IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. MARGARET DeBLASE and JOHN GIROUX, **Relators,** **-v-** **OHIO BALLOT BOARD, *et al.*** **Respondents.**	**Case No. 2023-0388** **Original Action in Mandamus**

BRIEF OF RESPONDENTS NANCY KRAMER, AZIZA WAHBY, DAVID HACKNEY, JENNIFER McNALLY, AND EBONY SPEAKES-HALL

Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman 7394
Ridgepoint Drive, Suite 8
Cincinnati, Ohio 45230
(513) 379-2923
hartmanlawfirm@fuse.net

Counsel for Relators

David Yost (0056290)
Ohio Attorney General

Julie Pfeiffer (0069762)
*Counsel of Record
Ann Yackshaw (0090623)
Michael Walton (0092201)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2872
julie.pfeiffer@OhioAGO.gov
ann.yackshaw@OhioAGO.gov
michael.walton@OhioAGO.gov

Counsel for Respondents Ohio Ballot Board and its Members

Donald J. McTigue (0022849)
*Counsel of Record
J. Corey Colombo (0072398)
Katie I. Street (0102134)
McTigue & Colombo, LLC

545 East Town Street
Columbus, OH 43215
(614) 263-7000
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
kstreet@electionlawgroup.com

Freda J. Levenson (0045916)
B. Jessie Hill (0074770)
ACLU of Ohio Foundation
4506 Chester Avenue
Cleveland, Ohio 44103
(614) 586-1972
flevenson@acluohio.org
bjh11@case.edu

Carlen Zhang-D'Souza (0093079)
ACLU of Ohio Foundation
1108 City Park Avenue
Suite 203
Columbus, Ohio 43206
(614) 586-1972
czhangdsouza@acluohio.org

Counsel for Respondents Nancy Kramer, Aziza Wahby, David Hackney, Jennifer McNally, and Ebony Speakes-Hall

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES:

CASES:

CONSTITUTIONAL PROVISIONS; STATUTES:

INTRODUCTION

The proposed constitutional amendment at issue here, entitled "Right to Reproductive Freedom with Protections for Health and Safety," relates to only one common purpose: reproductive freedom. This conclusion is dictated by this Court's precedent, which mandates highly deferential review of the Ballot Board's decision. First, a proposed amendment must be found to be only one amendment whenever its provisions all relate to one general purpose or object, as they clearly do here: all of the proposed amendment's provisions deal with decision-making related to reproduction. Second, this Court may overturn the Ballot Board's decision only if that body has abused its discretion. No such abuse has occurred in this case, where the basis for the Board's decision is overwhelmingly clear from the face of the petition.

Since R.C. 3519.01(A) and R.C. 3505.062(A)–which together provide that the Ohio Ballot Board ("Ballot Board") "shall" examine each written initiative petition "to determine whether it contains only one proposed law or constitutional amendment"–were enacted in 2006, over 60 initiative petitions have been submitted and reviewed by the Ballot Board.[1] Only twice did the Ballot Board divide the petition into separate amendments. Both times, the petitioners' committee contested those decisions in this Court, and in both cases this Court found that only one amendment was proposed. And never–until now–has there been a lawsuit challenging a Ballot Board finding that a petition proposes a single amendment. For the reasons set forth

[1] Ohio Attorney General, List of petitions submitted to the Attorney General's Office, https://www.ohioattorney general.gov/Legal/Ballot-Initiatives/Petitions-Submitted-to-the-Attorney-General-s-Offi/ (accessed Apr. 4, 2023).

below, Relators' novel quest to force the Ballot Board to divide up the instant initiative petition must be dismissed.

STATEMENT OF FACTS

Respondents Nancy Kramer, Aziza Wahby, David Hackney, Jennifer McNally, and Ebony Speakes-Hall (collectively, "Respondent Committee") accept the statement of facts as laid out by Relators.

ARGUMENT

A. The Ballot Board's decision meets this Court's established legal standard for whether an initiative petition proposes a single amendment.

R.C. 3519.01(A) provides that "[o]nly one proposal of law or constitutional amendment to be proposed by initiative petition shall be contained in an initiative petition to enable the voters to vote on that proposal separately." This Court has referred to this requirement as the "separate-petition" requirement. *See State ex rel. Ohio Liberty Council v. Brunner,* 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 41.

