IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* Citizens Not Politicians, *et al.*, **Relators,** **v.** **Ohio Ballot Board, *et al.*,** **Respondents.**	**Case No. 2024-1200** Original Action in Mandamus Pursuant to Article XVI, Section 1 of the Ohio Constitution Expedited Election Case Pursuant to Supreme Court Rule of Practice 12.08 Peremptory and Alternative Writs Requested

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INTRODUCTION

Political accountability matters. The Amendment seeks to establish a citizen-driven redistricting process, free from domination by self-interested politicians, that operates openly and with accountability to Ohio citizens. In Relators' view, this would be a vast improvement over current law, where those responsible for redistricting are not accountable to Ohio voters and have manipulated the process to entrench themselves and their partisan allies in power.

But at issue in this lawsuit is a second kind of accountability. This Court must decide whether the Ballot Board and the Secretary of State will be held accountable to their obligation to adopt ballot text that fairly and accurately represents a citizen-initiated ballot measure, or whether they have free rein to adopt language and a title that are plainly designed to persuade against the Amendment. Respondents' merit brief is an exercise in linguistic hair-splitting and sophistic arguments that the ballot language and title are technically accurate. These arguments are not correct—both are plagued by misleading content and material omissions. But even more to the point, Respondents scarcely attempt to deny that the text is crafted in attempt to persuade voters to reject the Amendment. Indeed, the Argument prepared by opponents of the Amendment mirrors the ballot language by the Ballot Board.[1] Such language and title fail constitutional muster.

The Court should hold the Ballot Board and Secretary LaRose accountable to the legal standards that govern their conduct and protect Ohio voters' right to cast an informed ballot free from improper influence. It should issue writs of mandamus directing prescription of lawful ballot language and a lawful ballot title; and it should further retain jurisdiction and render any and all further orders that the Court may deem necessary.

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[1] *Argument Against Issue 1*, Ohio Works, https://www.ohiosos.gov/globalassets/ballotboard/2024/issue-1-against-arguments---ohioworks.pdf (last accessed Sept. 5, 2024).

ARGUMENT

I. The ballot language prescribed by the Ohio Ballot Board violates Ohio law.

The theme of Respondents' brief is that, so long as they can cobble together an argument that ballot language is technically accurate, they have "discretion" to adopt whatever language they wish. (Resp'ts' Merit Br. at 4). They support their argument with fragments of statutory text that excise language showing they are wrong. For example, they quote Section 3505.062(B) of the Ohio Revised Code as requiring them only to "identify 'the substance of the proposal to be voted upon.'" *Id.* at 5, quoting R.C. 3505.062(B). But the provision reads, in relevant part: "The Ohio ballot board shall . . . [p]rescribe the ballot language . . . which [] shall **properly** identify the substance of the proposal to be voted upon." (Emphasis added.) R.C. 3505.062(B); *accord* Ohio Const., art. XVI, § 1. To be "proper" ballot language, "'[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**.'" (Emphases added and alteration in original.) (Resp'ts' Merit Br. at 5), quoting *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 519 (1981). And the test formulated by this Court requires that the Ballot Board craft language: (1) that allows "a voter . . . to know what it is he is being asked to vote upon"; (2) that does not include "language which is in the nature of a persuasive argument in favor of or against the issue"; and (3) whose cumulative technical defects, if any, are "harmless . . . to the validity of the ballot." (Cleaned up.) *Bailey*, 67 Ohio St.2d at 519. Ballot language "need not contain the full text of the proposal," R.C. 3505.06(E), but any summary must be a fair and truthful representation. Ballot language is defective if it is inaccurate *or* impermissibly persuasive.

A. Inaccurate ballot language is not a fair and truthful representation.

Where ballot language, as here, "tells voters" something other than "what they are being asked to vote on," it goes beyond "impermissible[] . . . persuasive argument . . . against the issue."

State ex rel. One Person One Vote v. Ohio Ballot Bd., 2023-Ohio-1928, ¶ 8 (per curiam). Inaccurate ballot language cannot "properly identify the substance of the proposal to be voted upon" and serves only "to mislead, deceive, or defraud." Ohio Const., art. XVI, § 1.

1. Paragraph 2 falsely claims that the new Ohio Citizens Redistricting Commission would be "required to gerrymander."

Respondents spill much ink to attempt to justify paragraph 2 of the ballot language. It is clear why attempting to defend this aspect of the ballot language is such a Herculean labor. The Amendment expressly sets forth standards "[t]o ban partisan gerrymandering and prohibit the use of redistricting plans that favor one political party and disfavor others." (RELATORS_016 at Sec. 6(B)). Yet Respondents now ask the Court to bless ballot language that says the opposite—that the Amendment would "require" gerrymandering and favoritism of "either of" the two major political parties. (RELATORS_034 ¶ 2). Respondents attempt to defend the indefensible.

