The Supreme Court of Ohio

State of Ohio *ex. rel*. Annette Fischer, Relator, v. The Honorable Judge David Woessner, Respondent.	)))))))))	**Original action in prohibition**

RELATOR'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND RELATOR'S ALTERNATIVE MOTION FOR LEAVE TO AMEND COMPLAINT TO ADD NOMINAL PARTY

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OVERVIEW

Respondent is a conscientious jurist, but his stated view that it's "inappropriate" to sue him in prohibition here is incorrect. For respondent himself notes on page eight of his motion for judgment on the pleadings that a complaint in prohibition tests "solely and only" the lower court's subject-matter jurisdiction. This case is therefore no different than other prohibition cases against sitting judges. *State ex rel. Fifth Third Mtge. Co. v. Russo*, 129 Ohio St.3d 250, 2011-Ohio-3177, 951 N.E.2d 414, ¶19, ("Judge Russo, however, argues that the parties' loan-modification agreement represented a settlement of Fifth Third's original foreclosure claim, which barred its right to recover on that claim. Yet the judge ignores the explicit language of the parties' agreement that it did not constitute a satisfaction or release of the note and security agreement."); *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶1, ("Relator-appellant, V.K.B., filed this action to prevent the respondents-appellees, Sandusky County Juvenile Court, Sandusky County Juvenile Court Judge Bradley J. Smith…from exercising jurisdiction with respect to the custody of her minor daughter, J.B."). And, as in *Russo* and *Smith*, *supra*, this court regularly reaches the merits in prohibition cases when the adverse parties in the underlying case is absent from the prohibition case.

As another example, this court issued a writ of prohibition based upon Civ. R. 41 in *State ex rel. Walton v. Williams*, 145 Ohio St.3d 469, 2016-Ohio-1054, 50 N.E.3d 520 after

denying a motion to intervene filed by a party in physical custody of the potentially affected juvenile.[1] If this court is now inclined to say that the underlying adverse party must be named, then relator requests leave to amend her complaint to do so.

But precisely because relator's complaint tests "solely and only" Judge Woessner's jurisdiction, he is currently the named respondent. In prohibition actions, the trial-court judge is always the appropriate party to be named and heard on the issue of jurisdiction. Indeed, one must wonder what can a nominal lay party can bring to the jurisdictional analysis that the relevant judge cannot.

ARGUMENT

Respondent's brief at page ten says that relator Fischer's complaint can be stripped down to a dispute over whether the correct "case number" was used in the underlying case. This is an overly simplistic portrayal of her prohibition complaint.

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[1] *01/29/2016 Case Announcements*, 2016-Ohio-309 (order denying motion to intervene); see also, *State ex rel. V.K.B. v. Smith*, *supra*, 138 Ohio St.3d 84, 2013-Ohio-5477, (underlying paternal grandparent absent); Accord, *State ex rel. V.K.B. v. Smith*, 142 Ohio St.3d 469, 2015-Ohio-2004, 32 N.E.3d 452; *State ex rel. Swanson v. Hague*, 11th Dist. Ashtabula No. 2009-A-0053, 2010-Ohio-4200, ¶1, (maternal grandmother who obtained judgment in underlying juvenile court omitted from meritorious prohibition action), ("This action in prohibition is presently before this court for final disposition of the parties' competing motions for summary judgment. Upon considering each side's respective evidentiary materials and legal arguments, we conclude that relator, Vanda Leah Swanson, has established that she can satisfy the elements for the writ in regard to the judicial acts which respondent, Judge Charles G. Hague of the Ashtabula County Court of Common Pleas, has taken in an underlying juvenile proceeding. Specifically, relator has demonstrated that respondent lacked the authority to render any decision as to the custody of the subject child because his jurisdiction was never properly invoked at the outset of the proceeding.")

"To demonstrate entitlement to a writ of prohibition," relator must establish that respondent "(1) is about to or has exercised judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. The second and third elements may be satisfied by a showing that the lack of jurisdiction is 'patent and unambiguous.'" *State ex rel. Fiser v. Kolesar*, 164 Ohio St.3d 1, 2020-Ohio-5483, 172 N.E.3d 1, ¶7, (cleaned up). Respondent admits he has and will continue to exercise judicial power absent a writ of prohibition. This case thus issue comes down to whether jurisdiction is patently and unambiguously lacking. It is.

First, the complaining party in the underlying juvenile-court case that is the object of this prohibition action dismissed her own complaint under Civ. R. 41 (alternatively, respondent *himself* dismissed it under Juv. R. 22) and therefore the law treats that complaint and case *as if it never existed*. Thus, respondent's "jurisdiction" of a "motion" filed subsequent to the dismissal of the underlying complaint is patently and unambiguously lacking. For this reason, whether Fischer could appeal in the ordinary course of law any potential adverse final order on the "motion" in the underlying juvenile-court case is irrelevant. *Second*, respondent concedes that his juvenile-court jurisdiction flows solely from statutory grant by the General Assembly. Despite the majority's opinion in *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241,

which is discussed below, the Ohio legislature hasn't bestowed upon juvenile courts jurisdiction to award custody of a fit mother's child to another woman.

