

IN THE SUPREME COURT OF OHIO

**ETHICS FIRST – YOU DECIDE OHIO
POLITICAL ACTION COMMITTEE, et al.**

Relators,

v.

**R. MICHAEL DEWINE,
OHIO ATTORNEY GENERAL**

Respondent.

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: Case No. 2016-0464
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: Original Action for a
: Writ of Mandamus
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RESPONDENT’S MOTION TO DISMISS

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RESPONDENT’S MOTION TO DISMISS

Pursuant to Sup.Ct.Prac.R. 12.04 and Civ.R. 12(B)(6), Respondent R. Michael DeWine, Ohio Attorney General, hereby moves this Court to dismiss Relators’ petition for a writ of mandamus. A memorandum in support of this motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Relators' challenge fails to overcome the strong presumption of constitutionality afforded to R.C. 3519.01 and R.C. 3505.062, as amended by H.B. 3 in 2006. The challenged statutes provide safeguards to ensure that, *inter alia*, an initiative petition proposing a constitutional amendment contains only one amendment, so as to enable the voters to vote on each proposal separately. R.C. 3519.01(A), R.C. 3505.062(A).

Relators' petition fails as a matter of law to state any of the elements required for mandamus. First, there is an adequate alternative remedy at law. What Relators seek is actually a declaratory judgment action, which they could have brought months or years ago in a court of common pleas. Second, the Attorney General has no duty and Relators have no right to have him ignore statutes that were validly enacted ten years ago. This is particularly true where none of the challenged statutory requirements violate Ohio or U.S. Constitutional provisions cited by Relators. The separate-vote requirement facilitates the initiative process in compliance with Article II, Section 1g of the Ohio Constitution ("Requirements for initiative and referendum petitions") by allowing voters to make an informed choice about the specific change (or changes) in law that are being proposed. In addition, contrary to Relators' assertions, such separate-vote provisions do not regulate core political speech under the First Amendment. Relators ignore the fact that similar separate-vote requirements for initiative petitions in other states have been repeatedly upheld by all the courts to consider them. The State's important regulatory interests, including avoiding confusion and promoting informed decision-making, are enough to justify the reasonable, nondiscriminatory requirements here.

Accordingly, Relators' complaint should be dismissed for failure to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS

R.C. 3519.01 and R.C. 3505.062, as amended by H.B. 3 in 2006, provide safeguards to ensure, *inter alia*, that “[o]nly 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.” R.C. 3519.01(A), *see also* Compl. Ex. D (H.B. 3). The statutes also make explicit the Ballot Board’s ability to, if necessary, “divide the initiative petition into individual petitions containing only one proposed law or constitutional amendment so as to enable the voters to vote on each proposal separately and certify its approval to the attorney general.” R.C. 3505.062(A). If the Ballot Board deems it necessary to divide a petition that contains more than one proposed law or constitutional amendment, petitioners “shall resubmit to the attorney general appropriate summaries for each of the individual petitions arising from the board’s division of the initiative petition[.]” *Id.*

Relators are the supporters of a proposed constitutional amendment that would affect the members of the General Assembly, including a revision to the method by which members’ compensation is fixed. Compl. Ex A (Summary Petition for Ethics First – You Decide Ohio). On March 4, 2016, Relators submitted their proposed amendment and summary to the Attorney General. *Id.* After completing his statutory review, the Attorney General sent the proposed initiative to the Ohio Ballot Board on March 14, 2016, in accordance with R.C. 3519.01(A). Compl. Ex. B (Letter from Attorney General). On March 23, 2016, the Board convened as required by R.C. 3505.062 to discuss whether “the initiative petition contains more than one proposed law or constitutional amendment[.]” R.C. 3505.062(A). No petitioner or

representative of petitioners appeared before the board to explain the reasoning behind the petition. The Board decided that the initiative petition in fact contained three proposed constitutional amendments and separated it accordingly so that petitioners could submit three separate summaries. Compl. Ex. C (Letter from Ballot Board).

After that decision, Relators filed this action to declare “those statutory provisions (R.C. § 3519.01 and R.C. § 3505.062) are null and void” and remove the Ballot Board’s role in the initiative petition process. Compl. ¶ 29, 47-48.

