

IN THE SUPREME COURT OF OHIO

STATE EX REL. RESPONSIBLEOHIO, et al., :
: **Relators,** : **Case No. 2015-1411**
: :
: **v.** : **Expedited Election Case**
: **Original Action in Mandamus**
THE OHIO BALLOT BOARD, et al., :
: **Respondents.** :

BRIEF OF AMICI CURIAE

**NATIONAL FEDERATION OF INDEPENDENT BUSINESSES – OHIO, OHIO
CHAMBER OF COMMERCE, OHIO CHILDREN’S HOSPITAL ASSOCIATION, OHIO
COUNCIL OF RETAIL MERCHANTS, OHIO HOSPITAL ASSOCIATION, OHIO
MANUFACTURERS ASSOCIATION, AND OHIOANS TO END PROHIBITION**

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INTRODUCTION TO AMICI CURIAE

For themselves and their thousands of members and constituents, the following amici ask the Court to deny the writ of mandamus requested by Relators ResponsibleOhio and the Issue 3 petitioners' committee, so that Issue 3 may be presented to the voters with the ballot language prescribed by the Ohio Ballot Board on August 18, 2015, and the ballot title certified by the Ohio Secretary of State on August 25, 2015. Both include language that puts voters on fair notice that the Proposed Amendment seeks constitutional sanction of a monopoly over the market for recreational and medical marijuana in Ohio.

The **Ohio Chapter of the National Federation of Independent Business** ("NFIB/Ohio") is an association with more than 25,000 members, making it the state's largest association dedicated exclusively to serving the interests of small and independent business owners. NFIB/Ohio's members typically employ fewer than twenty-five people and record an annual revenue of \$250,000 or less. NFIB/Ohio's members have major concerns with, among other things, Issue 3's proposal of a monopolistic system of self-governance and taxation of the proposed marijuana industry in Ohio.

Founded in 1893, the **Ohio Chamber of Commerce** ("Ohio Chamber") is Ohio's largest and most diverse business advocacy organization. The Ohio Chamber works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

Amicus Curiae **Ohio Children's Hospital Association** ("OCHA") is the voice of Ohio's youngest patients, their families, and health care providers. OCHA's six member hospitals are

dedicated to saving, protecting and enhancing children’s lives. Ohio has arguably the strongest network of children’s hospitals in the nation – hospitals that are committed to ensuring that all three million Ohio children have access to the highest quality health care possible. OCHA serves children, regardless of their ability to pay, from all 88 Ohio counties, all 50 states, and dozens of international countries.

Founded in 1922, Amicus Curiae the **Ohio Council of Retail Merchants** (“Council”) is Ohio’s oldest and largest advocate for the retail and wholesale industries, representing more than 6,400 retailers and wholesalers across the state. Ohio’s retail industry accounts for \$46.5 billion of Ohio’s annual Gross Domestic Product and supports 1.5 million jobs, one in four of all Ohio jobs, more than any other industry. The Council promotes the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business.

Amicus Curiae **Ohio Hospital Association** (“OHA”) is a private, non-profit trade association established in 1915 as the first state-level hospital association in the United States. The OHA is comprised of 219 hospitals and 13 health systems, all located in Ohio, and works with its member hospitals across the state, and their 280,000 employees, to improve the quality, safety, and affordability of health care for all Ohioans. The OHA’s mission is to collaborate with member hospitals and health systems to ensure a healthy Ohio.

Amicus Curiae **Ohio Manufacturers’ Association** (“OMA”) is a statewide nonprofit trade association whose membership consists of over 1,400 manufacturing companies employing approximately 660,000 Ohioans. The OMA aims to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio.

Amicus Curiae **Ohioans to End Prohibition** (“OTEP”) is the coalition working towards a comprehensive marijuana policy in Ohio and the sponsor of the Cannabis Control Amendment (CCA). OTEP opposes legislation that would create a financial windfall for a handful of investors and, instead, favors a free market approach to encourage innovation and entrepreneurship.

STATEMENT OF FACTS

The Proposed Amendment is a constitutional text of unprecedented length. If adopted, it would increase the total length of the Ohio Constitution by more than 10%. It fills 62 paragraphs with more than 6,500 words and spills over 12 pages. Not until the last five pages are there “General Provisions and Specific Limitations” and “Definitions,” which often are the first place important provisions are found. It is so long and convoluted that the proponents included a summary of the Proposed Amendment *within* the text of the amendment, something not found anywhere else in Ohio’s 164-year old Constitution.

Presented with these extraordinary circumstances of Relators’ own making, the Secretary of State and the Ohio Ballot Board have fulfilled their duties and have neither abused their discretion nor disregarded clearly established law.

The Proposed Amendment and Petition Initiative

On March 3, 2015, Relators submitted to the Ohio Attorney General the full text of a proposed constitutional amendment that is more than 6,500 words, 62 paragraphs and 12 pages long. (Compl., Ex. 1 [the “Proposed Amendment”].) At the same time, Relators provided the Attorney General with an Initiative Petition – a putative summary of the Proposed Amendment, prepared by Relators, that is itself more than 2,700 words and 28 paragraphs long. (Compl., Ex. 2 [the “Initiative Petition”].) Acting under R.C. 3519.01(A), the Attorney General certified the Initiative Petition as a fair and truthful statement of the Proposed Amendment. (Compl., Ex. 3.)

With that certification of their own drafted advocacy piece, Relators could present the Initiative Petition to voters in Ohio in order to drum up signatures sufficient to put the Proposed Amendment on the November 3, 2015 ballot. Notably, citizens asked to review the language of

the Initiative Petition, unlike those in the voting booth, could take as much time as needed to review the Initiative Petition and even ask questions of the circulators. The Secretary of State then timely certified that the Relators had sufficient signatures to put the issue of the Proposed Amendment on the November 3, 2015 ballot. (Compl., ¶ 8.)

The Ballot Language and Ballot Title

On August 18, 2015, the Ballot Board held a meeting to determine ballot language identifying the substance of the Proposed Amendment. (Compl., Ex. 9.) Relators attended and submitted two forms of proposed Ballot Language, a one-sentence “Short Version” summary of two terms of the Proposed Amendment: legalization of medical marijuana and personal use of one ounce or less of marijuana by individuals 21 or older. (Compl., Ex. 5.) Alternatively, Relators submitted a proposed “Long Version” of Ballot Language that is simply a reformatted version of the 2,700+ word Initiative Petition. (Compl., Ex. 6.)

