

Case No. 2016-0464

**Supreme Court
of the State of Ohio**

STATE OF OHIO *ex rel.*
ETHICS FIRST – YOU DECIDE OHIO POLITICAL ACTION COMMITTEE,

and

STATE OF OHIO *ex rel.* RON ALBAN,

and

STATE OF OHIO *ex rel.* TIM BOGGS,

and

STATE OF OHIO *ex rel.* JOHN BOYLE, JR.,

Relators,

v.

R. MICHAEL DeWINE, Ohio Attorney General,

Respondent.

**RELATORS' MEMORANDUM
IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS**

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The State of Ohio, by and on relation to Relators herein, hereby tenders the following memorandum in opposition to the Respondent’s Motion to Dismiss.

MEMORANDUM IN OPPOSITION

This Court decision in *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 568 N.E.2d 1206 (1991), provides an excellent roadmap for addressing – and, ultimately, rejecting – the various arguments posited by the Respondents in seeking the dismissal of this mandamus action. For like the present case, *Zupancic* involved an original mandamus action challenging the constitutionality of a legislative enactment; as in this case, the relators in *Zupancic* claimed a certain legislative enactment was unconstitutional and, thus, sought mandamus to compel a public official to proceed with his legal duties under the provisions of the former statute; and similar to the present arguments before the Court, the respondent in *Zupancic* claimed that mandamus was not the appropriate means to test the constitutionality of the statute because a declaratory judgment action could provide an adequate remedy. While this Court ultimately held the statute at issue in *Zupancic* to be constitutional and, thus, denied the requested writ, with respect to the preliminary issues which mirror those presently raised by Respondent, this Court expressly held that the relators in *Zupancic* “properly brought [the] mandamus action” by which they challenged the constitutionality of a legislative enactment; the same conclusion and reasoning applies herein.

Mandamus is an appropriate means to test the constitutionality of a legislative enactment.

“The right of relator to question, by mandamus, the constitutionality of [a] statute is recognized in Ohio.” *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 608, 138 N.E.2d 660

(1956); *State ex rel. Brown v. Summit County Bd. of Elec.*, 46 Ohio St.3d 166, 167, 545 N.E.2d 1256 (1989)(“mandamus is appropriate to challenge the constitutionality of a statute”); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 1999-Ohio-123, 86 Ohio St.3d 451, 509, 715 N.E.2d 1062 (1998)(“in Ohio mandamus is a proper proceeding in which to question the constitutionality of legislative enactments”).¹ Furthermore, “where this court has found a statute unconstitutional it may direct the public bodies or officials to follow a constitutional course in completing their duties.” *Zupancic*, 58 Ohio St.3d at 133. “In other words, if a court determines that a challenged [statute] is unconstitutional, it may order a [public office] to satisfy its clear legal duty, *i.e.*, to rectify any action taken pursuant to the unconstitutional [statute].” *Parker v. City of Upper Arlington*, 2006-Ohio-1649 ¶20 (10th Dist.)

Thus, this Court has repeatedly adjudicated in mandamus actions the constitutionality of legislative enactments and, if such enactments have been found to be unconstitutional, to issue a writ of mandamus to compel the performance of legal duties provided for in prior statutory provisions. *See, e.g., State ex rel. Brown v. Summit County Bd. of Elec.*, 46 Ohio St.3d 166, 168

¹ In his Motion, Respondent cites to *Sheward* for the proposition that this Court “limit[ed] 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’.” (Motion, at 5-6.) That characterization of *Sheward*, however, is outright wrong and disingenuous.

That portion of *Sheward* from which Respondent quotes did not concern itself whatsoever with the use of mandamus to challenge the constitutionality of a statute; instead, that portion of *Sheward* addressed the standing of relators to bring the action as taxpayers when they had not suffered a personal injury or harm. *See Sheward*, 86 Ohio St.3d at 467-75.

For it was much later in the *Sheward* opinion, *i.e.*, in a completely different section, that this Court actually addressed the use of mandamus to challenge the constitutionality of a statute. *See Sheward*, 86 Ohio St.3d at 506-10. And in *Sheward*, this Court did not impose any limitation on such use of mandamus and actually acknowledged that “our decision in *Zupancic* is dispositive of respondents’ arguments going to the true nature of the relief sought and the availability of alternate remedies and forms of actions, and our reliance thereon is entirely justified.” *Sheward*, 86 Ohio St.3d at 510. Thus, *Sheward* actually supports the long-standing and well-established precedent of this Court that allows constitutional challenges to be pursued in mandamus actions.

