In the Supreme Court of Ohio

STATE OF OHIO EX REL. CITIZENS NOT POLITICIANS, Case No. 2024-1200

CITIZENS NOT POLITICI

Original Action in Mandamus

Relators,

Expedited Elections Case

v.

AMICUS REPLY BRIEF OF JACK F. FUCHS, ESQ. IN SUPPORT OF

RELATORS

OHIO BALLOT BOARD, et al.,

•

Respondents.

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I. Amicus Statement of Interest

The undersigned is a voter and resident in Columbia Township, Hamilton County, Ohio. Columbia Township, which is the least populous township in Hamilton County, https://www.cincinnati.com/story/news/2024/08/24/what-are-the-most-populous-communities-in-hamilton-county-ohio/74217901007/, is divided between Ohio House Districts 27 and 28. Hamilton County is divided between Congressional Districts 1 and 8. The current partisan and racial gerrymandering of Columbia Township and Hamilton County diminishes the voting force of the undersigned.

II. Facts

The amicus adopts the statement of facts in Relators' Merits Brief.

III. Respondents' Merits Brief Accurately States the Applicable Standard

In their Merits Brief, Respondents provide the following statement of the standard applicable to Relators' challenge of the Ballot Language adopted by the Ohio Ballot Board:

To answer whether the Ballot Language properly describes the proposed amendment, this Court has devised a three-step test. "First, a voter has the right to know what it is he is being asked to vote upon." *Bailey* [v. Celebrezze, 67 Ohio St.2d 516,] at 519 [(1981)] (citing State ex rel. Burton v. Greater Portsmouth Growth Corp., 7 Ohio St.2d 34, 37 (1966)). Second, the Ballot Board is prohibited from using language that is "in the nature of a persuasive argument in favor of or against the issue" Id. (quoting Beck v. Cincinnati, 162 Ohio St. 473, 474-475 (1955)). Third—and generally dispositive—"is whether the cumulative effect of these technical defects [in ballot language] is harmless or fatal to the validity of the ballot." Id. (quoting State ex rel. Williams v. Brown, 52 Ohio St.2d 13, 19 (1957), and citing Sinking Fund, 167 Ohio St. 71 (1957)).

Consistent with the original understanding of the Ballot Board's watchdog role in Ohio's citizen-initiative process, "[i]n order to pass constitutional muster, '[t]he text of a ballot statement ... must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected." *Id.* (quoting Markus v. Trumbull Cty. Bd. of Elections, 22 Ohio St.2d 197 (1970), at paragraph four of the syllabus).

Respondents' Merits Brief at 5. Contrary to Respondents' assertions, the Ballot Language fails each of the three identified steps so that the Ballot Language fails to "fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected."

IV. Respondents' Brief Misapplies the Applicable Standard to the Ballot Language

A. Paragraph 1 of the Ballot Language Fails to "fairly and accurately present the question or issue to be decided"

Despite Respondents' protestations, Paragraph 1 misstates what voters are being asked to vote on, uses language designed to persuade voters to vote no on Issue 1, and prejudicially misleads voters as to Issue 1.

Paragraph 1 of the Ballot Language provides, in full, that the Amendment proposed as Issue 1 would:

Repeal constitutional protections against gerrymandering approved by nearly three quarters of Ohio electors participating in the statewide elections of 2015 and 2018, and eliminate the longstanding ability of Ohio citizens to hold their representatives accountable for establishing fair state legislative and congressional districts.

Relators_034 (emphasis added). The Ballot Language simply ignores the opinion of now-Chief Justice Kennedy in *League of Women Voters v. Ohio Redistricting Comm'n* ("*League 1*"), 167 Ohio St. 3d 255, 2022-Ohio-65, 192 N.E.3d 379, ¶ 189 (Kennedy, J., dissent), that the 2015 and 2018 amendments to the Ohio Constitution provide **no** protection or safeguard as to the political and racial gerrymandering that Issue 1 is designed to address:

Article XI is explicit in detailing this court's authority. Article XI, Section 9(D)(3) provides that "[i]f the supreme court of Ohio determines that a general assembly district plan adopted by the commission does not comply with [the neutral map-drawing criteria

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¹ Then-Chief Justice Maureen O'Connor, one of the principal proponents of Issue 1, was part of the majority in League 1. Then-Justice Kennedy's decision can be inferred to be today's effective majority opinion given the change in the Supreme Court's makeup.

provided in] Section 2, 3, 4, 5, or 7," it may invalidate the plan in whole or in part. Conspicuously absent from this list of violations for which this court may invalidate a plan—a list that includes all the neutral map-drawing requirements and constitutional and federal statutory protections for voter rights—is the failure to meet the directives set forth in Article XI, Section 6 relating to attempts to avoid partisan favoritism and to create a statewide proportion of districts that closely corresponds to the statewide preferences of Ohio voters.

