Supreme Court of Ohio Clerk of Court - Filed June 05, 2023 - Case No. 2023-0672

**IN THE SUPREME COURT OF OHIO**

| **State of Ohio *ex rel.* One Person One Vote, *et al.*,**<br><br>**Relators,**<br><br>**v.**<br><br>**Ohio Ballot Board, *et al.*,**<br><br>**Respondents.** | **Case No. 2023-0672**<br><br>Original Action in Mandamus Pursuant to Article XVI, Section 1 of the Ohio Constitution<br><br>Expedited Election Case Pursuant to Supreme Court Rule of Practice 12.08<br><br>Peremptory and Alternative Writs Requested |
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# RELATORS' REPLY BRIEF

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## TABLE OF CONTENTS

INTRODUCTION .......... 1
ARGUMENT .......... 2
I. The ballot language prescribed by the Ballot Board is misleading and improperly persuasive .......... 2
A. The ballot language unlawfully omits any information about the pre-Amendment status quo .......... 3
B. The ballot language unlawfully fails to contextualize the Amendment in history .......... 6
C. The ballot language inaccurately uses the word "specify" to describe the Amendment's elimination of the option to cure initiative petitions .......... 7
D. The ballot language inaccurately describes how many petition signatures the Amendment requires from each county .......... 8
E. The ballot language's myriad defects are fatal to its validity .......... 9
II. The ballot title prescribed by the Secretary is neither true nor impartial .......... 10
A. The title is inaccurate .......... 10
B. The title is not impartial .......... 12
III. Because the ballot language and ballot title are unlawful, Relators are entitled to writs of mandamus .......... 13
CONCLUSION .......... 14
CERTIFICATE OF SERVICE .......... 16

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

*Jurcisin v. Cuyahoga County Board of Elections*,
35 Ohio St.3d 137, 519 N.E.2d 347 (1988) ....................11, 12

*Markus v. Trumbull County Board of Elections*,
22 Ohio St.2d 197, 259 N.E.2d 501 (1970) ....................1, 3, 4

*State ex rel. McCord v. Delaware County Board of Elections*,
106 Ohio St.3d 346, 2005-Ohio-4758, 835 N.E.2d 336 ....................3, 7

*Schnoerr v. Miller*,
2 Ohio St.2d 121, 206 N.E.2d 902 (1965) ....................2

*United States v. Lopez*,
998 F.3d 431 (9th Cir. 2021) ....................11

*State ex rel. Voters First v. Ohio Ballot Board*,
133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119 ....................1, 3, 6, 7, 8, 9

### Statutes

R.C. 3519.21 ....................10, 12

### Other Authorities

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal
Texts....................11

*Semantics*, Merriam-Webster, https://www.merriam-
webster.com/dictionary/semantics (last visited June 5, 2023)....................1

*Specify*, Merriam-Webster, https://www.merriam-
webster.com/dictionary/specify (last updated May 22, 2023)....................7

## INTRODUCTION

The proposed Amendment would take away the people's century-old right to decide the contents of the Constitution by a simple-majority vote. And the Amendment would make it harder for the people to propose constitutional amendments by initiative petition while leaving the requirements for politicians in the General Assembly to do so unchanged. Respondents' adopted ballot title and ballot language say none of this. They are in various parts inaccurate, misleading, and improperly persuasive, all in violation of Ohio law. The Court should order Respondents to fix them.

Respondents barely defend their own work. Their argument that the language need not mention the status quo—which since the 1912 Constitutional Convention has allowed amendments by a simple-majority vote—is contrary to decades of practice and this Court's precedent. They *concede* that the ballot language's explanation of the new signature requirement is wrong, yet offer no justification for the error. They do not deny that the title's unnecessary use of the term "elevating" carries a strong positive connotation that could easily have been avoided without any loss of meaning, and they butcher the title's grammatical structure in attempting to deny its plain inaccuracy.

