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' MERIT BRIEF

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INTRODUCTION

This November, the people of Ohio will vote on Issue 1, a proposed constitutional amendment that would establish "The Right to Reproductive Freedom with Protections for Health and Safety" (the "Amendment"). If approved, the Amendment would guarantee the individual right to make and carry out reproductive decisions for oneself—including decisions about (i) contraception, (ii) fertility treatment, (iii) continuing one's own pregnancy, (iv) miscarriage care, and (v) abortion.

This case seeks a writ of mandamus against the Ohio Ballot Board. Relators request that the Court instruct the Ballot Board to reconvene and prescribe ballot language for the Amendment that meets the requirements set out in Article XVI of the Ohio Constitution. The present language, which the Ballot Board adopted by a 3-to-2 vote at its August 24, 2023, meeting, utterly flouts those requirements. Rather than "properly identify[ing] the substance of the proposal to be voted upon," as Article XVI requires, the Ballot Board's chosen language would "mislead, deceive, or defraud the voters."

The stakes are high. As this Court has repeatedly explained, "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." *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 29 (*per curiam*) (quoting *Schnoerr v. Miller*, 2 Ohio St.2d 121, 125, 206 N.E.2d 902 (1965)). Accordingly, "to pass constitutional muster" under Article XVI, ballot language "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." *Id.* at ¶ 29 (quoting *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 519, 426 N.E. 2d 493 (1981)); *see Jurcisin v. Cuyahoga Cnty. Bd. of Elections*, 35 Ohio St. 3d 137, 141, 519 N.E.2d 347 (1988). This Court has never hesitated to strictly enforce that

requirement. It should do the same here.

A voter who obtained knowledge of the Amendment primarily from the Ballot Board's prescribed language would be profoundly misled about its scope and effects. The ballot language mischaracterizes the Amendment in a host of ways:

- The Amendment creates a right "to make and carry out one's own reproductive *decisions*"—but the ballot language says that the Amendment creates an amorphous right to "medical treatment."

- The Amendment restricts "the State," defined as "any governmental entity and any political subdivision," from burdening or interfering with the right to make one's own reproductive decisions—but the ballot language says the Amendment imposes such a restriction on "the *citizens* of the State."

- The Amendment specifies *five* protected categories of reproductive decision—contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion—but the ballot language mentions *only abortion*, omitting the four other categories.

- The Amendment constrains a physician's discretion to determine fetal viability by providing a clear, specific, binding definition of "fetal viability"—but the ballot language suggests that determination is simply left up to each physician to make on a case-by-case basis, without any constraints.

- The Amendment *protects* a patient's right to *continue* a pregnancy even when the treating physician determines an abortion is necessary to protect the pregnant patient's life or health—but the ballot language claims that the Amendment would "always allow" such an abortion.

The Ballot Board's prescribed language misleads the voters about all these points, and many more described below. If that language stands, many Ohio voters, trusting the words on their ballots, will reach incorrect conclusions about the Amendment. In the terms of Article XVI, the prescribed ballot language will therefore "mislead, deceive, or defraud the voters."

The Court should grant a writ of mandamus instructing the Ballot Board to reconvene and adopt the full text of the Amendment as the ballot language. In the alternative, the Court should grant a writ instructing the Ballot Board to prescribe ballot language for the Amendment that corrects the current language's numerous defects.

STATEMENT

I. Ohio citizens proposed an amendment to the Ohio Constitution entitled "The Right to Reproductive Freedom with Protections for Health and Safety."

On February 21, 2023, Ohio citizens submitted to Attorney General Dave Yost a proposed initiative petition including the text of the proposed Amendment, a summary, and part-petitions bearing the signatures of over a thousand qualified electors. (RELATORS 001–003.) The full text of the Amendment reads as follows:

> Be it Resolved by the People of the State of Ohio that Article I of the Ohio Constitution is amended to add the following Section:
>
> Article I, Section 22. The Right to Reproductive Freedom with Protections for Health and Safety
>
> A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:
>
> 1. contraception;
> 2. fertility treatment;
> 3. continuing one's own pregnancy;
> 4. miscarriage care; and
> 5. abortion.
>
> B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
>
> 1. An individual's voluntary exercise of this right or
> 2. A person or entity that assists an individual exercising this right,
>
> unless the State demonstrates that it is using the least restrictive means to advance the pregnant individual's health in accordance with widely accepted and evidence-based standards of care.
>
> However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.
>
> C. As used in this Section:
>
> 1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
> 2. "State" includes any governmental entity and any political subdivision.
>
> D. This Section is self-executing.

(RELATORS 002.)

The petition summary reads as follows:

> The Amendment would amend Article I of the Ohio Constitution by adding Section 22, titled "The Right to Reproductive Freedom with Protections for Health and Safety."
>
> The Amendment provides that:
>
> 1. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion.
> 2. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either an individual's voluntary exercise of this right or a person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.
> 3. However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.
> 4. As used in this Section, "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis"; and "State" includes any governmental entity and political subdivision.
> 5. This Section is self-executing.

(RELATORS 001.) The summary is formatted differently from the Amendment, but the text of the summary and Amendment are substantively identical.

II. The Attorney General, the Ballot Board, and this Court all reviewed the Amendment's text and allowed the petition to proceed.

The submission of the proposed petition triggered the Attorney General's duty to transmit the part-petitions to the appropriate county boards of elections for signature verification, and to "conduct an examination of the summary." R.C. 3519.01(A). On March 2, by letter, Attorney General Yost confirmed that the county boards of elections had verified "at least 1,000 signatures" and that he had determined that the summary was "a fair and truthful statement of the proposed constitutional amendment." (RELATORS 004–005); *see* R.C. 3519.01(A).

Attorney General Yost remarked, in certifying the petition summary:

> I cannot base my determination on the wisdom or folly of a proposed amendment as a matter of public policy. "These arguments must be addressed to

> the electorate," not to me. *State ex rel. Schwartz v. Brown*, 32 Ohio St.2d 4, 11, 288 N.E.2d 821 (1972). Elected office is not a license to simply do what one wishes. The rule of law necessarily means that there are limits to the decision-making of those who temporarily exercise public authority.
>
> This is true of prosecutors who will not enforce criminal statutes with which they disagree, or presidents who wish to take actions not authorized by the Constitution or Congress. It is also true of attorneys general required by a narrow law to make a decision about the truthfulness of a summary. My personal views on abortion are publicly known. In this matter, I am constrained by duty to rule upon a narrow question, not to use the authority of my office to effect a good policy, or to impede a bad one. A duty that never compels an unpleasant duty or act is not duty, but self-service, the opposite of public service—government by solipsism. That way lies chaos, and ultimately the breakdown of self-governance.
>
> I state these first principles because it has become increasingly common for elected leaders to ignore them when convenient, and the process is accelerating as each side in our perpetual conflicts expects their own to act as faithlessly as the other side.

(RELATORS 004–05.)

The Attorney General's determination, in turn, triggered the Ballot Board's duty to determine whether the Petition contained "only one proposed . . . constitutional amendment so as to enable the voters to vote on a proposal separately." R.C. 3505.062(A); *see* Ohio Constitution, Article II, Section 1g. On March 13, by letter, the Board indicated that it had so determined. (RELATORS 007.)

On March 20, two relators filed an original action challenging the Amendment in this Court. *See State ex rel. DeBlase v. Ohio Ballot Bd.*, No. 2023-0388, 2023-Ohio-1823, 2023 WL 3749300. That action sought a writ of mandamus against the Ballot Board, arguing that the Amendment was in fact not a single amendment but multiple amendments. *Id.* at ¶ 20. On June 1, this Court declined to issue the writ. While the Justices reached that result by two different paths, they were unanimous in the judgment. *See id.* at ¶ 24 (*per curiam* lead opinion); *id.* at ¶¶ 37, 39 (Kennedy, C.J., joined by DeWine & Deters, J.J., concurring in judgment only); *id.* at ¶ 28 (noting that Justice Fischer concurred in the judgment without joining either opinion).

In rejecting the *DeBlase* relators' argument, the lead opinion interpreted several parts of the Amendment's text in a manner pertinent to this case. First, the lead opinion explained that "the first provision of the proposed amendment specifies a general purpose (protecting an individual's *right to make reproductive decisions*) and then specifies *five types of reproductive decisions* that would be covered by the amendment." *Id.* at ¶ 22 (*per curiam* lead opinion) (emphasis added). Second, the lead opinion explained that "Section B prohibits *the state* from interfering with the exercise of the rights identified in Section A." *Id.* (emphasis added).

Chief Justice Kennedy, in her concurrence, emphasized that "the ultimate decision on what the Constitution should say and how it should say it belongs to the people in exercising their right to ratify or reject an amendment at the ballot box." *Id.* at ¶ 39 (Kennedy, C.J., concurring in judgment only).

III. Over 700,000 Ohioans signed the petition—which included the full text of the Amendment—qualifying the Amendment for the November ballot.

On July 5, the petition committee submitted the Amendment petition, which bore more than 700,000 signatures, to the Secretary of State's office. (RELATORS 008.) In accordance with R.C. 3519.05, each part-petition presented to voters during the signature-gathering phase bore both the summary and the full text of the Amendment. Thus, each of the Ohioans who signed the petition had the opportunity to review the full text—and the substantively identical summary—before deciding whether to sign the petition. On July 25, the Secretary's office certified that the petitioners had submitted more than the required number of valid signatures from the requisite number of counties. (RELATORS 014.) Accordingly, the Amendment qualified for the November 7, 2023, general election ballot. *See* Ohio Constitution, Article II, Sections 1a, 1g.

After the Amendment qualified for the ballot, its opponents again sued, asking this Court to remove it from the ballot based on a purported violation of R.C. 3519.01(A). *See Giroux v.*

Committee Representing Petitioners, No. 2023-0946, 2023-Ohio-2786, 2023 WL 5163291 (*per curiam*). The Court for a second time unanimously rejected a challenge to the Amendment's submission to the people of Ohio.

