In the
Supreme Court of Ohio

State of Ohio ex rel. WILLIAM DUDLEY, et al.,	:	
	:	**Case No. 2024-0161**
Relators,	:	
v.	:	**Original Action in Mandamus**
DAVE YOST, in his official capacity as OHIO ATTORNEY GENERAL,	:	
Respondent.	:	

RESPONDENT'S MERIT BRIEF

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RESPONDENT'S MERIT BRIEF

Respondent Dave Yost submits his merit brief in compliance with this Court's briefing schedule. Entry (May 22, 2024). For the reasons outlined below, Relators are not entitled to a writ of mandamus.

Respectfully submitted,

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RESPONDENT'S MERIT BRIEF

I. INTRODUCTION

When a circulator comes to the door with a petition for a citizen-initiated constitutional amendment, the first thing an Ohio voter is likely to read is its title. This is important information. "More so than the text, a title immediately alerts signers to the nature of [the] proposed legislation." *State ex rel. Hildreth v. LaRose*, 2023-Ohio-3667, ¶ 17 (citation omitted). Its accuracy, therefore, is critical. As such, Ohio law provides an initial safeguard to ensure citizens receive dependable information when asked to amend the state's highest source of law: the Attorney General's fair-and-truthful review of petition summaries.

Under R.C. 3519.01, initiative petitioners must create a summary of their proposed amendment. The summary is presented to potential signatories during the signature-gathering phase to properly advise them of the amendment's character. Naturally, the summary can only do so if it is faithful to its source. So, R.C. 3519.01(A) requires petitioners to submit their summary to the Attorney General, who is charged with determining whether it is a fair and truthful statement of the proposed amendment.

Relators' summary did not meet this standard. Specifically, the Attorney General determined that the summary's title was misleading because it failed to reflect the nature of the amendment. Relators take exception to this determination for two reasons. First, they theorize that the summary's title is outside the scope of Attorney General Yost's fair-and-truthful review altogether. They believe that Attorney General Yost cannot flag the title as misleading—even if the title blatantly mischaracterizes what the proposed law or amendment does. Second, they posit that their title is a fair and truthful statement of their proposed amendment. Relators are wrong on both counts.

Relators' view of the scope of the Attorney General's authority is flawed because it obstructs the core purpose of R.C. 3519.01(A): to ensure the benefit of a summary that fairly and truthfully states what a proposed amendment or law does if enacted. A summary's title is the first thing a voter is likely to read when handed a petition. If it cannot be reviewed, unscrupulous petitioners would be free to label their summary whatever they wish—however untrue—and gather signatures by deception. Thus, a summary's title must be within the scope of the Attorney General's review under R.C. 3519.01(A). Otherwise, the statute's central goals—maintaining election integrity and deterring fraud—would be subverted.

Relators' reference to other statutes, past petitions, policy objectives, and allegations of abuse of discretion do little to move the scale in their favor. *First*, the language of R.C. 3519.01(A) is unambiguous and the Court does not need to resort to the rules of statutory interpretation to garner the meaning and scope of R.C. 3519.01(A). *Second,* the Attorney General's interpretation is supported by this Court's recent case law emphasizing the importance of titles in the initiative context. Attorney General Yost did not run afoul of R.C. 3519.01(A) by keeping abreast of and taking guidance from developments in the law. That's his job. *Third*, Attorney General Yost's authority to review a summary's title is consistent with the policy objectives of R.C. 3519.01(A). The Attorney General's fair-and-truthful review ensures that voters have reliable information and prevents them from being misled. A summary that misleads through its title is equally as—if not more—problematic than a summary that is misleading in its body. *Fourth*, the Attorney General did not abuse his discretion in determining the title "Ohio Voters Bill of Rights" is misleading. Relators' proposed amendment is an election-mechanics law. It does not reflect the common understanding of what a "bill of rights" is and does.

Ohio law requires Attorney General Yost to review the entirety of every initiative petition summary submitted to him and to determine whether it is a fair and truthful statement of the proposed amendment. Relators' was not. Therefore, they are not entitled to a writ of mandamus.

II. BACKGROUND FACTS

Relators first submitted a statewide initiative petition on December 19, 2023. (RELATORS_020). The title of Relators' submission was "Secure and Fair Elections." *Id*. The Attorney General declined to certify the summary for multiple reasons. *See* (RELATORS_031). Among those was the summary's title ("Secure and Fair Elections"), which did "not fairly or truthfully summarize or describe the actual content of the proposed amendment." (RELATORS_032).

