IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* William Dudley
6389 Pinehurst Ln.
Mason, OH 45040

State of Ohio *ex rel.* Terence Brennan
6219 Orchard Ln.
Cincinnati, OH 45213

State of Ohio *ex rel.* Michael Harrison
4185 Ledgewater Dr.
Mogadore, OH 44260

State of Ohio *ex rel.* Pamela Simmons
2581 E. 5th Ave.
Columbus, OH 43219

and

State of Ohio *ex rel.* Deidra Reese
5882 Warner Meadows Dr.
Westerville, OH 43081

Relators,

v.

Dave Yost, in his official capacity as Ohio Attorney General
30 E. Broad St., 16th Floor
Columbus, OH 43215

Respondent.

Case No. 2024-0161

Original Action in Mandamus and Under Section 3519.01(C) of the Ohio Revised Code

RELATORS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

Ohio law sets out a lengthy process for qualifying an initiative petition for the ballot, in which different government officials play different roles at different stages. The statutory authority of the Attorney General in the initiative petition process is strictly limited to the initial certification stage and, even there, is narrow in scope. Just last year, Attorney General Dave Yost acknowledged that his role "is limited to determining whether the wording of the summary properly advises potential petition signers" about what is being proposed: specifically, whether it is a fair and truthful statement of the proposed law or constitutional amendment. Compl. ¶ 31. Provided "the summary is a fair and truthful statement of" the proposal, "the attorney general *shall* [] certify" the petition. (Emphasis added.) R.C. 3519.01(A). As the Attorney General has recognized, this statutory language "constrain[s]" him "by duty to rule upon" only the very "narrow question" of whether a summary is fair and truthful. Compl. ¶ 31. If it is, the Attorney General *must* certify.

Yet, now, in what appears to be an unprecedented decision, the Attorney General has refused to certify the petition for Relators' proposed amendment without citing a single deficiency in the summary. The only objection that he identified to justify his refusal is to the *title* of the proposed amendment—the "Ohio Voters Bill of Rights." The Attorney General, however, has no authority to review the title, and his Motion identifies none. The title is not part of the summary. Instead, his argument boils down to the position that it is desirable from a policy perspective for the Attorney General to exercise oversight over petition titles. But this Court interprets the law as written—it does not and cannot adopt the Attorney General's policy preferences as the basis to broaden the scope of his narrow role in the initiative petition process.

Moreover, the Attorney General's arguments as to why this Court should step out of its ordinary lane ignore some of the basic features and sequence of the initiative petition process enacted by the General Assembly. A title is not even required at this initial stage, and the *Secretary*

of State is tasked by statute with later determining the title that appears on the ballot. R.C. 3519.21. In weaving various absurd scenarios that the Attorney General argues justify expanding his role, the Attorney General ignores that his role is determined by law, not by fiat.

Finally, allowing the Attorney General to broadly interpret the statute as he urges here would itself lead to absurd consequences, including the indefinite delay of the petition process, a result that would run directly contrary to the intent of the statute. The final section of the Attorney General's brief only underscores his untenable position. He claims that he did not even "reach the balance of the summary" during his review and requests more time to consider whether he might have additional concerns to justify his failure to certify. This is not only contrary to the Attorney General's statement that he reviewed the summary in his letter declining to certify the proposal, but it is also an admission that he failed to comply with his duties under the plain language of the statute, which requires him to conduct his examination of the summary within ten days of receipt. Nor may the statute be properly read to allow the Attorney General to conduct his review ad seriatim, each time potentially identifying more deficiencies. As courts have recognized, the strict ten-day period is meant to limit the "attorney general's ability to impede the process." *Schaller v. Rogers*, 10th Dist. Franklin No. 08AP–591, 2008-Ohio-4464, at ¶ 51. Yet the Attorney General asks this Court for an order allowing him to do just that.

The Motion to Dismiss should be denied. Because the Attorney General has reviewed the summary and failed to identify any deficiencies with the summary within the allotted ten-day period, Relators are entitled to relief under Revised Code 3519.01(C) and to a peremptory writ of mandamus directing the Attorney General to certify the summary. In the alternative, this Court should set an expedited schedule for merit briefing on Relators' writ of mandamus or relief under Revised Code Section 3519.01(C).

BACKGROUND

Pursuant to Section 3519.01(A) of the Ohio Revised Code, anyone seeking "to propose a law or constitutional amendment by initiative petition shall, by a written petition signed by one thousand qualified electors, submit the proposed law or constitutional amendment and a summary of it to the attorney general for examination." The provision makes the Attorney General's duties clear: "Within ten days after [] receipt . . . , the attorney general *shall conduct an examination of the summary*." (Emphasis added.) *Id*. If "the summary is a fair and truthful statement of the proposed law or constitutional amendment, the attorney general *shall* so certify" and forward the petition to the ballot board for approval. (Emphasis added.) *Id*.

This matter concerns the Attorney General's failure to abide by his duties in response to Relators' submission of a proposed initiative petition that would amend the Constitution to guarantee the people several rights related to voting. On December 19, 2023, Relators submitted to the Attorney General a written petition including the text of their proposed constitutional amendment, a summary, and part-petitions bearing the signatures of more than a thousand qualified electors. Compl. ¶ 19. The proposed amendment establishes that the right to vote is a fundamental right and prohibits the enactment of laws, regulations, procedures, the use of harassment or intimidating conduct, or any other means to deny, abridge, interfere with, or burden the fundamental right to vote. It further enumerates specific voting rights and assigns the State several roles and responsibilities to further the fundamental right to vote. As originally submitted, Relators' petition also included a title separate from the summary: "Secure and Fair Elections." *Id.*

On December 28, 2023, the Attorney General responded by letter stating that he was "unable to certify the summary as a fair and truthful representation of the proposed amendment[,]" based on specific issues that the Attorney General claimed "would mislead a potential signer as to the scope and effect of the proposed amendment." Compl., McTigue Verification, Ex. 9.

