing in election cases:

Relators cite *State v. Brown* (1882), 38 Ohio St. 344, and *State ex rel. Gregg v. Tanzey* (1892), 49 Ohio St. 656, 32 N.E. 750. Brown and Gregg are part of a long line of cases establishing that mandamus is available to enforce public duties, that any duty related to an election is public, and that a citizen has the capacity to sue even if the duty only generally affects him. *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4, 35 O.O.2d 1, 3, 215 N.E.2d 592, 595.

The same rule applies in prohibition actions. Thus, in *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 54 O.O. 392, 122 N.E.2d 105, paragraphs one and two of the syllabus, we held:

“1. Ordinarily, a person is not authorized to attack the constitutionality of a statute where his private rights have suffered no interference or impairment, but as a matter of public policy a citizen does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself and the citizens generally.”

* * *

Moreover, *Matasy* cited *Skilton* with approval, and *Skilton* also recognized the " * * * line of cases involving election questions * * * [which] held that a citizen has sufficient interest as an elector to maintain an action in mandamus to compel compliance with the election laws." *Skilton*, 164 Ohio St. at 164-

165, 57 O.O. at 146, 128 N.E.2d at 49, citing *Brown, Gregg* and *Newell*. Accordingly, we conclude that relators have standing as electors to bring this action.

Whether the action is one in mandamus, prohibition, a challenge under Art. II, Sec. 1g or under Ohio Rev. Code 3519.01(C) does not make a difference. The elector is seeking to enforce public duties. Adding the word “aggrieved” to Ohio Rev. Code 3519.01 may prevent an individual who is not an elector from having standing or, at a minimum, having to establish some special harm different than the harm to the public at large; but it does not obviate the fact that an elector, by virtue of his or status as an elector, not as a member of the public at large, is aggrieved when public officials fail to follow election laws on matters which the elector is qualified to vote.

C. The Attorney General's Decision to Certify the Summary in the Absence of Petitioners Filing the Text of Art. I, § 1 of the Constitution is Subject to Review Under R. C. § 3519.01(C)

1. The Attorney Acted Improperly in Certifying that the Summary is a Fair and Truthful Statement of the Proposed Constitutional Amendment When Petitioners Failed to File the Full Text as Required By R. C. 3519.01(A)

The arguments supporting this challenge under R. C. 3519.01(C) are the same as those set forth above in Part II C for the challenge under Art. II, Sec. 1g of the Constitution. As a result, Relators are aggrieved by the Attorney General's “certification decision” and also bring this action as set forth in Ohio Rev. Code 3519.01(C).

2. The Summary is Not a Fair and Truthful Statement of the Proposed Amendment

The arguments supporting this challenge under Ohio Rev. Code 3519.01(C) are the same as those set forth above in Part II D for the challenge under Art. II, Sec. 1g of the Constitution. As a result, Relators are aggrieved by the Attorney General's "certification decision" and also bring this action as set forth in Ohio Rev. Code 3519.01(C).

IV. RELATORS HAVE PLED CLAIMS FOR WHICH MANDAMUS RELIEF MAY BE GRANTED BY THIS COURT

Relators have properly plead claims for relief in mandamus. The duties of the State Respondents are discussed below. However, common with respect to the requests for mandamus relief is that Relators have a clear legal right to require that the State Respondents properly exercise their mandatory duties and that Relators lack an adequate remedy in the ordinary course of law. Relator, Healthy Families Ohio, Inc., actively engaged in the process before the Attorney General and Ohio Ballot Board, bringing before those parties in a timely manner the very legal issues involved in the instant action. It also represents organizations and individuals opposed to the proposed amendment. Relator, Dougherty, is an officer of Healthy Families Ohio, Inc., and a qualified elector of the State of Ohio.

The only alternative to a writ of mandamus is a declaratory judgment and "affirmative" injunction in the common pleas court, but that is not an adequate remedy for obvious reasons. First is that the claims presented

potentially impact the November 6, 2016 general election, leaving insufficient time for the case to be litigated in the lower courts and make its way back to this Court. Secondly, affirmative injunctions are disfavored involving the exercise of duties by public officials. Indeed, mandamus is the appropriate remedy for requiring public officials to properly perform mandatory duties.