Therefore, respondent would have no jurisdiction in the underlying matter even if it wasn't dismissed, which it was.

* * *

I. This court has already held that Civil Rule 41(A)(1) applies in juvenile court. Plus, much of respondent's Rule 12(C) brief actually supports, not weighs against, issuing a writ of prohibition.

A. Rule 41(A)(1) applies.

"The Rules of Civil Procedure apply to custody proceedings in juvenile court except when they are clearly inapplicable." *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, 868 N.E.2d 261, ¶11. We know that Civil Rule 41(A)(1) applies because that rule served as this court's sole basis for issuing a writ of prohibition in *State ex. rel. Walton v. Williams*, supra, which says that "**when a trial court unconditionally dismisses a case or a case has been voluntarily dismissed under Civ. R. 41(A)(1), the trial court patently and unambiguously lacks jurisdiction to proceed, and a writ of prohibition will issue to prevent the exercise of jurisdiction**." *State ex rel. Walton v. Williams*, 145 Ohio St.3d 469, 2016-Ohio-1054, ¶16. Notably, the relator in *Walton* initially argued that the Hamilton county juvenile court lacked jurisdiction to consider the validity of an acknowledgement of paternity that was at issue in the underlying juvenile court case that was the object of the relator's prohibition action in *Walton*. This court avoided

deciding relator Walton's substantive statutory theories as to why jurisdiction was lacking by issuing a writ of prohibition against the juvenile court upon observing that the underlying case had already been previously dismissed under Civ. R. 41(A), which therefore divested the juvenile court of ongoing jurisdiction:

> Walton asserts that the ultimate issue in his prohibition action is whether a juvenile court patently and unambiguously lacks jurisdiction to consider the validity of an acknowledgement-of-paternity affidavit, except in a rescission action under R.C. 3111.28. However, we hold that **the court below lacks jurisdiction because Walton's paternity case had been voluntarily dismissed. We therefore grant the writ on *that* basis**."

State ex rel. Walton v. Williams, supra, ¶2, (emphasis added).

Respondent might attempt to distinguish *Walton* by noting that the relator in *Walton* had initiated the underlying juvenile-court case whereas, here, relator Fischer was the defendant in the underlying action. But such a "distinction" only favors Fischer because the woman who originated the underlying action against Ms. Fischer voluntarily dismissed *her own* case under Civ. R. 41(A)(1) on August 8, 2022 by filing a notice stating as follows:

> Now comes Plaintiff, Jennifer A. Urbanski, by and through undersigned counsel, and hereby gives notice to this Honorable Court pursuant to Civ. R. 41(A) of her dismissal of all claims and motions currently pending before this Court without prejudice.

Complaint, ¶16; Answer, ¶16.

Then, as, respondent admits at ¶17 of his answer here, on August 9, 2022 respondent Judge Woessner issued his own order unmistakably stating:

> Plaintiff's Motion for Legal Custody is hereby **DISMISSED** without prejudice. The evidentiary hearing set for August 31, 2023 is hereby **VACATED**.

On the one hand, respondent didn't have to issue his August 9th judgment entry because Rule 41 dismissals are self-executing: "The notice of voluntary dismissal is self-executing and completely terminates the possibility of further action on the merits of the case upon its mere filing, without the necessity of court intervention." *State ex rel. Engelhart v. Russo*, 131 Ohio St.3d 137, 2012-Ohio-47, 961 N.E.2d 1118, ¶23. But the very fact that he did issue his own judgment entry contradicts respondent's insistence here that Rule 41 clearly doesn't apply. We know from *Walton* that it does apply, which is of course why respondent issued his August 9, 2022 order saying that the underlying matter was dismissed.

These August of 2022 dismissals entitled Fischer, the mother of a young daughter, to live her life as if the underlying custody action never existed or happened because, when an action has been dismissed without prejudice, "legally, that action is deemed to never have existed." *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶24. Stated differently, "When an action has been voluntarily dismissed, Ohio law treats the previously filed action as if it had never been

commenced." *Estate of Johnson v. Randall Smith, Inc*., 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶17.

The Wood county juvenile court local rule, Rule 7, that respondent cites in his motion for judgment on the pleadings must be understood in this context. The only logical reading of that rule is that it applies to pending—not dismissed—cases. Plus, any local rule is necessarily subservient to all of the civil rules.[2] *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 554, 597 N.E.2d 153, 155 (1992), ("local rules may not be inconsistent with any rule governing procedure or practice promulgated by this court, including the Rules of Civil Procedure. Any local rule is therefore enforceable only to the extent that it is consistent with the Civil Rules.") This matters here because the "plain import of Civ. R. 41(A)(1) is that once a plaintiff voluntarily dismisses all claims against a defendant, the court is divested of jurisdiction over those claims." *State ex rel. Fifth Third Mtge. Co. v. Russo*, *supra*, 129 Ohio St.3d 250, ¶17.