Relators submitted a second statewide initiative petition with revisions on January 19, 2024. This time, Relators titled their petition "Ohio Voters Bill of Rights." (RELATORS_036). On January 25, 2024, the Attorney General declined to certify the second submission. (RELATORS_052). Once more, the Attorney General found that the title "does not fairly or accurately summarize or describe the actual content of the proposed amendment." *Id.* Acknowledging that the Attorney General's Office has not always evaluated a summary's title, he noted that this Court's recent decision in *State ex rel. Hildreth v. LaRose*, 2023-Ohio-3667, confirmed that a summary's title is material to voters. (RELATOR_052-053). The Attorney General further explained that the title "Ohio Voters Bill of Rights" was not a fair and truthful statement of the proposed amendment because the amendment created no legitimate claim of entitlement to a benefit and, as a result, did not establish a right. (RELATOR_053). The Attorney General further opined that the title did not fairly or truthfully summarize the common understanding of a bill of rights. *Id.* The proposed amendment, he explained, is largely

concerned with process, rather than simply defining rights possessed by Ohio voters. *Id.* Attorney General Yost concluded that the summary's title, which immediately alerts people to the nature of a proposed amendment, was not fair and truthful, and declined to certify on that ground alone. (RELATOR_053-054).

Relators filed a complaint in mandamus in this Court on February 1, 2024. Relators allege that the Attorney General is without authority to review the title of a summary. *See* Compl. at ¶ 29-38. Relators further allege that, even if the Attorney General could review the title, his denial of certification was "an abuse of discretion and/or contrary to law." *Id*. at ¶ 41. Relators request "a writ of mandamus or other order under R.C. 3519.01 directing the Attorney General to… certify and forward to the Ballot Board." *Id*. at ¶ 48.

III. LAW AND ARGUMENT

A. Standard of Review

Mandamus is one of the "extraordinary remedies, to be issued with great caution and discretion and only when the way is clear." *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 15 (1977). To be entitled to a writ of mandamus, relators generally must establish "(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 Board*, 2023-Ohio-1823, ¶ 15, citing *State ex. rel. Husted v. Brunner*, 2009-Ohio-4805, ¶ 11. "For a mandamus claim to succeed, a relator must have a clear legal right to, and the respondent must have a clear legal duty to provide, the relief requested." *State ex rel. Beard v. Hardin*, 2018-Ohio-1286, ¶ 16. "Relators must prove their case by clear and convincing evidence." *E.g*., *State ex rel. Ohioans United for Reprod. Rights v. Ohio Ballot Bd*., 2023-Ohio-3325, ¶ 10.

In mandamus actions challenging decisions of the Ohio Ballot Board or the Secretary of State under R.C. 3519.01, "the standard is whether they engaged in fraud, corruption, or abuse of discretion, or acted in clear disregard of applicable legal provisions." *State ex rel. Ohioans for Secure & Fair Elections v. LaRose,* 2020-Ohio-1459, ¶ 14; *see also DeBlase* at ¶ 15; *State ex rel. Ohio Liberty Council v. Brunner*, 2010-Ohio-1845, ¶ 30. The abuse-of-discretion standard applies equally to the Attorney General's fair-and-truthful determination under the same statute.

Here, Relators do not allege that the Attorney General committed fraud or engaged in corruption; instead, Relators allege that the Attorney General abused his discretion when finding that the title did not fairly and truthfully state what the proposed amendment does. *See* Relators' Br. at 14. "An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude." *DeBlase* at ¶ 27. This is a demanding standard. So, if the record reflects that multiple reasonable determinations may be reached in the Attorney General's fair-and-truthful review, mere disagreement is not enough to warrant the issuance of a writ. *See State ex rel. Portage Lakes Educ. Ass'n v. State Empl. Rels. Bd.*, 2002-Ohio-2839, ¶ 41. And if the Attorney General has evidence to support his determination, no abuse of discretion occurred. *State ex rel. Schaengold v. Ohio Pub. Emples. Retirement Sys.*, 2007-Ohio-3760, ¶ 19.

B. Proposition of Law No. 1: Under R.C. 3519.01(A), the Attorney General may review the title of a summary of an initiative petition.

1. The plain language of R.C. 3519.01(A) allows the Attorney General to review the entire summary of a proposed amendment, which includes the summary's title.

R.C. 3519.01(A) mandates that the Attorney General "conduct an examination of the summary" to make sure that it "is a fair and truthful statement of the proposed law or constitutional amendment[.]" No part of R.C. 3519.01(A) limits the Attorney General's review

to only the body of the summary and not the entire summary, which includes the title. "Statutes that are plain and unambiguous must be applied as written without further interpretation." *Proctor v. Kardassilaris*, 2007-Ohio-4838, ¶ 12. "In constructing the terms of a particular statute, words must be given their usual, normal, and/or customary meaning." *Id*. While the word "summary" is neither defined in R.C. 3519.01 nor any other section within Chapter 3519, it has a common meaning that supports the view that a summary encompasses both the summary's body and title. *See Stewart v. Vivian*, 2017-Ohio-7526, ¶ 25-26 ("Terms that are undefined in a statute are accorded their common, everyday meaning[,]" and courts "first consider the dictionary definition of the term"); R.C. 1.42 ("Words and phrases shall be read in context and construed according the rules of grammar and common usage."). The word "summary" is defined as "an abstract, abridgment, or compendium." Merriam-Webster's Collegiate Dictionary 1250 (2003). And the word "abstract" is defined as "something that summarizes or concentrates the essentials of a larger thing or several things." *Id*. at 5. When read in context of R.C. 3519.01(A), the Attorney General is asked to review the "summary" to make sure that "the summary is a fair and truthful statement of the proposed law or constitutional amendment[.]" R.C. 3519.01(A). Applying the common meaning of the "summary" to include the entire summary (body and title) comports with the context—to put in place a safeguard to make sure summaries that Ohio electors read are "fair and truthful."