Instead of offering a substantive defense, Respondents complain that Relators are engaged in "semantics warfare." Respondents' Br. 11. But "semantics" is "the study of meanings." *Semantics*, Merriam-Webster, https://www.merriam-webster.com/dictionary/semantics (last visited June 5, 2023). And when it comes to the way that a proposed amendment is described to the electors who are asked to approve it, meanings matter greatly. The Court has held, time and again, that most electors will learn what a ballot measure does *only* from what the ballot title and ballot language say. *See, e.g.*, *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 29; *Markus v. Trumbull Cnty. Bd. of Elections*, 22 Ohio St.2d

197, 203, 259 N.E.2d 501 (1970); *Schnoerr v. Miller*, 2 Ohio St.2d 121, 125, 206 N.E.2d 902 (1965). And ballot language that is misleading, inaccurate, or argumentative is improper under Ohio law and subject to invalidation by this Court.

In his speech to the 1912 Constitutional Convention that wrote the provisions the Amendment would change, Teddy Roosevelt warned against attempts to "make of the constitution a means of thwarting instead of securing the absolute right of the people to rule themselves." The Amendment aims to do just that. But any Ohioan who relies on the ballot language and title to understand the Amendment will be left with a misunderstanding of its scope and effect and no understanding of its import. Ohio law unambiguously requires more. The Court should grant the writs.

## ARGUMENT

### I. The ballot language prescribed by the Ballot Board is misleading and improperly persuasive.

The ballot language that Respondents adopted violates the Constitution and the Revised Code because it does not adequately tell electors what the Amendment does. It is fatally flawed in several different ways, any one of which justifies granting the writ. It fails to describe the status quo—under which the people approve amendments with a simple-majority vote—leaving electors to guess as to the direction and significance of the change to a sixty-percent supermajority requirement. The ballot language also does not mention the existing, simple-majority requirement's century-long pedigree, which Respondents concede electors would find relevant. It states that the Amendment "specifies" a prohibition on curing insufficient signatures when in fact it eliminates that existing right. And, most obvious of all, it wrongly describes the Amendment's signature requirements—as Respondents admit.

Respondents say the Court has upheld ballot language that generated only "a *slight* chance

for voter confusion." Respondents' Br. at 6–7 (emphasis added) (citing *State ex rel. Comm'rs of Sinking Fund v. Brown*, 167 Ohio St. 71, 73–75, 146 N.E.2d 287 (1957) and *State ex rel. Foreman v. Brown*, 10 Ohio St.2d 139, 147–51, 226 N.E.2d 116 (1967)). This is a tepid defense, to put it mildly. But the problems here are not slight. And Respondents' arguments run contrary to the Court's longstanding jurisprudence.

### A. The ballot language unlawfully omits any information about the pre-Amendment status quo.

The prescribed ballot language is unlawful, first, because it does not describe the pre-Amendment status quo and therefore leaves electors to guess as to the direction and significance of the Amendment's sixty-percent supermajority requirement. *See* Relators' Br. 10–13. Proposed ballot language must address the "actual existing circumstances" in which a ballot item will take effect if those circumstances are relevant to electors' decisions. *State ex rel. McCord v. Delaware Cnty. Bd. of Elections*, 106 Ohio St.3d 346, 2005-Ohio-4758, 835 N.E.2d 336, ¶¶ 52, 57. Otherwise, the language will fail to provide "an accurate and unambiguous statement of the issue sought to be submitted to the electorate." *Markus*, 22 Ohio St.2d at 202, 259 N.E.2d 501.

In defending their omission of the status quo, Respondents misread this Court's precedent, make inapposite analogies to ballot language describing prior amendments, and attempt to cover their errors by relying on text outside their prescribed description. Each of their arguments fails.

*First*, Respondents attempt to limit *Markus*'s applicability to the present case by misreading it. *See* Respondents' Br. 7–8. Respondents argue that the ballot summary in *Markus* was invalidated only because it was inaccurate, not because of an omission. *Id.* But even if *Markus*'s discussion of the *ballot* summary could be read so narrowly, *Markus* also addressed and invalidated the summary language on the referendum petitions. *See* 22 Ohio St.2d at 200–02. The requirements for summaries on referendum petitions are the same as for ballot language: the

summary must not be "misleading or inaccurate or contain[] material omissions." *Voters First*, 2012-Ohio-4149, ¶ 25. And the petition language in *Markus* was literally accurate: the petition was, indeed, a challenge to "a zoning amendment from 'residential' use to 'business and commercial' use . . . *in connection with* real estate owned by" a particular person and described by an attached legal description. *Markus*, 22 Ohio St.2d at 200–01 (emphasis added). True, some of the land described in that legal description was already zoned commercial, but the petition did not say otherwise. *See id.* So the language was not "inaccurate" in a strictly logical sense, but the Court still held it unlawfully "insufficient, ambiguous, and misleading" because it did not inform electors "of the zoning status of the property as it presently is and the nature and extent of the proposed changes." *Id.* at 201–02.

