

IN THE SUPREME COURT OF OHIO

State of Ohio *ex rel.* One Person One Vote,
et al.,

Relators,

v.

Ohio Ballot Board, *et al.*,

Respondents.

Case No. 2023-0672

Original Action in Mandamus
Expedited Elections Case

BRIEF OF AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF OHIO IN
SUPPORT OF RELATORS

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INTRODUCTION

It is one thing for voters to lack perfect knowledge at the ballot box. But it is another thing entirely for the language on the ballot to deceive the reader about what a “yes” or “no” vote means. Because the manipulation of ballot language can mislead voters and impact the outcome of an election, the Ohio Constitution anticipates and guards against such abuse. It forbids language that would “mislead, deceive, or defraud the voters.” Ohio Const., Art. XVI, § 1. “While democracy can survive some irrationality in voter decisions, voter participation becomes a mockery if voter rationality is substantially reduced by the use of difficult, confusing, or misleading ballot language.” Affidavit of David Niven at ¶ 7, attached as Exhibit 1 (internal citation and quotation marks omitted).

Despite this clear mandate, Issue 1 employs language that is misleadingly selective, confusing, out-of-context, and even outright false. Read literally, the words of Issue 1 will mislead and deceive Ohio voters. This language is unconstitutional, in part because it would deprive Ohioans attempting to exercise their fundamental right to vote of effective participation in the democratic process.

Voters have a basic and profound interest in understanding what their votes would change. Nowhere is that interest more compelling than with a measure that, if passed, would diminish voters’ power to amend the Constitution—and in so doing, would dilute the “main promise of direct democracy ... to circumvent the legislative process to effect policy change.”¹

¹ Burnett, Craig M., and Vladimir Kogan, *When does ballot language influence voter choices? Evidence from a survey experiment*, POL. COMM’N 32, no. 1, 110 (2015) available at <https://bpb-us-w2.wpmucdn.com/u.osu.edu/dist/e/1083/files/2015/02/stoleninitiative-21w55m1.pdf>.

Issue 1's distorted language obscures the effect of voters' votes, undermining the integrity of the election and depriving the voters of a powerful check on their elected legislators. This Court should prevent this travesty of democracy and strike this deceptive formulation of Issue 1.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae League of Women Voters of Ohio ("LWVO") is the Ohio chapter of the League of Women Voters of the United States—a nonpartisan, statewide non-profit founded in May 1920, shortly before the ratification of the Nineteenth Amendment in August 1920 granting women's suffrage. LWVO currently has 3,438 members across the state, the vast majority of whom are registered Ohio voters, who live and vote in all of Ohio's Senate districts and 94 of Ohio's 99 House districts. LWVO's members make up 34 local Leagues and at-large units that are dedicated to empowering citizens and ensuring an effective democracy.

LWVO's mission is to help Ohioans exercise the right to vote, improve American democracy, and engage Ohioans in the decisions that most impact their lives. As part of its mission, LWVO aims to shape public policy, to educate the public about policy issues and the functioning of our democracy, and to protect and expand Ohioans' access to elections and their government. As such, LWVO and its members invest substantial volunteer time in voter education, civic engagement, and voter registration efforts.

LWVO is committed to protecting the voting rights of all Ohioans. LWVO has filed state and federal cases and appeared as amicus curiae in seeking to hold Ohio's elected officials accountable to the Ohio Constitution in planning and conducting elections. *See, e.g., Ohio A. Philip Randolph Institute v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019), *LWVO v. Ohio Redistricting Comm.*, 168 Ohio St.3d 309, 2022-Ohio-789, *LWVO v. Ohio Redistricting Comm.*, 168 Ohio St.3d 374, 2022-Ohio-1235, *LWVO et al. v. Ohio Redistricting Comm.*, 168 Ohio St.3d

522, 2022-Ohio-1727, *State ex rel. Ohio Democratic Party v. LaRose*, 159 Ohio St.3d 277, 2020-Ohio-1253 (as amicus); *State ex rel. One Person One Vote v. LaRose*, No. 2023-0630 (as amicus). Issue 1’s deceptive and misleading language frustrates LWVO’s mission of ensuring that all Ohioans are afforded the opportunity to understand the meaning of their votes, and thus to make their voices heard in our democracy.