Attempting to insert limitations into the statute, Relators argue the "plain text of R.C. 3519.01(A)" means that the Attorney General can only review the body of summary, not the summary's title, and that the "Attorney General lacks the authority and discretion to refuse to certify a petition based on the title." Relators' Br. at 8. But Relators' plain-text argument cuts against itself. Relators ask this Court to insert a limitation not found in the text of the statute: to

construe the word "summary" as "the body of the summary." So, while Relators are correct that R.C. 3519.01(A) is unambiguous, Relators do not apply a proper plain-text analysis.

Nor are Relators correct that the Attorney General's review of the title amounts to a judgment on the proposed amendment's merits. Relators note that the Attorney General's review "is limited to whether the summary is fair and truthful." Relators' Br. at 8, quoting *State ex rel. Barren v. Brown*, 51 Ohio St.2d 169, 170 (1977). But reviewing the summary's title passes no judgment on the merits of the amendment. Rather, the review ensures that the title fairly and truthfully states the proposed amendment. Consider an example. If the proposed amendment said that everyone in Ohio may own a Bengal tiger, the Attorney General could review the summary's title to ensure it fairly and truthfully conveyed the proposed amendment. He could not decline certification on the law's merits (regardless of its wisdom). But if the summary's title was "Every Ohioan May Have a House Cat," he would be within his discretion to find the summary misleading.

2. R.C. 3519.05 does not insert a limitation on what the word "summary" means in R.C. 3519.01(A).

Nothing in R.C. 3519.01(A) prevents the Attorney General from reviewing a summary's body *and* title. R.C. 3519.05, which sets forth the form of a petition, does not change the plain meaning of R.C. 3519.01(A) and does not prevent the Attorney General from reviewing a summary's body and title.

R.C. 3519.05 sets forth the typographical and formatting requirements for a petition. Included among its requirements are font sizes for the title and summary and the sequence of information on a petition. Relators argue that R.C. 3519.05 supports their view that the summary's title is unreviewable. Relators' Br. at 8. Relators are correct that R.C. 3519.05 differentiates between the summary and title for the purpose of font size and placement on a

circulating petition. Relators are mistaken, however, that the typographical distinctions in R.C. 3519.05 alter the meaning of "summary" as it appears in R.C. 3519.01(A).

Relators' reliance on R.C. 3519.05 fails for two reasons. *First*, a plain and unambiguous statute like R.C. 3519.01(A) does not require the rules of statutory interpretations. Relators' Br. at 8; *e.g., Symmes Twp. Bd. of Trs. v. Smyth*, 87 Ohio St.3d 549, 553 (2000) ("When the language of statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statuary interpretation"). Relators' citation to R.C. 3519.05 invokes the *in pari materia* rule of statutory construction, but *in pari materia* is not applicable when a statute is unambiguous. *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 2017-Ohio-8714, ¶ 17-18. The fact that one statute includes distinctions does not mean those distinctions can be blue penciled into another statute that does not include them. Here, the Court can interpret the meaning of the word "summary" as it appears in R.C. 3519.01(A) by the statute's plain text and the common meaning of the word, and there is no need to consider other statutes.

Second, Relators forget that R.C. 3519.05 and R.C. 3519.01 pertain to different parts of the petition process. R.C. 3519.01 describes the initial phase of the process wherein petitioners gather the one thousand signatures necessary for submission to the Attorney General and Ballot Board. Once the one thousand signatures are collected, R.C. 3519.01(A) has two broad categories relevant to a petition submission to the Attorney General for his fair-and-truthful review: (1) the text of the proposed amendment; and (2) the "summary of it." R.C. 3519.01(A). The title of Relators' summary, then, must be one of those two things. Since "Ohio Voters Bill of Rights" is not the text of the proposed amendment, it must necessarily be part of the "summary of it."

R.C. 3519.05, on the other hand, outlines the formal requirements for petitions during the subsequent phase, wherein petitioners gather the signatures necessary to place the measure on the ballot. The Attorney General's interpretation of "summary" in R.C. 3519.01(A) does not "render null or superfluous" typographical distinctions in a separate statute governing a separate stage of the process. Relators' Br. at 10. R.C. 3519.05's distinctions have no direct impact on the preceding signature-gathering stage or the Attorney General's fair-and-truthful review.