Given versions too short to be truthful and too long to be readable at a voting machine, the Ballot Board prescribed its own ballot language, a nine paragraph, 482-word summary (the “Ballot Language”). (Compl., Ex. 7.) On August 25, 2015, the Secretary of State prepared and certified the “Ballot Title” for the Ballot Language, to wit: “Grants a monopoly for the commercial production and sale of marijuana for recreational and medicinal purposes.” (Relators’ Evidence, Ex. 11.)

The Proposed Amendment, Explained

Of course, the Court is not being asked to pass upon the merits of the Proposed Amendment. But, the Proposed Amendment is the touchstone for any analysis of the Ballot Title and the Ballot Language. It is not an easy read. It is structured much like a statute, although it was not written by experienced elected representatives, did not go through the legislative hearing

process, was not subject to public debate in the General Assembly, is organized more to obfuscate than to illuminate (for example, the foundational feature of the Proposed Amendment, the licensure and formation of ten exclusive marijuana growth, cultivation and extraction (“MGCE”) facilities, is not explained until three pages and 16 paragraphs into the text), and it holds back important provisions, specific limitations and key definitions for the end of the text instead of the beginning. (*See generally* Proposed Amendment.)

Perhaps most unusual of all, and a nod to its unwieldy form, it includes within itself its own summary (“Amendment Summary”). No other Ohio Constitutional provision or amendment contains its own summary. Their Amendment Summary, however, omits certain key information. For instance, it does not mention the formation of exclusive MGCE facilities or their exclusive commercial rights over the growth, cultivation and extraction of marijuana in Ohio. (*Compare* Proposed Amendment § 12(A) *with id.* § 12(F) (regarding MGCE facilities).) Or, while it says that “no marijuana establishment may be within 1,000 feet of a house of worship,” playground, school or day-care center, it makes no mention of the fact that the 1,000 foot zone applies only to playgrounds, schools, etc. that were already built by January 1, 2015 or on the date a marijuana establishment applies for a license. (*Compare* Proposed Amendment § 12(A) *with id.* § 12(J)(1) (regarding the 1,000 foot limitation).)

For ease of reference, the following sections highlight pertinent parts of the Proposed Amendment:

- **Exclusive Distribution Channels and Control – A Monopoly**
 - Ten MGCE facilities control the market for raw material
 - Ten MGCE facilities grow and cultivate all marijuana for sale and medical use in Ohio. (§ 12(F))

- Ten MGCE facilities will be licensed – all on pre-designated parcels near Ohio’s largest cities. (§ 12(F))
- MGCE licenses will renew unless the MGCE facility repeatedly violates applicable rules and regulations or voluntarily relinquishes its license. (§ 12(I))
- No additional MGCE facility will be licensed unless all MGCE facilities together cannot meet measured and projected consumer demand for two years. (§ 12(F))
- The MGCE facilities may expand its structures and related operations to adjacent real property, if needed to meet demand before any new license is issued. (§§ 12(F) & (L)(1))
- MPM facilities must buy from the ten MCGE facilities
 - “MPM” facilities have exclusive rights to make, process, package and sell marijuana infused products and accessories. (§ 12(G))
 - MPM facilities must buy marijuana only from exclusive, licensed MGCE facilities. (§ 12(G))
- Marijuana retail stores also must buy from the ten MCGE facilities
 - Only Marijuana retail stores can sell marijuana and marijuana infused products to individuals in Ohio. (§ 12(H))
 - Marijuana retail stores can buy marijuana only from exclusive, licensed MGCE facilities and marijuana infused products from MPM facilities. (§ 12(H))
- Medical marijuana dispensaries must buy from the ten MCGE facilities
 - Medical marijuana dispensaries are established to sell medical marijuana to patients. (§ 12(C))

- Medical marijuana dispensaries must buy medical marijuana from exclusive, licensed MGCE facilities. (§ 12(C))
- **Medical and Recreational Use**
 - There is no provision for home grown marijuana to be sold. It may only be shared. All purchases must be from a licensed retail or medical dispensary. (§ 12(D))
 - For recreational use, individuals may buy, transport, possess and share up to 1 ounce of marijuana from a retail store and may grow, possess, use and share up to 8 ounces of homegrown marijuana. (§ 12(D))
 - With a physician certification, a person may obtain medical marijuana from a medical marijuana dispensary. (§ 12(C))
- **Location of Marijuana Establishments**
 - The ten MGCE facilities will be on parcels designated in the Proposed Amendment but can expand into adjacent parcels. (§ 12(F))
 - Approximately 1,100 marijuana retail stores are permitted in Ohio's 88 counties, based on population ratios, licensing and results of local option elections. (§ 12(H))
 - Marijuana testing facilities are created near colleges to research and/or certify marijuana which is obtained only from the ten MCGE facilities. (§ 12(L)(12))
 - A marijuana establishment may be located within 1,000 to a place of worship, a library, a school, a playground or a day-care center that did not exist as of January 1, 2015 or otherwise at the time the marijuana establishment first applies for a license. (§ 12(J)(1))
 - No local laws, regulations or similar provisions can prohibit the development of a marijuana establish that is not in an area zoned exclusively residential as of January 1,

2015 or otherwise when the marijuana establishment first applies for a license.
(§ 12(J)(10))

○ **Special Tax Rates**

- Owners of marijuana establishments will be exempted from Ohio tax on distributed income. (§ 12(E))
- Marijuana establishments will pay some, but not all, taxes applicable to other Ohio businesses. (§ 12(E))
- MGCE facilities and MPM facilities will pay a special flat tax of 15% on gross revenue, while retail stores will pay a 5% special flat tax on gross revenues. (§ 12(E))

○ **The Marijuana Control Commission Is Formed, But Frail**

- The Commission will regulate Ohio's new marijuana monopoly and market. (§ 12(I))
- The Commission may not promulgate rules that require "a high investment of risk, money, time, or any other resource or asset" by a marijuana establishment. (§§ 12(I) & (L)(20))
- The Commission may issue remedial orders, but can only terminate the license of a marijuana establishment that "has repeatedly failed to comply" with those remedial orders. (§ 12(I))

○ **The General Assembly is Handcuffed**

- It cannot ban medical marijuana use on school grounds, at state-licensed day care centers, at correctional facilities, or community corrections facilities. (§ 12(J)(2))
- It cannot ban the use of medical marijuana by employees who "self-administer" the drug while at work. (§ 12(J)(4))

- It cannot ban individuals of any age from purchasing, possessing, transferring, transporting, using or sharing medical marijuana accessories. (§ 12(J)(7))
- It cannot adjust the special tax rates and distribution of those tax revenues. (§ 12(E))
- It cannot levy “additional taxes, assessments, fees or charges ... on the operations, revenue, or distributed income of [a MGCE facility, a MPM facility, a retail marijuana store, or a medical marijuana dispensary]. (§ 12(E))
- It cannot legislate *who* can use medical marijuana.