The proposed amendment challenged by Relators relates to only one common purpose: establishing "the right to make and carry out one's own reproductive decisions."[2] Specifically, the Amendment adds Section 22 to Article I of the Ohio Constitution. It contains four Subsections. Subsection A establishes a constitutional right to make and carry out one's own reproductive decisions and lists some of the reproductive decisions included within that right. Subsection B addresses the State's regulation of the right to make one's own reproductive decisions. Subsection C defines two terms found in the Section, and Subsection D provides that the Section is self-executing.[3]

This Court has likened the single subject requirement for initiated constitutional amendments to the "separate-vote" requirement for constitutional amendments proposed by the General Assembly, set forth in Section 1, Article XVI of the Ohio Constitution. The separate-vote requirement that applies to amendments proposed by the General Assembly provides that "[w]hen 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 Const.,

[2] Memo provided by Counsel for Respondent Committee, provided to the Ballot Board prior to its March 13, 2023 hearing. Stipulation of Facts, Ex. D (StipExh 008).
[3] *Id.*

Art. XVI, § 1. Due to the similar wording of requirements for voter-initiated and legislatively-initiated amendments, the Court has determined that its test for measuring compliance with the separate-vote requirement also applies to the single subject requirement in R.C. 3519.01(A). *Ohio Liberty Council,* ¶¶ 30-41.

The Court explained:

> "[T]he applicable test for determining compliance with the separate-vote requirement of Section 1, Article XVI is that 'a proposal consists of one amendment to the Constitution only so long as each of its subjects bears some reasonable relationship to a single *general* object or purpose.'…'Thus, where an amendment to the Constitution relates to a single purpose or object and all else contained therein is incidental and reasonably necessary to effectuate the purpose of the amendment, such amendment is not violative of the provisions of Section 1, Article XVI.'" (citing *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, ¶ 34).
>
> * * *
>
> The power of initiative must be liberally construed, and the General Assembly cannot diminish that power…
>
> Based on the foregoing, the ballot board has a clear legal duty to liberally construe the right of initiative, and as long as the citizen-initiated proposed amendment bears **some reasonable relationship to a single general object or purpose**, the board must certify its approval of the amendment as written without dividing it into multiple petitions.

Id., ¶¶ 41-42, 56-57 (citations omitted) (emphasis added).

In *Ohio Liberty Council*, the Ballot Board had split a proposed amendment into two amendments on the grounds that the proposed amendment both established a constitutional right to freedom to choose health care and health care coverage, and dealt with the governance and oversight of the health care and health insurance industries. The proponents of the amendment challenged the Board's decision in this Court. This Court granted mandamus relief, holding that

the proposed amendment consisted of only one amendment. It so held because all the sections bore "some reasonable relationship" to the single general purpose of preserving Ohioans' freedom to choose their health care and health-care coverage as it existed before the enactment of a federal law. *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 43. This Court required the Ballot Board to certify its approval of the single proposed amendment, as written, and to certify its approval to the Ohio Attorney General.

In the only other case challenging a Ballot Board decision, *State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, 159 Ohio St.3d 568, 2020-Ohio-1459, 152 N.E.3d 267, the result was the same. There, the Board had found that the *Ohio-SAFE* amendment, which contained a basket of reforms related to voting, voter registration, and elections, had no central purpose and that even if it did, the various provisions were not reasonably related to that purpose and had split the proposed amendment into four separate amendments. *Id.*, at ¶ 10. The Court issued a judgment reversing the Ballot Board's decision and granting a writ of mandamus to petitioners. When determining whether *Ohio-SAFE*'s amendment contained a single general purpose, three Justices relied upon *State ex rel. Ohio Liberty Council*, stating,

> We have "generally taken a 'liberal [view] in interpreting what such a single general purpose or object may be.'" *Ohio Liberty Council*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, at ¶ 42, quoting *Foreman*, 10 Ohio St.2d at 146, 226 N.E.2d 116. In *Willke*, for example, we considered a proposed constitutional amendment to "permit the issuance of general obligation bonds to create and preserve jobs, enhance employment and educational opportunities, and promote economic growth through funding local government public infrastructure capital improvements, research and development, and the development of certain sites and facilities, and to expand state and local government authority regarding economic development."