Indeed, the General Assembly's choice to distinguish between title and summary in R.C. 3519.05 indicates that R.C. 3519.01's omission of such distinctions was purposeful. *See Nacco Industries, Inc. v. Tracy*, 79 Ohio St.3d 314, 316 (1997), citing *City of Chicago v. EDF*, 511 U.S. 328, 338 (1994) ("Congress is generally presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another."). The General Assembly presumably intended to create a "title" distinction that is relevant for purposes of R.C. 3519.05, but not for purposes of R.C. 3519.01.

Further, Relators' interpretation undermines the fair-and-truthful review process. This Court adopted the view that "requiring petition advocates to submit a petition summary to the attorney general for approval facilitates the process because it 'arguably helps potential signers understand the content of the law more efficiently,' and deters fraud by circulators who might misrepresent the effect of the law." *State ex rel. Ethics First-You Decide Ohio PAC v. Dewine*, 2016-Ohio-3144, ¶ 17, quoting *Schaller v. Rogers*, 2008-Ohio-4464, ¶ 46–¶ 47(10th Dist.). Barring the Attorney General from reviewing a summary's title, no matter how grossly misleading, doesn't facilitate the petition process—it kneecaps it. Relators cannot look to this Court to insert words the General Assembly did not include in a statute—especially not where it would subvert the statute's purpose.

For the two reasons stated, R.C. 3519.05 has no bearing on how "summary" appearing in R.C. 3519.01(A) should be interpreted.

3. The title of a summary is not a distinguishable part that removes it from the Attorney General's fair-and-truthful review.

The plain text of R.C. 3519.01(A) allows the Attorney General to review a title. And there's nothing inherent about a title that counsels otherwise. Relators argue that titles, by their nature, serve a different role than the "short, concise summing up" performed by summaries. Relators' Br. at 10. Relators assert that "[l]ike a title of a book, the title of a petition is a short-hand name to identify a particular petition." Relators' Br. at 10. Relators further note that "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 a summary[.]" *Id*. Relators are wrong.

Under Ohio law, "a summary is 'a short, concise summing up,' which will properly advice those who are asked to either sign the petition or support the amendment at the polls of the character and of purport of the amendments without the necessity of pursuing them at length." *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 27–28 (1931). A summary's title falls squarely within the summary's ultimate purpose of alerting people to the "character and purport of the amendments without the necessity" of reviewing the amendment further. *Id*. Furthermore, a misleading title to a book or federal legislation does the same type of harm discussed here—it mischaracterizes the character and purport of the underlying content. Nonetheless, Relators' artful similes do not change the fact that the definition of "summary" supports the Attorney General's interpretation. *See* Merriam-Webster's Collegiate Dictionary 1250 (2003); *see id*. at 5 (definition of "abstract").

4. Prior petition reviews do not dictate the scope of the Attorney General's fair-and-truthful review.

That the Attorney General has not historically reviewed titles to petition summaries does not mean that Ohio law *forbids* him from doing so. To be sure, historically, Ohio Attorneys General have not weighed in on a summary's title. In fact, Attorney General Yost acknowledged this very fact in his January 25, 2024, denial letter. *See* (RELATORS_052). Attorney General Yost also quoted this Court's recent decision that highlighted the importance of a title because a '"title immediately alerts signers to the nature of [the] proposed legislation."' *Id*., quoting *State ex rel. Hildreth v. Larose*, 2023-Ohio- 3667, ¶ 17, quoting *State ex rel. Esch v. Lake Cty. Bd. of Elections*, 61 Ohio St.3d 595, 597 (1991). In the plainest terms, the Court stated that "[t]here is no question that the title of [proposed legislation] is material to a petition." *Id*. A title conveys "material information about the nature" of the petition, and petition signers rely on that information when deciding to sign. *Id*. at ¶ 20. As such, the Court held that proponents of a proposed ordinance may not amend or substitute a petition title on part-petitions after the signature-gathering phase. Based on this Court's guidance in *Hildreth*, Attorney General Yost concluded that titles should be included in his fair-and-truthful review because they are material to petition signers. Because nothing within R.C. 3519.01(A) limits the Attorney General's review to the summary's body, reviewing a summary's title is within his statutorily prescribed authority. The fact that titles were not evaluated in past reviews does not waive the Attorney General's authority to review Relators' proposed title.

5. The Attorney General's review of the title of a summary serves the considerations behind R.C. 3519.01(A).

The Attorney General's interpretation of R.C. 3519.01(A) finds support from both the statute's plain text and its purpose. Indeed, any interpretation of R.C. 3519.01(A) should be grounded in that statute's purpose: ensuring that potential petition signers are not misled. But

according to Relators, they are free to give their summary any misleading title they choose, and that title is unreviewable. Under their theory, they could go door-to-door presenting a petition titled "Every Ohioan to receive one million dollars if amendment passes"—even though their proposed amendment says nothing of the sort. This cannot be the case, and the purposes behind R.C. 3519.01(A) make the absurdity of Relators' interpretation clear.

