

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. VOTERS FIRST,
et al.,

Relators,

v.

OHIO BALLOT BOARD, et al.,

Respondents.

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Case No. 2012-1443

Original Action in Mandamus

**MERIT BRIEF OF RESPONDENTS OHIO BALLOT BOARD AND
OHIO SECRETARY OF STATE JON HUSTED**

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**MERIT BRIEF OF RESPONDENTS OHIO BALLOT BOARD AND
OHIO SECRETARY OF STATE JON HUSTED**

I. INTRODUCTION

The Ohio Ballot Board prepared the ballot language consistent with its constitutional and statutory duties. Relators seek to challenge the language because they prefer their proposed language to the language adopted by the Ohio Ballot Board. No action can lie for such relief. While Respondents have a duty to compose constitutionally sufficient ballot language, and take that duty seriously, Relators do not have a right to substitute their own proposed ballot language for that adopted by the Ballot Board.

II. STATEMENT OF FACTS

On August 6, 2012, Respondent Ohio Secretary of State Jon Husted determined that Relator Voter's First had collected enough valid signatures to place the proposed amendment at issue on the general election ballot. Complaint, ¶ 11. The proposed amendment seeks to change the state's Constitution to overhaul the redistricting and reapportionment process in Ohio. Complaint, ¶ 7. As required by the Ohio Constitution and statute, the Ohio Ballot Board convened on August 15, 2012 to consider and certify ballot language for the proposed amendment. Complaint, ¶ 15; Damschroder Aff. ¶ 5.

Counsel for Relators in this matter attended the meeting and presented a legal memorandum and proposed ballot language on Relators' behalf. Complaint, ¶ 17; *see also* Relators' Ex. 2, 3 and Respondent Exhibit XX (transcript). A group opposing passage of the proposed amendment also submitted proposed ballot language and testified at the meeting. Complaint, ¶ 18; *see also* Complaint, Ex. E. After hearing the testimony, the Ballot Board amended the ballot language proposed by staff and adopted the language at issue here. Complaint, ¶ 16.

More than a week after the Ballot Board meeting, on August 23, 2012, Relators filed the present action in mandamus, alleging that the language adopted by the Ballot Board violates the strictures outlined in the Ohio Constitution. Complaint, ¶ 4; Damschroder Aff. ¶ 6.

III. LAW AND ARGUMENT

A. **Relators' Complaint Is Barred By Laches Because Of Relators' Unexcused, Unreasonable Delay That Prejudices The Boards Of Elections, Secretary Of State, And The Voters Of Ohio.**

An action is barred on the basis of laches when there is an "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *Owens*, 2010-Ohio-1374, ¶ 16, quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145 (1995). Further, in elections cases, "laches is not an affirmative defense, and [relators] have the burden of proving that they acted with the requisite diligence." *Smith v. Scioto County Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, ¶ 14, quoting *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, ¶ 13. Each laches factor is met in the present action and Relators fail to prove otherwise.

1. Relators' Complaint Is Barred By The Doctrine Of Laches Because Relators Waited An Unreasonable Amount Of Time To Bring This Lawsuit With No Excuse For The Delay.

This action is, of course, an expedited elections matter under Ohio Supreme Court Rule 10.9. Elections cases require greater assiduousness for laches purposes, and “[i]f relators in election cases do not exercise the utmost diligence, laches may bar an action for extraordinary relief.” *State ex rel. Owens v. Brunner*, 125 Ohio St.3d 130, 2010-Ohio-1374, ¶ 16, quoting *State ex rel. Craig v. Scioto Cty. Bd. of Elections*, 117 Ohio St.3d 158, 2008-Ohio-706, ¶ 11. The Court’s “consistent requirement that expedited elections cases be filed with the required promptness is not simply a technical nicety.” *State ex rel. Fishman v. Lucas Cty. Bd. of Elections*, 116 Ohio St.3d 19, 2007-Ohio-5583, ¶ 8, quoting *State ex rel. Carberry v. Ashtabula*, 93 Ohio St.3d 533, 524, 2001-Ohio-1625. Rather, “[e]xpedited elections cases ‘implicate the rights of electors underlying the statutory time limits of R.C. 3505.01 and 3509.01.’” *Id.*, quoting *State ex. Rel. Ascani v. Stark Cty. Bd. of Elections*, 83 Ohio St.3d 490, 494 (1998).

