In the Supreme Court of Ohio

STATE OF OHIO EX REL. OHIOANS UNITED FOR REPRODUCTIVE RIGHTS, ET AL.,	:	**Case No. 2023-1088**
Relators,	:	**Original Action in Mandamus**
v.	:	**Expedited Elections Case**
OHIO BALLOT BOARD, ET AL.,	:	
Respondents.	:	

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MERIT BRIEF OF RESPONDENTS

I. INTRODUCTION

Relators want this Court to force the Ohio Ballot Board to adopt the text of the proposed amendment titled "The Right to Reproductive Freedom with Protections for Health Safety" as the ballot language. So, they present this Court with a false framework for evaluating their claim for writ of mandamus. Over and over again, Relators insist that the amendment's text is *better than* the ballot language adopted by the Ballot Board, and because of this, the Ballot Board's chosen ballot language must be set aside in favor of the amendment's full text. But this Court does not decide whether other ballot language would have been better than the language ultimately adopted by the Ballot Board. The Court only decides whether the ballot language properly identifies the substance of the proposal to be voted upon and does not mislead, deceive or defraud the voters. The answer to those two questions is "yes" and thus, the ballot language approved by the Ballot Board must stand.

II. BACKGROUND

On February 21, 2023, an initiative petition was filed with the Office of Ohio Attorney General Dave Yost, proposing a constitutional amendment entitled "The Right to Reproductive Freedom with Protections for Health and Safety Amendment". *See* RELATORS_004. In short, the proposed amendment would prohibit Ohioans from "directly or indirectly, burden[ing,] penaliz[ing,] prohibit[ing,] interfer[ing] with, or discriminat[ing] against" an individual's exercise of his or her right to reproductive medical treatment. RELATORS_002. Acting pursuant to his mandatory duties in R.C. 3519.01(A), Attorney General Yost certified that the petition summary was a fair and truthful statement of the proposed constitutional amendment. RELATORS_004. Further, Attorney General Yost forwarded his certification to the Respondent Ohio Ballot Board, as required by R.C. 3519.01(A). *Id.*

The Ballot Board held a meeting on March 12, 2023, to consider whether the initiative petition contained a single, proposed constitutional amendment, as required by R.C. 3519.01(A) and 3505.062(A). RELATORS_007. Although arguments were made on both sides, the Ballot Board determined that the initiative petition contained a single, proposed constitutional amendment and certified its decision to Attorney General Yost. *See id.* This certification was the subject of a challenge in this Court, and this Court ultimately agreed with the Ballot Board's determination. *See generally State ex rel. DeBlase v. Ohio Ballot Board*, 2023-Ohio-1823.

On July 5, 2023, the committee responsible for circulating the initiative petition for signatures, comprised of the individual Relators, submitted its efforts to the Respondent Secretary of State Frank LaRose's Office for verification. *See* RELATORS_013. By letter dated July 25, 2023, and pursuant to his mandatory duties under the Ohio Constitution and R.C. 3501.05(K) and 3519.16, Secretary LaRose verified that the committee gathered sufficient signatures to place the proposed amendment on the November 2023 General Election ballot. RELATORS_013-014.

However, the initiative petition was subject to another challenge in this Court, based on the petition committee's alleged failure to include all statutes that would be affected by the adoption of the proposed amendment in the initiative petition as required by R.C. 3519.01(A). *See generally State ex rel. Giroux v. Committee Representing Petitioners*, 2023-Ohio-2786. On review, this Court found that the petition committee was not required to include those statutes under the law and denied the writ. *Id.* at ¶ 16.

Pursuant to its authority under Article II, Section 1g of the Ohio Constitution, the Ballot Board met on August 24, 2023, to prescribe the official ballot language for the proposed amendment. RELATORS_021. Although a motion was made to adopt the full text of the proposed amendment as the official ballot language, the Ballot Board declined to do so. RELATORS_041-042. Rather, the Ballot Board adopted the language proposed by Secretary LaRose. RELATORS_051-052. Thus, the official ballot language is as follows:

Issue 1

A Self-Executing Amendment Relating to Abortion and Other Reproductive Decisions

Proposed Constitutional Amendment

Proposed by Initiative Petition

To enact Section 22 of Article I of the Constitution of the State of Ohio

A majority yes vote is necessary for the amendment to pass.