Specifically, the Attorney General identified the following issues: (1) the summary's use of the term "specified process" to refer to the verification of voter identity could be misleading because there are different processes for requesting an absentee ballot, voting by absentee ballot, and voting in person by signed declaration, and the summary failed to explain in detail the different requirements based on the voter's method of casting their ballot; (2) the summary's description of the types of "person" to which the amendment applies was incomplete and could be misleading; and (3) the summary omitted the words "immediately" and "afforded due process" from the description of issues with absentee ballot applications or absentee ballot envelopes. *Id*. In addition to his objections to the summary, the Attorney General also took issue with the title "Secure and Fair Elections." Compl. ¶ 21. This appears to be the first time, based on records available on the Attorney General's website, that an Attorney General has examined the title of a petition and cited a deficiency with the title as a reason for declining to certify the summary of a proposed amendment. *Id.*

Relators addressed and resolved all the claimed deficiencies identified by the Attorney General in his December 28, 2023, letter and submitted a new written petition on January 16, 2024. Compl. ¶ 22. This submission again included the text of the proposed constitutional amendment, a revised summary, and part-petitions bearing the signatures of more than a thousand qualified electors. *Id.* The revised summary set forth the "specified processes" for the verification of voter identity in detail rather than summarizing them, included the complete definition of "person," and added the words "immediately" and "afforded due process" to the applicable section on issues with absentee ballot applications or absentee ballot envelopes. *Id.* In addition, although Relators pointed out in their resubmission letter that the Attorney General does not have authority to review the ballot title under Section 3519.01, of their own volition and to avoid further delay over the issue,

Relators also revised the title, now calling the proposed amendment the "Ohio Voters Bill of Rights." Compl. ¶ 23. Other than minor revisions to the text, which were also reflected in the summary, the January 16, 2024, submission was substantively identical to the December 19, 2023, submission that the Attorney General reviewed on December 28, 2023. Compl. ¶ 24.

On January 25, 2024, the Attorney General again sent Relators a letter stating that he was refusing to certify the summary. Compl. ¶ 25. This time, however, the Attorney General did not identify any deficiencies with the summary of the proposed amendment. Instead, his only objection was to the title. *Id.* Specifically, the Attorney General stated that he had "reviewed the renewed submission," Compl. ¶ 27, and that he was declining to certify based on his view that the title "Ohio Voters Bill of Rights" does not fairly or truthfully summarize or describe the proposed amendment because it does not reflect the common understanding of a "Bill of Rights." Compl. ¶ 25. In particular, the Attorney General expressed his opinion that a bill of rights cannot include descriptions of specific election processes. *Id.* While the Attorney General acknowledged that his office had previously certified petitions with similar titles like the "Nursing Facility Patients' Bill of Rights" in 2021 and the "Ohio Voters Bill of Rights" in 2014, he asserted that those actions were not dispositive because his office had not examined the titles of those petitions. Compl. ¶ 26. At the same time, however, the Attorney General cited no authority that the title is an element of a petition's summary, nor did he cite *a single instance* in which any Attorney General had previously refused to certify a summary due to purported deficiencies with the proposed title. Compl. ¶ 27.

On February 1, 2024, Relators filed their Complaint, requesting a writ of mandamus and/or other relief under Revised Code Section 3519.01(C) directing the Attorney General to certify the summary. Citing the need to resolve the matter in time for the proposed amendment to appear on

the general election ballot in November, which must be filed with the Secretary of State's office by July 3, 2024, Relators sought an expedited case schedule, which the court denied on February 8, 2024. Mot. for Expedited Scheduling Order (Feb. 1, 2024); Order, *State of Ohio ex. rel. Dudley v. Yost*, No. 2024-0161 (Ohio Feb. 8, 2024). On February 26, 2024, the Attorney General filed the present Motion to Dismiss ("MTD").

STANDARD OF REVIEW

Per Revised Code Section 3519.01(C), this Court has exclusive, original jurisdiction in all challenges to the Attorney General's failure to certify a proposed petition. R.C. 3519.01(C) (authorizing "[a]ny person who is aggrieved by a certification decision [to] challenge the certification or failure to certify of the attorney general in the supreme court, which shall have exclusive, original jurisdiction in all challenges of those certification decisions.").

The Attorney General's request that the Court "summarily review the merits of a cause of action in mandamus," *State ex rel. Horwitz v. Cuyahoga Court of Common Pleas, Probate Div.*, 65 Ohio St.3d 323, 325, 603 N.E.2d 1003 (1992), is "unusual and should be granted with caution," *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108–109, 647 N.E.2d 799 (1995). Indeed, under this Court's precedent, a mandamus action may only be dismissed under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted, "if, after all factual allegations of the complaint are presumed true and reasonable inferences are made in relator[s'] favor, it appears *beyond doubt* that [relators] can prove *no set of facts* entitling [them] to the requested writ of mandamus." (Emphases added.) *State ex rel. Ethics First-You Decide Ohio Political Action Commt. v. DeWine*, 147 Ohio St. 3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 8, quoting *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, ¶ 6.