IV. Rather than using the full text of the Amendment, the Ballot Board approved a longer "summary" that is misleading, deceitful, and threatens to defraud the voters.

The Amendment's qualification for the general election ballot triggered the Ballot Board's duty to prescribe ballot language. In an August 21 letter from counsel, Relator Ohioans United for Reproductive Rights proposed that the Ballot Board adopt the full text of the Amendment as the ballot language. (RELATORS 017–20.) As the letter noted, "when the Board prescribes condensed language, litigation has often resulted." (RELATORS 017.) Because "the full text of the proposed amendment is clear, concise, and direct," using it as the ballot language would avoid any "dispute about whether legal standards have been satisfied or whether the condensed text misleads, deceives, or defrauds voters." (RELATORS 017.) And, most crucially, using the full text would allow voters to "see for themselves the language they are being asked to approve" and to "make a free and independent decision on this fundamental question." (RELATORS 017.)

Ohioans United for Reproductive Rights therefore submitted proposed ballot language as follows:

Issue 1

To Establish the Right to Reproductive Freedom with Protections for Health and Safety

Proposed Constitutional Amendment

Proposed by Initiative Petition

To add a new Section 22 to Article I of the Constitution of the State of Ohio, The Right to Reproductive Freedom with Protections for Health and Safety

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

If adopted, the Amendment would provide that:

A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:

1. contraception;
2. fertility treatment;
3. continuing one's own pregnancy;
4. miscarriage care; and
5. abortion.

B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:

1. An individual's voluntary exercise of this right or
2. A person or entity that assists an individual exercising this right,

unless the State demonstrates that it is using the least restrictive means to advance the pregnant individual's health in accordance with widely accepted and evidence-based standards of care.

However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.

C. As used in this Section:

1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures." This is determined on a case-by-case basis.
2. "State" includes any governmental entity and any political subdivision.

D. This Section is self-executing.

(RELATORS 019–20.)

The Ballot Board met to prescribe and certify the ballot language for the Amendment on August 24. Board Secretary Josh Sabo advised the Board of its substantive obligations. He explained that the ballot language "must properly identify the substance of the proposal to be voted on," that it "may contain the full text or a condensed version of the proposal," that "[i]f a condensed version of the proposal is used, the ballot language must not omit substance of the proposal that is material," and that "if the proposed amendment is condensed, the resulting language must not result in or imply persuasive argument." (RELATORS 032–33.) Secretary LaRose then proposed draft ballot language for the Amendment as follows:

Issue 1

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

Proposed Constitutional Amendment

Proposed by Initiative Petition

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

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

The proposed amendment would:

- Establish in the Constitution of the State of Ohio an individual right to one's own reproductive medical treatment, including but not limited to abortion;
- Create legal protections for any person or entity that assists a person with receiving reproductive medical treatment, including but not limited to abortion;
- Prohibit the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child is determined to be viable, unless the State demonstrates that it is using the least restrictive means;
- Grant a pregnant woman's treating physician the authority to determine, on a case-by-case basis, whether an unborn child is viable;
- Only allow the citizens of the State of Ohio to prohibit an abortion after an unborn child is determined by a pregnant woman's treating physician to be viable and only if the physician does not consider the abortion necessary to protect the pregnant woman's life or health; and
- Always allow an unborn child to be aborted at any stage of pregnancy, regardless of viability if, in the treating physician's determination, the abortion is necessary to protect the pregnant woman's life or health.

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

(RELATORS 071.)

As State Representative and Ballot Board Member Elliot Forhan pointed out, this purportedly condensed summary of the Amendment is not condensed at all. (RELATORS 038.) In fact, it contains *more* words (203, to be exact) than the substantive language of the Amendment itself (which contains only 194 words).[1] And, as Representative Forhan argued, it misrepresents many aspects of the Amendment in an improper attempt to persuade voters to vote against it. (RELATORS 037–39.)

In that sense, Secretary LaRose's proposal was consistent with his outspoken opposition to the Amendment leading up to the meeting. To name one example, in an interview with NBC4's Colleen Marshall on August 20—just days before the meeting—Secretary LaRose called the Amendment a "dangerous anti-parent amendment." NBC4 Columbus, Full Interview: Ohio Secretary of State Frank LaRose, at 3:03–06, YouTube (Aug. 20, 2023).[2] He then purported to quote a portion of the Amendment that—he claimed—would explicitly authorize medical procedures "regardless of age or regardless of parental involvement." *Id.* at 6:52–56. When Ms. Marshall pointed out—correctly—that the Amendment "doesn't have the word 'parent' in it," Secretary LaRose responded only "mhm," before changing the subject. *Id.* at 6:56–7:10.

After Secretary LaRose introduced his proposed ballot language at the August 24 meeting, Board Member and State Senator Paula Hicks-Hudson moved to substitute the full text of the Amendment itself for the proposed language. (RELATORS 034–35.) Representative Forhan then spoke in favor of the motion. He urged that "[t]he ballot board should trust the people of Ohio and

[1] These word counts exclude the mandatory prefatory titles in both texts and the formatting, *i.e.*, the bullets in the Ballot Board's language and the equivalent section and subsection lettering and numbering in the Amendment.

[2] Available at https://www.youtube.com/watch?v=mEbJodAb7tM.

adopt the full text of the Amendment," and observed that "[t]he text is clear, concise, and direct. It's what hundreds of thousands of Ohioans already reviewed when they signed the petitions to put the measure on the ballot." (RELATORS 036–37.)

In contrast to the Amendment itself, Representative Forhan described Secretary LaRose's proposal as "rife with misleading and defective language." (RELATORS 037.) Representative Forhan identified specific several points that, in his view, exemplified the problem:

- "First, the amendment gives Ohioans the right to make [] reproductive decisions. The proposed language misleadingly transforms this into a right to 'Reproductive medical treatment.' That's not what the measure says. It doesn't require the State of Ohio to provide medical treatment itself." (RELATORS 037.)

- "Second, the proposed language doesn't identify four of the five kinds of reproductive decisions addressed in the measure . . . contraception, fertility treatment, continuing one's own pregnancy, and miscarriage care." (RELATORS 037.)

- "Third, the amendment expressly restricts the state from burdening, penalizing, prohibiting, interfering with, or discriminating against an individual's reproductive decision rights, yet the proposed language falsely says that it restricts the citizens of the State. The measure itself defines the state to include any government entity and any political subdivision." (RELATORS 037–38.)

- "Four[th], the amendment uses the medically correct term, 'fetus,' but the proposed language substitutes the phrase . . . 'unborn child,' which reflects a personal viewpoint." (RELATORS 038.)

- "[F]ifth, and finally, the ballot language is longer than the amendment it purports to summarize. It is needlessly repetitive . . . it's an attempt to confuse voters." (RELATORS 038.)

Representative Forhan concluded that these defects rendered the language proposed by Secretary LaRose "beyond repair" and that it should accordingly "be replaced with the full text of the amendment itself." (RELATORS 038.) Nevertheless, the Ballot Board rejected Senator Hicks-Hudson's motion to adopt the full text of the Amendment as the ballot language by a 3-to-2 vote. (RELATORS 041–42.)

Board Member and State Senator Theresa Gavarone then spoke in support of Secretary

LaRose's proposed ballot language. But her remarks scarcely addressed the matter at hand: whether the ballot language satisfied the applicable constitutional standard. Instead, Senator Gavarone attacked the substance of the Amendment itself as "an abomination," and asserted that the Amendment entailed an "assault on parental rights." (RELATORS 044.) Immediately after Senator Gavarone's charged remarks, Secretary LaRose declared that he "agree[d] with [her] words" but reminded the Board that "we're not here to debate the merits of this." (RELATORS 045.)

Senator Hicks-Hudson then moved to correct several of the defects in Secretary LaRose's proposed ballot language that Representative Forhan had previously identified. (RELATORS 045–47.) That motion failed by another 3-to-2 vote. (RELATORS 048–49.)

Speaking in support of his proposed language, Secretary LaRose explained that he had himself "worked extensively on drafting" it, and that "the written text of a 250-plus word Constitutional Amendment creates what I consider a number of very substantial changes to the Ohio Constitution. We tried to summarize that the best way we can and make it a clear statement here in the ballot language of what this amendment would actually do." (RELATORS 050–51.)[3] Secretary LaRose did not respond to any of Representative Forhan's or Senator Hicks-Hudson's substantive critiques of the ballot language. The Ballot Board ultimately voted 3-to-2 to adopt the language introduced by Secretary LaRose. (RELATORS 052; *see* RELATORS 071–72.)

Just a few hours after the Ballot Board approved his proposed ballot language, Secretary

[3] To arrive at his 250-word count, Secretary LaRose presumably included not only the Amendment's words, but also all the words in the constitutionally mandated prefatory title—which are not a part of the Amendment—as well as the section and subsection numbering and lettering, which are not "words." In fact, Secretary LaRose's purportedly "summarize[d]" version of the Amendment contains nine *more* words (203, to be exact) than the substantive language of the Amendment itself (which contains only 194 words). *See supra* n.1.

LaRose tweeted more factually misleading information about the substance of the Amendment: "The radical left wants to amend Ohio's constitution to allow abortion on demand up to the moment of birth." (RELATORS 073.) *But see infra* Argument, Parts I.A.3.–5.

LEGAL STANDARD

"A relator seeking a writ of mandamus must establish (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent official or governmental unit to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, ¶ 18.