The proposed amendment would:

- Establish in the Constitution of the State of Ohio an individual right to one's own reproductive medical treatment, including but not limited to abortion;
- Create legal protections for any person or entity that assists a person with receiving reproductive medical treatment, including but not limited to abortion;
- Prohibit the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child is determined to be viable, unless the State demonstrates that it is using the least restrictive means;
- Grant a pregnant woman's treating physician the authority to determine, on a case-by-case basis, whether an unborn child is viable;

- Only allow the citizens of the State of Ohio to prohibit an abortion after an unborn child is determined by a pregnant woman's treating physician to be viable and only if the physician does not consider the abortion necessary to protect the pregnant woman's life or health; and
- Always allow an unborn child to be aborted at any stage of pregnancy, regardless of viability if, in the treating physician's determination, the abortion is necessary to protect the pregnant woman's life or health.

If passed, the amendment will become effective 30 days after the election. RELATORS_071.

III. LAW AND ANALYSIS

A. Standard Of Review – Mandamus

The purpose of a writ of mandamus is to compel a public officer to perform an act the law requires him or her to do. *See State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 2009-Ohio-4805, 914 N.E.2d 397, ¶ 17. In order to be entitled to an extraordinary writ, the Relators must establish: (1) a clear legal right to the requested relief; (2) a clear legal duty owed by the Ballot Board and Secretary LaRose to perform the requested relief; and (3) that they lack an adequate remedy at law. *See State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 18, citing *State ex rel. Marsalek v. S. Euclid City Council*, 111 Ohio St. 3d 163, 2006-Ohio-4973, 855 N.E.2d 811, ¶ 8. As to the first two requirements, "in the absence of any evidence of fraud or corruption, the dispositive issue is whether the ballot board abused its discretion and clearly disregarded applicable law in adopting the ballot language of the proposed constitutional amendment." *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St. 3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 23, citing *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010 Ohio 1845, 928 N.E.2d 410, ¶ 30. Relators have the burden of demonstrating entitlement to mandamus relief by clear and convincing evidence. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 55. Relators have not carried their burden here.

B. The ballot language easily passes constitutional muster.

Relators fail to establish why this Court should intrude on the Ohio Ballot Board's constitutional mandate to draft the ballot language for their proposed constitutional amendment.

The Ohio Ballot Board is a creature of the Ohio Constitution and its duties and obligations in preparing ballot language flow directly from its constitutional mandate. The Board consists of the statewide-elected Secretary of State as Chairman and four appointed members. R.C. 3505.061(A). The five-member Board is strictly bipartisan, with the members being appointed by Ohio's majority and minority legislative leaders in the General Assembly. "One of the members shall be appointed by the president of the senate, one shall be appointed by the minority leader of the senate, one shall be appointed by the speaker of the house of representatives, and one shall be appointed by the minority leader of the house of representatives." *Id.* "No more than two of the appointed members shall be of the same political party." *Id.* Thus, Ohio law does not stack the political deck in Ballot Board appointments.

The Ohio Ballot Board, by charge of the people of Ohio through the Ohio Constitution, is inextricably intertwined in the purely legislative process of amending our constitution by ballot initiative – a bedrock legislative act. For citizen-initiated constitutional amendments, Ohio Constitution, Article II, Section 1g states, "[T]he ballot language shall be prescribed by the Ohio ballot board 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 this constitution."

As to the drafting of ballot language, Article XVI, Section 1 sets forth two simple requirements: (1) the ballot language shall "properly identify the substance of the proposal to be voted upon" and (2) as a whole, it cannot "mislead, deceive, or defraud the voters." The greater, overarching focus must be on whether the ballot language, as a whole, would mislead, deceive or defraud the voters. *State ex rel. Williams v. Brown*, 52 Ohio St.2d 13, 19, 368 N.E.2d 838, 842

(1977). Because, even if ballot language approved by the Board contains errors or omissions, "the determinative issue presented to this court is whether the cumulative effect of [any] technical defects is harmless or fatal to the validity of the ballot." *Id. State ex rel. Voters First v. Ohio Ballot Bd.,* 133 Ohio St.3d 257, 264 (2012) ("Under Article XVI, Section 1, the sole issue is whether the board's approved ballot language "is such as to mislead, deceive, or defraud the voters."). Factors going towards whether ballot language misleads, deceives, or defrauds voters are (1) the concept that "a voter has the right to know what it is he is being asked to vote upon"; and (2) use of language that is "in the nature of a persuasive argument in favor of or against the issue." *Id.* (internal citations omitted.).