545 N.E.2d 1256 (1989)(“[t]he board of elections in this case was merely following the residency requirement of the Stow Charter and, at the time of its ruling, had no clear duty to place the name of the relator on the ballot because it could not declare a city charter section unconstitutional. However, if we determine that the charter section in question is unconstitutional, then the duty of the board of elections to place the name of the relator on the ballot will relate back to the time relator filed his nominating petition and a writ of mandamus will properly issue”); *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Bd.*, 22 Ohio St.3d 1, 8, 488 N.E.2d 181 (1986)(“we find that it was proper for relator to seek the remedy of mandamus. Accordingly, we determine that the ‘Dayton Amendment’ [to R.C. § 4117.01(F)(2)] is unconstitutional. Since the ‘Dayton Amendment’ is unconstitutional, it is null and void, and the SERB is under a duty to consider relator’s Request for Voluntary Recognition in accordance with the [prior] law”); *State ex rel. The Medical Centre Co v. Wallace*, 107 Ohio St. 557, 561,140 N.E. 305 (1923)(“it must be declared that the portion of Section 1579-36 above quoted is unconstitutional and void. It follows that it was the duty of the clerk to file the petition without leave first obtained, and the peremptory writ of mandamus will therefore be allowed”); *State ex rel. McKell v. Robins*, 71 Ohio St. 273, 73 N.E. 470 (Ohio 1905)(“[o]ur conclusion is that the statute is unconstitutional and it is accordingly ordered and adjudged that the demurrer to the answer be sustained and a Peremptory writ of mandamus allowed”).

And this is precisely how this action is framed, *i.e.*, Relators challenging the constitutionality of R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, and seeking a writ of mandamus to compel Respondent’s compliance with his legal duties under R.C. § 3519.01 as it existed prior to the enactment of the unconstitutional amendment thereto brought

about by H.B. 3. *See, e.g., Sheward*, 86 Ohio St.3d at 509 (“[i]t is necessary to consider whether Am. Sub. H.B. No. 350 is unconstitutional in order to determine whether respondents have a clear legal duty to follow prior law. Concomitantly, relators would have a clear legal right to have respondents proceed under preexisting law if we found Am. Sub. H.B. No. 350 unconstitutional”); *State ex rel. Davis v. Hidebrant*, 94 Ohio St. 154, 170-71, 114 N.E. 55 (1916)(“whether the secretary of state and his deputies in their ministerial capacity shall act under the legislative act of April 28, 1913, or under the later act of May 27, 1915, and the determination as to which of said acts is valid, is a judicial question and not a political one, and this court, under the constitutional provision giving it original jurisdiction in mandamus, assumes jurisdiction”)

Thus, the question before this Court is not whether a mandamus action may be brought to challenge the constitutionality of a statute – for long-standing and well-established precedent clearly holds such an action may be maintained. Instead, the substantive issue raised by Respondent is that which has become a standard, talismanic defense by governmental officials in mandamus actions, *i.e.*, the rote assertion that the relief being sought is in the nature of a declaratory judgment and prohibitory injunction, not mandamus. That alone is the appropriate question for consideration by this Court at this stage of the proceedings.

Respondent ignores the well-established legal principle that an unconstitutional legislative enactment is void from its enactment and of no legal consequence ab initio.

Before proceeding to addressing the nature of the relief being sought herein, an important and underlying legal principle must be recognized even though Respondent has completely ignored it. For throughout the Motion, Respondent appears to proceed from the erroneous belief that duties and obligations of public officials can be established even by legislative enactments

which are unconstitutional. (*See, e.g.*, Motion, at 8 (“[t]his action does not allege that the Attorney General in any way failed to comply with the current law”).)

But “[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 80, 495 N.E.2d 380 (1986)(quoting *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886)). For an unconstitutional statute is void from the date of its enactment. *Spier v. American University of the Caribbean*, 3 Ohio App.3d 28, 443 N.E.2d 1021 (1st Dist. 1981). It is a mere nullity. *Cincinnati, Wilmington and Zanesville RR. Co. v. Clinton County*, 1 Ohio St. 77 (1852). Consequently, “[a] decision overruling a former statute as being unconstitutional is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law.” *Roberts v. Treasurer*, 147 Ohio App.3d 403, 770 N.E.2d 1085, 2001-Ohio-8867 ¶20 (10th Dist.).