Here, the proposed amendment (“Issue 2”) will be voted on at the general election on November 6, 2012. Complaint, ¶ 4. The language of Issue 2 was adopted by the Ballot Board on August 15, 2012, a meeting at which at least one of the Realtors was present and Relators’ counsel testified. Complaint, ¶¶ 16-19. The Secretary of State was required to certify the form of the ballot to the boards of elections no later than the 70th day before the election. R.C. 3505.01. To ensure compliance with the federal and state mandate that ballots be ready for uniformed services and overseas absentee voters (“UOCAVA”) voters by the 45th day before the election (September 22, 2012), the form of the official ballot, including the language for Issue 2, was issued to the boards of elections on Friday, August 24, 2012. *Damschroder Aff.* ¶ 7. Preparing the ballots for the general election is a critical task that is both time-consuming and

detailed. Damschroder Aff. ¶ 8. Once the Secretary of State certifies the official form of the ballot, boards of elections begin building their ballots, a complex task that may take more than a week. Damschroder Aff. ¶ 9.

Had Relators filed this action as soon as they were aware of the alleged violation, this matter would have been fully briefed and decisional by August 27, 2012, at the latest. Further, had Respondents filed their answer the next day (as they did here), this matter would have been decisional an entire week earlier, on August 23, 2012. A decision before the August 28, 2012 deadline to certify the official form of the ballot would have prevented a disruption in the time-sensitive and vital process of developing ballot forms.

2. Relators Had Knowledge Of The Alleged Wrong On August 15, 2012 And Their Delay Causes Prejudice To The Secretary The Boards Of Elections, And Voters.

More than a week before filing their lawsuit, Relators had knowledge of the ballot language, the alleged wrong. Relators' counsel and at least one of the other Relators attended the Ballot Board meeting on August 15, 2012 during which the contested ballot language was adopted. Complaint, ¶ 17. Realtors' counsel presented his proposed ballot language and had an opportunity to speak to his language as well as the other language being reviewed by the board. Relators' counsel also prepared a memorandum of law describing the legal requirements for the ballots language and orally argued most of the points he raises in this case. Relators Evidence Exh. B at 5-28. Relators inexplicably delayed more than a week before filing this case even though there can be no doubt they had actual knowledge of the alleged wrong.

Relators' delay impairs the ability of county boards of elections and Secretary of State to complete their duties and could adversely affect the ability of Ohio voters to vote. Prejudice in expedited election cases occurs where a moving party's delay "impairs boards of elections' ability to prepare, print, and distribute appropriate ballots because of the expiration of the time

for providing absentee ballots.” *Owens* 2010-Ohio-1374, ¶ 19, quoting *State ex rel. Willke v. Taft*, 107 Ohio St.3d 1, 2005-Ohio-5303, ¶ 18. As this Court recognized in *Fishman*, “[i]f relator[] had acted more promptly, this might have been avoided and any potential prejudice . . . [as a result of the] statutory obligation to absentee voters would have been minimized.” *Id.*, quoting *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 201, 2002-Ohio-5583, ¶ 18.