(Emphasis added). In ruling on whether the Ballot Language misstates Issue 1, this Court must determine anew whether then-Justice Kennedy's analysis that the 2015 and 2018 amendments provide no constitutional **protections** from partisan (and racial) gerrymandering, but only an aspirational prohibition without an enforcement mechanism, is correct.²

More clearly this Court identified the absence of any legal protection from political and racial gerrymandering provided by the 2015 and 2018 amendments when it addressed a challenge to the current gerrymandering for the **sixth** time:

 $\{\P 5\}$ The September 2021 plan was adopted by a five-to-two vote of the commission, with both Democratic members of the commission opposed to it. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379, \P 24 ("League I"). This court invalidated the September 2021 plan, finding that it did not comply with Article XI, Sections 6(A) and 6(B) of the Ohio Constitution. *Id.* at \P 2, 135, 138. In addition, we ordered the commission to be reconstituted and to adopt a new plan in conformity with the Ohio Constitution. Id. at \P 138. We also retained jurisdiction for the purpose of reviewing the new plan. Id. at \P 139.

{¶ 6} In four subsequent cases, this court invalidated plans adopted by the commission in response to this court's decisions. League of Women Voters of Ohio v. Ohio Redistricting Comm., 168 Ohio St.3d 28, 2022-Ohio-342, 195 N.E.3d 974, ¶ 67 ("League II"); League of Women Voters of Ohio v. Ohio Redistricting Comm., 168 Ohio St.3d 309, 2022-Ohio-789, 198 N.E.3d 812, ¶ 2 ("League III"); League of Women Voters of Ohio v. Ohio Redistricting Comm., 168 Ohio St.3d 374, 2022-Ohio-1235, 199 N.E.3d 485, ¶ 2 ("League IV"); League of Women Voters of Ohio v. Ohio Redistricting Comm., 168 Ohio St.3d 522, 2022-Ohio-1727, 200 N.E.3d 197, ¶ 5 ("League V"). Each time, the plan that this court reviewed had not been passed with bipartisan support. In each case, we ordered the commission to be reconstituted and to adopt a new plan in conformity with the Ohio Constitution. League II at ¶ 67; League III at ¶ 44; League IV at ¶ 78; League V at ¶ 5. As in League I, we retained jurisdiction for the limited purpose of reviewing the new plans

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² The definition of "protection" is "the act of protecting or state of being protected." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/protection.

adopted by the commission. See League II at \P 68; League III at \P 45; League IV at \P 79; League V at \P 6.

 $\{\P\ 7\}$ In the last of this court's decisions, the commission was ordered to submit a new plan by June 3, 2022. League V at \P 6-7. The commission did not submit a new plan by that date. Instead, by order of the federal district court in *Gonidakis v. LaRose*, 599 F.Supp.3d 642 (S.D.Ohio 2022), the plan that this court had found unconstitutional in *League III* was used for the 2022 election. *Gonidakis* at 678-679; see League V at \P 2.

League of Women Voters of Ohio v. Ohio Redistricting Comm., 2023-Ohio-4271, ¶¶ 5-7 (per curiam) (emphasis added). The first five iterations of this Court's review of the challenges to political and racial gerrymandering under the 2015 and 2018 amendments resulted in orders finding the redistricting plans to be unconstitutional. The unconstitutional plans were implemented in the 2022 elections despite their undue partisan and racial gerrymandering. It is patent that regardless of what the 2015 and 2018 amendments may purport to prohibit, they provide no legal or constitutional **protection** from undue partisan and racial gerrymandering.

The history of partisan gerrymandering in Ohio since 2018 demonstrates that the 2015 and 2018 amendments provide no constitutional protection, as opposed to precatory or unenforceable aspirational prohibitions, as to partisan and racial gerrymandering. Despite a 54% Republican to 46% Democratic voting breakdown, both chambers of the General Assembly have a Republican supermajority that does not reflect votes. In 2022, few State Senate seats were contested. No Democrat ran in Districts 1, 5, 29 and 31; no Republican ran in District 15. Only a few districts were competitive. Wilkinson, *Analysis: Ohio Republicans finally have what they want: Total control*, https://www.wvxu.org/politics/2023-09-29/analysis-ohio-republicans-finally-have-total-control (Sept. 29, 2023).

No less pointedly, the congressional maps drawn under the 2015 and 2018 Amendments both diluted Democratic and African Americam voting influence in drawing the First and Eighth Congressional Districts. Rather than applying compact regional principles as to Hamilton County,

Ohio, the election map reflected partisan (and racial) gerrymandering. In the 2022 and 2024 elections, the applicable maps assign the city of Cincinnati, which has elected a Democratic mayor and council, and is approximately 39.6% African Americam,³ to Ohio's First Congressional District, joining it with Warren County, Ohio, which is less than 4% African Americam.⁴ The General Assembly assigned Forest Park, Ohio, the second largest city in Hamilton County, Ohio, which is approximately 55% African Americam,⁵ to Ohio's Eighth Congressional District. By divvying up Hamilton County, Ohio, the General Assembly's gerrymandering diluted African American voting power, a result ignored in the amicus brief filed by the Black Equity and Redistricting Fund in support of Respondents.