In other words, Relators get nowhere by arguing for their own preferred words and phrases, or challenging Board members' ability for objectiveness when casting votes, or speculating on how advocacy groups or media outlets will spin the ballot language, or identifying alternative interpretations that voters *might* make despite plain language. For the reasons set forth below, Relators have failed to carry their burden in proving that the bipartisan Ballot Board's majority-approved ballot language is so flawed that it will mislead, deceive and defraud the voters.

C. Relators fail to identify any deficiencies in the ballot language.

1. The ballot language is accurate.

Relators identify three purported inaccuracies in the ballot language, but an examination of each reveals that the ballot language is, in fact, truthful.

First, Relators object to the ballot language's use of the phrase "the citizens of the State of Ohio." Compl. ¶ 75. Specifically, the ballot language states that the proposed amendment would "[p]rohibit the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child is determined to be viable, unless the State demonstrates that it is using the least restrictive means" and "[o]nly allow the citizens of the State

of Ohio to prohibit an abortion after an unborn child is determined by a pregnant woman's treating physician to be viable and only if the physician does not consider the abortion necessary to protect the pregnant woman's life or health." Compl. Ex. 13.

Relators contend that this phrase gives the voter the false impression that the amendment would restrict private action by Ohio citizens rather than state action. Relators' argument, however, overlooks the bedrock principle that government "is by the people, through their chosen representatives." *State ex rel. Milhoof v. Bd. of Educ*., 76 Ohio St. 297, 307 (1907); *see also Hale v. State*, 55 Ohio St. 210, 214 (1896) ("Here, the people possessing all governmental power, adopted constitutions completely distributing it to appropriate departments."). Indeed, the Ohio Constitution itself recognizes that "[a]ll political power is inherent in the people." Ohio Const. Art. I, § 2. Accordingly, it is not misleading to state that the amendment would prohibit the citizens of the State of Ohio—acting through their representative government—from enacting certain restrictions on abortion.

Indeed, in one crucial respect, the ballot language is *more* accurate and informative than the petition language. The people of Ohio reserved to themselves the power to propose new statutes to the General Assembly. Ohio Constitution, Article II, Section 1b. Citizen-initiated statutes can be passed by the General Assembly, or under certain circumstances, can be submitted to the voters for their approval or rejection. *See id*. Of course, any statute that conflicts with the Ohio Constitution cannot stand, citizen-initiated or not. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 11 ("When incompatibility [between a statute and the Constitution] is clear, it is the duty of this court to declare the statute unconstitutional."). The ballot language recognizes

this and informs voters that adoption of Amendment 1 would prohibit them from overriding the amendments' provisions through either direct democracy[1] or their elected representatives.

Second, Relators quibble with the ballot language's use of the phrase "reproductive medical treatment." Compl. ¶ 76. The ballot language gives the impression, according to Relators, that the State of Ohio must affirmatively provide access to the reproductive medical treatment of an individual's choice. *Id*. Relators' interpretation of the ballot language finds no support in the text itself. The ballot language states that the amendment would establish "an *individual* right to *one's own* reproductive medical treatment," unequivocally describing the right as an individual right, not a State-provided benefit. Compl. Ex. 13. Reading a right to State-provided medical treatment into the ballot language adds language—specifically, "an individual right to one's own **State-provided** reproductive medical treatment"—that does not appear in the text. This contravenes accepted principles of interpretation. *State ex rel. DeBlase v. Ohio Ballot Board*, S.Ct. No. 2023-0388, 2023-Ohio-1823, ¶ 36 (Kennedy, C.J., concurring) ("[W]e should not add words to the Constitution in the guise of interpreting it."). If the Ballot Board's chosen language would mislead voters if and only if given an unreasonable and anti-textual interpretation, the language is not misleading at all.

Relators also contend that "reproductive medical treatment" cannot serve as a substitute for "reproductive decisions." According to Relators, the first term suggests medical care while the second suggests internal determinations that may or may not entail medical care. Because the terms are not one-to-one substitutes, Relators argue, the use of the term "reproductive medical treatment" is misleading and must be substituted with "reproductive decisions." Relators' Br. at 16.

