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Via regular U.S. Mail and E-mail

Re: Submitted Petition for Initiated Constitutional Amendment to Add Article I, Section 22 of the Ohio Constitution– "Protecting Ohioans' Constitutional Rights"

Dear Mr. Brown,

On November 8, 2023, 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 part-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 November 17, 2023.

Having reviewed the renewed submission, I am unable to certify the summary as a fair and truthful representation of the proposed amendment. Upon review of the summary, we identified omissions and misstatements that, as a whole, would mislead a potential signer as to the actual scope and effect of the proposed amendment.

First, the summary fails to fairly and truthfully summarize the scope of potential party makeup, potential venue, and nonparty liability under the proposed amendment. With respect to venue, the proposed amendment provides that an action naming a public employee as a defendant "may be brought in any Court of Common Pleas for a county in which that public employee resided or worked at the time the action was filed." Proposed Amendment, Section (B)(3)(a). It further provides that an action naming the State or a political subdivision may be brought in any county, with the exception that "if a public employee is also named a defendant, then the action may only be brought in a Court of Common Pleas for a county in which that public employee resided or

worked at the time the action was filed. Id., Section (B)(3)(b). The Amendment is silent on proper venue for actions against multiple public-employee defendants who do not reside or work in the same county at the time the action is filed.

In turn, the summary provides that jurisdiction and venue lies "in the Court of Common Pleas for the county where the public employee who is named as a defendant resides or works at the time the action is filed," and that "[w]hen only the State or a political subdivision is the defendant the action may be filed in the Court of Common Pleas for any County in Ohio," but "[i]f both a public employee and the State or a political subdivision are named in the same action, the venue is restricted to the county where the named public employee resided or worked at the time of filing." Summary, paragraph 3. In this regard, the summary is misleading in two ways.

It is misleading to the extent that it falsely purports to set forth an exhaustive list of potential venues. The summary does not address proper venue in actions where a plaintiff names two public-employee defendants who do not share a common county where they live or work. While the amendment also does not expressly account for venue in such actions, nothing in the proposed amendment limits a plaintiff to a single public-employee defendant. Therefore, the summary is misleading to the extent it purports to set forth all potential venues for an action authorized by the amendment.

By the same token, a reader would also be misled into believing that the proposed amendment limits the type and number of potential governmental defendants. The summary's limited description of potential venues outlined above further misleads a reader into believing that the proposed amendment limits the makeup of governmental defendants to either (1) one public employee, (2) the State or one political subdivision, or (3) one public employee and the State or one political subdivision. This is driven home by the summary's reference to a singular public employee in the third foregoing scenario: in such a case, the summary states, venue is restricted to the country where "*the* named public employee" resided or worked. Summary, paragraph 3 (emphasis added.). In actuality, the proposed amendment contains none of the foregoing limitations implied in the summary. In fact, the proposed amendment authorizes actions brought against a "government actor or *actors*." Proposed Amendment, Section (B)(2).

The summary is also misleading with respect to the nonparty liability created by the proposed amendment. The amendment provides that, if a public employee is found liable for deprivation of a person's constitutional right, and it is proven by a preponderance that the public employee was acting on behalf of, under color of, or within the scope of authority granted by the State or political subdivision, "then the State or political subdivision shall be held liable to that person for the conduct of the public employee." Proposed Amendment, Section (D)(3).

Critically, the proposed amendment does not require the State or a political subdivision to be a named party in order to be held liable to the plaintiff under Section (D)(3). This is a significant departure from general legal principles and raises a host of potential substantive issues. But without regard to whether such a provision is legally sound or advisable, the fact that the proposed amendment creates nonparty liability of a State or political subdivision that is never named in a plaintiff's action is significant. A fair and truthful summary must, at the least, explain that nonparty State or political subdivision liability may arise as a result of the proposed amendment. This summary completely omits this significant aspect and, consequently, is misleading.

Second, the summary omits critical words and would materially mislead a potential signer with respect to defined terms. For example, the summary materially misstates the amendment's definition of "public employee." In particular, the proposed amendment states that a "public employee means any *entity* who is….." but the word "entity," which is a much broader term encompassing more than individuals, is omitted from the summary. This changes the character of the defined term. The summary also fails to articulate the difference between a public employee as an "entity" versus the common meaning and understanding of a public employee as a human being. This Office expressly noted this flaw in its prior August 18, 2023 declination letter sent in response to the previous iteration of this petition. It remains uncorrected.

