

IN THE SUPREME COURT OF OHIO

HEALTHY FAMILIES OHIO, INC., et al.)	
)	
Relators,)	Case No. 2012-0070
)	
v.)	
)	Original Action in Mandamus
OHIO BALLOT BOARD, et al.,)	and Prohibition
)	
Respondents.)	

RESPONDENTS PERSONHOOD OHIO, JAMES PATRICK JOHNSTON, FRANK WEIMER, DAVID DAUBENMIRE, AND TOM RADDELL'S RESPONSE TO RESPONDENTS OHIO BALLOT BOARD, SECRETARY OF STATE JON HUSTED, AND OHIO ATTORNEY GENERAL MIKE DEWINE'S MOTION TO DISMISS

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FILED
 FEB 21 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 FEB 21 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

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Respondents Personhood Ohio, James Patrick Johnston, Frank Weimer, David Daubenmire, and Tom Raddell (hereinafter “Personhood Ohio”), by and through the undersigned counsel, submit the following response in support of Respondents Ohio Ballot Board, Secretary of State Jon Husted, and Ohio Attorney General Mike DeWine’s (hereinafter collectively “State Respondents”) motion to dismiss.

INTRODUCTION

The State Respondents’ motion to dismiss is well taken and should be granted. This Court lacks jurisdiction to hear Relators’ claims under Section 1g, Article II of the Ohio Constitution, and Relators are not “aggrieved parties” under R.C. 3519.01(C). In addition, the State Respondents’ arguments concerning Relators’ failure to state a claim upon which relief can be granted are meritorious as well. For all of these reasons, Relators’ complaint should be dismissed, and Personhood Ohio should be allowed to proceed with the collection of signatures

in order to allow the citizens of Ohio to exercise their right to vote on the important issue presented by the proposed amendment.

STATEMENT OF FACTS

Personhood Ohio concurs in and hereby adopts by reference the State Respondents' statement of the facts, with the following additions and exceptions.

It is of course well settled that on a motion to dismiss, "the factual allegations of the complaint are taken as true." *NCS Healthcare, Inc. v. Candlewood Partners, LLC*, 160 Ohio App. 3d 421, 427, 827 N.E.2d 797, 801 (Ohio Ct. App. 2005). However, "[u]nsupported conclusions of a complaint are not considered admitted . . . and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639, 639 (1989). Here, Relators' assertions in paragraphs 2, 42, 53, 55, and 56 that Personhood Ohio seeks to amend *two* sections of the Ohio Constitution (Art. I, Sec. 1 and Art. I, Sec. 16), are but unsupported conclusions, and should not be considered admitted. The State Respondents' statement of facts is erroneous to the extent it assumes those assertions are true.

The text of the proposed amendment itself is clear:

Be it resolved by the people of the State of Ohio that Article I, Section 16, of the Ohio Constitution be adopted and read as follows:

Redress in courts: 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.

....

Insert: Article I, Section 16(b). "Person" and "men" defined:

(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.

(B) Nothing in this Section shall affect genuine contraception that acts solely by preventing the creation of a new human being; or human “eggs” or oocytes prior to the beginning of the life of a new human being; or reproductive technology or In Vitro Fertilization (IVF) procedures that respect the right to life of newly created human beings.

Complaint, ¶2; *see also* Appx. A-4. On its face, the proposed amendment amends only Article I, Section 16. It thus constitutes a single amendment, as the Ballot Board correctly determined at its public hearing on January 9, 2012. *See* Compl., ¶¶20, 21. The State Respondents’ admission of Relators’ unsupported and unsupportable assertion to the contrary was thus erroneous.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR RELATORS’ CHALLENGE TO PROCEEDINGS PRELIMINARY TO THE INITIATIVE PROCESS.¹

As both the State Respondents and Relators agree, the Ohio Supreme Court has “original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section.” OHIO CONST., Art. II, § 1g. This constitutional grant of jurisdiction is limited on its face, however, to “*petitions and signatures upon such petitions.*” *Id.* (emphasis added). As correctly argued by the State Respondents, it therefore does not include challenges to proceedings that take place prior to a petition having been presented to qualified electors and the collection of their signatures. *See* Memorandum of State Respondents at 5-6.

