

IN THE SUPREME COURT OF OHIO

**State of Ohio ex rel. Citizens Not
Politicians**

545 East Town Street
Columbus, OH 43215

State of Ohio ex rel. Cara Dillon

4760 Mason Oaks Drive
Mason, OH 45040

and

**State of Ohio ex rel. Annette Tucker
Sutherland**

16817 Aldersyde Drive
Shaker Heights, OH 44120

Relators,

v.

Ohio Ballot Board

180 Civic Center Drive, 5th Floor
Columbus, OH 43215

**Frank LaRose, in his official capacities as
Chair of the Ohio Ballot Board and Ohio
Secretary of State**

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**Senator Theresa Gavarone, in her official
capacity as Member of the Ohio Ballot
Board**

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SUPREME COURT
CASE NO. 2024-1200

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

**Representative Terrence Upchurch, in
his official capacity as Member of the
Ohio Ballot Board**

77 S. High Street, 10th Floor
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Respondents.

**BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF
RELATORS STATE OF OHIO *EX REL.* CITIZENS NOT POLITICIANS, ET AL.**

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INTRODUCTION

As the United States Supreme Court has recognized, states across the country are “placing power to draw electoral districts in the hands of independent commissions” as a way to “restrict[] partisan considerations in districting.” *Rucho v. Common Cause*, 588 U.S. 684, 719 (2019). The United States Supreme Court specifically pointed to Colorado and Michigan where voters amended their constitutions to establish Independent Redistricting Commissions (“IRCs”) by approving ballot initiatives. *Id.* When Ohio’s voters cast their ballots this November, they will have the opportunity to do the same thing by voting to approve Issue 1 (“the Amendment”). The Amendment would create the Ohio Citizens Redistricting Commission—a 15-member IRC with an even 5-5-5 split between commissioners affiliated with each of the two largest political parties and unaffiliated commissioners—to conduct Ohio’s General Assembly and congressional redistricting. Ohio voters will not, however, have a genuine understanding of “what they are being asked to vote on” unless this Court orders the Ohio Ballot Board and Secretary of State LaRose to correct the current misleading, deceptive, and factually inaccurate ballot language and title which are “impermissibly argumentative” against the Amendment. *State ex rel. Ohioans United for Reprod. Rts. v. Ohio Ballot Bd.*, 2023-Ohio-3325, ¶ 12 (“*Ohioans United*”).

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is free and fair for all voters. CLC regularly litigates cases regarding voting rights and redistricting, including numerous cases addressing partisan gerrymandering such as *Gill v. Whitford*, 585 U.S. 48 (2018), and *Rucho v. Common Cause*, 588 U.S. 684 (2019), as well as cases defending IRCs, *see, e.g., Daunt v. Benson*, 999 F.3d. 299 (6th Cir. 2021) (upholding constitutionality of Michigan’s IRC). CLC also advocates for and

develops policy on a range of democracy issues including redistricting. CLC recently released a comprehensive report evaluating the performance of various redistricting commissions during the 2021 cycle based on an in-depth review of the laws and procedures that governed commissions in each state, as well as an assessment of each commission’s redistricting process.¹ The report found that true IRCs vested with the full authority of redistricting; guided by clearly defined and ranked criteria protective of the rights of every voter; and required to engage in a participatory and transparent redistricting process are the gold standard. The IRC created by the Amendment would hit all these structural and procedural marks. CLC respectfully submits this amicus brief in accordance with Rule 16.06 of the Ohio Supreme Court Rules of Practice.

STATEMENT OF FACTS

Amicus adopts the Relators’ statement of facts, as described in their Complaint.

LAW AND ARGUMENT

Under the Ohio Constitution, “the people reserve to themselves the power . . . to propose amendments to the constitution and to adopt or reject the same at the polls.” Ohio Const., art II, § 1. To enable the people to exercise that critical power, the Ohio Constitution requires that the ballot board create ballot language that “shall properly identify the substance of the proposal to be voted upon.” Ohio Const., art XVI, § 1. Ballot language cannot “mislead, deceive, or defraud the voters.” *Id.* Similarly, the secretary of state, tasked with preparing ballot titles for initiatives, is obligated by statute to “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.” R.C. 3519.21. The

¹ Campaign Legal Center, *Redistricting Commissions in the 2021 Redistricting Cycle: Case Studies and Lessons Learned for 2031 and Beyond*, available at https://campaignlegal.org/sites/default/files/2024-06/CLC_RedistrictingComm_Report_WEB_FINAL.pdf (accessed Aug. 23, 2024) [<https://perma.cc/5STF-XJMW>].