The ballot language here is just like the petition language in *Markus*. The description of the sixty-percent supermajority requirement may be accurate in a strictly logical sense, but the omission of the existing context leaves electors to guess as to whether it makes amending the Constitution easier or harder, and by how much.

*Second*, Respondents cite two ballot measures from recent years that they say did not include language describing the status quo. Respondents' Br. at 8–9. But neither of those ballot descriptions was challenged, so the Court has never held that they complied with the legal requirements. And at least as Respondents describe it, the ballot language for 2017 Issue 1 seems to have been misleading indeed, stating that the "amendment would provide victims with" rights that Respondents say "were already provided by the Constitution." *See* Certified Ballot Language for 2017 Issue 1 (Aug. 17, 2017), https://www.ohiosos.gov/globalassets/ballotboard/2017/2017-08-17-certifiedballotlanguageissue1.pdf; *see also* Respondents' Br. 8. The fact that no one challenged that language does not insulate future misleading language from review. As for 2022

Issue 2, it imposed new restrictions on voting in local elections that the Ohio Constitution did not expressly address. The status quo is much less significant in the context of an amendment addressing an entirely new issue. Here, in contrast, the Amendment changes longstanding, existing constitutional rules without adequately explaining the existing rules or the nature of the changes.

Moreover, the ballot language for both 2017 Issue 1 and 2022 Issue 2 included words that at least conveyed the direction of the proposed amendment. The ballot language describing 2017 Issue 1 states that the proposed amendment would "expand" the rights of victims, making clear to electors both that the Constitution already includes some rights for victims and that the proposed amendment adds to those rights (rather than subtracting from them). *See* Respondents' Br. 8 (citing Certified Ballot Language for 2017 Issue 1). And the ballot language describing 2022 Issue 2 states that the proposed amendment would mandate that "only" individuals who meet certain qualifications may vote in state and local elections and would "prohibit" local governments from allowing electors who do not meet state voting qualifications to vote in local elections. *See* Respondents' Br. 9 (citing Certified Ballot Language for 2022 Issue 2). Although that language did not spell out the status quo, it communicated to electors that the proposed amendment would restrict local governments' authority to set their own qualifications for electors. That is precisely the sort of information that is missing from the ballot language here, which, in failing to include any hint of the status quo, does not inform electors whether the Amendment would make it harder or easier to pass and initiate constitutional amendments.

*Finally*, Respondents try to hide their omission of the current simple-majority threshold by pointing to other text on the ballot, which states: "A majority yes vote is necessary for the amendment to pass." Respondents' Br. 8. But that language does not purport to provide information about the Amendment's effect and instead appears in the heading section for all ballot

issues. Material information must be included in the description of the proposed amendment itself, not in a separate notation on the ballot. As this Court has explained, "[i]n the larger community, in many instances, the only real knowledge a voter obtains on the issue for which he is voting comes when he enters the polling place and reads *the description of the proposed issue* set forth on the ballot." *Voters First*, 2012-Ohio-4149, ¶ 29 (emphasis added) (quoting *Schnoerr*, 2 Ohio St.2d at 125). Regardless, nothing in that language tells electors that *all* proposed constitutional amendments are currently subject to a simple-majority vote requirement. Even if some electors understand that language to be an indication of the status quo, they might conclude that the existing threshold is set by statute, that it is up to the General Assembly on a case-by-case basis, that it varies by type of amendment, or any of countless other possibilities.

### B. The ballot language unlawfully fails to contextualize the Amendment in history.

The ballot language is also defective because it excludes any mention of the fact that the simple-majority requirement dates to the 1912 Constitutional Convention. Relators' Br. 11. Respondents argue that including this information would amount to an improper persuasive argument, because "[v]oters may likely presume that the constitutional provisions to be amended, having been the law of our state for over 100 years, 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?" Respondents' Br. 10. But this is just an admission that the simple-majority requirement's long pedigree is a material fact that may affect electors' choices. That is precisely why it must be included in the ballot description. The mere statement of the existing rule's age is not improper argumentation; electors are left to decide for themselves whether that fact weighs in favor of or against the Amendment. Some might think the historical pedigree favors the status quo, while others might think it indicates a need for change.