This means that the Attorney General may only prevail on his Motion to Dismiss if it is

beyond doubt, on the face of the Complaint, that Relators can prove no set of facts under which there exists "(1) a clear legal right to the requested relief, (2) a clear legal duty on the [respondent's] part to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *State ex rel. DeBlase v. Ohio Ballot Bd.*, 2023-Ohio-1823, ¶ 15, citing *State ex. rel. Husted v. Brunner*, 123 Ohio St.3d 119, 2009-Ohio-4805, 914 N.E.2d 397, ¶ 11.

The Attorney General's suggestion that the Court should dispense with this binding precedent and instead apply an abuse-of-discretion standard is not well-founded. As even the cases cited in the Attorney General's own Motion to Dismiss reflect, this Court has applied an abuse of discretion standard only at the merits stage of ballot language challenges. *See* MTD at 4–5 (citing cases). At the motion to dismiss stage, the deferential "no set of facts" standard applies. But even if the Attorney General were correct, the Motion to Dismiss must be denied because, as explained below, *infra* Section III, the Complaint alleges sufficient facts that the Attorney General abused his discretion here.

LAW AND ARGUMENT

Under any standard, the Motion to Dismiss must be denied because Relators have adequately alleged: (1) that the Attorney General had a clear legal duty to review the summary within the ten-day statutory period and certify it absent a finding that the summary was not fair or truthful—a finding that the Attorney General failed to make here; (2) that Relators have a clear legal right to their requested relief as, per Revised Code 3519.01(C), they are persons aggrieved by the Attorney General's refusal to certify the summary on an improper basis; and (3) that Relators lack an adequate remedy in the ordinary course of the law. Indeed, the Attorney General makes no argument that Relators have an adequate remedy in the ordinary course of the law, and the plain text of the relevant statute makes clear that the Attorney General was obligated to conduct his review of the summary within the ten-day statutory period after it was submitted and certify

the written petition under the circumstances at issue. Moreover, even if this Court were to find that the Attorney General was within his rights to consider the title, his conclusion that it was not a fair or truthful representation of the proposed amendment was an abuse of discretion.

I. The Attorney General had a clear legal duty to certify the written petition.

For this Court to hold that the Attorney General had a clear legal duty to certify the written petition, Plaintiffs need only show that (1) rejecting the written petition on the basis of an allegedly deficient title was outside the scope of the Attorney General's authority, and (2) the Attorney General exhausted his review of the summary itself. Both are true here.

A. The Attorney General exceeded his authority by rejecting Relators' written petition on account of an allegedly deficient title.

Section 3519.01(A) of the Ohio Revised Code defines the Attorney General's limited role at the certification stage for a proposed constitutional amendment. When statutory language is unambiguous, courts "apply it as written without resorting to rules of statutory interpretation or considerations of public policy. . . . [O]ur review 'starts and stops' with the unambiguous statutory language." *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 165 Ohio St. 3d 390, 2021-Ohio-2067, 179 N.E.3d 1169, ¶ 13, first citing *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748, ¶ 23–24, 26, then citing *Johnson v. Montgomery*, 151 Ohio St.3d 75, 2017-Ohio-7445, 86 N.E.3d 279, ¶ 15. Courts may "neither add to nor delete from the statutory language" and must "read a statute as a whole and to not dissociate words and phrases from that context." *Gabbard* at ¶ 13, 22.

Here, the relevant statute sets forth that, within ten days after the proponents of a constitutional amendment by initiative petition submit the proposed amendment and its summary, "the attorney general shall conduct an examination of the summary," and if "the summary is a fair and truthful statement of the . . . constitutional amendment, the attorney general shall so certify

and then forward the submitted petition to the Ohio ballot board for its approval." R.C. 3519.01(A). The plain text of the statute is clear and unambiguous both that the Attorney General's authority is limited to the petition's summary and that he must conduct his review within ten days of receipt of the proposed petition. He thus lacks the authority or discretion to refuse to certify a petition based on the title. *See State ex rel. Barren v. Brown*, 51 Ohio St.2d 169, 170, 365 N.E.2d 887 (1977) ("Under [R.C. 3519.01(A)], the authority of the Attorney General is limited to whether the summary is fair and truthful. If he determines that it is, he is directed to so certify."). He further lacks the authority to decline to review a portion of the summary during that ten-day period, only to come back later and identify additional perceived deficiencies. The Attorney General's arguments to the contrary are unavailing.

1. The title is not part of the summary under the relevant law.

First, the title is not part of the summary, and the Attorney General has no authority to review it or to base his refusal to certify on any perceived shortfalls of the title. The Attorney General cites no authority supporting his claim that the title is properly considered part of the summary, an argument that rests on nothing more than the Attorney General's bald contention that "everything submitted as part of the written petition" must be part of the text of the measure or part of the summary. MTD at 7. But this is incorrect as a matter of basic statutory interpretation.

As an initial matter, there are other requirements beyond submission of the full text and summary of the measure at the certification stage. Indeed, the Attorney General acknowledges the point in a footnote—for example, a 1,000-signature requirement that cannot be characterized as either the proposed amendment or the summary. MTD at 6, n. 1.

Moreover, it is standard practice for written petitions to include other details beyond the measure's text and summary: for example, the names and addresses of the committee to represent

the petitioners. *See, e.g.*, Compl., McTigue Verification, Ex. 11. Those names and addresses do not automatically become part of the summary, nor are they part of the proposed constitutional amendment itself. Even though the statute does not explicitly provide for it, proponents are not precluded from including information about the committee, just like they are not precluded from including a petition title—a separate, optional component at this stage of the process. Simply put, a measure's "summary" as that term is used in Chapter 3519 of the Revised Code is not "everything other than the text," as the Attorney General would have it.