A. The Attorney General

The duties of the Attorney General under Ohio Rev. Code 3519.01(A) to examine a summary and the full text of a proposed amendment to determine whether the summary is a fair and truthful statement of the proposed amended have been discussed above and are equally applicable with respect to Relators' request for mandamus relief. Relators fully incorporate those arguments here.

B. The Ohio Ballot Board

Ohio Rev. Code 3505.062(A) requires the Ohio Ballot Board to examine each state initiative petition to determine whether it contains only one proposed amendment to the Constitution and if it contains more than one proposed amendment the Board must divide the petition into separate petitions "so as to enable voters to vote on a proposal separately." The arguments why the Personhood Petition contains more than one proposed amendment to the Constitution are set forth above and are hereby incorporated in support of Relators request for relief in mandamus.

C. The Secretary of State

The issues raised in this case are ones that the Secretary of State would ultimately face in determining whether the initiative petition complies with all legal requirements and can lawfully be certified for the ballot. Ohio Rev Code 3501.01(K) provides that the Secretary of State shall “receive all initiative and referendum petitions on state questions and issues and certify to the sufficiency of those petitions. Thus, this case implicates the duties of the Secretary of State and he is so situated that the disposition of this action in his absence may as a practical matter impede or impair his ability to protect that interest. Further, given that a writ of prohibition can not be issued against the petitioners to prevent the filing of the initiative petition, but only against the Secretary of State from accepting or, if accepted, from certifying the initiative petition, inclusion of the Secretary of State serves the purpose of the Court being able to provide complete relief. Finally, the claim for relief with respect to the Secretary of State arises out of the same transactions or occurrences as the claims asserted against the other Respondents in that these same transactions and occurrences would be the basis for a later separate action against the Secretary if he were to accept for filing or certify the initiative petition. For all these reasons, he may be joined as a party under Civ. R. 19 and/or Civ. R. 20.

V. RELATORS HAVE PLED CLAIMS FOR WHICH WRITS OF PROHIBITION CAN BE GRANTED BY THIS COURT

Relators have plead a claim for relief in the form of a writ of prohibition as an alternative to a writ of mandamus or relief under Art. II, Sec. 1g or 3519.01(C). As the State Respondents note in their motion, the decision of the Attorney General with respect to whether the summary is a fair and truthful statement of the proposed amendment is a factual determination. Therefore, the Attorney General must review and weight facts in order to make his decision. The same is true with respect to the Ohio Ballot Board's determination whether a proposal proposing more than one constitutional amendment or if there is a single unified purpose to the different provisions of a proposed amendment. Although there was no judicial hearing before the Attorney General or Ballot Board involving sworn testimony, each received documents (exhibits) which they reviewed and relied upon in making their determinations. When the initiative petition is filed with he Secretary of State, he and the county boards of elections under his direction will have to review it for compliance with all legal requirements and make a determination whether it does comply and can be certified for placement on the November ballot. This is arguably the exercise of quasi-judicial authority. Further, if relief can not be afforded under Art. II, Sec. 1g or Ohio Rev. Code 3519.01(C) or by way of a writ of mandamus, a writ of prohibition would provide necessary relief to resolve the issues of first

impression presented by this case and protect the rights of the petitioners, challengers and the voters.

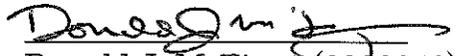
VI. CASE CAPTION

The Motion also raises the issue of the incorrect captioning of the complaint for purposes of the mandamus and prohibition claims only. The day following the filing of the State Respondents' Motion, Relators filed a Motion for Leave to File a First Amended Complaint. The reasons set forth therein in favor of granting the Motion for Leave are hereby fully incorporated into this response memorandum. The Motion to Dismiss acknowledged that the Court has granted motions to dismiss where the issue is raised and relators fail to seek leave to amend. Further, although the caption did not contain the prefix "state ex rel.," it did denominate the parties in the caption and throughout the Complaint as "Relators."

VII. CONCLUSION

For all of the above reasons, the State Respondents' Motion to Dismiss should be denied.

Respectfully submitted,


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Certificate of Service

The undersigned counsel hereby certifies that the foregoing was served upon the following via electronic mail this 17th day of February, 2012:

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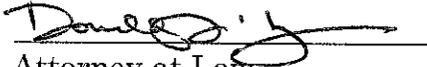
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