Simply put, the Ballot Language falsely asserts that the 2015 and 2018 amendments created constitutional **protections** from partisan and racial gerrymandering and that Issue 1 will repeal them. Given that the gerrymandering 2015 and 2018 amendments have been treated as merely "aspirational" and not mandatory by this Court and the Redistricting Commission, there are no constitutional protections from partisan and racial gerrymandering in the 2015 and 2018 amendments to be repealed. As a result, the Ballot Language misrepresents Issue 1, is argumentative in a way designed to mislead voters, and fails "to fairly and accurately present the question or issue to be decided," but rather is crafted to prevent "a free, intelligent and informed vote by the average citizen affected." This Court should reject Paragraph 1 of the Ballot Language

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³ See https://www.census.gov/quickfacts/fact/table/cincinnaticityohio/POP645222.

⁴ See https://www.census.gov/quickfacts/fact/table/warrencountyohio,US/PST045222#:

^{~:}text=75.5%25%20Black%20or%20African%20American,alone%2C%20percent%20%28a%2 9%20%EE%A1%80%20%EE%A0%BF%203.8%25.

⁵ See https://data.census.gov/profile/Forest_Park_city,_Hamilton_County,_Ohio?g= 060XX00US3906127706#race-and-ethnicity

and direct the Ballot Board to adopt Petitioners' language which the Attorney General has determined to be a fair statement.

B. Paragraph 2 of the Ballot Language Fails to "fairly and accurately present the question or issue to be decided"

Paragraph 2 of the Ballot Language also fails to pass constitutional muster. That paragraph provides, in full, that the Amendment would:

Establish a new taxpayer-funded commission of appointees required to gerrymander the boundaries of state legislative and congressional districts to favor either of the two largest political parties in the state of Ohio, according to a formula based on partisan outcomes as the dominant factor, so that:

- A. Each district shall contain single-member districts that are geographically contiguous, but state legislative and congressional districts will no longer be required to be compact; and
- B. Counties, townships and cities throughout Ohio can be split and divided across multiple districts, and preserving communities of interest will be secondary to the formula that is based on partisan political outcomes.

Relator_034. Two simple points. First, the language misrepresents the activity proposed by Issue 1 as partisan gerrymandering. Second, as detailed above, the current situation allows cities, townships and counties to be split and divided across multiple districts and preservation of communities of interest are regularly disregarded to maximize one party's representation in the General Assembly and in Congress.⁶ The Ballot Language not only misleads voters by suggesting that current law is changing, but seeks a particular outcome based on that misrepresentation.

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⁶ The undersigned resides in Columbia Township G precinct in Hamilton County, Ohio. Although the undersigned is in House District 26, other Columbia Township precincts are in House District 27.

C. Paragraph 4 of the Ballot Language Fails to "fairly and accurately present the question or issue to be decided"

Paragraph 4 of the Ballot Language states that the Amendment would "[p]revent a commission member from being removed, except by a vote of their fellow commission members, even for incapacity, willful neglect of duty or gross misconduct." Relators_034. As worded, the Ballot Language implies that a commission member cannot be removed "even for incapacity, willful neglect of duty or gross misconduct." "[I]t is common sense," *Berkheimer v. REKM, LLC*, 2024 Ohio 2787, ¶ 23, that use of the double negative to describe what the Commission can do is both misleading and argumentative. The affirmative statement that "by a vote of their fellow commission members, a commission member may be removed for incapacity, willful neglect of duty or gross misconduct, among other reasons" is neither misleading nor argumentative. This Court should require new Ballot Language that is not designed to mislead voters as to Issue 1.

D. Paragraph 8 of the Ballot Language Fails to "fairly and accurately present the question or issue to be decided"

Paragraph 8 of the Ballot Language misstates that Issue 1 would "[l]imit the right of Ohio citizens to freely express their opinions to members of the commission or to commission staff regarding the redistricting process or proposed redistricting plans." Relators_035-036. In fact, Issue 1 merely sets the means for voters to express such communications in order to avoid undue or illegal influence: "[c]ommissioners and commission staff ... shall not communicate with any outside person about the redistricting process or redistricting plan outcomes **other than through designated public meetings or official commission portals**." Relators_014 (emphasis added). Issue 1 does not "[l]imit the right of Ohio citizens to freely express their opinions to members of the commission or to commission staff regarding the redistricting process or proposed redistricting plans," but rather prescribes in a neutral manner the time, place and manner by which those

communications are to be made. As a result, this Court should require new Ballot Language that is not designed to mislead voters as to Issue 1.

V. Conclusion

Each of the misstatements and misleading wordings identified above renders the Ballot Language flawed under this Court's precedent. Even worse, they have a cumulative effect such that the Ballot Language misleads Ohio voters as to the substance of Issue 1. This Court should require the Commission to prepare Ballot Language that is not inaccurate and misleading.

Respectfully submitted,

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Certificate of Service

I hereby certify that each of the counsel who have appeared in this case were served via email with this reply amicus brief on September 5, 2024.

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