Here, if the Court were to order rule in favor of Relators, changes to the ballot form would have far-reaching negative effects as boards get closer to making ballots available on September 22, 2012. Reprogramming is not a simple task. *Damschroder Aff.* ¶ 14. As one example, any change in length of the ballot language will require a review of all ballot styles to ensure that the ballot layout for Issue 2 and any subsequent issues has not been adversely affected. *Damschroder Aff.* ¶ 15. Additionally, many boards of elections contract with vendors to program the central tabulating system, and additional time can be costly and hard to come by due to limited vendor availability. *Damschroder Aff.* ¶ 10-11. Further, those counties that are required to provide Spanish language translation for the complete text of the ballot pursuant to a consent decree with the United States Department of Justice would not only have to reprogram this aspect of their ballots, but retranslate the ballot language as well. *Damschroder Aff.* ¶ 17. Boards would have to start the time-consuming, but necessary, ballot proofing process again. Directive 2012-38, *Damschroder Aff.* ¶ 18. Once ballots are proofed, those proofs must be posted for at least 24 hours in a publicly accessible place after which boards still must still complete logic and accuracy testing. *Damschroder Aff.* ¶ 19-20. In considering the enormity of these tasks, it is also important to remember that counties have numerous ballot styles to deal with. In a large county, like Franklin County, this means that thousands of ballot styles would need to be reprogrammed, proofed, and tested for accuracy. *Damschroder Aff.* ¶ 21. Even in a

smaller county, while they may have fewer ballot styles, they have fewer staff and resources available to complete these tasks. Damschroder Aff. ¶ 21. Because of Relators' delay, any ruling in Relators' favor would have a prejudicial effect on the boards of elections.

Relators' delay also impairs the Secretary of State's ability to coordinate the constitutionally required advertising of Issue 2. The Secretary of State is responsible for advertising the proposed amendment, the ballot language, and the explanations and arguments, once a week for three consecutive weeks preceding the election. Ohio Constitution Article II, Section 1g, R.C. 3505.062(G). This must be advertised in at least one newspaper of general circulation in each of the 88 counties in the state of Ohio. Ohio Constitution Article II, Section 1g. Accordingly, the Secretary of State must have time to finalize and proof the language that will be published and to provide that language to a printer for statewide distribution.

Most significantly, Relators' decision to delay could also disrupt important upcoming dates for voters, in particular UOCAVA voters. Federal and State law require boards of elections to issue ballots to UOCAVA voters by September 22, 2012, the 45th day before the election. 42 U.S.C.A. § 1973ff-1(a)(8), R.C. 3511.04. Because of all of the tasks boards of elections would have to complete if this Court were to grant Relators' requested relief, the ability of boards of elections to meet this federal and state mandated deadline might be jeopardized. Damschroder Aff. ¶ 23. Boards of elections could be forced to issue ballots containing the current Issue 2 language, or federal only ballots, and then later transmit a second ballot with new Issue 2 language. Damschroder Aff. ¶ 25. Issuing two absentee ballots to UOCAVA voters, a category of voters who already face unique burdens in receiving and returning their ballots, would create significant confusion. Damschroder Aff. ¶ 26. A change to the ballot at this stage may jeopardize the ability of boards of elections to provide complete ballots to UOCAVA voters

by September 22, 2012, thus Relators have not diligently pursued litigation in this case. Based on Relators' unexcused, unreasonable delay that prejudiced the voters of Ohio, this Court should bar the complaint based on the doctrine of laches.

B. The Language Adopted By The Ballot Board Does Not “Mislead, Or Deceive, Or Defraud The Voters.”

Even if this Court were to find that Relator's complaint is not barred by laches, the language adopted by the Ballot Board meets the requirements of Ohio law. The Court, when examining a challenge to ballot language, can grant relief only if the language approved by the ballot board “is such as to mislead, deceive, or defraud the voters.” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 518 (1981), quoting Section 1, Article XVI of the Ohio Constitution. “In order to pass constitutional muster, “[t]he text of a ballot statement * * * must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected.” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 519 (1981), quoting *Markus v. Bd. of Elections*, 22 Ohio St. 2d 197, paragraph four of the syllabus (1970).