The Ballot Board sufficiently summarized the key provisions that inform the voters of the most salient aspects of the Proposed Amendment. Should voters want more, the entirety of the Proposed Amendment text, will be available at every polling place. R.C. 3505.06(E). The complete text of the Proposed Amendment and arguments – pro and con – are also available on the Secretary’s website (<http://www.sos.state.oh.us/sos/LegnAndBallotIssues/BallotBoard.aspx>) and will be published in each county of this State for three consecutive weeks before the election. Ohio Constitution, Article XVI, Section 1; R.C. 3501.05(BB), 3505.062(F) & (G).

ARGUMENT

I. Standard of Review

Relators, proponents of a proposed amendment of unprecedented scope and convoluted construction, cannot meet their high burden of showing that the Ballot Board and the Secretary of State abused their discretion and disregarded clearly established law when they adopted the Ballot Language and Ballot Title. Relators' complaint, briefing, and submission of evidence all fail to show that the Ballot Title or Ballot Language will mislead, deceive or defraud the voters. The writ of mandamus should be denied.

When an amendment is proposed to the Ohio Constitution, the Ballot Board prescribes the official ballot language, which "shall properly identify the substance of the proposal to be voted upon" and will be upheld as valid unless it is shown "to mislead, deceive or defraud the voters." Ohio Constitution, Article II, Section 1g; *id.*, Article XVI, Section 1. After ballot language is prescribed, the Secretary of State must "[p]repare the ballot title" 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. 3501.05(H) & 3519.21.

This court should deny mandamus unless Relators show that the ballot title or ballot language will "mislead, deceive or defraud the voters." *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, 978 N.E.2d 119, ¶ 26. The Court's analysis is guided by a three-part test:

- **First, a voter has the right to know what it is he is being asked to vote upon.**
- **Second, use of language which is "in the nature of a persuasive argument in favor of or against the issue * * *" is prohibited**
- **And, third, "the determinative issue * * * is whether the cumulative effect of these technical defects [in ballot language] is harmless or fatal to the validity of the ballot."**

Voters First, 133 Ohio St.3d at 264, ¶ 26 (emphasis added and citations omitted) (quoting *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 519, 426 N.E.2d 493 (1981)) (citing also *Jurcisin v. Cuyahoga Cty. Bd. of Elections*, 35 Ohio St.3d 137, 141, 519 N.E.2d 347 (1988)).

The burden here is on Relators to establish both “a clear legal right to compel the ballot board to revise its ballot language, [and] a corresponding clear legal duty on the part of the board to revise its ballot language.” *State ex rel. Cincinnati for Pension Reform v. Hamilton Cty. Bd. of Elections*, 137 Ohio St.3d 45, 2013-Ohio-4489, 997 N.E.2d 509, ¶ 20. Absent evidence of fraud or corruption, relief is appropriate only upon a showing of abuse of discretion or clear disregard of applicable law. *Voters First*, 133 Ohio St.3d at 263, ¶ 23 (citing *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, ¶ 30).

II. The Ballot Title Provides Voters a True, Impartial and Clear Synopsis of the Proposed Amendment – Which Grants a Monopoly for the Commercial Production and Sale of Marijuana for Recreational and Medicinal Use.

Presented with the Proposed Amendment of a size, scope and structure previously unseen in Ohio’s constitutional history, the Secretary of State properly prepared a title that gives 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 Ballot Title should not be invalidated because it “provides a clear synopsis of the proposed . . . amendment,” that is “not inaccurate, incorrect, or illegal . . . [or] confusing, misleading, or argumentative.” *Jurcisin*, 35 Ohio St.3d at 141.

A. The Proposed Amendment grants a monopoly: ten landowners get exclusive constitutional rights to grow, cultivate, extract and sell all marijuana in Ohio, including for medicinal use.

1. The Proposed Amendment grants a monopoly.

Relators do not acknowledge the everyday understanding of the term “monopoly”; they seek to avoid it by citation to irrelevant treatises and out-of-state federal district court cases. (Relators’ Br. at 41-42. *See also* Amicus Br. of Mr. Wood and DGF, LLC at 5-6.)

a. Exclusive control – by one or a group – is a monopoly in common use.

Assuming that the exclusive rights granted under the Proposed Amendment will vest in ten different entities, “monopoly” accurately describes their exclusive control over the medicinal and recreational marijuana market. The plain meaning of “monopoly” is “[t]he exclusive possession or control of the supply or trade in a commodity or service” and includes a “company or **group** having exclusive control over a commodity or service.” *See* “Monopoly,” *Oxford English Dictionary*, available at http://www.oxforddictionaries.com/us/definition/american_english/monopoly (emphasis added). *See also* “Monopoly,” *Dictionary.com*, available at <http://dictionary.reference.com/browse/monopoly> (including “exclusive control of a commodity or service in a particular market, or a control that makes possible the manipulation of prices” and “a company or group that has such control”).

b. Control – by one or a group – is a monopoly in the law, too.

Relators are mistaken that the law provides any different definition; in legal parlance, too, exclusivity is the hallmark of a monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (monopoly power is “the power to control prices or exclude competition”); *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 223, 22 S. Ct. 820, 46 L. Ed. 1132 (1902) (a monopoly is “the right to exclude others from . . . doing” the same

thing). The law also recognizes that a monopoly can be created when multiple actors combine their efforts to build “empires” and keep competition out of their domain. *See, e.g.*, 15 U.S.C. § 2 (providing criminal penalties for “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce”); *Grinnell Corp.*, 384 U.S. at 571 (“defendants have monopoly power” in that they have “buil[t] [an] empire”); *see also United States v. Patten*, 226 U.S. 525, 542, 33 S. Ct. 141, 57 L. Ed. 333 (1913) (“a conspiracy [by several market participants] to run a corner in the market” results in a monopoly); *State ex rel. Brown v. Napco*, 44 Ohio App.2d 140, 142, 336 N.E.2d 439 (11th Dist. 1975) (two or more persons are capable of combining into monopolies prohibited by Ohio law).

This is particularly true when exclusive control is derived from governmental action. *See e.g. Ohio Motor Vehicle Dealer’s and Salesman’s Licensing Board v. Memphis Auto Sales*, 130 Ohio App. 347, 356, 142 N.E.2d 268 (8th Dist. 1957) (finding that a statute restricting automobile dealers’ ability to advertise vehicles for sale absent a franchise from a manufacturer created a “monopoly by way of a special privilege in favor of the persons enfranchised by the manufacturers.”).