Ohio Ballot Board and Secretary of State LaRose grossly violated these constitutional and statutory commands when crafting and approving the ballot language and title for the Amendment.

I. The Ohio Ballot Board’s Approved Ballot Language regarding Gerrymandering is Misleading, Deceptive, and Factually Inaccurate

The approved ballot language is misleading, deceptive, and factually inaccurate—and therefore impermissibly argumentative—in its representation that commissioners would be “required to gerrymander.” Ohio Ballot Board, *Certified Ballot Language State Issue 1* (Aug. 19, 2024) (“Ballot Language”).² Far from *requiring* gerrymandering, the Amendment has clear criteria “[t]o *ban* partisan gerrymandering and prohibit the use of redistricting plans that favor one political party and disfavor others....” Complaint, Ex. A § 6(B), *State of Ohio ex rel. Citizens Not Politicians, et al. v. Ohio Ballot Board, et al.*, No. 2024-1200 (Aug. 19, 2024) (“Ex. A”) (emphasis added).

The assertion that the Amendment would “[r]epeal constitutional protections against gerrymandering,” is highly misleading and deceptive. Ballot Language ¶ 1.³ The Amendment requires that “the statewide proportion of districts in each redistricting plan that favors each political party shall correspond closely to the statewide partisan preferences of the voters of Ohio.” Ex. A § 6. This language is nearly identical to the Ohio Constitution’s current provision on partisan gerrymandering: “The statewide proportion of districts whose voters. . . favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.” Ohio Const., art. XI,

² Available at https://www.ohiosos.gov/globalassets/ballotboard/2024/2024-08-16_certifiedballotlanguage_stateissue1.pdf (accessed Aug. 23, 2024).

³ This brief focuses only on a subset of the misleading, deceptive, and defrauding aspects of the approved ballot language. For example, this brief does not address the ways in which ballot language paragraphs 1 and 9 deceptively and prejudicially misrepresent Ohio’s current system of redistricting by a political commission and the accountability (or lack thereof) of the partisan commissioners. It addresses neither the misleading framing and material omissions regarding the ballot initiative’s redistricting criteria nor the prejudicial nature of the ballot title.

§ 6(B). The Amendment precisely defining “correspond closely”—the overarching standard in both provisions—as a deviation of “no more than three percentage points in either direction . . . from the statewide partisan preferences of the voters of Ohio” does not amount to the complete erasure of partisan gerrymandering protections implied by the ballot language. Ex. A § 6(B)(3). Nor does adding specificity to this standard amount to a requirement to gerrymander.

The ballot language stating that the IRC’s commissioners would be “required to gerrymander the boundaries of state legislative and congressional districts to favor the two largest political parties in the state of Ohio, according to a formula based on partisan outcomes as the dominant factor,” Ballot Language ¶ 2, surpasses misleading to become entirely factually inaccurate.⁴ The U.S. Supreme Court has expressly rejected the proposition that it involves “political gerrymander[ing]” for mapdrawers to act “with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths.” *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). Indeed, the Court was “quite unconvinced” that a redistricting plan was a partisan gerrymander “because it attempted to reflect the relative strength of the parties in locating and defining election districts.” *Id.* That is because “gerrymandering” has a longstanding definition. “By 1840, the gerrymander was a recognized force in party politics . . . It was generally conceded that each party would *attempt to gain power which was not proportionate to its numerical strength.*” *Rucho v. Common Cause*, 588 U.S. 684, 697 (2019)

⁴ Including in the ballot language a statement that the Amendment would require commissioners to create maps “to *favor* the two largest political parties in the state of Ohio,” Ballot Language ¶ 2 (emphasis added), is misleading because the Amendment explicitly “*prohibit[s]* the use of redistricting plans *that favor one political party and disfavor others.*” Ex. A § 6(B) (emphasis added). Using a standard to ensure there is not disproportionate partisan representation between “the only two parties in the State large enough to elect legislators from discernible geographic areas,” *Gaffney*, 412 U.S. at 752, is not the same as disfavoring other, smaller political parties.