The Court has “recognize[d] the difficulty inherent in formulating ballot language which properly describes any given proposed constitutional amendment,” and the Court has determined that the test for deciding whether ballot language is proper is not whether different language *could* be used, “but, rather, whether the language adopted by the ballot board properly describes the proposed amendment.” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 519 (1981) (emphasis added), citing *State ex rel. Foreman v. Brown*, 10 Ohio St. 2d 139, 150 (1967). Thus, given the “relative uniqueness of each case and the necessarily subjective nature of any synopsis of a given statute or constitutional amendment, it is difficult to establish firm criteria against

which the decisions of the ballot board may be measured.” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 519 (1981).

The Court also considers that full text of the proposed amendment is published in newspapers across the state, thus providing “another source of information concerning this proposed amendment...for the enlightenment of the voters.” *State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13, 20 (1977). Voters have access to the full text of the amendment at their polling place, and in the additional materials circulated in newspapers. R.C. 3505.06(E) (“[T]he full text of the proposed...amendment...shall be posted in each polling place in some spot that is easily accessible to the voters.”); R.C. 3505.062(G) (requiring the Ballot Board “[d]irect 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”).

In order to determine whether the proposed ballot language is designed to “mislead, or deceive, or defraud the voters,” the Court considers three general criteria: (1) a voter has the right to know what it is he is being asked to vote upon; (2) use of language “in the nature of a persuasive argument” is prohibited; and (3) the cumulative effect of “technical defects” is “the determinative issue” in assessing the validity of ballot language. *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 519 (1981); see also *State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13, 19 (1977), quoting *Thrailkill v. Smith*, 106 Ohio St. 1, 11 (1922).

Relators contest phrasing in the ballot language adopted by the Ballot Board. As noted above, the test for determining the propriety of ballot language, however, is not whether different language could have been used, but rather whether the language used is designed to “mislead or deceive, or defraud the voters.” *State ex rel. Bailey v. Celebrezze*, 67 Ohio St. 2d 516, 519 (1981), citing *State ex rel. Foreman v. Brown*, 10 Ohio St. 2d 139, 150 (1967); see also *State ex*

rel. Williams v. Brown, 52 Ohio St. 2d 13, 19 (1977), quoting *Thrailkill v. Smith*, 106 Ohio St. 1, 11 (1922). Relators cite several paragraphs of the ballot language as either “material omissions” or “inaccurate and prejudicial language,” though none of these examples, either individually or taken together, simply are not sufficient to meet the high burden Relators must meet to invalidate the ballot language in this case. Relators’ Merit Brief at 10, 15; Complaint, ¶¶ 22-31. Each allegation is addressed in turn below.

1. The Ballot Language Properly Describes The Proposed Amendment So That Voters Know What They Are Voting For Or Against And Contains No “Material Omissions.”

Relators cite several “material omissions” that they argue mislead voters as to the substance of the amendment. Ballot language, however, is not meant, and is not required to be, a substitute for the full text of the proposed amendment. R.C. 3505.06(E); *see also State ex rel. Minus v. Brown*, 30 Ohio St.2d 75, 80, 283 N.E.2d 131 (1972). Rather, ballot language is designed to communicate the substance of the proposed amendment in condensed terms. R.C. 3505.06(E) (“A condensed text that will properly describe the...amendment proposed by other than the general assembly shall be used....”). In reviewing Relators’ claims, it is important to remember that voters have access to the full text of the amendment both at their polling location and in materials that are circulated in newspapers three weeks before the election. R.C. 3505.06(E), 3505.062(G). Though Relators might wish otherwise, omissions are necessary to the process of condensing the text of the proposed amendment, and it is within the Ballot Board’s discretion to make them. Ohio Constitution Art. II Sec 1g, citing Ohio Constitution Art. XVI Sec 1 (“The ballot need not contain the full text...of the proposal.”).