ARGUMENT

I. Proposition of Law I: The ballot language prescribed by the Ballot Board violates the Ohio Constitution.

The Ballot Board's prescribed ballot language is unlawful. Rather than properly identifying the substance of the proposal, it misleads and deceives the voters, and it attempts to persuade them to vote against the Amendment. It suffers from a host of defects, ranging from bald falsehoods and material omissions to improperly charged language and needless repetition. And the cumulative effect of these defects is to render the language, as a whole, unlawful under the Ohio Constitution.

Article XVI of the Ohio Constitution establishes the standard that the ballot language must satisfy. Ohio Constitution, Article XVI, Section 1; *see* Ohio Constitution, Article II, Section 1g (applying the Article XVI standard to ballot language for initiated amendments); *see also* R.C. 3505.062(B) (restating the constitutional standard). Specifically, where the Ballot Board elects to summarize a proposed amendment rather than using its full text, Article XVI provides that the 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."[4]

The Court has developed several principles to enforce this constitutional command. The Court generally determines first "whether the language tells voters what they are being asked to vote on and whether the language impermissibly amounts to persuasive argument for or against the issue." *State ex rel. One Pers. One Vote v. Ohio Ballot Bd.*, No. 2023-0672, 2023-Ohio-1928, 2023 WL 3939006, ¶ 8 (*per curiam*). In making that determination, the Court looks to several specific considerations:

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

Markus v. Trumbull Cnty. Bd. of Elections, 22 Ohio St.2d 197, 203, 259 N.E.2d 501 (1970). The Court considers material omissions to be just as misleading as explicit inaccuracies. An "omission in the ballot[] board's condensed ballot language . . . is in the nature of a persuasive argument against its adoption" because it misleads voters by implication. *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 48.

If the Court determines that "there are defects in ballot language," it next "examine[s] the defects as a whole and determine[s] whether their cumulative effect violates the constitutional standard." *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8. In assessing the cumulative effect of any defects, the Court has usually looked to the ultimate purpose of the ballot language and asked whether the language adequately serves that purpose. "It is only from the ballot statement that the

[4] Section 3505.062(B) of the Revised Code similarly requires the Ballot Board to "[p]rescribe the ballot language for constitutional amendments . . . which language shall properly identify the substance of the proposal to be voted upon."

ultimate deciders of the question can arrive at an efficacious and intelligent expression of opinion." *Markus*, 22 Ohio St.2d at 203.

Finally, the Court's analysis takes into account the critical importance of ballot language to voter decision-making. In this regard, the Court has recognized that "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, at ¶ 29 (quoting *Schnoerr v. Miller*, 2 Ohio St.2d 121, 125, 206 N.E.2d 902 (1965)).

A. The ballot language is defective.

The Ballot Board's prescribed language misleads the voters about "what they are being asked to vote on" and engages in improper "persuasive argument . . . against" the Amendment. *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8. Accordingly, the ballot language is defective. *Id.* The ballot language suffers from at least the seven following defects: It improperly misleads the voters about (1) what right the Amendment would create; (2) what actors the Amendment would restrict; (3) whether and to what degree the Amendment would protect the right to *continue* a pregnancy; (4) how much discretion a physician would have under the Amendment to determine fetal viability; and (5) how the Amendment would limit state regulation. And the ballot language improperly attempts to persuade the voters by using (6) the unnecessarily value-laden term "unborn child" and (7) absolute terms like "only" and "always" where they do not apply. Each of these defects violates the Constitution and laws of the State of Ohio, and cannot survive under this Court's precedents.

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

First, the ballot language misleads the voters about the fundamental nature of the right that the Amendment would bestow on Ohio's citizens. It accomplishes this both by distorting the

textually conferred right "to make and carry out one's own reproductive *decisions*" into a right to "reproductive medical *treatment*," and by omitting any mention of four of the five categories of reproductive decision the Amendment expressly covers:

Amendment's Text	A. Every individual has **a right to make and carry out one's own reproductive decisions**, including but not limited to decisions on: **1. contraception;** **2. fertility treatment;** **3. continuing one's own pregnancy;** **4. miscarriage care; and** **5. abortion.** B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either: 1. An individual's voluntary exercise of **this right** or 2. A person or entity that assists an individual exercising **this right**[.]
Ballot Board's Prescribed Language	The proposed amendment would: • Establish in the Constitution of the State of Ohio an individual **right to one's own reproductive medical treatment**, including but not limited to **abortion**; • Create legal protections for any person or entity that assists a person with receiving **reproductive medical treatment**, including but not limited to **abortion**;

Substituting "medical treatment" for "decisions" is both inaccurate and misleading. The terms are far from synonymous, as any dictionary illustrates. A "decision" is "a determination arrived at after consideration." *Decision*, Merriam-Webster.[5] And "reproductive" means "of, relating to, or capable of reproduction"—in the sense of the choice whether to "produce offspring." *Reproductive*, Merriam-Webster[6]; *see Reproduce*, Merriam-Webster.[7] "Reproductive decision" thus suggests a considered determination about any matter related to producing offspring. Medical

[5] https://www.merriam-webster.com/dictionary/decision (last visited Sept. 5, 2023).

[6] https://www.merriam-webster.com/dictionary/reproductive (last visited Sept. 5, 2023).

[7] https://www.merriam-webster.com/dictionary/reproduce (last visited Sept. 5, 2023).

"treatment," in contrast, is "the action or way of treating a patient or a condition medically or surgically." *Treatment*, Merriam-Webster.[8] "Reproductive medical treatment" thus suggests medical *care* in some way related to producing offspring.

Many reproductive decisions do not entail what in everyday usage would be termed "medical treatment." For instance, the decision to continue a pregnancy does not necessarily entail receipt of care from medical providers. Nor does the decision to use certain forms of contraception, or, conversely, the decision not to use contraception. And even where "medical treatment" does relate to a "reproductive decision," it is separate and distinct from that decision—one first decides on a medical objective, and only then pursues *treatment* to effectuate the decision. The Ballot Board's chosen language is thus expressly misleading as to the scope of the right the Amendment would confer on Ohioans. This is not a case of choosing between two words that are "similar in meaning," *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 29; rather, the Ballot Board's choice of terms changes the Amendment's meaning significantly.[9]

In this way, the Ballot Board's choice of the phrase "medical treatment" is expressly misleading. In context, that phrase also is misleading because of what it implies—an *affirmative* right to government-provided "reproductive medical treatment" of any sort. "Evaluating the context in which a word is written is essential to a fair reading of the text." *Great Lakes Bar*

[8] https://www.merriam-webster.com/dictionary/treatment (last visited Sept. 5, 2023).

[9] That Secretary LaRose's prescribed ballot *title* uses the term "decisions," rather than "medical treatment," is no response to this argument. The legality of the ballot title is a separate issue from the legality of the ballot language: It is prescribed by a different actor pursuant to a different substantive standard, one set out in the Revised Code rather than the Constitution. *See* R.C. 3519.21. Thus, the ballot title cannot cure a defect in the ballot language. And, if anything, Secretary LaRose's use of the word "decisions" in the title makes the Ballot Board's decision to use a different term in the ballot language even more curious—why was the word used in the Amendment itself suitable for the title, but not the language?

Control, Inc. v. Testa, 156 Ohio St.3d 199, 2018-Ohio-5207, 124 N.E.3d 803, ¶ 9. Here, the context is a grant of a right. In both everyday usage and legal parlance, when rights-conferring language authorizes the right-holder to *engage* in some category of conduct—a right to worship freely, for instance—the implication is that the government may not *interfere* with that conduct. This sort of right is often termed a "permissive" or "negative" right. *See, e.g.*, *Gary B. v. Whitmer*, 957 F.3d 616, 629 (6th Cir. 2020), *vacated*, 958 F.3d 1216 ("Negative rights, in this view, are freedoms from government intervention or intrusion[.]"). But when the rights-conferring language instead suggests an *entitlement* to some concrete thing—a right to welfare, for instance—the implication is that the government must *provide* that thing. This sort of right is often termed a "positive" right. *See, e.g.*, *id.* ("[P]ositive rights, by contrast, entail affirmative obligations that the state must afford its citizens.").

"Medical treatment" is a concrete benefit, not a category of conduct. And when courts refer to a "right to medical treatment," they have in mind a *positive* right to such treatment that the government must affirmatively satisfy. *See, e.g.*, *Estate of Carter v. City of Detroit*, 408 F.3d 305, 313 (6th Cir. 2005) (recognizing "a pretrial detainee's right to medical treatment for a serious medical need."). The Amendment, however, would create a right to "*make* and *carry out* one's *own* reproductive decisions." This language entitles an individual to make and carry out such decisions without the government's preventing or otherwise making impossible the decision or its realization. The Amendment's text does not suggest that the government must affirmatively *provide* something. Yet the ballot language's use of the phrase "right to . . . reproductive medical treatment" suggests a government-provided right to have someone else render medical treatment *to* the individual. The ballot language thus improperly and misleadingly implies that the Amendment would entitle Ohioans to have the State provide any and all "reproductive medical

treatment[s]" an individual wishes to elect.[10]

Omissions in the ballot language further obscure the nature of the right that the Amendment would create. Specifically, the Ballot Board's language omits four of the five categories of reproductive decisions that are expressly covered by the Amendment's protections. The Amendment's text specifies that it covers decisions about "contraception; fertility treatment; continuing one's own pregnancy; miscarriage care; and abortion." But the ballot language mentions only "abortion." The failure to even note 80 percent of the kinds of reproductive decisions covered by the Amendment is a misleading material omission. *See Voters First*, 2012-Ohio-4149, at ¶ 48.

In particular, this omission is misleading because it falsely suggests ambiguity about what categories of decision the overarching right "to make and carry out one's own reproductive decisions" covers. Constitutional rights normally do not cover every imaginable subcategory of the protected conduct. The First Amendment right to "the freedom of speech," for instance, generally does not cover inciting or defamatory speech. *See State v. Lessin*, 67 Ohio St.3d 487, 497, 620 N.E.2d 72 (1993) (Scott Gwin, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). It is self-evidently material to voters that the Amendment, by guaranteeing a right to make reproductive decisions, would unambiguously guarantee their right to make decisions about contraception, fertility treatment, continuing a pregnancy, and miscarriage care. The ballot language's omission of the Amendment's protections for those decisions is a grave defect.