[1] The Constitution empowers the citizens of Ohio to amend that document. Ohio Constitution, Art. II, §1b. Voters considering an amendment to the Ohio Constitution will, by definition, understand that they can further amend the Constitution in future votes.

To begin, there is no requirement that the Ballot Board can only use terms that are one-to-one substitutes for the amendment's language. Indeed, "[a] strict requirement that boards cannot draft ballot language using nouns or verbs that do not appear in the proposed amendment would unduly restrict a board's discretion as it carries out its duties." *State ex rel. Cincinnati for Pension Reform v. Hamilton Cty. Bd. of Elections*, 137 Ohio St.3d 45, 2013-Ohio-4489, 997 N.E.2d 509, ¶ 52. As set forth above, the Court must determine whether the ballot language misleads, deceives, or defrauds the voters, not whether the terms used in the ballot language serve as one-to-one replacements for the amendment's language. *One Person One Vote* ¶ 7.

Here, the ballot language is accurate and does not mislead. The Ballot Board's use of the term "reproductive medical treatment" appropriately zeroes in on the *substance* of the proposed amendment and what the amendment would actually do. *One Person One Vote* ¶ 20. In opposite, Relators prefer to keep the focus on the right to make a decision – as if making a decision in one's own mind is somehow controllable by outside forces. Such a concept has been confined to science fiction and dystopian novels and the mechanism to do so has eluded the most imaginative of authoritarian regimes. Indeed, as Relators recognize, a *decision* refers to a personal, intangible thing. A person makes a reproductive decision in his or her mind after "a considered determination about any matter related to producing offspring." Relators' Br. at 16. But without more, it is just that – a decision residing only in one's mind and solely possessed by the decision maker. No constitutional amendment, statute, regulation, or policy can prevent any individual from making a considered determination in his or her mind. To say that Ohio may not interfere with a person's reproductive decisions in his or her mind is to say nothing at all—a person's internal determinations lay well outside the State's regulatory authority. Informing voters that they

continue to be free to make their own decisions in their minds does not tell them what effect the amendment would have in practice.

Rather, the crux, or substance, of the proposed amendment lies in the *carrying out* of these reproductive decisions. The proposed amendment would give voters the individual right to *act* on his or her reproductive decisions without interference. The ballot language therefore appropriately centers on the carrying out of a reproductive decision by using the phrase "reproductive medical treatment." This phrase informs the voters that, if adopted, the amendment would allow them to carry out their reproductive decisions by establishing a right to reproductive medical treatment free from interference. Indeed, even Relators allow that "reproductive medical treatment" denotes the taking of an *action* that cannot be interfered with. *See* Relators' Br. at 17. Because the ballot language focuses on the actual activity that could not be restricted if the amendment were adopted, it does not mislead, deceive, or defraud.

Third, Relators take issue with the phrase "always allow." The ballot language explains that the proposed amendment would "[a]ways allow an unborn child to be aborted at any stage of pregnancy, regardless of viability if, in the treating physician's determination, the abortion is necessary to protect the pregnant woman's life or health." Compl. Ex. 13. According to Relators, this language falsely implies that the amendment would allow an abortion over a patient's objections. Again, Relators read words into the ballot language that are not there. Relators' argument would be correct, if, say, the ballot language provided that amendment always allowed abortions "regardless of viability or the pregnant woman's wishes to the contrary." Likewise, if the ballot language stated that abortions were *required* or *mandated* if the treating physician found them necessary to protect the pregnant woman's life or health, Relators' argument might persuade. But the existing ballot language says no more than what is strictly true. Specifically, the

amendment would always *allow* or *permit*—not *require*—abortions when a physician judges the abortion necessary to protect life or health, even after viability. Because the language "describes what the law would be if the proposed amendment is approved," and "does so accurately," the ballot language survives constitutional scrutiny. *One Person One Vote* ¶ 20.

Relators have not shown any entitlement to a writ of mandamus based on the ballot language's purported inaccuracies.