In any event, this Court need not decide the scope of federal antitrust law but, instead, only whether “monopoly” is a fair description of the important provision of the Proposed Amendment. The Proposed Amendment grants a few persons the exclusive rights to establish and operate MGCE facilities, and to control supply and sale of raw marijuana material in Ohio. The Ballot Title fairly and accurately describes the proposed monopoly, as the term is defined by the United States Supreme Court and Ohio law.

2. The MGCE facilities will have monopoly power over marijuana – everyone must buy from them, directly or indirectly, and competitors are excluded from the market.

The predominant feature of the Proposed Amendment is that all manufacturing and sales of marijuana products in Ohio will begin with marijuana grown at and sold by ten MGCE facilities. Those facilities are granted the exclusive privilege of serving as the only suppliers of marijuana to the Ohio market. (Proposed Amendment, § 12(G).) Relators attempt to avoid this reality by claiming that since the Proposed Amendment does not predesignate, limit or give exclusive rights to downstream customers of the MGCE facilities – including not-for-profit medical marijuana dispensaries (“Dispensaries”), marijuana product manufacturing (“MPM”) facilities, or marijuana retail stores – then there cannot be a “monopoly” over the commercial production and sale of marijuana. (Relators’ Br. at 42-45.)

The cartel-like structure is a monopoly. All of the downstream manufacturing facilities and the retail stores must buy from the cartel. There will be no other source for commercial and medical marijuana. The fact that the Proposed Amendment authorizes creation of a potentially unlimited number of MPM facilities or approximately 1100 Retail Marijuana Stores (“RMS”) that may engage in downstream manufacturing and sales of marijuana products does not change this result. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 241-242, 68 S. Ct. 996, 92 L. Ed. 1328 (1948) (in an integrated industry, where a monopoly controls the source of the only raw material consumed in that industry, the monopolistic effect reduces competition at all levels in the industry, including in the distribution channels); *United States v. Swift*, 188 F. 92, 100-101 (D.Ill. 1911) (a monopoly on production of raw materials infects all stages of the market, and even if it cannot be called “an absolute monopoly,” it is, at the very least, “a commercial monopoly” in that it reduces free competition throughout the market.) Thus, the proposed title of the ballot initiative is accurate and not misleading in that

“production” – growing of marijuana – and “sale” – sale to manufacturers and dispensaries – will be controlled by the monopoly.

3. The Proposed Amendment’s licensing scheme not only limits entry into the market but does not promote competition and allows indefinite control of the market.

There is no persuasive value to Relators’ suggestion that the MGCE facilities could lose their rights – voluntarily or involuntarily – or could face increased competition in the form of one new licensee per year beginning in four years. (Relators’ Br. at 19-20 & 42.) If enacted, the Proposed Amendment will create a monopoly from day one. Increased competition in the market will not threaten the exclusive license of any MGCE facility. And it is purely speculative to suggest that there is no monopoly because one or more cartel members **might** leave the cartel. Even Relators’ amici admit, “there will be, at all times, at least ten” MGCE facilities because “by issuing only a limited number of grower licenses, the State increases the value of each license. License holders therefore have an incentive to retain their licenses by cooperating with the State and meeting regulatory requirements.” (Br. Amici Frank Wood & DGF, LLC, 9/4/15, at 1 & 2.)

Even if the market demand exceeds supply available for two years, and an additional MGCE may be added to the market, the ten MGCE facilities still are protected from competition because that new MGCE will not be competing; it will simply be meeting unmet demand. And, before that happens, the exclusive MGCE facilities will likely exercise their newly minted constitutional rights to expand their facilities onto adjacent properties, defined as being within 1,000 feet around the entire circumference of the pre-determined 10 parcels, thus adding hundreds of total acres to increase capacity if rising demand requires it. (Proposed Amendment, §§ 12(F) & (L)(1).)

By the time that another facility even could be considered by the Commission – again, only to meet excess market demand – the exclusive MGCE facilities would have enjoyed years

of monopoly control over the market for commercial production and sale of marijuana in Ohio. Relators are wrong when they claim that there is “no monopoly” on “commercial manufacturing” or “commercial sales” of marijuana. The Proposed Amendment undisputedly limits the number of downstream MPM or RMS facilities and medical marijuana dispensaries.

4. Homegrown marijuana, purchased only from one of the ten designated growers, cannot be sold. It can only be shared.

There is no provision in the proposed Constitutional Amendment for homegrown marijuana to be sold. It can be shared, but not sold. End users, recreational or medicinal, may not sell that which they have been allowed to grow. Furthermore, the homegrowers will have to purchase their plants from one of the designated 10 growing facilities. Those who do not grow their own may only buy from the retail establishments supplied by the cartel. This prohibition on individual commerce and competition further defines the monopoly.

B. The Ballot Title accurately and clearly refers to recreational use of marijuana, which is widely and commonly understood to describe nonmedicinal use of marijuana.

Using the term “recreational” in the Ballot Title and the Ballot Language is not misleading or factually inaccurate. The Proposed Amendment allows medical use of marijuana; in addition, it allows individuals to “purchase, possess, transport, use and share with another person” marijuana and marijuana infused products from marijuana retail stores and also allows individuals to “grow, cultivate, use, possess, and share with another person . . . homegrown marijuana.” (Proposed Amendment, § 12(D)). Such individual, non-medical use fits squarely within the common dictionary meaning of “recreational.” Merriam-Webster defines “recreational” as something “done for enjoyment,” and, in the sense of a “recreational drug,” as “for pleasure instead of for medical purposes.” See “Recreational,” *Merriam-Webster.com*, Merriam-Webster, n.d. Web., available at <http://www.merriam-webster.com/dictionary/>

recreational. Indeed, the usage example in the dictionary is: “Marijuana is a recreational drug.” *Id.* No other description or term is more accurate.

1. “Recreational” is more precise and accurate than “Personal.”

The term “recreational” *more* accurately describes non-medical use of marijuana than Relators’ preferred term, “personal,” since individuals may share marijuana under the Proposed Amendment. *See* “Personal,” *Merriam-Webster.com*, Merriam-Webster, n.d. Web., *available at* <http://www.merriam-webster.com/dictionary/personal> (“intended for private use or use by one person”). As used in the Proposed Amendment, the term “personal” is both over-inclusive (including individual, non-shared recreational and medical use) and under-inclusive (not including shared recreational use). “Recreational” is an eminently reasonable and fair way to describe non-medical use of marijuana allowed under the Proposed Amendment.