> *Willke*, 107 Ohio St.3d 1, 2005-Ohio-5303, 836 N.E.2d 536, at ¶ 2, quoting Am.Sub.H.J.R. 2. Despite the fact that the amendment addressed multiple topics, we declined to issue a writ of mandamus to keep it off the ballot:
>
> After applying this deferential test to H.J.R. 2, we find that although the issuance of state bonds for the public-works, Third Frontier, and business-facilities projects may represent different components, they are all reasonably related to the single general purpose of job creation or economic development in Ohio. The General Assembly's combination of these three programs in one amendment—although seemingly the product of a tactical decision—is not so incongruous that it could not, by any reasonable interpretation, be considered germane to the purposes of statewide job creation and economic development. *Id.* at ¶ 38.
>
> The related question, and the heart of this case, is whether each of the provisions of the Ohio-SAFE amendment is sufficiently related to that common purpose. As discussed, the test is whether the various provisions all relate to, and are incidental to and reasonably necessary to effectuate, the common purpose.
>
> The board's merit brief argues that "if [Ohio-SAFE's] purpose [was] to propose an Amendment that relates only to voting, it should not have included provisions that govern registering to vote." This argument treats "voting" and "registration" as unrelated topics. But registering to vote and casting a ballot are both plainly related to the overarching concept of "voting."

Id., at ¶ 44-45, 49-50.

R.C. 3519.01(A)'s separate petition requirement is also analogous to the "one-subject" requirement for laws enacted by the General Assembly. The one-subject requirement for laws enacted by the General Assembly, set forth in Section 15(D), Article II of the Ohio Constitution, provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." The Court has explained that "[t]o accord appropriate deference to the General Assembly's law-making function, we must liberally construe the term "subject" for purposes of the rule." *State ex rel. Ohio Civ. Serv. Emples. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 16.

Thus, this Court has explained:

> The one-subject rule does not prohibit a plurality of topics, only a disunity of subjects. *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (1991). The mere fact that a bill embraces more than one topic is not fatal as long as a common purpose or relationship exists between the topics. *Hoover v. Franklin Cty. Bd. of Commrs.*, 19 Ohio St. 3d 1, 6, 19 Ohio B. 1, 482 N.E.2d 575 (1985). And we invalidate statutes as violating the one-subject rule only when they contain "a manifestly gross and fraudulent violation." [*State ex rel. Dix v. Celeste,* 11 Ohio St.3d 141, 145, 464 N.E.2d 153 (1984)]. That standard recognizes not only the General Assembly's great latitude in enacting comprehensive legislation, but also that "there are rational and practical reasons for the combination of topics on certain subjects. It acknowledges that the combination of provisions on a large number of topics, as long as they are germane to a single subject, may not be for purposes of logrolling but for the purposes of bringing greater order and cohesion to the law or of coordinating an improvement of the law's substance." *Id.*
>
> Only when there is no practical, rational or legitimate reason for combining provisions in one act will we find a one-subject-rule violation. *Id.*

Id., at ¶ 17.

In the case of a citizen-initiated Amendment, the voters are functioning under the power reserved to them under Article II, Section I of the Ohio Constitution; therefore, like an initiating legislative body, they must be accorded the same deference given to the General Assembly when it enacts a law. Under this standard, the one-subject rule is violated only when there is no practical, rational, or legitimate reason to combine provisions.

The Reproductive Rights Amendment easily meets this standard. No component relates to an incongruous subject, let alone in a manner that is "manifestly gross and fraudulent." *Id.* Everything in the Amendment relates to its common purpose: establishing the right to make and carry out one's own reproductive decisions. One need not look hard to identify the unifying

thread: the terms enumerated in Section A (contraception, fertility treatment, continuing a pregnancy, miscarriage care, and abortion) all relate to reproductive decision-making—that is, decisions concerning reproduction. Further, all of the other sections of the amendment relate back to that section and the right it enumerates.