Moreover, omitting four of the five specific categories of reproductive decision also exacerbates the (previously discussed) misleading effects of the Ballot Board's terminological

[10] Of course, not every voter is sure to interpret the ballot language this way. But many will. And the Constitution does not require that language mislead or deceive *every* voter to be defective.

choices. First, omitting those categories compounds the effects of the Ballot Board's decision to substitute the term "medical treatment" for "decisions," rendering it yet more misleading. Several of the covered categories of decision do not entail any treatment at all—continuing a pregnancy, or choosing not to use contraception, for example. Including those categories in the ballot language would signal to voters that the term "medical treatment" is inaccurate. Excluding them, and including only abortion, however, has the opposite effect: Abortion does often entail a medical treatment (after a reproductive decision has been made). Its use as the lone example of a "reproductive medical treatment" thus sharpens the ballot language's deceptive impact on voters. Second, an abortion is something that can, in theory, be provided by the government—unlike, for example, the decision to continue a pregnancy. Thus, the ballot language's singling out of abortion as the lone example of "medical treatment" deepens the false implication that the Amendment creates a right to *state-provided* "reproductive medical treatment" of any sort, "including but not limited to" state-provided abortion.

To sum up: The ballot language misleads voters about the scope of the right created by the Amendment both by redefining that right—as a right to "reproductive medical treatment" rather than a right to "make and carry out one's own reproductive decisions"—and by omitting mention of all the categories of covered decisions that could tell a different story. The Court need look no further than its decision, just a few months ago, in *State ex rel. DeBlase v. Ohio Ballot Board*, for the corrective. *See* No. 2023-0388, 2023-Ohio-1823, 2023 WL 3749300. In that case, the three-Justice lead opinion explained that "the first provision of the proposed amendment specifies a general purpose (protecting an individual's *right to make reproductive decisions*) and then specifies *five types of reproductive decisions* that would be covered by the amendment." *Id.* at ¶ 22 (*per curiam* lead opinion). Quite right.

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

Second, the ballot language grossly misleads the voters about the identity of the actor to which the Amendment's restrictions would apply. It does this by inserting words into the Amendment's text to distort its meaning, and omitting the Amendment's definition of "State":

Amendment's Text	B. **The State** shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either: 1. An **individual's** voluntary exercise of this right or 2. A person or entity that assists an **individual** exercising this right, unless **the State** demonstrates that it is using the least restrictive means to advance the pregnant **individual's** health in accordance with widely accepted and evidence-based standards of care. . . . C. As used in this Section: . . . 2. **"State" includes any governmental entity and any political subdivision.**
Ballot Board's Prescribed Language	The proposed amendment would: . . . • Prohibit **the citizens of the State of Ohio** from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child is determined to be viable, unless the State demonstrates that it is using the least restrictive means; . . . • Only allow **the citizens of the State of Ohio** to prohibit an abortion after an unborn child is determined by a pregnant woman's treating physician to be viable and only if the physician does not consider the abortion necessary to protect the pregnant woman's life or health;

The Amendment's text could not be clearer that it would create a right against *state* interference with personal reproductive decision-making. The Amendment uses the term "the State" twice to describe the actor the new constitutional right would restrict. The Amendment repeatedly contrasts that term with "the individual" who would "exercise" the right or otherwise be protected by it. And the Amendment expressly defines the term "State" to include "any governmental entity and any political subdivision." The Amendment leaves absolutely no ambiguity about what "the State" means. This Court certainly was not confused in *DeBlase*. As

the three-Justice lead opinion explained, "Section B [of the Amendment] prohibits *the state* from interfering with the exercise of the rights identified in Section A." *DeBlase*, 2023-Ohio-1823, at ¶ 22 (*per curiam* lead opinion) (emphasis added). The Court did not say that the "citizens" would be so prohibited—because that would have been wrong.

The ballot language, by contrast, turns this aspect of the Amendment inside out. By inserting the words "the citizens of"—which appear nowhere in the Amendment—before "the State," the ballot language converts a right held by the citizens against the State into a restriction enforced by the State against the citizens. Little else can be said, or needs to be, about this aspect of the ballot language. It is breathtakingly misleading. It is flatly wrong. It cannot be reconciled with *DeBlase*. And it can only be understood as a transparent attempt by the Ballot Board to persuade voters to oppose the Amendment.

What is more, this aspect of the ballot language would raise, for the average citizen, a host of questions about the Amendment's scope that the Amendment's text itself does not. If the Amendment restricts *citizens* from burdening "reproductive medical treatment," *how* and to *what extent* does it do so exactly? For instance, does that mean that a private citizen could not protest outside an abortion clinic? Or pen an op-ed opposing abortion? The ballot language misleadingly suggests that the Amendment might restrict these private activities, and many others, if adopted. It would not, because it would not restrict the citizenry at all.

And for those particularly savvy voters who are familiar with the processes by which the Ohio Constitution can be amended, the phrase "[o]nly allow the citizens of the State of Ohio to prohibit an abortion . . ." implies one further restriction: a ban on future initiated amendments that seek to roll back the Amendment or otherwise impose new restrictions on abortion. As written, the ballot language suggests, falsely, that such an amendment would unconstitutional. Indeed, that

reading might be particularly likely given the recency of the highly charged August special election campaign, which educated many voters about the citizen-initiated constitutional amendment process. The reality is that the Amendment would not—and could not—restrict the people's power to amend their Constitution again in the future. *See* Ohio Constitution, Article II, Section 1b; Article XVI, Sections 1 & 3.

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

Third, the ballot language suggests the Amendment would "always allow" abortions even against a pregnant person's wishes. The ballot language thereby flips an individual's agency to make personal reproductive decisions on its head, implying that even when an individual wants to proceed with a pregnancy against medical advice, they will not be permitted to do so:

Amendment's Text	A. **Every individual has a right to make and carry out one's own reproductive decisions, including** but not limited to decisions on: . . . **3. continuing one's own pregnancy;** . . . B. **The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against** . . . 1. **An individual's voluntary exercise of this right** . . . However, abortion may be prohibited after fetal viability. But **in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.**
Ballot Board's Prescribed Language	The proposed amendment would: . . . • Prohibit the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child **is determined to be viable,** unless the State demonstrates that it is using the least restrictive means; . . . • Only allow the citizens of the State of Ohio to prohibit an abortion after an unborn child is **determined by a pregnant woman's treating physician to be viable and only if the physician does not consider the abortion necessary to protect the pregnant woman's life or health**; and • **Always allow an unborn child to be aborted at any stage of pregnancy, regardless of viability** if, in the treating physician's determination, the abortion is necessary to protect the pregnant woman's life or health.

The Amendment confers the "right to make and carry out one's own reproductive decisions." It explicitly includes in that category decisions about "*continuing* one's own pregnancy." And it generally restricts the State from directly or indirectly burdening, penalizing, prohibiting, or otherwise interfering with the exercise of the right to make such decisions. By its plain terms, the Amendment would protect the decision to *continue* a pregnancy with the same force that it would protect the decision to have an abortion. Given our nation's shameful legacy of forcing abortions and sterilizations on some marginalized people, an individual's right to continue a pregnancy, made explicit by the Amendment, has genuine importance.[11] The ballot language providing otherwise is plainly inaccurate.

The Amendment simply would not do what the Ballot Board asserts in the final bullet of its prescribed language: "*Always allow* an unborn child to be aborted at any stage of pregnancy, regardless of viability if, in the treating physician's determination, the abortion is necessary to protect the pregnant woman's life or health." To the contrary, if the Amendment were adopted, such an abortion would *not* be allowed insofar as the pregnant patient objected to it. In that case, the pregnant person would have an individual right to decide to "continue [their] own pregnancy." The ballot language's final bullet point is thus demonstrably false and misleading—the Amendment would not "always" allow the described category of abortions. Put bluntly, this bullet point seems designed not to fairly summarize the Amendment, but instead to provide the Amendment's opponents with the ability to quote the patently misleading phrase "*Always allow*

[11] *See, e.g.*, *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) (holding that statute authorizing forced sterilization did not violate the Fourteenth Amendment and infamously proclaiming: "Three generations of imbeciles are enough."); *In re Guardianship of Moe*, 960 N.E.2d 350, 352 (Mass. App. 2012) (vacating trial court order appointing schizophrenic woman's parents as guardians for the purpose of consenting to abortion and sterilization on her behalf).

an unborn child to be aborted at any stage of pregnancy, regardless of viability . . ."

This bullet point is also defective for a second reason: It just rehashes information covered by the third and fifth bullet points, which together address the pre-viability and post-viability stage of pregnancy. The repetition is most acute with regard to the immediately prior fifth bullet point. The fifth bullet point says (with certain other defects corrected by alterations) that the "proposed amendment would . . . [o]nly allow [the State] to prohibit an abortion after [viability] and only if the physician does not consider the abortion necessary to protect the pregnant woman's life or health." The sixth bullet point says, in substance, almost exactly the same thing: the "proposed 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." The main difference between the two bullets, other than the misleading word "always," is the syntax—the fifth bullet is phrased as a restriction on abortion prohibitions, while the sixth bullet is phrased as an authorization of abortions. And to the extent that the sixth bullet point is broader than the fifth because it addresses both pre- and post-viability abortions, it just duplicates information already conveyed by the third bullet point. Thus, the sixth point is misleading and an improper attempt to persuade in a second sense: It accomplishes nothing more than repeating points that the Ballot Board apparently concluded might motivate voters to vote against the Amendment. This Court has long recognized that repetitive "amplification" of this ilk has an improper "misleading tendency." *Markus*, 22 Ohio St.2d at 203.