“Because [a statute] was unconstitutional at the time of its passage, it was void from its inception. The passage of time and subsequent performance [under the statute] cannot ‘cure’ this constitutional defect, for an unconstitutional law must be treated as having no effect whatsoever from the date of its enactment.” *City of Middletown*, 25 Ohio St.3d at 80. Thus, Respondent’s compliance *vel non* with “the current law”, *i.e.*, the current version of R.C. § 3519.01, is of no significance if that statutory provision is unconstitutional – for that “the current law” would not be a law; it never was the law; and it would impose no duties on the Respondent. This basic and fundamental legal principle is ignored by Respondent throughout the Motion. But it is important that this Court appreciate this basic legal principle as it dictates and controls the legal duties of the Respondent at issue herein and, more importantly, consideration of the Motion to Dismiss.

The nature of the relief sought herein is appropriately in the nature of mandamus.

As for Respondents invoking the governmental official's talismanic defense in mandamus actions that the relief being sought is not appropriate for a mandamus action (*see* Motion, at 5-8), consistent with this Court's precedent, the claim brought herein is clearly one for mandamus, not a prohibitory injunction.

Respondent claims, without any analysis or legal citation, that "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." (Motion, at 5.) But contrary to this assertion "[t]he availability of an action for declaratory judgment does not bar the issuance of a writ of mandamus if the relator demonstrates a clear legal right thereto.... [W]here declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of a mandatory injunction, the availability of declaratory injunction is not an appropriate basis to deny a writ to which the relator is otherwise entitled." *State ex rel. Fenske v. McGovern*, 11 Ohio St.3d 129, 464 N.E.2d 525 (1984)(syllabus ¶2); *accord State ex rel. Kmart Corp. v. Westlake Planning Comm'n*, 68 Ohio St.3d 151, 158, 624 N.E.2d 714, 1994-Ohio-419. Additionally, "the availability of a mandatory injunction will not prevent the issuance of a writ of mandamus." *State ex rel. The Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 102, 564 N.E.2d 486 (1990); *see State ex rel. American Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Comm'rs*, 128 Ohio St.3d 256, 943 N.E.2d 553, 2011-Ohio-625 ¶25 ("[a] mandatory injunction...is an extraordinary remedy that does not preclude a writ of mandamus"). For "the mere existence of another remedy does not bar the issuance of a writ of mandamus." *State ex rel. Hunter v. Certain Judges of the Akron Mun. Court*, 71 Ohio St.3d 45, 49, 641 N.E.2d 722, 1994-Ohio-371.

Only when a claim seeks both a declaratory judgment and a prohibitory injunction does this Court lack original jurisdiction, even though the claim may be couched as one for mandamus. *State ex rel. Holwadel v. Hamilton Cty. Bd. of Elec.*, 144 Ohio St.3d 579, ___ N.E.3d ___, 2015-Ohio-5306 ¶43; accord *State ex rel Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999)(“[i]n general, if 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”). Thus, in keeping with the talismanic defense of public officials in all mandamus actions, Respondent posits, though through nothing more than *ipse dixit*, that “the real objects sought by this action are a declaratory judgment and a prohibitory injunction.” (Motion, at 6.) But in making this argument and in relying upon cases addressing this principle, Respondent: (i) fails to recognize the nature of the action herein; and (ii) demonstrates a failure to appreciate or understand the difference between a mandatory injunction versus a prohibitory injunction.

“To discern the real objects of an action, [a court] must examine the complaint “to see whether it actually seeks to prevent, rather than to compel, official action.” *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 818 N.E.2d 688, 2004-Ohio-6363 ¶40 (2004)(Lunberg Stratton, J., dissenting); accord *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 857 N.E.2d 88, 2006-Ohio-5439 ¶20 (in applying this rule to mandamus actions, the Court “examin[es] the complaint to determine whether it actually seeks to prevent, rather than compel, official action”). For “[a] writ of mandamus compels action or commands the performance of a duty, while a decree of injunction ordinarily restrains or forbids the performance of a specified act.” *State ex rel. Smith, v. Indus. Comm’n*, 139 Ohio St. 303, 39 N.E.2d 838 (1942) (syllabus ¶2).