2. The ballot language makes no material omissions.

Relators' assertions that the ballot language omits material portions of the proposed amendment, Compl. at ¶¶ 78-81, similarly fail to withstand scrutiny. Omissions bear on a writ of mandamus only if they are *material*—that is, only if they omit information that "strikes at the very core of the proposed amendment." *State ex rel. Cincinnati for Pension Reform v. Hamilton County Bd. of Elections*, 137 Ohio St.3d 45, 2013-Ohio-4489, ¶ 59, quoting *State ex rel. Minus v. Brown*, 30 Ohio St.2d 75, 81, 283 N.E.2d 131 (1972). This Court has further described material omissions as those that "prevent[] voters from knowing the substance of the proposal being voted upon or mislead[], deceive[], or defraud[] voters." *State ex rel. Cincinnati for Pension Reform v. Hamilton County Bd. of Elections*, 137 Ohio St.3d 45, 2013-Ohio-4489, ¶¶ 59-60, quoting *State ex rel. Minus v. Brown*, 30 Ohio St.2d at 81, 283 N.E.2d 131 (1972). Relators have not and cannot point to any omissions rising to materiality.

First, Relators object to the Ballot Board's decision not to list each type of enumerated reproductive medical treatment covered by the amendment and to instead refer to "reproductive medical treatment, including but not limited to abortion." Compl. ¶ 79. This, Relators claim, "falsely suggests ambiguity about what categories of decisions" the amendment covers. Relators' Br. at 19. Any ambiguity, however, arises from the text of the amendment itself, not the ballot language.

That is, the amendment's own language makes its enumerated list of categories expressly non-exhaustive: by its own terms, it applies to "reproductive decisions, *including but not limited to* decisions on" abortion. Compl. Ex. 11. (Emphasis added.) The amendment delineates five categories of reproductive decisions, but it does not set forth *all* the rights that the amendment will create. The ballot language tracks the amendment's indefinite and non-exhaustive language, setting forth some, but not all, of the rights that the amendment will create. That the scope of reproductive medical treatment covered by the amendment is undefined or open to wide interpretation is therefore not unique to the ballot language. These features simply echo *the amendment itself*, which fails to define the full contours of the right to be created.

What is more, listing five specific categories for a concept that is expressly undefined – "including but not limited to" – is itself inconsistent and misleading. Listing several categories leads a voter to believe that he or she is being given the entire scope of the right. But again, the Ballot Board's language accurately conveys that the scope of the amendment is truly undefined. The ballot language is accurate per the text of the amendment and poses no risk of preventing a reasonable voter from understanding the substance of the proposal—constitutionalizing the right to obtain or abstain from abortion and other related reproductive medical treatment.

Next, Relators argue that the ballot language materially omits part of an exception to the amendment's general prohibition on state action. Compl. ¶ 80. The ballot language provides that "[t]he proposed amendment would prohibit[] * * * the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child is determined to be viable, unless the State demonstrates that it is using the least restrictive means[.]" Compl. Ex. 13. The amendment states that the exception applies if "the State demonstrates that it is using the least restrictive means to advance the pregnant individual's health in accordance with widely

accepted and evidence-based standards of care." Compl. Ex. 11. Relators argue that leaving out this additional language renders the ballot language "nonsensical." Relators' Br. at 27. Not so. The language has a sensical and ordinary meaning that accurately reflects the amendment: the State cannot burden, penalize, or prohibit abortion prior to viability unless it does so by means that are the least restrictive on the pregnant woman. Because the language is accurate and true to the amendment, it must stand. Relators call it nonsensical in order to bolster their campaign to utilize the language they *prefer*. But neither the Constitution nor Ohio law mandates that Relators' preferred language be printed on the ballot. Instead, the Ballot Board's mandate is to use language that "properly identif[ies] the substance of the amendment" and does not "mislead, deceive, or defraud the voters." Ohio Constitution, Article XVI, Section 1. The foregoing ballot language satisfies these Constitutional requirements.

Finally, Relators object to the decision to omit language defining "fetal viability" to mean the point at which "the fetus has a significant likelihood of survival outside the uterus with reasonable measures" according to "the professional judgment" of a treating physician. Compl. ¶ 81. This, according to Relators, "misleads voters about the degree of a physician's discretion * * * to determine whether or not a pregnancy is viable[,]" going so far as to claim the ballot language suggests that discretion is "unbounded." Relators' Br. at 25. But the ballot language is, again, accurate and does not intimate "unbounded" physician discretion as Relators argue.