Relators ignore the fundamental policies underpinning the Attorney General's fair-and-truthful review, and their argument devalues the Attorney General's important role in the initiative petition process. Indeed, the Attorney General's fair-and-truthful review of initiative petition summaries is nearly as old as the right to initiative itself. Ohio electors enshrined the right to initiative and referendum in 1912. *State ex rel. Nolan v. ClenDening*, 93 Ohio St. 264, 278 (1915). As part of those amendments, Ohio electors also granted the General Assembly authority to pass laws that "facilitate their operation." *Id*. at 279. In 1929, the General Assembly exercised its constitutional authority to pass the predecessors to section 3519.01(A), G.C. 4785-175 and G.C. 4785-176. *Schaller v. Rogers*, 2008-Ohio-4464, ¶ 13 (10th Dist.). This latter section provided that 100 or more electors "may, by a written petition signed by them, submit any proposed law or constitutional amendment to the attorney general for examination." *Id.* It also provided that the electors "may also submit to the attorney general a fair and impartial synopsis" of the proposed amendment. *Id*. If the Attorney General found the synopsis to be fair and truthful, G.C. 4785-176 further directed him to certify it. *Id*. In 1931, the General Assembly amended G.C. 4785-175 to add a requirement that initiative petitioners submit proposed amendments "and a summary of same to the attorney general for examination. If in the opinion of the attorney general the summary is a fair and truthful statement of the proposed law, constitutional amendment or measure to be referred, he shall so certify." *Id.* at ¶ 14.

For equally as long—nearly a century—this Court has recognized the importance of the Attorney General's role in Ohio's ballot-initiative process: the "spirit and purpose" of Ohio's statutory pre-certification requirements mandate a summary that will "properly advise those who are asked to either sign the petition or to support the amendment at the polls of the character and purport of the amendments without the necessity of perusing them at length." *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 27–28 (1931). And Ohio courts have continued to recognize that the summary requirement may help electors "understand the content of the law more efficiently than if they had to rely solely on a review of the entire law, especially where the law sought to be repealed is lengthy, complicated or difficult to navigate." *Schaller* at ¶ 46. It further serves to "deter circulation fraud and abuse by deterring circulators from misrepresenting the contents or impact of the law sought to be repealed." *Id.* at ¶ 47. At bottom, a petition's "summary is valuable to a potential signer only if it is fair and truthful." *Id.* at ¶ 48. The same *must* be true for its title.

Relators fail to grapple with the historical purposes of the Attorney General's fair-and-truthful review, and how neatly review of a summary's title fits within the underlying policy considerations. Instead, Relators focus on the roles of the Secretary of State and Ballot Board during later stages of the petition process. Relators Br. at 12-13. But Relators cannot handwave away the importance of the initial stage of signature gathering and the significant role played by the Attorney General at that part of the process. That the Secretary of State and Ballot Board must approve the ballot language and ballot title would not remedy a false impression a petitioner signer receives from an inaccurate title months earlier. Indeed, a misleading summary "could not only influence [a voter's] decision whether to support the petition but also could leave a lasting false impression which affects their decision on election day." *Brown v. Yost*,

No. 2:24-cv-1401, 2024 U.S. Dist. LEXIS 75595, at *30 (S.D. Ohio Apr. 25, 2024). By requiring a summary certified as fair and truthful at the initial initiative-petition stage, the General Assembly ensures election integrity and voter education and confidence throughout the petition process.

If a summary's title—the very first thing a potential signatory is likely to read—is unreviewable, petition proponents would be licensed to mislead voters at the first step of the initiative process. In contrast, permitting review provides the only firewall against misleading titles at this stage of the initiative process; it bolsters election integrity and voter education, and deters fraud. The Attorney General's reading of R.C. 3519.01(A) would further the statute's purpose. Relators' interpretation would destroy it.

C. Proposition of Law No. 2: The Attorney General did not abuse his discretion when finding the title "Ohio Voters Bill of Rights" misleading.

The Attorney General did not abuse his discretion when he determined that the title "Ohio Voters Bill of Rights" did not fairly or truthfully summarize the proposed amendment. The Attorney General found that the title "Ohio Voters Bill of Rights" misleads because it does not comport with the common understanding of a "bill of rights" in several key ways. Additionally, the Attorney General determined that the title falsely implied that the proposed amendment would entitle voters to certain benefits. In fact, the amendment would vest elections officials with discretion to offer certain voting conveniences.

1. The title "Ohio Voters Bill of Rights" misleads because the amendment largely regulates government processes in lieu of bestowing individual rights.

A bill of rights is a set of specific, discrete rights that may be enforced by individuals against the government. But because the proposed amendment simply regulates government procedures, the Attorney General correctly concluded that the title misleads.

A bill of rights summarizes "those rights and liberties considered essential to a people or group of people." Bill of rights, American Heritage Dictionary (5th ed. 2022). Indeed, Relators agree that a bill of rights articulates a set of "rights and liberties considered essential." Relators' Br. at 15. Importantly, a bill of rights describes *individual* rights. It sets forth the rights that the government cannot intrude upon; it does not tell the government how the government must organize itself. As one federal court aptly put it, the "Bill of Rights enshrines negative liberties. It directs what government may not do its citizens, rather than what it must do for them." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 645 (7th Cir. 2013).

