IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* Ohioans United for Reproductive Rights, *et al.*, **Relators,** **v.** **Ohio Ballot Board, *et al.*,** **Respondents.**	**Case No. 2023-1088** 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

RELATORS' REPLY BRIEF

Donald J. McTigue (0022849)
Counsel of Record
MCTIGUE & COLOMBO, LLC
545 East Town Street
Columbus, OH 43215
(614) 263-7000
dmctigue@electionlawgroup.com

Ben Stafford**
ELIAS LAW GROUP LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
(206) 656-0176
bstafford@elias.law

Emma Olson Sharkey**
Samuel T. Ward-Packard**
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001
(202) 968-4490
eolsonsharkey@elias.law
swardpackard@elias.law

** Applications for admission *pro hac vice* pending

Counsel for Relators

Dave Yost (0056290)
OHIO ATTORNEY GENERAL

Julie M. Pfeiffer (0069762)
Counsel of Record
Ann Yackshaw (0090623)
Michael A. Walton (0092201)
Stephen P. Tabatowski (0099175)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
Julie.Pfeiffer@OhioAGO.gov
Ann.Yackshaw@OhioAGO.gov
Michael.Walton@OhioAGO.gov
Stephen.Tabatowski@OhioAGO.gov
T: (614) 466-2872
F: (614) 728-7592

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

The theme of Respondents' brief is that words do not matter. Respondents claim that any meaningful scrutiny would "intrude on the Ohio Ballot Board's constitutional mandate to draft the ballot language" as it sees fit. Thus, Relators' arguments can be waved away. This Court's precedent can be disregarded. The words in the ballot language can be defined and redefined as needed to match Respondents' assertions. In the guise of demanding deference, Respondents in fact demand the right to alter, manipulate, and ignore the words in the Amendment itself—all in service of their preferred outcomes.

Respondents misconstrue or ignore the words in Relators' brief instead of addressing them head-on. They start by charging Relators with applying a "false framework" that, they say, requires subjective judgments about which language is "better." Yet every one of the seven defects that Relators identify in the ballot language renders that language misleading, improperly persuasive, or both—which is to say, in violation of the Ohio Constitution under the framework Respondents agree applies. And as their Merit Brief continues, Respondents have no answer to many of Relators' arguments about *how* that framework applies.

Respondents also ignore this Court's command to consider the "cumulative effect" of the ballot language. This is not a case of one or two marginal defects, but a comprehensive abuse of discretion. No impartial Ballot Board faithfully performing its constitutional role would have devised this ballot language. Instead, the Ballot Board drafted a misleading and inaccurate expanded "summary" of the Amendment, in an effort to persuade the voters to reject it.

When they try to justify the ballot language that emerged from that tainted process, Respondents borrow a page from Lewis Carroll: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" Lewis Carroll, *Through the Looking Glass* 124 (1872). For instance, Respondents say that "citizens"

means the people "acting through their representative government"—though nothing in the ballot language would lead a reasonable voter to read it that way. "Medical treatment," they claim, means "carrying out a decision," even when the decision is to *forgo* treatment, or has nothing to do with medical treatment at all. And "least restrictive" means "least restrictive on the pregnant woman," though the words "on the pregnant woman" are found nowhere in the ballot language.

Noticeably absent from Respondents' brief are the words used in the Amendment itself. Respondents do not seem to want the Court to read them. For good reason: To see why Relators are entitled to a writ of mandamus, one needs only to place the Amendment and the ballot language side-by-side—as Relators did throughout their Merit Brief. To name a few examples:

- The Amendment creates a right to "make and carry out one's own reproductive decisions." Yet the ballot language twists this into a right to "reproductive medical treatment."
- The Amendment imposes restrictions on the "State," defined as "any governmental entity and any political subdivision." Yet the ballot language says the Amendment would impose restrictions on "the citizens of the State of Ohio."
- The Amendment expressly enumerates five protected reproductive decisions, including "continuing one's own pregnancy." Yet the ballot language names only "abortion."

This Court should reject Respondents' arguments and make clear—once again—that words do matter, because "words are how the law constrains power." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). The words in the ballot language will mislead and deceive the voters about the Amendment. Accordingly, the Court should issue a writ of mandamus that directs the Ballot Board to put the words of the Amendment itself before the voters or, at a minimum, to draft language that satisfies the constitutional standard.