B. Relators' analytical approach is misguided.

Relators fail to apply the standard enunciated by this Court, straining instead to create a new standard. They posit that if something is different from something else, the two "ipso facto" cannot be reasonably related to a common purpose or object. Relators offer nothing in support of this assertion other than dictionary definitions of "unique" and "different." They do not explain why items that are unique or different cannot still be related to a common *purpose* or *object*. There is also no Ohio case authority for this argument.

Relators argue that abortion is "unique" and "different" from other reproductive rights and therefore abortion does not and cannot relate to one's own reproductive decisions.[4] They support this stance with out-of-context phrases from *Roe v. Wade* and *Planned Parenthood v. Casey,*[5] federal cases whose overruling by *Dobbs v. Jackson Women's Health Org* is not even acknowledged by Relators.[6] The United States Supreme Court evaluated abortion laws in both cases in the context of deciding constitutional rights of privacy under the Federal Constitution. The Court was not considering Ohio's single amendment law. Relators' misguided reliance on the *Casey* Court calling abortion "unique" does not mean that abortion is unrelated to the common purpose of the right to make and carry out one's own reproductive decisions.[7]

---

[4] Relators' Brief, p. 1.
[5] *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[6] *Dobbs v. Jackson Women's Health Org.*, ___U.S.___, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).
[7] Realtors seem to be confused about how to deal with language in the proposed amendment about the individual's right to make decisions about continuing one's own pregnancy. This portion of the amendment ensures that individuals cannot be subject to government-mandated abortion. Such coercion is - unfortunately - not unheard-of, as it has appeared in many forms throughout our history. *See, e.g., Does I through III v. D.C.*, 232 F.R.D. 18, 20 (D.D.C. 2005) (discussing allegations of forced abortions performed on women in government-operated facilities),

Indeed, the *Casey* Court itself acknowledged—in language that the Relators overlook—that "in some critical respects the abortion decision is of the same character as the decision to use contraception" and that abortion is intimately related to other "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851-52.

The proposed amendment lists a number of reproductive decisions that are included within the scope of the right to reproductive freedom established by the amendment. They are all related to the same general topic of reproduction and the same purpose of establishing a right to make reproductive decisions. The decision to reproduce or not reproduce are both decisions about reproduction. That is inescapable regardless of one's personal view about contraception, abortion, etc. To argue that abortion is unique does not mean that it is not a decision on reproduction. Contraception is different from fertility treatment, miscarriage care is different from contraception, and so on. Each is "unique" but still are related to reproduction decisions.

Relators claim that Respondent Committee "carve[d] out abortion and only abortion for special and unique treatment in Sections B, C and D."[8] However, Relators have entirely misread the language of the proposed amendment. Section B, which provides the State with the limited ability to regulate reproductive rights in the context of the amendment, is not limited to abortion. Section B applies to the entire amendment as it specifically references "this right" - which is the right to reproductive freedom.

C. Relators have offered no evidence of deceit or logrolling.

Relators correctly state that the single amendment rule is to "prevent imposition upon or deceit of the public by the presentation of a proposal which is misleading or the effect of which

rev'd in part, vacated in part sub nom. Doe ex rel. Tarlow v. D.C., 489 F.3d 376 (D.C. Cir. 2007); *cf. Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding constitutionality of state-mandated sterilization).

[8] Relators' Brief, p. 15

is concealed or not readily understandable."[9] However, the purpose of the amendment at issue is neither hidden nor misleading. Reproductive freedom is central to the amendment's language and its stated purpose. "Abortion" is not hidden. It is clearly spelled out multiple times in the one-page amendment.[10]

Relators also correctly state a second objective of the single amendment law: to "prevent logrolling," or to prevent the legislature from adding unrelated provisions to a bill to obtain the votes to support the original provisions of the bill. However, when there is a common purpose, there is no logrolling. In the proposed amendment before this Court, each of the four subsections relate to the clear common purpose of the right to make and carry out one's own reproductive decisions. Further, Relators have not provided any evidence that any of the provisions of the amendment would not prevail without the others. Relators have failed to establish any indication of logrolling.