First, choosing not to include the name “Ohio Citizens Independent Redistricting Commission” is not a material omission and does not deceive, mislead or defraud the voters. The

name of the commission consists of vague terms that are ambiguous at best. Including the phrase “Ohio Citizens Independent Redistricting Commission” in the ballot language does not tell a voter anything at all about what this proposed constitutional amendment will do. Relators themselves have already conceded this point: the summary submitted to and approved by the Attorney General and circulated by the Relators only calls the commission “Ohio Independent Redistricting Commission” in the first paragraph only but simply refers to it as “Commission” throughout the remaining 13 paragraphs.

Second, Relators contest the omission of the “seven standards that are mandated by the Proposed Amendment,” which they characterize as forming the “very core of the proposal.” Complaint, ¶¶ 22, 23; Relators’ Merit Brief at 13-14. The reality is that many of these standards are already part of Ohio law and will not be changed by the proposed amendment. *See* Complaint, Ex. A, at 5 (reassigning contiguousness, compactness, and whole unit preference from current Ohio Constitution § 11.07(A) to proposed §§ 11.07(B), (C)(1), and (C)(4)). Moreover, including any changes to the standards would have little to no meaning unless the ballot language also included a full list of the current standards. As Relators concede, the ballot language clearly informs voters that the purpose of the amendment is to “change the standards and requirements in the Constitution for drawing legislative and congressional districts.” Complaint, ¶ 22.

Third, the language adopted by the Ballot Board does not serve to mislead, deceive, or defraud the voter as to the procedure for choosing commission members. While Relators allege that the ballot language contains “none of the essential particulars regarding how the commission members are chosen,” Relators concede that the proposed amendment establishes a “detailed process” for selecting commission members. Relators’ Merit Brief at 11; Complaint, ¶ 23.

Indeed, Relators devote more than two pages of the proposed amendment to an explanation of the selection process, yet these points were not included in their own proposal submitted to the Ballot Board. Relators' Merit Brief at 11-13; see also Complaint, Ex. E, ¶¶ 6, 7 (citing the "veto authority" of political caucuses and lack of removal authority by other government branches). The adopted ballot language clearly states that the commission will be politically balanced, citing the "4-4-4" configuration that Relators highlight. Complaint, Ex. B, ¶ 2; *see also* Relators' Merit Brief at 13. Further details will be available to voters in accordance with law. *See* Ohio Constitution Art. II Sec 1g; R.C. 3505.06(E); R.C. 3505.062(G).

Finally, a decision to not include language pertaining to openness and public process does not mislead voters, as this is already required under current Ohio law. The Apportionment Board currently in place, and at issue in the litigation Relators cite (Relators' Merit Brief at n.14), is subject to the Ohio Open Meetings Act and the Ohio Public Records Act. *See* R.C. 121.22; R.C. 149.43. Therefore, Relators' amendment provisions "for an open, public process" do not mark a departure from current Ohio law. Relators' Merit Brief at 14-15; Complaint ¶ 23. These laws require public bodies to make available all records of the body (in short, to "make relevant data available to the public" and "make publicly available all proposed plans"), and to "conduct all its business in meetings open to the public." Relators' Merit Brief at 14. These openness provisions do not form the heart of the proposed amendment as Ohio laws supporting transparent and open government will independently apply to the commission upon formation.

Not one of the "material omissions" cited by Relators misleads voters as to the substance of the amendment: the establishment of a new commission to handle redistricting and reapportionment in Ohio. The ballot language adopted by the Ballot Board properly identifies the substance to be voted on, i.e. forms the commission's purpose, composition, procedure, and

funding. Additionally, Ohio voters will have access to the full text of the amendment and the arguments prepared by the opponents and proponents as the Ohio Constitution requires the Secretary of State to publish the proposed amendment and the arguments 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. Ohio Constitution Article II, Section 1g.