2. The popular press describes non-medical use of marijuana as “recreational use.”

The term “recreational” is also used pervasively in daily discourse. Newspapers across Ohio already regularly employ the term to describe the Proposed Amendment. *See, e.g.,* Editorial, *Fighting the Cartel*, THE COLUMBUS DISPATCH (Aug. 23, 2015) (“Ohio would become only the fifth state to legalize marijuana use for recreational purposes”); Laura Bischoff, *Ohio’s marijuana controversy: Big-stakes ballot to unfold*, THE DAYTON DAILY NEWS (Aug. 23, 2015) (“[I]n many respects, Ohio’s plan for recreational marijuana resembles what the other four states are doing.”); Jackie Borchart, *Marijuana legalization amendment approved for Ohio’s November ballot*, THE CLEVELAND PLAIN DEALER (Aug. 12, 2015) (“Ohio voters will decide this fall whether to legalize marijuana in the Buckeye State for recreational and medical use.”); Anna Saker, *Cincinnati developer buys into marijuana legalization*, THE CINCINNATI ENQUIRER (July 24, 2015) (“. . . one of the proposed 10 farms that will grow marijuana if Ohio enacts a

constitutional amendment legalizing recreational use in November.”). And in states that have previously legalized non-medical marijuana use, including Oregon, Washington, and Colorado, the term “recreational” is equally in common usage to describe legalization.¹

3. Medical and academic literature refers to the non-medical use of marijuana as “recreational use.”

This use of “recreational” also accords with the terminology of academic literature on the subject. For example, one recent study by doctors from Nationwide Children’s Hospital in Columbus, regarding the effect of marijuana exposure on young children, referred to the four states and the District of Columbia that “have also voted to legalize marijuana for recreational use.” Onders *et al.*, *Marijuana Exposure Among Children Younger Than Six Years in the United States*, CLINICAL PEDIATRICS, Aug. 2015, at 1-9. Indeed, the authors categorized all marijuana use as done either “illegally, medically, or recreationally.” *Id.* at 7.

This usage in medical and academic writing is not restricted to Ohio. *See, e.g.*, Saloner, *et al.*, *Policy Strategies to reduce youth recreational marijuana use*, PEDIATRICS, June 2015; Rezkalla, S., & Kloner, R., *Editorial: Recreational Marijuana Use: Is it Safe for Your Patient?*, J. AM. HEART ASSOC., Apr. 2014; Weitzer, *Legalizing Recreational Marijuana: Comparing Ballot Outcomes in Four States*, 2 J. QUAL. CRIM. JUST. & CRIMINOLOGY, Oct. 2014; D’Souza, *et al.*, *Medicinal and Recreational Marijuana Use among HIV-Infected Women in the Women’s Interagency HIV Cohort (WIHS), 1994–2010*, 61(5) J. ACQUIR. IMMUNE DEFIC. SYNDR. 618–626, Dec. 2012.

¹ *See, e.g.*, Noelle Crombie, *Oregonian/OregonLive seeks freelance marijuana reviewer*, THE OREGONIAN (Aug. 14, 2015) (describing “recreational consumers” of marijuana); Joseph O’Sullivan, *Wining, dining and policy talk on agenda as lawmakers converge on Seattle*, THE SEATTLE TIMES (Aug. 6, 2015) (detailing “recreational-pot sales”); John Frank, *Colorado, Washington legislators lead pot panel at lawmaker conference*, THE DENVER POST (Aug. 5, 2015) (“In roughly 20 states this year, lawmakers proposed bills to legalize marijuana for recreational use . . .”).

4. Relators offer no evidence of other personal use.

Perhaps most telling is that Relators make no allegation and offer no evidence that there is any other allowed “personal” use that is not medical and that is not captured by the term “recreational.” That is because there is no other description. Given the everyday use of the term “recreational” to describe the type of legalization contemplated by the Proposed Amendment, and the factual accuracy of using the term to describe home, non-medical use that is both personal and shared, the Ballot Title and Ballot Language are written “[f]airly and accurately” to “assure a free, intelligent and informed vote.” *Markus v. Bd. of Elections*, 22 Ohio St.2d 197, 203, 259 N.E.2d 501 (1970).

III. The Ballot Language Is a Fair and Accurate Summary of Information Relevant to Voters – Even More Fair and Accurate Than Their Amendment Summary in the 6,500+ Word Proposed Amendment.

Grappling with the Proposed Amendment’s historic size and statute-like contents, the Board has crafted Ballot Language which “properly identif[ies] the substance of the proposal to be voted upon,” while cognizant of the fact that the Ballot Language “need not contain the full text . . . of the proposal.” Ohio Constitution, Article XVI, Section 1. The question before the Court is not whether it “might have used different words to describe the language used in the proposed amendment, but, rather, whether the language adopted by the ballot board properly describes the Proposed Amendment.” *Bailey*, 67 Ohio St.2d at 519 (citing *State ex rel. Foreman v. Brown*, 10 Ohio St.2d 139, 150, 226 N.E.2d 116 (1967)). Thus, the Board’s chosen language will not be invalidated so long as it is “not misleading in the sense of leading the reader to draw a false conclusion,” “d[oes] not introduce a new subject that [is] outside the terms of the Proposed Amendment,” or “[is] not factually inaccurate.” *Cincinnati Pension Reform*, 137 Ohio St.3d at 52, 54, ¶¶ 35, 49.

A. The Proposed Amendment grants exclusive rights to ten MGCE facilities.

Bullet Point 1 of the Ballot Language fairly and accurately explains that the Proposed Amendment would:

Endow exclusive rights for commercial marijuana growth, cultivation, and extraction to self-designated landowners who own ten predetermined parcels of land in Butler, Clermont, Franklin, Hamilton, Licking, Lorain, Lucas, Delaware, Stark, and Summit Counties. One additional location may be allowed for in four years.

(Compl., Ex. 7.)

1. MGCE facilities have exclusive rights, as further licensing is speculative.

The crux of the Proposed Amendment is that only 10 self-designated entities will be allowed licenses to grow, cultivate, and extract marijuana at the inception of this new industry, with the granting of any additional licenses being only speculative. (*See* Proposed Amendment, § 12(F)) (There “shall be only ten [marijuana growth, cultivation, and extraction] facilities, which shall operate” on designated properties in Butler, Clermont, Franklin, Hamilton, Licking, Lorain, Lucas, Delaware, Stark, and Summit Counties.). Those rights are exclusive, *i.e.*, limited under the Proposed Amendment to ten designated landowners. The Ballot Language fairly and accurately describes these rights, which would be conferred by the Proposed Amendment.

