

**Case No. 2015-1411
Expedited Election Case**

**Supreme Court
of the State of Ohio**

STATE OF OHIO *ex rel.* RESPONSIBLEOHIO, *et al.*,

Relators,

v.

THE OHIO BALLOT BOARD, *et al.*,

Respondents.

BRIEF OF AMICI CURIÆ

**TAYLOR RATH DEUTSCHLE, ANDREW GOLDSMITH,
LISA ANN LAUFER & JEFF UNGAR IN SUPPORT OF RELATORS**

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Because all governmental action relating in any manner to an initiative proposal is subject to the First Amendment, the Ballot Board may not adopt language concerning ballot language that, in any way, alters or modifies the content of the initiative proposal, either in the text itself or through a mischaracterization of the proposal that will be presented to the electorate.

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INTEREST OF AMICI CURIÆ

As citizens and electors in the State of Ohio, amici curiæ Taylor Rath Deutschle, Andrew Goldsmith, Lisa Ann Laufer & Jeff Ungar joined together with over 320,000 of their fellow citizens in the State of Ohio to exercise one of the powers expressly reserved unto the people in the Ohio Constitution – the right of initiative. Taking full advantage of that reserved power, Taylor Rath Deutschle, Andrew Goldsmith, Lisa Ann Laufer & Jeff Ungar, as well as all others supporting the proposed constitutional amendment at issue herein, fully exercised through this initiative-petition process their rights of freedom of association and freedom of speech protected by the First Amendment.

Recognizing that such fundamental rights ring hollow if the government is able to interfere with or alter such associational and speech rights, and that such a threat currently exists through the present action of the Ballot Board, Taylor Rath Deutschle, Andrew Goldsmith, Lisa Ann Laufer & Jeff Ungar seek to ensure that this Court affords the greatest protection to their First Amendment rights, as well as the rights of all citizens of this State who have joined together to advance the proposed constitutional amendment.

STATEMENT OF FACTS

Amici defer to the Statement of Facts as presented by Relators.

LAW AND ARGUMENT

Proposition of Law No. 1: The proponents of any initiative proposal are the masters of the precise language they elect to use within such proposal such that the government may not, consistent with the First Amendment, compel a characterization or summary that, in any way, alters the gist of the proposal.

Proposition of Law No. 2: As the initiative process is a citizen-initiated and citizen-driven process, the governmental role is limited to the ministerial task of enabling the proposal as specifically developed and advanced by its proponents to be put forth for a plebiscite.

Proposition of Law No. 3: Because all governmental action relating in any manner to an initiative proposal is subject to the First Amendment, the Ballot Board may not adopt language concerning ballot language that, in any way, alters or modifies the content of the initiative proposal, either in the text itself or through a mischaracterization of the proposal that will be presented to the electorate.

Through the initiative [the people] can also submit an amendment to the constitution and secure a vote of the people upon it. The initiative is, therefore, the most useful governmental invention which the people of the various states have had under consideration in recent years. It is the most effective means yet proposed for giving the people absolute control over their government.

– William Jennings Bryan, address to the
1912 Ohio Constitutional Convention,
March 12, 1912

A product of the 1912 Constitutional Convention, the initiative process constitutes one of the means by which the people may directly effectuate reform and change in their government. For the power of initiative was expressly reserved by the people in an act evincing their ultimate role as sovereign; the initiative process was not granted to the people through the *noblesse oblige* of the government. *See Pfeifer v. Graves*, 88 Ohio St. 473, 486, 104 N.E. 529, 533 (1913) (initiative and referendum are reserved powers that “comprehen[d] all of the sovereign power of legislation not thus delegated” to the General Assembly); *see also* Ohio Const., Art. I, Sec. 2 (“[a]ll political power is inherent in the people”); *McIntyre v. Ohio Elec. Comm’n*, 514 U.S. 334,

346 (1995)(“[i]n a republic where the people are sovereign”)(quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)); *City of Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 211, 65 N.E. 885 (1902)(“[u]nder our system of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people”)(quoting *Taylor v. Porter & Ford*, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843)).)

As the initiative process was expressly reserved by the people of this State, it enables and advances their fundamental rights to associate together in order to advocate and advance their political beliefs. For the initiative process “involves both the expression of a desire for political change and a discussion of the merits of the proposed change” so as to be “appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). As such, “[t]he Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech,” *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005), and, in particular, the First Amendment rights of those individuals signing and submitting any initiative petition. This is true regardless of whether a statutory enactment is being proposed or, as in this case, an amendment to the state constitution.

“[W]here the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment applied to the States through the Fourteenth Amendment.” *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999). And, thus, any governmental actions involved in or affecting the initiative process must be undertaken, not just with due regard for the First Amendment rights of the proponents of the initiative proposal, but actually without infringing upon the First Amendment rights of those proponents. But in this case, the Ballot Board has impermissibly infringed upon the First Amendment rights of the proponents of the proposed constitutional amendment at issue herein.