B. Respondent's reliance upon C.*H. v. O'Malley* is misplaced on a few levels.

Respondent relies upon the dissent in *O'Malley* for the proposition that Rule 41 doesn't apply in juvenile court.[3] Obviously, the majority disagreed and so respondent's

[2] Neither respondent's affidavit nor his contention that he filled out statistical reporting paperwork changes the Rule 41 analysis and neither is properly before this court on a Civ. R. 12(C) posture. *State ex rel. Leneghan v. Husted*, 154 Ohio St.3d 60, 2018-Ohio-3361, 110 N.E.3d 1275, ¶¶16-17.

[3] As discussed below in this brief, the underlying matter here is distinguishable from a typical custody dispute as the focus here is in fact not solely on the "best interests" standard as state court's generally cannot substitute their judgments for that of fit parents as to what is in a child's best interests.

reliance upon *O'Malley* is curious. Plus, the dissent in *O'Malley* actual urged granting a writ of prohibition in a case where one of the underlying parties—a putative biological father seeking custody from an adoptive mother—was absent from the prohibition action. *C.H. v. O'Malley*, 158 Ohio St.3d 107, 2019-Ohio-4382, 140 N.E.3d 589, ¶23, ("I would grant a writ of prohibition and order the Cuyahoga County Court of Common Pleas, Juvenile Division, to return custody of the child to his lawful adoptive mother."), (Kennedy and Stewart, J.J., dissenting). Under respondent's reasoning, the putative father's absence from the prohibition case would preclude this court from issuing a writ of prohibition respecting the underlying Cuyahoga county case. Obviously, the dissent in *O'Malley* does not buttress respondent's logic in this regard. If respondent were correct about who must be named in a prohibition action, then the *O'Malley* dissent would've actually *concurred* in the majority's denial of a writ.

But the truth is that neither the majority nor dissent in *O'Malley* had a problem with reaching the merits despite the fact that the relator in *O'Malley* did not name any private party as a respondent in that case. This highlights that no rule of law requires a relator in a prohibition action against a judge to name the underlying adverse party as a secondary respondent in order to unlock a merits determination in this court.

Finally, the relator in *O'Malley*—unlike Ms. Fischer here—inexplicably never argued that the "new motion" filed subsequent to the Rule 41 dismissal of the underlying case was itself a nullity. "Under the circumstances, it is apparent that this

case definitely calls for the application of the principle that a reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication." *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 131, 107 N.E.2d 206, 208 (1952). Thus, any contention that *O'Malley* precludes this court from issuing a writ prohibiting respondent from exercising jurisdiction with respect to the underlying "renewed motion" is a non-starter as this question wasn't passed upon or raised at the time of the adjudication in *O'Malley*.

C. Respondents other arguments actually underscore why this court should issue a writ or prohibition.

1. If respondent's emphasis that "any" person may sue relator or any other mother for custody is true, then it only illustrates the need for order in these types of cases.

Respondent's brief emphasizes that *any* person may sue a mother for custody. If so, then any person may also dismiss the action on the eve of trial, reinstitute it with a "renewed motion" without any meaningful new cost exposure to the complaining party, and thereafter recurrently hail the mother back into court—leaving her unable to rely upon any predictable process—with as many dismissals followed by "renewed motions" the person desires. Rule 41 prevents exactly this scenario. Just as the juvenile court patently and unambiguously lacked jurisdiction in *State ex. rel. Walton v. Williams*, supra, so too does respondent here. This court shouldn't change the effects of a Rule 41

dismissal on a case-by-case basis. By law, the outcome here should be the issuance of a writ of prohibition. And if a new underlying complaint is properly re-filed, then it can be dealt with in due course.

2. **The prohibition analysis doesn't hinge on whether the underlying complaining party could engage in the same discovery in the event of a proper refiling. Rather, any party contemplating employing Rule 41(A)(1) in the course of litigation must consider the consequences of dismissal—including having to restart totally from scratch in the event of a proper refiling—which oftentimes discourages dismissals in the first place while encouraging diligence from the outset.**

Relator argues that if a writ of prohibition may issue here, then the underlying complaining party could file a freestanding custody complaint and re-engage in discovery. So be it. For, even if this is true, it's wholly irrelevant to the issue of jurisdiction. Anyway, there's a major difference between exercising jurisdiction within a dismissed case, which is, legally speaking, treated as if it never existed, and the exercise of jurisdiction in a properly refiled new case. Courts should take things one step at a time. Until a new complaint is properly re-filed, respondent patently and unambiguously lacks jurisdiction. If a new complaint is filed, then the entire process must indeed start afresh—precisely because the previous case is treated as if it never existed—as this is simply a consequence of the original dismissal. Relatedly, respondent's contention that relator Fischer seeks a "redo" of the underlying case with a new lawyer omits that (a) there's no final order in the underlying case to "redo" and

(b) the complainant in the underlying matter is the party who switched lawyers and circumvented a looming trial date by, through her new lawyer, dismissing the first lawyer's complaint. Starting totally anew after filing a proper complaint is the cost of the benefit of being able to voluntarily dismiss a case in the first place. Respondent's observation that a litigant who dismissed a case could re-file and retake depositions or discovery is true in *every* voluntarily dismissal situation. Thus, the possibility that a party who dismisses an action may later file a new action is fundamentally immaterial.