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

Fourth, the ballot language misleads the voters about the degree of a physician's discretion, under the Amendment, to determine whether or not a pregnancy is viable. It accomplishes this by omitting a crucial definition:

Amendment's Text	C. As used in this Section: 1. "**Fetal viability**" means "the point in a pregnancy when, in the **professional judgment** of the pregnant patient's treating physician, the fetus has **a significant likelihood of survival outside the uterus with reasonable measures**. This is determined **on a case-by-case basis**."
Ballot Board's Prescribed Language	The proposed amendment would: . . . • Grant a pregnant woman's treating physician the authority to determine, **on a case-by-case basis**, whether an unborn child is viable;

The ballot language suggests a physician has entirely unfettered authority to determine fetal viability as the physician sees fit in each particular case. This grossly mischaracterizes the Amendment. In fact, the Amendment constrains a physician's discretion to determine fetal viability in three ways. First, and most importantly, the Amendment 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." Accordingly, a physician does *not* have "authority" to employ a personal, idiosyncratic definition of "fetal viability." Second, the Amendment requires the physician to use "professional judgment," *i.e.*, the medical expertise acquired through years of training and practice, in applying that definition. The physician thus has a professional obligation to apply the provided definition of "fetal viability" reasonably. Third, the Amendment requires that the physician exercise professional judgment in applying that definition on a "case-by-case basis." So, for instance, a physician could not simply declare that no pregnancy is viable before the third trimester—the physician must consider individual circumstances.

The ballot language, by contrast, states only that the Amendment would "[g]rant a pregnant woman's treating physician the authority to determine, on a case-by-case basis, whether an unborn child is viable." By omitting both the binding definition of "fetal viability" and the requirement to exercise professional judgment, the ballot language falsely suggests that physicians have

unbounded discretion about viability determinations.

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

Fifth, the ballot language misleads the voters about the circumstances in which the State may regulate reproductive decision-making. It accomplishes this by including the legal term of art "least restrictive means," but omitting the rest of the sentence in which the Amendment uses and contextualizes that term:

Amendment's Text	B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either: 1. An individual's voluntary exercise of this right or 2. A person or entity that assists an individual exercising this right, **unless the State demonstrates that it is using the least restrictive means to advance the pregnant individual's health in accordance with widely accepted and evidence-based standards of care**.
Ballot Board's Prescribed Language	• Prohibit the citizens of the State of Ohio from directly or indirectly burdening, penalizing, or prohibiting abortion before an unborn child is determined to be viable, **unless the State demonstrates that it is using the least restrictive means**;

The Amendment would permit the State to interfere with or otherwise burden the right to make and carry out one's own reproductive decisions, prior to fetal viability, so long as the State demonstrates that it is "using the least restrictive means to advance the pregnant individual's health in accordance with widely accepted and evidence-based standards of care." In practical terms, this means that pre-viability reproductive regulations must be tied closely to a scientifically grounded consensus about how best to advance the patient's health. The State could, for example, regulate a form of contraception that is widely agreed, based on objective medical evidence, to be dangerous to users.

The ballot language, by contrast, leaves out all the substance of the exception by omitting half of the Amendment's "least restrictive means" test. The result is nonsensical. Although it uses

the phrase "least restrictive means," it does not say *what* the least restrictive means are meant to advance or protect. If one must use the "least restrictive means," the natural follow-up question is "use the least restrictive means to do *what*?" The ballot language leaves that question unanswered. Voters who also happen to be lawyers may recognize the term of art "least restrictive means." *See generally, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264 (2022). But without further specification, "least restrictive means" is opaque even to lawyers, and quite meaningless to most voters. By omitting the rest of the sentence in which that term is used, the ballot language thus misleads voters about the degree to which the Amendment would authorize the State to enact regulations that advance Ohioans' health.

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

Sixth, the ballot language uses the phrase "unborn child" four times, though it appears nowhere in the text of the Amendment, in an improper attempt to persuade the voters. *See One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8. The Amendment itself uses the terms "fetus" and "fetal viability" because "fetus" is the scientifically accepted term for the prenatal development stage during which "viability"—the ability to survive outside the uterus—comes into play. *See, e.g.*, *Viability*, Merriam-Webster ("(2): the capability of a *fetus* to survive outside the uterus" (emphasis added)).[12] Because the Amendment would condition the State's right to regulate abortion in certain ways on whether the point of "fetal viability" has been reached, "fetus" is the most accurate, neutral term. The Ballot Board's decision to replace that term with the phrase "unborn child" sacrifices accuracy and neutrality in order to set down the Board majority's ethical judgment or personal view that a fetus, embryo, and zygote all constitute, for ethical purposes, an "unborn child." The

[12] https://www.merriam-webster.com/dictionary/viability (last visited Sept. 5, 2023).

Amendment's text itself makes no such judgment—instead, it leaves the ethical judgments to the voters. Terminological choices are inextricably bound up with opinions about how to regulate abortion in this country. One's judgment about the developmental stage at which the ethical status of "unborn child" attaches has obvious implications for whether and how one believes abortion should be regulated. The Ballot Board is not permitted to substitute its judgment for that of the voters by inserting its preferred, loaded terminology into the ballot language. Doing so "impermissibly amounts to persuasive argument . . . against the issue." *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8.

This is not a case where the Ballot Board lacked an available, neutral alternative. The Board cannot argue that the terms used in the Amendment itself—"fetus" and "fetal viability"—imply a moral judgment that a fetus is *not* an "unborn child." "Fetus" is nothing more or less than a scientific term for a stage of prenatal development. *See, e.g., Fetus*, Oxford English Dictionary ("Originally: the offspring of a human or other animal during its development within the uterus or egg. In later use: *spec.* the developing offspring of a human or other viviparous animal in the period after the major structures of the body have been formed.").[13] And, indeed, advocates of restrictions on abortion often argue that a "fetus" has the ethical status of an "unborn child" or a "person." *See, e.g.*, (RELATORS 074–075.) Some people believe a "fetus" is an unborn child. Others maintain that a "fetus" is not an unborn child. The fact that the same term can be used by proponents and opponents of a given proposition illustrate that "fetus" is not, like "unborn child," a necessarily morally freighted term, and so confirms that the Ballot Board's choice of language was

[13] https://www.oed.com/dictionary/fetus_n (last accessed Sept. 5, 2023); also reproduced at (RELATORS 076).

unjustified.[14]

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

Seventh, the ballot language uses words like "only" and "always" to attempt to persuade voters that the Amendment embodies categorical and extreme positions. For example, the ballot language provides that the proposed Amendment would "*[o]nly* allow the citizens of the State of Ohio to prohibit an abortion after an unborn child is determined by a pregnant woman's treating physician to be viable and *only* if the physician does not consider the abortion necessary to protect the pregnant woman's life or health." This language is factually incorrect and misleading for the reasons stated above. It is also an improper attempt to persuade—by using the adverb "only" twice over, the ballot language implies that the Amendment imposes unreasonably strict limits on state authority. Likewise, as more fully set out above, the ballot language states that abortions would "*always*" be allowed before and after viability when, in fact, the Amendment expressly allows the State to regulate abortion in various circumstances both before and after viability. This is akin to ballot language saying that a law authorizing pilot licenses would: "Always allow any Ohioan to pilot any kind of aircraft, at any time, and anywhere, except where otherwise specified by licensing regulations." The Ballot Board is burying the lede under loaded language and distorting both the scope and effects of the Amendment.

[14] Nor is the Ballot Board's choice of the term "unborn child" justified by the fact that the General Assembly has, in the past, chosen to use that term. *See, e.g.*, R.C. 2919.16(L) ("'Unborn child' means an individual organism of the species homo sapiens from fertilization until live birth."). A statute cannot rewrite or redefine a constitutional provision's terms, *State ex rel. One Pers. One Vote v. LaRose*, No. 2023-0630, 2023-Ohio-1992, 2023 WL 4037602, ¶ 31, and the Amendment itself uses the term "fetus," not "unborn child." Indeed, to the extent that the Amendment uses the term "fetus," replacing that term with "unborn child" in the ballot language is confusing and inaccurate with reference to the statutory definition, which also encompasses the zygotic and embryonic stages of development.

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

As the foregoing discussion demonstrates, there are numerous "defects in [the] ballot language." *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8. Accordingly, following the approach set out just a few months ago in *One Person One Vote*, the Court should "examine the defects as a whole and determine whether their cumulative effect violates the constitutional standard." *Id.* That standard asks whether the ballot language "properly identif[ies] the substance of the proposal to be voted upon," or instead is "such as to mislead, deceive, or defraud the voters." Ohio Constitution, Article XVI, Section 1. Put another way, the question is whether the ballot language will assist the voters in casting intelligent, fully and accurately informed votes: "It is only from the ballot statement that the ultimate deciders of the question can arrive at an efficacious and intelligent expression of opinion." *Markus*, 22 Ohio St.2d at 203.

The arguments made above, in Part I.A., establish that each of the individual defects already identified violates the constitutional standard. Each specific defect either "mislead[s]" the voters, seeks to persuade the voters rather that identifying "the substance of the proposal," or both.

Each of the identified defects is material in and of itself. As for the defects' "cumulative effect," *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 8, every single bullet point in the Ballot Board's prescribed language suffers from at least one of the identified defects, and most suffer from several. Moreover, the defects are fundamental in nature—they reach everything from what right the Amendment confers to whose conduct the Amendment regulates to what standards the Amendment imposes on the State and physicians. Far from "convey[ing] an intelligent idea of the scope and import of the amendment," *Markus*, 22 Ohio St.2d at 203, the ballot language seeks to rewrite it in a painfully obvious attempt to prejudice voters against the Amendment.

Three further points merit brief mention.

