

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. CITIZENS	:	
NOT POLITICIANS ET AL.,	:	Case No. 2024-1200
	:	
<i>Relators</i>	:	
	:	
v.	:	Original Action in Mandamus
	:	
OHIO BALLOT BOARD ET AL.,	:	Expedited Elections Case
	:	
<i>Respondents</i>	:	

**BRIEF OF AMICUS CURIAE BLACK EQUITY & REDISTRICTING FUND IN
SUPPORT OF RESPONDENTS OHIO BALLOT BOARD, FRANK
LAROSE, SENATOR THERESA GAVARONE AND WILLIAM MORGAN**

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INTRODUCTION

As the 44th President of the United States once infamously said,

*“You can put lipstick on a pig...
It’s still a pig.”*¹

Obviously, this case does not involve a pig, nor anything remotely close. But the rhetorical expression provides a fitting analogy to what this litigation is about. Relators desperately try to disguise their proposed constitutional amendment as something other than what it truly is; namely, a proposed constitutional amendment that will enshrine gerrymandering into Ohio’s constitution. Although Relators attempt to explain away that obvious conclusion, the truth is that their proposal will indeed require gerrymandering, and the Ballot Board has correctly made that fact clear in the certified ballot language it adopted for Ohio’s voters to see at the November 5, 2024 general election.

On August 16, 2024, the Ohio’s Ballot Board performed its constitutional responsibility of drafting ballot language that will accurately educate Ohio’s voters, in plain English, about Relators’ proposed constitutional amendment.² Even though it is factually accurate in every sense, Relators vehemently object to the language and instead profess the complete opposite – that it will somehow end gerrymandering in Ohio. Nothing could be farther from the truth.

If anyone is trying to mislead or deceive the voters of Ohio about what Relators’ proposed constitutional amendment does, it is Relators, not Respondents. Relators’ so-called “proportionality” requirement, which would take precedence over any other requirement in their

¹ “Raw Video: Obama's Lipstick Comment”, Associated Press, September 9, 2008, <https://youtu.be/XuizXVoY2bc?si=kVMqRIIdVqcp00vIK> (last accessed Sept. 2, 2024)

² The certified language can be found at https://www.ohiosos.gov/globalassets/ballotboard/2024/2024-08-16_certifiedballotlanguage_stateissue1.pdf

proposal other than compliance with federal law, would mandate that districts be drawn in a way that allocates a certain number of seats in the Ohio General Assembly and Congress to the Republican party and a certain number of seats for the Democratic party. Manipulating district lines in such a way that benefits one political party over another is textbook gerrymandering. Governor DeWine recognized this at his press conference on July 31, 2024, when he said the following:

If this amendment were to be adopted, Ohio would actually end up with a system that mandates -- that compels -- map drawers to produce gerrymandered districts. In fact, Ohio would have gerrymandering in the extreme.³

Nevertheless, Relators seek to persuade this Court (and the general public for that matter) that because Relators tell us that the amendment will “end gerrymandering,” then that is what it must do. Unfortunately, quite the opposite will happen. Gerrymandering will be enshrined into Ohio’s Constitution and the people of Ohio will just have to deal with it.

Black Equity & Redistricting Fund urges this Court to reject Relators’ challenge to the Ballot Board’s certified language for one other important reason: to protect black representation in Ohio. Within the last 2 years, Black representation decreased in Michigan’s legislature and its congressional delegation after Michigan’s newly created Independent Citizens Redistricting Commission racially gerrymandered urban districts all in the name of “partisan fairness.” Black Equity & Redistricting Fund does not want to see the same loss of black representation happen in Ohio that just happened in Michigan. Such representational losses will certainly occur though if Relators proposed constitutional amendment passes. That is why it is vital for Ohio’s voters to understand what Relators’ proposed constitutional amendment is actually designed to accomplish.