2. The Ballot Language Is Accurate And Is Not “In The Nature Of A Persuasive Argument”

The approved ballot language properly describes the proposed amendment and does not contain persuasive language, as Relators contend. Relators erroneously identify several sections of the ballot language that they allege amount to “persuasive arguments” through “inaccurate and prejudicial language,” but these arguments are unsupported. Relators’ Merit Brief at 15; Complaint, ¶¶ 24-31.

First, Relators allege that the first paragraph of the ballot language is inaccurate because it (1) refers to the proposed commission members as “appointed,” and (2) states that the amendment will remove redistricting authority from elected officials. Complaint, ¶ 25. The commission members are appointed. The language of the proposed amendment provides for eight appellate judges to designate 42 applicants to serve as potential members of the commission. Complaint, Ex A, at 1-3.. Only these individuals selected by the judges can serve as members of the Commission. Courts often refer to dictionaries in analyzing the meaning of particular terms to the average citizen. *See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S.Ct. 1997, 2002 (2012) (using dictionaries to determine the ordinary meaning of a word). The term “appoint” is defined as “to name or assign to a position, an office, or the like; designate.” Webster’s Unabridged Dictionary (2001). Nine of the twelve commission members will be

selected and named, based on their qualifications, to a position on the commission by a panel of appellate judges. Complaint, Ex. A at 2-3. To characterize this process as an “appointment” certainly does not mislead, deceive, or defraud the voter.

Individuals who currently draw legislative and congressional districts are elected officials. The General Assembly is tasked with the duty to draw congressional districts through legislative enactment. United States Constitution Article I, Section 2 and Ohio Revised Code 3521.01. Members of the General Assembly are “elected officials.” The Ohio Constitution confers the duty to draw state legislative districts on the Apportionment Board. Ohio Constitution Art. XI Sec 1. The Apportionment Board is comprised of, elected officials: the Governor, the Secretary of State, and the Auditor and two members are selected by the Speaker of the House of Representatives and the senate leader of the same party, and the other by a member selected by the house and senate leaders of other party. *Id.* All members of the 1991, 2001, and 2011 Apportionment Boards were elected officials. For 1991 board, see *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992); for 2001 board, see *Parker v. Ohio*, 263 F. Supp.2d 1100 (S.D. Ohio 2003); for 2011 board, see www.sos.state.oh.us/SOS/reshape/GADistricts/ApportionmentBoard.aspx. Characterizing the current system as being led by “elected officials” does not mislead, deceive, or defraud the voter as the majority of members are elected officials by law and all members of the Apportionment Boards for the last 30 years have been elected officials. Splitting these hairs constitutes “mere technical irregularities” that should not impede the ability of voters to decide the issue. *State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13, 20 (1977). The ballot language reflects the essential components of the amendment by highlighting that power will move from the current board

controlled by elected officials to a commission composed of members appointed from a pool of qualified applicants.

Second, Relators allege that the ballot language fails fully to explain how the pool of potential commission members is selected. Relators' Merit Brief at 16; Complaint, ¶ 26. Again, there is nothing misleading or false about the phrase "limited pool of applicants." The proposed amendment specifically excludes from the pool of applicants: (1) any person who has not voted in at least two of the three previous general elections conducted in even numbered years; (2) any person or family member of a person who within the ten preceding years served as a federal or state elected official, was a paid employee of the Ohio Legislature, the United States Congress, or the office of a federal or state elected official, was the director of a state department or agency or was a paid lobbyist; and (3) any person or family member of a person who, within the five years preceding the date of the application, was a candidate for federal or state office, was a paid employee or paid consultant of the campaign for a political candidate or for a political committee, was an official or paid employee of any political party organization, or made monetary contributions to political campaigns or political parties that exceed a total of \$5,000 during a two year period. (Proposed Amendment XI, Section 1 (C)(2). The pool is further limited by the requirement that the appellate judges chose only people with "the relevant skills and ability, including a capacity for impartiality." (Proposed Amendment XI, Section 1 (C)(5). Thus, this language does not mislead, deceive, or defraud the voter but accurately reflects the substance of the proposed amendment.

