

IN THE SUPREME COURT OF OHIO

STATE <i>ex rel.</i> , OHIO CAMPAIGN TO PROTECT MARRIAGE, <i>et al.</i> ,	:	
	:	
Relators,	:	Case No. 2012-0592
	:	
v.	:	
	:	Original Action under Art. II, Sec. 1g of the Ohio Constitution
OHIO ATTORNEY GENERAL MICHAEL DEWINE, <i>et al.</i> ,	:	
	:	
Respondents.	:	

**MOTION TO DISMISS OF RESPONDENT
OHIO ATTORNEY GENERAL MICHAEL DEWINE**

Pursuant to Sup. Ct. Prac. R. 10.5, Ohio Civ. Rule 12(B)(1) and 12(B)(6), Respondent Ohio Attorney General Michael DeWine respectfully asks this Court to dismiss Relators' original action. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

This action presents a challenge to the Attorney General's decision to certify the summary language of a proposed initiative petition. The Attorney General performs this ministerial function pursuant to the mandate of R.C. 3519.01(A) and this Honorable Court has no constitutional authority to review the correctness of his certification decision. Therefore, the complaint should be dismissed for lack of jurisdiction. In the alternative, Relators' complaint fails to state a claim for which this Court can grant it relief.

II. STATEMENT OF FACTS

Pursuant to R.C. 3519.01, when a group seeks to place a constitutional amendment on the ballot, the first step in the process is to submit one thousand signatures and a summary of the proposed amendment to the Ohio Attorney General for review. The Ohio Attorney General is then obligated to review that summary language to determine whether it is a fair and truthful summary of the proposed amendment. R.C. 3519.01. This case arises out of a proposed initiative petition filed with the Ohio Attorney General by a group that seeks to place a constitutional amendment on the ballot to repeal Section 11, Article IV of the Ohio Constitution and replace it with the so-called "Freedom to Marry and Religious Freedom Amendment." Compl., ¶¶ 8, 9. As required by statute, the submission included a summary of the language in the proposed amendment. *Id.*

On April 3, 2012, pursuant to his responsibilities in R.C. 3519.01, Attorney General DeWine issued a letter certifying that the language summarizing the proposed initiative was a fair and truthful statement of the proposed constitutional amendment. *Id.* at ¶¶ 6, 11. His decision to certify the summary language does not in any way indicate whether the Attorney

General supports passage of the proposed initiative. Rather, if the summary is a “fair and truthful statement” of the proposed amendment, the Attorney General **must** grant certification, even if he believes the proposed amendment to be unwise or even unconstitutional. R.C. 3519.01(A); *State ex rel. Barren v. Brown*, 51 Ohio St.2d 169 (1977).¹

Relators, the Ohio Campaign to Protect Marriage and Lori Viars, have captioned their challenge to the certification decision as an “Original Action under Article II, Section 1g of the Ohio Constitution.” However, the pre-petition certification process is statutory, not part of the Article II initiative process over which this Court has original jurisdiction. For this reason, Ohio Attorney General DeWine respectfully asks this Court to dismiss Relators’ complaint for lack of jurisdiction. In the alternative, Relators have failed to state a claim for which this Court can grant them relief.

III. ARGUMENT

A. A Pre-Petition Challenge to the Attorney General’s Certification does not arise under Art. II, Sec. 1g of the Ohio Constitution.

Art. II, Sec. 1g grants the Ohio Supreme Court “original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions and under this section.” However, by its plain terms, Art. II, Sec. 1g only applies to the **petition** process, which is a separate process that only begins after completion of the statutory **pre-petition** process described in R.C. 3519.01(A).

The statutory procedure set forth in R.C. 3519.01 is a preliminary proceeding that occurs prior to the start of the Art. II, Sec. 1g initiative process. *State ex rel. Rankin v. Ohio State*

¹ The Attorney General made this point explicitly in his Certification Letter. “**Without passing upon the advisability of the approval or rejection of the measure to be referred, but pursuant to the duties imposed upon the Attorney General’s Office under Section 3519.01(A) of the Ohio Revised Code**, I hereby certify that the summary is a fair and truthful statement of the proposed constitutional amendment.” See Relators’ Exhibit B (emphasis added).