Respondents also mistakenly argue that because the full text of the Amendment itself does not indicate how long the status quo has existed, the ballot language need not do so. Respondents' Br. 9–10. But this Court has held the opposite. In *McCord*, the respondents made a similar argument—that the petition summary at issue "should not be penalized for not specifying proposed uses that the resolution itself did not contain." 2005-Ohio-4758, ¶ 42. The Court rejected that argument, explaining that, where a summary does not merely "contain[] substantially the same wording as the resolution itself"—as the ballot language for the Amendment indisputably does not—then the summary must include all material facts, even if they are not contained in the resolution's text. *Id.* ¶¶ 43–46; *see also Voters First*, 2012-Ohio-4149, ¶ 29 (relying on a petition-summary case in construing the requirements for ballot language). Here, the ballot language does not simply describe the Amendment's operative text using its own wording, so the ballot language must accurately summarize all material facts about the Amendment. The language's failure to contextualize the Amendment in Ohio's constitutional history violates that requirement precisely because, as Respondents concede, electors will likely find that history significant.

### C. The ballot language inaccurately uses the word "specify" to describe the Amendment's elimination of the option to cure initiative petitions.

The ballot language is also misleading and inaccurate in asserting that the Amendment would "[*s*]*pecify* that additional signatures may not be added to an initiative petition … proposing to amend the Constitution of the State of Ohio." (Emphasis added.) Because "specify" means "to name or state explicitly or in detail," *Specify*, Merriam-Webster, https://www.merriam-webster.com/dictionary/specify (last updated May 22, 2023), its use suggests that the Constitution currently does *not* specify whether "additional signatures" may be added to cure a defective petition. That is false: the Constitution in fact now specifies that curing by submitting additional signatures *is allowed*. Relators' Br. 14–15.

Respondents do not engage with Relators' arguments about the persuasive nature of their word choice. Instead, they baldly assert that their description is accurate and confusingly characterize Relators' contention as "semantics warfare." Respondents' Br. 11. But because the word "specify" does not accurately describe what the Amendment does, its use is another mark against the ballot language's validity.

**D. The ballot language inaccurately describes how many petition signatures the Amendment requires from each county.**

Finally, the ballot language blatantly misstates the signature requirement for amendments proposed by initiative petitions, describing the requirement as "five percent of the eligible voters of each county" when the requirement is in fact five percent of the total votes for governor in the most recent election, a very different number. Respondents concede this inaccuracy. *See* Respondents' Br. 11 ("[T]here is a technical difference between 'eligible voters,' as used by the Ballot Board, and the actual number of signatures required for each county under the proposed amendment."). Their sole defense of the language is to contend that electors will have other opportunities, outside of the ballot language itself, to learn of the *actual* substance of the proposed amendment. Respondents' Br. 11–12. But this Court has rejected the argument "that the inclusion of the full text of the proposed amendment in each polling place and in newspapers renders any error in the ballot language harmless." *Voters First*, 2012-Ohio-4149, ¶ 57 (internal citations omitted). After all, "voters cannot leave their voting booth to read the full text of the proposed amendment and then return to cast their vote." *Id.* Rather, "for many voters, their only knowledge of the proposed constitutional amendment comes from the ballot language." *Id.* (citing *Schnoerr*, 2 Ohio St.2d at 125, 206 N.E.2d 902).

Moreover, even if some electors are aware of the general nature of the Amendment because "it is a highly controversial issue," Respondents' Br. 12 (quoting *Foreman*, 10 Ohio St.2d at 150),

they are unlikely to be familiar enough with the details of its specific provisions to avoid being misled by the inaccurate description. The inaccuracy is not obvious even from the face of the Amendment's full text. Determining the number of signatures required for citizen-initiated constitutional amendment petitions requires one to read beyond the text of the amended provisions altogether. As Respondents' brief itself explains, "[u]nder the proposed amendment, several aspects of Article II, Sec. 1g remain the same, including the clarification that '[t]he basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor.'" Respondents' Br. 11. But the amended subsection does not include an internal cross-reference to that clarification. As a result, an elector cannot learn the new signature requirement by reading only the Amendment's proposed changes; the elector must also read the entire relevant section of the Constitution, recognize a hidden cross-reference, and import that cross-reference's clarification to the amended subsection—all based on text that will not be available inside the voting booth. For Respondents to suggest that "any possibility of confusion is remote at best" under those circumstances beggars belief. Respondents' Br. 12.