If the possibility of a proper re-filing followed by discovery was somehow relevant, then all of the case law saying that a dismissed action is treated as if it never existed wouldn't make any sense.

On top of that, respondent's August 9, 2022 judgment entry plainly terminated the underlying matter and was never appealed by anyone. Respondent correctly viewed Civ. R. 41 as applying to the underlying action or else he wouldn't have entered his dismissal entry, but would've instead ruled that any attempted use of Rule 41 was a nullity. Instead, he dismissed the action. This un-appealed dismissal became the law of the underlying case, which must be treated as if it hadn't been brought.

A judge cannot "reacquire" jurisdiction of a voluntarily dismissed case: "A dismissal without prejudice leaves the parties as if no action had been brought at all." *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶20. And, contrary to respondent's brief, the problem isn't so much whether the same "case

number" *per se* was used; rather, no orderly or predictable process with finality exists if *any* nonparent may (a) sue to seek custody of child, (b) dismiss a case seeking custody of a child just before trial, and (c) later so easily reinstitute things by filing a "renewed" motion within the already dismissed, and thus legally nonexistent, case. Recall that Civil Rule 41(A) may only be taken advantage of once due to its clause stating that:

> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

If respondent is correct that Rule 41(A) doesn't apply, then this important limiting aspect of that rule is also inapplicable. Hence, a holding that Rule 41 doesn't apply would frustrate judicial economy in the long run as there could be infinite dismissals without procedural consequence, a point that could then be used as a litigation tactic by nonparents seeking custody. The better course is that, like any other voluntarily dismissed case, the entire process can only start anew—indeed, "from scratch"—with **one** fresh refiling. This serves several big-picture concerns.

For example, it discourages litigants from cavalierly dismissing cases, including those potentially affecting children, on the eve of trial, a tactic that can drain the other party's financial and emotional reserves; while simultaneously encouraging the optimal use of individual and judicial resources *in the first place*—i.e., pre-dismissal.

Because any complaining party knows that a dismissal results in the case being treated as if it had never been filed, this treatment must be weighed when considering

whether to dismiss. Changing this fundamental aspect of the law would upset the delicate real-world calculus that is routinely considered by litigants deciding whether or not to utilize Rule 41(A)(1). And so while an entirely new refiling might seem onerous in a particular given case, our broader legal system requires it for good, salutary reasons. And this is perhaps especially true in juvenile court—where Juv. R. 10(B)(3) has a special requirement that complaints be made "under oath." Here, the "renewed motion" that respondent relies upon for exercising judicial power was *not* under oath and thus does not even arguably satisfy Juv. R. 10(B)(3).[4]

3. Assuming for the sake of argument that the juvenile court has subject-matter jurisdiction, the underlying action would necessarily require the determination of hotly-contested and highly-adversarial threshold issues. Thus, the underlying premise of relator's argument, i.e., that the focus in the underlying case is only on "best-interests" standard, is fundamentally flawed.

Respondent's contention that the underlying action is not adversarial in nature because it strictly involves the "best interests" of the child overlooks the very case law that respondent relies upon to claim jurisdiction in the first place. That precedent, which should be reversed for reasons addressed below in this brief, says that, "Parents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents' right to custody of their

[4] In *O'Malley*, the custody motion filed in the underlying juvenile-court case after the Rule 41(A)(1) dismissal was at least made under oath, as the filer, the putative father, attached his own affidavit, which can be viewed on pages 9-10 of respondents' evidence in *O'Malley* on this court's docket in case 2018-1191.

children is paramount to any custodial interest in the children asserted by nonparents." *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, ¶11. For this reason, a mother may be denied custody "only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable…" *In re Perales*, 52 Ohio St.2d 89, 98, 369 N.E.2d 1047, 1052 (1977). In sum, a biological mother has a fundamental right to parent her child and hence cannot be forced by the machinery of state government to share custody unless there's a threshold finding of abandonment, contractual relinquishment of custody, a total inability to provide care or support, or unsuitability.[5]

The "interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court of the United States. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, 530 U.S. 57, 68–69. It is

[5] *See also*, *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971, ¶16, modified, 98 Ohio St.3d 1476, 2003-Ohio-980, 784 N.E.2d 709, ¶16, ("the overriding principle in custody cases between a parent and nonparent is that natural parents have a fundamental liberty interest in the care, custody, and management of their children. This interest is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution.")

hard to imagine a more adversarial and oppositional courtroom context than a mother litigating custody of her child versus a private party, nonparent.[6]

Consequently, the underlying case is unlike the typical custody dispute involving either unmarried or divorcing parents or abuse, neglect, and dependency cases initiated by an instrumentality of state government. On this note, and contrary to respondent's motion for judgment on the pleadings, all parties plainly viewed the underlying case as litigation between a "**plaintiff**" versus a "**defendant**" as this is how the underlying (a) complaint, (b) notice of voluntary dismissal, and (c) respondent's own dismissal entry of August 9, 2022 are all consistently captioned.