Third, Relators argue that the ballot language implies that there can be no challenge to the first set of plans adopted by the commission until the next decennial census, and only this first plan may be challenged in court. Relators' Merit Brief at 20-21; Complaint, ¶ 30. Relators also

state that the first sentence of the paragraph is “nonsensical” as it does not include a comma after the word “order.” Relators’ Merit Brief at 20; Complaint, ¶ 30. In fact, it is the omission of the comma that supplies the meaning of the sentence, and one that accurately reflects the proposed amendment. The full sentence reads: “Require new legislative and congressional districts be immediately established by the Commission to replace the most recent districts adopted by elected representatives, which districts shall not be challenged except by court order until the next federal decennial census and apportionment.” Complaint, Ex. B, ¶ 3. The subordinate clause (following the comma and beginning with “which districts”) refers to “the most recent districts” that were recently adopted by the current Apportionment Board. The subordinate clause goes on to clarify that those recently adopted districts can only be challenged at the next federal decennial census. Inserting a comma, as Relators suggest, would truncate the subordinate clause and render the sentence inaccurate. With Relators’ suggested comma, the sentence would then appear to mean that the commission-adopted plans could not be challenged until the next census, which, of course, is inaccurate. Thus, the ballot language accurately explains that the commission will immediately establish new plans to replace those recently enacted by the current Apportionment Board.

Relators also allege that the ballot language is inaccurate as it implies the Supreme Court may select any of the plans submitted to the commission, should the commission fail to timely adopt a plan. Relators’ Merit Brief at 21; Complaint ¶ 31. The language accurately reflects the essence of the proposed amendment, communicating that the Supreme Court will select a plan in the event a plan is not in place by the October 1 deadline. The Supreme Court is bound by the laws of Ohio and federal election law. The Supreme Court must of course select a plan that complies with all applicable law, including the proposed amendment, if passed. The ballot

language therefore accurately reflects the substance of the proposed amendment and does not mislead, deceive, or defraud the voter.

Fourth, Relators take issue with the ballot language explaining how the commission is to be funded. Relators argue that the language indicates the General Assembly will be providing a “blank check” to the commission. Relators Merit Brief at 17; Complaint, ¶ 27. The ballot language states that the amendment will “[m]andate the General Assembly to appropriate all funds as determined by the Commission.” Complaint, Ex. B, ¶ 5. This language accurately reflects the proposed amendment, which requires the General Assembly, not another entity, to fund the activities of the commission. Complaint, Ex. A, at 3 (“The General Assembly shall make appropriations necessary to adequately fund the activities of the Commission....”). Further, the amendment requires the General Assembly to “adequately fund” the activities of the commission, including, but not limited to, compensation for members, staff, office space, experts, legal counsel, the independent auditor, necessary supplies, and equipment. Complaint, Ex. A, at 3. The Commission is required to be fully funded and the amendment requires the General Assembly to appropriate those funds. Adding the words “necessary to adequately fund” will offer no additional information to the voter as those words are ambiguous and have no quantitative meaning. Thus, the proposed ballot language accurately reflects the substance of the funding provision in the proposed amendment, and does not mislead, deceive, or defraud the voter.

Fifth, Relators also argue that the “numbered sub-list” of personnel that may be hired by the commission draws “special attention” to the list and results in a persuasive argument. Relators’ Merit Brief at 18; Complaint, ¶ 28. Further, Relators allege that the term “consultants” as included in the “sub-list” is too broad a term to accurately reflect the language of the proposed

amendment. *Id.* The list of Commission staff that may be compensated for their work accurately reflects the language of the proposed amendment. The proposed amendment permits funding for the activities of the commission, including, but not limited to, compensation for commission members, necessary staff, experts, legal counsel, and the independent auditor. Complaint, Ex. A, at 3. A “consultant” is defined as “a person who gives professional or expert advice.” Webster’s Unabridged Dictionary (2001). Use of the term consultant encompasses the “experts” and “independent auditor” enumerated by the proposed ballot language, as well as any additional advisors.¹ Thus, the list of compensated positions on the Commission does not mislead, deceive, or defraud the voter and accurately reflects the substance of the proposed amendment.

