

Case No. 2023-0388

**Supreme Court
of the State of Ohio**

STATE OF OHIO *ex rel.* MARGARET DEBLASE, *et al.*,

Relators,

v.

OHIO BALLOT BOARD, *et al.*,

Respondents.

Original Action in Mandamus

RELATORS' REPLY BRIEF

Counsel for Relators:

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

*Counsel for Respondents Ohio Ballot
Board and its Members:*

David Yost (0056290)
Ohio Attorney General
Julie Pfeiffer (0069762)
Ann Yackshaw (0090623)
Michael Walton (0092201)
Constitutional Offices Section,
Office of the Ohio Attorney General
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 Members of the
Committee to Represent Petitioners:*

Donald J. McTigue (0022849)
McTigue & Colombo, LLC
545 East Town Street
Columbus, OH 43215
(614) 263-7000
dmctigue@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

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
REPLY BRIEF	1
The OHIO BALLOT BOARD attempts to rewrite the language of the proposal....	2
The OHIO BALLOT BOARD conveniently ignores that abortion has been recognized as being “inherently different” and a “unique act”	4
The OHIO BALLOT BOARD and PETITIONERS fail to appreciate that the failure to exercise any discretion is, in and of itself, an abuse of discretion.....	4
The legal determination by the OHIO BALLOT BOARD is not subject to deference.....	6
The OHIO BALLOT BOARD fails to appreciate that enacting a broad general constitutional right is substantially different, <i>i.e.</i>, of a different purpose, than enactment of precise legislation involving line-drawing and the balancing of interests.....	7
This Court has already held that the responsibility of the OHIO BALLOT BOARD to ensure petitions only propose a single constitutional amendment and to divide proposal is constitutional	7
CONCLUSION	9
Certificate of Service	11

TABLE OF AUTHORITIES

Case Citations

Beaver Excavating Co. v. Testa,
134 Ohio St. 3d 565, 983 N.E.2d 1317, 2012-Ohio-5776)..... 9

Dobbs v. Jackson Women's Health Org.,
597 U.S. ___, 142 S. Ct. 2228 (2022) 4

Planned Parenthood v. Casey,
505 U.S. 833 (1992)..... 4

Roe v. Wade,
410 U.S. 113 (1973)..... 4

State ex rel. Ethics First-You Decide Ohio PAC v. DeWine,
147 Ohio St. 3d 373, 66 N.E.3d 68, 2016-Ohio-3144)..... 9, 10

State ex rel. Ohioans for Secure & Fair Elections v. LaRose,
159 Ohio St.3d 568, 152 N.E.3d 267, 2020-Ohio-1459)..... 8, 9

TWISM Ents., L.L.C. v. State Bd. of Registration for Prof. Eng'rs & Surveyors,
___ Ohio St.3d ___, ___ N.E.3d ___, 2022-Ohio-4677)..... 6

Westfield Ins. Co. v. Galatis,
100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849 10

State Statutes

R.C. 3505.062(A) *passim*

R.C. 3519.01(A) *passim*

REPLY BRIEF

Generally speaking, the parties do not disagree as to the legal standard for issuance of a writ of mandamus in this case challenging the action of the OHIO BALLOT BOARD, *i.e.*, whether the BALLOT BOARD and its members either (i) abused their discretion; or (ii) acted in clear disregard of applicable legal provisions. *See Ballot Board's Brief, at 7 & 15; Petitioners' Brief, at 11*¹. The parties also acknowledged that the separate-petition mandate of R.C. 3519.01(A) and 3505 .062(A), requires an actual assessment and determination of whether all of the subjects encompassed or potentially encompassed within an initiative petition have a commonality such that they relate “to a single general object or purpose.” *See Relators' Brief, at 12-16; Ballot Board's Brief, at 8; Petitioners' Brief, at 4.*

However, in a *post hoc* effort to justify the lack of any inquiry, assessment, analysis, or discussion by its members on the actual proposal before it and everything encompassed thereby, the BALLOT BOARD conveniently attempts to recast the actual language involved. Not only does the failure to exercise any discretion constitute an abuse of discretion, but the mischaracterization of the proposal itself by the BALLOT BOARD simply confirms the impact of their lack of any effort to actually undertake any inquiry, assessment, *etc.*, of the actual language before making the legal determination at issue herein.