ARGUMENT

I. The ballot language violates the constitutional standard.

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. Respondents acknowledge that this is the "dispositive issue" with respect to this challenge. Respondents' Br. at 4 (quoting *Voters First*, 2012-Ohio-4149, at ¶ 23). Ballot language must "properly identify the substance of the proposal to be voted upon," and may not be "such as to mislead, deceive, or defraud the voters." Ohio Constitution, Article XVI, Section 1; *see also* R.C. 3505.062(B). The Ballot Board's prescribed language violates this mandate because it misleads the voters about "what they are being asked to vote on" and engages in improper "persuasive argument . . . against" the Amendment. *State ex rel. One Pers. One Vote v. Ohio Ballot Bd.*, No. 2023-0672, 2023-Ohio-1928, 2023 WL 3939006, ¶ 8.

Respondents nonetheless argue that this Court's authority to police the Ballot Board's discretion is too limited to reach the ballot language at issue here. On their view, the Board has sweeping authority to shape ballot language as it wishes, while this Court may correct only the Board's worst errors. The constitutional history of Article XVI tells a very different story. Prior to 1974, the Ohio Constitution did not prescribe standards for ballot language. Now, Article XVI both establishes the substantive standard for ballot language and gives this Court the authority to decide whether the Board's work satisfies that standard. And Article XVI gets that standard straight from *Thrailkill v. Smith*, 106 Ohio St. 1, 11, 138 N.E. 532 (1922), in which this Court established that it would enjoin ballot language that would "mislead, or deceive, or defraud the voters"—over *half a century* before the Ballot Board existed. Those words are now in the Constitution because when the people of Ohio voted to amend Article XVI and create a bipartisan

Ballot Board, in 1974, they also voted overwhelmingly to give this Court exclusive and original jurisdiction to review the Board's work under the *Thrailkill* standard.[1]

Respondents' very narrow view of this Court's authority is entirely untethered from this history. When the voters created the Ballot Board, they created a bipartisan body specifically tasked with preparing fair and neutral ballot language that properly identifies the substance of the proposal to be voted upon. And the voters concurrently created a check on the Ballot Board's authority—they granted this Court jurisdiction to review the Ballot Board's work under the same legal standard the Court had, by that point, employed for more than fifty years. The people of Ohio thus intended that the Court would continue to guard their right to fair and accurate ballot language. In the years since 1974, the Court has routinely performed that constitutional duty. It most recently did so just three months ago. *See One Pers. One Vote,* 2023-Ohio-1928. Respondents identify no good reason why this Court should take such a narrow, ahistorical view of its authority and duty in this case and this case alone.

A. The ballot language improperly misleads the voters about what right the Amendment would create.

The ballot language transforms the right "to make and carry out one's own reproductive *decisions*" into a right to "reproductive *medical treatment*," and omits four of the five expressly covered categories of reproductive decisions. *See* Relators' Br. at 15–20. These defects amplify one another to mislead voters about the nature of the right the Amendment would create. *See id.* Scrambling to defend this aspect of the ballot language, Respondents try to rewrite the Amendment while ignoring its protections for reproductive decisions that do not entail medical treatment.

[1] *See* Ohio Secretary of State, *Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors* 15 (2018), https://www.sos.state.oh.us/globalassets/elections/historical/issuehist.pdf. The 1974 amendment concerned measures proposed by the General Assembly. *See id.* The voters extended the same process and standard to citizen-initiated measures in 1978. *Id.* at 18.

First, the ballot language misleads the voters by redefining the right to make and carry out one's own reproductive decisions as a right to "reproductive medical treatment." This is true even assuming that *carrying out* one's own reproductive decisions is the "crux" of the Amendment right, as Respondents claim. Respondents' Br. at 10. Relators' Merit Brief demonstrated as much by pointing to several reproductive decisions that may be carried out without any "medical treatment," including "the decision to continue a pregnancy," "the decision to use certain forms of contraception," and "the decision not to use contraception." Relators' Br. at 17. Respondents have no response to these examples—they just ignore them. As a practical matter, this amounts to conceding that the ballot language is inaccurate. *Cf. In re App. of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 19 ("[I]t is not generally the proper role of this court to develop a party's arguments").