Attorney General, 161 Ohio App.3d 521, 2005-Ohio-2717, 831 N.E.2d 438, ¶ 31 (10th Dist.) (citing *State ex rel. Durrell v. Celebrezze*, 63 Ohio App.2d 125, 127, 409 N.E.2d 1044 (10th Dist. 1979)) (emphasis added). “Any alleged deficiencies in [the R.C. 3519.01(A)] process, which would presumably include an improper finding by the Attorney General that a submitted summary constitutes a fair and truthful statement of a proposed constitutional amendment, do not affect the constitutional initiative process.” *State ex rel. Rankin*, 2005-Ohio-2717, at ¶ 31. Since this case does not arise under Art. II, Sec. 1g, it necessarily follows that the grant of original jurisdiction in that section is inapplicable.

This lawsuit is indistinguishable from the one this Court summarily dismissed in *Healthy Families Ohio, Inc. v. Ohio Ballot Bd.*, 131 Ohio St.3d 1481, 2012-Ohio-1143, 963 N.E.2d 822. *Healthy Families* was also a challenge to the Attorney General’s certification of summary language for a proposed constitutional amendment. *Healthy Families*, Compl., ¶¶ 1-2 (Jan. 13, 2012). The Respondents filed a motion to dismiss arguing that Art. II, Sec. 1g did not provide this Court with original jurisdiction over the statutory pre-petition process, relying upon the *Rankin* line of cases. *Healthy Families*, Motion to Dismiss, pp. 5-7 (Feb. 9, 2012). On March 21, 2012, this Court granted the Attorney General’s motion to dismiss in a decision published without opinion. *Healthy Families*, 2012-Ohio-1143.

Here, as in *Healthy Families*, Relators allege that the Attorney General should not have certified the language pursuant to R.C. 3519.01(A) because it was not a fair and truthful summary. Compl., ¶ 14. This allegation, even if accepted as true as required for the purposes of this motion to dismiss, is not actionable under Art. II, Sec. 1g for the reasons set out above: the Attorney General’s decision whether or not to certify the language is part of the pre-petition

process and Art. II, Sec. 1g does not grant this Court original jurisdiction over the pre-petition process.² Accordingly, this Court should dismiss Relators' complaint for lack of jurisdiction.

B. R.C. 3519.01(C) cannot confer jurisdiction on this Court.

Alternatively, Relators suggest this Court should hear their challenge based on the statutory grant of jurisdiction in R.C. 3519.01(C). Compl., ¶ 1. Under R.C. 3519.01(C), “[a]ny person who is aggrieved by a certification decision under division (A) or (B) of this section may challenge the certification or failure to certify of the Attorney General in the supreme court, which shall have exclusive, original jurisdiction in all challenges of those certification decisions.”

While the term “aggrieved” as it is used in that section has not been defined or interpreted, this Court has long held that if “a term is not defined in the statute, it should be accorded its plain and ordinary meaning.” *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 17 (citing *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70, 525 N.E.2d 1386 (1988)). The word “[a]ggrieved” is commonly defined as “having legal rights that are adversely affected; having been harmed by an infringement of legal rights.” *Id.* at ¶18 (quoting *Black’s Law Dictionary* 77 (9th Ed. 2009)).

Relators cannot establish that they are “aggrieved” persons as that term is used in R.C. 3519.01(C). Instead, Relators conclusively state they “have been aggrieved by the Attorney General’s decision certifying the summary of the proposed constitutional amendment which, if adopted by the voters, would repeal the Ohio Marriage Amendment and replace it with a much different amendment.” *Id.* at ¶ 17. They have not identified any legal rights that have been that are adversely affected or infringed. See *Rhodes*, 2011-Ohio-3279, ¶¶ 26-27.

² This Court *can* compel the Attorney General to issue a certification decision one way or the other, if the Attorney General has failed to act, pursuant to the Court’s original mandamus jurisdiction. But that would be a very different case from one in which this Court is asked to review the merits of the Attorney General’s decision.

Moreover, even if this Court determined Relators to be “aggrieved” for the purposes of R.C. 3519.01(C), the General Assembly cannot enlarge the original jurisdiction of this Court by statute. *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶¶ 3-4 (quoting *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St.3d 39, 41, 577 N.E.2d 1077 (1991)). Just as the Court dismissed the *ProgressOhio* suit for lack of jurisdiction, the Court should also dismiss the present suit.

C. **Even if this Court had jurisdiction to consider Relators’ complaint, Relators fail to state a claim for which this Court may grant relief.**

Relators present two substantive objections to the certification decision. First, they claim the summary is not a “short, concise summing up” because the summary contains as many or more words as the amendment itself.³ Compl., ¶ 15. And second, they complain that the summary does not mention certain features of the amendment. Compl., ¶ 16.