Furthermore, the BALLOT BOARD and its members completely ignore that abortion – the primary purpose and goal of the proposed constitutional amendment – has repeatedly been recognized as “inherently different” and a “unique act” in comparison to other intimate acts

¹ However, in the introduction to their brief, PETITIONERS wrongfully state “this Court may overturn the Ballot Board’s decision *only if* that body has abused its discretion,” *Petitioners' Brief, at 1* (emphasis added), clearly disregarding the alternative ground for issuance of mandamus, *i.e.*, acting in clear disregard of applicable law. And the gist of the *Petitioners Brief*, in its entirety, proceeds predominately to address only the abuse of discretion standard, while making, at best, only a passing reference to the second basis for issuance of mandamus.

(including that of contraception) while the PETITIONERS attempt to perfunctorily dismiss such issue with little to no substantive analysis.

At the end of the day, neither the BALLOT BOARD nor the PETITIONERS have refuted the clear indication that, in making the determination that the proposal entitled as “The Right to Reproductive Freedom with Protections for Health and Safety Amendment” contained one proposed constitutional amendment, the BALLOT BOARD and its members: (i) abused their discretion (in failing to exercise any discretion whatsoever); and (ii) acted in clear disregard of applicable law.

The OHIO BALLOT BOARD attempts to rewrite the language of the proposal.

At the outset, it must be recognized that, in a *post hoc* effort to rationalize their action and decision, the BALLOT BOARD and its members conveniently attempt to rewrite the actual language of the proposal within the initiative petition. Declaring that the proposal “establishes that every individual has a right to ‘make and carry out one’s own reproductive decisions’ on contraception, fertility treatment, continuing one’s own pregnancy, miscarriage care, and abortion”, *Ballot Board Brief, at 4*, the BALLOT BOARD conveniently fails to appreciate such is not the limit of the scope of the right being created in Section A of the proposal.

The actual language does not constrain the newly-created right only to decision on contraception, fertility treatment, continuing one’s own pregnancy, miscarriage care, and abortion as declared by the BALLOT BOARD.² Instead, by the express terms of the proposal itself, this listing is preceded by the phrase “including but not limited to” and, thus, the limited

² Naturally, even if so constrained, the inclusion of “abortion” therein clearly involves more than one subject or purpose in light of abortion being recognized as “inherently different” and a “unique act” in comparison to various other intimate matters, including contraception. *See Relators’ Brief, at 13-16.*

listing simply provides a non-exclusive exemplar of what the proposal declares within the ambit of “out one’s own reproductive decisions” but, contrary to the assertion of the BALLOT BOARD, it is not an exclusive listing.

By implicitly admitting of how they wrongfully viewed the proposal, the BALLOT BOARD and its members concededly failed to consider (then and now) everything that falls or may fall within what the *amici* appropriately characterized a “unspecified decisions falling within the vague ‘including but not limited to’ language.” *See Amici Brief, at 5.* Thus, the BALLOT BOARD and its members clearly failed to assess or consider what amici appropriately identified as “other activities that affect reproduction,” including without limitation, “gender transition treatment, gender reassignment surgery, sterilization, and genital mutilation.” *Amici Brief, at 5.* And PETITIONERS are also noticeably silent on the potential scope of their own proposal.³

The present effort of the BALLOT BOARD and its members to ignore the actual and all-encompassing (though vague) language of the proposal so as to justify *post hoc* their prior determination cannot be condoned or countenanced by this Court. Through such arguments before this Court, the BALLOT BOARD and its members clearly misperceived the nature and scope of the proposal; the BALLOT BOARD and its members clearly abused their discretion and/or acted in clear disregard of applicable law.

³ In conveniently not addressing how these other potential matters, *i.e.*, gender transition treatment, gender reassignment surgery, sterilization, and genital mutilation, fall within the ambit of decisions relating to reproduction, the BALLOT BOARD and PETITIONERS also fail to appreciate, for example, that even “miscarriage care” is unrelated to a decision on reproduction. *See <https://www.webmd.com/baby/understanding-miscarriage-treatment>* (“[t]he main goal of treatment during and after a miscarriage is to prevent heavy bleeding (they’ll call it hemorrhaging) and infection”).