In any case, Respondents' focus on "carrying out" decisions is unjustified. For starters, it is a basic principle of textual analysis that the Court's role is to "give effect to every word and clause." *State ex rel. Nat'l Lime & Stone Co. v. Marion Cnty. Bd. of Comm'rs*, 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 14. Yet the ballot language effectively writes the words "to make . . . one's own reproduction decisions" out of the Amendment. Respondents denigrate the importance of this right, describing it as "nothing at all," and incorrectly deriding it as the stuff of "science fiction and dystopian novels." Respondents' Br. at 9. In doing so, Respondents ignore this nation's long and brutal history of depriving people of this right, including through mechanisms like forced castration or sterilization.[2] Those procedures certainly deprive the victim

[2] Forced castration was routinely deployed to control or punish enslaved people in the antebellum South, and systematic forced sterilization of immigrants and women of color was practiced under the banner of the eugenics movement well into the twentieth century. *See, e.g.*, Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. Times (June 8, 2022), https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html.

of the right to make a considered determination about reproduction: A person whose reproductive capacity has been destroyed by the government has no decision to make—even in "one's mind," *contra* Respondents' Br. at 9. Nor are state attempts to restrict the right to make reproductive decisions a distant memory. This Court held a "procreation prohibition" unconstitutional just three years ago, *State v. Chapman*, 163 Ohio St.3d 290, 2020-Ohio-6730, 170 N.E.3d 6, ¶ 29, and Relators' Merit Brief cited an instance of attempted forced sterilization from the 2010s, *see* Relators' Br. at 24 & n.11 (discussing *In re Guardianship of Moe*, 960 N.E.2d 350, 352 (Mass. App. 2012)). The Amendment would protect Ohioans against just this sort of affirmative state interference with individual reproductive decision-making. That right is deadly serious and an indispensable purpose of the Amendment. The ballot language's use of the phrase "reproductive medical treatment" misleads the voters by obscuring this purpose.

Second, the phrase "reproductive medical treatment" falsely implies a right to state-provided treatment. Relators' Br. at 17–18. It does not take an "unreasonable and anti-textual interpretation" to find such an implication in the ballot language. *Contra* Respondents' Br. at 8. Courts routinely employ the phrase "right to medical treatment" to refer to a right to receive government-provided treatment—another point established in Relators' Merit Brief that Respondents choose to ignore entirely. *See* Relators' Br. at 18 (quoting *Estate of Carter v. City of Detroit*, 408 F.3d 305, 313 (6th Cir. 2005)). And voters understand the difference between a right to engage in certain conduct, on the one hand, and a right to receive a certain tangible benefit, on the other. That distinction is baked into how Americans talk about rights. *See id.* (quoting *Gary B. v. Whitmer*, 957 F.3d 616, 629 (6th Cir. 2020)). Here, many voters will employ that distinction to interpret the ballot language's right to "reproductive medical treatment," which is a tangible thing, not a category of conduct. Respondents dub this point "unreasonable," Respondents' Br. at 8, but

do not ever explain why. The ballot language will inaccurately and misleadingly suggest to many voters that the Amendment creates a right to state-*provided* reproductive medical treatment.[3]

Third, the ballot language misleads voters by omitting any mention of four of the five categories of reproductive decision that the Amendment would explicitly protect. Relators' Br. at 19. The Amendment itself is not ambiguous about whether it covers decisions about contraception, fertility treatment, continuing one's own pregnancy, and miscarriage care. It categorically does. *Id.* It thus makes no sense to argue that "any ambiguity" in the ballot language arises from the Amendment's use of the phrase "including but not limited to"—that argument ignores the phrase's context. *Contra* Respondent's Br. at 11–12. If anything, Respondents' argument just proves Relators' point. If Respondents are right that the phrase "including but not limited to" is "indefinite," *id.* at 12, and the Amendment lists five *definite* categories, then the voters should be told what those five categories are.

Respondents' rejoinder, that "listing several categories leads a voter to believe that he or she is being given the entire scope of the right," Respondent's Br. at 12, is bizarre. Perhaps most obviously, Respondents do not explain how to square that logic with the ballot language they are themselves defending, which lists only *one* category—abortion. By Respondents' own reasoning, the ballot language is even more misleading than ballot language listing all five categories would be. And taking Respondents' argument to its logical conclusion, the best way to avoid misleading the voters is to put the Amendment's entire phrase—"including but not limited to decisions on

[3] Respondents italicize the words "individual" and "one's own" in the phrase "individual right to one's own medical reproductive treatment," Respondents' Br. at 8, as if to suggest that those words somehow refute Relators' argument. They do not. Those words indicate only that the medical treatment is "individual" or "one's own" medical treatment, rather than some other person's (a dependent's or spouse's, for example)—they do not thereby imply that the State will not *provide* that treatment to the individual.

contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion"—on the ballot. Relators, needless to say, have no objection to that approach.