ARGUMENT

I. Accurate Ballot Language is Critical to Ensure the Election Results Reflect the Will of the People

Ballot issues are an important and critical element of Ohio’s democratic government, providing the people with the direct power to effectuate change even—perhaps *especially*—if their elected representatives refuse to. In addition to electing government officials, Ohioans can vote to enact or change policies through constitutional amendments, initiatives, and referenda.² Although evaluated on a case-by-case basis due to the “necessarily subjective nature of any . . . constitutional amendment,” voters are entitled to “know what it is [they are] being asked to vote upon.” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 519, 426 N.E.2d 493 (1981) (internal citations omitted) (“In order to pass constitutional muster, [t]he text of a ballot statement * * * must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected.”).

Misleading ballot language prevents the public from understanding the consequences of their vote and inhibits their ability to vote in accordance with their preferences.³ This in turn leads

² *Ballot Board*, OHIO SEC’Y OF STATE, <https://www.ohiosos.gov/legislation-and-ballot-issues/ballot-board/> (accessed on May 24, 2023).

³ See Binder, Mike, *Getting it Right or Playing it Safe? Correct Voting, Confusion and the Status Quo Bias in Direct Democracy* (September 1, 2009) available at <https://ssrn.com/abstract=1465780>; Reilly, Shauna & Richey, Sean, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity* POL. RSCH. Q. 62 (2009) available at

to election results that are not “a true reflection of the electorate’s desires.” Binder, *supra* note 3 at 23.⁴

The language of ballot initiatives must be clear, accurate, and complete in order to enable faithful reflection of the electorate’s desires. This is especially so in the case of Issue 1, where voters will be asked to substantially diminish their own power ever again to amend the Ohio Constitution. They must be given enough information to understand unambiguously that this is, in fact, what Issue 1 would do, and how it would do so. Yet the current language obscures Issue 1’s purpose in several critical respects, such that the average voter will not be able to decipher how a “yes” vote would change the status quo.

A. Issue 1 Fails to Provide Crucial Information About the Law That It Seeks to Change

First, Issue 1’s language omits necessary context. The amendment would raise the threshold to pass a constitutional amendment to 60% of voters, but as Relators note in their Complaint, the ballot language omits the fact that the current threshold is a simple majority. Second, the ballot language of Issue 1 suggests that the amendment requires petition signatures for citizen-led amendment initiatives from “at least five per cent of the electors of the county” in *each* of Ohio’s 88 counties in order to place a proposed amendment on the ballot.⁵ But the ballot

https://www.researchgate.net/publication/249802589_Ballot_Question_Readability_and_Roll-Off_The_Impact_of_Language_Complexity; see also Redish, Janice, et al., U.S. Dep’t of Com., NISTIR 7556, *Report of Findings: Use of Language in Ballot Instructions* (May 2009) https://www.eac.gov/sites/default/files/eac_assets/1/28/NIST-use-of-Language-in-Ballots.pdf (finding that voters make less mistakes and are more likely to vote how they intended when ballot instructions are clear).

⁴ See also Center for Civic Design, *Ballot questions are hard to understand. Here are 6 ways to fix them* (Apr. 19, 2022) <https://civicdesign.org/ballot-questions-are-hard-to-understand-here-are-6-ways-to-fix-them/>.

⁵ See Am. Sub. S.J.R. 2, 135th Gen. Assemb. (2023) https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/EN/06/sjr2_06_EN?format=pdf.

language again omits mention of the current law, which requires signatures from five percent of the last gubernatorial vote in *half* of Ohio’s counties. *See* Ohio Const. Art. II, § 1g.

As Ohio political scientist Professor David Niven notes: “A number is meaningless without context,” and context can transform how an individual perceives a number’s value. Niven Aff. ¶¶ 2-4. Voters’ understanding of an initiative is incomplete—and may be drastically affected—without information about the status quo that the initiative would change. For example, in the first version of a 2008 initiative, California voters initially would not have been advised that their constitution already included the right of same-sex couples to marry, and that the proposed initiative would eliminate that right. *See id.* at ¶ 9 (indicating the initial language stated only that the language would “limit[]” marriage to one man and one woman). When revised language later included that critical context, it resulted in a six-point change in voter support. *Id.*; *see also id.* at ¶ 10 (citing studies finding “as much as a 39-point difference in support” for vague proposals compared with clear and explicit ones).