Relators argue in opposition that this language was intended to encompass all challenges, whether made during the pre-petition stage or the petition stage itself. *See* Relators’

¹ Even though Personhood Ohio has filed its answer to the complaint, it has not and cannot waive argument as to subject matter jurisdiction. “It is axiomatic that subject-matter jurisdiction may not be conferred upon a court by agreement of the parties, *may not be waived*, and is the basis for mandatory *sua sponte* dismissal.” *Logan v. Vice*, 79 Ohio App. 3d 838, 842, 608 N.E.2d 786, 788 (Ohio Ct. App. 1992) (emphasis added).

Memorandum Contra Motion to Dismiss (hereinafter “Relators’ Memorandum”) at 7-10. Relators, however, focus on the wrong word. They isolate the word “all” and argue that “‘all’ means ‘all,’” including pre-petitions as well as petitions. *Id.* at 7. But Relators ignore the qualifying clause immediately following the word “all,” which expressly limits this Court’s jurisdiction to all challenges made to *petitions* and signatures upon such petitions. “Strictly speaking, the statutory procedure under [R.C. 3519.01] is *not part of the initiative process* but is a statutory requirement *prior to commencement of the initiative process* under the Constitution.” *State ex rel. Rankin v. Attorney General*, 161 Ohio App.3d 521, 529-30, 831 N.E.2d 438, 445 (Ohio Ct. App. 2005) (emphasis added). Nothing in the recent amendments to Article II of the Ohio Constitution alters this basic proposition.

The process by which initiative petitions are presented to the Attorney General is outlined by the statute. Only when the statutory requirements are met, “*the constitutional initiative process commences.*” *Id.* at 530, 831 N.E.2d at 445 (emphasis added). The *Rankin* court made clear that the *pre*-petition process is separate and independent from the actual *petition* process, over which this Court has exclusive and original jurisdiction. Specifically, “once certification is made by the Attorney General pursuant to [R.C. 3519.01], any procedural defect in the proceedings under that section does not affect the validity of the subsequent constitutional initiative process.” *Id.* at 530, 831 N.E.2d at 445.

In *Rankin*, a non-profit group, Ohio Campaign to Protect Marriage, sought to propose a constitutional amendment concerning the definition of marriage. *Rankin*, 161 Ohio App.3d at 522, 831 N.E.2d at 439. The group followed the statutory requirements of OHIO REV. CODE § 3519.01 and presented the proposed amendment and summary to the Attorney General for his certification. *Id.* at 523, 831 N.E.2d at 439. The Attorney General certified the initiative petition

as a fair and truthful summary of the proposed amendment. *Id.*; 831 N.E.2d at 439. Much like Relators' assertions in this case, the proposed amendment and the Attorney General's certification was challenged as allegedly defective under the statutory requirements, and the challengers sought a writ of mandamus, a declaration that the certification was not a fair and truthful statement of the proposed amendment, and a preliminary injunction prohibiting the non-profit group from circulating the petition. *Id.* at 523, 831 N.E.2d at 439-40. The court agreed with the Attorney General and found that the decision to issue a certification to the group proposing a constitutional amendment was solely within the discretion of the Attorney General and therefore the court was without jurisdiction to challenge his decision. *Id.* at 531, 831 N.E.2d at 445-46.

Here, Relators seek relief nearly identical to the relief sought in *Rankin*. It is noteworthy that Relators ignore this important precedent altogether. Indeed, their brief is almost entirely devoid of citations to authority of any kind, apparently proceeding on the assumption that because this case is one of first impression, all prior case law and authority may be disregarded. Relators are mistaken. It is well-established that the legislature is presumed to know the state of the law relating to the subjects with which it deals, *State ex rel. Cromwell v. Myers*, 80 Ohio App. 357, 368, 36 O.O. 62, 73 N.E.2d 213 (Ohio Ct. App. 1947), and therefore the language of a statute "must be construed in light of the common law in force at the time of its enactment." *In re Medure*, 2002 WL 31114919, *9 (Ohio Ct. App. 2002) (DeGenaro, J., dissenting) (citing *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 95, 90 N.E. 146 (1909)). Here, the legislature must be presumed to have been familiar with *Rankin*; its failure to directly address it must therefore be taken as a tacit acceptance of its holding.