III. STANDARD OF REVIEW

“A court can dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted.” *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. In order for a complaint to be dismissed, it must appear beyond doubt that the relator can prove no set of facts warranting the requested writ of mandamus. *Id.* The court must consider and accept all factual allegations of the complaint as true and afford all reasonable inferences in the nonmoving party’s favor. *Id.* This does not allow, however, unsupported conclusions to be admitted or to be sufficient. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994).

IV. LAW AND ANALYSIS

Mandamus is an extraordinary legal remedy. *State ex rel. Gerspacher v. Coffinberry*, 157 Ohio St. 32, 36, 104 N.E.2d 1 (1952). To be entitled to a writ of mandamus, the relator must establish three elements: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the respondent; and, (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Richard v. Mohr*, 135 Ohio St.3d 373, 2013-Ohio-1471, 987 N.E.2d 650, ¶ 4. The burden of proof in mandamus rests with the moving party. *State ex. rel*

Van Gundy v. Indus. Comm., 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13. If a relator fails to establish one of these elements, the court has discretion to dismiss the action. *Id.* at ¶ 1.

Relators' complaint fails to support any of the elements required for a writ of mandamus. Relators have an adequate alternative remedy at law in the form of a declaratory judgment action, making this an inappropriate subject for mandamus relief. In addition, they have no clear legal right—nor does the Attorney General have a clear legal duty—to have the Attorney General disregard his statutory obligations. Accordingly, Relators fail to state a claim upon which relief can be granted.

A. Relators' constitutional challenge is not an appropriate subject for mandamus, as Relators have an adequate remedy at law in an action for declaratory judgment.

Relators' assertion that they "lack any adequate remedy at law by which they might challenge the constitutionality of R.C. § 3519.01 and to R.C. § 3505.02, as amended by H.B. 3," is without basis. Compl. at ¶ 82. To the contrary, Relators' ability to bring a constitutional challenge through a declaratory judgment action is not only adequate, but in fact is the appropriate forum for their requested relief. "Constitutional challenges to legislation are generally resolved in an action in a common pleas court rather than in an extraordinary writ action filed here." *Rammage v. Saros*, 97 Ohio St.3d 430, 2002-Ohio-6669, 780 N.E.2d 278, ¶ 11, citing *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 579, 757 N.E.2d 357 (2001); see also *State ex rel. Crobaugh v. White*, 91 Ohio St.3d 470, 472, 746 N.E.2d 1120 (2001), quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 635, 716 N.E.2d 704 (1999) ("[C]onstitutional challenges to legislation are normally considered in an action in a court of common pleas rather than an extraordinary writ action filed here"). Cf. *State ex rel. Ohio*

Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (limiting the circumstances in which an original action is appropriate to challenge the constitutionality of a statute, such as where “the General Assembly ha[d], in several places, reenacted legislation which this court ha[d] already determined to be unconstitutional . . .”).

This Court has refused to issue a writ of mandamus where the real objects sought are a declaratory judgment and a prohibitory injunction. In *State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289, for example, this Court refused to issue a writ of mandamus against various local governmental entities regarding the apportionment and distribution of certain local government funds and revenues despite a challenge to the constitutionality of Sub.H.B. No. 329 (2002):

“[I]f the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.” *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999). In order to divine the true objects of relators' mandamus action, “we must examine [their] complaint ‘to see whether it actually seeks to prevent, rather than to compel, official action.’” *State ex rel. Cunningham v. Amer Cunningham Co., L.P.A.*, 94 Ohio St.3d 323, 324, 762 N.E.2d 1012 (2002), quoting *State ex rel. Stamps v. Montgomery Cty. Automatic Data Processing Bd.*, 42 Ohio St.3d 164, 166, 538 N.E.2d 105 (1989).”

Satow, at ¶ 13. In *Satow*, this Court specifically noted that, although the relators characterized the action as seeking a judgment compelling the performance of affirmative duties, the nature of the relief was actually that of declaratory judgment and prohibitory injunction. *Id.* at ¶ 14.

Similarly here, the real objects sought by this action are a declaratory judgment and a prohibitory injunction, to prohibit the Attorney General from following his statutory obligations under R.C. 3519.01. This includes prohibiting the Attorney General from his obligation, following the Ballot Board’s determination, to “review the resubmitted summaries, within ten

days after their receipt, to determine if they are a fair and truthful statement of the respective proposed laws or constitutional amendments and, if so, certify them.” R.C. 3519.01(A). A declaratory judgment action under R.C. 2721.12 would permit Relators to pursue the relief they clearly seek: a judicial determination on the constitutionality of the statutory provisions at issue. Accordingly, Relators’ challenge is not an appropriate subject for mandamus relief, and they have an adequate remedy at law.