As the Complaint clearly sets forth, Relators seek to compel an affirmative, official act by Respondent, *i.e.*, “to comply with the prior (and constitutional) version of R.C. § 3519.01 and to file with the Ohio Secretary of State a verified copy of the proposed constitutional amendment as originally submitted by the ETHICS FIRST – YOU DECIDE OHIO, together with the summary and the attorney general’s certification.” (Complaint ¶82.) This duty clearly arises if R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, are ultimately concluded to be unconstitutional. Thus, Relators are seeking more than ruling on the legal question of whether R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, violates Article 1, Section 1g of the Ohio Constitution; Relators are also seeking to compel Respondent to comply with his legal duty pursuant to the version of R.C. § 3519.01 and R.C. § 3505.062 compatible with the Constitution. *See State ex rel. Court Index Press, Inc. v. Deters*, 56 Ohio St.3d 140, 565 N.E.2d 532 (1990)(mandamus available because relator sought more than an abstract legal declaration that the publication was a newspaper of general circulation; court was also asked to compel respondents to remove any disqualification orders or impediments to the ability of relator to publish legal notices); *State ex rel. Ullmann v. Husted*, 2015-Ohio-3120 ¶12 (10th Dist.)(“a declaratory judgment that the JobsOhio statutes are unconstitutional would not be complete without a mandatory injunction ordering the state respondents to take affirmative action to dissolve a corporation created in violation of the Ohio Constitution. Because relator's mandamus action seeks a specific order directing state actors to perform certain legal duties, this court has subject-matter jurisdiction”). For Respondent’s legal duty and Relator’s legal right to the requested relief proceeds from the unconstitutionality of R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3. *See Sheward*, 86 Ohio St.3d at 509 (“[i]t is necessary to consider whether Am. Sub. H.B. No. 350 is unconstitutional in order to determine whether respondents have a

clear legal duty to follow prior law. Concomitantly, relators would have a clear legal right to have respondents proceed under preexisting law if we found Am. Sub. H.B. No. 350 unconstitutional”); *Dayton Fraternal Order of Police*, 22 Ohio St.3d at 8 (“[s]ince the ‘Dayton Amendment’ is unconstitutional, it is null and void, and the SERB is under a duty to consider relator’s Request for Voluntary Recognition in accordance with the [prior] law”); *The Medical Centre*, 107 Ohio St. at 561 (having declared portion of statute unconstitutional, “[i]t follows that it was the duty of the clerk to file the petition without leave first obtained, and the peremptory writ of mandamus will therefore be allowed”).

The present case and relief sought is comparable to the situation in *Zupancic*:

In the present case relators would have a clear legal right to have respondent proceed under the former apportionment formula if we found R.C. 5727.15(C), in its present form, unconstitutional. Although relators could seek a declaratory judgment coupled with a mandatory injunction in order to achieve nearly the same result we find that the alternative remedy would not be as complete as a writ of mandamus. Ultimately, if any court would declare R.C. 5727.15(C) unconstitutional, the relators could still be forced to request a writ of mandamus in order to have respondent follow the apportionment formula requested in their complaint and/or a prohibitory injunction to enjoin respondent from exercising her statutory duties under the challenged statute. Accordingly, we hold that relators have properly brought this mandamus action before the court since all alternative remedies at law are wholly inadequate.

Zupancic, 58 Ohio St.3d at 133-34. Similarly, even if Relators sought a declaratory judgment with respect to the constitutionality *vel non* of R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, they would still need the additional relief of mandamus (not a prohibitory injunction) compelling affirmative action by Respondent to comply with the prior version of R.C. § 3519.01 and file the requisite documents with the Ohio Secretary of State.

Finally and in addition to the foregoing, “[f]or a remedy at law to be adequate, the remedy should be complete in its nature, beneficial and speedy.” *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.3d 102, 104, 488 N.E.2d 883 (1986). But final and complete resolution of

the constitutionality of R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, could not otherwise be accomplished in a speedy and timely manner. For the proposed constitutional amendment is designed to be on the ballot in November 2016 as several provisions therein are time-sensitive with specific dates for implementation, including as early as January 1, 2017. (See Complaint ¶18.) By the time any proceedings in a trial court and subsequent appeals would be resolved, some, if not all, of those dates will have lapse, making the proposed amendment a nullity. Thus, any challenge to the constitutionality of R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, by an action other than mandamus would not be adequate, *i.e.*, would not be complete and speedy.

Respondent improperly attempts to have this Court resolve the merits of the mandamus claim pursuant to a motion to dismiss.