Reading Section 3519.01(A) in the context of the whole statute confirms the point. *Electronic Classroom of Tomorrow v. Ohio Dept. of Edn.*, 154 Ohio St. 3d 584, 2018-Ohio-3126, 118 N.E.3d 907, ¶ 11 (explaining that, because courts must consider statutes "as a whole," they cannot "pick out one sentence and dissociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body[,]" quoting *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997)). The statutory scheme regarding initiative petitions does not require a "title" until after the Attorney General reviews the summary, submits the proposed amendment to the Ohio Ballot Board to determine whether it proposes one amendment, and the committee in charge of the initiative petition prepares a petition that complies with Section 3519.05 for circulation. Section 3519.05 of the Ohio Revised Code sets forth the form requirements for an initiative petition at that stage and specifies that it must include both the summary certified by the Attorney General *and* a separate title.

> "Amendment" printed in fourteen-point boldface type shall precede the title, which shall be briefly expressed and printed in eight-point type. The summary shall then be set forth printed in ten-point type, and then shall follow the certification of the attorney general, under proper date, which shall also be printed in ten-point type. The petition shall then set forth the names and addresses of the committee of not less than three nor more than five to represent the petitioners in all matters relating to the petition or its circulation.

R.C. 3519.05. In doing so, Section 3519.05 expressly references the summary in conjunction with the Attorney General's certification under Section 3519.01. *See* R.C. 3519.05 ("The summary shall then be set forth printed in ten-point type, and then shall follow the certification of the attorney general, under proper date, which shall also be printed in ten-point type."). And it *separately* includes a requirement for a title, which must be printed on the petition before the summary and Attorney General's certification are set out. *Id.* Thus, far from being irrelevant as the Attorney General suggests, *see* MTD at 9–11, Section 3519.05 puts the very same summary that the Attorney General is responsible for reviewing under Section 3519.01(A) in the context of *other* components of the petition—including the title.

The Attorney General's reading would render Section 3519.05 nonsensical. Again, that section requires the post-certification petition to list the title in "eight-point type," followed by the summary in "ten-point type." If the Attorney General's reading were correct, and the title was part of the summary, proponents could not comply with the statute: The statute would demand that the title simultaneously be written in both eight-point and ten-point font. And a reasonable statutory interpretation cannot render null or superfluous other parts of the statute. *Electronic Classroom of Tomorrow*, 154 Ohio St. 3d 584, 2018-Ohio-3126, 118 N.E.3d 907 at ¶ 23 (rejecting an interpretation that would "render portions of the statute superfluous"). If the title is a mere subset of the summary, the statutory text setting out different font and sequencing requirements for the title and the summary would be surplusage. In sum, the plain text of the statute and the statutory scheme make clear that the title and summary of a petition are distinct.

Even if it were necessary to go beyond the statutory text to construe the meaning of title and summary, additional tools of statutory construction support the conclusion that a title is different than a summary. The Attorney General cites to dictionary definitions of "summary" but

not of "title." *See* MTD at 6–7. When one assesses both definitions, it becomes obvious that "summary" and "title" refer to entirely different things and serve different purposes. A title is a "distinguishing name" or a "heading."[1] Like the title of a book, the title of a petition is a short-hand name to identify a particular petition. And like the title of federal legislation (e.g., Inflation Reduction Act, SAFE Banking Act), the title of a petition allows proponents and voters to quickly refer to it—a very different purpose from that of "an abstract, abridgment, or compendium" provided by a summary. MTD at 7, quoting Merriam-Webster's Collegiate Dictionary 1250 (2003). In fact, the two cases the Attorney General cites support this distinction. *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 27–28, 176 N.E. 664 (1931)—which makes no mention of a "title"—defines "summary" as "a short, concise summing up" that "advise[s]" voters of the petition's "character and purport." And *State ex rel. Hildreth v. LaRose*—which makes no mention of a "summary"—provides that a title "immediately alerts signers to the nature of the proposed legislation." 2023-Ohio-3667, ¶ 13. Neither case defines "summary" or "title" in relation to the other, and the definitions they do provide only underscore that the two components serve different purposes: Whereas the summary serves to *advise* a voter about the "character and purport" of the issue, the title merely serves to *alert* the voter to the "nature" of the issue.

Other provisions of Ohio law confirm that titles and summaries, in the ballot measure context, are not the same. For example, the Revised Code gives the Secretary of State the authority to prescribe the ballot "title" for any proposed amendment for which proponents thereafter gather sufficient signatures to qualify to appear on the ballot, R.C. 3519.21, whereas Article XVI, Section 1 of the Ohio Constitution gives the ballot board the authority to prescribe the "ballot language" (which "properly identif[ies] the substance of the proposal") and "explanation" ("which may

[1] Merriam-Webster, *Title*, available at https://www.merriam-webster.com/dictionary/title.

include its purpose and effects") of such an amendment. If, as the Attorney General suggests, the title were *part* of the other summary-like components of the ballot, then Section 3519.21 would be unconstitutional. *Mills v. City of Dayton*, 21 Ohio App. 3d 208, 209, 486 N.E.2d 1209 (2nd Dist. 1985) ("[I]t is the duty of the courts to interpret the statute so as to render it constitutional if possible.").