In fact, Relators had an adequate remedy to bring a declaratory judgment action months or even years ago. Relators did not need to wait for the Ballot Board’s decision on their initiative petition in order to bring their constitutional challenge to R.C. 3519.01 and R.C. 3505.062. Relators could have brought their challenge when they first formed their petition committee or first collected signatures. In addition, at least two of the three individual Relators were aware of the Ballot Board process and could have brought this challenge years ago. Relator Alban and Relator Boyle served on a committee that proposed an initiative petition entitled “The Ohio Estate Elimination Tax Act” on September 2, 2009. *See* Response in Opposition to Motion to Expedite, Ex. A. Those same two Relators later submitted a petition entitled “Strengthening Term Limits on State Legislators” in August 2015. *See id.* Ex. B. Both of Relators’ previous initiatives were subject to the same Ballot Board review process that Relators now challenge.

Relators’ complaint stands in stark contrast to the one this Court considered in *State ex. rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410. In that case, the relators sought “to compel the ballot board to certify its approval of the single proposed amendment as written and certify its approval to the attorney general.” *Id.* at ¶ 26. The Court specifically declined to address the relators’ alternate claim “that the ballot board lacks constitutional authority to divide a citizen-initiated proposed amendment[.]” *Id.* at ¶ 58.

Here, Relators do not challenge a certification or a failure to certify their specific petition. Their action falls outside of the jurisdiction granted by R.C. 3519.01(C) (“Any person who is aggrieved by a certification decision . . . may challenge the certification or failure to certify of the attorney general in the supreme court[.]”) This action does not allege that the Attorney General in any way failed to comply with the current law when he declined to file a verified copy of Relators’ March 4, 2016 petition with the Secretary of State. *See* R.C. 3901.01(A). And, in any event, subsection (C) was added as part of H.B. 3, the very bill Relators contest. Compl. Ex D.

The availability of a declaratory judgment and a prohibitory injunction as a remedy requires that this Court dismiss Relators’ action in mandamus.

B. Relators fail to state a clear legal duty—or corresponding clear legal right—for the Attorney General to disregard his statutory obligations under R.C. 3519.01 and R.C. 3505.062.

Mandamus should also be denied because the Attorney General has no clear legal duty—and Relators have no corresponding clear right—for him to disregard his obligations under state law.

Relators cannot overcome the presumption of constitutionality afforded to state statutes. As this Court explained in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007–Ohio–6948, 880 N.E.2d 420, ¶ 25, “[i]t is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality.” Before a court may declare a statute unconstitutional, “it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Proving that a statute is unconstitutional on its face, as Relators allege in their complaint, is especially difficult. A party raising a facial challenge must

demonstrate that there is no set of circumstances in which the statute would be valid. *Arbino* at ¶ 26, citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005–Ohio–5334, 836 N.E.2d 1165, and *United States v. Salerno*, 481 U.S. 739, 745 (1987). “The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid.” *Harrold* at ¶ 37.

1. Relators fail to state a claim that R.C. 3519.01 and R.C. 3505.062 limit or restrict the initiative process under Article II, Section 1g of the Ohio Constitution.

Relators fail to state a claim under Article II, Section 1g of the Ohio Constitution. That section does not preclude additional requirements to the initiative process, so long as they facilitate, and do not limit or restrict, the reserved powers of referendum or initiative. *See* Article II, Section 1g (“Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.”) Although Section 1g is a self-executing provision, laws may be passed to facilitate its operation. *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 2007-Ohio-5838, 876 N.E.2d 1231, ¶ 26-27, citing *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.*, 49 Ohio St.3d 102, 104, 551 N.E.2d 150 (1990). The question is not whether there could be additional requirements, but whether the statutory requirements at issue here facilitate the reserved powers without limiting or restricting them. Relators argue that any requirements made to the referendum process under R.C. 3519.01(A) and R.C. 3505.062(A), as amended by H.B. 3, violate the Constitution's prohibition against “limiting or restricting” the power of referendum. Compl. ¶ 53-60. This contention is without merit.