Even though it is improper for a court to use a motion to dismiss to summarily review the merits of a claim for an extraordinary writ so as to prematurely dispose of a case, *State ex rel. Hanson v. Guernsey Cty. Bd. of Comm'rs*, 65 Ohio St.3d 545, 605 N.E.2d 378, 1992-Ohio-73, Respondent spends an inordinate amount of time focused on the merits. Without waiving their right to fully present their evidence and arguments on the merits (if an alternative writ should issue instead of a peremptory writ), Relators will highlight certain errors in Respondent's arguments.

Throughout the Motion, Respondent improperly treats the issue before this Court as one concerning a "separate vote" requirement akin to that imposed upon legislatively-initiated constitutional amendments under Article XVI, Section 1, of the Ohio Constitution. (See, *e.g.*, Motion, at 14 ("the separate-vote requirement facilitates the initiative process"); Motion, at 13 ("[t]he separate-vote requirement may in fact be constitutionally mandated by Article II, Section

lg”); Motion, at 15 (“[s]eparate-vote requirements for initiative petitions do not limit the quantity of speech available to an initiative proponent”). But, at this stage of the initiative process, what is at issue is more accurately characterized as a “separate petition” requirement. For it is premature to address whether a constitutional amendment or amendments proposed by an initiative petition must be subjected to a separate vote comparable to the constitutional requirement imposed upon legislatively-initiated constitutional amendments.²

And while this Court in *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 928 N.E.2d 410, 2010-Ohio-1845, indicated that the “separate-petition requirement [in R.C. § 3505.062] is comparable to the separate-vote requirement for legislatively-initiated constitutional amendments under Section 1, Article XVI of the Ohio Constitution” such that “precedent construing the constitutional provision is instructive in construing the statutory requirement,” *id.* ¶41, this Court appropriately did not consider them to be one-and-the-same. For the initiative petition effort is akin to a joint resolution of the legislature by which constitutional amendments are proposed. *See Bigelow v. Brumley*, 138 Ohio St. 574, 583, 37 N.E.2d 584 (1941)(“[t]he initiative procedure for amending the Ohio Constitution is...a legislative process”). And it is not until the petitioners obtain the requisite number of signatures

² The difference between a “separate petition” requirement versus a “separate vote” requirement can be seen in how the Ballot Board operated prior to the enactment of H.B. 3 in 2006. In 1992, a single initiative petition was circulated to propose a constitutional amendment imposing term limits on members of Congress; members of the General Assembly; and the elected executive officers of this State. After the proponents circulated this proposal in a single petition and obtained the requisite number of signatures, the Ballot Board then split the proposal into three distinct proposals when it was considering the ballot language. Similarly, in 2005, a group known as Reform Ohio Now circulated a single petition wherein it proposed three separate amendments to the Ohio Constitution. While Reform Ohio Now agreed that its three proposed amendments should be subjected to “separate votes” by the electorate, the Ballot Board actually split that single petition into four separate amendments which were then submitted to the electorate. The transcripts of these hearings before the Ballot Board were submitted as part of the evidentiary record in *State ex rel. Ohio Liberty Council v. Brunner*, Ohio Supreme Court Case No. 2010-643, and is available on the Court’s website and, thus, subject to judicial notice.

(or the General Assembly passes a joint resolution) does the question arise of whether the electorate is to be presented proposed constitutional amendments by a separate-vote. Thus, Respondent's repeated effort to refer to a separate-vote requirement and the interest supposedly being served thereby are not applicable or pertinent at this time.

The distinction between the process by which constitutional amendments are proposed versus the actual vote thereon by the electorate was actually addressed by the Tenth District in *State ex rel. Slemmer v. Brown*, 34 Ohio App.2d 27, 295 N.E.2d 434 (10th Dist. 1973). The issue in *Slemmer* concerned "whether the General Assembly can, by a single joint resolution, propose two separate amendments to the Ohio Constitution." *Id.* at 30. Finding "no limitation upon the General Assembly with respect to proposing more than one amendment by a single joint resolution", *id.* at 30-31, the Tenth District concluded that "Section 1, Article XVI, Ohio Constitution, [simply] requires that the electors must be able to vote separately on each proposed constitutional amendment, but such section does not require that the General Assembly vote separately thereon in determining whether to submit constitutional amendments to the electors." *Id.* at 31. Thus, through R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, the General Assembly has clearly imposed restrictions and limitations on proposing constitutional amendments through the initiative-petition process, *i.e.*, a legislative process by the people, that go above and beyond any restrictions and limitations imposed on the General Assembly to do the same thing. *See State ex rel. Fulton v. Bremer*, 130 Ohio St. 227, 231, 198 N.E. 874 (1935) ("[t]he people by means of the initiative and through the medium of their Constitution legislate directly").