Additionally, the proposed amendment defines "State" to mean "the State of Ohio, including, but not limited to, the offices of all elected state officers and all departments and other instrumentalities of the State of Ohio." Proposed Amendment, Section (A)(1). In contrast, the summary provides that the amendment creates a private cause of action for violations of Ohio Constitutional rights by "the State of Ohio, its officers, departments and instrumentalities …." The summary omits that the proposed amendment provides for liability of "the offices of all elected state officers." The summary's description of liability for the State's "officers" does not fairly and truthfully summarize the potential for liability of the offices of elected state officers as set forth in the amendment. This is particularly true when considered with the fact that the State's "officers" are included within the amendment's definition of "public employee" rather than within the definition of the "State." Compare Proposed Amendment, Section (A)(1) with Section (A)(3)(a). The omission of potential liability of the offices of elected state officers is materially misleading.

The summary further omits that the definition of "public employee" includes those individuals and entities that are "not compensated." Proposed Amendment, Section (A)(3)(a). In light of the ordinary, everyday definition of "employee" as generally *not* including uncompensated persons, this omission is misleading. A reader of the summary would not likely understand that the proposed amendment provides for liability of, for instance, uncompensated volunteers, because the definition's inclusion of "public employees" that are "not compensated" is omitted from the summary.

Moreover, "public employee" is defined in the proposed amendment as including an independent contractor "who is *authorized to act* and is acting under color of law." (emphasis added.). Proposed Amendment, Section (A)(3)(b). However, the summary states differently: it provides that liability of independent contractors is "limited to *conduct that is authorized* and under color of state law." Summary, paragraph 1 (emphasis added.). This is a significant distinction. The summary misleads a reader into believing that an independent contractor is liable only when the specific conduct at issue has been authorized by the State, rather than, as the proposed amendment more broadly provides, when the independent contractor was merely "authorized to act."

Third, the summary's statements on remedies and bench-or-jury-trial election are also inaccurate and misleading. The summary states that, as a remedy, "[c]ourts are also *authorized* to order government actors found to have violated Ohio's Constitution to take reasonable measures to prevent similar violations from occurring in the future." Summary, paragraph 2 (emphasis added.). This is inaccurate. Instead, the proposed amendment provides that, upon a finding of liability against a government actor, "the court *shall*" order the government actor found liable to take such reasonable measures. Proposed Amendment, Section (E)(2) (emphasis added.). The language

"courts are also authorized" in the summary incorrectly suggests that courts have discretionary authority to order a liable party to take such measures. In reality, the proposed amendment would require courts to do so.

Further, the summary states that remedies under the proposed amendment include "reasonable attorney's fees," Summary, paragraph 2, but omits that a prevailing party is entitled to those fees "regardless of whether the attorney provided services on an hourly, contingent, or pro bono basis." Proposed Amendment, Section (E)(1)(c). This omission potentially misleads a reader into believing that a prevailing party is entitled only to fees that were actually incurred and are owed by that party.

Finally, the summary provides that "the private cause of action created by this Amendment may be tried before the bench or a jury …." Summary, paragraph 3. The summary omits that it is the plaintiff who is entitled to this election: the proposed amendment is clear that "[t]he person bringing an action pursuant to this Section may elect whether the action will be tried in a bench or jury trial." Proposed Amendment, Section (D)(1). By omitting this portion of Section (D)(1), the summary may mislead a reader into believing that a named defendant – be it the State, a political subdivision, or a public employee – also has the right to insist upon a jury or bench trial.

Fourth, the summary's statements on the liability of a "public employee" are incorrect and misleading. The summary provides that "[l]iability for public employees is limited to those instances where their conduct is authorized by their governmental employers and within the scope of their employments." Summary, paragraph 1. This tracks the first definitional category of "public employee" contained in the proposed amendment. Proposed Amendment, Section (A)(3)(a). However, this sentence is inaccurate because it ignores that the proposed amendment's definition of "public employees" also includes "an independent contractor who is authorized to act and is acting under color of law." Id., Section (A)(3)(b). Thus, it is incorrect and misleading to state that public-employee liability "is limited" to instances falling under Section (A)(3)(a), as the summary purports. The summary does appear to attempt to reconcile this with its next sentence: "Liability for independent contractors is limited to conduct that is authorized and under color of law." Summary, paragraph 1. Nonetheless, the first sentence purporting to state the limits of public-employee liability remains incorrect and misleading.