The desire for detail in the summary is in tension with the need for brevity: more detail usually means more words; fewer words almost always mean some component of the proposed amendment will not be mentioned. The General Assembly vested the Attorney General with a duty to review the summaries for their adequacy. As noted previously, the review that the Attorney General performs under RC 3519.01 is a statutory pre-petition review that occurs before the constitutional initiative process begins. This Court, in reviewing questions about initiative and referendum, has consistently held that those powers are to be liberally construed. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 5; *Hilltop Realty, Inc. v. City of South Euclid* (Cuyahoga App. 1960), 110 Ohio App. 535, syllabus ¶ 1. This rule of construction promotes and permits the exercise of the power rather than prevents or obstructs the object

³ The allegation that the summary contains as many words as the amendment is demonstrably false. The number of words in the amendment (not counting words in the parenthetical or the crossed-out language), totals seventy-one (71) words. Compl., ¶ 9. By the same approach, the language in the summary totals forty-four (44) words. Compl., ¶ 10.

sought to be obtained. *C.V. Perry & Co.*, 94 Ohio St.3d 442, 446, 2002-Ohio-1369, 764 N.E.2d 411; *Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St.3d 511, 514, 2001-Ohio 1624, 757 N.E.2d 297. The Attorney General, in exercising his authority under RC 3519.01 has always been mindful to review summary language in such a way as to resolve any dispute in favor of the summary being fair and truthful. Just as it is important to recognize the rights of the people to the constitutional process of initiative and referendum, it is also equally important to recognize that same overarching right in the statutory pre-petition process.

In this particular case, the Attorney General was given specific summary language for a specific constitutional proposal. Although that summary language may not detail every minute aspect of the amendment itself, the Attorney General believed that it was sufficient to allow a reasonable reader to determine what the legal effect of this amendment would be. Because the Attorney General has a legal duty to certify a summary and to broadly construe whether that summary is fair and truthful, the Attorney General certified this summary.

When looking beyond the controlling principles, one must reach the conclusion that the Relators are not entitled to relief, even if this Court were to determine it has jurisdiction. In claiming that the summary is not fair and truthful, Relators present arguments that should be rejected by this Court. They argue that the summary does not mention the prohibition on marriages between partners of close consanguinity or bigamy. Compl., ¶ 16(c). They also claim that the summary is not fair and truthful because it does not say that religious institutions would not be required to *perform* certain marriages, but does not mention that they also would not be required to *recognize* those marriages. Compl., ¶ 16(b).

When examining whether the summary is fair and truthful, however, it is not required that the summary detail absolutely every item that the amendment could or would do. Instead,

the summary must be detailed enough to allow a reasonable person to read and understand the amendment and then determine whether he or she would want to sign the amendment. No reasonable person would believe it necessary to be given specific information in the summary that the amendment continues to ban marriage by partners of close consanguinity. Similarly, no reasonable person would believe it necessary to be told that the amendment would continue the State's prohibition against bigamy. Finally, no reasonable person would feel they were deceived by omission or commission if they were told that religious institutions would not be required to perform certain marriage, but not told that those institutions would also not be required to recognize those marriages.

Other allegations are belied by the plain language of the summary, which Relators have included in the Complaint. For instance, Relators assert that the summary "falsely states that the proposed constitutional amendment would give religious institutions the freedom to determine whom to marry." *Id.* at ¶ 16(a). Yet the amendment plainly reads that "no religious institution shall be required to perform or recognize a marriage." *Id.* at ¶ 9. Similarly, Relators claim the summary does not "adequately alert" voters to the language of the Constitution that would be changed by the amendment. *Id.* at ¶ 16. But the summary begins with the statement: "The amendment would repeal and replace Section 11, Article XV of the Constitution [...]." Relators fail to provide this Court with a claim for relief.

Accordingly, the Relators have stated no claim that would allow this Court to substitute its judgment for that of the elected office holder charged with this duty.

IV. CONCLUSION

For the reasons argued above, Respondent Ohio Attorney General Michael DeWine respectfully asks that this Court dismiss Relators' complaint.

Respectfully submitted,

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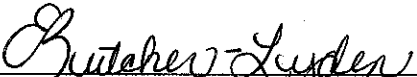
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion to Dismiss of Respondent Ohio Attorney General Michael DeWine* was served by regular U.S. mail, postage prepaid, on April 27, 2012 upon the following:

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