Additionally, "Section 1, Article II of the Ohio Constitution places the legislative power of the state in the General Assembly, but reserves to the people the right to propose, adopt or

reject legislation and constitutional amendments by initiative and referendum. The grant to the General Assembly is a delegated power. Initiative and referendum are reserved powers. “[They] comprehen[d] all of the sovereign power of legislation not thus delegated.” *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 4, 591 N.E.2d 1186 (1992)(quoting *Pfeifer v. Graves*, 88 Ohio St. 473, 486, 104 N.E. 529 (1913)). Thus, “[t]he powers of initiative and referendum should be liberally construed to effectuate the rights reserved” such that “[t]he general assembly cannot enlarge the power of the people nor can it diminish it.” *Id.* at 5 (quoting *Shryock v. Zanesville*, 92 Ohio St. 375, 385, 110 N.E. 937, 940 (1915)).³

³ Respondent attempts to rely upon the general “presumption of constitutionality afforded to state statutes.” (See Motion at 8-9.) While this Court recognized in *Cincinnati, W. & Z.R. Co. v. Clinton Cty Comm’rs*, 1 Ohio St. 77 (1852), “the presumption is always in favor of the validity of the law” such that there must be a “clear incompatibility between the constitution and the law” before the courts will refuse to enforce such a law, *id.* at 82, “the authority of the General Assembly is much too broadly stated, when it is claimed that all their acts must be regarded as valid, which are not expressly prohibited by the constitution.” *Id.* at 84. This is especially true when “the people [explicitly and expressly] reserve[d] to themselves the power to propose... amendments to the constitution.” Ohio Const, art. I, sec. 1.

In *Cincinnati, W. & Z.R.*, this Court recognized the presumption relied upon by the Respondent cannot be given the broad application he desires, explaining the “unsoundness” of the position taken by the Respondent. Proceeding from the recognition of the foundational principle that “all political power resides with the people”, this Court stated the people:

have, therefore, the most undoubted right to delegate just as much, or just as little, of this political power with which they are invested as they see proper, and to such agents or departments of government as they see fit to designate. To the constitution we must look for the manner and extent of this delegation; and from that instrument, alone, must every department of the government derive its authority to exercise any portion of political power....

... Unlike the constitution of the United States, and from the necessity of the case, no attempt at a specific enumeration of the items of legislative power is made. This must, therefore, always be determined from the nature of the power exercised. If it is found to fall within the general terms of the grant, we can only look to the other parts of the constitution for limitations upon it: if none are there found, none exist. But, as the General Assembly, like the other departments of government, exercises only delegated authority, it cannot be doubted, that any act passed by it, not falling fairly within the scope of legislative power, is as clearly void as though expressly prohibited....

If, in delegating certain legislative powers to the General Assembly, the people did not impose any restriction on the General Assembly's ability to propose multiple constitutional amendments through a single resolution, then *a fortiori* the reserved power of the people to propose multiple constitutional amendments through a single initiative petition cannot have such a restriction or limitation imposed upon it. (*Cf.* Motion, at 12 (“[t]he 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”). To allow otherwise would make the General Assembly sovereign over the people. But “[t]he sovereign power under [a] republican form of government is lodged with the body of its enfranchised citizens.” *Fulton v. Bremer*, 130 Ohio St. at 231. Thus, R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, impermissibly restricts or limits the power of initiative the people reserved unto themselves.

In addition to limiting and restricting the right of the people to propose constitutional amendments by initiative, R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, do not facilitate the exercise of that right either. For the only delegated power the General Assembly has with respect to the initiative process is to pass laws that “facilitate” the people’s constitutional right of initiative. *See* Ohio Const., art. II, sec. 1g. And while cases generally

From these considerations, it follows that it is always legitimate to insist that any legislative enactment, drawn in question, is void, either, because it does not fall within the general grant of power to that body, or because it is expressly prohibited by some provision of the constitution.