Ohio's Bill of Rights, the first article of the Ohio Constitution, exemplifies this characteristic. Ohio Constitution, Article I; *Hart v. Andrews*, 103 Ohio St. 218, 225 (1921) ("We have a 'Bill of Rights,' in which individual inalienable rights of man are declared and defined . . . ."); *Cincinnati v. Correll*, 141 Ohio St. 535, 538 (1943) ("Article I of the Constitution, known as the Bill of Rights, contains twenty sections defining rights of the people, collectively and individually, and guaranteeing the enjoyment of such rights."). Ohio's Bill of Rights describes an individual right or set of rights that an Ohioan may enforce against the government. But the Bill of Rights does *not* tell the government what it must do to preserve those rights. For example, the Bill of Rights confirms the "privilege of the writ of habeas corpus." Ohio Constitution, Article I, Section 8. But the Bill of Rights does not tell the courts how to adjudicate habeas corpus actions. *See* R.C. Chapter 2725. Similarly, the Bill of Rights enshrines the right to just compensation for the taking of private property for public use. Ohio Constitution, Article I, Section 19. But it does not tell the government what takings procedures it must follow. *See* R.C. Chapter 163.

Relators argue that their proposed amendment comports with this ordinary understanding of a bill of rights by "enumerat[ing] several specific guarantees of rights related to voting that would be expressly protected as essential of the voters approve it." Relators' Br. at 15. But in support of this point, Relators cite duties imposed upon the State, not individual rights:

- The State shall make applications necessary to obtain absentee ballots generally available and easily accessible
- The State shall institute a publicly accessible system by which any registered Ohio elector may electronically track the status of submitted absentee ballot applications and absentee ballots
- The State shall make reasonable accommodations for electors with disabilities.

Relators' Br. at 15.

Relators' failure to cite individual rights comes as no surprise. The bulk of the amendment details elections procedures the State must implement. Indeed, some of the amendment's provisions simply constitutionalize existing portions of Title 35, which regulates the State's conduct of its elections. *Compare* Proposed Amendment Section 1(C)(1), *with* R.C. 3501.32 (voting hours); *compare* Proposed Amendment Section 1(E), *with* R.C. 3509.01-.05 (setting forth absentee ballot eligibility and procedures). Even those provisions of the proposed amendment purporting to set forth individual "rights" largely detail the processes the government must follow. For example, the amendment articulates a right to verify voter identity through certain methods of identification. The amendment then sets forth the types of photo identification that must be accepted at the polls and a provision allowing voters to submit a declaration in lieu of photo identification. *See id*. at 1(C)(8)(a)-(b). The amendment provides a detailed procedure for election officials to review the voter's declaration, notify the voter of any deficiencies in the declaration, and permit the voter to cure the declaration. *Id*. at 1(C)(8)(b)-(c). Again, the proposed amendment describes the process of election administration, not individual rights.

Relators argue that these features do not disqualify the amendment as a bill of rights because the Attorney General previously certified petitions titled "bill of rights" that included government procedures. Relators' Br. at 17. But as set forth in Section III B 4 *supra*, those decisions predated this Court's *Hildreth* opinion, which highlighted the need for petition titles to be truthful. Based on this Court's instruction, the Attorney General began to review petition titles to ensure that they will not mislead putative petition signers. Accordingly, the Office's prior decisions on petitions titled "bill of rights" are of little use.

2. The title "Ohio Voters Bill of Rights" misleads because the proposed amendment does not describe fundamental and inalienable rights.

The proposed amendment's title promises a set of *fundamental* rights, but it does not deliver them. The Attorney General therefore correctly concluded that the title misleads.

By its nature, a bill of rights describes fundamental rights. In other words, a bill of rights describes those rights that a person need not *do anything* to enjoy. *See Hart*, 103 Ohio St. at 225 ("We have a 'Bill of Rights,' in which individual inalienable rights of man are declared and defined . . . ."). Again, Article I of Ohio's Constitution, our Bill of Rights, is instructive. Article I, Section 1 begins with a description of our inalienable rights: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." Likewise, an Ohioan need not do, say, or believe anything to enjoy her right to assemble, to bear arms, to be tried by a jury, to speak freely, to be free from unreasonable searches or seizures, or to make and carry out her own reproductive decisions. Ohio Constitution, Article I, Sections 3, 4, 5, 11, 14, 22. As used in Ohio, a bill of rights means fundamental and inalienable rights.