The OHIO BALLOT BOARD conveniently ignores that abortion has been recognized as being “inherently different” and a “unique act”.

The only counterargument that the BALLOT BOARD and its members offer as to how the “inherently different” and “unique act” of abortion relates to the same general object or purpose of other acts (such as miscarriage care), *see Relators’ Brief, at 1-2 & 13-16*, is to completely ignore the issue. In fact, void from the *Ballot Board’s Brief* is any mention or reference to *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), or *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022), wherein the United States Supreme Court specifically and repeatedly recognized abortion as “inherently different” and a “unique act” in comparison to other intimate matters, including contraception. And as for PETITIONERS, they summarily, though wrongfully, claim that because the Supreme Court was considering a federal constitutional issue, those decisions have no implication herein. *See Petitioners’ Brief, at 8-9*. But regardless of the specific legal issues involved in the underlying cases, the truism espoused by the Supreme Court in *Roe* and *Casey* as to the nature of abortion itself, still holds true. As such, that which is “inherently different” or a “unique act” cannot *ipso facto* relate to the same general object or purpose of other act, and the BALLOT BOARD and the PETITIONERS have not offered anything to refute such truism and its dispositive nature herein.

The OHIO BALLOT BOARD and PETITIONERS fail to appreciate that the failure to exercise any discretion is, in and of itself, an abuse of discretion.

Compounding their error in failing to actually appreciate the language of the proposal, the BALLOT BOARD and its members also attempt to miscast the nature of the argument posited by RELATORS in support of *Proposition of Law No. 4*. Whereas RELATORS clearly set forth the well-established legal principle that the failure to exercise any discretion is, in and of itself,

an abuse of discretion, *see Relators' Brief, at 9-11*, the BALLOT BOARD and its members wrongfully posit such argument as simply being a contention that they failed to conduct “a fulsome discussion amongst themselves”. *See Ballot Board's Brief, at 13*. But RELATORS have never contended that, under the abuse-of-discretion standard, a “fulsome” inquiry, assessment, analysis, or discussion is required. But what is certainly not permitted is the failure to conduct any inquiry, assessment, analysis, or discussion whatsoever.

As for the PETITIONERS, they essentially argue that the abuse-of-discretion standard in the context of the BALLOT BOARD is substantively different than the standard when considered in the context of action by a trial court or any other administrative agency. *See Petitioners' Brief, at 12-13*. While reviewing courts have repeatedly recognized in a variety of context that an abuse of discretion arises when there is no indication that discretion was actually exercised, *see Relators' Brief, at 10*, the PETITIONERS attempt to carve out an exception or special treatment be afforded to the BALLOT BOARD. Contrary to the suggestion of the PETITIONERS, the BALLOT BOARD is not functioning as a body enacting legislation, *see Petitioners' Brief, at 14*; the enactment of legislation itself is not subject to an abuse-of-discretion standard and PETITIONERS wrongfully intimate otherwise. Instead, though and elsewhere in their brief, the PETITIONERS actually recognized that the BALLOT BOARD was functioning in an administrative or executive role, *see Petitioners' Brief, at 16* (characterizing Board as “an executive branch board”), and it is in that context that the abuse-of-discretion standard to which decisions of all administrative boards are subject to judicial review.

Finally, the PETITIONERS repeatedly invoke the “unanimous” decision of the BALLOT BOARD, *see, e.g., Petitioners' Brief, at 13, 14 & 15*, as though that somehow negates the failure

of the BALLOT BOARD and its members to exercise any discretion. Unanimity does not make the failure of to exercise discretion any more or less an abuse of discretion.

The legal determination by the OHIO BALLOT BOARD is not subject to deference.

