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Via regular U.S. Mail and E-mail

Donald J. McTigue
McTigue & Colombo LLC
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Re: Submitted Petition for Initiated Constitutional Amendment to Amend Article V, Sections 1, 2 and 6 of the Ohio Constitution – “Ohio Voters Bill of Rights” – SECOND SUBMISSION

Dear Mr. McTigue,

On January 16, 2024, in accordance with Ohio Revised Code Section 3519.01(A), I received a written petition containing (1) a copy of a proposed constitutional amendment, and (2) a summary of the same measure. One of my statutory duties as Attorney General is to send all of the petitions to the appropriate county boards of elections for signature verification. With all of the county boards of elections reporting back, at least 1,000 signatures have been verified.

It is also my statutory duty to determine whether the submitted summary is a “fair and truthful statement of the proposed law or constitutional amendment.” R.C. 3519.01(A). The Ohio Supreme Court has defined “summary” relative to an initiated petition as “a short, concise summing up,” which properly advises potential signers of a proposed measure’s character and purport. *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24 (1931). If I conclude that the summary is fair and truthful, I am to certify it as such within ten days of receipt of the petition. In this instance, the tenth day falls on January 25, 2024.

Having reviewed the renewed submission, I am unable to certify the summary as a fair and truthful representation of the proposed amendment. Our review of the summary identified a misstatement that is, by itself, sufficient to mislead a potential signer as to the scope and effect of the proposed amendment.

The title “Ohio Voters Bill of Rights” does not fairly or accurately summarize or describe the actual content of the proposed amendment. In the past, this Office has not always rigorously evaluated whether the title fairly or truthfully summarized a given proposed amendment. But recent authority from the Ohio Supreme Court has confirmed that the title for a ballot initiative is material to voters. With respect to a petition for a proposed ordinance, the Court held that “[t]here is no question that the title of a proposed ordinance is material to a petition. A title ‘provides notice of the proposal to signers of an initiative petition. More so than the text, the title immediately alerts signers to the nature of [the] proposed legislation.’” *State ex rel. Hildreth v. Larose*, 2023-Ohio-

3667, P17 (quoting *State ex rel. Esch v. Lake Cty. Bd. of Elections*, 61 Ohio St.3d 595, 597, 575 N.E.2d 835 (1991)). Indeed, in our time of heightened polarization and partisanship, whether the title of a proposed amendment fairly or truthfully summarizes the proposal takes on even greater importance to voters asked to sign a petition. Thus, while examples of past practice from this Office may be relevant, *see, e.g.*, Nursing Facility Patients’ Bill of Rights (2021); The Ohio Voters Bill of Rights (2014), they cannot be dispositive because they did not undertake to determine whether the title itself is a “fair and truthful statement.” Ohio Revised Code Section 3519.01(A).

First, the title “Ohio Voters Bill of Rights” does not fairly or truthfully summarize or describe the actual content of the proposed amendment, which confers discretion on government officials. To establish a right, the amendment would need to create in voters a “legitimate claim of entitlement” to a benefit. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). A purely discretionary act does not create any such 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); *see also United States v. Herrera-Pagoda*, 14 F.4th 311, 320 (4th Cir. 2021).

Despite the proposed amendment’s label, many provisions of the amendment define “legitimate claim[s] of entitlement.” *Roth*, 408 U.S. at 577. Indeed, the proposed amendment contains provisions that cannot properly be described as creating a right for Ohio voters at all. For example, the proposed amendment states that local election authorities “shall have the *discretion*” to place multiple absentee-ballot drop boxes throughout their counties. This grant of unfettered discretion, by definition, does not create a right that voters may seek to enforce. It also allows discretion for the State to institute technological advancements in the voting process. This provision likewise fails to create any enforceable right. Any single such example renders the label misleading.

Second, the title “Ohio Voters Bill of Rights” does not fairly or truthfully summarize the common understanding of a “Bill of Rights.” Although the common understanding of that term has evolved over time since the American founding, *see* Gerard N. Magliocca, *The Bill of Rights as a Term of Art*, 92 Notre Dame L. Rev. 231 (2016), today, a “Bill of Rights” means an articulation of specific, discrete rights that may be enforced by individuals against the government. The ordinary meaning of a “Bill of Rights” is thus “[a] formal summary of those rights and liberties considered essential to a people or group of people.” *Bill of rights*, American Heritage Dictionary (5th Ed. 2022); *see also Hamill v. Hawks*, 58 F.2d 41, 47 (10th Cir. 1932), *rev’d*, 288 U.S. 52 (1933) (defining Bill of Rights as “[a] formal and public declaration of popular rights and liberties.” (citation omitted)). Under this contemporary understanding, a bill of rights does not dictate the detailed, procedural operations of government processes. The proposed amendment, however, is just as concerned—if not *more* concerned—with process than with rights. Rather than simply defining the rights possessed by Ohio’s voters, it focuses in detail on the processes the State uses to carry out its elections. Those processes are not properly described as “rights” and therefore cannot be fairly and truthfully said to be components of a “Bill of Rights.”

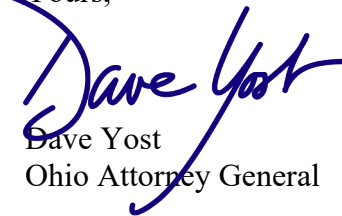
For example, the proposal mandates that the legislature appropriate funds to carry out the many processes and the systems it establishes, and it authorizes the Ohio Supreme Court to compel the legislature to make such appropriations. It also dictates the specifics of polling times on voting days, the location of and equipment at polling locations, the number of calendar days (46) before an election day that officials must send ballots to absentee voters, absentee ballot tracking

processes, electronic and non-electronic voter registration, same-day voter registration procedures, and procedures for voters to cast ballots without presenting a photo ID. None of these government processes fit the ordinary definition of a “summary of those rights and liberties considered essential to a people or group of people.”

It has become commonplace to use the language of advocacy and advertising in initiated statutes and constitutional amendments. Such language will be employed, no doubt, in the campaign around such matters. *At least* on the formal ballot, the language should be as neutral as possible. This office will take a skeptical view of such efforts in its reviews, regardless of which political tribe may be offering its proposal to the sovereign people.

The highly misleading and misrepresentative title of this amendment is sufficient *on its own* to reject this petition. Thus, without reaching the balance of the summary, I am unable to certify the summary as a fair and truthful statement of the proposed amendment.

Yours,



Dave Yost
Ohio Attorney General

cc: Committee Representing the Petitioners