D. Relators failed to establish that the Ballot Board abused its discretion.

This Court has stated that "[t]he elements to invoke a court's jurisdiction to issue a writ of mandamus are: (1) the petitioner has a clear legal right to the requested relief, (2) the respondent has a clear legal duty to perform the requested acts, and (3) the petitioner has no adequate remedy in the ordinary course of the law." *State ex rel. Maras v. LaRose*, Slip Opinion No. 2022-Ohio-3852, ¶ 10; citing *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 13.

Further, "[i]n extraordinary actions challenging the decisions of the Secretary of State and boards of elections, the standard is whether they engaged in fraud, corruption, or abuse of

[9] Relators' Brief, p. 12.
[10] Relators' Brief, p. 4.

discretion, or acted in clear disregard of applicable legal provisions." *State ex rel. Husted v. Brunner,* 123 Ohio St.3d 288, 915 N.E.2d 1215, 2009-Ohio-5327, ¶ 9 (quoting *Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 778 N.E.2d 32, 2002-Ohio-5923 ¶ 11).

Relator has offered no evidence that the Ballot Board engaged in any fraud or corruption. In *Ohio-SAFE*, Justice Kennedy explained that "[f]or the remaining requirements of clear legal right and clear legal duty, in the absence of any evidence of fraud or corruption, the dispositive issue is whether the ballot board abused its discretion or clearly disregarded applicable law." *State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, 159 Ohio St. 3d 568, 152 N.E.3d 267, 2020-Ohio-1459 ¶ 66.

Although Relator contends that the Ballot Board "fail[ed] to exercise any discretion whatsoever," stipulated exhibits clearly establish that the Ballot Board met on March 13, 2023, conducted a public hearing, received a legal memo from Respondent Committee's counsel, accepted testimony from Respondent Committee's counsel as well as Relator John Giroux, and made a unanimous decision. The exercise of discretion was in voting for or against the motion made by the Board Chair, Secretary LaRose. Relator points to no precedent indicating that a particular amount of discussion or debate is required, particularly when—as here—the issue before the Ballot Board is straightforward.

In Justice Fischer's dissenting opinion in *Ohio-SAFE*, he laid out the standard for finding an abuse of discretion by the Ballot Board:

> "'[a]n abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude.'" State ex rel. *Ohioans for Secure & Fair Elections v. LaRose*, 159 Ohio St.3d 568, 2020-Ohio-1459, 152 N.E.3d 267, ¶ 108, citing *State ex rel. Greene v. Montgomery Cty. Bd. of Elections*, 121 Ohio St.3d 631, 2009-Ohio-1716, 907 N.E.2d 300, ¶ 12, quoting *State ex rel. Cooker Restaurant Corp. v. Montgomery Cty. Bd. of Elections*, 80 Ohio St.3d 302, 305, 1997-Ohio-315, 686 N.E.2d 238 (1997).

Id., at ¶ 108.

Justice Fischer found it "very difficult to say that the ballot board abused its discretion or acted in clear disregard of applicable legal provisions." *Id.*, at ¶ 11. This is because relators were unable to demonstrate by clear and convincing evidence that the decision by the ballot board was arbitrary or unreasonable.

This Court has repeatedly held that a writ of Mandamus cannot be used to control the exercise of discretion. *State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.*, 81 Ohio St.3d 283, 288, 690 N.E.2d 1273 (1998), *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 504, 37 N.E.2d 41 (1941) ("Finally, a writ of mandamus cannot be issued to control the discretion of public officials").

Relators argue that the Ballot Board "summarily" made its determination and that this is proof in and of itself of an abuse of discretion, but provide no binding legal authority.[11] Relators attempt to impose a requirement that board members must provide public explanations for their votes. But their reliance on a small assortment of non-binding cases from out-of-state courts, none of which applied Ohio law – is misplaced.[12] These cases range from a citizen of the Dominican Republic who had been convicted of various drug crimes and sought release,[13] to the retirement plan decision making processes,[14] to the Board of Immigration Appeals' denial of asylum,[15] and are not relevant or applicable to the Ohio initiated petition process, Ohio Constitution, or the Ohio Revised Code sections at issue.

[11] Relators' Brief, p. 2, 8, 19.
[12] Relators' Brief, p. 10, 11.
[13] *Aponte v. Holder*, 610 F.3d 1, 4 (1st Cir. 2010).
[14] *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323 (9th Cir. 1994).
[15] *Ke Zhen Zhao v. United States DOJ*, 265 F.3d 83, 97 (2d Cir. 2001).