First, cumulatively, the ballot language's defects prove beyond any doubt that the Ballot

Board did not try to describe the Amendment fairly and accurately but instead sought to undermine it. No truly impartial body would ever have produced this ballot language. This is not a case of one or two sloppily imprecise statements; it is a sweeping and comprehensive abuse of discretion.

Second, the flaws in the ballot language cannot be explained away as the result of the hard choices inherent in summarizing a longer text. By word count, the ballot language is longer than the substantive text of the Amendment itself. *See supra* nn.1, 3. If the Ballot Board majority truly intended the ballot language to be a neutral summary of the Amendment, it would no doubt be shorter than the Amendment's text.

Third, while the Court need look no further than the misleading inaccuracies evident on the face of the ballot language, the circumstances of its adoption further confirm that it was drafted to deceive. As noted, the ballot language was adopted by a narrow 3-to-2 vote. (RELATORS 052.) One board member in the majority—Senator Gavarone—repeatedly called the Amendment "an abomination" and attacked its substance before casting her decisive vote to adopt the ballot language. (RELATORS 044.) Yet another, the board chairperson and drafter of the language itself—Secretary LaRose—expressly agreed with her comments. (RELATORS 045.) And he has repeatedly mischaracterized the Amendment, including by making public statements that mislead the voters about its text and effects. *See* (RELATORS 073); *supra* n.2. This context, together with the ballot language's length and many defects, makes clear that the Board majority's personal opposition to the Amendment infected the Ballot Board's exercise of authority.

II. Proposition of Law II: Relators are entitled to a writ of mandamus.

Mandamus relief is appropriate here. Respondents the Ballot Board and its members have acted in clear disregard of applicable law and have abused their discretion. Relators have a clear legal right to the requested relief because the currently prescribed ballot language violates well-established constitutional standards. *See supra* Part I. Respondents have a clear legal duty to

provide the requested relief because they have a mandatory duty to prescribe lawful ballot language. *See* Ohio Constitution, Article XVI, Section 1; R.C. 3505.062. And Relators lack an adequate remedy at law because this Court has original and exclusive jurisdiction of the subject matter of the action, *see* Ohio Constitution, Article XVI, Section 1, and has long treated mandamus as the only available remedy to correct ballot language when an election is impending, *see, e.g.*, *One Pers. One Vote*, 2023-Ohio-1928, at ¶ 6.

Here, Relators specifically request that the Court issue a writ directing the Ballot Board to prescribe the Amendment's full text as the ballot language. As explained below, this Court has the authority to grant such relief. In the alternative, the Court should issue a writ specifying, in detail, the ballot language's defects and all necessary corrections, and requiring the Ballot Board's strict compliance. And in either case, the Court should retain jurisdiction of the action.

A. Under the circumstances present here, the Court can and should issue a writ directing the Ballot Board to prescribe the Amendment's full text as the ballot language.

The most appropriate, simple, and certain remedy in this case is a writ of mandamus compelling the Ballot Board to prescribe the full text of the Amendment as the ballot language. While Article XVI provides that the ballot does not *invariably* need to contain a proposal's full text, it permits that remedy. And the circumstances make that remedy the only one that would adequately guarantee ballot language that satisfies the standards set out in Article XVI—and fully redress Relators' injuries. Every bullet point in the Ballot Board's prescribed language is defective, making line-by-line repair very difficult. Cosmetic repairs do not suffice when a complete rebuild is necessary. Further, the Ballot Board majority has made its opposition to the Amendment clear. *See supra* Part I.B. Relators are consequently suffering an ongoing procedural injury; the Ballot Board's decision-making process, which should be impartial and fair, has been tainted by improper animus. Given these circumstances and the press of time—ballots will start going out just three

weeks from now, *see* 52 U.S.C. § 20302(a)(8)—Relators, this Court, and above all the people of Ohio cannot afford to grant the Ballot Board a second opportunity to abuse its discretion. A writ of mandamus compelling the Ballot Board to prescribe the Amendment's full text as the ballot language is therefore the only means of assuring an effective, timely remedy.

To Relators' knowledge, this Court has not previously addressed whether it has the authority to compel the Ballot Board to prescribe a measure's full text as the ballot language. That said, in *Voters First*, Chief Justice O'Connor argued in a concurring opinion that the Court lacked authority "to craft the ballot language for [a] proposed constitutional amendment." 2012-Ohio-4149, at ¶ 59 (O'Connor, C.J., concurring). For three reasons, the Court should not apply that logic here. *First*, the separation-of-powers concerns Chief Justice O'Connor voiced in *Voters First*, *see id.* at ¶¶ 60–61, find the most traction when the Court is asked to craft the words of the ballot language itself—as the opinion she was responding to had proposed, *see id.* at ¶ 69 (Pfeifer, J., concurring) (proposing the full text of alternative ballot language). Here, in contrast, Relators just ask that the Court order the Ballot Board to prescribe the Amendment's text—*i.e.*, the language the voters *will put in the Constitution if they enact Issue 1*—as the ballot language. Doing so would not require the Court to trench on the Ballot Board's executive discretion by creating new language from whole cloth. The Amendment's text already exists, and it is, by definition, an objective statement of the Amendment's contents.

Second, this case arises under Article XVI, which gives this Court jurisdiction in all cases challenging the "*submission* of a proposed constitutional amendment to the electors." (Emphasis added). Chief Justice O'Connor apparently read that phrase to limit this Court's jurisdiction to "a determination of whether the contested language is invalid." *Voters First*, 2012-Ohio-4149, at ¶ 62 (O'Connor, C.J., concurring). But the provision does not say that—instead, it gives the Court

jurisdiction of all matters related to the Amendment's "submission . . . to the electors." In this action, Relators have established both the invalidity of the existing language and the Ballot Board's incapacity, in the few weeks remaining before ballots must be printed, to produce valid language that can be submitted to the electors. Accordingly, Relators seek a writ of mandamus compelling the "submission of [the] proposed constitutional amendment to the electors" with the Amendment's full text as the ballot language. In the circumstances, Article XVI unambiguously gives the Court jurisdiction and authority to afford such relief.

Third, ordering the full text of a measure to appear on a ballot is plainly permitted by Article XVI, whereas the Ballot Board has no authority to attempt to derail the people's use of the initiative process by larding ballot language with misleading phrasing and partisan posturing. The real threat to the separation of powers presented by this case is the Ballot Board's growing willingness to infringe on the people's reserved legislative powers. In divided times, politicians serving in capacities requiring neutrality may find it difficult to withstand pressure to put a thumb on the scale in service of political considerations. But it is emphatically true that "the ultimate decision on what the Constitution should say and how it should say it belongs to the people." *DeBlase*, 2023-Ohio-1823, at ¶ 39 (Kennedy, C.J., concurring in judgment only).

B. In the alternative, the Court should issue a writ specifying each defect in the ballot language and prescribing how it must be cured.

Alternatively, if the Court determines that the foregoing remedy is unavailable or inappropriate, it should grant a writ of mandamus that specifies each of the existing language's defects, as set out above, and notes the specific corrections necessary to redress those defects, as follows:

i. The ballot language must accurately state whose action the Amendment regulates—the State's—and replace all references to "the citizens of the State of Ohio" with "the State"

or "the government."

ii. The ballot language must accurately describe the right that the Amendment confers and replace all references to "right to one's own reproductive medical treatment" with "right to make and carry out one's own reproductive decisions."

iii. The ballot language must not state or imply that the State, a treating physician, or anyone else has the authority to allow an abortion over the pregnant person's objections. Accordingly, the final bullet point must be removed in full. Moreover, the final bullet point is subsumed in the third and fifth bullet points, and inaccurately uses the term "always," and should be removed in full for these reasons as well.

iv. The ballot language must accurately describe the purpose and scope of the Amendment and expressly indicate that the Amendment establishes the right to make and carry out one's own reproductive decisions, including by expressly naming each of the five enumerated categories of decision: (i) contraception, (ii) fertility treatment, (iii) continuing one's own pregnancy, (iv) miscarriage care, and (v) abortion.

v. The ballot language must describe the "least restrictive means" exception fully, including the language or concept: "to advance the pregnant individual's health in accordance with widely accepted and evidence-based standards of care."

vi. The ballot language must directly quote or accurately describe the standard by which treating physicians will determine fetal viability.

vii. The ballot language must avoid any inaccuracies, including by implication.

viii. The ballot language must refrain from using any terms whose use impermissibly amounts to persuasive argument for or against the issue, including "unborn child."

ix. The ballot language must avoid using absolute terms when they do not apply, including

the current use of "Only" and "Always."

x. The ballot language must avoid distorting the Amendment's prohibitions into obligations.

C. The Court should retain jurisdiction of this action.

Finally, this Court has inherent and express authority to retain jurisdiction of an action, and it should do so here. Ohio courts have inherent authority to enforce their orders. *See Infinite Sec. Solutions, L.L.C. v. Karam Props., II, Ltd.,* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 27 (citing *Rieser v. Rieser*, 191 Ohio App.3d 616, 2010-Ohio-6227, 947 N.E.2d 222, ¶ 5 (2d Dist.) and *In re Whallon* 6 Ohio App. 80, 83, 25 Ohio C.A. 167, 26 Ohio C.C. (n.s.) 167 (1st Dist. 1915) ("Courts have inherent authority to enforce their final judgments and decrees.")). This Court has previously retained jurisdiction where doing so was necessary to effectuate an order in time for an upcoming election. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 167 Ohio St.3d 255, 2022-Ohio-65, 192 N.E.3d 379, ¶¶ 136–37 ("[B]ecause the election cycle should not proceed with a General Assembly–district map that we have declared invalid, . . . [w]e also retain jurisdiction to review the [remedial] plan that the commission adopts for compliance with our order."). And Revised Code Section 2731.16 expressly confirms the Court's authority, in an action for mandamus, "to carry its order and judgment into execution, or to punish any officer . . . for contempt or disobedience of its orders or writs."