Instead, it accurately explains that the amendment prescribes a case-by-case review of viability. Any "case-by-case" review, as the phrase is commonly understood, requires an *individualized* determination based upon some broader context of what is being reviewed. This common understanding is reflected in virtually all areas of Ohio law. *See, e.g., Cincinnati Ins. Co. v. Getter*, 194 Ohio App.3d 788, 2011-Ohio-3344, ¶ 38 (12th Dist.) ("The third approach,

commonly referred to as the 'case-by-case approach,' requires the court to examine the lease as a whole * * *."); *State v. Bourn*, 148 Ohio St.3d 167, 2016-Ohio-5105, ¶ 20 ("A determination of actual prejudice involves '"a delicate judgment'" and a case-by-case consideration of the particular circumstances."); *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, ¶ 12 (9th Dist.) ("A determination of unconscionability is a fact sensitive question which requires a case-by-case review of the surrounding circumstances.") As such, a reasonable voter would not read the ballot language to, for instance, authorize a physician to "declare that no pregnancy is viable before the third trimester[,]" Relators' Br. at 26, because the ballot language provides in plain terms that viability is to be determined on a case-by-case basis.

It is also common knowledge[2] amongst voters that Ohio law already imposes obligations upon physicians that include, at the very least, the exercise of "professional judgment" when engaging in the practice of medicine according to accepted industry standards. *See, e.g.,* R.C. 4731.22(B)(6) (outlining disciplinary action for a physician's "departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established") and (B)(18) (outlining disciplinary action for a physician's violation of the ethical codes of a national professional organization specified by the medical board by rule). Thus, when applying this commonsense reading to the ballot language, the omission of the amendment's additional language regarding a physician's viability determination neither prevents a voter from understanding what they are voting on, nor does it mislead, deceive, or defraud them.

[2] *See Hammonds v. Aetna Cas. & Surety Co.*, 243 F. Supp. 793, 801 (N.D.Ohio 1965) (noting that the promise of discretion in the Hippocratic Oath is known by "almost every member of the public * * *.").

None of the omissions identified by Relators—whether viewed alone or in conjunction—render the ballot language inaccurate, misleading, deceptive, or fraudulent. They are therefore not material omissions which might render the ballot language unlawful.

3. The ballot language contains no argument.

Finally, Relators argue that the ballot language improperly argues against the substance of Amendment 1. Ballot language "in the nature of a persuasive argument in favor of or against the issue" to be voted on is prohibited. *State ex rel. Voters First. v. Ohio Ballot Board*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 26, quoting *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 141, 519 N.E.2d 347 (1988). However, accurate language that neither induces a vote for nor a vote against the amendment must stand. *Id*. Here, all the language identified by Relators satisfies those requirements.

Relators mainly take issue with the ballot language's use of the phrase "unborn child." Relators claim that this phrase introduces an "ethical judgment" into the amendment. Relators argue that the ballot language must instead include the "neutral, accurate, and scientifically accepted" terms from the amendment text.

Again, the Ballot Board need not use terms from the amendment's text or one-to-one substitutes thereto. *Cincinnati for Pension Reform* ¶ 52 ("A strict requirement that boards cannot draft ballot language using nouns or verbs that do not appear in the proposed amendment would unduly restrict a board's discretion as it carries out its duties."). Nor is the inquiry whether the terms from the amendment are somehow *better* than the terms selected by the Ballot Board. Rather, the Court need only determine whether the ballot language's use of the term "unborn child" is inaccurate or inappropriately argues for or against the amendment's adoption. *See Voters First* ¶ 26.

The term "unborn child" passes these tests. The term is neutral, accurate, and accepted in Ohio law. Indeed, "unborn child" is regularly deployed in the Ohio Revised Code, both in

provisions that deal explicitly with abortion and in provisions that address other topics. For example, provisions of Ohio criminal law prohibiting certain types of abortion use the term "unborn child." *See, e.g.*, R.C. 2919.15 (partial birth feticide); R.C. 2919.201 (abortion after gestational age of 20 weeks); R.C. 2919.17 (terminating or attempting to terminate human pregnancy after viability); 2919.10 (abortion related to finding of down syndrome). But the term is also used outside the abortion context, including in provisions addressing trusts and estates, R.C. 5803.03(F) (allowing a parent to represent and bind the parent's "unborn child"), notifications to putative fathers of children to be placed for adoption, R.C. 3107.07611, and providing the scope of insurance coverage for emergency services, R.C. 3923.65.[3] Accordingly, as a matter of general usage in Ohio law, "unborn child" is a neutral term accepted in a variety of contexts.