Finally, the Attorney General's position also defies the longstanding practice of his own office. As Relators alleged in their Complaint, based on a review of historical records on the Attorney General's own website, it appears that no Attorney General has ever before rejected a petition based solely on concerns with the title. Compl. ¶ 33. Instead, the Attorney General's Office has historically limited its review to the summary, as Relators define that term. The Attorney General does not contend otherwise. Further, a review of historical petitions and certification letters reveals (and the Attorney General's own January 25, 2024, letter acknowledged) that the Attorney General's Office has repeatedly approved written petitions with identical or nearly identical titles as the one here, including the Nursing Facility Patients' Bill of Rights in 2021, the Ohio Crime Victims Bill of Rights in 2017, and the Ohio Voters Bill of Rights in 2014.[2] The fact that the Attorney General has never before attempted to exercise or even asserted the authority to review the title of a written petition is further evidence that he in fact lacks the authority to do so.

[2] *See List of Petitions Submitted to the Atty. Gen.'s Office*, Ohio Att'y Gen., https://www.ohioattorneygeneral.gov/Legal/Ballot-Initiatives/Petitions-Submitted-to-the-Attorney-General-s-Offi; *see also* Letter from Dave Yost, Ohio Atty. Gen., to J. Corey Columbo, McTigue & Colombo LLC (June 30, 2021), https://www.ohioattorneygeneral.gov/getattachment/14136efd-a871-4677-9555-38dd6a91e01e/Nursing-Facility-Patients%E2%80%99-Bill-of-Rights.aspx (concluding that the summary for the proposed amendment "Nursing Facility Patients' Bill of Rights" is a fair and truthful statement of the proposed amendment and certifying to Secretary of State); Letter from Mike DeWine, Ohio Atty. Gen., to Jon Husted, Ohio Secy. of State (Feb. 3, 2017), https://www.ohioattorneygeneral.gov/getattachment/ffbbb242-de02-4f65-9a9f-7f22d49718c6/Ohio-Crime-Victims-Bill-of-Rights.aspx (concluding that the summary for the proposed amendment "Ohio Crime Victims Bill of Rights" is a fair and truthful statement of the proposed law and certifying to Secretary);
Letter from Mike DeWine, Ohio Atty. Gen., to Donald J. McTigue, McTigue & Colombo LLC (March 10, 2014), https://www.ohioattorneygeneral.gov/getattachment/23923cc7-28e6-49ee-ab8f-2c7475162770/The-Ohio-Voters-Bill-of-Rights.aspx (concluding that the summary for the proposed amendment the "Ohio Voters Bill of Rights" is a fair and truthful statement of the proposed law and certifying to the Secretary of State).

2. The Attorney General's policy arguments are misplaced.

The Attorney General next argues that his review of the title is necessary to carry out the purpose of Section 3519.01(A) by protecting against absurd consequences. In the Attorney General's telling, he is the only bulwark guarding against ballot measure proponents submitting measures with grossly misleading titles, as without him "a title is unreviewable." MTD at 13. But this is not correct, and it ignores and misconstrues Ohio's carefully constructed provisions that govern the process for qualifying petitions for the ballot.

The Attorney General's role comes at the very start of this process before a title is required, even before there is an initiative petition. His review of the summary under Section 3519.01 is a "statutory requirement *prior* to commencement of the initiative process." (Emphasis added.) *State ex rel. Durell v. Celebrezze*, 63 Ohio App. 2d 125, 130, 409 N.E.2d 1044 (10th Dist. 1979). After the Attorney General's initial review of the written petition, there are several steps that the proponents of a constitutional amendment must take before their proposal appears on the ballot. *See* Ohio Constitution, Article II, Section 1g. And importantly, state officials—not the proponents themselves—determine the title and language that will ultimately describe the proposed amendment on the ballot.

The title that appears on the ballot—what Ohioans see before deciding whether to enact a measure into law—*is* prescribed by the Secretary of State. *See* R.C. 3519.21 (the Secretary is tasked with determining the title, which "shall give a true and impartial statement of the measures in such language that the ballot title shall not be likely to create prejudice for or against the measure"). The Attorney General's bald claim that "the Secretary [of State does not have] any authority to certify whether a title is fair and truthful," MTD at 12 n.4, is simply wrong. In fact, the Secretary has a legal duty to prescribe a ballot title that is not only "true," but "impartial"—

that is "not be likely to create prejudice for or against the measure" (in other words, fair).

R.C. 3519.21 states that Relators may suggest a title, but the Secretary may reject it and craft his own if he concludes that it is not true or impartial. Certainly, it is clear that the Attorney General thinks that it would be *better* if his office could decline to certify a proposed amendment based on his view of the propriety of the written petition title. But this Court's role is to apply the statutes adopted by the legislature, not pass judgment on their wisdom. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20. It is the Legislature's prerogative to dictate who may weigh in on the title, and when; Ohio law has delegated this duty to the Secretary at a specific time in the process. There is no basis for reading into the law an additional role of the Attorney General at an earlier stage. *See Hulsmeyer v. Hospice of S.W. Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 26 ("[I]f the General Assembly could have used a particular word in a statute but did not, we will not add that word by judicial fiat.").

The cases cited by the Attorney General in his Motion to Dismiss only underscore that concerns about the title are resolved at the ballot stage, not the pre-certification stage where the Attorney General has improperly sought to insert himself on this issue. *See State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13, 18, 368 N.E.2d 838 (1977) (considering whether the ballot prescribed by the Secretary is constitutionally defective due to alleged errors on the ballot); *State ex rel. Foreman v. Brown*, 10 Ohio St. 2d 139, 148, 226 N.E.2d 116 (1967) (considering the ballot text prepared by the Secretary for a constitutional amendment proposed by the General Assembly); *Thrailkill v. Smith*, 106 Ohio St. 1, 9, 138 N.E. 532 (1922) (considering statements printed on the ballot); *Beck v. City of Cincinnati*, 162 Ohio St. 473, 124 N.E.2d 120 (1955), syllabus (addressing the insertion of misleading words into the caption of a ballot submitted to electors in a city election

where the relevant statute, R.C. 3505.06, specifically provided for a "brief title descriptive of the question or issue").