Relators challenge the Attorney General's certification by alleging that the summary is not a fair and truthful statement of the proposed amendment. This claim is identical to what the challengers in *Rankin* alleged. As such, it fails for the same reasons the challenge in *Rankin* failed. "Any alleged deficiencies in the [statutory process], which would presumably include an improper finding by the Attorney General that a submitted summary constitutes a fair and truthful statement of the proposed constitutional amendment, *do not affect the constitutional initiative process.*" *Rankin*, 161 Ohio App.3d at 530, 831 N.E.2d at 445 (emphasis added). Relators' claim should therefore be dismissed.

Relators further assert that there is no distinction between the pre-petition process and the petition process. *See* Relators' Memorandum at 9 (arguing that Respondents' assertion that the pre-petition process is not included in the constitutional grant of original jurisdiction is making "a distinction without a difference"). Relators mistakenly assert that they are not challenging the pre-petition process, and that the proposed amendment and the Attorney General's certification have somehow become "part of the initiative petition for circulation." *Id.* This nonsensical assertion, however, is without merit and is flatly inconsistent with the assertions made in Relators' Complaint. Relators specifically challenge the validity of the pre-petition summary of the proposed amendment and the Attorney General's certification of that summary as a fair and truthful statement of the proposed amendment. *See* Compl., ¶ 38. Relators have therefore squarely challenged the *pre*-petition process.

A proposed amendment cannot even proceed to the petition process unless the Attorney General certifies the proposed initiative and its summary. R.C. 3519.01(A). If the petition cannot even be presented to the voters without receiving certification from the Attorney General, then it is beyond question that the challenge presented here—i.e., the challenge to the Attorney

General's certification—is *preliminary to the petition process* over which this Court has jurisdiction. Relators' complaint should therefore be dismissed.

In fact, Relators concede that the signatures on the petition itself are not at issue in their challenge. *Id.* As Relators correctly stated in the Complaint, Personhood Ohio is currently collecting signatures on the petition for the purposes of placing the proposed amendment on the ballot in the November elections. *See* Compl. ¶ 22; Personhood Ohio's Answer, ¶ 22. Nevertheless, Relators have not challenged that process or the petition on which those signatures are being collected. Instead, they have challenged only the Attorney General's certification of the proposed summary and the Ballot Board's determination that the petition presents only a single amendment. This case thus presents a quintessential *pre*-petition challenge. Because Article II, Section 1g confers on this Court "original, exclusive jurisdiction over all challenges made to *petitions and signatures upon such petitions*," (emphasis added), Relators' pre-petition challenge must be dismissed.

II. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS ACTION UNDER R.C. 3519.01(C).

The State Respondents' motion should also be granted with respect to the second ground on which Relators stand in bringing this challenge, namely R.C. 3519.01(C), because Relators do not qualify as "aggrieved parties." *See* State Respondents' Memorandum at 7-9. The citizens of Ohio are unquestionably vested with the right to amend the Ohio Constitution by means of the initiative process, and need only satisfy certain criteria for such amendments to become operative. *See* R.C. 3519.01(A) and (B). 3519.01(C), adopted in 2006, allows "any person who is aggrieved by" a certification made under subsections (A) or (B) to bring an action challenging that certification. *Id.* Here, Relators were not aggrieved by the certifications.

The term aggrieved is not defined in the statute, which requires this Court to give it its plain and ordinary meaning. “Where a particular term in a statute is not defined, it will be accorded its plain, everyday meaning.” *Sharp v. Union Carbide Corp.*, 38 Ohio St. 3d 69, 70, 525 N.E.2d 1386, 1387 (Ohio 1988). For parties to be aggrieved, they must have suffered injury by “having their legal rights . . . adversely affected” or have suffered “harm[] by an infringement of legal rights.” BLACK’S LAW DICTIONARY 77 (9th ed. 2009) (defining “aggrieved”). As the term is used in other statutes, a party may be aggrieved “where the improper disposition of the record infringes upon a person’s legal right to scrutinize and evaluate a governmental decision.” *State ex rel. Bell v. London*, 2011 WL 3443592 ¶ 28 (Ohio Ct. App. 2011). Finally,

In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury *in a manner or degree different from that suffered by the general public*, that the law in question caused the injury, and that the relief requested will relieve the injury.