Moreover, the ballot language's use of "unborn child" sidesteps any confusion resulting from the development-specific terms "fetus" and "fetal." As Relators point out, fetus and fetal describe a particular gestational state. Merit Br. at 29. But usage of the term "fetus" does not always denote this scientific definition. For example, portions of the Revised Code define a "fetus" as including all stages of development from conception, *see* R.C. 2919.19(A)(5), but other portions differentiate "fetus" from other gestational stages like zygote, blastocyte, and embryo, *see, e.g.*, R.C. 2317.56 (requiring reporting of the probable gestational age of an aborted "zygote, blastocyte, embryo, or fetus"). Ballot language including the term "fetus" has the potential to confuse voters, who may not know or understand the term's varying definitions.

[3] Although Respondents need not show that the term "unborn child" is as good as or better than Relators' preferred term, it bears mentioning that the Revised Code uses "fetus" and "fetal" in similar contexts as "unborn child." The Revised Code uses the term "fetus," the term appearing in the amendment's text, in the abortion context, see R.C. 3701.79 (abortion reports), and in other contexts, see R.C. 1337.17 (durable power of attorney for health care).

The Ballot Board instead adopted ballot language that does not require voters to make any leaps of interpretation. It uses a term, "unborn child," that encompasses all gestational stages, both as a matter of general usage and statutory definition. *See* R.C. 2919.16(L) ("'Unborn child' means an individual organism of the species homo sapiens from fertilization until live birth."); R.C. 2919.20(I) (same). The ballot language then explains the restrictions that apply to unborn children at various gestational stages: (1) abortions before an unborn child's viability cannot be prohibited, burdened or penalized; (2) abortions after an unborn child's viability can be prohibited only if a physician does not judge them necessary to protect life or health; and (3) regardless of stage, abortions cannot be prohibited when physicians judge them necessary to protect life or health. With the Ballot Board's majority-approved language, voters in the ballot box will not have to guess at the amendment's meaning. Rather, the language clearly spells out the rules that will apply at each stage of pregnancy. Thus, as required by Ohio law, the ballot language's use of the term "unborn child" is accurate and does not mislead.

Relators contend that "unborn child" inherently tends to induce a vote against the amendment. But they cannot show that this term rises to the level of a constitutional violation. As Relators concede, abortion "is one of the most divisive issues of our time." Compl. ¶ 7. Included among the divisive issues raised by abortion is word choice. An abortion-related term accepted as neutral by some may be regarded as inaccurate, argumentative, or inflammatory by others. *See, e.g.*, Amy Harmon, "'Fetal Heartbeat' vs. 'Forced Pregnancy': The Language Wars of the Abortion Debate," N.Y. Times, available at https://www.nytimes.com/2019/05/22/us/fetal-heartbeat-forced-pregnancy.html. Under such circumstances, this Court should defer to the Ballot Board's word choices in the absence of any inaccuracies or errors. As explained above, because

the term "unborn child" is an accurate term with a consistent definition across existing Ohio law, the Ballot Board's decision to use that term should stand.

Finally, Relators argue that the terms "only" and "always" imply that the amendment unduly restricts state authority to regulate abortion. According to Relators, this amounts to improper persuasion. As explained in Part III(C)(1), *supra*, this language is correct and does not mislead. The language may highlight the narrow windows in which the State may regulate abortion, but the amendment would, in fact, starkly curtail the State's ability to do so compared to current law. *Compare Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2233 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."), *with* Compl. Ex. 13. If approved, the amendment would *only* allow abortion restrictions under a narrow set of circumstances. Likewise, it would *always* allow abortions to occur under many circumstances not permitted under current law. Amendment 1's proposed changes to existing law are momentous, and the ballot language reflects the magnitude of the proposed change. When ballot language "describes what the law would be if the proposed amendment is approved," and "does so accurately," the ballot language does not violate the Ohio Constitution. *One Person One Vote* ¶ 20.

4. As a whole, the ballot language is lawful and must stand.

In their effort to rewrite the ballot language, Relators also raise issues with its length[4] and its alleged "repetitive amplification."[5] Relators' Br. at 10, 25. As noted throughout, "the

[4] Relators' word-count formula is questionable at best. They exclude, for example, the title of the ballot from the word count, but the title's language is also reviewable. R.C. 3505.06(D). Regardless, Relators do not directly attack the ballot language as unlawful because it is not "condensed" as they claim.