First, the ballot language cannot be squared with the petition summary certified by the Attorney General, who certified the summary as "fair and truthful" in stating that the Amendment would "ban" partisan gerrymandering. As Respondents would now have it, "[t]he Attorney General ***did not*** certify that the Amendment would actually do what Relators professed, only that they had accurately summarized their own proposed amendment." (Emphasis in original.) (Resp'ts' Merit Br. at 15). But this is in and of itself an admission. Under Ohio law, the Attorney General first must certify that the summary "is a fair and truthful statement of the proposed law or constitutional amendment." R.C. 3519.01(A). Later, the Ballot Board must adopt ballot language that "fairly and accurately present the question or issue to be decided." *State ex rel. Voters First v. Ohio Ballot Bd.*, 2012-Ohio-4149, ¶ 29, quoting *Bailey*, 67 Ohio St.2d at 519. This is nearly word-for-word the same standard. There is no basis for concluding that a summary that says the Amendment would "ban" partisan gerrymandering is "fair and truthful," but ballot language that

says the amendment would "require" partisan gerrymandering "fairly and accurately" represents the ballot measure. For the standards to operate in conjunction, it cannot be that the Attorney General can certify language that voters may rely on in signing the petition for a proposal that is fundamentally contradictory to language the Ballot Board presents to voters when they cast their votes on the same proposal. At its core, Respondents' argument is that they are not limited to accurately summarizing the provisions of the presented amendment. Rather, the Ballot Board seeks to aggrandize to itself a new power to look beyond the "face" of a proposed amendment and adopt language stating as fact their opinion about what they believe a proposed amendment would *really* do. (Resp'ts' Merit Br. at 15–16). They cite no authority supporting that new claim of power.[2]

Next, the description of the partisan fairness provisions of paragraph 2 cannot be squared with the description in paragraph 1 of existing Article XI. Paragraph 1 states that the Amendment would "[r]epeal constitutional protections against gerrymandering." (RELATORS_034 at ¶ 1). And yet, the current provision requires that state legislative districting plans be drawn such that:

> (A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party.
>
> (B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.

Ohio Const., art. XI, § 6. This provision requires the existing Commission to consciously attempt

[2] Further, the Ballot Board's language betrays basic misunderstandings of the Amendment's operation, casting doubt on their ability to fairly and truthfully describe it. For example, they claim that the Amendment "*requires* that the 'First Major Party' . . . be favored in the largest number of districts in any redistricting plan adopted by the commission." (Emphasis in original.) (Resp'ts' Merit Br. at 16). But the "First Major Party" is the party whose gubernatorial candidate received the most votes in the last election. (RELATORS_022 at Sec. 11(C)). The partisan fairness provision provides that Ohioans' partisan preferences calculated based on a six-year timeframe.(RELATORS_016 at Sec. 6(B)(3)). Thus, the "Second Major Party" could be favored in the largest number of districts if it had relatively more success over the last six years. *Id.* at Sec. 6(B)(2)(a).

to draw general assembly plans where districts' partisan composition closely corresponds with statewide voting preferences. Meanwhile, the Amendment's text provides, nearly identically, that:

> To ban partisan gerrymandering and prohibit the use of redistricting plans that favor one political party and disfavor others, the 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.

(RELATORS_016 at Sec. 6(B)). If the former is a protection against gerrymandering, Respondents fail to explain how the latter's nearly word-for-word reproduction of the existing provision "require[s]" the new Commission "to gerrymander." (RELATORS_034 ¶ 2). It is fundamentally misleading and would defraud voters if the Ballot Board can wield the term "gerrymandering" against the Amendment's requirements while describing the same basic requirements in existing Article XI as a protection against gerrymandering. *See also infra* Section I.B.1. Notably, Relators made this point in their merit brief. *See* (Relators' Merit Br. at 18–20). Respondents implicitly concede the point by offering no response.

The above are reasons to reject use of the term "gerrymandering" in the ballot language regardless of what precisely that term means. Turn now to what Respondents and their various *amici* would have this Court believe—that *any* consideration of political factors in redistricting, even to *correct* a prior redistricting plan rigged to favor one party over the other, is gerrymandering. Respondents' new definition of "gerrymandering" cannot be squared with this Court's own recent jurisprudence regarding that term. The Court, in describing the similar provisions of Article XI, spoke approvingly of provisions aimed at ensuring partisan fairness by closely following the statewide preferences of voters as "protections against gerrymandering." *See League of Women Voters of Ohio v. Ohio Redist. Comm.*, 2022-Ohio-65, ¶ 101 (recognizing that "[p]artisan gerrymandering entrenches the party in power" and rejecting "notion that Ohio voters rallied so strongly behind an anti-gerrymandering amendment" yet believed it was "toothless").