**E. The ballot language's myriad defects are fatal to its validity.**

In their opening brief, Relators set forth how the ballot language's omissions and inaccuracies prevent electors from "know[ing] what [they are] being asked to vote upon" and serve as "persuasive argument[s] in favor of" the Amendment, such that "the[ir] cumulative effect … is … fatal to the validity of the ballot." *Voters First*, 2012-Ohio-4149, ¶ 26; *see* Relators' Br. 8–15. And as outlined above, none of Respondents' arguments to the contrary are persuasive. Respondents' last-ditch defense that correcting their material omissions and inaccuracies would mean adding more language that would confuse voters is also wrong. Misleading and inaccurate

ballot language is not lawful just because it is short. And many of the defects could be fixed by adding or changing just a few simple words, with no risk of confusing voters. The Ballot Board and its members should thus be directed to prescribe new ballot language that complies with their clear legal duties.

## II. The ballot title prescribed by the Secretary is neither true nor impartial.

Secretary LaRose's prescribed ballot title—"Elevating the standards to qualify for and to pass any constitutional amendment"—is unlawful because it is not accurate or impartial. Respondents' counterarguments, far from proving otherwise, just illustrate the title's defects.

### A. The title is inaccurate.

The title violates Section 3519.21 because it is not "a true . . . statement of the measure[]." The title indicates that the Amendment "elevat[es] the standards to qualify for … *any* constitutional amendment." (Emphasis added). But the Amendment's changes to qualifying standards—doubling the number of counties from which signatures must be gathered and eliminating the option to cure—apply *only* to amendments that the people propose via initiative petition. Relators' Br. 16. The changes to the qualifying standards do not apply to amendments proposed by politicians in the General Assembly or at a future constitutional convention, and no other aspect of the Amendment raises the qualifying standards for such amendments either. If an elector asked, "Does the Amendment raise the standards for *any* constitutional amendment to qualify for the ballot?," the only honest answer would be, "No, only for some amendments."

Respondents make two ineffectual counterarguments. First, Respondents point out that the Amendment's changes to "the requirements for passage"—*i.e.*, the sixty-percent supermajority threshold—do apply to "'any' and all" amendments. Respondents' Br. 13–14. True, but irrelevant. The title says that the Amendment "Elevate[s] the standards to qualify for *and* to pass any

constitutional amendment." (Emphasis added). The sixty-percent supermajority requirement involves "pass[ing]" constitutional amendments; it is not a change in the standards to qualify amendments for the ballot.

Second, Respondents argue that, "[b]ecause 'any' directly precedes the word 'pass' in the ballot title," the title is "accurate and true." Respondents' Br. 14. This claim is, first of all, factually incorrect—"any" does not directly *precede* "pass" in the title, it directly *follows* it. In any case, Respondents do not attempt to explain why the ordering or proximity of the terms "any" and "pass" renders the title truthful. Nor could they. The crucial phrase in the title is "to qualify for *and* to pass." The word "and" is "conjunctive," meaning that it "combines items" rather than "creat[ing] alternatives." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 12; *see also United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021) (explaining that "'and' means 'and'"). Here, the word "and" indicates unambiguously that the two items it joins—the infinitive verbs "to qualify for" and "to pass"—*both* apply to what follows, namely, "any constitutional amendment." As a grammatical matter, the title therefore unmistakably asserts that the Amendment "elevat[es] the standards to qualify for . . . *any* constitutional amendment." (Emphasis added). That assertion is simply false.

Respondents do not even try to deny that this inaccuracy in the ballot title is material. It is. The Amendment's changes to qualifying standards for initiatives will make it proportionately more likely that future constitutional amendments originate with the politicians in the General Assembly, rather than with the people. An accurate title would make that effect clear to the electors. Secretary LaRose's chosen title instead unlawfully seeks to hide it from them, a defect that is "fatal to the validity of the ballot." *Jurcisin v. Cuyahoga Cnty. Bd. of Elections*, 35 Ohio St.3d 137, 141, 519 N.E.2d 347 (1988).