(internal citations and quotations omitted). The Amendment’s specificity as to the meaning of “closely corresponds” ensures that no party will have such disproportionate power. And its use of a straight-forward metric is just the kind of “provision[] in state statutes and state constitutions” anticipated by the U.S. Supreme Court to “provide standards and guidance for state courts to apply” to adjudicate partisan gerrymandering claims. *Id.* at 719. Furthermore, a clear obligation to assess partisan effects prevents a “politically mindless approach” wherein no political data is considered and which “may produce, whether intended or not, the most grossly gerrymandered results.” *Id.* at 753.

In sum, the ballot language’s statements regarding gerrymandering are, individually and in combination, misleading, deceptive, and factually inaccurate in a manner that is impermissibly argumentative. *See Ohioans United*, 2023-Ohio-3325, at ¶ 12.

II. The Ohio Ballot Board’s Approved Ballot Language regarding Public Input is Misleading, Deceptive, and Factually Inaccurate

The ballot language regarding public input is both misleading for its content and for its material omission of essential aspects of the ballot initiative. The ballot language claims that the Amendment would “[l]imit the right of Ohio citizens to freely express their opinions to members of the commission or to commission staff regarding the redistricting process or proposed redistricting plans.” Ballot Language ¶ 8. This is so, the Ballot Board contends, because the Amendment prohibits commissioners from discussing official matters in private, outside the conduct of a public meeting.

The contention that an open meeting, sunshine law is a “limit[ation]” on speech is absurd. Laws requiring public business to be conducted in public are hardly new, and hardly sinister. *See, e.g.*, R.C. 121.22 (Ohio Open Meetings Act); R.C. 121.22(A) (“This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon

official business only in open meetings unless the subject matter is specifically excepted by law.”). And the Sixth Circuit has expressly upheld the constitutionality of such a provision related to IRCs. *See Daunt v. Benson*, 956 F.3d 396, 419 (6th Cir. 2020) (upholding provisions governing the Michigan IRC). Far from limiting the *public’s* right to free speech, this provision protects the public’s ability to speak and to know who else has the ear of the commissioners.

The public input provisions underscore the misleading nature of the adopted ballot language. The Ohio Constitution currently requires hearings to receive public input only *after* the Commission has drafted and proposed a plan, with no requirements for meaningful public access to such hearings: “[b]efore adopting, but after introducing, a proposed plan, the commission shall conduct a minimum of three public hearings across the state to present the proposed plan and shall seek public input regarding the proposed plan.” Ohio Const., art. XI, § 1(C). In the 2021 redistricting cycle, Ohio’s political commission provided minimal opportunity for public input, noting that it would accept testimony regarding map proposals “only in conjunction with scheduled meetings and hearings of the Commission.”⁵ The Ohio Commission’s failure to create effective opportunities for public input in 2021 is perhaps best encapsulated by the commission holding one required public input session in the middle of the workday *in a state park*. Predictably, there was with meager public participation as a result.⁶

In contrast, the Amendment would require Ohio’s IRC to “conduct its hearings in a manner that invites broad public participation throughout the state, including by using technology to

⁵ Ohio Redistricting Commission, *Commission Meetings*, <https://archive.redistricting.ohio.gov/meetings#previous-meetings> (accessed Aug. 23, 2024).

⁶ Nick Evans, *Ohio Redistricting Commission kicks off regional hearings*, Ohio Capital Journal (Sept. 25, 2023), *available at* <https://ohiocapitaljournal.com/2023/09/25/ohio-redistricting-commission-kicks-off-regional-hearings/> (accessed Aug. 23, 2024) [<https://perma.cc/W2EKYGYE>].

broadcast commission meetings and to facilitate meaningful participation from a range of Ohioans.” Ex. A § 5(A). Instead of requiring just three meetings *total*, the Amendment would require the IRC to engage in three *rounds* of meetings with meetings both before and after proposing maps: at least five before maps are released, five after the release of draft maps, and two for any subsequent revisions. *Id.* § 5(B)(1)-(3). And public participation would not just be limited to hearings, because the IRC would be required to “provide a portal for digital submission of public comments.” *Id.* § 5(C). To characterize this guaranteed expansion of opportunity for public input as a “limit” on Ohioans’ ability to express their opinions about the redistricting process is misleading and deceptive.