Respondents also argue that the Amendment's "prohibit[ion] [on] the use of redistricting plans that favor one political party and disfavor others," (Resp'ts' Merit Br. at 15), quoting (Compl. ¶ 55), actually "require[s] any redistricting plan . . . to 'favor either of the two largest political parties." *Id.* at 16, quoting (RELATORS_034). But a prohibition is the *opposite* of a requirement. Perhaps Respondents are caught up on the word "favor." *See id.* at 16–17. To "favor" a political party is to exhibit a bias towards it. FAVOR, *Black's Law Dictionary* (12th Ed. 2024). And such a "bias" towards a political party is a "prejudice" or "predilection" towards it. BIAS, *Black's Law Dictionary* (12th Ed. 2024). The probative baseline in this context is whether the partisan compositions of elected officials reflect the breakdown of votes cast for or against them. For example, if every Ohioan voted for one party's candidates, then every elected official should represent that party. If Ohioans split evenly between two political parties, one would expect approximately one-half of the elected officials to represent each party.[3] *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redist. Comm.*, 2022-Ohio-342, ¶¶ 40, 42; *League of Women Voters of Ohio*, 2022-Ohio-65, at ¶ 126 (finding more proportional alternative redistricting plan to be probative evidence that original plan was a partisan gerrymander). Thus, a redistricting plan "favors," or is "biased" towards, a political party when it seeks to sabotage these expected, approximate outcomes by either granting a political party an undue advantage or hampering another political party to the same effect. *See Gill v. Whitford*, 585 U.S. 48, 55 (2018) (describing "cracking" and "packing" voters in districting plan so as to favor the other party); *Adams v. DeWine*, 2022-Ohio-89, ¶ 62 (concluding that "enacted plan contains districts that . . . are the

[3] One such well-recognized measure of partisan gerrymandering, for example, is "partisan bias," which "is the difference between each party's seat share and 50% in a hypothetical, perfectly tied election." *See Ohio 2022 Redistricting Plan*, PlanScore, https://planscore.org/ohio/#!2022-plan-statesenate-pb (last accessed Sept. 5, 2024).

product of an effort to pack and crack" voters).

Lastly, Respondents' assertion that the Amendment "subordinat[es]" traditional redistricting principles and thereby constitutes "gerrymandering," (Resp'ts' Merit Br. at 17–19), is a baseless diversion. First, this argument erroneously relies heavily on federal caselaw on the distinct concept of "racial gerrymandering." *See id.* at 17, citing *Shaw v. Reno*, 509 U.S. 630 (1993), *Bush v. Vera*, 517 U.S. 952 (1996), and *Cooper v. Harris*, 581 U.S. 285 (2017). A "racial gerrymander," or "racial gerrymandering," is a legal term of art with a specific meaning in federal law that is simply not applicable here. *See Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1234 (2024). The U.S. Supreme Court accepts partisan gerrymandering *as a defense* to a racial gerrymandering claim, such that litigants must "rul[e] out the competing explanation that political considerations dominated the legislature's redistricting efforts." *Id.* at 1235. Ultimately, each state makes its own decisions about both the criteria that should govern redistricting and the order of priority by which they should apply. If the People of Ohio approve the Amendment, then the criteria therein simply become Ohio's new criteria. But Respondents' argument is based on a patchwork of irrelevant caselaw, and entirely misses the point.

Moreover, the Amendment does not "require[] that districts be drawn along partisan lines in disregard of traditional districting principles." (Resp'ts' Merit Br. at 18). Respondents repeatedly rely *on their own adopted ballot language* to support several baseless statements. *Id.*, citing (RELATORS_034). For example, they rail against the absence of the specific word "compact," but ignore that Amendment Section 6(C) provides that "[d]istricts shall ensure the equal functional ability of politically cohesive **and geographically proximate**" communities and "shall preserve communities of interest to the extent practicable." (Emphasis added.) (RELATORS_017 at Sec. 6(C)(2), (3)). And Relators have explained—and Respondents do not

contest—that the Amendment *introduces* preservation of geographically proximate communities of interest as a criterion into Ohio's redistricting process. *See id.* at Sec. 6(C)(3). Existing law does not provide any protection for communities of interest. *See Adams*, 2022-Ohio-89, at ¶ 62.