Insofar as the Court grants relief, it should also retain jurisdiction, because there will not be time for Relators to bring a second action to enforce the judgment, correct noncompliance, or rectify new defects in revised ballot language. *See* Ohio Constitution, Article XVI, Section 1 ("No such case challenging the ballot language . . . shall be filed later than sixty-four days before the election."); *see also* 52 U.S.C. § 20302(a)(8) (requiring Ohio to transmit ballots to overseas and military voters "not later than 45 days before the election"—meaning, this cycle, by September

23). Retaining jurisdiction is thus necessary to afford complete relief, protect the Court's own authority, and preserve the separation of powers.

CONCLUSION

For the foregoing reasons, 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 above in Part II.B.

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 5th day of September, 2023

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

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APPENDIX
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ohio Constitution, Article II

Section 1: In whom power vested

The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

Section 1a: Initiative and referendum to amend constitution

The first aforestated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to one hundred twenty-five days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors."

Section 1b: Initiative and referendum to enact laws

When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes. If said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the referendum. If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the general assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months, if no action has been taken thereon, or after the law as passed by the general assembly

shall have been filed by the governor in the office of the secretary of state. The proposed law shall be submitted at the next regular or general election occurring subsequent to one hundred twenty-five days after the supplementary petition is filed in the form demanded by such supplementary petition, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly. If a proposed law so submitted is approved by a majority of the electors voting thereon, it shall be the law and shall go into effect as herein provided in lieu of any amended form of said law which may have been passed by the general assembly, and such amended law passed by the general assembly shall not go into effect until and unless the law proposed by supplementary petition shall have been rejected by the electors. All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in 1a and 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. If conflicting proposed laws or conflicting proposed amendments to the constitution shall be approved at the same election by a majority of the total number of votes cast for and against the same, the one receiving the highest number of affirmative votes shall be the law, or in the case of amendments to the constitution shall be the amendment to the constitution. No law proposed by initiative petition and approved by the electors shall be subject to the veto of the governor.

Section 1e: Powers; limitation of use:

(A) The powers defined herein as the "initiative" and "referendum" shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

(B)

(1) Restraint of trade or commerce being injurious to this state and its citizens, the power of the initiative shall not be used to pass an amendment to this constitution that would grant or create a monopoly, oligopoly, or cartel, specify or determine a tax rate, or confer a commercial interest, commercial right, or commercial license to any person, nonpublic entity, or group of persons or nonpublic entities, or any combination thereof, however organized, that is not then available to other similarly situated persons or nonpublic entities.

(2) If a constitutional amendment proposed by initiative petition is certified to appear on the ballot and, in the opinion of the Ohio ballot board, the amendment would conflict with division (B)(l) of this section, the board shall prescribe two separate questions to appear on the ballot, as follows:

(a) The first question shall be as follows: "Shall the petitioner, in violation of division (B)(l) of Section le of Article II of the Ohio Constitution, be

authorized to initiate a constitutional amendment that grants or creates a monopoly, oligopoly, or cartel, specifies or determines a tax rate, or confers a commercial interest, commercial right, or commercial license that is not available to other similarly situated persons?"

(b) The second question shall describe the proposed constitutional amendment.

(c) If both questions are approved or affirmed by a majority of the electors voting on them, then the constitutional amendment shall take effect. If only one question is approved or affirmed by a majority of the electors voting on it, then the constitutional amendment shall not take effect.

(3) If, at the general election held on November 3, 2015, the electors approve a proposed constitutional amendment that conflicts with division (B)(l) of this section with regard to the creation of a monopoly, oligopoly, or cartel for the sale, distribution, or other use of any federal Schedule I controlled substance, then notwithstanding any severability provision to the contrary, that entire proposed constitutional amendment shall not take effect. If, at any subsequent election, the electors approve a proposed constitutional amendment that was proposed by an initiative petition, that conflicts with division (B)(l) of this section, and that was not subject to the procedure described in division (B)(2) of this section, then notwithstanding any severability provision to the contrary, that entire proposed constitutional amendment shall not take effect.

(C) The supreme court of Ohio shall have original, exclusive jurisdiction in any action that relates to this section.

Section 1g: Petition requirements and preparation; submission; ballot language; by Ohio ballot board

Any initiative, supplementary, or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary, or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the county and the rural route number, post office address, or township of his residence. A resident of a municipality shall state the street and number, if any, of his residence and the name of the municipality or post office address. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the statement of the circulator, as may be required by law, that he witnessed the affixing of every signature. The secretary of state shall determine the sufficiency of the signatures not later than one hundred five days before the election.

The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. Any challenge to a petition or

signature on a petition shall be filed not later than ninety-five days before the day of the election. The court shall hear and rule on any challenges made to petitions and signatures not later than eighty-five days before the election. If no ruling determining the petition or signatures to be insufficient is issued at least eighty-five days before the election, the petition and signatures upon such petitions shall be presumed to be in all respects sufficient.

If the petitions or signatures are determined to be insufficient, ten additional days shall be allowed for the filing of additional signatures to such petition. If additional signatures are filed, the secretary of state shall determine the sufficiency of those additional signatures not later than sixty-five days before the election. Any challenge to the additional signatures shall be filed not later than fifty-five days before the day of the election. The court shall hear and rule on any challenges made to the additional signatures not later than forty-five days before the election. If no ruling determining the additional signatures to be insufficient is issued at least forty-five days before the election, the petition and signatures shall be presumed to be in all respects sufficient.

No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary, and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section, or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section, or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, shall be published once a week for three consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The secretary of state shall cause to be placed upon the ballots, the ballot language for any such law, or proposed law, or proposed amendment to the constitution, to be submitted. The ballot language shall be prescribed by the Ohio ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution. The ballot language shall be so prescribed and the secretary of state shall cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative and supplementary petition shall be: “Be it Enacted by the People of the State of Ohio,” and of all constitutional amendments: “Be it Resolved by the

People of the State of Ohio." The 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. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

Ohio Constitution, Article IV

Section 2: Organization and jurisdiction of Supreme Court

. . .

(B)

(1) The Supreme Court shall have original jurisdiction in the following:

(a) Quo warranto;

(b)Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

. . .

Ohio Constitution, Article XVI

Section 1: Constitutional amendment proposed by joint resolution of General Assembly; procedure

Either branch of the General Assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be filed with the secretary of state at least ninety days before the date of the election at which they are to be submitted to the electors, for their approval or rejection. They shall be submitted on a separate ballot without party designation of any kind, at either a special or a general election as the General

Assembly may prescribe.

The ballot language for such proposed amendments shall be prescribed by a majority of the Ohio ballot board, consisting of the secretary of state and four other members, who shall be designated in a manner prescribed by law and not more than two of whom shall be members of the same political party. The ballot language shall properly identify the substance of the proposal to be voted upon. The ballot need not contain the full text nor a condensed text of the proposal. The board shall also prepare an explanation of the proposal, which may include its purpose and effects, and shall certify the ballot language and the explanation to the secretary of state not later than seventy-five days before the election. The ballot language and the explanation shall be available for public inspection in the office of the secretary of state.

The Supreme Court shall have exclusive, original jurisdiction in all cases challenging the adoption or submission of a proposed constitutional amendment to the electors. No such case challenging the ballot language, the explanation, or the actions or procedures of the General Assembly in adopting and submitting a constitutional amendment shall be filed later than sixty-four days before the election. The ballot language shall not be held invalid unless it is such as to mislead, deceive, or defraud the voters.

Unless the General Assembly otherwise provides by law for the preparation of arguments for and, if any, against a proposed amendment, the board may prepare such arguments.

Such proposed amendments, the ballot language, the explanations, and the arguments, if any, shall be published once a week for three consecutive weeks preceding such election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The General Asembly shall provide by law for other dissemination of information in order to inform the electors concerning proposed amendments. An election on a proposed constitutional amendment submitted by the general assembly shall not be enjoined nor invalidated because the explanation, arguments, or other information is faulty in any way. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately.

Ohio Revised Code, Title 27

Section 2731.01: Mandamus defined

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Section 2731.02: Courts authorized to issue writ – contents

The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such

writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance.

Section 2731.04: Application for writ
Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice.

Section 2731.05: Adequacy of law remedy bar to writ

The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law.

Section 2731.06: Peremptory writ in first instance

When the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus. In all other cases an alternative writ must first be issued on the allowance of the court, or a judge thereof.

Section 2731.16: Power of court

Sections 2731.14 and 2731.15 of the Revised Code do not limit the power of the court to carry its order and judgment into execution, or to punish any officer named therein for contempt or disobedience of its orders or writs.

Ohio Revised Code, Title 29

Section 2919.16: Post-viability abortion definitions

As used in sections 2919.16 to 2919.18 of the Revised Code:
[Divisions (A) through (K) omitted.]

> (L) "Unborn child" means an individual organism of the species homo sapiens from fertilization until live birth.
>
> (M) "Viable" means the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.

Ohio Revised Code, Title 35

Section 3501.05: Election duties of secretary of state

The secretary of state shall do all of the following:

. . .

(G) Determine and prescribe the forms of ballots and the forms of all blanks, cards of instructions, pollbooks, tally sheets, certificates of election, and forms and blanks required by law for use by candidates, committees, and boards;

(H) Prepare the ballot title or statement to be placed on the ballot for any proposed law or amendment to the constitution to be submitted to the voters of the state;

(I) Except as otherwise provided in section 3519.08 of the Revised Code, certify to the several boards the forms of ballots and names of candidates for state offices, and the form and wording of state referendum questions and issues, as they shall appear on the ballot;

[Divisions (J) through (EE) omitted.]