Respondents also fail to refute Relators' arguments that the four omitted categories of decision will be *material* to voters as they decide how to cast their votes. *See* Relators' Br. at 19. Voters care about, and will be motivated by, all five categories of explicitly covered decision, not just abortion. Consider, for example, a voter who favors some restrictions on abortion but wants to preserve access to miscarriage-management drugs because of her own past difficulties accessing adequate miscarriage care. This voter might have a narrow understanding of the phrase "the right to make reproductive decisions" and wonder whether it covers miscarriage-care decisions: Decisions about miscarriage care, after all, are usually made after reproduction is no longer a possible outcome of the pregnancy. The Amendment itself leaves no doubt that miscarriage-care decisions qualify as "reproductive decisions." The ballot language, by contrast, does not, and so would materially mislead such a voter by omitting pivotal information that would help her to "arrive at an efficacious and intelligent expression of opinion." *Markus v. Trumbull Cnty. Bd. of Elections*, 22 Ohio St.2d 197, 203, 259 N.E.2d 501 (1970).[4]

Fourth, all the foregoing defects in the ballot language exacerbate one another. Relators' Br. at 19. Respondents obscure that fact by separating, into different sections of their brief, the ballot language's use of the phrase "right to reproductive medical treatment" and its omission of four of the five covered categories of decision. *See* Respondents' Br. at 8–9, 11–12. But these defects cannot be separated. *See* Relators' Br. at 19–20. To illustrate: If the ballot language used the phrase "right to make and carry out one's own reproductive decisions," a voter might

[4] To illustrate the point further: If the ballot language named only "contraception" to the exclusion of the other four categories (including abortion), there would be no question that it was misleading—a point with which Respondents' arguments suggest they agree.

reasonably infer that the Amendment encompasses decisions about contraception. But a voter quite likely would not understand that the ballot language's phrase "individual right to one's own reproductive medical treatment" encompasses contraception decisions, because using or not using contraception is a choice that is often carried out without any "medical treatment." The ballot language's distortions and omissions thus amplify one another's misleading effects. Neither the distortions nor the omissions should survive this Court's review.

B. The ballot language improperly misleads the voters about whom the Amendment would restrict.

The ballot language rewrites the Amendment's restrictions on state action to convert a right held by the citizens against the State into a restriction enforced by the State against the citizens. *See* Relators' Br. at 21–23. It does this in the least subtle way imaginable: It just inserts the words "the citizens" and thereby flips the Amendment's meaning. *See id.* Respondents' flimsy attempts to justify this ham-fisted rewrite collapse under the slightest scrutiny.

First, the ballot language's use of the phrase "the citizens" will mislead voters because it suggests that the Amendment would restrict their individual private activities. It suggests, for instance, that the Amendment might prohibit a "citizen" from "burdening" abortion by protesting an abortion clinic. *See* Relators' Br. at 22. Of course, the Amendment would do no such thing, because it does not restrict purely private activity at all. Respondents do not attempt to respond to Relators' various examples of how voters could understand this rewrite to reach private activity.

Respondents' contrary theory about how voters will interpret this aspect of the ballot language, Respondents' Br. at 7, is implausible on its face. To hear Respondents tell it, when voters encounter the phrase, "The proposed amendment would [p]rohibit the citizens of the State of Ohio . . ." on the ballot, they will somehow intuit that the Ballot Board meant not *individual* citizens, but rather something like, "the people" in their collective sovereign capacity, who,

"possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments." *Id.* (quoting *Hale v. State*, 55 Ohio St. 210, 214 (1896)). That is a remarkably counterintuitive reading. In evaluating ballot language, this Court assesses how the "ordinary person" will read the text. *Markus*, 22 Ohio St.2d at 203. The ordinary person does not interpret the words on the ballot by reference to nineteenth-century judicial soliloquies about the origins of republican government.

In fact, Respondents' reading is so counterintuitive and contrary to plain language that they do not even manage to stick to it *in their own brief.* In attempting to defend the ballot language's omission of most of the "least restrictive means" test, they say that one provision of the Amendment means that "the State"—*not* "the citizens of the State"—cannot burden, penalize, or prohibit abortion prior to viability unless it satisfies that test. Respondents' Br. at 13.