2. Paragraph 5 falsely depicts the Amendment's effects on judicial review.

Paragraph 5 of the ballot language wrongly asserts that no court can hear any challenge to a Commission-adopted redistricting plan "*except* if the lawsuit challenges the proportionality standard applied by the commission." (Emphasis added.) (RELATORS_034–35). Respondents concede that this language is inaccurate, because it states that *only* challenges to "the proportionality standard" may be heard, yet Section 6(B) also addresses—and thus allows for—judicial challenges based on other challenges. (Resp'ts' Merit Br. at 29). Respondents attempt to explain away this inaccuracy, however, claiming that it is not "material" based on Respondents' speculation about which "central component" of the ballot language is "likely most material" to an average voter. *Id.* Their arguments badly miss the mark.

The question here is whether the ballot language is accurate, not whether it omits something material. Paragraph 5's assertion that one and only one kind of challenge can be brought to redistricting plans adopted by the Commission—to the "proportionality standard"—is not accurate. (Resp'ts' Merit Br. at 29). Accordingly, it violates this Court's precedent and must be rewritten. *One Person One Vote*, 2023-Ohio-1928, at ¶ 22 ("In the absence of any dispute about the inaccuracy of this language, we grant a writ of mandamus ordering the ballot board to adopt lawful ballot language that accurately characterizes and explains the [relevant provision].").

Even if the relevant question were whether the inaccuracy is a meaningful omission, Respondents offer nothing but conclusory assertions in support of their claim that the average voter would not care about what courts could hear if the Amendment were approved. (Resp'ts' Merit Br. at 29). Notably, the Amendment introduces two related but distinct protections against political

favoritism. First, the proposed amendment prevents adoption of a map that unduly favors a given political party by ensuring that the adopted map roughly tracks the vote share for the major political parties. *See supra* Section I.A.1. But, second, the amendment also prevents the Commission from favoring *specific* politicians by precluding it from considering their residential address (and thus from drawing districts to designed to further the election of a given politician). The average voter would find both components material. If the Ballot Board addresses the topic of judicial review, then it is a material omission to not address the fact that the amendment provides for judicial review with regard both to favoring political parties or individual politicians.

Next, Respondents claim that the Amendment purports to strip federal courts of jurisdiction and thus the Ballot Board accurately stated that "no court" would have jurisdiction other than those that the language specifies. Again, this is wrong. Respondents' claim is that any reference in Ohio law must make pedantically clear that references to "courts" do not extend to federal courts—otherwise such laws are "likely unconstitutional" because they purport to strip the federal courts of jurisdiction. (Resp'ts' Merit Br. at 28). But many Ohio laws state that "no courts" may do certain things without express limitation to "Ohio" courts.[4] This includes Article XI, Section 9(D)(1) of the Ohio Constitution. Respondents now argue that this language is "likely unconstitutional," but this strains credulity. This Court construes Ohio law to *avoid* constitutional infirmities wherever possible, rather than capaciously so as to create them. *State ex rel. Thompson v. Spon*, 83 Ohio St.3d 551, 555 (1998) (per curiam). Federal courts do likewise. *See Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006) (Sutton, J.) (even if ambiguous, a state law granting exclusive

[4] *See, e.g.*, R.C. 4501.37 ("No court may reverse, suspend, or delay any order made by the registrar of motor vehicles, or enjoin, restrain, or interfere with the registrar or a deputy registrar in the performance of official duties . . . ."); R.C. 1548.04 ("No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any watercraft or outboard motor sold or disposed of, or mortgaged or encumbered, unless evidenced" by certain proof).

state-court jurisdiction "would still [be] construe[d] . . . not to bar federal jurisdiction"), citing *Marshall v. Marshall*, 547 U.S. 293, 312–14 (2006). This provision addressing court review of an Ohio redistricting commission applying Ohio law speaks only to *Ohio* courts' jurisdiction.

3. Paragraph 8 falsely claims that the Amendment limits speech rights because it extends Sunshine Law protections to the Commission.

As already explained, the Amendment subjects the new commission to Ohio's Sunshine Law and mandates open public meetings and various other mechanisms for Ohioans to monitor the Commission's work and provide input to it. (Relators' Merit Br. at 22–25). Paragraph 8 of the ballot language describes none of that. Respondents retort that they simply focus on "what is *new* with the Amendment . . . rather than what is generally the status quo." (Emphasis in original.) (Resp'ts' Merit Br. at 32). But their cramped choice of what they consider "new" reveals a blatant intent to persuade voters to vote against the Amendment. The adopted ballot language is imbued with a clear—and entirely incorrect—implication of what the status quo is: that Ohio citizens currently may express their opinions freely and easily to the Ohio Redistricting Commission, and thus that the Amendment would *make it more difficult* for them to participate in the Ohio Citizens Redistricting Commission. That could not be further from the objective truth.