³ “As Prepared Remarks Governor Mike DeWin, Redistricting Press Conference, July 31, 2024”, https://content.govdelivery.com/attachments/OHIOGOVERNOR/2024/07/31/file_attachments/2952853/2024-07-31%20Redistricting%20Remarks%20as%20prepared.pdf (last accessed Sept. 2, 2024).

The Ballot Board's certified ballot language accurately does that, but if Ohio's voters do not get to see that language, they will be presented with what amounts to nothing more than a pig with lipstick. Ohioans deserve better; thus, Relators challenge to the language must be dismissed.

STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to S. Ct. Prac. R. 16.06, Black Equity & Redistricting Fund ("BERF") submits this brief as *amicus curiae* in support of Respondents Ohio Ballot Board, Secretary of State Frank LaRose, Senator Theresa Gavarone and Ballot Board member William Morgan (collectively, the "Respondents"). BERF is a non-profit organization founded to (1) advance a diverse corporate and civic leadership that includes African Americans, (2) ensure more black representation in urban centers densely populated by African Americans in accordance with the Voting Rights Act of 1965, as amended, and (3) bring awareness to policies, efforts and practices which undermine black representation in states across the country.

This case is of great importance to BERF. If this Court were to rule in favor of Relators, Ohioans will not get the chance to fully appreciate the detrimental impact that Relators' proposed constitutional amendment will have on black representation in Ohio. BERF was founded in response to the catastrophic experience Michigan went through over the past 3 years with their redistricting. Michigan's newly created Independent Citizens Redistricting Commission enacted state senate and house districts that a three-judge federal district court panel found to be racial gerrymanders in violation of the 14th Amendment to the U.S. Constitution. There, the record was "oceanic" in the amount of direct evidence that showed how district boundaries were drawn predominantly on the basis of race which was in part due to because of Michigan's "partisan fairness" redistricting criteria.

Michigan is clearly the template that Relators used to construct the constitutional amendment they now present in Ohio. BERF does not want to see Ohio have to endure what just

recently happened in Michigan. If the ballot language certified by the Ballot Board on August 16, 2024 is not presented to Ohio’s electorate, as is, the people of Ohio will not fully understand how the state’s black representation will likely be diminished.

STATEMENT OF FACTS

Black Equity & Redistricting Fund, as *amicus curiae*, defers to and incorporates the Respondents’ statement of facts in their Merit Brief.

LEGAL STANDARD

Ohio law is clear when it comes to challenges to ballot language summarizing a citizen initiated constitutional amendment. Article II, Section 1g of the Ohio Constitution empowers the Ballot Board with the responsibility of prescribing the ballot language for those amendments, and the Ballot Board must develop the language “in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of [the Ohio] constitution.” *State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Bd.*, 174 Ohio St.3d 285, 2023-Ohio-3325, ¶ 5, quoting Article II, Section 1g, Ohio Const. When doing so, the Ballot Board shall prescribe ballot language that “properly identif[ies] the substance of the proposal to be voted upon.” *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, ¶ 24, quoting Article XVI, Section 1, Ohio Const.)

“[T]he test for determining the validity of proposed ballot language is not whether the members of this court might have used different words to describe the language used in the proposed amendment, but, rather, whether the language adopted by the ballot board properly describes the proposed amendment.” *State ex rel. Bailey v. Celebrezze* (1981), 67 Ohio St.2d 516, 519 citing *State ex rel. Foreman, v. Brown* (1967), 10 Ohio St.2d 139, 150. The “sole issue is whether the board’s approved ballot language ‘is such as to mislead, deceive, or defraud the

voters.” *Ohioans United for Reproductive Rights*, 2023-Ohio-3325 at ¶ 41 (internal citations omitted).

