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GIROUX ET AL. *v.* COMMITTEE REPRESENTING THE PETITIONERS WITH RESPECT TO THE INITIATIVE PETITION PROPOSING AN AMENDMENT TO THE OHIO CONSTITUTION ENTITLED THE RIGHT TO REPRODUCTIVE FREEDOM WITH PROTECTIONS FOR HEALTH AND SAFETY ET AL.

[Cite as *Giroux v. Commt. Representing the Petitioners with Respect to the Initiative Petition Proposing an Amendment to the Ohio Constitution Entitled the Right to Reproductive Freedom with Protections for Health and Safety*, 2023-Ohio-2786.]

Challenge to initiative petition—Proposed constitutional amendment—R.C. 3519.01(A) does not require a petition proposing a constitutional amendment to include the text of an existing statute—Challenge denied.

(No. 2023-0946—Submitted August 9, 2023—Decided August 11, 2023.)

CHALLENGE under Article II, Section 1g of the Ohio Constitution.

Per Curiam.

{¶ 1} In this original action under Article II, Section 1g of the Ohio Constitution, relators, Jennifer Giroux and Thomas E. Brinkman Jr. (collectively, "Giroux"), challenge an initiative petition to place a proposed constitutional amendment on the November 7, 2023 ballot. Respondents in this case are the committee proposing the amendment and its individual members[1] (collectively, "the committee") and Secretary of State Frank LaRose. Because Giroux has not shown that Ohio law requires invalidation of the petition, we deny the challenge.

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1. The committee members are Nancy Kramer, Aziza Wahby, David Hackney, Jennifer McNally, and Ebony Speakes-Hall.

Background

{¶ 2} The people of Ohio have reserved to themselves the right to propose constitutional amendments by initiative petition. Ohio Constitution, Article II, Sections 1 and 1a. At issue here is a petition proposing a constitutional amendment titled "Right to Reproductive Freedom with Protections for Health and Safety." The full text of the proposed amendment reads:

> Be it Resolved by the People of the State of Ohio that Article I of the Ohio Constitution is amended to add the following Section:
>
> Article I, Section 22. The Right to Reproductive Freedom with Protections for Health and Safety
>
> A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
>
> 1. contraception;
>
> 2. fertility treatment;
>
> 3. continuing one's own pregnancy;
>
> 4. miscarriage care; and
>
> 5. abortion.
>
> B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
>
> 1. An individual's voluntary exercise of this right or
>
> 2. A person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.
>
> However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional

> judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.
>
> C. As used in this Section:
>
> 1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
>
> 2. "State" includes any governmental entity and any political subdivision.
>
> D. This Section is self-executing.

In *State ex rel. DeBlase v. Ohio Ballot Bd.*, 173 Ohio St.3d 191, 2023-Ohio-1823, 229 N.E.3d 13, this court denied a writ of mandamus to the relators who were seeking to force the Ohio Ballot Board to divide this same proposed amendment into multiple petitions.

{¶ 3} To qualify the proposed amendment for the November 7 ballot, the committee had to obtain signatures from a certain number of electors from at least half the counties in Ohio and file the signed petition with the secretary of state at least 125 days before the election. *See* Ohio Constitution, Article II, Sections 1a and 1g. The parties to this challenge agree that the committee has met these requirements. On July 25, the secretary of state certified that the petition contains enough valid signatures and that it otherwise satisfies Ohio law for placement on the ballot. The secretary declared that he will direct the boards of elections to place the proposed amendment on the November 7 ballot.

{¶ 4} On July 28, Giroux filed this challenge alleging that the petition does not comply with R.C. 3519.01(A), which provides that an initiative petition "shall include the text of any existing statute or constitutional provision that would be

amended or repealed if the proposed law or constitutional amendment is adopted." According to Giroux, the petition is invalid and may not be placed on the November 7 ballot, because it does not include the text of at least four existing statutes that would be amended or repealed by implication if the proposed constitutional amendment is adopted. The committee and the secretary of state do not dispute that the petition does not include the text of any existing statutes. Ohio Right to Life has filed a brief as amicus curiae urging this court to sustain Giroux's challenge.