Second, even if one were to accept Respondents' contrived reading of the phrase "the citizens," the ballot language's use of that phrase would still mislead the voters because it suggests that the Amendment would limit citizens' authority to petition for and ratify future amendments restricting abortion. Relators' Br. at 22. It cannot and would not. In fact, *only* the citizens would have the authority to roll back the Amendment, by ratifying a future amendment, whether citizen-initiated or General Assembly-initiated. *See* Ohio Constitution, Article II, Section 1a; Article XVI, Section 1. And as Relators explained, Relators' Br. at 22–23, Ohioans *just* voted on a constitutional amendment that would have restricted their capacity to amend the Constitution further going forward. In that context, the Ballot Board's use of the phrase "prohibit the citizens of the State of Ohio . . ." is especially misleading: It makes the Amendment sound like a follow-on attempt to restrict the citizens' initiative power.

Respondents' footnoted, one-sentence rejoinder, that voters will "by definition, understand

they can further amend the Constitution in future votes," does not engage with this logic at all. *Contra* Respondents' Br. at 8 n.1. Indeed, it does not even contest that the ballot language, as written, is inaccurate; Respondents just assert that *despite* the inaccurate language, voters will somehow know the Amendment does not restrict the people's initiative power. But they offer nothing to back that assertion up.

Nor does it matter that the Amendment may in some cases trump *statutory* initiatives that would restrict abortion. *Contra* Respondents' Br. at 7–8. To repeat: The claim made in the ballot language is that the Amendment would "Prohibit the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibition abortion [before viability]." That claim is syllogistically false, because the people would retain the right to do all those things by initiated amendment, as just explained; thus, they would not be "prohibit[ed]" from doing so. Whether they could *also* restrict abortion by statutory initiative is simply beside the point—whether they could or not, the ballot language as written is false and misleading.

C. The ballot language improperly misleads the voters about whether the Amendment would protect the right to continue a pregnancy.

The ballot language falsely claims the Amendment would "always allow" a category of abortions that it would, in truth, sometimes expressly forbid. *See* Relators' Br. at 23–25. In so doing, the ballot language misleads the voters about the Amendment's crucial protections for the right to *continue* a pregnancy. *See id.* Respondents completely misunderstand (or mischaracterize) Relators' straightforward argument, and so leave its substance entirely unrebutted.

First, the claim made in the sixth bullet point—that the Amendment would "[a]lways allow an [abortion] 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"—is false because it is a categorical claim that is not categorically true. Respondents assert that the sixth

bullet point is true because "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." Respondents' Br. at 10–11. It is true that the Amendment would allow such an abortion if the patient wanted to undergo the abortion. But the Amendment would *not* allow the abortion if the patient wished to proceed with the pregnancy despite the risks, because the Amendment makes each person the final decision-maker about their own reproductive decisions—including the decision to continue a pregnancy. The question is not whether the Amendment would ever *require* an abortion a physician deemed medically necessary, but whether it would ever *not allow* one. In at least some instances, it would not.

Second, the sixth bullet point is particularly defective because in addition to being false and misleading, it is gratuitous. Excepting the inaccurate word "always," it just repeats information already conveyed in the third and fifth bullet points. Respondents address this point in a single footnoted sentence, claiming that the sixth bullet is not repetitive because "it addresses the amendment['s] prohibition on state action at differing gestational stages of pregnancy." Respondents' Br. at 18 n.5. Just so. Relators agree that the sixth bullet covers both pre- and post-viability stages—that is the problem. The third bullet already conveys all the same information about pre-viability abortions, and the fifth bullet already conveys all the same information about post-viability abortions. The sixth bullet point thus serves no purpose besides misleading voters with the inaccurate, categorical use of "always," and biasing or confusing voters through repetition. *See Markus*, 22 Ohio St.2d at 203 (explaining that "amplification" gives ballot language a "misleading tendency").

D. The ballot language improperly misleads the voters about a physician's discretion under the Amendment to determine fetal viability.

The ballot language omits the Amendment's binding definition of "fetal viability" in an

attempt to mislead voters about how the Amendment would constrain physicians' discretion to make viability determinations. *See* Relators' Br. at 25–27. Respondents have no response other than confusing and implausible assertions.