In reality, the Amendment includes new and far more robust public participation and transparency requirements. For example, existing constitutional provisions for state legislative redistricting require "a minimum of three public hearings . . . open to the public," Ohio Const., art. XI, § 1(C); *see also id.* § 8(A)(2), while the existing provisions for congressional redistricting similarly require two public meetings before the General Assembly or Ohio Redistricting Commission adopts a plan. Ohio Const., art. XIX, § 1(G)–(H). In contrast, the Amendment *increases* the number of required public meetings and hearings, requiring that the commission "hold at least three rounds of public meetings" *before* adopting any redistricting plan, and *then* at

least another five public input hearings, that must be held across Ohio's five regions, both before and after the release of draft redistricting plans, (RELATORS_014–15 at Sec. 5(B)). In addition to increasing required public meetings and hearings, the Amendment includes several other mandatory requirements that broadly boost transparency and public participation and input, including new requirements that "*[a]ll deliberations and actions of the commission shall be in public meetings*," (emphasis added.) (RELATORS_013 at Sec. 4(A)), that "[t]he commission . . . conduct its hearings in a manner that invites broad public participation throughout the state, *including by using technology to broadcast commission meetings and to facilitate meaningful participation from a range of Ohioans*," (emphasis added.) (RELATORS_014 at Sec. 5(A)), and that the Commission "provide a portal for *digital submission* of public comments," (emphasis added.) (RELATORS_015 at Sec. 5(C)). All this on top of the Amendment's requirement that all "commissioners and commission staff, professionals, and consultants . . . adhere to all applicable public records and open meetings laws." (RELATORS_014 at Sec. 5(A)(1)).

The ballot language does not describe these robust requirements, and instead misrepresents a mere and lone sub-component: a provision addressing *ex parte* communications. The result is so incomplete and so rife with material omissions to be false, telling voters that the Amendment is *closing* the doors of redistricting in Ohio to public participation, rather than *opening* them to public scrutiny. Respondents ignore Relators' arguments on the prohibition on *ex parte* communications itself, instead relying on two inapposite cases to conclude merely that "'shall not' and 'shall' in the two respective limitations are legal prohibitions." (Resp'ts' Merit Br. at 30). But as Relators already made clear, the interpretation of the Amendment's limitation on *ex parte* communications is made "evident from the consequences for noncompliance," which impose duties upon *the Commission* rather than consequences on the citizen. (Relators' Merit Br. at 24).

Crucially, that citizen is not limited from making their intended communication "via letter, phone call or face-to-face, in an office, at a baseball game or the grocery store, or anywhere they choose." (Resp'ts' Merit Br. at 30–31).[5] The Amendment simply aims to "prevent a party from gaining an unfair advantage . . . through *ex parte* communications with the decisionmaker," *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 303 (1992), by requiring that *the Commission* make public any material *ex parte* communications made to it. Such requirements, like the open meetings law to which the new Commission is explicitly bound under the Amendment, are "aimed at promoting openness in government" and thus preclude deliberations from being made behind closed doors in smoked-filled rooms. *Paridon v. Trumbull Cty. Children Servs. Bd.*, 2013-Ohio-881, ¶ 29; *see also* R.C. 121.22(A).[6] "The intent of the Sunshine Law is to require governmental bodies to deliberate public issues in public." (Quotation omitted.) *Radtke v. Chester Twp.*, 2015-Ohio-4016, ¶ 22.[7] The Amendment explicitly aims to do the same. But rather than tell voters about the Amendment's guarantees of public participation and transparency in redistricting by imposing strict requirements on the new Commission, the falsehoods injected into the Ballot Board's adopted ballot language "mislead voters by suggesting that the amendment would limit the rights of individual citizens" to freely express their opinions. *State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot*

[5] Accordingly, Respondents' insinuation that this provision raises questions under the First Amendment to the U.S. Constitution is meritless.

[6] Ohio's open meetings law also requires that "[e]very public body . . . establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings," and that a "resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body." R.C. 121.22(F), (H)

[7] Prohibitions on *ex parte* communications are commonplace and noncontroversial, especially in the judicial context. *See, e.g.*, Jud. Cond. R. 2.9. But no one would assert that such rules, even considering their exceptions, would be fairly and truthfully described in the first instance with language like: "preventing parties appearing before the Court from freely and fully litigating matters to the Court." Nor do judicial conduct rules violate the First Amendment by preventing efforts to influence judges outside the public courtroom.

Bd., 2023-Ohio-3325, ¶ 29.

B. Blatant mischaracterizations materially omit how the Amendment alters the existing redistricting process.

The Ballot Board's repeated (and, as shown above, incorrect) refrain is that its adopted ballot language is "accurate." *See, e.g.*, (Resp'ts' Merit Br. at 1–2, 6, 9, 14–16, 18–20, 24, 26–30, 32–34, 36). But, as they admit, that is not the test. "[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**.'" (Emphases added and second alteration in original.) *Id.* at 5, quoting *Bailey*, 67 Ohio St.2d at 519. And "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 *Bailey* at 519. Even a technically accurate statement may still be impermissibly persuasive or misleading. Indeed, ballot language:

> must be complete enough to convey an intelligent idea of the scope and import of the amendment. It ought not to be clouded by undue detail as not to be readily understandable. It ought to be free from any misleading tendency, whether of amplification, or omission. It must in every particular be fair to the voter to the end that intelligent and enlightened judgment may be exercised . . . .