Knowing that a bill of rights typically describes fundamental and inalienable rights, a reader of the title "Ohio Voters Bill of Rights" would expect to find such rights there. Stated differently, a "Voters Bill of Rights" should describe rights that exist independently of any duty or obligation on the voter's part. Instead, the reader finds in the proposed amendment certain actions that voters can take to satisfy voting requirements. For example, the proposed amendment states that voters who are not registered to vote in their county of residence can submit proof of identity and residential address to satisfy the requirements to cast a ballot. Amendment at 1(C)(6). Unlike a fundamental right described in a bill of rights, a voter must first present documentation to claim the right set forth in Section 1(C)(6) of the proposed amendment. Similarly, Section 1(E) describes the actions a voter must take—providing identification—to secure an absentee ballot. Again, Section 1(E) does not describe a fundamental right, but an action that a voter may take to satisfy the State's absentee-voting requirements.

In their brief, Relators do not meaningfully contend with this point or attempt to argue that the proposed amendment describes fundamental and inalienable rights. Instead, they attack the Attorney General, baselessly claiming that he "does not believe that Ohioans should be guaranteed the[] constitutional rights" described in the proposed amendment or that those rights are "essential." Relators' Br. at 18. These accusations fundamentally misunderstand the nature of the Attorney General's fair-and-truthful review. As the Attorney General noted when approving a previous summary, he does not base his decision on the wisdom or folly of the proposed amendment as a matter of policy. (RELATORS_016). Here, the Attorney General did not decide that the proposed amendment does not belong in the Ohio Constitution, that it is bad policy, or that Ohioans should not adopt it. Those decisions belong to the electorate. *State ex*

rel. Schwartz v. Brown, 32 Ohio St.2d 4, 11 (1972). He simply decided that Relators cannot use the title "Ohio Voters Bill of Rights" to describe rights that are neither fundamental nor inalienable.

Also off the mark is Relators' argument that the proposed amendment is not "unusual" and in fact mirrors "rights guaranteed in other states' constitutions." Relators Br. at 18. Again, this mistakes the nature of the fair-and-truthful review. The Attorney General did not decide that the Ohio Constitution *could not* include provisions like the one in the proposed amendment. Indeed, such a determination would exceed his authority under R.C. 3519.01. *State ex rel. Barren v. Brown*, 51 Ohio St.2d 169, 170 (1977) ("The fact that respondent believes that the matters are not subject to referendum is irrelevant."). He simply decided that Relators' summary did not meet the standard articulated in R.C. 3519.01.

3. Because the proposed amendment vests discretion in elections officials, it is misleading to call the amendment a "bill of rights."

The title "Ohio Voters Bill of Rights" creates an expectation that the proposed amendment would, if passed, create a "legitimate claim of entitlement" to a benefit. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). But because the proposed amendment would vest discretion in elections officials, the Attorney General correctly deemed the title misleading.

Ohio and federal law use the term "right" to describe something that a person may enforce or protect. *See, e.g.*, R.C. 2505.02(A)(1) (defining a "substantial right" as "a right that the United State Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect"); 52 U.S.C. §§ 10501(a), 10504 (prohibiting literacy or character tests that deny "the right to vote" and giving the Attorney General the authority to enforce the prohibition). This, of course, contrasts with a discretionary act, which does not create any claim or entitlement. A "benefit is not a protected entitlement if government

officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

Prospective petition signers seeing "Ohio Voters Bill of Rights" would believe that the proposed amendment confers enforceable rights upon them. But the proposed amendment leaves crucial matters to the discretion of elections officials. For example, the proposed amendment gives elections officials the "discretion to place multiple secure drop boxes throughout their counties for the return of absentee ballots, and to designate multiple locations throughout their counties for early in person voting." Proposed Amendment 1(D). This provision confers no "rights" upon voters. They do not have the right to demand multiple drop boxes in their county; indeed, they do not have the right to a drop box at all. *See id*; R.C. 3509.05(C)(2)-(3) (allowing but not requiring boards of elections to place a "secure receptable outside the office of the board . . . for the purpose of receiving absent voter's ballots"). And the proposed amendment allows—but does not require—the State to permit voters to "verify their identity and cast their ballots" in new ways enabled by technological advancements. Proposed Amendment 1(H). Stated differently, voters have no right under the proposed amendment to demand *any* changes to verification requirements or voting methods.

Relators acknowledge that the proposed amendment gives elections officials discretion. But they argue that these provisions can nonetheless be described as a bill of rights because they resemble the Tenth Amendment in the U.S. Constitution's Bill of Rights. Relators' Br. at 16. The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. 10. Nothing about the proposed amendment resembles the Tenth Amendment. Unlike the Tenth Amendment, the proposed amendment does not refer to the

existence of other, unenumerated powers. Nor does the proposed amendment reserve any powers to voters at all. The proposed amendment is a detailed set of election-administration procedures, not a reservation of unenumerated rights.

The Attorney General did not abuse his discretion in determining that the proposed amendment cannot be fairly and truthfully described as a bill of rights. Rather than describing a set of fundamental and inalienable rights, it describes elections procedures and vests elections officials with discretion.[1]

D. Proposition of Law No. 3: Because Relators do not have a clear legal right to certification of an unreviewed summary and the Attorney General does not have a clear legal duty to certify an unreviewed summary, Relators are not entitled to a writ of mandamus.