Relators do pluck a citation, out of context, from one Ohio case, *State v. Chase*, that it was not "possible to determine if the decision [was] reasonable without some explanation of the reason or reasons for that decision." *State v. Chase*, 2d Dist. Montgomery No. 26238, 2015-Ohio-545, ¶ 17. But the full quotation goes on to say that, "*[u]nless the reason or reasons for the trial court's decision are apparent from the face of the record*, it is not possible to determine if the decision is reasonable without some explanation of the reason or reasons for that decision." *Id.,* [emphasis added]. Here, of course, the Board's decision is amply supported by the record.

Relators are asking that this Court find an abuse of discretion without supporting facts and force the Ohio Ballot Board members to reverse their unanimous decision and compel that the proposed amendment be split.

An absence of public deliberation does not imply that any members of the Ballot Board did not consider the issue before them. It also does not mean that the Ballot Board members failed to read the amendment, independently analyze, review the appropriate legal standards, or discuss any questions they had with staff members. In advance of the meeting, the Ballot Board was able to reference the legal memorandum provided by Respondent Committee's counsel, the precedents of this Court, and the text of the amendment itself. During the hearing, Relator Giroux provided testimony during which he failed to argue the legal standards regarding the single amendment determination and instead chose to discuss personal beliefs. The Ballot Board also heard testimony from Respondent Committee's counsel stating how all of the components were related to a common purpose or object.

Ballot Board members are not legally required to publicly disclose their personal deliberations or reasoning. To agree with Relators, that public officials must publicly set forth on

the record their reasoning each time they vote, would require inserting language that does not exist into the statute. This Court held in *Hudson v. Petrosurance, Inc*. that "[o]ur role as a court is to apply statutes as written." *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 33. "We apply the statute as written, and we refrain from adding or deleting words when the statute's meaning is clear and unambiguous." *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278 (2015). Holding for Relators would lead to new requirements that any time public officials make a substantive decision without an "on the record" inquiry, assessment, analysis, or discussion, it would constitute an abuse of discretion. If that were the standard, then thousands of decisions made by legislators and board members every day would be an abuse of their discretion. This burden does not and cannot reasonably exist in the law.

In this case, the single-amendment question presented to the board complied so clearly with the deferential legal standard that a public discussion by the board was unnecessary. Member Gavarone, who is publicly opposed to abortion, articulated her understanding of the procedural question at issue. During the Ballot Board's March 13, 2023 meeting, Member Gavarone stated that "[a]lthough I'm very much opposed to the substance, the issue before us is procedural only, whether this is one question or more."[16] She then voted to certify that the proposed amendment contained only one amendment; the Ballot Board's decision was unanimous.

The Ballot Board is not required to manufacture or invent points and counterpoints for the record. Instead, to win a reversal of the Board, Relators have the steep burden of proving, by clear and convincing evidence, an abuse of discretion. They have utterly failed to do so. The Ohio Ballot Board, composed of two Democratic and three Republican members, unanimously

[16] Stipulation of Facts, Ex. E (StipExh 020).

voted in favor of Secretary LaRose's motion after receiving Petitioners' legal memorandum, listening to testimony from a proponent and an opponent of the proposed amendment, and being afforded opportunities to discuss the motion.

Here, the Ballot Board clearly did not abuse its discretion and Relators failed to establish that the bipartisan, unanimous decision made by the Ballot Board was unreasonable, arbitrary, or unconscionable.

E. Alternatively, the requested writ should be denied because the statutory provisions violate Ohioans' rights under Article II Section 1 of the Ohio Constitution.

The Ohio Constitution vests the legislative 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" to the people. Oh. Const. Art. II, § 1. Article II, Section 1A provides that "[t]he 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." Oh. Const. Art. II, § 1A. This section is self-executing and specifically reserves the right to the people.