2. Others can obtain licenses to operate MGCE facilities in only very limited ways.

a. The possible loss or relinquishment of an MGCE facility is too speculative to require inclusion in the Ballot Language.

There are only two exceptionally limited situations in which others may receive licenses: either (1) an existing MGCE license is voluntarily relinquished or involuntarily terminated for illegal conduct or (2) if the Commission determines that an additional license is necessary to meet demand in four years. (*See* Proposed Amendment, § 12(F)) (“beginning in the fourth year

following the adoption of this section the Commission may issue a license for an additional . . . facility”). Relators erroneously argue that the omission of these very circumscribed exceptions is fatal to the Ballot Language. (*See* Compl., ¶ 62.)

b. License holders have safeguards against supply shortfalls and a new entrant.

The Ballot Language need not explain that the designated landowners *could* lose their rights to licenses, which *could* then be reassigned by the Commission, *only* if they voluntarily relinquish those rights or if they violate local or state laws and regulations. One of the interested landowners dispels any such concerns, conceding that “there will be, at all times, at least ten growth and cultivation farms.” (Br. Amici Frank Wood and DGF, LLC, 9/4/15, at 1.) Besides, the Proposed Amendment provides several safeguards for the first ten MGCE facilities – although Relators make no mention of them. For example, no new license can be granted unless all MGCE facilities together cannot meet demand for two years – one year looking back and one year projected out. (Proposed Amendment, § 12(F).) Nor do Relators mention that MGCE’s will have a *new* constitutional right to expand their “facilities” up to 1,000 feet all around the existing, exclusive sites to meet demand. (*Id.*, §§ 12(F) & (L)(1).)

c. Financial benefits of control prevent license holder default.

Moreover, the possibility that designated landowners could lose their licenses by violating the law is speculative and perhaps even remote. The Commission cannot terminate an MGCE facility’s license unless “the Commission determines that the licensee has **repeatedly** failed to comply with its remedial orders.” (Proposed Amendment, § 12(I)) (emphasis added). As one of the interested landowners admits, that will not happen: “License holders therefore have an incentive to retain their licenses by cooperating with the State and meeting regulatory requirements.” (Br. Amici Frank Wood and DGF, LLC, 9/4/15, at 2.)

Because of how speculative those scenarios are, their omission from the Ballot Language would not lead voters to draw a false conclusion about the Proposed Amendment. *See Cincinnati Pension Reform*, 137 Ohio St.3d at 52, ¶ 35 (upholding Ballot Language that was “not misleading, in the sense of leading the reader to draw a false conclusion”).

d. Only one additional marijuana growth, cultivation, and extraction facility may be licensed four years after the adoption of the Proposed Amendment.

The Ballot Language accurately states that only one additional facility may be licensed four years after adoption of the Proposed Amendment. (*See* Compl., Ex. 7.) Relators’ only attack on that language requires them to add language that is not in the Proposed Amendment, claiming “The Proposed Amendment actually states that beginning in the fourth year, and continuing each year after, the [Commission] can issue an additional license for a MGCE facility, based on annual audits and consumer demand in the previous year.” (Relators’ Br. at 20) (citing Proposed Amendment, § 12(F)) (emphasis in original).) But the Proposed Amendment does not say anywhere “*continuing each year after.*” Relators are making that up.

Even if the Proposed Amendment is read as Relators would have it, the MGCE facilities would not lose monopoly power. A new MGCE facility would be licensed only if demand were so great that the exclusive MGCE facilities did not meet the demand and could not likely meet it. The existing, exclusive MGCE facilities would, therefore, suffer no prejudice to their rights or interests. And the monopoly over all downstream sales would continue. Thus, the possible future growth in the number of facilities is insignificant and thus non-essential information for voters. *Cf. Cincinnati Pension Reform*, 137 Ohio St.3d at 59, ¶ 75 (concluding that omission from summary that city would be prohibited from raising taxes or reducing services to fund cost of living adjustments was “not core, essential information, simply because the amount of money involved [was] relatively small compared to the overall impact of the total amendment”).

3. Use of the term “endow” accurately, fairly and succinctly describes the granting without compensation of an exclusive right or privilege upon those who previously did not have such right or privilege.

The Ballot Language properly, non-prejudicially uses the verb “endow.” As commonly used, “endow” means “To enrich with property” or “To invest with (privileges, etc.)” or “To enrich or furnish with any ‘gift.’” “Endow,” *Oxford English Dictionary*, available at http://www.oed.com/view/Entry/62005_; see also, *Merriam-Webster.com*. Merriam-Webster, n.d. Web., available at <http://www.merriam-webster.com/dictionary/endow> (“to provide with something freely or naturally”; “to furnish with an income: to make a grant of money providing for the continuing support or maintenance of”).

Relators selectively choose an outdated “ordinary” use when they argue that the choice of “endow” is confusing because it can mean “to furnish with a dower.” (See Compl., ¶ 86.) Relators’ argument depends on a definition that “would have [no] meaning to the lay public.” *Cincinnati Pension Reform*, 137 Ohio St.3d at 60, ¶ 83.

The Ballot Language dispels the remote possibility of any such confusion because it says that the Proposed Amendment would endow “exclusive rights” – not “dower.” In the Ballot Language, “endow” is used as it has been for centuries,² meaning “to enrich with property” or “to invest with (privileges, etc.)” or “to enrich or furnish with any ‘gift’” – that is, without compensation. The word “endow” captures succinctly the gravity and extent of privileges that will exclusively be given to a select few for an indefinite period of time by an affirmative vote by Ohio citizens.

² It is doubtful that George III had any such confusion in 1776, and virtually certain that no Ohioan today would conclude from the Ballot Language that the Proposed Amendment is a form of marital inducement.

Relators cannot establish that the use of “endow” would “mislead, deceive, or defraud the voters.”

B. The Proposed Amendment establishes 1100 marijuana retail stores based upon Ohio’s population.

The Ballot Language, in the second bullet point, explains that the Proposed Amendment would:

Permit retail sale of recreational marijuana at approximately 1,100 locations statewide.

(Compl., Ex. 7.) This language fairly reflects the subject matter at the core of the Proposed Amendment. *Voters First*, 133 Ohio St.3d at 267, ¶ 41 (emphasizing that the summary language fairly reflect the “subject matter [that] strikes at the very core of the Proposed Amendment”).