State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 86 Ohio St. 3d 451, 470, 715 N.E.2d 1062, 1081 (Ohio 1999) (emphasis added).

Here, Relators claim that their legal rights have been adversely affected, but are unable to show anything more than mere disagreement with the substance of the proposed amendment – an “injury” no different from that suffered by the general public. As the State Respondents noted, Relators’ allegation in the complaint utterly fails to identify any unique legal right that has been infringed. *See* State Respondents’ Memorandum at 7 (quoting Compl. ¶60). Relators claim that there was a “material omission” in the petition summary required to be shown to voters. *See* Compl., ¶ 40. Additionally, Relators assert that the “Petition Summary . . . does not accurately represent the text of the Amendment” because it “fail[s] to include “‘human organism’ in the definition.” *Id.*

Relators further claim that the Petition Summary “misrepresents the actual text of the Amendment by overstating the reach of these exceptions.” *Id.* ¶ 41. These assertions, however, are nothing more than legal conclusions upon which Relators claim they are entitled to relief. They do not provide any basis on which Relators can establish that they were aggrieved in a manner distinct from members of the general public. For this reason, Relators complaint must fail.

Relators assert that they are “aggrieved by the Attorney General’s decision to certify the summary of the Proposed Amendment as fair and truthful despite the fact that it is not, and therefore does not satisfy OHIO REV. CODE 3519.01.” Compl., ¶ 44. Again, however, Relators’ assertion is conclusory, and fails to identify any specific rights that are being adversely affected or any basis upon which their legal rights are being infringed. It is therefore insufficient as a matter of law. *See Yost v. Jones*, 2002 WL 59666, *2 (Ohio Ct. App. 2002) (quoted by State Respondents). Relators fail to assert such an infringement. Additionally,

[A] general interest as a citizen, without a distinct injury, does not satisfy the requirements of standing. The personal distaste for a particular situation or perceived lack of faith in any agency’s administration of its role, without more, does not satisfy the legal concepts of “adversely affected” or “aggrieved” for purposes of standing.

Id. Relators are unable to show anything more than this “general interest;” they are therefore not aggrieved parties.

Relators’ response to the State Respondent’s motion reveals the flaw in their assertion that they are “aggrieved parties.” The gravamen of Relators’ claim that they are aggrieved parties simply because they “actively participated as the proposed amendment was being considered by Respondent Attorney General.” *See* Relators’ Memorandum at 28. This is exactly the kind of general injury that the *Yost* court held was insufficient to confer standing. Relators may have

participated in the process, but this fact is irrelevant to the determination of whether they are entitled to bring their challenge *at this time*.

Relators' assertion is based on nothing more than a general interest in the proposed initiative process. The general nature of Relators' alleged standing is made evident by their response to State Respondents' motion. Relators assert that "[w]ith 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." *See* Relators' Memorandum at 10 (emphasis added). That is, the general interest of all citizens is at stake, and Relators are no different than "all Ohioans."

Relators' authorities provide no support for their position, either. Relators cite *Schaller v. Rogers*, 2008 -Ohio- 4464 (Ohio Ct. App. 2008) for the proposition that R.C. 3519.01(C) is unambiguous. *See* Relators' Memorandum at 28. Neither the State Respondents nor Personhood Ohio disputes this proposition. However, that case concerned the rights of the *proponents* of referendum petition, not a third party. Moreover, the plaintiffs in *Schaller* did not bring a challenge under R.C. 3519.01(C); the case is therefore inapposite.