In *Ohio-SAFE,* Justice Kennedy, joined by Justices DeWine and French, also recognized a limit on the Ballot Board's constitutional authority. She stated, "The extent of the ballot board's constitutional authority in the initiative-petition process is therefore to prescribe the ballot language, prepare an explanation, and certify both to the secretary of state." *State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, 159 Ohio St.3d 568, 2020-Ohio-1459, 152 N.E.3d 267, ¶ 74. Justice Kennedy continued and noted that

> The Constitution does not establish a 'single-subject rule' that limits the people to proposing a constitutional amendment with

> only one subject, purpose, or objective. The single-subject requirement that this court applied in *Ohio Liberty Council*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, originated in cases interpreting a separate provision of the Ohio Constitution: the separate-vote requirement of Article XVI, Section 1.

Further,

> In Ohio Liberty Council, this court quoted Article II, Section 1 of the Ohio Constitution, which states that "[t]he 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," suggesting that this language somehow limits the power of the people to propose an amendment to the Constitution. However, it does not, and it was not relevant to the analysis in Ohio Liberty Council. This limiting language applies when the people enact a law through the right of initiative, not when they propose an amendment to the Constitution. Throughout Article II, the Constitution distinguishes between "laws" and "amendments." For example, Article II, Section 1a grants the people the power "to propose an amendment to the constitution," while Article II, Section 1b guarantees the right of the people to propose "a law."
>
> Article II, Section 1 simply provides that when the people enact a law through initiative, that law is subject to the same constitutional limitations that apply to a statute enacted by the General Assembly, such as the protections afforded by Ohio's Bill of Rights. It does not impose those limitations on the General Assembly's power onto the people's right to propose a constitutional amendment by initiative petition.

Id., at ¶ 75, 84-85.

The Ohio Constitution does not establish the hurdle of seeking the Ballot Board's approval. That requirement was superimposed in 2006 by the General Assembly, which, with the enactment of H.B. 3. R.C. 3519.01(A) and 3505.062, unconstitutionally provided authority for the Ballot Board to break apart a proposed initiated amendment and disallow the voters to vote on their proposal as written. By requiring that an executive branch board approve the

citizen-initiated amendments, the General Assembly unconstitutionally burdened the people's right to propose amendments for the approval or rejection of the electors.

CONCLUSION

For all of the foregoing reasons, Relators have failed to carry their burden of establishing entitlement to a writ of mandamus and the Court should enter judgment in favor of the Ohio Ballot Board and Respondent Committee.

Respectfully Submitted,

/s/ Donald J. McTigue
Donald J. McTigue*
(0022849)
*Counsel of Record
J. Corey Colombo (0072398)
Katie I. Street (0102134)
McTigue & Colombo, LLC
545 East Town Street
Columbus, OH 43215
(614) 263-7000
dmctigue@electionlawgroup.com
ccolombo@electionlawgroup.com
kstreet@electionlawgroup.com

Freda J. Levenson (0045916)
B. Jessie Hill (0074770)
ACLU of Ohio Foundation
4506 Chester Avenue
Cleveland, Ohio 44103
(614) 586-1972
flevenson@acluohio.org
bjh11@case.edu

Carlen Zhang-D'Souza
(0093079)
ACLU of Ohio Foundation
1108 City Park Avenue
Suite 203
Columbus, Ohio 43206
(614) 586-1972
czhangdsouza@acluohio.org

Counsel for Respondents Nancy Kramer, Aziza Wahby, David

Hackney, Jennifer McNally, and Ebony Speakes-Hall

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the above and that a copy of the foregoing has been served via USPS first class mail, postage pre-paid, e-mail, and/or this Court's electronic notification system to the following on this 4th day of April, 2023:

Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, Ohio 45230
(513) 379-2923
hartmanlawfirm@fuse.net

Counsel for Relators

David Yost (0056290)
Ohio Attorney General

Julie Pfeiffer (0069762)
*Counsel of Record
Ann Yackshaw (0090623)
Michael Walton (0092201)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2872
julie.pfeiffer@OhioAGO.gov
ann.yackshaw@OhioAGO.gov
michael.walton@OhioAGO.gov

Counsel for Respondents Ohio Ballot Board and its Members

Respectfully Submitted,

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

Counsel for Respondents Nancy Kramer, Aziza Wahby, David Hackney, Jennifer McNally, and Ebony Speakes-Hall