Markus v. Trumbull Cty. Bd. of Elections, 22 Ohio St.2d 197, 202–03 (1970). Because material omissions and mischaracterizations in the language here do not tell voters what they are going to vote for, and instead tell an entirely incomplete story aimed at persuading against the Amendment, the language violates Ohio law.

1. Paragraph 1's description of the Amendment's general impact is deceptive, misleading, and impermissibly persuasive.

Relators described above, *supra* Section I.A.1, the problems with paragraph 1's language stating that the Amendment would "[r]epeal constitutional protections against gerrymandering." (RELATORS_034 at ¶ 1). They now address the balance of the language in paragraph 1.

First, Respondents do not dispute that it is "unprecedented" for ballot language to "include

information about the vote margin or method by which current law was adopted." (Relators' Merit Br. at 19). They offer no justification for doing so here, merely arguing that the language is factually accurate, and complaining that "Relators cite no authority for the proposition that including this truthful information for the purpose of providing relevant historical context violates the constitutional standards for ballot language." (Resp'ts' Merit Br. at 10). Relators' authority is Respondents themselves—they just recently argued that a ballot measure should *not* address the constitutional status quo *because that would be in the nature of a persuasive argument:*

> Moreover, including the historical nature of the status quo could actually have a detrimentally negative effect on electors, such that it could render the Ballot Language insufficient. Specifically, the language could be seen as argumentative in support of rejecting the proposed amendment. Voters may likely presume that the constitutional provisions to be amended . . . must inherently bear the imprimatur of legitimacy and thus be free from any defect necessitating amendment by the people. In other words, why change it now?

Merit Br. of Resp'ts at 10, *State ex rel. One Person One Vote v. Ohio Ballot Bd.*, No. 2023-0672 (Ohio June 2, 2023). Just so. How long the current redistricting articles have been in effect, or the vote margin by which they were adopted, has no relevance to informing voters what the Amendment would do—to the question they are being asked to decide.

Finally, as to the language that the Amendment would supposedly "eliminate the longstanding ability of Ohio citizens to hold their representatives accountable for establishing fair state legislative and congressional districts," (RELATORS_034 at ¶ 1), Respondents again do not dispute that the language is intended to persuade, and argue merely that it is accurate because the "executive officials and elected representatives [currently responsible for redistricting] are accountable to the People because they may be voted out of office." (Resp'ts' Merit Br. at 13). But this Court has directly stated that it is not accurate. *See League of Women Voters of Ohio*, 2022-Ohio-65, at ¶ 101 ("The suggestion that the solution to unconstitutional partisan gerrymandering is simply to vote out its perpetrators is disingenuous."). This is Respondents' argumentatively-

stated opinion, not a factually-accurate statement about what the Amendment would do.

2. Paragraph 3 misrepresents the effect of the Amendment on partisan influence in redistricting.

As Respondents would have it, the propriety of paragraph 3 relies on academic conceptions of a political party. While the ballot language does misleadingly suggest that Commission members must formally "belong" to a party in a sense the Amendment does not require, *see* (Relators' Merit Br. at 20–22), whether the ballot language here is legally deficient rests on whether it is "complete enough to convey an intelligent idea of the scope" of the Amendment's requirements. *Markus*, 22 Ohio St. 2d at 202–03. And, academic inquiries aside, the adopted ballot language suggests that partisans will control the commission, which is simply not the case.

The Amendment would *limit* the influence of political parties. The Amendment's most notable innovations are ensuring that no single party can dominate the process by: (1) *limiting* the composition of the Commission to only one-third commissioners affiliated with the largest political party, and only another third affiliated with the second largest political party, with the remaining third unaffiliated entirely; and (2) requiring decisions of the Commission be made with nine-fifteenths assent of commissioners across all three of these groups. In contrast, the status quo allows a single political party's own *elected officials*—including those who are elected from the very districts that will be drawn (and beholden to their compatriots in the General Assembly)—to entirely control the redistricting process. The adopted language omits essential context, making paragraph 3 impermissibly misleading through selective "amplification" paired with blatant "omission" of every key component of the Amendment's requirements for the new Commission's composition. *Markus*, 22 Ohio St. 2d at 203.