When assessing ballot language under this standard, the Court considers “whether the language is improperly argumentative in favor of or against the issue.” *Ohioans United for Reproductive Rights*, 2023-Ohio-3325 at ¶ 42; see also *One Person One Vote*, 2023-Ohio-1928 at ¶ 8. “[I]f ballot language is factually accurate and addresses a subject that is in the proposed amendment itself, it should not be deemed argumentative.” *Ohioans United for Reproductive Rights*, 2023-Ohio-3325 at ¶ 44 (internal citations omitted). Even though relators may “not like the way in which the language is phrased ... the court will not deem language to be argumentative when it is accurate and addresses a subject in the proposed amendment. See *id.* at ¶ 46; see also *State ex rel. Cincinnati Action for Hous. Now v. Hamilton Cty. Bd. of Elections*, 164 Ohio St.3d 509, 2021-Ohio-1038, ¶ 26.

Here, the sole issue for this Court to decide is whether the August 16, 2024 ballot language misleads, deceives, or defrauds Ohio voters. The language does no such thing. Instead, it accurately explains to Ohio’s voters the various subjects in the Relators’ proposed amendment. Therefore, it is not argumentative, and just because Relators would rather use different words (i.e., their own handpicked words) to describe the language in their proposed amendment, doing so would be well beyond the Court’s responsibility because the Ballot Board’s August 16, 2024 ballot language accurately describes Relators’ proposed amendment.

ARGUMENT

I. The ballot language certified by the Ballot Board accurately explains to Ohio’s voters that Relators’ proposed amendment will require gerrymandering of legislative and congressional districts in Ohio.

What has become abundantly apparent in this litigation is that Relators are desperately

trying to prevent Ohio’s voters from knowing the truth about their proposed constitutional amendment on the ballot in November of this year. The essence of Relators’ argument is this: because they tell everyone that their proposed amendment prevents “partisan gerrymandering”, then they are right and everyone else, including the Ballot Board, is wrong. Unfortunately, Relators are the ones who are wrong, and who are misleading and deceiving the voters of Ohio, to believe that Relators’ proposed amendment will not force gerrymandering into Ohio’s constitution. As much as they try to argue that point, the plain language of their disastrous amendment dictates otherwise.

The word “gerrymandering” has received increased attention throughout the United States over the past couple decades. In reality, the concept is nothing new in this state or the country. The word originated back in 1812 after former Massachusetts Governor Elbridge Gerry, signed into law legislation that heavily favored his political party.⁴ One particular district was shaped like a salamander, and after a cartoonist drew wings on that district, the cartoon was widely reprinted over the years and the term “gerrymander” came to be.⁵

As interesting as that story may be, it does not provide any legal context to what the word means. Although the text of Relators’ proposed amendment includes the word “gerrymander”⁶, the amendment does not define it. Neither does the Ohio Revised Code nor any other authority in Ohio law. Consequently, one must turn to the Merriam Webster dictionary, which defines “gerrymandering” as “the practice of dividing or arranging a territorial unit into election districts in a way that gives one political party an unfair advantage in elections.”⁷ Knowing this, the

⁴ See “The Birth of the Gerrymander”, Massachusetts Historical Society, September 2008, <https://www.masshist.org/object-of-the-month/objects/the-birth-of-the-gerrymander-2008-09-01> (last accessed Sept. 2, 2024)

⁵ Id.

⁶ See RELATORS_016.

⁷ Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam->

question becomes whether Relators’ proposed amendment falls within this definition of gerrymandering? The answer is a clear “Yes”.

The centerpiece of Relators’ proposed amendment is a concept known as “proportionality”.⁸ That concept is superior to any other district drawing requirement in the proposed amendment, other than contiguity of districts and compliance with federal law.⁹ Notably, ¶ (B) states the following:

“[T]he statewide **proportion** of districts in each redistricting plan that **favors each political party shall** correspond closely to the statewide **partisan preferences of the voters of Ohio.**”¹⁰

That paragraph expressly requires that a specified number of districts favor the Republican party in Ohio, and a specified number of districts favor the Democratic party in Ohio. Consequently, when districts would be drawn under this proposal, the lines must be constructed in a particular way to ensure Republicans are favored in X number of seats, and Democrats are favored in Y number of seats. After applying this methodology to Merriam Webster’s definition of gerrymandering, Relators proposed amendment undoubtedly requires gerrymandering.