Relators also cite *State ex rel. Barth v. Hamilton Co. Bd. of Elections*, 65 Ohio St.3d 219, 602 N.E.2d 1130 (1992). *See* Relators' Memorandum at 29. Again, though, *Barth's* facts are distinguishable. It involved an action by electors to obtain a writ of prohibition barring the placement of the name of a certain candidate on the general election ballot. Relators in *Barth* did not bring an action under R.C. 3519.01(C), and were not required to demonstrate that they were "aggrieved parties." Accordingly, the special rule set forth in *Barth* does not apply here, and the general rule requiring that a party must demonstrate that it was "aggrieved" in a manner distinct from the general public applies to an action under R.C. 3519.01(C). Relators all but concede that

they cannot make that showing. Therefore, they do not have standing to sue under R.C. 3519.01(C), and the State Respondents' motion should be granted.

III. RELATORS' COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE GROUNDS UPON WHICH RELIEF CAN BE GRANTED.

Finally, the State Respondents' motion should be granted as to its alternative basis, namely that Relators' Complaint fails to state a claim upon which relief may be granted. *See* State Respondents' Memorandum at 9-21. While Relators are not required to provide detailed analysis regarding the factual record upon which their complaint is based, it is nevertheless their "obligation to provide the grounds for their entitlement to relief." *DiGiorgio v. Cleveland*, 2011 WL 5517366 at ¶ 41. Additionally, a mere "formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the mere speculative level." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Conclusory statements in a complaint that are not supported by facts are not afforded the presumption of the veracity and are insufficient to withstand a motion to dismiss." *Id.*

Relators' statements in the Complaint cannot be afforded the "presumption of veracity" and should be dismissed. Here, Relators recite the requirements of the ballot process, as outlined in R.C. 3519.01, and then proceeded to state in mere conclusory fashion that Respondents' process failed these requirements. This, however, is insufficient to warrant the relief Relators request.

It is noteworthy that all of Relators' assertions that they are entitled to relief as an aggrieved party are specifically formulaic recitations of the statute at issue. *See* Compl., ¶¶38, 51, 69. For example, Relators claim that the text of the initiative petition fails to contain the text of the amendment, that "the proposed summary is not a fair and truthful statement of the

Proposed Amendment,” and that the initiative petition fails to satisfy the required constitutional provisions of the Ohio Constitution. *See* Compl., ¶38. This assertion is simply false. Respondents’ proposed amendment specifically provides the text of Article I, Section 16, and provides the language that it is proposing to be inserted into that provision. *See* Compl., Appx. A-4. A constitutional amendment proposed by the initiative process requires that the proposal include the text of the amendment that would be amended and receive the Attorney General’s certification that the law is a “fair and truthful statement of the proposed constitutional amendment.” R.C. 3519.01(A)-(B). These requirements were satisfied. Relators’ complaint fails to provide the relevant factual assertions that would support any entitlement to relief. Relators’ assertions for relief under the second and third claims fare no better and recite the same allegations of the claims for relief contained in the above-listed provision. *See* Compl., ¶¶51, 69. These two provisions merely assert that the initiative fails the statutory requirements and that the initiative summary is not a “fair and truthful statement of the Proposed Amendment.” *Id.* Relators have simply taken the precise language of the statute and asserted that it was violated. This Court should find these assertions insufficient and grant Respondents’ motion.

CONCLUSION

For all of the foregoing reasons, as well as the reasons propounded by the State Respondents, this Court should grant the State Respondents’ motion to dismiss, and award such other and further relief to which all Respondents are entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONSE TO RESPONDENTS OHIO BALLOT BOARD, SECRETARY OF STATE JON HUSTED, AND OHIO ATTORNEY GENERAL MIKE DEWINE'S MOTION TO DISMISS has been served on this 20th day of February, 2012, via email, on the following counsel of record:

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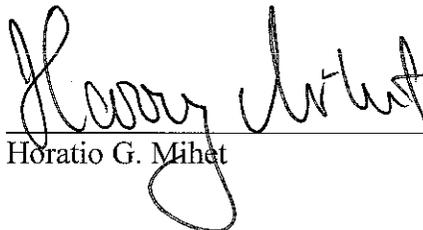
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