In short, the basic premise of the Attorney General's brief is wrong: Ballot measure proponents do not have carte blanche to put misleading titles on the ballot to hoodwink voters, because the Secretary of State is tasked with prescribing the ballot title and ensuring its accuracy. R.C. 3519.21. In other words, the Attorney General's review of the title on the written petition has no bearing on the title voters will see on the ballot. And at the petition circulation stage, voters who consider signing a petition are able to fully assess the proposed amendment by reviewing the Attorney General-certified summary, and the full text of the measure, R.C. 3519.05—something that is not present on the ballot itself. Ohio Constitution, Article XVI, Section 1 ("The ballot need not contain the full text nor a condensed text of the proposal."). The Attorney General's limited review of the written petition is a design feature of the statutory scheme, not a bug.

B. The Attorney General exhausted his review of the summary itself.

Under the plain text of Section 3519.01(A), "the attorney general *shall* conduct an examination of the summary" "[w]ithin ten days after the receipt of the written petition and the summary of it." (Emphasis added.) Here, the ten-day period has passed, and the Attorney General acknowledged in his letter identifying his refusal to certify that he had "reviewed the renewed submission." Compl. ¶ 27. He also reviewed a substantively identical summary just weeks earlier, in which he identified deficiencies that Relators corrected before resubmitting. Compl. ¶¶ 20-22. The Attorney General even publicly announced that the "misleading title is the only matter of contention."[3]

Yet now the Attorney General reverses himself, stating that he did not actually review the

[3] Attorney General Dave Yost (@DaveYostOH), X (formerly TWITTER) (Feb. 2, 2024 8:43 AM), https://twitter.com/DaveYostOH/status/1753413915042607497.

rest of the summary, and requests that the Court allow him additional time to do so. If true, this is an express admission that the Attorney General failed to execute his duty under the statute, which requires that he conduct an examination of the summary within ten days of receipt. There is no basis to allow the Attorney General to review only part of a submission and then go back again to potentially identify more purported problems. Indeed, such a finding would not only be at odds with the plain text of the statute, but also collide with the statute's intent and purpose. As Ohio courts have recognized, the General Assembly added the ten-day deadline to limit the "attorney general's ability to impede the process." *Schaller*, 10th Dist. Franklin No. 08AP–591, 2008-Ohio-4464, at ¶ 51; *cf. State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner*, 118 Ohio St.3d 515, 2008-Ohio-2824, 890 N.E.2d 888, ¶ 36 (O'Donnell, J. concurring) (a statute related to the Secretary of State's duty to appoint members to a county board of elections does not allow the Secretary to keep rejecting additional recommendations into perpetuity).

In sum, this Court has no basis to allow the Attorney General additional bites at the apple. *See infra* Section II. He has a clear legal duty to certify.

II. Relators have a clear right to their requested relief.

Relators have a clear right to their requested relief: that this Court mandate that the Attorney General certify their written petition. In arguing otherwise, the Attorney General misconstrues Section 3519.01(A), which directs the Attorney General to examine the summary submitted to him within ten days of receipt and provides that, if the "summary is a fair and truthful statement of the . . . constitutional amendment, *the attorney general shall so certify*." (Emphasis added.) R.C. 3519.01(A). As outlined above, the Attorney General has clearly exhausted his review of the summary here. *See supra* Section I.B.

Barren, 51 Ohio St. 2d 169, 365 N.E.2d 887, is instructive. There, the Attorney General's "only reason for refusing certification [was] that the matters may not be subject to referendum."

Id. at 171. The Court found that it was thus "implicit that, in [the Attorney General's] opinion, the summary meets the requirement of being a fair and truthful statement of the matter to be referred." *Id.* And because the issue of whether the matters are subject to referendum is "irrelevant" and "not involved in the Attorney General's honest and impartial evaluation of whether the proposed summary is a 'fair and truthful statement of the [] measure to be referred,'" the Court directed him to certify. *Id.* at 170, quoting R.C. 3519.01. So, too, here. The Attorney General's only reason to refuse certification was an objection to the title, and he has thus implicitly determined that the summary was fair and truthful. As in *Barren*, the Court should direct the Attorney General to "certify the summary as a fair and truthful statement of the measures sought to be referred" by granting the writ of mandamus. *Id.* at 171.

The Attorney General may not avoid this result by now claiming that he did not actually carry out his duty to review the summary within the finite statutory period in which he was required to conduct it. Indeed, to so hold would undermine the very intent of the statute. Courts' "paramount concern in construing statutes is legislative intent." *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St. 3d 471, 2009-Ohio-5934, 918 N.E.2d 135, ¶ 25 (collecting cases). The legislative history of Section 3519.01 confirms that the petition process includes clear deadlines precisely to prevent state officials from unduly delaying the process and to ensure that the Attorney General "cannot block a petition effort altogether." *Schaller*, 10th Dist. Franklin No. 08AP–591, 2008-Ohio-4464, at ¶ 51. In fact, the previous version of Section 3519.01 placed no time limitations on the Attorney General's review and approval of the summary, which at least one justice of this Court concluded "impeded the right of initiative." *Id.* (citing *State ex rel. Tulley v. Brown*, 29 Ohio St.2d 235, 239, 281 N.E.2d 187 (1972) (Schneider, J., dissenting)). The General Assembly then added the ten-day deadline to limit the Attorney General's "ability to impede the process." *Id.* Providing the Attorney

General with another opportunity to examine the same summary that he has already reviewed and conjure new deficiencies therefore runs counter to the clear legislative intent of the statute.