Recall the definition...“the practice of dividing or arranging a territorial unit into election districts in a way that gives one political party an unfair advantage in elections.”¹¹ Relators proposed amendment involves (1) a constitutionally required practice (2) of drawing election districts (3) in a way that gives Republicans a defined advantage in a certain number of seats and Democrats a defined advantage in a certain number of seats. There is only one conclusion that can be reached with that – Relators’ proposed amendment does indeed require gerrymandering.

webster.com/dictionary/gerrymandering (last accessed Sep. 2, 2024)

⁸ See RELATORS_016.

⁹ RELATORS_016 and 017 at ¶¶(A), (B) and (C).

¹⁰ RELATORS_016 at ¶(B)(emphasis added).

¹¹ Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gerrymandering> (last accessed Sep. 2, 2024)

That being so, this case is a straightforward application of this Court’s recent decision in *Ohioans United for Reproductive Rights*, 2023-Ohio-3325. Last year, this Court concluded that factually accurate ballot language that addresses a subject in a proposed amendment will not be deemed argumentative, and the Court will not disturb the Ballot Board’s language explaining that.¹²

In the end, Relators’ entire complaint is premised around their objections to the words the Ballot Board chose to describe Relators’ proposed amendment. Unfortunately for Relators those words are all correct. Their proposed amendment does indeed require gerrymandering and the case law in Ohio dictates that this Court should not disturb the Ballot Board’s language, when (as here), the language is accurate. As such, Relators request for mandamus must be denied.

II. The Attorney General’s certification in November of 2023 that Relators’ summary was a fair and truthful representation of the proposed amendment has no authoritative value on the Ballot Board’s constitutional responsibility of certifying accurate ballot language for Ohio’s voters.

Early in the process of citizens initiating a constitutional amendment in Ohio, those citizens must submit to the Attorney General the full text of the initiative, a summary of the initiative and the required 1,000 signatures.¹³ The Attorney General is then tasked with reviewing the *summary* of a petition submitted into the Attorney General’s office. If the Attorney General determines that the *summary* submitted is a fair and truthful statement of the proposed constitutional amendment”, then the Attorney General must certify that to the Ballot Board.¹⁴

Relators attempt to present a separate, novel argument to this Court for why the Ballot Board’s certified ballot language must be invalidated. Specifically, Relators argue that since the

¹² *Ohioans United for Reproductive Rights*, 2023-Ohio-3325 at ¶ 44 (stating how the “court will not deem language to be argumentative when it is accurate and addresses a subject in the proposed amendment.”).

¹³ R.C. §3519.01.

¹⁴ *Id.*

Attorney General certified Relators' petition *summary* as fair and truthful, then the Ballot Board lacked any authority to certify ballot language that is inconsistent with the Attorney General's conclusion.

Although novel, Relators' argument here is both unfounded and meritless. To begin with, nothing in the Ohio Revised Code or the Ohio Constitution requires the Ballot Board to conclude anything just because the Attorney General does, or vice versa. Instead, like the Attorney General under Art. III, Section 1 of the Ohio Constitution, the Ohio Ballot Board is a constitutionally distinct entity of state government under Art. XVI, Section 1 of the Ohio Constitution. Being constitutionally distinct offices, the Ballot Board and the Attorney General are not beholden to the other's decisions.

Next, while the Attorney General is tasked with reviewing the *summary* of a proposed constitutional amendment submitted to his office, the Ballot Board is separately tasked with drafting their own summary of a constitutional amendment for voters (here, Relators' amendment is 17 single spaced pages of text). Further, the Attorney General only has 10 days to review a petitioner's summary,¹⁵ while the Ballot Board has weeks, if not months, worth of time to analyze a proposed constitutional amendment. Finally, the Court has consistently held for decades that an attorney general opinion is not binding authority in this state, but instead is persuasive authority at best.¹⁶ Relators are grasping for straws in trying to suggest that the Ballot Board must reach the same decision the Attorney General does on an entirely separate question. Relators' argument here must be summarily rejected.