{¶ 5} The secretary of state does not take a position on the merits of Giroux's challenge. But the committee argues that (1) this court lacks jurisdiction over this challenge pursuant to Article II, Section 1g of the Ohio Constitution, (2) R.C. 3519.01(A) does not require the text of any potentially implicated statutes to be included in the petition, (3) Giroux's reading of R.C. 3519.01(A) would render that statutory division unconstitutional, and (4) this action is barred under the doctrine of laches.

{¶ 6} Giroux has filed a motion for leave to file a letter from the attorney general to the secretary of state as rebuttal evidence. The committee opposes the motion, but the secretary of state takes no position on it. Under S.Ct.Prac.R. 12.06(B), a relator "may file a motion for leave to file rebuttal evidence within the time permitted for the filing of relator's reply brief." *See also* S.Ct.Prac.R. 14.01(C) ("In all challenge proceedings filed under this rule [addressing petition challenges], these rules shall govern the procedure and the form of all documents"). Giroux's motion was timely filed under S.Ct.Prac.R. 12.06(B). Because the evidence Giroux seeks to file is relevant to relators' response to one of the committee's arguments, we grant the motion.

Analysis

This court has jurisdiction

{¶ 7} Giroux invokes this court's jurisdiction under Article II, Section 1g of the Ohio Constitution, which provides that this court "shall have original, exclusive

jurisdiction over all challenges made to petitions and signatures upon such petitions *under this section*." (Emphasis added.) The committee argues that this court lacks jurisdiction over this case because Giroux's challenge is premised not on an alleged failure to comply with one of Article II, Section 1g's requirements but on an alleged failure to comply with R.C. 3519.01(A). The committee contends that this court's Article II, Section 1g jurisdiction does not extend to "this wholly statutory claim."

{¶ 8} According to the committee, Giroux is trying to use R.C. 3519.01(A) to expand this court's constitutionally defined jurisdiction. The committee invokes the well-established rule " 'that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution.' " *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 3, quoting *Smith v. State*, 289 N.C. 303, 328, 222 S.E.2d 412 (1976). But Giroux does not argue that R.C. 3519.01(A) expands this court's jurisdiction. Giroux argues that Article II, Section 1g gives this court original, exclusive jurisdiction over challenges alleging that a petition fails to comply with statutory law.

{¶ 9} The committee concedes that R.C. 3519.01(A) was passed under the authority of Article II, Section 1g of the Ohio Constitution, which authorizes the General Assembly to pass laws "to facilitate [the] operation" of Article II, Section 1g's provisions. In *Ohio Manufacturers' Assn. v. Ohioans for Drug Price Relief Act*, 147 Ohio St.3d 42, 2016-Ohio-3038, 59 N.E.3d 1274, ¶ 1, 8, this court exercised jurisdiction over a challenge brought under Article II, Section 1g alleging failures to comply with several statutes passed under that constitutional authority. Moreover, this court has held that a petition challenge under Article II, Section 1g " 'extends to *any* defect of the petition of such character as would render it insufficient to require submission to a vote of the electorate as provided by Section 1a, Article II.' " (Emphasis added.) *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 25, quoting *State ex rel. Schwartz v. Brown*, 32 Ohio St.2d 4,

10, 288 N.E.2d 821 (1972); *see also Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Commt.*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 N.E.3d 1139, ¶ 27 (sustaining a challenge under Article II, Section 1g based on a failure to comply with a statutory requirement). Accordingly, we conclude that Giroux's challenge here properly invokes this court's jurisdiction under Article II, Section 1g.

A petition proposing a constitutional amendment is not required to include the text of an existing statute

{¶ 10} Giroux argues that the petition does not comply with R.C. 3519.01(A), which provides, "A petition shall include the text of any existing statute or constitutional provision that would be amended or repealed if the proposed law or constitutional amendment is adopted." According to Giroux, the petition is invalid because it does not include the text of at least four existing statutes that relators say would be amended or repealed if the proposed constitutional amendment is adopted. We deny Giroux's challenge because R.C. 3519.01(A) does not require a petition proposing a *constitutional amendment* to include the text of an existing *statute*.