Fatally, Respondents do not even attempt to address the most egregious inaccuracy that Relators point out with respect to a physician's discretion to determine fetal viability. Contrary to the ballot language's plain text, the Amendment does *not* allow physicians to "determine on a case-by-case basis whether [a fetus] is viable," because that suggests to voters that physicians have complete discretion to decide what "viable" means. *See* Relators' Br. at 25–27. To the contrary, the Amendment itself defines "fetal viability" to mean "the point in a pregnancy when . . . the fetus has a significant likelihood of survival outside the uterus with reasonable measures," and requires physicians to employ that definition to make their case-by-case determinations. *See* Relators' Br. at 26.

Indeed, Respondents' brief supports the need for the ballot language to define fetal viability. Respondents themselves posit that voters may not know or understand the definitions of "fetus" or "fetal" without clarification. Respondents' Br. at 16. And Respondents make plain that understanding the concept of "fetal viability" is central to understanding the Amendment's effects—because fetal viability governs whether or not the State may prohibit abortion and which exceptions, if any, apply. *See* Respondents' Br. at 17. Respondents' own argument thus buttresses the point that omission of this critical definition is a fatal flaw.

This also answers Respondents' argument that a case-by-case review of viability implies "an *individualized* determination." Respondents' Br. at 13–14. That argument does nothing to rehabilitate the defect Relators identify—that the "ballot language suggests a physician has entirely unfettered authority to determine fetal viability as the physician sees fit *in each particular case*,"

Relators' Br. at 26 (emphasis added). Rather, Respondents' argument underscores that defect: Without the additional context that is in the Amendment itself, the ballot language communicates to voters that a physician's individualized determination is entirely discretionary and standardless.[5]

E. The ballot language improperly misleads the voters about how the Amendment would limit state regulation.

The ballot language misleads the voters about the Amendment's "least restrictive means" test by leaving out the part of the test that would be meaningful to voters. *See* Relators' Br. at 27–28. Respondents' own brief proves the point—it has to restore some of the omitted language in order to muster a defense of the ballot language.

Bafflingly, Respondents assert that the ballot language's use of "least restrictive means" on its own "has a sensical and ordinary meaning," which is that "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*." Respondents' Br. at 12–13 (emphasis added). The bullet point in question does not include any reference to "the pregnant woman" at all. Respondents thus argue that the "ordinary meaning" of the ballot language somehow includes words that are not in the ballot language. To describe this argument is to refute it.

---

[5] Respondents' assertion that Ohio voters implicitly know that physicians are statutorily required to exercise professional judgment in making viability determinations is baseless speculation. *Contra* Respondents' Br. at 14. The nearly sixty-year-old case that Respondents cite to support that proposition says only that the public is aware that the Hippocratic Oath requires doctors not to release confidential information about a patient without the patient's permission; it says absolutely nothing about whether the public is generally aware that doctors are legally required to exercise professional judgment. *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."). And the statutes to which Respondents point as ones of which voters purportedly have "common knowledge" are not directed to the general public or the patient population at all. *See* Respondents' Br. at 14. Instead, by Respondents' own account, they set forth a disciplinary action regime that applies only to physicians. *See id.* (describing R.C. 4731.22(B)(6), (B)(18)). For Respondents to suggest that the average Ohio voter knows these statutes exist, let alone has memorized their contents, defies reason.

Nor do Respondents make any effort to explain why a voter would naturally read "on the pregnant woman" into the ballot language—perhaps because there is no plausible explanation. The ballot language uses the phrase "least restrictive means" but says nothing about what *ends* the "least restrictive means" must serve. And the possibilities for those ends are myriad. Even in the context of the Amendment, a voter reading the ballot language might reasonably assume that the "least restrictive means" should serve "to protect the unborn child" (in the Ballot Board's phrasing), or to advance some undefined state interest, rather than "to advance the pregnant individual's health." That two voters could take the opposite meaning from the same bullet point simply shows how meaningless it is without the substantive half of the standard.

In fact, even at face value, Respondents' asserted "meaning" is meaningless, and thus inaccurate. What does it mean for the State to burden abortion using the means that are the least restrictive "on the pregnant woman"? That the means are least restrictive on the pregnant person physically? Or perhaps financially? The actual standard in the Amendment is "the least restrictive means to advance the pregnant individual's health"—a concept that is completely missing from the ballot language.

F. The ballot language improperly attempts to persuade the voters by using the term "unborn child."

The ballot language replaces the neutral, accurate terms "fetus" and "fetal viability" with the phrase "unborn child," a choice which reflects the Board majority's ethical judgments, not the Amendment's language. *See* Relators' Br. at 28–30. In so doing, the ballot language improperly attempts to bias the voters against the Amendment. *See id.* Respondents' justifications for this rewrite all fail.