First, R.C. 3519.01 and R.C. 3505.062 are a natural progression of the General Assembly's long history and wide discretion in passing laws to facilitate the operation of the initiative and referendum process. The initiative and referendum clauses were inserted into the Ohio Constitution in 1912 without requirements for submission of a preliminary petition to the Secretary of State or the Attorney General. *See Schaller v. Rogers*, 10th Dist. No. 08AP-591, 2008-Ohio-4464, ¶ 12-16 (Sept. 4, 2008) (recounting the history of the initiative petition process). Nonetheless, the General Assembly in 1929 passed a bill requiring anyone proposing a law or constitutional amendment by initiative petition to file a copy of the relevant law or amendment, "together with a synopsis of the same," with the Secretary of State before circulating a petition. Am.Sub.S.B. No. 2, 113 Ohio Laws 307, 391. In 1931, the General Assembly added more specific requirements for the form of a petition, as well as a requirement that 100 or more electors must submit a proposed law or amendment and summary to the attorney general to certify whether the summary is a "fair and truthful statement" of the proposed law. Am.S.B. No. 320, 114 Ohio Laws 679, 708-09.

Since that time, Ohio courts have upheld numerous statutory regulations against challenges brought under the reserved powers of referendum or initiative in Article II, Section 1g. In *In re Protest Filed with the Franklin Cty. Bd. of Elections by Citizens for the Merit Selection of Judges, Inc.*, 49 Ohio St.3d 102, 551 N.E.2d 150 (1990), this Court held that R.C. 3519.10, which required that each signer of any initiative petition had to include his or her voting residence, did not conflict with Section 1g. This Court held that the purpose of the requirement "is not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the process." *Id.* at 106. In *In re Protest of Brooks*, 155 Ohio App.3d 370, 2003-Ohio-6348, 801 N.E.2d 503 (3rd Dist.), the Third District Court of Appeals found that the

circulator compensation statement requirement contained within R.C. 3519.05 did “not, in any meaningful manner or degree, restrict or limit the ability of people to sign initiative petitions.” *Brooks* at ¶ 14. Instead, the court concluded, “it provides potential signers with important information regarding the initiative so that when they are asked by a circulator to sign a petition, they may make a more informed decision whether or not to do so.” *Id.*; *see also id.* at ¶ 15 (recognizing that states have “considerable leeway to protect the integrity and reliability of the initiative process”) (citation omitted). In *Schaller*, the Tenth District upheld, among other provisions, the requirement that petitioners must submit a summary of the law they seek to repeal by referendum. *See* R.C. 3519.01(B)(1). The court held that the requirement “arguably helps 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* at ¶ 46. These decisions emphasize the importance of ensuring that voters have access to important information and understand the content of the law being proposed.

Similarly here, the requirement that individual petitions contain only one proposed law or constitutional amendment facilitates the initiative process by “enabl[ing] the voters to vote on a proposal separately.” R.C. 3505.062(A). Just as the summary requirement in *Schaller* “arguably helps potential signers understand the content of the law more efficiently,” ensuring that each petition contains only one proposed law or constitutional amendment provides voters with the ability to make an informed choice about the specific change (or changes) in law that are being proposed.

Courts have repeatedly explained that valid regulatory interests support similar separate-vote requirements in other states, including interests in “avoiding confusion, promoting informed decision-making, and preventing ‘logrolling.’” *Pest Committee v. Miller*, 626 F.3d 1097, 1107 (9th Cir. 2010) (quotation omitted); *see also Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) (holding that separate-vote requirements prevent voter confusion and logrolling, while also “promot[ing] informed decisions by narrowing the initiative to a single matter and providing information on that single matter to the voter.”).

The rationales for a separate-vote requirement for legislatively-initiated constitutional amendments under Article XVI, Section 1 of the Ohio Constitution, apply equally to uphold the statutory requirements for citizen-initiated constitutional amendments now at issue. *See Ohio Liberty Council* at ¶ 41 (“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. Willke v. Taft*, 107 Ohio St. 3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶ 27-28, this Court held that the purposes of the separate-vote requirement for legislatively-initiated constitutional amendments include “to prevent deception of the electorate and logrolling”:

“The constitutional mandate that multifarious amendments shall be submitted separately has two great objectives. The first is to prevent imposition upon or deceit of the public by the presentation of a proposal which is misleading or the effect of which is concealed or not readily understandable. The second is to afford the voters freedom of choice and prevent “logrolling” or the combining of unrelated proposals in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts.” *Andrews v. Governor*, 294 Md. 285, 295, 449 A.2d 1144 (1982), quoting *Fugina v. Donovan*, 259 Minn. 35, 38, 104 N.W.2d 911 (1960), construing similar separate-vote requirements in the Maryland and Minnesota Constitutions.