Section 3505.06: Questions and issues ballot

(A) On the questions and issues ballot shall be printed all questions and issues to be submitted at any one election together with the percentage of affirmative votes necessary for passage as required by law. Such ballot shall have printed across the top thereof, and below the stubs, "Official Questions and Issues Ballot."

(B)

(1) Questions and issues shall be grouped together on the ballot from top to bottom as provided in division (B)(1) of this section, except as otherwise provided in division (B)(2) of this section. State questions and issues shall always appear as the top group of questions and issues. In calendar year 1997, the following questions and issues shall be grouped together on the ballot, in the following order from top to bottom, after the state questions and issues:

(a) County questions and issues;

(b) Municipal questions and issues;

(c) Township questions and issues;

(d) School or other district questions and issues.

In each succeeding calendar year after 1997, each group of questions and issues

described in division (B)(1)(a) to (d) of this section shall be moved down one place on the ballot except that the group that was last on the ballot during the immediately preceding calendar year shall appear at the top of the ballot after the state questions and issues. The rotation shall be performed only once each calendar year, beginning with the first election held during the calendar year. The rotation of groups of questions and issues shall be performed during each calendar year as required by division (B)(1) of this section, even if no questions and issues from any one or more such groups appear on the ballot at any particular election held during that calendar year.

(2) Questions and issues shall be grouped together on the ballot, from top to bottom, in the following order when it is not practicable to group them together as required by division (B)(1) of this section because of the type of voting machines used by the board of elections: state questions and issues, county questions and issues, municipal questions and issues, township questions and issues, and school or other district questions and issues. The particular order in which each of a group of state questions or issues is placed on the ballot shall be determined by, and certified to each board of elections by, the secretary of state.

(3) Failure of the board of elections to rotate questions and issues as required by division (B)(1) of this section does not affect the validity of the election at which the failure occurred, and is not grounds for contesting an election under section 3515.08 of the Revised Code.

(C) The particular order in which each of a group of county, municipal, township, or school district questions or issues is placed on the ballot shall be determined by the board providing the ballots.

(D) The printed matter pertaining to each question or issue on the ballot shall be enclosed at the top and bottom thereof by a heavy horizontal line across the width of the ballot. Immediately below such top line shall be printed a brief title descriptive of the question or issue below it, such as "Proposed Constitutional Amendment," "Proposed Bond Issue," "Proposed Annexation of Territory," "Proposed Increase in Tax Rate," or such other brief title as will be descriptive of the question or issue to which it pertains, together with a brief statement of the percentage of affirmative votes necessary for passage, such as "A sixty-five per cent affirmative vote is necessary for passage," "A majority vote is necessary for passage," or such other brief statement as will be descriptive of the percentage of affirmative votes required.

(E) The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or an amendment proposed by other than the general assembly shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If other than a full text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible

to the voters.

(F) Each question and issue appearing on the questions and issues ballot may be consecutively numbered. The question or issue determined to appear at the top of the ballot may be designated on the face thereof by the Arabic numeral "1" and all questions and issues placed below on the ballot shall be consecutively numbered. Such numeral shall be placed below the heavy top horizontal line enclosing such question or issue and to the left of the brief title thereof.

(G) No portion of a ballot question proposing to levy a property tax in excess of the ten-mill limitation under any section of the Revised Code, including the renewal or replacement of such a levy, may be printed in boldface type or in a font size that is different from the font size of other text in the ballot question. The prohibitions in division (G) of this section do not apply to printed matter either described in division (D) of this section related to such a ballot question or located in the area of the ballot in which votes are indicated for or against that question.

Section 3505.061: Ohio ballot board

(A) The Ohio ballot board, as authorized by Section 1 of Article XVI, Ohio Constitution, shall consist of the secretary of state and four appointed members. No more than two of the appointed members shall be of the same political party. One of the members shall be appointed by the president of the senate, one shall be appointed by the minority leader of the senate, one shall be appointed by the speaker of the house of representatives, and one shall be appointed by the minority leader of the house of representatives. The appointments shall be made no later than the last Monday in January in the year in which the appointments are to be made. If any appointment is not so made, the secretary of state, acting in place of the person otherwise required to make the appointment, shall appoint as many qualified members affiliated with the appropriate political party as are necessary.

(B)

(1) The initial appointees to the board shall serve until the first Monday in February, 1977. Thereafter, terms of office shall be for four years, each term ending on the first Monday in February. The term of the secretary of state on the board shall coincide with the secretary of state's term of office. Except as otherwise provided in division (B)(2) of this section, division (B)(2) of section 3505.063, and division (B)(2) of section 3519.03 of the Revised Code, each appointed member shall hold office from the date of appointment until the end of the term for which the member was appointed. Except as otherwise provided in those divisions, any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of that term. Except as otherwise provided in those divisions, any member shall continue in office subsequent to the expiration date of the member's term until the member's successor takes office or a period of sixty days has elapsed, whichever occurs first. Any vacancy occurring on the board shall be filled in the manner provided for original appointments. A member appointed to fill a vacancy shall be of the same

political party as that required of the member whom the member replaces.

(2) The term of office of a member of the board who also is a member of the general assembly and who was appointed to the board by the president of the senate, the minority leader of the senate, the speaker of the house of representatives, or the minority leader of the house of representatives shall end on the earlier of the following dates:

(a) The ending date of the ballot board term for which the member was appointed;

(b) The ending date of the member's term as a member of the general assembly.

(C) Members of the board shall serve without compensation but shall be reimbursed for expenses actually and necessarily incurred in the performance of their duties.

(D) The secretary of state shall be the chairperson of the board, and the secretary of state or the secretary of state's representative shall have a vote equal to that of any other member. The vice-chairperson shall act as chairperson in the absence or disability of the chairperson, or during a vacancy in that office. The board shall meet after notice of at least seven days at a time and place determined by the chairperson. At its first meeting, the board shall elect a vice-chairperson from among its members for a term of two years, and it shall adopt rules for its procedures. After the first meeting, the board shall meet at the call of the chairperson or upon the written request of three other members. Three members constitute a quorum. No action shall be taken without the concurrence of three members.

(E) The secretary of state shall provide technical, professional, and clerical employees as necessary for the board to carry out its duties.

Section 3505.062: Ohio ballot board duties

The Ohio ballot board shall do all of the following:

(A) Examine, within ten days after its receipt, each written initiative petition received from the attorney general under section 3519.01 of the Revised Code to determine whether it contains only one proposed law or constitutional amendment so as to enable the voters to vote on a proposal separately. If the board so determines, it shall certify its approval to the attorney general, who then shall file with the secretary of state in accordance with division (A) of section 3519.01 of the Revised Code a verified copy of the proposed law or constitutional amendment together with its summary and the attorney general's certification of it.

If the board determines that the initiative petition contains more than one proposed law or constitutional amendment, the board shall divide the initiative petition into individual petitions containing only one proposed law or constitutional amendment so as to enable

the voters to vote on each proposal separately and certify its approval to the attorney general. If the board so divides an initiative petition and so certifies its approval to the attorney general, the petitioners shall resubmit to the attorney general appropriate summaries for each of the individual petitions arising from the board's division of the initiative petition, and the attorney general then shall review the resubmissions as provided in division (A) of section 3519.01 of the Revised Code.

(B) Prescribe the ballot language for constitutional amendments proposed by the general assembly to be printed on the questions and issues ballot, which language shall properly identify the substance of the proposal to be voted upon;
(C) Prepare an explanation of each constitutional amendment proposed by the general assembly, which explanation may include the purpose and effects of the proposed amendment;

(D) Certify the ballot language and explanation, if any, to the secretary of state no later than seventy-five days before the election at which the proposed question or issue is to be submitted to the voters;

(E) Prepare, or designate a group of persons to prepare, arguments in support of or in opposition to a constitutional amendment proposed by a resolution of the general assembly, a constitutional amendment or state law proposed by initiative petition, or a state law, or section or item of state law, subject to a referendum petition, if the persons otherwise responsible for the preparation of those arguments fail to timely prepare and file them;

(F) Direct the means by which the secretary of state shall disseminate information concerning proposed constitutional amendments, proposed laws, and referenda to the voters;

(G) Direct the secretary of state to contract for the publication in a newspaper of general circulation in each county in the state of the ballot language, explanations, and arguments regarding each of the following:

(1) A constitutional amendment or law proposed by initiative petition under Section 1g of Article II of the Ohio Constitution;

(2) A law, section, or item of law submitted to the electors by referendum petition under Section 1g of Article II of the Ohio Constitution;

(3) A constitutional amendment submitted to the electors by the general assembly under Section 1 of Article XVI of the Ohio Constitution.

Section 3519.21: Ballot title and order

The order in which all propositions, issues, or questions, including proposed laws and constitutional amendments, shall appear on the ballot and the ballot title of all such propositions, issues, or questions shall be determined by the secretary of state in case of propositions to be voted

upon in a district larger than a county, and by the board of elections in a county in the case of a proposition to be voted upon in a county or a political subdivision thereof. In preparing such a ballot title the secretary of state or the board shall give a true and impartial statement of the measures in such language that the ballot title shall not be likely to create prejudice for or against the measure. The person or committee promoting such measure may submit to the secretary of state or the board a suggested ballot title, which shall be given full consideration by the secretary of state or board in determining the ballot title.

Except as otherwise provided by law, all propositions, issues, or questions submitted to the electors and receiving an affirmative vote of a majority of the votes cast thereon are approved.

United States Code, Title 52

Section 20302: State responsibilities

(a) In general

Each State shall—

. . .

(8) transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter—

(A) except as provided in subsection (g), in the case in which the request is received at least 45 days before an election for Federal office, not later than 45 days before the election; and

(B) in the case in which the request is received less than 45 days before an election for Federal office—

(i) in accordance with State law; and

(ii) if practicable and as determined appropriate by the State, in a manner that expedites the transmission of such absentee ballot;

. . .