In attempting to justify their rewrite, Respondents all but admit that it violates the constitutional prohibition on persuasive language. *See One Pers. One Vote*, 2023-Ohio-1928, at

¶ 8. Respondents acknowledge that "word choice" in the abortion context is "divisive," then demand that this Court defer to the Ballot Board's word choice because it is supposedly *accurate*. Respondents' Br. at 17. As explained below, "unborn child" is not an accurate synonym for "fetus" in the context of an Amendment that draws a crucial line at "fetal viability." But even if it were, Respondents' argument effectively concedes that "unborn child" is a loaded term, and just asserts that "fetus" is as well. But Relators already explained why "fetus" and "fetal viability" are neutral scientific terms, *not* terms that induce bias, *see* Relators' Br. at 29, and Respondents—yet again—ignore that explanation.

The Court need look no further than how often the ballot language deploys the fraught and divisive term "unborn child" to see that the Ballot Board inserted that phrase in an attempt to persuade. The Amendment itself uses "fetus" only once—in its definition section—while the ballot language uses the term "unborn child" *four times*. This stark difference shows that the Ballot Board did not simply choose "unborn child" over "fetus," but consciously and repeatedly injected a concededly charged term into the ballot language where it did not need to appear at all.

Given that context, Respondents' attempts to cloak their improper gambit fail. Relators have already rebutted the argument that the Revised Code's use of "unborn child" justifies the ballot language's use of the same term. *See* Relators' Br. at 30 n.14. Statutes cannot rewrite constitutional provisions or redefine their terms. *State ex rel. One Pers. One Vote v. LaRose*, No. 2023-0630, 2023-Ohio-1992, 2023 WL 4037602, ¶ 31. Respondents simply ignore this argument. They also seem to assume that a term's use in a statute makes it neutral or accurate. *See* Respondents' Br. at 16. That assumption is neither warranted—legislators use loaded or unclear language in bills all the time—nor relevant, because the Amendment would change the Constitution, not statutes.

Respondents' contention that "unborn child" is a comprehensive term for all developmental stages, and so will help voters understand the Amendment's significance at each stage of pregnancy, defies common sense. *Contra* Respondents' Br. at 16–17. The only development-stage term voters need to understand the Amendment is "fetal viability." Accordingly, the Amendment defines that term precisely, and the ballot language should as well. *See supra* Part I.D. So long as voters are informed of the Amendment's definition of "fetal viability," the Amendment's significance can be fully explained using that term: Abortions are generally permitted prior to fetal viability but may generally be prohibited after viability. Voters will have no trouble understanding that framework. The Ballot Board elected to use the term "unborn child" not because it makes the Amendment's framework clearer to voters—it does the opposite—but because that term is a loaded one that the Board believed would persuade voters to vote against the Amendment.

G. The ballot language improperly attempts to persuade the voters by using absolute terms where they do not apply.

The ballot language employs inaccurate, absolute verbiage and manipulates sentence structure in an attempt to persuade voters to reject the Amendment. Relators' Br. at 30. Respondents counter only that the terms used are *accurate*, Respondent's Br. at 18, which is neither true, *see supra* Part I.C., nor responsive to Relators' argument. Relators previously illustrated how technically accurate language can nonetheless be improperly persuasive with an unrebutted hypothetical about pilot licenses. Relators' Br. at 30. Here is another: "Ohio State lost the Game every year between 2010 and 2019, except when it scored more than Michigan." That sentence is accurate, but it obviously aims to give the reader a slanted impression. Here, the ballot language uses a similar trick of phrasing to create a similarly slanted impression.

Notably, in explaining the Amendment's "rules . . . at various gestational stages," Respondents' Merit Brief does not use the same convoluted constructions that the ballot language

itself uses. *See* Respondents' Br. at 17. Now, Respondents do not use the terms "only" and "always," nor do they refer to the "citizens of the State of Ohio." In other words, in attempting to set forth the Amendment's restrictions simply and clearly, Respondents themselves default to language that tracks the Amendment, not the ballot language.

H. The ballot language's accumulated defects violate the constitutional standard.

As Relators' Merit Brief made clear, and as the above discussion only confirms, there are numerous "defects in [the] ballot language," *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8, each of which violates the Article XVI standard, and which together leave no question that this Court's intervention is necessary.