B. Issue 1’s Title Misrepresents Its Content

Exacerbating the deception, Issue 1’s title is not only misleading, but it is also a material falsehood about the amendment. The title is “Elevating the standards to qualify for *and* to pass *any* constitutional amendment” (emphasis added). The title is misleading because the word “elevate” indicates that the standards are improving—which is both argumentative and debatable. The title is also factually incorrect: The conjunction “and” clearly indicates that two things would be “elevat[ed]”: the “standards to qualify for ... *any* constitutional amendment,” and the “standards to ... pass *any* constitutional amendment” (emphasis added). But as Relators note, only the latter of those two assertions is true; the former is patently false. A proposed amendment to the Ohio Constitution may qualify to be placed on the ballot either by way of a citizen-led petition initiative,

or by a joint resolution passed by three-fifths vote in each house of the General Assembly. *See* Ohio Const. Art. II, §. 1a, 1g; Art. XVI, § 1. Issue 1 would increase the threshold—and therefore the difficulty—of the citizen-led initiative route by requiring 5% of the gubernatorial vote in all 88 counties rather than the current 44—but it would leave intact the threshold for a joint resolution.

As Dr. Niven notes, deceptive phrasing of this nature has a considerable impact on voters' perceptions. A proposed Missouri constitutional amendment in 1976 asked voters whether they wished to provide taxpayer support to “all public and nonpublic elementary and secondary school children.” Niven Aff. ¶ 5. It failed to explain that the amendment was not providing any new or additional funding to public schools, but only to private schools, which the language carefully described as “nonpublic.” *Id.* The rhetorical sleight of hand had drastic consequences. Only 4 in 10 voters correctly understood the amendment, and some 30% of opponents of the proposed issue actually voted *for* it, having been taken in by the deception. *Id.* ¶ 6.

Issue 1's deceptive title is even worse than the Missouri example, because it is not only objectively inaccurate, but also subjectively misleading. The substance of the inaccuracy, no mere semantic matter, goes to the heart of whether voters will be informed sufficiently to understand the amendment's function. Issue 1 would alter the balance of power between the people and their legislature at the expense of the former, by heightening the threshold for a constitutional amendment to qualify for the ballot only when it is offered by the general public, but *not* when it is offered by the legislature. Misrepresenting the amendment's content in this way operates to “mislead, deceive, or defraud” the voters. Ohio Const. Art. XVI, § 1.

C. Issue 1's Summary Fails to Convey That It Eliminates a Petition Signature Cure Period

Under current law, if a citizen-led initiative petition is submitted to the Secretary of State with insufficient signatures—which may occur if signatures are found to be invalid, such as where

a person's signature style has changed and does not match their voter registration, or the person turns out to be incorrect about their voter registration status—the Constitution allows for a cure period in which supplemental signatures may be submitted to meet the threshold. *See* Ohio Const. Article II, § 1g (providing “ten additional days ... for the filing of additional signatures”).

Issue 1 would eliminate this cure period for constitutional amendments, but it fails to say so in a direct or comprehensible fashion. In the summary's second bullet point, it states that Issue 1 requires “that any petition *filed on or after January 1, 2024 with the Secretary of State* proposing to amend the Constitution of the State of Ohio be signed by at least five percent of the eligible voters of each county in the state,” and in the third bullet point, adds that “additional signatures may not be added to an initiative petition *filed with the Secretary of State on or after January 1, 2024* proposing to amend the Constitution of the State of Ohio.”⁶ (emphasis added).

Both phrases use similar descriptive language, emphasized above, but neither explains the temporal difference between them. The second bullet point alters the requirements that must be met *before* a petition is submitted, while the third bullet point alters procedures to occur *after* the petition is submitted. That is not conveyed to the voter, nor is the meaning of the term “additional signatures.” As noted above, confusing language of this nature risks misleading voters and skewing the results of the election. *See* Niven Aff. ¶¶ 5–6.

II. Deceptive Ballot Language Combined with the Last-Minute Scheduling of an August Election Undermines the Democratic Process

Because the ballot language for Issue 1 is confusing, deceptive, and misleading, a reading of the language fails to inform voters about what it is they are voting for or against. The only way

⁶ OHIO SEC'Y OF STATE, *Certified Ballot Language, Issue 1: Elevating the Standards to Qualify for and to Pass Any Const. Amend.* (2023) available at <https://www.ohiosos.gov/globalassets/ballotboard/2023/certified-ballot-language-for-issue-1.pdf>.

for a voter to understand the effect of their vote would be to proactively investigate the issue in advance of the election. The last-minute and unexpected scheduling of an August special election makes the inaccurate and deceptive wording of this issue more of a problem, because there is less notice and less time for education efforts to try to help voters understand the true meaning of the language and the consequences of their vote.