Id. at 85-87. The delegation of power to the General Assembly vis-à-vis the initiative process is very narrow, *i.e.*, laws can only facilitate the right of initiative, and the imposition of a broad prohibition on the exercise of that limited power, *i.e.*, such laws may not limit or restrict the exercise of that right. *See* Ohio Const., art. II, sec. 1g. In light of the express reservation in the Constitution to the people of the power to propose constitutional amendments, as well as the severely limited grant of power to the General Assembly over that reserved power, the broad presumption argued by the Respondent is not applicable.

have focused upon the complimentary provision of the Ohio Constitution that declares such laws may not “limit” or “restrict” the initiative, because this Court “must give meaning to all the words which appear in the Constitution,” *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 626 N.E.2d 59, 1994-Ohio-433 (Wright, J., dissenting), the separate inquiry also must be made as to whether R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, actually facilitate the right of initiative; they clearly do not.

In *State v. Hartman*, 93 Ohio St.3d 274, 754 N.E.2d 1150, 2001-Ohio-1580, this Court provided a succinct and direct definition: “‘Facilitate’ is defined as ‘to make easier or less difficult: free from difficulty or impediment [as in] to facilitate the execution of a task[;] ...to lessen the labor of (as a person): assist, aid.’” *Id.* at 290 (quoting Webster’s Third New INT’l Dict. (1986), at 812.) By subjecting initiative petitions to review by the Ballot Board at the outset of the process and further empowering the Ballot Board to split an initiative petition into multiple parts – each part which must then be re-summarized for separate petitions and then circulated as separate petitions (and doubling or triplicating *etc.* the number of signatures needed before the proposal can even be submitted to the voters) – R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, do nothing to make the initiative process easier or less difficult for the people; these statutory provisions clearly do not facilitate the exercise by the people of the reserved right of initiative. And by involving the Ballot Board at the outset of the petitioning process, R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, actually serve as an impediment to the ability of the people to fully exercise reserved right of initiative the explicitly reserved unto themselves as the ultimate sovereign in our State. *See* Ohio Const., art. I, sec. 1. For with the power to split an initiative proposal into multiple parts, the Ballot Board increases the labor imposed upon the people by now requiring the circulation of multiple petitions, which

not only increases the administrative burden and expense involved, but also increases the gross number of signatures that must be obtained.

Whether a proposed constitutional amendment should be split into multiple parts when placed on the ballot before the voters is not the issue. Instead, the issue herein concerns the increased burdens and limitations placed upon proponents proposing constitutional amendments that are not even imposed upon legislatively-initiated constitutional amendments; the issue is the failure of R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, to actually facilitate, *i.e.*, to make easier or less difficult, the exercise of the initiative by the people. While the Ballot Board is constitutionally empowered to prescribe the ballot language of initiated proposals, *see* Ohio Const., art. II, sec. 1g, there is no constitutional authority for its involvement to dictate the scope or the language the people must use on the proposal they are seeking to propose through an initiative petition (just as there is no limitation on the General Assembly to propose multiple constitutional amendments by a single joint resolution). The involvement of the Ballot Board to dictate and implement a “separate-petition” requirement is not akin to its power to ensure compliance with any “separate-vote” requirement. R.C. § 3519.01 and R.C. § 3505.062, as amended by H.B. 3, clearly is not consistent with and violates the reserved power of the people, as well as does nothing to facilitate the exercise of that right but only serves to further limit and restrain that right.

Conclusion

Prior to the constitutional amendments brought about by the 1912 Constitutional Convention, this Court “had the discretion to decline to exercise its original jurisdiction over extraordinary writs.” *Hughes v. Scaffide*, 53 Ohio St.2d 85, 88-89, 372 N.E.2d 598 (1978); *accord Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St.3d 123, 129 519 N.E.2d

370 (1988). However, since 1913, this Court lacks discretion to decline the original jurisdiction given to it by Article IV, Section 2(B)(3), of the Ohio Constitution. *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 855 N.E.2d 1188, 2006-Ohio-5202 ¶¶27-31.

Courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,” and that “[t]he one or the other would be treason to the Constitution.” *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 358 (1989) (quoting *Cohens v. Virginia*, 19 U.S.(6 Wheat.) 264, 404 (1821)). This principle applies equally to federal courts and state courts. Relator has invoked the original jurisdiction of this Court, properly seeking relief via mandamus. Thus, resolution of the merits herein is warranted. Accordingly, Respondent’s Motion to Dismiss lacks merit and must be denied, and a peremptory or alternative writ should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served via e-mail upon the following on the 15th day of April 2016.

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