1. Additional restrictions regarding the establishment of marijuana retail stores are peripheral yet are alluded to by the Ballot Language.

Although Relators do not dispute that the Ballot Language conveys essential information, they claim that the Ballot Language should be supplemented with more details about potential limitations on the number of marijuana retail stores resulting from licensing requirements and local option privileges. (Compl., ¶¶ 56–58.) There is no merit to this argument.

The Ballot Language need not detail every way in which the number of marijuana stores could be restricted under the Proposed Amendment. Such restrictions are peripheral to the core subject and their inclusion would defeat the purpose of the Ballot Language. *See Jurcisin*, 35 Ohio St.3d at 142 (“Of course a greater degree of accuracy of expression would have resulted if the ballot had contained the lengthy technical terms of the entire amendment, but this is the very difficulty sought to be avoided by the statute which expressly states that the ‘ballot need not contain the full text of the proposal.’”). Indeed, the cumbersome construction of the Proposed Amendment makes it unclear what could be accurately added to the Ballot Language. For

example, the Proposed Amendment requires that marijuana retail stores be subject to local option elections in a manner applicable to alcohol sales – except for provisions unique to alcohol sales. (Proposed Amendment, § 12(H).) This is more likely to confuse than inform a reasonable voter at the polling place.

Nevertheless, the Ballot Language does indicate that there are additional restrictions in the Proposed Amendment regarding the total number of marijuana retail stores. The Ballot Language uses the word “permit” to describe the number of marijuana retail stores, rather than “require” or “establish.” The Ballot Language uses the word “permit” in ordinary sense of “to afford the opportunity to” establish. *See, e.g., “Permit,” Oxford English Dictionary, available at http://www.oxforddictionaries.com/us/definition/american_english/permit (“[with object] (Of a thing, circumstance, or condition) provide an opportunity or scope for (something) to take place; make possible”).* *See also Zak v. Ohio State Dental Bd.*, 2004-Ohio-2981, at ¶ 64 (Ohio Ct. App. June 10, 2004) (noting that the Merriam Webster’s Collegiate Dictionary “defines to ‘permit’ as . . . ‘To Consent to; allow’ or . . . ‘To afford opportunity to’; it does not “make reference to a ‘right to control or direct’”). The essence of the Proposed Amendment is that it authorizes the establishment of a formulaic number of marijuana retail stores, that is, one for every 10,000 persons. The Ballot Language fairly reflects that information.

2. The Ballot Language gives voters a better understanding of the number of marijuana retail stores under the Proposed Amendment than does the Proposed Amendment itself.

Just as unreasonable as requiring that the Ballot Language include every restriction on the number of marijuana retail stores, is forcing voters to apply the formula set forth in the Proposed Amendment in order to determine the approximate number of marijuana retail stores permitted by the Proposed Amendment. (*See, e.g., Compl.*, ¶ 58.) Most voters encountering this issue will do so for the first time at a voting booth under inherent space and time limitations. *See Dodd v.*

Cristenfeld, 49 A.D.2d 916, 916 (N.Y. App. Div. 1975) (recognizing that there are “space and time limitations inherent in a voting booth”). That is no time to be making mathematical calculations using uncertain population figures. Not only would voters need to know the current population of Ohio but also of each of their counties in order to accurately contemplate the number of proposed retail locations. By disclosing to voters that the formula set forth in the Proposed Amendment would permit approximately 1,100 locations – $(1/10,000) \times (11,594,163)^3$ – the Ballot Language provides a *clearer* description to voters of what the Proposed Amendment contemplates than the actual formula itself.

C. Bullet point 4 accurately informs voters about the quantity of marijuana that would be legalized by the Proposed Amendment.

1. The Ballot Language distinguishes between marijuana that may be purchased and homegrown and does not lead the reader to draw the false conclusion that over one-half pound of marijuana may be purchased or transported.

The Ballot Language fairly and accurately states the substance of the Proposed Amendment relating to recreational use of marijuana. The Proposed Amendment allows adults to “purchase, possess, transport, use and share . . . one ounce or less of marijuana.” (Proposed Amendment, § 12(D).) It also allows adults to “grow, cultivate, use, possess, and share with another person 21 years of age or older homegrown marijuana in an amount not to exceed four flowering marijuana plants and eight ounces of usable homegrown marijuana at a given time.” (*Id.*)

The Ballot Language accurately aggregates these amounts and activities and says the Proposed Amendment would: “Allow each person, 21 years of age or older, to purchase, grow, possess, use, transport and share over one-half pound of marijuana or its equivalent in marijuana-

³ See <http://www.development.ohio.gov/files/research/P7001.pdf>.

infused products at a time (a total of 8 ounces of usable, homegrown marijuana for recreational use, plus 1 ounce of purchased marijuana for recreational use), plus 4 homegrown, flowering marijuana plants.” The Ballot Language, as written (and explained in the parenthetical), is conjunctive and shows a reasonable reader that the one-half pound number applies not to each activity individually but to the combination of activities joined together to demonstrate a series of activities allowed. See “And,” *Merriam-Webster.com*. Merriam-Webster, n.d. Web., available at <http://www.merriam-webster.com/dictionary/and> (“used as a function word to indicate connection or addition especially of items within the same class or type ; used to join sentence elements of the same grammatical rank or function”).

While Relators argue that the Ballot Language misrepresents allowed activities and amounts, they can support their argument only by deliberately misstating the Ballot Language. Relators’ quotation of the Ballot Language simply reads “[a]llow each person, 21 years of age or older to purchase, grow, possess, use, transport and share over one-half pound of marijuana (Compl., ¶ 38) (emphasis in original); (Relators’ Br. at 11.) After Relators’ ellipses, however, the Ballot Language includes a parenthetical explaining the “one-half pound” as “(a total of 8 ounces of usable, homegrown marijuana for recreational use, plus 1 ounce of purchased marijuana for recreational use).” (Compl., Ex. 7) (emphasis added). By omitting the remainder of the bullet point, Relators mischaracterize the ballot language. When read as written – that is, with the parenthetical – the “over one-half pound” language Relators deem inappropriate simply tells voters, accurately, that the combination of marijuana that one may grow (8 ounces) and that one may purchase (1 ounce) amounts to more than one-half pound, a true statement. The text of the Ballot Language is accurate and fair.

Also notable is the fact that the Ballot Language does **not** read “[a]llow each person . . . to purchase, grow, possess, use, transport **or** [not in original] share over one-half pound of marijuana.” If the language did read that way, it would imply that over one-half pound of marijuana would be legal for each activity *on its own, or alternatively*. See “Or,” *Oxford English Dictionary*, available at http://www.oxforddictionaries.com/us/definition/american_english/or (“Used to link alternatives”).