3. Paragraph 4 mischaracterizes the Amendment as preventing removal.

Like the summary certified by the Attorney General, the natural and neutral way of

describing the Amendment is to explain that it would, upon a vote of the Commission, "[p]rovide procedures for removal for cause of Commissioners." (RELATORS_003); *see also* (RELATORS_042). It does *not* generally *prevent* removal. Indeed, the Ballot Board's language begs an obvious and unanswered question: prevent *who* from removing a commissioner except as delineated in the Amendment? That the ballot language does not answer this question reveals the unnatural way the Ballot Board constructed this paragraph. Indeed, this is seen clearly by comparing Respondents' arguments here with their inconsistent arguments elsewhere.

For example, with regard to paragraph 8, Respondents assert they thought it important to "focus[] on what is *new* with the Amendment . . . rather than what is generally the status quo." (Emphasis in original) (Resp'ts' Merit Br. at 32). If that was their guiding light, then one would think that as to paragraph 4, they would focus on what is new (the fact that a commissioner can now be removed *at all*) given that the status quo is one where commissioners cannot be removed *no matter what*. As Respondents' shifting rationales reflect, the Ballot Board was guided by an attempt to misleadingly characterize a new removal power to argue against the Amendment.

4. Paragraph 9 misleadingly suggests that Ohio citizens get a vote in the current redistricting process.

Respondents concede that paragraph 9 would be "problematic" if "it suggest[ed] that the current district plans were adopted by Ohio's voters." *Id.* at 32. But that is exactly what it does. Indeed, even the cases Respondents cite do not support their claim that tacking on "through their elected representatives" suggests otherwise. If anything, they stand only for the proposition that acts of the *General Assembly* represent the will of the people. *See Duncan v. McCall*, 139 U.S. 449, 461 (1891) (discussing "legislative power reposed in representative bodies"); *State ex rel. Milhoof v. Barberton Bd. of Edn. of Vill. of Barberton*, 76 Ohio St. 297, 307 (1907) (explaining that "the Legislature has the right to pass laws [] according to the common belief of the people").

But here, Respondents acknowledge that the current maps were adopted by the Ohio Redistricting Commission, (Resp'ts' Merit Br. at 33), which is not a representative body, but instead a Commission made up of *ex officio* statewide officials and some representatives from individual districts, who were chosen to serve by partisan legislators rather than the people. Ohio Const., art. XI, § 1. Proper ballot language "ought not to be clouded by undue detail." *Markus*, 22 Ohio St. 2d at 202–03. The phrase "by the citizens of Ohio" adds no value, because the "citizens of Ohio" concededly had no role in adopting the most recent districts. Its inclusion is impermissible "persuasive argument . . . against the issue." *One Person One Vote*, 2023-Ohio-1928, at ¶ 8.

5. Paragraph 10 mischaracterizes the Amendment's costs.

Paragraph 10 misleadingly and prejudicially describes the costs associated with the Amendment. Respondents do not dispute that under current law, the General Assembly appropriates funds for the Ohio Redistricting Commission—including for hiring staff—or that the State is currently responsible—without limit—for paying the legal fees incurred defending redistricting plans. Rather, they argue that because the Amendment's redistricting process is *new*, it will come with new costs. But these "new" costs are, in main, redirected funds from one redistricting process to another. Again, if Respondents truly sought to focus on what is new with the Amendment as to costs (little-if-anything), we might expect to see no paragraph 9 at all.

In any event, Respondents appear to concede that most of paragraph 9 is impermissible persuasive argument against the Amendment, as their only defense is that the language is not inaccurate. A simple comparison with appropriations language in the previous ballot language on which Respondents rely on proves the point: "Provide that the general assembly must appropriate sufficient funds for the commission to perform its duties. The commission may expend funds as it, in its discretion, deems necessary." (Resp'ts' Evid. at 10) (2005 ballot language). "Mandate the General Assembly to appropriate all funds necessary to adequately fund the activities of the

Commission . . . .” *Id.* at 14 (2012 ballot language). Neither description uses loaded words like “taxpayer-funded” or “unlimited,” which make the present language unconstitutionally infirm.

II. The ballot title prescribed by the Secretary of State violates Ohio law.

This Court “must examine whether the ballot title tells voters what they are being asked to vote on and whether it impermissibly uses language that amounts to persuasive argument.” *One Person One Vote*, 2023-Ohio-1928, at ¶ 24, citing *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 141 (1988). “To create an appointed redistricting commission not elected by or subject to removal by the voters of the state,” (RELATORS_034), mostly describes what the commission is *not* while begging core questions about what it *is* and *does*. The defects permeating the Secretary’s ballot title are not a matter of merely “parsing minute differences in connotation [or] . . . choos[ing] between words of the same meaning.” *One Person One Vote*, 2023-Ohio-1928, at ¶ 29. The title is defective because the choices of what it does say and does not say culminate in a biased “statement . . . likely to create prejudice . . . against” the Amendment.” R.C. 3519.21.