Not surprisingly, the PETITIONERS seek to have this Court engage in what they characterize as a “highly deferential review of the Ballot Board’s decision”. *Petitioners’ Brief, at 1*; see also *Petitioners’ Brief, at 14* (referencing “the deferential legal standard”). In essence, PETITIONERS are calling upon this Court to apply *Chevron* deference to the interpretation and application of state law by the BALLOT BOARD. But recognizing that “it is exclusively the ‘the province and duty of the judicial department to say what the law is’”, this Court has explicitly rejected *Chevron* deference. *TWISM Ents., L.L.C. v. State Bd. of Registration for Prof. Eng’rs & Surveyors*, __ Ohio St.3d __, __ N.E.3d __, 2022-Ohio-4677 ¶43 (quoting *Marbury v. Madison*, 5 U.S.137, 177 (1803)). Thus, whether the BALLOT BOARD and its members acted in clear disregard of the law which mandates that an initiative petition may contain only one constitutional amendment does not involve a decision to which deference might be afforded; instead, whether an initiative petition proposes one or more constitutional amendments involves a legal standard set forth in R.C. 3505.062(A) for which this Court has the final say.

In *TWISM*, this Court appropriately “reaffirm[ed]...that it is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means. Thus, the judicial branch is *never* required to defer to an agency’s interpretation of the law.” *Id.* ¶3 (emphasis in original). And, in the present context, whether an initiative petition actually “contains only one proposed...constitutional amendment” requires a legal determination. As such, the effort by PETITIONERS to have this Court defer to any decision of the BALLOT BOARD and its members on this legal issue is misplaced and wrong.

The OHIO BALLOT BOARD fails to appreciate that enacting a broad general constitutional right is substantially different, *i.e.*, of a different purpose, than enactment of precise legislation involving line-drawing and the balancing of interests.

Similar to their tact of simply ignoring that abortion is “inherently different” and a “unique act” in comparison to other intimate acts (such as contraception), the BALLOT BOARD and its members simply fail to address the distinct purposes being served by enactment something of a constitutional nature, *i.e.*, laying down broad general principles, versus something of a legislative enactment, *i.e.*, the balancing of competing interests involving precise line-drawing. *See Relators’ Brief, at 16-17.* As the creation of a constitutional right and the enactment of specific legislation on a particular subject are not of the same general object or purpose, the BALLOT BOARD abused its discretion and/or acted in clear disregard of the law finding both matters to be one and the same.

This Court has already held that the responsibility of the OHIO BALLOT BOARD to ensure petitions only propose a single constitutional amendment and to divide proposal is constitutional.

In a final, last-ditched effort to have this Court avoid saying what the law is, the OHIO BALLOR BOARD and PETITIONERS posit or suggest that R.C. 3519.01(A) and 3505.062(A), as amended in 2006, unconstitutionally burden the people’s right to propose constitutional amendments when those statutes empower the BALLOT BOARD to determine whether an initiative petition seeks to propose only one constitutional amendment and, if not, to divide the proposals. *See Ballot Board Brief, at 12; Petitioners Brief, at 15-17.* In support thereof, the BALLOT BOARD references and PETITIONERS quote a concurring opinion by then-Justice Kennedy in *State ex rel. Ohioans for Secure & Fair Elections v. LaRose*, 159 Ohio St.3d 568, 152 N.E.3d 267, 2020-Ohio-1459. *See Ballot Board Brief, at 12; Petitioners Brief, at 15-16.*

What the BALLOT BOARD and PETITIONERS conveniently fail to inform the Court (and which was not even addressed in *Ohioans for Secure & Fair Elections*) is that this Court has already considered and held that the responsibility of the BALLOT BOARD for ensuring that an initiative petition complies with the “one law” requirement, as well as its statutory authority to divide an initiative petition into separate proposal, did not unconstitutionally limit the right of initiative. In *State ex rel. Ethics First-You Decide Ohio PAC v. DeWine*, 147 Ohio St. 3d 373, 66 N.E.3d 68, 2016-Ohio-3144, this Court specifically addressed and examined a legal challenge “that R.C. 3519.01(A) and 3505.062(A), as amended by H.B. 3, unconstitutionally limit the right of initiative.” *Id.* ¶7. In addressing this claim, this Court more fully summarized the issue before it as:

whether relators have stated a claim warranting relief in their challenge to the constitutionality of the requirement that the Ballot Board review the initiative proposal and subdivide it if it contains more than one amendment. Relators argue that this requirement impermissibly restricts the right of initiative granted by the Constitution.