As the initiative process is a citizen-initiated and citizen-driven process, the governmental role is limited simply to the ministerial task of enabling the proposal as specifically developed and advanced by its proponents to be put forth for a plebiscite. For the proponents of any initiative proposal are the masters of the precise language they elect to use within such proposal. As such, the First Amendment precludes the government from altering or changing the language of any initiative proposal – either in the text itself or, as in this case, through a mischaracterization of the proposal that will be presented to the electorate. For even though Article XVI, Section 1 of the Ohio Constitution may declare that “ballot language shall not be held invalid unless it is such as to mislead, deceive, or defraud the voters,” a higher authority, *i.e.*, the United States Constitution and the First Amendment, serves as an additional limitation and restriction upon the authority of the Ballot Board to promulgate language concerning an initiative proposal. *See Romer v. Evans*, 517 U.S. 620 (1996); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.” *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795 (1988). For “freedom of speech prohibits the government from telling people what they must say.” *Agency for Int’l Dev. v. Alliance for Open Society Int’l, Inc.*, 570 U.S. ___, 133 S.Ct. 2321, 2327 (2013). And this prohibition against government control or manipulation of one’s speech applies equally to compelled statements of opinions and compelled statements of fact. *Riley*, 487 U.S. at 797-98.

“‘Since *all* speech inherently involves choices of what to say and what to leave unsaid,’ one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say’.... [For] a speaker has the autonomy to choose the content of his own message.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)(quoting *Pacific Gas & Electric Co. v. Public Utilities Comm’n of Cal.*, 475

U.S. 1, 11 & 16 (1986)). And outside the context of commercial speech, the government “may not compel affirmance of a belief with which the speaker disagrees.” *Id.*

When, as in this case, the Ballot Board adopts language that, in any way, alters or modifies the content of the initiative proposal, the government has, in fact, unconstitutionally compelled speech that the initiative proponents would not otherwise make; through the adoption of the ballot language herein, the Ballot Board, *i.e.*, the government, has rejected the content of the proponents’ proposed summary and essentially compelled the proponents to assent to a position or belief with which they disagree and which is violative of their First Amendment rights. And that is precisely what occurred in this case.

Consistent with the procedural requirements for all initiative proposals in the State of Ohio, the proponents of the proposed constitutional amendment tendered to the Ohio Attorney General the language of the amendment, together with a summary thereof. (Complaint ¶11 & Exh. 1 & 2.) And the Attorney General concluded that the summary that the proponents had tendered was, in fact, “a fair and truthful statement” of the proposed constitutional amendment. (Complaint ¶12 & Exh. 3.) Yet at the hearing before the Ballot Board, the summary language already approved by the Attorney General was found objectionable only because its contents were initially drafted by the proponents of the amendment. (*See* Complaint, Exhibit 9 – Hearing Transcript at, 91 (“It was drafted by the people who were putting forth the initiative... [T]hey chose the order in their summary as to what to emphasize and deemphasize’).) But such an objection clearly demonstrates that the government in the guise of the Ballot Board took it upon itself to tell the proponents what was and was not acceptable speech, and that the such objection went directly to the content of the proponents “fair and truthful” speech – an action that is presumptively unconstitutional and necessitates the Ballot Board satisfy the requirements of

strict scrutiny in order to constitutionally justify such censorship. *See Reed v. Town of Gilbert*, 576 U.S. ___, ___, 135 S.Ct. 2218, ___ (2015)(“Content-based laws—those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests”). As the action of the Ballot Board clearly ran afoul of the First Amendment, the summary language should be that tendered previously by the initiative proponents and already determined by the Attorney General to be a fair and truthful statement” of the proposed constitutional amendment.

Because the proponents of any initiative proposal are the masters of the precise language they elect to use within such proposal and because the people of Ohio expressly reserved unto themselves the initiative process such that the speech is that of the proponents and the government’s role in placing the matter on the ballot for the plebiscite is simply ministerial, deference and respect must be afforded to the language the proponents actually utilized. While any governmental body may ultimately weigh in on the merits of any proposed initiative consistent with the newly-minted and developing government-speech doctrine, *see Walker v. Texas Division, Sons of Confederate Veterans Inc.*, 576 U.S. ___, 135 S. Ct. 2239 (2015), the time and place for doing so is during the course of the debate in the marketplace of ideas on the initiative proposal, not by governmental fiat which deliberately modifies the gist of any initiative proposal, *i.e.*, the core political speech of the proponents of the initiative. There is plenty of time for debate and polemics on the initiative proposal. But when, as in this case, the government in the guise of the Ballot Board enters into such debate through polemical language on the ballot, the proponents of any initiative proposal are no longer the masters of the precise language they elected to use and the Ballot Board has transgressed the First Amendment. Thus, so as to ensure

full and robust protection of the First Amendment rights of the over 320,000 individuals who sign the initiative petition, this Court should appropriately reject the ballot language adopted by the Ballot Board and, instead, direct the use of the “fair and truthful statement” of the proposed constitutional amendment as posited by the initiative proponents and already found acceptable by the Ohio Attorney General.

Respectfully submitted,

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I certify that a copy of the foregoing will be served, via e-mail, upon the following on the 4th day of September 2015:

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