For August elections, in general, there is far less opportunity for campaign, outreach, and advertising efforts, as such elections are more “low-profile.” Reilly, *supra* note 3 at 121; *see Eliminate August Special Elections Except for U.S. House Nomination: Hearing on H.B. 458 before the H. Ways and Means Comm.*, 2021 Leg., 134th Sess., 1 (statement of Frank LaRose, Secretary of State) (noting the “embarrassingly low voter turnout rates” of an August special election). August elections tend to be about local issues, such as tax levies and liquor licenses, not generally about amending the state constitution.⁷ In these low-profile elections, clear ballot language is therefore even more critical, as it may be the only opportunity a voter has to decipher the meaning of a proposal. *See* Reilly, *supra* note 3.

Issue 1’s deceptive and misleading language poses a substantial risk that the results of the election will fail to reflect, or even subvert, the will of the people. In the context of Issue 1, this could mean not only a constitutional amendment that the majority of Ohioans do *not* in fact favor but could also hamstring the voters’ own ability *ever* to undo that measure by future amendment.

⁷ *See, e.g.*, Local Questions and Issues Results (XLSX), *Primary/Special Election: August 2, 2022*, OHIO SEC’Y OF STATE, <https://www.ohiosos.gov/elections/election-results-and-data/2022-official-election-results/> (accessed on May 24, 2023).

CONCLUSION

For the foregoing reasons, *amicus curiae* League of Women Voters of Ohio respectfully request that this Court issue the Relators a Peremptory Writ of Mandamus, striking the language of Issue 1 as currently written as unconstitutional and directing the Ballot Board to issue lawful ballot language.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, the foregoing Amicus Brief of the League of Women Voters of Ohio in Support of Relators was filed electronically using the Court's e-filing system. I further certify that the foregoing was served by electronic mail upon the following:

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Exhibit 1

Affidavit of David Niven, PhD

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5.24.23 Affidavit of David Niven.pdf

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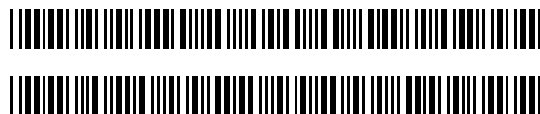
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Case No. 2023-0672

Original Action in Mandamus
Expedited Elections Case

AFFIDAVIT OF DAVID NIVEN, PH.D. IN SUPPORT OF
BRIEF OF AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF OHIO

I, David Niven, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify as to the facts set forth below based on my personal knowledge and having personally examined all records referenced in this affidavit, and further state as follows:

1. I am a professor of political science and researcher at the University of Cincinnati, where I conduct research relating to democracy, elections, and representation, particularly in the State of Ohio. I have published numerous peer-reviewed papers on voting, public opinion, and related matters. In addition to my research and academic publications, I testified as an expert witness for the plaintiffs in *Ohio A. Philip Randolph Institute v. Larry Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019), and submitted amicus briefs to this Court in support of the relators in *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379. Both cases pertained to alleged partisan gerrymandering in Ohio. In



addition, I recently offered testimony in support of the League of Women Voters of Ohio's amicus brief to this Court in *State ex rel. One Person One Vote v. LaRose*, Case No. 2023-0630.

2. A number is meaningless without context. Daniel Kahneman won a Nobel Prize for research he conducted with Amos Tversky demonstrating that it is context that gives numbers practical, consequential meaning to people. More than four decades ago, Kahneman and Tversky found that the average person would drive across town to save \$5 on a \$15 purchase but would not drive across town to save \$5 on a \$125 purchase.¹ Superficially five dollars is exactly the same amount and either justifies a trip across town or it does not. But in human reality, we measure the merit of a number -- or an idea, or a thing -- within a context.

3. Kahneman and Tversky also demonstrated the power of directional framing. That is, they found that people responded more favorably to a medical treatment said to save 200 people out of 600 afflicted than a treatment said to have failed to save 400 out of 600 afflicted, despite the two circumstances being identical.

4. Context influences how people respond to spending money, to saving lives, and just as surely it influences how people respond to changing their state's constitution. The power of context is illustrated in scholarship directly addressing the wording of ballot questions.