4. Respondent's treatment of *State ex. rel. Walton v. Williams* by analogizing to *In re A.B.* is unpersuasive.

On page seventeen of his brief, respondent recognizes the controlling general rule: A court loses jurisdiction "after a 41(A) voluntary dismissal under *State. ex. rel. Walton v. Williams*." But respondent then cites an intermediate appellate opinion, *In re A.B.*, for the proposition that Civil R. 41(A) isn't applicable. However, the juvenile-court complaint in *In re A.B.* wasn't initiated, as here, by a private litigant seeking private custody; rather, the Morrow County Department of Jobs & Family Services commenced an abuse, neglect, or dependency case. *Matter of A.B.*, 5th Dist. Morrow No. 2022CA0012, 2022-Ohio-4805, ¶2, ("On August 5, 2022, appellant Morrow County

[6] But if it is somehow non-adversarial, then respondent's argument that the absent underlying private party must be named in prohibition to represent her "interests" here makes even less sense.

Department of Job and Family Services filed a complaint of abuse, neglect, and dependency with regards to child A.B., who was born on November 23, 2021. The complaint was filed after a report was made by Nationwide Children's Hospital alleging the child suffered a non-accidental injury while in the parents' care.") It's this sort of claim that the *A.B.* court held wasn't subject to a Rule 41 dismissal. *Id.*, ¶17, ("Civil Rule 41(A)(1) is 'clearly inapplicable' to a dependency, neglect, or abuse case in juvenile court…") The *A.B.* court held that a dependency, neglect, or abuse claim brought by government may be dismissed only under Juv. R. 22(A), which requires court permission. *A.B.* is therefore inapposite. But it is useful to illustrate one point. Here, unlike the juvenile-court judge in *A.B.*, respondent admits that *he did in fact himself dismiss the underlying action* on August 9, 2022. So, this court should issue a writ of prohibition whether Juv. R. 22 or Civ. R. 41 applied to the underlying dismissal.

5. Lack of jurisdiction can be raised at any time—including as late as oral argument in the court of last resort.

Though there's been no final order in the underlying action, respondent implies that relator cannot be heard to complain in prohibition due to not raising a lack of jurisdiction earlier. Not so. When a lack of jurisdiction is raised is irrelevant, as this court has explained in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002, 1007 (1998):

> A jurisdictional defect cannot be waived. This means that the lack of jurisdiction can be raised at any time, even for the first time on appeal. This

> is because jurisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void. (cleaned up).

In fact, a lack of jurisdiction can be raised at oral argument in this court. *Cohen v. Karavasales*, 171 Ohio St. 46, 47, 167 N.E.2d 768, 769 (1960), ("The fatal question of jurisdiction of the subject matter is, of course, one that may be raised initially at any time in any court, as was done during the oral arguments in this case.") Here, even if respondent has statutory jurisdiction of the underlying case, which as explained below, he does not, this court should still issue a writ of prohibition due to the voluntary dismissal of the underlying action. The underlying complaining party's decision to dismiss the underlying case carried certain consequences, including divesting the juvenile court of jurisdiction it might otherwise have.[7]

II. This court's decision in *In re Bonfield* was wrongly decided in a case where both parties wanted the same result, but did not even advocate for the rationale that the *Bonfield* majority unilaterally adopted.

Relator points this court to her complaint and her contemporaneously filed memorandum in support and incorporates them by reference as this section of the brief will mostly respond to respondent's Rule 12(C) motion. That motion quotes a snippet

[7] It must be noted that the original underlying complaint sought alternative relief by asking the juvenile court to (1) "declare" the underlying claimant to be an actual "parent" and then grant custody after this threshold declaration, or (2) grant visitation" under R.C. 3109.051 which only applies to actual parents, whereas the subsequent (and invalid and unsworn/unverified) "renewed motion" abandoned any claim of custody or visitation premised upon parentage, which was the entire basis for the voluntarily dismissed complaint. Nonparents shouldn't be permitted to file complaints premised upon the idea that they are an actual parent, then dismiss the complaint, only to file a "renewed motion" within the same case asserting different theories.

from ¶45 of relator's complaint on page twenty of his motion for judgment on the pleadings and then says that relator "admits" that he respondent has statutory jurisdiction. But if this court reviews ¶45 and the surrounding allegations, it will see relator "admits" no such thing. The complaint of course recognizes the existence of the *Bonfield* decision, but then recites that (1) a juvenile court's jurisdiction flows from statutes passed by the General Assembly, not case law, and (2) no statute grants a juvenile court with jurisdiction over a nonparent's claim for shared custody of a fit mother's minor child. This is why relator argues that *Bonfield* ought to be overturned.

To be sure, the parties in *Bonfield*—who were not adverse, as they were united toward a common goal of shared custody—did *not* urge the interpretation of R.C. 2151.23(A)(2) ultimately reached by the majority in *Bonfield*. Rather, they parties in *Bonfield* both claimed to be "parents" for purposes of R.C. 3109.04. After rejecting this theory, the majority didn't stop there, as it should have.