¹⁵ R.C. § 3519.01.

¹⁶ *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St. 3d 430, 2003-Ohio-4123; *Gen. Dynamics Land Sys., Inc. v. Tracy* (1998), 83 Ohio St.3d 500.

III. The gerrymandering required by Relators’ proposed amendment is likely to result in the same loss of black representation that Detroit experienced at the hands of Michigan’s new Independent Citizens Redistricting Commission.

Prior to 2018, redistricting in Michigan was the responsibility of the state legislature. At that time, Michigan had 11 majority-minority state house districts and 5 majority-minority state senate districts which districts were almost entirely in the Detroit area and which districts produced robust Black representation.¹⁷ In 2018, Michigan voters approved a constitutional ballot amendment that set new redistricting criteria (including a partisan fairness mandate) and transferred redistricting authority from the state legislature to an Independent Citizens Redistricting Commission. Mich. Const. art. IV, § 6. In what was later found to have been an odious racial gerrymander, the Michigan Independent Citizen’s Redistricting Commission adopted bizarre “spoke-like” districts which diluted the Black electorate by combining portions of predominately Black urban areas with larger portions of predominately White suburban areas. In total, the Michigan Independent Citizen’s Redistricting Commission adopted no majority-Black state senate districts and, only after a public outcry, six majority Black state house districts. As predicted, the subsequent 2022 elections resulted in diminished Black representation and a federal three-judgment panel had to intervene and order both the state house and senate maps to be redrawn.¹⁸

As already explained in this brief, BERF was formed to protect and enhance black

¹⁷ “Redistricting's effect on Black Representation in Michigan”, Michigan State University Institute for Public Policy and Social Research, College of Social Science, Dec. 9, 2022, <http://www.ippsr.msu.edu/public-policy/michigan-wonk-blog/redistrictings-effect-black-representation-michigan> (last accessed Sept. 2, 2024)

¹⁸ Even more astonishing is the damage done to Detroit’s black representation in Congress. After the Independent Commission adopted Michigan’s current congressional map, for the first time in almost 70 years, Detroit no longer has black representation in Congress. And it looks like that will continue to be the case in a city that has a black population of almost 80%.

representation in districts throughout the United States. BERF is gravely concerned that Relators' proposed amendment, if passed this November in Ohio, will lead to Ohio experiencing Michigan-like loss of black representation in the General Assembly and in its congressional delegation, which notably just added a third African American congresswoman (Rep. Sykes, OH-13) to the Ohio delegation in 2023. Consequently, this Court should reject Relators' request for a writ of mandamus so that Ohio's voters can see a factually accurate explanation of what Relators' proposed constitutional amendment is about.

CONCLUSION

As loud as Relators object to the Ballot Board's August 16, 2024 certified ballot language, Relators cannot avoid the reality that their proposed amendment would mandate gerrymandering into Ohio's Constitution. The ballot language accurately explains this fact, regardless of Relators professing otherwise. Such mandated gerrymandering will almost certainly result in the same disastrous maps that Michigan just dealt with, and a loss of black representation in the General Assembly and Ohio's congressional delegation. This Court should not placate Relators' attempt to trick Ohio's electorate into thinking otherwise. Instead, the Court should let the voters see the accurate ballot language that was certified by the Ballot Board. For all these reasons, Black Equity & Redistricting Fund respectfully requests that this Court deny Relators' request for a writ of mandamus, including any other requested alternative form of relief, and dismiss the Complaint in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2024, the foregoing was filed electronically using the Court's e-filing system. I further certify that the foregoing was served via electronic mail on:

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