The Attorney General's contrary view would give him unfettered discretion to control the petition process. For instance, he could identify ten supposed flaws in a petition, and then take ten business days to reject the summary on the basis of only one of those supposed flaws, requiring the proponents to correct the flaw, gather 1,000 more signatures, and resubmit. He could continue like this again and again, preventing any petition from progressing to the next step of the process for months on end. This absurd result—particularly where proponents have made every revision the Attorney General required and where he has not identified any additional issues with the summary—directly undermines the purpose of imposing a ten-day review period. The Court should deny the Attorney General's attempt to write into the law an effective right of unlimited review to derail the petition process. *Gulf Oil Corp. v. Kosydar*, 44 Ohio St. 2d 208, 217, 339 N.E.2d 820 (1975) ("It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, to so construe a statute as to avoid unreasonable or absurd consequences.").

In the alternative, if the Court finds it improper to mandate that the Attorney General certify their written petition, Relators are entitled to an order directing the Attorney General to review the summary—and only the summary—and list *all* perceived deficiencies with that summary within the single ten-day review period. If there are no deficiencies with the summary, the Attorney General should be directed to certify and may not defer his examination of any part of the summary until after his single ten-day review period has passed.

III. Even if he may review the title, the Court should deny the Attorney General's Motion to Dismiss.

Finally, even assuming that the Attorney General has authority to review the proposed amendment title at this stage, Relators have pled sufficient facts of an abuse of discretion in the Attorney General's interpretation of the title to defeat the Attorney General's Motion to Dismiss at this stage and proceed to merit briefing.

The title "Ohio Voters Bill of Rights" accurately describes the proposed amendment, which establishes that the "right to vote is a fundamental right" enjoyed by every citizen and sets forth a variety of voting rights. Compl. ¶ 42. This title, which has been used in petitions approved by the Attorney General as recently as in 2014,[4] is nothing like the absurd titles the Attorney General uses to support his arguments. *See* MTD at 13 (expressing concern over "highly misleading titles like, 'All Ohioans to receive a million dollars if amendment passes,' or 'This amendment will ensure that Ohio continues to have NFL football teams'"). Under any reasonable reading, it is fair and truthful. The proposed amendment sets out various constitutional rights for Ohio voters. To that end, it prohibits the enactment of laws, regulations, procedures, the use of harassment or intimidating conduct, or any other means to deny, abridge, interfere with, or burden the fundamental right to vote. Compl. ¶ 42. And to buttress that fundamental right to vote, the proposed amendment enumerates several specific guarantees of voting rights for eligible Ohio voters, including the rights to in-person voting, military and overseas absentee voting, early in-person voting, automatic voter registration, voter registration by non-electronic and electronic means, same-day voter registration, and no-excuse absentee voting. *Id.*

[4] See Letter from Mike DeWine, Ohio Atty. Gen., to Donald J. McTigue, McTigue & Colombo LLC (March 10, 2014), https://www.ohioattorneygeneral.gov/getattachment/23923cc7-28e6-49ee-ab8f-2c7475162770/The-Ohio-Voters-Bill-of-Rights.aspx (concluding that the summary for the proposed amendment the "Ohio Voters Bill of Rights" is a fair and truthful statement of the proposed law and certifying to the Secretary of State).

In common parlance, the protections secured by a constitutional proviso are referred to as constitutional "rights." The measure sets out a number of such rights. This is a bill of rights. None of the Attorney General's arguments regarding the merits of the title are persuasive.

First, the Attorney General baselessly argues that a "Bill of Rights" must confer enforceable rights and cannot confer any discretion to government officials. MTD at 15–17. The ordinary meaning of a "Bill of Rights," as the Attorney General himself recognizes, is a set of "rights and liberties considered essential," MTD at 17, or "a document containing a formal statement of rights."[5] This measure enumerates several specific guarantees of voting rights. Several provisions require the State to undertake specific acts to make voting accessible (i.e., "The State shall make applications necessary to obtain absentee ballots generally available and easily accessible," "The State shall institute a publicly accessible system," "The State shall make reasonable accommodations for electors with disabilities"). Compl. ¶ 43. And in service of the enumerated guarantees and provisions requiring greater voting accessibility, the measure gives State and local election authorities some discretion to further improve voting access in the spirit of the proposed amendment (i.e. to place secure drop boxes and to institute reliable additional options for voter identification and casting ballots). *Id.* These rights are the types of constitutional protections that are expected to be found in a "Bill of Rights."

Despite the Attorney General's suggestion, the provisions setting forth "discretionary acts" are entirely consistent with and belong in a "Bill of Rights." For example, the provision ensuring that "[l]ocal election authorities shall have the discretion to place multiple secure drop boxes throughout their counties for the return of absentee ballots" creates a right to have local election officials determine that multiple drop boxes are warranted, regardless of the Secretary of State's

[5] Meriam-Webster, *Bill of Rights*, https://www.merriam-webster.com/dictionary/bill%20of%20rights.

or General Assembly's preferences. Compl., McTigue Verification, Ex. 11. This provision is, in effect, a negative right from state interference, much like the Tenth Amendment to the U.S. Constitution, part of the federal Bill of Rights, which reserves the "powers not delegated to the United States by the Constitution. . . to the States." Just as the Tenth Amendment protects certain state powers from federal intrusion, this provision reserves the right over certain kinds of expansions to the franchise to local officials and protects that power from state government actors. Similarly, that the State "may institute reliable additional secure options for qualified electors to verify their identity and cast their ballots as such methods become available through technological advancements" guarantees that those advancements must "maintain ballot secrecy and security" and that existing methods remain acceptable. Compl., McTigue Verification, Ex. 11. This provision *constrains* the State's discretion to institute procedures that violate voters' rights to ballot secrecy and security and *guarantees* voters' rights already specified in the proposed amendment.