Contrary to Respondents’ assertions, technical accuracy is not a defense where language simply does not “tell[] voters what they are being asked to vote on,” *One Person One Vote* at ¶ 24. For example, presumably Respondents would agree that a title that said the Amendment “would create a commission to do some things” is constitutionally deficient, even though it is entirely accurate. “Accuracy” is not enough. Likewise, here, the ballot language does not even tell voters the Amendment replaces the existing redistricting process with a new one, or that it covers both state legislative and congressional redistricting, or that it *does* include removal provisions. The ballot title does not describe basic aspects of the Amendment, and it half describes what it does address. The title must be “an accurate summary of the proposed amendment’s text,” *Ohioans United for Reproductive Rights*, 2023-Ohio-3325, at ¶ 36. It must answer: What will this

constitutional amendment do, if approved? But crucially, the Secretary's ballot title would be legally deficient *even if the Ballot Board's ballot language were fair and truthful*—it does not even give voters a sense of what the Ballot Board claims the Amendment would do. *But see supra* Part I.

Of course, a title cannot, and should not, reproduce the entirety of the Amendment. But the title could simply state "To create an appointed redistricting commission," and it would at least be accurate and not misleading as to the question of removal, as set out above. *See* (RELATORS_88) (Relators' demonstrative ballot language and title). Instead, it triples down on just one component of the Amendment: that commissioners are "appointed," i.e., "not elected," and not "subject to removal by the voters." *But see supra* Sections I.B.3; *but cf.* (Resp'ts' Merit Br. at 29) (arguing that ballot language paragraph 5 is accurate because it focuses on Ballot Board's view of its "central component"). The adopted ballot title tells voters nothing more, rendering it deceptive in its presentation of the Amendment and thus irreparably defective under Ohio law.

III. This Court has power to, and should, grant the requested relief.

The Court must assert its authority and hold the Ballot Board accountable to the legal standard for accurate and fair ballot language that is not written as a persuasive argument against the Amendment. Respondents do not dispute that this Court has the authority to grant the actual remedy that Relators request, or that this Court should retain jurisdiction of this action. They contest only whether there is sufficient time for this Court to grant relief and whether this Court may "prescribe particular language to appear on the ballot." (Resp'ts' Merit Br. at 39–40).

As to the timing issue, with the filing of this reply, this case will be fully briefed and ripe for resolution. Nothing prevents this Court from deciding it expeditiously, as it has done in previous litigation. *State ex rel. One Person One Vote v. Ohio Ballot Bd.*, No. 2023-0672 (Ohio, decided June 12, 2023); *State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Bd.*,

No. 2023-1088 (Ohio, decided Sept. 19, 2023). If this Court resolves this case by September 13, there will be a full week for corrected language to be crafted and printed. Moreover, Section 3505.07 of the Revised Code authorizes the Secretary to "provide separate ballots for the . . . issue" if "it is impracticable to place . . . the wording for" the Amendment "upon the ballot when the . . . wording . . . ordered onto the ballot by a court of competent jurisdiction and the ballots have been printed prior to the court order." R.C. 3505.07(B). If needed, this Court can order the Secretary to provide separate ballots for the Amendment. In short, this Court, and the People of Ohio, are not without recourse. The extraordinary writ of mandamus is designed exactly for these purposes.

As for the argument that this Court cannot "prescribe particular language," (Resp'ts' Merit Br. at 39), it is flawed for several reasons. Relators do *not* ask this Court to mandate the adoption of its preferred language wholesale. (Compl. at 36–38). Rather, Relators provide the Court with exemplar language to illustrate the ballot language's flaws. *See* (RELATORS_088). In any event, Article XVI gives this Court jurisdiction in all cases challenging the "*submission* of a proposed constitutional amendment to the electors." (Emphasis added.) Ohio Const., art. XVI, § 1. Respondents themselves call their ability to produce valid text on a timely basis into question. Relators are entitled to writs of mandamus compelling the "submission of [the] proposed constitutional amendment to the electors" with valid ballot language and a valid ballot title. *Id.*

To let Respondents to get away with blatantly unlawful behavior will continue the cycle of unaccountability. It is emphatically true that "the ultimate decision on what the Constitution should say and how it should say it belongs to the people." *State ex rel. DeBlase v. Ohio Ballot Bd.*, 2023-Ohio-1823, ¶ 39 (Kennedy, C.J., concurring in judgment only). This Court should issue the writs.

CONCLUSION

This Court should issue Relators' requested writs of mandamus directing Respondents to prescribe lawful ballot language and a lawful ballot title for the Amendment.

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Respectfully submitted,

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