Respondents completely ignore Relators' arguments about the cumulative weight of the ballot language's defects, not to mention the Ballot Board's deceptive intent. *See* Relators' Br. at 31–32. Instead, they simply recite the mandamus standard without explaining how the ballot language as a whole satisfies their clear legal duty to provide fair and accurate language.

They do not because they cannot. No neutral Ballot Board would come up with this ballot language, for the many reasons detailed above. When the Court looks at the big picture, the Ballot Board's gamesmanship should come into sharp relief.

II. This Court should issue a writ of mandamus and retain jurisdiction of this action.

Respondents contest only (i) whether the existing ballot language violates the constitutional standard and (ii) whether the Ballot Board may be compelled to prescribe the Amendment's text as a remedy. They do not dispute that this Court may grant the alternative remedy that Relators request—a writ specifying each defect in the ballot language and prescribing how it must be cured—or that this Court should retain jurisdiction of this action. *See* Relators' Br. at 35–38. Accordingly, if this Court finds that the ballot language is unlawful, the Court should, at the very least, (i) mandate that Secretary LaRose reconvene the Ballot Board, (ii) further mandate that the

Ballot Board prescribe lawful ballot language as described in Part II.B of Relators' Merit Brief, and (iii) retain jurisdiction to review the remedied ballot language.

Additionally, Relators maintain that the most appropriate, simple, and certain remedy is a writ of mandamus compelling the Ballot Board to prescribe the full text of the Amendment as the ballot language—and that this Court has the authority to issue such a writ. *See* Relators' Br. at 33–35. Respondents' argument to the contrary relies on Chief Justice O'Connor's *Voters First* concurrence. But Respondents never engage with Relators' arguments about why that concurrence takes too narrow a view of this Court's remedial authority. *Id.* And Respondents mischaracterize the Amendment's full text as Relators' "preferred language," rather than acknowledging it for what it is: the words that the voters will add to the Constitution if they approve Issue 1.

***

Respondents do get one thing exactly right: "All political power is inherent in the people." Ohio Constitution, Article I, Section 2; *see* Respondent's Br. at 7. And when the U.S. Supreme Court declared in *Dobbs* that "the authority to regulate abortion must be returned to the people and their elected representatives," it put the people first for a reason. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022). The Ballot Board's ballot language would mislead and deceive the people of Ohio. In 1974, the people entrusted this Court with the authority to protect them against that outcome. The Court should exercise that authority and grant the writ.

CONCLUSION

For the foregoing reasons, and those set forth in their Merit Brief, Relators request that this Court issue a peremptory or other writ of mandamus directing Respondent Secretary LaRose to reconvene the Ballot Board and further directing Respondent the Ballot Board to prescribe that the Amendment's full text be used as the ballot language.

In the alternative, Relators request that this Court issue a peremptory or other writ of

mandamus directing Respondent Secretary LaRose to reconvene the Ballot Board and further directing Respondent the Ballot Board to prescribe lawful ballot language, as detailed in Part II.B of Relators' Merit Brief.

Relators further request that this Court retain jurisdiction of this action pursuant to its inherent enforcement authority and Revised Code Section 2731.16, and render any and all further orders that the Court may deem necessary, including, but not limited to, determining the validity of any new ballot language prescribed by the Ohio Ballot Board.

Finally, Relators request that this Court grant such other or further relief the Court deems appropriate, including, but not limited to, an award of Relators' reasonable costs.

DATED this 11th day of September, 2023

Respectfully submitted,

/s/ Donald J. McTigue
Donald J. McTigue (0022849)
Counsel of Record
MCTIGUE & COLOMBO, LLC
545 East Town Street
Columbus, OH 43215
(614) 263-7000
dmctigue@electionlawgroup.com

Ben Stafford**
ELIAS LAW GROUP LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
(206) 656-0176
bstafford@elias.law

Emma Olson Sharkey**
Samuel T. Ward-Packard**
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, DC 20001
(202) 968-4490
eolsonsharkey@elias.law
swardpackard@elias.law

** Applications for admission *pro hac vice* pending

Counsel for Relators

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email this 11th day of September 2023 to the following:

Julie M. Pfeiffer, Julie.Pfeiffer@OhioAGO.gov
Ann Yackshaw, Ann.Yackshaw@OhioAGO.gov
Michael A. Walton, Michael.Walton@OhioAGO.gov
Stephen Tabatowski, Stephen.Tabatowski@OhioAGO.gov

Counsel for Respondents

/s/ Donald J. McTigue
Donald J. McTigue (0022849)