### B. The title is not impartial.

The second reason the title violates Section 3519.21 is that it is not "impartial." Secretary LaRose's choice of the word "elevating" is an obvious attempt to prejudice electors in favor of the Amendment by evoking that term's suggestion of desirability. The Secretary could have selected a more neutral word such as "raising," "increasing," or "modifying," each of which conveys the substance of the Amendment without the strongly favorable associations "elevating" will create in the minds of many electors. His choice not to do so can be explained only as an attempt to prejudice the electors.

Respondents do not deny that "elevating" has a strong positive connotation, nor that its use here breaks sharply with the more neutral verbs used in other recent ballot titles. *See* Respondents' Br. 14. Respondents instead counter that Relators are asking the Court "to choose between synonymous terms" and are objecting to "the positive connotation" the term "elevating" carries, an approach they fault as focused on "semantics rather than substance." *Id.* But the positive connotations matter. This Court's well-settled rule is that the ballot title must avoid language "which is 'in the nature of a persuasive argument in favor of or against the issue.'" *Jurcisin*, 35 Ohio St.3d at 141 (quoting *Beck v. Cincinnati*, 162 Ohio St. 473, 475, 124 N.E.2d 120 (1955)). The Secretary's choice of a term with strongly positive connotations where several neutral ones are available countermands that rule, unless some good reason other than an intent to prejudice electors justifies the choice.

No such reason exists here. Secretary LaRose has now had three separate opportunities to explain his thinking in choosing the word "elevating": at the Ballot Board's meeting, at his post-meeting press conference, and in his brief to this Court. Yet his only explanation of the choice to date came at the press conference, where he said only that the first dictionary definition of "elevate" is to "raise or increase." (RELATORS_0065). If so, and the main benefit of "elevating"

is that it sometimes means "raising or increasing," then why does he object to simply using one of those more neutral terms? His brief does not say. The obvious inference is that he chose "elevating" in an unlawful attempt to bias the electors.[1]

Because the ballot title is neither "true" nor "impartial," it is unlawful, and Secretary LaRose should be directed to prescribe a new title that complies with the foregoing legal standards.

## III. Because the ballot language and ballot title are unlawful, Relators are entitled to writs of mandamus.

Respondents contest only whether Relators are correct about the underlying questions of law in this case, conceding that Relators' entitlement to relief is entirely dependent on the merits. The Court should therefore mandate that the Ballot Board reconvene and prescribe lawful ballot language for the Amendment consistent with the following standards:

- The ballot language must fully and accurately describe the status quo that the Amendment would modify, including the simple-majority vote threshold for amendments, the petition signature requirements, and the provision for cure of amendment petitions;
- The ballot language must accurately characterize and explain the definition of "electors" underlying the petition signature requirements, including how many signatures are required to qualify an initiative petition;
- The ballot language must specify that the provisions to be amended have been part of the Ohio Constitution in their current form since 1912;

[1] RITE, arguing in support of Respondents as *amicus*, challenges the propriety of "changing," "modifying," and "increasing," but even RITE cannot muster any argument as to why "raising," which Relators' merit brief also proposed, would not have been an appropriately neutral choice. *See* RITE Br. 3–4; Relators' Br. 17. Indeed, RITE itself *uses "raise" rather than "elevate"* in the course of arguing against "modify" or "change." RITE Br. 4 ("The voter is left guessing whether the proposed changes will *raise* or strengthen these standards or, rather, will lower or weaken them." (emphasis added)).

- Or, in the alternative, the full text of the proposed amendment may be adopted as the ballot language.

Likewise, the Court should mandate that Secretary LaRose prescribe a lawful ballot title for the Amendment, meaning that the title must not use words or phrases that are likely to mislead electors about the Amendment's scope or create prejudice in favor of the Amendment.

## CONCLUSION

For the foregoing reasons, and those in their complaint and merit brief, Relators ask that this Court issue their requested writs of mandamus.

Dated: June 5, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email this 5th day of June 2023 to the following:

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