Lastly, Relators allege the final paragraph creates the implication that the commission is entitled to unlimited funding and “highlight[s] this one provision of the Proposed Amendment above all other provisions.” Complaint, ¶ 29. Funding of the commission is an important substantive point, as Relators’ attention to the issue (devoting three paragraphs of the complaint and three pages of the merit brief to the single paragraph in the ballot language) seems to underscore. *See* Relators’ Merit Brief at 17-19; Complaint, ¶¶ 27-29. Further, the ballot language does not create the implication of “unlimited funds” for the commission. *See* Complaint, ¶ 27. The proposed amendment requires that several categories of staff and the commission members themselves be compensated through General Assembly-appropriated funds, which will be, of course, “state funds.” Complaint, Ex. A, at 3, Relators’ Merit Brief at 19. Once again, the ballot language in this instance accurately represents the substance of the amendment.

¹ The 1,934-word summary the Relators prepared before circulating this proposed amendment used the word “consultants.” On March 29, 2012 the Ohio Attorney General certified this summary, including use of the word “consultants” as “a fair and truthful statement of the proposed constitutional amendment” pursuant “the the duties imposed upon the Attorney General’s Office under Section 3519.01(A) of the Ohio Revised Code.”

Thus, the proposed ballot language is an appropriate reflection of the substance of the proposed amendment, and does not mislead, deceive, or defraud the voter. In reviewing Relators' claims, the Court must also consider that full text of the proposed amendment is posted at the polls and published in newspapers across the state, thus providing "another source of information concerning this proposed amendment...for the enlightenment of the voters." R.C. 3505.06(E), *State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13, 20 (1977). Relators' claims are unfounded, as the approved ballot language accurately reflects the substance of the proposed amendment and does not serve to mislead, deceive, or defraud voters.

C. Relators' Request For A Writ Of Mandamus Must Be Denied Because Respondents Have Complied With The Law And Owe No Further Duty To Relators.

A writ of mandamus will issue only where three requirements are met: (1) the relator must have a clear legal right to the requested relief; (2) the respondent must have a clear legal duty to perform the requested relief; and (3) the relator must have no adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm'n*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13, citing *State ex rel. Luna v. Huffman*, 74 Ohio St.3d 486, 487, 659 N.E.2d 1279 (1996).

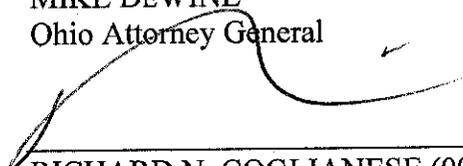
Relators fail to establish that any instance of the allegedly defective ballot language they cite will mislead, deceive, or defraud the voter on Election Day. Further, these supposed deficiencies fail to amount to a cumulative defect that supports invalidation of the ballot language. Relators do not have a clear legal right to have their own proposed ballot language substituted for that certified by the Ballot Board, and the Respondents does not have a clear legal duty to include one or all of the points enumerated by Relators. Respondents have fulfilled their constitutional and statutory duties and the Court should not issue the writ requested.

III. CONCLUSION

Because Relators have unreasonably delayed in bringing this complaint, Relators' claims are barred by the doctrine of laches. Even if this Court were to find that Relators' complaint is not time-barred, Relators' requested relief should be denied for the reasons enumerated above.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Merit Brief of Respondents Ohio Ballot Board And Ohio Secretary of State Jon Husted* was served on this 29th day of August 2012, by electronic mail and U.S. mail, postage prepaid, to:

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