5. A 1976 Missouri constitutional amendment asked voters whether they wished to authorize taxpayer support of "all public and nonpublic elementary and secondary school children." The wording of the amendment did not explain that the purpose and effect of the amendment was to fund private schools. It did not explain that no new funding would be provided

¹ Tversky, Amos, and Daniel Kahneman, *The framing of decisions and the psychology of choice*, SCIENCE 211, no. 4481, 453-458 (1981).



to public schools if the amendment passed. In other words, no context was provided with regard to what this amendment was actually changing and what effect that would have.

6. An exit poll of Missouri voters revealed widespread confusion such that only 4 in 10 voters correctly understood that the effect of the amendment was to increase taxpayer funding of private schools and not increase funding of public schools.² Perhaps even more alarming, almost 3 in 10 voters who opposed public funding of private education voted for the amendment “they would have opposed if they had understood it more accurately.”³

7. Gafke and Leuthold conclude their examination of the Missouri amendment with a stern warning about the consequences of opaque, context-free ballot wording: “While democracy can survive some irrationality in voter decisions, voter participation becomes a mockery if voter rationality is substantially reduced by the use of difficult, confusing, or misleading” ballot language.⁴

8. Survey work has tested the effects of actual ballot language versus language rewritten to be clear and direct. Cozza, Elkins, and Hudson found it is possible to increase by nearly half the percentage of respondents who can correctly identify the consequences of a ballot question merely by writing ballot language meant to be understood.⁵

9. In 2008, a California constitutional amendment addressed whether same-sex marriage would continue to be permitted. Initial ballot language described “limiting” marriage to one man and one woman. Revised language noted that passage of the amendment would

² Gafke, Roger, and David Leuthold. *The effect on voters of misleading, confusing, and difficult ballot titles*, THE PUB. OP. Q. 43, no. 3 at 394-401 (1979).

³ Gafke and Leuthold, 398.

⁴ Gafke and Leuthold, 400.

⁵ Cozza, Joseph Francesco, Zachary Elkins, and Alexander Hudson, *Reverse mortgages and aircraft parts: The arcane referendum and the limits of citizen competence*, ELECTORAL STUD. 74, 102408 (2021).



“eliminate” the right of same-sex couples to marry, providing essential context establishing the direction and effect of the amendment. In a survey, researchers found that the wording difference was associated with a six-point change in support for the amendment.⁶

10. Other survey and experimental work has found sometimes massive effects on support levels for ballot questions based on the inclusion or exclusion of details that establish the basic consequence or purpose of a proposal. Braidwood, for example, found as much as a 39-point difference in support between responses to a vague proposal and one that explicitly stated its purpose clearly.⁷ Rossier notes that even longtime voters can find themselves unable to correctly assess the meaning and implications of ballot questions that are not clearly written.⁸

11. By failing to state, directly and clearly, the present standard for Ohio constitutional amendments, the proposed 60 percent ballot language utterly fails to establish the essential context necessary for voters to judge the consequences of their action. Based on the wording of the ballot language, a voter would have no way of knowing *how 60 percent compares with* the present requirement for amendments, and thus no context in which to assess whether this amendment proposal represents an improvement or an impediment from their vantage point.

12. The current standard for passing a constitutional amendment in Ohio is 50 percent plus one vote. With that context, any Ohio voter could rationally decide if they preferred the current passage standard or 60 percent. Without that context, a person could find themselves voting against their own interests because a number is meaningless without context.

⁶ Burnett, Craig M., and Vladimir Kogan, *When does ballot language influence voter choices? Evidence from a survey experiment*, POL. COMM’N 32, no. 1, 109-126 (2015).

⁷ Braidwood, Travis, *You want to spend my money how? Framing effects on tax increases via ballot propositions*, STATE POL. & POL’Y Q. 19, no. 1 at 29-52 (2019).


⁸ Rossier, Ted D. *Voter experience and ballot language framing effects: Evidence from a survey experiment*, SOC. SCI. Q. 102, no. 6, 2955-2971 (2021).



David Niven
Signed on 2023/05/24 12:01:42 -8:00

David Niven

Signed at Columbus, Franklin, Ohio.
City County State


Signed on 2023/05/24 12:01:42 -8:00

before me this 24th day of May, 2023

Notary Public



Notarial act performed by audio-visual communication

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