In any event, the two provisions that provide discretion to further the enumerated rights comprise a small fraction of the amendment's more than fifteen enumerated rights and required State actions to support the fundamental right to vote. Compl. ¶ 43. It is not true, as the Attorney General claims, that the proposed amendment "leaves crucial matters to the discretion of election officials," MTD at 16, when the vast majority of the amendment enumerates specific rights and creates a private right of action for individuals to enforce those rights. By the Attorney General's logic, the First Amendment does not belong in the federal Bill of Rights, because it leaves some discretion to government officials to regulate particular kinds of speech, such as incitement.

Second, citing no authority, the Attorney General claims that a "Bill of Rights" cannot contain procedures that regulate the operations of state government, MTD at 17–19, but previous constitutional amendment initiative petitions refute that contention. Several examples demonstrate

that a proposed amendment that includes provisions "detail[ing] elections procedures the government must implement" that support the fundamental right guaranteed by amendment can appropriately be called a "Bill of Rights." *Contra* MTD at 18. For example, a 2021 petition entitled "Nursing Facility Patients' Bill of Rights" set out a number of procedures that guarantee specific rights to care, many of which require government action.[6] The proposed amendment required the Ohio Department of Health to provide by regulation for minimum standards of care, including licensed nurse to patient ratios, daily average hours of direct care, and requirements for nursing facilities to implement specific protocols. Likewise, a 2014 petition entitled "Ohio Voters Bill of Rights" also detailed voting procedures that support the fundamental right to vote guaranteed by the proposed amendment.[7]

Third, the Attorney General argues that fundamental rights in a "Bill of Rights" are only those that can be enjoyed without the person having to take any action to vindicate the right, MTD at 20–21, but that position runs counter to the very notion of "voting rights." It is elementary that voting rights are "fundamental political right[s] . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The right to vote "in a free and unimpaired manner is preservative of other basic civil and political rights" and is a "fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). While a fundamental right, voting rights can be process-driven and often require actions from voters. For example, Article II, Section 4 of the Michigan Constitution protects the fundamental right to vote and includes actions that voters must take to register to vote by mail and

[6] Petition submitted to the Ohio Attorney General on June 23, 2021, proposing a summary for the constitutional amendment entitled "Nursing Facility Patients' Bill of Rights," https://www.ohioattorneygeneral.gov/getattachment/6fe0d04e-fe4a-451f-94da-a592bbeb5967/Nursing-Facility-Patients%E2%80%99-Bill-of-Rights.aspx.

[7] Petition submitted to the Ohio Attorney General on Feb. 28, 2014, proposing a summary for the constitutional amendment entitled "Ohio Voters Bill of Rights," https://www.ohioattorneygeneral.gov/getattachment/7448de71-18d8-46a8-89dd-45a90f4b7079/The-Ohio-Voters-Bill-of-Rights.aspx.

in person, prove their identity when voting, vote absentee, and access other voting rights. Voters have the right to prove their identity, for instance, "when voting in person or applying for an absent voter ballot in person by (1) presenting their photo identification, including photo identification issued by a federal, state, local, or tribal government or an education institution, or (2) if they do not have photo identification or do not have it with them, executing an affidavit verifying their identity." Michigan Constitution, Article II, Section 4. These detailed provisions do not render the right to vote any less "fundamental," and the Attorney General's narrow approach to the content of a "Voter Bill of Rights" should be rejected.

Finally, the Attorney General's bizarre position—that the title of the amendment must specifically describe and apply to each provision of the amendment when the provisions are considered one by one, MTD at 21–22—misses that the proposed amendment *as a whole* serves as a bill of rights, and that provisions together buttress the fundamental right to vote. *Cf. State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Bd.*, 2023-Ohio-3325, ¶ 20 (finding that while ballot language might have been written to be more comprehensive, the deficiencies were "not material when considering the amendment as a whole.").

Presuming that all material allegations in the Complaint are true and making all reasonable inferences in Relators' favor, it cannot be said that "it appears beyond doubt that [relators] can prove no set of facts entitling [them] to the requested writ of mandamus," *State ex rel. Ethics First-You Decide Ohio Political Action Commt.*, 147 Ohio St. 3d 373, 2016-Ohio-3144, 375, 66 N.E.3d 689 at ¶ 8, which is all that is required to defeat a Motion to Dismiss. Relators have alleged more than sufficient facts at this stage, and the Court should deny the Attorney General's Motion, even assuming the Attorney General has authority to review a ballot title.

CONCLUSION

Because, on the face of their Complaint, Relators are aggrieved and have a right to bring this action under Revised Code 3519.01(C) and have a clear legal right to the requested relief, the Attorney General has a clear legal duty to certify, and there is a lack of adequate remedy in the ordinary course of the law, the Court should deny the Attorney General's Motion to Dismiss and issue a writ of mandamus directing him to certify the summary of the proposed amendment or, in the alternative, to review the summary and list all deficiencies within ten days. Even if the Court determines that the Attorney General may review the title, Relators have pled sufficient facts at this stage to sustain a claim that the Attorney General abused his discretion; therefore, the Court should deny the Motion and schedule merit briefing on Relators' challenge to the Attorney General's failure to certify.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2024, the foregoing was filed electronically. Notice of this filing was sent via electronic mail to the following:

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