Similarly, the summary further provides that the State and political subdivisions are "liable for the constitutional violation of one of its public employees when the conduct that caused the constitutional violation occurs within the course or scope of authority granted to that public employee" by the State or subdivision. Summary, paragraph 1. This, too, is inaccurate because it again fails to contemplate that the proposed amendment's definition of "public employee" also includes "an independent contractor of the State or a political subdivision who is authorized to act and is acting under the color of law." Proposed Amendment, Section (A)(3)(b). The summary's language here is again incorrect and misleads a reader into believing that liability for the State or a political subdivision for conduct by its public employee is limited to the categories of "public employee" set forth in Section (A)(3)(a), when the proposed amendment also defines independent contractors acting under color of state law as "public employees" under Section (A)(3)(b).

Fifth, the summary materially misstates that the proposed amendment's immunity defenses are "eliminated." The summary states that "[q]ualified immunity, sovereign immunity, prosecutorial

immunity, and any immunity provided to the State, political subdivision, or public employee by statute are eliminated." Summary, paragraph 2 (emphasis added.). However, the proposed amendment is not so broad – it provides only that in "*any action pursuant to this Section*, no government actor shall enjoy or may rely upon any immunities or defenses which are only available to government actors or any subset thereof, including but not limited to" qualified immunity, sovereign immunity, prosecutorial immunity, or any immunity provided to government actors by statute. Proposed Amendment, Section (C)(1) (emphasis added.). Thus, the statement that those types of immunity are "eliminated" in all instances is overbroad and fails to fairly summarize that the proposed amendment precludes the use of immunity defenses only "[i]n any action pursuant to this Section[.]" The blanket term "eliminated" would mislead a reader into believing the proposed amendment's effect on immunity defenses is broader than what the proposed amendment actually provides.

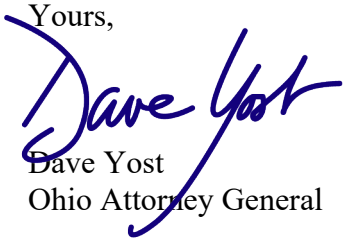
The summary's statement regarding "elimination" of immunity is overbroad in this respect, but it is also too narrow in another. That is, the purport of the proposed amendment is not limited to immunity. Indeed, the proposed amendment precludes a government actor from enjoying or relying upon "any immunities *or defenses* which are only available to government actors or any subset thereof …." Proposed Amendment, Section (C)(1) (emphasis added.). Additionally, the proposed amendment's list of immunities and defenses to which Section (C)(1) is expressly non-exhaustive. *Id.* ("…including but not limited to…").

In contrast, the summary mentions only immunity. It omits entirely any reference to the proposed amendment's effect on these "other defenses." Worse, it omits that these "other defenses" include not just those "only available to government actors," but also those "only available to … any subset thereof." The proposed amendment leaves this broad category—"subsets" of "government actors"—undefined. Thus, the summary fails to encapsulate the broader swath of defenses contemplated by the text of the proposed amendment.

The problem is exacerbated because the summary also omits that the types of immunities which are enumerated therein are part of an expressly non-exhaustive list. By limiting its description of the proposed amendment's effect to the enumerated types of immunity, the summary fails to fairly and truthfully summarize the full extent of the proposed amendment (i.e., as extending to additional defenses beyond those enumerated types). As a result, a reader would be misled into believing that the types of immunity listed in the summary are the only defenses affected by the proposed amendment, when the proposed amendment's effects are, as shown, broader.

The above instances are just a few examples of the summary's omissions and misstatements. It is significant to ask voters to make factual findings at the ballot box. A summary that fails to inform a signer of the existence of such findings does not fairly and truthfully reflect the amendment's import. Thus, without reaching the balance of the summary, and consistent with my past determinations, I am unable to certify the summary as a fair and truthful statement of the proposed amendment.

Yours,



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