[5] As addressed in part III(C)(1) and (3), *supra*, the ballot language Relators point to is not repetitive—it addresses the amendments' prohibition on state action at differing gestational stages of pregnancy.

determinative issue presented to this court is whether the cumulative effect of [any] technical defects is harmless or fatal to the validity of the ballot." *Brown*, 52 Ohio St.2d at 19. And, as shown above, Relators have shown *no* technical defects because the ballot language they take issue with is accurate, neutral, and identifies the substance of the proposed amendment.

While Relators may take exception with their preferred language not being used, this is not enough to establish their mandamus claim. Instead, Relators claim must fail because, when read as a whole, the ballot language satisfies the pertinent standard: it "properly identif[ies] the substance of the amendment" and does not "mislead, deceive, or defraud the voters." Ohio Constitution, Article XVI, Section 1.

D. The ballot board has no clear legal duty to adopt the amendment's text as the ballot language, and relators have no clear legal right to demand as much from the board.

Relators' mandamus claim fails for a separate reason. To the extent that Relators request this Court to order the ballot board to adopt the full text of the amendment as the ballot language, Relators' Br. at 33-34, or to order the ballot board to adopt specifically prescribed language, *id*. at 35-36, their mandamus claim must fail. Relators can establish neither (1) a clear legal right to that relief, nor (2) a clear legal duty owed by the Ballot Board and Secretary LaRose to perform it. *See State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 437, 2006-Ohio-5439, 857 N.E.2d 88, ¶ 18, citing *State ex rel. Marsalek v. S. Euclid City Council*, 111 Ohio St. 3d 163, 2006-Ohio-4973, 855 N.E.2d 811, ¶ 8.

That is because the Ohio Constitution vests the authority to craft ballot language exclusively with the Ballot Board. The Ballot Board has no legal duty to adopt the full text of an amendment as the ballot language, and Relators have no clear legal right to demand it. Ohio Constitution, Article XVI, Section 1. Because the Constitution imposes no clear legal duty on the

Ballot Board to adopt the amendment's text as the ballot language, this Court cannot order as much as a remedy in a mandamus lawsuit.[6] Rather, this Court's role in ballot-language challenges is limited to "a determination of whether the contested language is invalid." *Voters First*, 2012-Ohio-4149, ¶ 62 (O'Connor, C.J., concurring). As Chief Justice O'Connor stated in her concurrence, once the Court makes this decision, "the judiciary's role in the matter is complete." *Id*. Here, Relators' requested relief invites the Court to overstep its limited role. Likewise, Relators attempt to leapfrog the Ballot Board and its constitutional authority so they might draft the ballot language themselves. They have no clear legal right to draft the ballot language. And neither the Constitution nor Ohio law impose any duty upon the Ballot Board and Secretary LaRose accept Relators' preferred language.

Constitutionally speaking, the Ballot Board alone has the authority to carry out the admittedly difficult task of choosing ballot language. Relators deride the Ballot Board's actions as "partisan posturing" and "larding the ballot language." But there is a reason that the Ballot Board, not the petition's proponents, have the constitutional duty to select ballot language. "The language an amendment's proponents may regard as a negative description of the law's consequence could seem to its opponents merely a necessary explanation of the law's meaning." *See Cincinnati for Pension Reform*, 2013-Ohio-4489 at ¶ 53. After all, "'there is no end to the difficulty in choosing language which will awaken in the reader the very same thought that was in the mind of the

[6] Every voter can read the full text of the amendment before voting to approve or reject it. "The full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible to the voters." R.C. 3505.06(E). Further, the proposed amendment, together with the arguments and explanations "will be published once a week for three consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published." Ohio Constitution, Article II, Section 1g.

writer.'" *State ex. rel Commissioners of Sinking Fund v. Brown*, 167 Ohio St. 71, 74 146 N.E.2d 287 (1957). Relators want their preferred language printed on the ballots through a writ of mandamus, but nothing in the Constitution or the Revised Code gives Relators the right to demand particular language from the Ballot Board. They have no legal right to their requested relief, and the Ballot Board or Secretary LaRose owe Relators no clear legal duty to perform that relief. Relators' Complaint should be dismissed on this basis alone.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to enter judgment in their favor and dismiss the Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, the foregoing was filed electronically using the Court's e-filing system. I further certify that the foregoing was served via electronic mail upon the following:

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