Even if either of Relators' first two propositions of law are correct—that is, that the Attorney General (1) may not review the title of written petitions, or (2) may review the title but abused his discretion in doing so—Relators are still not entitled to a writ of mandamus compelling the Attorney General to certify the summary of Relators' petition. Relators lack a clear legal right to certification of summary that the Attorney General has not yet determined is fair and truthful. Holding otherwise would directly contravene the Attorney General's statutory duty to ensure that summaries of proposed laws be "fair and truthful."

R.C. 3519.01(A) states that the Attorney General must examine a written petition's summary within ten days of receiving it, and "*if, in the opinion of the attorney general*, the

[1] That portions of the proposed amendment could be described as a bill of rights does nothing for Relators. This Court has long held that "strict compliance is the default for election laws and that that standard is lowered only when the statutory provision at issue expressly states that it is." *State ex rel. Linnabery v. Husted*, 2014-Ohio-1417, ¶ 40. R.C. 3519.01(A) does not permit the Attorney General to certify partially fair and truthful summaries. Nor does the statute allow certification of summaries that describe portions of the constitutional amendment truthfully while misstating others. As set forth above, the Attorney General correctly concluded that the summary misstated numerous provisions included in the proposed amendment.

summary is a fair and truthful statement of the . . . constitutional amendment, the attorney general shall so certify." (emphasis added). R.C. 3519.01(A). Relators place emphasis on the wrong part of this provision. *See* Relators' Br. at 21 (emphasizing "the attorney general shall so certify."). While R.C. 3519.01(A) mandates that the Attorney General "shall . . . certify" the summary of a written petition, that duty arises *after* the Attorney General has made a "fair and truthful" determination as to that summary. As such, the Attorney General cannot be compelled to certify a summary if he has not yet decided that the entire summary is "fair and truthful." The language of R.C. 3519.01(A) makes it clear that a "fair and truthful" determination is the condition for certification (and is the *only* condition of certification), and there is simply no basis for an aggrieved party to force the Attorney General to bypass this requirement. *See State ex rel. CNN, Inc. v. Bellbrook-Sugarcreek Local Sch.*, 2020-Ohio-5149, ¶ 11 ("[W]hen a statute's language is unambiguous, . . . the court must simply apply the statute as written.").

In examining the summary of Relators' proposed amendment, the Attorney General made clear that he did not reach the balance of the summary and declined to certify based on the title alone. (RELATORS_054). Even if the Attorney General "completed his review during the ten-day window" erroneously by considering the proposal's title, "the proper remedy" would *not* be to force the Attorney General to bypass his own statutory obligation. *See* Relators' Br. at 20. Because the vehicle for certifying a petition's summary *must* be the Attorney General's determination that the summary is fair and truthful—and not merely the passage of time—the *only* proper remedy for Relators is an order directing the Attorney General to review the summary (excluding the title) to determine whether it is a "fair and truthful statement of the . . . constitutional amendment." R.C. 3519.01(A).

In arguing that they have a clear legal right in mandamus to certification of their summary, Relators fundamentally misconstrue precedent. Relators seek to draw a parallel between the facts of this case and that of *Barren v. Brown*, 51 Ohio. St. 2d 169 (1977). *Barren* involved an Attorney General who, after receiving a petition summary, "refused to certify the summary on an improper basis," Relators' Br. 22—"that the matters [addressed in the petition] may not be subject to referendum." *Barren* at 171. In turn, the Court found it "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*. Because the determination of whether the petition's contents were subject to referendum is "irrelevant" and not part of the Attorney General's "honest and impartial evaluation of whether the proposed summary is . . . 'fair and truthful . . .,'" the Court directed the Attorney General to certify. *Id.* at 170, citing R.C. 3519.01(A).

Relators' attempt to find similarity between this case and *Barren* is unfruitful, however, for two reasons. First, unlike in *Barren*, Attorney General Yost has yet to even reach the balance of the summary that would provide him with a basis for certification. Accordingly, Attorney General Yost cannot certify Relators' petition summary when he has not "conduct[ed] an examination of the summary" in whole. *See* R.C. 3519.01(A). Second, the reason for denial of certification in *Barren* was "quite clear[ly]" not part of the Attorney General's "honest and impartial evaluation" of the summary. *Barren* at 170. But here, the Attorney General concluded that the summary was not fair and truthful, which is the proper inquiry under R.C. 3519.01(A). The parties simply disagree whether a proposed amendment's title is "involved in the Attorney General's . . . ['fair and truthful'] evaluation" under R.C. 3519.01(A). As such, *Barren* does not support Relators' argument that they have a right to their requested relief. On the contrary,

Relators do not have a clear legal right to certification of a summary which has not been reviewed, and the Attorney General does not have a corresponding clear legal duty to certify one.

CONCLUSION

For the reasons set forth above, Relators are not entitled to a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2024, the foregoing *Respondent's Merit Brief* was filed electronically using the Court's e-filing system and served via electronic mail upon the following:

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