{¶ 11} A fair reading of a text requires evaluation of the context in which the words are written. *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, 124 N.E.3d 803, ¶ 9; Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("words are given meaning by their context"). R.C. 3519.01(A) must be evaluated in the context of Article II of the Ohio Constitution, which establishes two types of initiative petitions—those "proposing a law," Article II, Section 1b, and those proposing an "amendment to the constitution," Article II, Section 1a. R.C. 3519.01(A) implicitly recognizes that a "proposed law" potentially leads to a "statute" and a "proposed constitutional amendment" potentially leads to a "constitutional provision." Recognizing the natural pairings among these four terms is vital to understanding when R.C. 3519.01(A) requires the text of an existing statute or an existing constitutional provision to be included in a petition.

{¶ 12} To properly interpret R.C. 3519.01(A), we must also employ one of the canons of interpretation: the distributive-phrasing canon. " 'Where a sentence contains several antecedents and several consequents,' courts should 'read them distributively and apply the words to the subjects which, by context, they seem most properly to relate.' " *Facebook, Inc. v. Duguid*, 592 U.S. 395, 407, 141 S.Ct. 1163, 209 L.Ed.2d 272 (2021), quoting 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction*, Section 47.26 (7th Ed.Rev.2022); *see also* Scalia & Garner, *Reading Law* at 214 ("Distributive phrasing applies each expression to its appropriate referent"). In other words, when a sentence contains one set of terms that refers to another set of terms, each term in the first set should be paired with the individual term in the second set to which it most naturally relates.

{¶ 13} An illustration helps demystify this canon. Suppose an invitation states, "The vegetarian and nonvegetarian meal options are tofu and chicken." A reader would intuitively understand that tofu was the vegetarian option and chicken was the nonvegetarian option—not that either tofu or chicken was a vegetarian option. This is the distributive-phrasing canon at work.

{¶ 14} The canon applies similarly here. The text of R.C. 3519.01(A) contains two pairs of terms that allow for a coherent, one-to-one matching between the first set of terms—i.e. "existing statute or constitutional provision"—and the second set of terms—i.e. "proposed law or constitutional amendment." It is under these circumstances that "the distributive canon has the most force," *Encino Motorcars, L.L.C. v. Navarro*, 584 U.S. at 79, 87, 138 S.Ct. 1134, 200 L.Ed.2d 433 (2018). As we have explained, "existing statute" and "proposed law" are natural pairs. So too are "existing constitutional provision" and "proposed constitutional amendment." Thus, the natural reading of the statute is that a petition for a proposed constitutional amendment "shall include the text of any existing * * * constitutional provision," R.C. 3519.01(A)—not any existing statute—"that would be amended or repealed" by its adoption, *id.*

{¶ 15} This understanding of R.C. 3519.01(A) is bolstered by the problems inherent in the interpretation that Giroux asks us to adopt. Giroux asserts that R.C. 3519.01(A)'s use of the disjunctive "or" requires pairing all the terms, not just the most natural ones. Under Giroux's reading of R.C. 3519.01(A), "existing statute" must be paired with both "proposed law" and "proposed * * * constitutional amendment." The same would be true for "existing * * * constitutional amendment." It is true that "or" usually is disjunctive. *In re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, 950 N.E.2d 505, ¶ 18. But "statutory context can overcome the ordinary, disjunctive meaning of 'or.' " *Encino Motorcars* at 87. Employing the disjunctive meaning of "or" here leads to a nonsensical result, suggesting that a proposed law could amend or repeal a constitutional provision or that a constitutional amendment could amend or repeal a statute. Reading R.C. 3519.01(A) in the manner Giroux proposes is simply illogical. Applying the distributive-phrasing canon avoids this "contradiction in terms," *Huidekoper's Lessee v. Douglass*, 7 U.S. 1, 67, 2 L.Ed. 347 (1805).

{¶ 16} The fair and natural reading of R.C. 3519.01(A) does not require a petition proposing a constitutional amendment to include the text of an existing statute. Accordingly, the petition at issue here does not fail to comply with R.C. 3519.01(A).

Conclusion

{¶ 17} We grant Giroux's motion for leave to file rebuttal evidence.

{¶ 18} We deny Giroux's challenge under Article II, Section 1g of the Ohio Constitution because R.C. 3519.01(A) does not require a petition proposing a constitutional amendment to include the text of an existing statute. Because the challenge fails for this reason, we need not address the committee's remaining arguments.

Challenge denied.