Id. If preventing elected legislators from misleading the public facilitates the initiative process, certainly preventing a group of petitioners from misleading the public facilitates the process as well. *See Brooks* at ¶ 14 (finding that it facilitates the petition process to provide “potential signers with important information regarding the initiative” so that “they may make a more informed decision”). And the concern about freedom of choice—allowing a voter to vote for an amendment without having to vote for unrelated proposals—is no less pressing for a citizen-initiated initiative than a legislatively-initiated one. Both processes equally place in the hands of the public the opportunity to amend the Constitution, the basic legal document of our state. Allowing the public to vote separately on separate amendments allows each amendment to be judged upon its own merit. Just as the requirements in Article XVI facilitate the legislatively-initiated constitutional amendment process, so too do R.C. 3519.01 and R.C. 3505.062 facilitate the citizen-initiated initiative process under Article II, Section 1g.

The separate-vote requirement may in fact be constitutionally mandated by Article II, Section 1g, which provides that “the secretary of state shall cause the ballots so to be printed as to permit an affirmative or negative vote upon *each* law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution.” (Emphasis added.) Article II, Section 1g also explicitly incorporates some requirements from legislatively-initiated petitions to apply to citizen-initiated petitions, namely that “ballot language shall be prescribed by the Ohio ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution.” *Cf. State ex rel. Ohio Roundtable, Inc. v. Taft*, 76 Ohio St. 3d 643, 670 N.E.2d 231, 231 (1996) (finding that Article XVI’s 64 day time limit for bringing challenges to

proposed constitutional amendment ballot language applied under Section 1g); *State ex rel. Cappelletti v. Celebrezze*, 64 Ohio St. 2d 1, 3 (1980) (same).

As the separate-vote requirement facilitates the initiative process, so too does the Ballot Board's role in overseeing that requirement. In *Schaller*, the Tenth District upheld the Attorney General's role in the initiative certification process as a reasonable method to ensure the integrity of petition summaries:

If the requirement of a summary facilitates the referendum petition process, however, the requirement of attorney general review and certification of that summary arguably would also facilitate the process. A summary is valuable to a potential signer only if it is fair and truthful, just as a summary deters circulation fraud and abuse only if it is fair and truthful. While there may be any number of ways to ensure the integrity of the summary itself, requiring review by the attorney general, the top law officer for the state, may be a reasonable method for doing so.

Schaller at ¶ 48. Here too, submitting initiative petitions to the Ballot Board, comprised of the top election official in the Ohio—the Secretary of State—as well as a bipartisan panel of appointed members, R.C. 3505.061(A), is a reasonable method for ensuring the separate-vote requirement.

As R.C. 3519.01 and R.C. 3505.062 facilitate the initiative process, they comply with Article II, Section 1g of the Ohio Constitution. Accordingly, Relators have no legal right—and the Attorney has no legal duty—to disregard the obligations in those statutes.

2. Relators fail to state a claim that R.C. 3519.01 and R.C. 3505.062 violate the First Amendment, as the provisions do not regulate core political speech and reasonably support regulatory interests.

Relators fail to state a claim that the initiative process in R.C. 3519.01 and R.C. 3505.062 violates the First Amendment of the U.S. Constitution.

Relators base their First Amendment claim on the notion that a separate-vote requirement “constitutes a governmental regulation of the content of core political speech,” but this is an incorrect statement of law. Compl. ¶ 70. Rather, numerous federal courts of appeal have held that similar requirements do not affect the communicative process, and accordingly do not infringe on core political speech. *See Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996) (holding that Florida Constitution’s requirements that amendments proposed by initiative address a single subject “do not burden ‘core political speech,’ are content-neutral, and do not disparately impact particular political viewpoints are not subject to strict scrutiny under the First Amendment”). While a state should avoid regulations that are “content based or had a disparate impact on certain political viewpoints . . . [m]ost restrictions a state might impose on its initiative process would not implicate First Amendment concerns.” *Id.* at 1500. The Ninth Circuit agreed that “*prerequisites* to the circulation of initiative and referendum petitions . . . do not implicate protections for core political speech because they do not directly affect or even involve one-on-one communications with voters.” *Pest Committee*, 626 F.3d at 1107 (emphasis in original). Separate-vote requirements for initiative petitions do not limit the quantity of speech available to an initiative proponent: “If anything, requiring proponents to pursue separate initiative on separate subjects might encourage more speech on each subject.” *Campbell*, 203 F.3d at 745; *see also Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d 1235, 1242 (Nev. 2006) (holding that Nevada’s “single subject requirement does not restrict the overall quantum of speech or otherwise inhibit communication with voters about proposed political change”).