Rather, it went on to say it would "examine" the *Bonfield* parties' "claim for shared parenting in the custody context" and concluded, without the benefit of any adversarial briefing at any court level, that "the juvenile court has jurisdiction to determine whether a petition for shared custody is appropriate." *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, ¶36. Of course, if R.C. 2151.23(A)(2) actually allowed for such a result, then the parties in *Bonfield* would've proceeded under that statute in the first place—and the trial and intermediate appellate courts in *Bonfield*

would not have dismissed the underlying petition in that case. Here is what the intermediate appellate court said in affirming the trial court:

> Although we have concluded that existing Ohio law does not permit Teri and Shelly to enter into a shared-parenting plan, we do not intend to discredit their goal of providing a stable environment for the children's growth. Our respect for such a goal does not, however, provide us with an appropriate basis for disregarding the relevant statutory language. It is for the legislature, not this court, to recognize a broader definition of "parent" than that currently contained in the Revised Code

In re Ray, 1st Dist. Hamilton No. C-000436, 2001 WL 127666, *3, aff'd in part, rev'd in part sub nom. *In re Bonfield*, 96 Ohio St.3d 218, 2002-Ohio-4182, 773 N.E.2d 507, opinion superseded on reconsideration, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241.

Obviously, the courts considering *Bonfield* prior to this court's decision in that case did not view Ohio law as allowing two women to explicitly agree to shared custody as if they were parents. It therefore makes no sense to say that the law enables a juvenile court to declare an implicit agreement existed.

A. Former Justice Cook's dissent in *Bonfield* was correct.

The majority's opinion in *Bonfield* was not nearly as predictable as respondent would suggest. Indeed, both the trial and appellate courts in that case found a lack of jurisdiction and the majority's decision was contemporaneously described as an "outcome-determinative decision" that was "motivated by sympathy to the plight of homosexual couples desiring legal recognition of their relationships with one another's children." *Embrey, In Re Bonfield: Are We There Yet? The Ohio Supreme Court's Journey*

Establishing Adoption & Custody Laws in Ohio, 32 Cap. U.L. Rev. 207, 235 (2003).[8] This issue is best left in the legislative branch of representative government. Relatedly, because *Bonfield* isn't necessarily limited to affecting same-sex couples, any parent's child is subject to a potential custody complaint. This has the potential effect of discouraging single parents from seeking loving relationships as engaging in, and exposing children to such relationships, may be later said to amount to an implicit relinquishment of sole custody. This is in tension with *Troxel*, supra, because who a parent exposes their children to is itself a quintessential exercise of constitutionally protected parental autonomy. It is odd to suggest that too much exercise of a protected right can lead to the waiver or dilution of that right. Further, where does *Bonfield* end?

For example, relator Fischer is now married; so at some point will her spouse have a judicially enforceable private claim to custody of Fischer's daughter? How many slices can the "custody pie" have when all agree that the child's parent is not unfit? Justice Cook properly recognized that Ohio statutory law did not allow the situation to extend beyond the biological parents.

When the statutory scheme is read together in harmony, it is evident that R.C. 2151.23(A)(2) cannot be read strictly in isolation. "Our goal in reading a text should be

[8] One court has implicitly recognized the unexpected nature of the *Bonfield* decision by saying, "Here, a *Bonfield*-type agreement was not available when S. LaPiana and J. LaPiana were born. *Bonfield* was decided in late 2002, at a time when LaPiana and Goodman were separated but still cooperating with one another regarding the children. And there is absolutely no evidence in the record that when a *Bonfield*-type agreement became a viable option, that LaPiana or Goodman knew about it." *In re LaPiana*, 8th Dist. Cuyahoga No. 93691, 2010-Ohio-3606, ¶43, as amended nunc pro tunc (Aug. 16, 2010)

"to discern literal meaning in context" and avoid a hyperliteral, 'viperine' construction that kills the text." *Gabbard v. Madison Local School Dist. Bd. of Education*, 165 Ohio St.3d 390, 2021-Ohio-2067, 179 N.E.3d 1169, (DeWine, Fischer, JJ., dissenting), quoting *Scalia & Garner, Reading Law*: *The Interpretation of Legal Texts* 40 (2012). The majority in Bonfield would kill off the import of R.C. 2151.23(F)(1), which must be given affect and states in mandatory language that, "The juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04, 3109.21 to 3109.36, and 5103.20 to 5103.28 of the Revised Code." This necessarily tethers back to R.C. 2151.23(F)(1).

Indeed, before *Bonfield*, this court actually emphasized that:

> This statute requires that 'the juvenile court *shall* exercise its jurisdiction in child custody matters *in accordance with sections 3109.04*, 3109.21 to 3109.36, * * * of the Revised Code.' Therefore, when a juvenile court makes a custody determination, it must do so "in accordance with R.C. 3109.04.

In re Poling, 64 Ohio St.3d 211, 216, 594 N.E.2d 589, 593 (1992): (italics supplied by *Poling* court), (cleaned up).

This understanding in *Poling* is consistent with how former Justice Cook aptly summarized the statutory scheme at ¶¶52-54 of her dissent in *Bonfield*:

> As the majority correctly notes, R.C. 2151.23(A)(2) provides that the juvenile court has exclusive original jurisdiction under the Revised Code "to determine the custody of any child not a ward of another court of this state." This statutory provision merely empowers a juvenile court to entertain custody determination actions; it does not, however, provide the enabling mechanism by which such actions come before the juvenile court. Instead, R.C. 2151.23(F)(1) dictates how a party invokes the juvenile court's R.C. 2151.23(A)(2) jurisdiction:

> The juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04, 3109.21 to 3109.36, and 5103.20 to 5103.28 of the Revised Code.