Id. ¶14.

And after analyzing the pertinent provisions of the Ohio Constitution, this Court in *Ethics First* ultimately concluded:

When the Ballot Board subdivides a petition, R.C. 3505.062(A) merely requires the submission of new summaries to the attorney general. That modest imposition does not unduly restrict the right of initiative, given the benefit the voters enjoy of being able to vote separately on the proposals.

...

For this reason, we find that it is beyond doubt that Ethics First can prove no set of facts entitling it to relief. We hold that the mandamus complaint fails to state a claim warranting relief on the basis that the challenged H.B. 3 amendments to R.C. 3505.062 and 3519.01 impermissibly restrict the right to initiative.

Id. ¶¶19 & 21 (internal citation omitted).

Not only have the BALLOT BOARD and PETITIONERS failed to inform this Court of the holding in *Ethics First*, but they have failed to offer any argument, let alone a compelling argument, that such precedent should be overruled, under either the *Galatis* standard or otherwise. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849 (syllabus ¶1)(“[a] prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it”). Furthermore, PETITIONERS have not offered any evidence that refutes the presumption of constitutionality whereby they might establish beyond a reasonable doubt the unconstitutionality of R.C. 3519.01(A) and 3505.062(A). See *Beaver Excavating Co. v. Testa*, 134 Ohio St. 3d 565, 983 N.E.2d 1317, 2012-Ohio-5776 ¶27 (“[L]aws are entitled to a ‘strong presumption of constitutionality,’ and the party challenging the constitutionality of a law ‘bears the burden of proving that the law is unconstitutional beyond a reasonable doubt’” (citations omitted)).

CONCLUSION

Notwithstanding the avoidance of the actual issues by the BALLOT BOARD and PETITIONERS, the BALLOT BOARD and its members clearly abused their discretion and/or acted in clear disregard the law, when, with no inquiry, assessment, analysis, or discussion, they summarily concluded that: (i) the “inherently different” and “unique act” of “abortion” (and the synonymous concept of decisions regarding “continuing one’s own pregnancy”) were related to a singular object or purpose under the umbrella of “one’s own reproductive decisions” even though the scope of such concept is ill-defined (or not defined) but simply declared to include, though without limitation, “contraception”, “fertility treatment”, or “miscarriage care”; and (ii)

determined that the creation of a broad, though ill-defined, constitutional right related to the same general subject or purpose of a detailed and specific legislative enactment involving line-drawing and balancing of interests on a singular and particular subject.

Accordingly, this Court should order the issuance of a writ of mandamus to compel the OHIO BALLOT BOARD and its members:

- (i) to vacate their decision and determination of March 13, 2023, that, with respect to the initiative petition purportedly seeking to propose an amendment to the Ohio Constitution entitled “The Right to Reproductive Freedom with Protections for Health and Safety,” said petition contains only one proposed constitutional amendment;

and, pursuant to R.C. 3505.062:

- (ii) to issue a determination that the foregoing initiative petition contains more than one proposed amendment to the Ohio Constitution;
- (iii) to divide the foregoing initiative petition into individual petitions, each containing only one proposed constitutional amendment; and
- (iv) to certify the approval of each of the individual petitions containing only one proposed constitutional amendment to the attorney general.

Respectfully submitted,

/s/ Curt C. Hartman
Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, OH 45230
(513) 752-8800
hartmanlawfirm@fuse.net

Counsel for Relators
Margaret DeBlase and John Giroux

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing will be served upon the following via e-mail on the 7th day of April 2023:

*Counsel for Respondents Ohio Ballot Board
and its Members:*

David Yost (0056290)
Ohio Attorney General
Julie Pfeiffer (0069762)
Ann Yackshaw (0090623)
Michael Walton (0092201)
Constitutional Offices Section,
Office of the Ohio Attorney General
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 Members of the
Committee to Represent Petitioners:*

Donald J. McTigue (0022849)
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

/s/ Curt C. Hartman