The U.S. Supreme Court’s opinion in *Reed v. City of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015), relied on by Relators, does not change this analysis. Compl. ¶ 68-69. First, the Court in

Reed examined a town's sign ordinance, not a ballot regulation, and nothing in the opinion purports to overturn the numerous authorities finding ballot regulations such as the separate-vote requirement content neutral. *Reed*, 135 S.Ct. at 2232. In any event, the separate-vote requirement is not a content-based regulation within the meaning of *Reed*. The requirement does not “single[] out specific subject matter for differential treatment” or restrict speech based on its function or purpose. *Cf. id.* at 2230 (striking down an ordinance where “[i]deological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals”). Rather, separate-vote requirements apply with equal force regardless of the content of a proposed petition; the requirement applies across all subject matters.

As the separate-vote requirements at issue do not regulate core political speech, they are not subject to strict scrutiny. *See Biddulph* at 1500. Rather, the Sixth Circuit in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993), cited by Relators at Compl. ¶ 62, held that “the state may constitutionally place nondiscriminatory, content-neutral limitations on [a petitioner’s] ability to use the initiative procedure that serve [a state’s] interest in maintaining the integrity of its initiative process.” *Id.* at 297. At least four federal courts have analyzed similar separate-vote requirements and found them compatible with the First Amendment. *See Biddulph*, 89 F.3d at 1497; *Campbell*, 203 F.3d at 745; *Pest Committee*, 626 F.3d at 1107; *Wasson v. Oregon*, D. Oregon No. Civ. 03-6226-TC, 2005 WL 711683 (March 28, 2005). Most of these courts employed a balancing test to weigh the nature and importance of the First Amendment right against the state’s regulatory interests justifying the separate-vote rule.

See, e.g., Pest Committee, 626 F.3d at 1105-06.¹ Under this less-exacting form of review, “a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory reasons.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quotation omitted).

Here, the regulatory interests justifying the separate-vote requirement outweigh any potential First Amendment concerns. As noted above, numerous federal courts have explained the regulatory interests underlying the separate-vote requirement, including “avoiding confusion, promoting informed decision-making, and preventing ‘logrolling.’” *Pest Committee*, 626 F.3d at 1107 (quotation omitted); *see also Campbell*, 203 F.3d at 745. Additionally, separate-vote regulations do not limit “the overall quantum of speech.” *Nevadans for the Protection of Property Rights*, 131 P.3d at 1242. Instead of infringing a petitioner’s right to bring an initiative, the only thing that such a requirement “prevents is proposing multiple constitutional amendments as a single question.” *Wasson*, 2005 WL at *4.

If petitioners wish to have Ohioans vote on all of the subjects they are proposing, they may still do so; however, they must not present multiple amendments as if they are one. Because this reasonable, nondiscriminatory requirement does not run afoul of the First Amendment, Relators cannot show a clear legal right—or a corresponding clear legal duty by the Attorney General—to disregard the requirements of R.C. 3519.01 and R.C. 3505.062. For this reason as well, Relators’ complaint should be dismissed.

¹ The Eleventh Circuit did not conduct a balancing analysis in *Buddulph*, as the plaintiff did not request such an action. In addition, the court found that the separate-vote requirement at issue did not implicate right to vote or freedom of association so as to merit such an analysis. *Biddulph*, 89 F.3d at 1500, n. 10. Here, Relators’ claims fail for the same reasons.

V. CONCLUSION

For the foregoing reasons, Respondent R. Michael DeWine, Ohio Attorney General, respectfully moves this Court to dismiss Relators' extraordinary action in mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first class mail via the U.S. Postal Service on April 11, 2016, upon the following:

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