> Thus, it is R.C. 2151.23(F)(1), not (A)(2), that targets procedures by which a party can properly invoke the juvenile court's jurisdiction. Under the majority's reading of the statutory scheme, anyone could file for custody of any child simply by filing an "R.C. 2151.23(A)(2) motion." Yet the Revised Code generally limits the consideration of issues of custody/parenting of children to (1) circumstances of abuse, dependency, or neglect, see, generally, R.C. Chapter 2151; and (2) circumstances surrounding changes in the legal relationship of parents, such as divorce, legal separation, or annulment, R.C. 3109.04(A). By legislative choice, there must be a statutory trigger to invoke R.C. 2151.23(A)(2) jurisdiction.

This dissent would be extraordinarily ahistorical if a juvenile court's jurisdiction of non-parental complaints for custody was already truly well established in this state before *Bonfield*. Of course, Ohio had no such history; the cases cited by the majority in *Bonfield* as evidence of a such a supposed involved claims initiated by mothers as opposed to non-mothers seeking to split custody with an actual mother.[9]

Finally, R.C. 2151.23(F)(2) says that, "The juvenile court shall exercise its jurisdiction in child support matters in accordance with section 3109.05 of the Revised Code." If shared custody is awarded to a nonparent, what is the relevant statutory mechanism for either the nonparent or parent to seek child support? For R.C. 3109.05(A)(1) says that, "In a divorce, dissolution of marriage, legal separation, or child support proceeding, the court may order either or both parents to support or help

[9] *In re Perales*, supra, (claim brought by mother for return of daughter); *In re Torok*, 161 Ohio St. 585, 588, 120 N.E.2d 307, 309 (1954), (claim brought by mother).

support their children, without regard to marital misconduct." This cannot possibly apply to a nonparent versus parent situation. So, only the parent, Fischer, would be legally bound to support her daughter whereas the nonparent would not be subject to an order of child support. This incongruity once again suggests that R.C. 2151.23(A)(2) cannot be read without reference to R.C. 2151.23(F).

B. Respondent's contention that the General Assembly has implicitly approved the *Bonfield* majority's analysis is unpersuasive and overlooks a 2004 amendment to the Ohio constitution.

Subsequent legislative inaction tells us very little about the intent of the original drafters of the relevant, original statutory scheme, which, here, has been in effect since the 1960s or before—at a time in history when (a) *in vitro* fertilization was uncommon and (b) it was otherwise highly unlikely for policymakers to intend to enable a juvenile court to preside over a custody dispute involving a lesbian mother and her ex-girlfriend. Indeed, Antonin Scalia called vindication by subsequent legislative inaction a "canard." *Johnson v. Trans. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 672, 107 S.Ct. 1442, 1473, 94 L.Ed.2d 615 (1987), (Scalia, J., dissenting). And Felix Frankurter said it was akin to walking on "quicksand." *Helvering v. Hallock*, 309 U.S. 106, 121, 1940-1 C.B. 223, 60 S.Ct. 444, 452, 84 L.Ed. 604 (1940), ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.") To be sure, the

concept of "legislative acquiescence" has been severely criticized by all manner of respected scholars and jurists.[10]

That aside, subsequent legislative inaction would be more persuasive if the inaction occurred after to a judicial decision issued near in time to the enactment of the underlying legislation at issue. Here, *Bonfield* was decided many decades after the original drafters of R.C. 2151.23(A)(2) passed that statute. Inaction years later from an entirely new assembly of legislators, when many of the original drafters were already deceased, tells us nothing about the intent of the original drafters, which is the intent that matters. Regardless, Ohio voters overwhelmingly passed a citizens-initiated constitutional amendment in 2004, two years after *Bonfield*, saying in part that, "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. Article XV, Section 11.

[10] See e.g., *Honorable Amy Coney Barrett, Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case W. Res. L. Rev. 855, 866 (2020), ("there are several reasons why such an approach makes little sense"); *Barrett, Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 330 (2005), ("the notion that congressional silence following a judicial interpretation constitutes congressional acquiescence in it has been subject to a great deal of scholarly and judicial criticism"); *William Eskridge, Dynamic Statutory Interpretation 220* (1994) (analogizing the significance of legislative silence to Sherlock Holmes's "dog that did not bark"); *William N. Eskridge, Jr., Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 95 (1988), ("subsequent legislative history is highly unreliable and subject to strategic manipulation"); *Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES* 31-32 (1982). Accord, *Robinson v. Budget Rent-A-Car Systems, Inc*., 51 S.W.3d 425, 429 (Tex. App.2001), ("legislative action or inaction after a statute has taken effect is likely to be evidence of contemporary politics rather than prior legislative intent; thus, legislative history which comes after a statute is not necessarily indicative of the drafter's intent"), (cleaned up).