KENNEDY, C.J., and DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

FISCHER, J., concurs in judgment only, with an opinion.

FISCHER, J., concurring in judgment only.

{¶ 19} I agree with the court's decision to grant the motion for leave to file rebuttal evidence filed by relators, Jennifer Giroux and Thomas E. Brinkman Jr. (collectively, "Giroux"), and to deny Giroux's challenge to an initiative petition to place a proposed constitutional amendment on the November 7, 2023 ballot. Because I would apply a different analysis in reaching the conclusion that the challenge must be denied, I respectfully concur in judgment only.

{¶ 20} Giroux argues that R.C. 3519.01(A) requires an initiative petition proposing a constitutional amendment to include the text of any existing statute that would be amended or repealed by implication if the proposed measure is adopted. According to Giroux, a statute is amended or repealed by implication when its provisions are clearly irreconcilable with a new constitutional provision.

{¶ 21} Since "amended" and "repealed" are not statutorily defined terms, this court must determine their ordinary meanings—that is, how they "would commonly be understood" in the context in which they are used, *State v. Allen*, 159 Ohio St.3d 75, 2019-Ohio-4757, 147 N.E.3d 618, ¶ 4. The ordinary meanings of "amend" and "repeal" foreclose Giroux's argument. To "amend" a statute is "[t]o change [its] wording" or "formally alter [it] * * * by striking out, inserting, or substituting words." *Black's Law Dictionary* 101 (11th Ed.2019). And to "repeal" is to "[a]brogat[e] * * * an existing law by express legislative act." *Id*. at 1553. Both terms refer to action that actually changes a written existing law.

{¶ 22} Rarely has this court even suggested that the adoption of a constitutional amendment could implicitly repeal an existing statute. *See Schwartz v. Cuyahoga Cty. Bd. of Revision*, 143 Ohio St.3d 496, 2015-Ohio-3431, 39 N.E.3d

1223, ¶ 23; *see also State ex rel. Evans v. Dudley*, 1 Ohio St. 437, 441 (1853). The standard phrasing is that an unconstitutional statute is "void." *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803) ("an act of the legislature, repugnant to the constitution, is void"); *State v. Medbery*, 7 Ohio St. 522, 528 (1857) (a law that is inconsistent with the Constitution "must be held unconstitutional and void"). Giroux errs in assuming that when a law becomes inoperative it also is repealed.

{¶ 23} Giroux argues that it is wrong to examine the terminology courts use in describing their adjudications because adopting a constitutional amendment is a legislative act that changes the law. But this argument is faulty. No one questions that an initiative petition is an attempt to exercise legislative power. *See* Ohio Constitution, Article II, Section 1. What matters here are the words of R.C. 3519.01(A). Giroux argues that this court has occasionally referred to the idea that a constitutional amendment could repeal an existing statute by implication. But the relative scarcity of those references suggests that the General Assembly did not have implied amendments and repeals in mind when passing R.C. 3519.01(A). This court will not insert language into that—or any other—statute.

{¶ 24} Giroux's brief also betrays the unworkability of the conclusion that relators ask this court to reach: Giroux asserts that the proposed amendment would create conflicts with "innumerable" existing statutes, specifically "[a]t least" the four that relators have identified. If Giroux cannot confidently say that relators have identified all the statutes that would be in conflict with the proposed constitutional provision, would-be proponents of constitutional amendments will not be able to either.

{¶ 25} For these reasons, I cannot approve of Giroux's reading of R.C. 3519.01(A). Because Giroux has not shown that the proposed constitutional amendment would amend or repeal any existing statute, I agree with the court's decision to deny the challenge but respectfully concur only in the court's judgment.

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McTigue & Colombo, L.L.C., Donald J. McTigue, and J. Corey Colombo; and Elias Law Group, L.L.P., Ben Stafford, and Tina Meng Morrison, for respondents Committee Representing Petitioners, Nancy Kramer, Aziza Wahby, David Hackney, Jennifer McNally, and Ebony Speakes-Hall.

Dave Yost, Attorney General, and Elizabeth Hanning Smith, Heather L. Buchanan, and Michael A. Walton, Assistant Attorneys General, for respondent Ohio Secretary of State Frank LaRose.

Michael Gonidakis, urging sustaining of the challenge for amicus curiae, Ohio Right to Life.