In addition, the inclusion of only an inaccurate and misleadingly characterized “limitation” on public input without any information about the robust public input provisions in the ballot initiative is a significant material omission. “Any omission in ballot language must not be material, *i.e.*, its absence must not affect the fairness or accuracy of the text . . . Nor may ballot language omit any essential part of the proposed amendment.” *Ohioans United*, 2023-Ohio-3325, at ¶ 20 (internal citations and quotations omitted). The public input provisions in the Amendment are essential for public understanding of what the Amendment actually proposes. Their omission renders the text inaccurate.

The experiences of the Michigan and California IRCs in the 2021 redistricting cycle support the concept that public input is an essential part of IRC provisions. Michigan’s commission is required to hold at least 10 public hearings before maps are released, five public hearings on its proposed plans, and must provide at least 45 days for public comment on any proposed plan prior to that plan receiving a vote.⁷ In the 2021 cycle, the Michigan commission far exceeded these base

⁷ Mich. Const., art. IV, §§ 6(8), (9), (14)(b).

requirements, holding over 120 meetings and collecting more than 25,000 public comments; the commission regularly released reports summarizing the public comments it was receiving, which were also available on the website.⁸ California’s IRC takes a different approach with no set number of meetings required, but nonetheless requiring that the commission “conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines.”⁹ The public hearing process established by the California commission must be promoted through an outreach program and must include hearings to receive input both before and after the maps are drawn.¹⁰ California’s 2021 public input was robust with, for example, over 32,280 comments and suggestions from the public and 35 meetings hosted just on the topic of communities of interest.¹¹ Finally, like Ohio’s IRC that would be created by the Amendment, both California and Michigan’s commissions are subject to open public meeting requirements.¹²

The significant public comment in Michigan and California demonstrates (1) how integral public comment is for IRCs seeking to create fair, representative maps; (2) that public input is likely material not just to the prospective IRC’s function but also to the voters considering the potential merits of adopting the new redistricting process; and (3) that prohibitions on *ex parte* communications with commissioners do not, in fact, limit the ability of citizens to communicate their redistricting preferences. The omission of any information about the Amendment’s robust

⁸ MGGG Public Comment Portal Reports, *Michigan Independent Citizens Redistricting Commission*, <https://perma.cc/WJ78-9SB8>.

⁹ Cal. Const., art. XXI, § 2(b).

¹⁰ Cal. Gov’t Code § 8253(a)(7).

¹¹ California Citizens Redistricting Commission, *Report on Final Maps: 2020 California Citizens Redistricting Commission* at 2-3, 21 (Dec. 26, 2021), available at <https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Final-Maps-Report-with-Appendices-12.26.21-230-PM-1.pdf> (accessed Aug. 23, 2024) [<https://perma.cc/4WQE-W7NE>].

¹² Cal. Gov’t Code § 8253(a)(1); Mich. Const., art. IV, §§ 6(10)-(11)

public input provisions accordingly constitutes the omission of an “essential part of the proposed amendment.” *Ohioans United* at ¶ 20 (internal quotations omitted).

CONCLUSION

Independent Redistricting Commissions have the potential to avoid the challenges posed when politicians draw their own districts—problems like partisan gerrymandering and failure to take into account, or even take at all, public input about redistricting plans. IRCs can increase both public participation and transparency in the redistricting process, resulting in more representative maps and fostering trust in the electoral system. The Amendment put forward by Citizens Not Politicians and brought to the ballot by more than five-hundred thousand Ohioans contains these important elements. Unfortunately, the Ohio Ballot Board and Secretary LaRose have approved ballot language and a ballot title that mislead, deceive, defraud, and ultimately prejudice voters against the Amendment. Campaign Legal Center urges this Court to reject the ballot language and title and order the Ballot Board and Secretary LaRose to adopt language that accurately reflects the content of the Amendment so that Ohio’s voters are able to consider and decide this matter for themselves.

Respectfully submitted,

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I hereby certify that the foregoing was sent via electronic mail this 23rd day of August,

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