Implicit in the *Bonfield* majority's rationale was that the same-sex couple's relationship at issue in *Bonfield* merited recognition that approximated the design, qualities, significance, or effect of marriage. Again, the actual argument raised by the co-parties in *Bonfield* was that their committed relationship was akin to that of committed parents. *Bonfield*, ¶15, ("The specific issue is whether Shelly is a "parent" for purposes of R.C. 3109.04(A)(2).) After answering "no," the majority went on to reach a result *not* advocated by the parties by holding that a juvenile court may award shared custody to a same-sex couple under R.C. 2151.23(A)(2). In essence, the majority reached an outcome that it earlier in the opinion ruled that R.C. 3109.04(A)(2) didn't allow.

As for respondent's comment on page twenty-two of his brief about people's "dreams of raising children," this concern has nothing to do with the jurisdictional issue, but is "a social policy decision that should clearly be made by the General Assembly after full public debate and discourse, not by judicial legislation." *In re Bicknell*, 96 Ohio St.3d 76, 2002-Ohio-3615, 771 N.E.2d 846, ¶20 (Stratton, J., dissenting).

Ohio's electorate in 2004 essentially rejected the *Bonfield* approach. And while the Supreme Court of the United States' 2015 decision in *Obergefell v. Hodges*, 576 U.S. 644, 652, 135 S.Ct. 2584, 2593, 192 L.Ed.2d 609 has effectively nullified Art. XV, Sec. 11—a decision Fischer has availed herself to by now being married to another woman—the point is that the 2004 passage of Art. XV, Sec. 11 meant that the General Assembly didn't have to legislatively overrule *Bonfield*, as the people of Ohio had spoken at the

ballot box and effectively overruled it themselves. But even if not, it makes little sense to say that the same legislative era that had long banned same-sex marriage in Ohio did however intend to enable juvenile courts to award shared custody to an ex-girlfriend of a child's biological mother over the mother's strong objection.

Again, nothing in R.C. 2151.23(A)(2) that is limited to same-sex couples, for, if it were, the statute would likely violate equal protection. And because the statute isn't limited to same-sex couples, then this court's decision in *Bonfield* implicitly extends to anyone's children. This cannot possibly have been the legislative intent behind R.C. 2151.23(A) because, as then-Justice Cook observed in her dissent in *Bonfield*, that statute is narrowed or limited by the statutory caveats embedded within R.C. 2151.23(F)(1). Thus, while respondent is correct in that Ms. Fischer's complaint of course concedes that *Bonfield* exists, respondent omits the surrounding part of her complaint saying that what should govern is the actual statutory text. This court should overturn *Bonfield* because it is unfaithful to the all of the relevant text, which includes R.C. 2151.23(F)(1).

III. This court should grant leave to amend to add the underlying adverse party as a respondent in this case <u>if</u> this court deems her, a nonparent, to be a necessary party.

The Ohio constitution at Article IV, Section 2(B)(1)(d) grants this court original jurisdiction in prohibition. We are unaware of any rule requiring additional parties besides the judicial officer in question to be named as a respondent before this court can reach the merits of a prohibition case. However, relator will amend her complaint to

add an additional party if required. Everything else would remain the same; the only difference would be the addition of a third party who is not the object of the prohibition action. While relator believes this is unnecessary (she obviously otherwise would've named the third party if she believed it to be necessary), we ask for leave to amend out of an abundance of caution just in case this court agrees with pages 24 and 25 of the motion for judgment on the pleadings. That said, respondent's citation of *State ex rel. N.G. v. Cuyahoga Cty. Court of Common Pleas, Juvenile Div*., 147 Ohio St.3d 432, 2016-Ohio-1519, 67 N.E.3d 728 is curious given that the person whose motion to intervene in the prohibition action was denied at the intermediate appellate court level in *N.G.* was the mother of the child at issue in the underlying juvenile-court action. This court said that ***the mother's*** "fundamental constitutional right to make decisions concerning the care, custody, and control of her children" warranted reversal of the Eighth District's denial of the mother's motion to intervene. *Id*., ¶22. This court therefore remanded (but did not dismiss) the matter for a determination on the merits with the mother's participation. Here, the fundamental constitutional interest mentioned in *N.G.* is already accounted for because relator *is* the mother. Moreover, no other parties have sought to intervene.[11]

[11] This court has declined to require amendment in original actions where a potentially affected party is absent. See e.g., *State ex rel. Jones v. Husted*, 149 Ohio St.3d 110, 2016-Ohio-5752, 73 N.E.3d 463, ¶17, ("In his answer, Husted asserted the affirmative defense of failure to join necessary parties. Anticipating that Husted might argue that the county boards were necessary parties, the committee moved for leave to amend the complaint to add them, if necessary. The absence of the county boards has not become an issue, and we deny the motion as moot.")

CONCLUSION

This court should issue a writ prohibiting respondent from exercising jurisdiction in the underlying matter. Contrary to respondent's brief, this would be in the interests of parents raising their minor children.

Respectfully submitted,

Mayle LLC

/s/ Andy Mayle

CERTIFICATE OF SERVICE

On October 2, 2023, I emailed a copy of this brief to *jhoppenjans@woodcountyohio.gov* and *wdailey@woodcountyohio.gov*.

/s/ Andy Mayle