Inclusion of the “over one-half pound” language is a “clear and concise statement of the Proposed Amendment . . . sufficient to inform the voters of the contents of the amendment.” *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St.2d 34, 37, 218 N.E.2d 446 (1966).

2. Bullet point 4 of the Ballot Language does not prevent voters from understanding the substance of the proposal being voted upon.

Finally, Relators themselves have failed to highlight this distinction in their Amendment Summary written by their own hand. Their Amendment Summary does not make mention of the ability to purchase or transport any marijuana or the 1 ounce or 8 ounce distinctions. (Proposed Amendment, § 12(A).) Were the quantity distinctions truly an “essential part” of the Proposed Amendment, such that omission of the distinctions would “strike at the very core of the Proposed Amendment,” see *Cincinnati Pension Reform*, 137 Ohio St.3d at 56, ¶ 59, then surely that distinction would be evident in the summary Relators wrote and inserted into the Proposed Amendment. It is not. The precise quantity splits by allowed activity are peripheral details that do not strike at the core of the Proposed Amendment and may be omitted. *Id.*, ¶ 60.

D. Bullet point 4 of the Ballot Language fairly and concisely describes the Proposed Amendment’s provisions regarding medical marijuana.

The Ballot Title refers to medical marijuana and the Ballot Language refers to medical marijuana in three⁴ different places – addressing the establishment of medical marijuana dispensaries and their protection against local lawmaking and explaining that the Proposed Amendment would “[a]uthorize the use of medical marijuana by any person, regardless of age, who has a certification for a debilitating medical condition.” (Compl., Ex. 7, bullet points 4, 5 and 6.) Relators’ claim that more is required should be rejected.

1. Relators’ primary focus is on the quantity, not the quality, of the Ballot Language regarding medical marijuana.

Relators’ arguments show that they are primarily concerned with the *quantity* of the language regarding medical marijuana. (*See* Compl., ¶ 67.) This Court has emphasized, however, that the quality, rather than the quantity, of the summarized language is important. *See, e.g., Foreman*, 10 Ohio St.2d at 123 (refusing to wade into an argument over whether the Ballot Language was “too long” or “too short” because the relevant analysis is whether the ballot summary “properly describes” the proposed amendment).⁵

For instance, Relators argue that the Ballot Language should include the lengthy definition of “debilitating medical conditions” in the Proposed Amendment. (Compl., ¶ 69.) Relators also complain that the Ballot Language does not explicitly state that the Proposed Amendment legalizes production of medical-marijuana infused products. (Compl., ¶ 70.) But,

⁴ Relators inaccurately allege that the Ballot Language refers to medical marijuana only twice. (*See* Compl., ¶ 66; Relators’ Br. at 23.)

⁵ While Relators appear to complain that they would prefer less mention of “recreational” marijuana in the ballot language, their ubiquitous campaign with “Buddie” on Ohio’s college and university campuses demonstrates their own emphasis on recreational use. *See* Julie Carr Smyth, *Some Ohio health advocates want to nip pro-pot ‘Buddie’ mascot in the bud*, THE COLUMBUS DISPATCH (Sept. 8, 2015) (“James said ResponsibleOhio is seeking the youth vote, and Buddie is a way to get it.”)

again, both complaints are belied by their imbedded Amendment Summary. Their Amendment Summary, like the Ballot Language, refers to “the legalization of medical marijuana for use by persons with debilitating medical conditions” but does not define those conditions and does not mention production of medical marijuana-infused products. (Proposed Amendment, § 12(A).) As evidenced by their Amendment Summary, the omissions here are not crucial; they are merely superfluous and do not affect a voter’s ability to make an informed decision on whether to approve or reject the Proposed Amendment.

2. A physician’s certification, and parental consent for minors, before obtaining medical marijuana are implied in the Ballot Language and need not be stated explicitly.

The Ballot Language need not state the obvious. The Court should reject Relators’ argument that the Ballot Language should state that an Ohio physician must provide the certification necessary to obtain medical marijuana. For the same reason, the Court should reject Relators’ claim that the Ballot Language should state that minors need parental consent to obtain medical marijuana. Neither of Relators’ requested additions are essential information because the information is implicit in the Ballot Language.

In the context of “debilitating medical conditions,” adding to the Ballot Language that a “medical” certification for “medical” marijuana must come from an Ohio licensed physician would be mere surplusage. Physicians diagnose medical conditions and prescribe medical treatment, and under this circumstance, would “certify” the medical treatment.

Likewise, specific language that a minor would need a parent or guardian’s consent in order to get medical marijuana would be telling voters something they likely already would assume. Ohio law requires that minors receive parental consent before obtaining many forms of medical care and treatment, including prescriptions for other types of controlled substances. *See, e.g.,* R.C. 3719.061 (requiring parental consent before physicians can lawfully prescribe opioids

to minors). In sum, the word “medical” brings with it the obvious involvement of licensed medical practitioners and adherence to other Ohio laws regarding the treatment of minors.

To include these omitted provisions would be to state the obvious. Their absence does “not affect the fairness or accuracy of the” Ballot Language. *Voters First*, 133 Ohio St.3d at 265, ¶ 30.

E. Bullet point 5 of the Ballot Language accurately reflects the terms of the 1,000 foot requirements in the Proposed Amendment.

1. Describing the 1,000 foot requirements in permissive terms is not misleading and does not lead an average reader to any false conclusion about the requirements.

Bullet point 5 of the Ballot Language gives voters, in a format they can read summarily, information they surely want: how close a marijuana establishment can be built to a school, daycare center, playground, library or house of worship. The Proposed Amendment provides in convoluted language:

Permits marijuana growing, cultivation and extraction facilities, product manufacturing facilities, retail marijuana stores and not-for-profit medical marijuana dispensaries to be within 1,000 feet of a house of worship; a publicly owned library; a public or chartered non-public elementary or secondary school; or a child day-care center, or playground that is built after January 1, 2015 or after the date the marijuana operation applies for a license to operate.

(*See* Compl., Ex. 7.)

Relators’ complain that the Ballot Language is misleading because it “turns the restriction in the Proposed Amendment into a non-restriction” and fails to specify that the January 1, 2015 cutoff date applies to MGCE facilities whereas the date of the license application applies to MPM facilities, retail marijuana stores and not-for-profit medical marijuana dispensaries. (*See* Compl., ¶¶ 49-50.) Notably, Relators do not claim that bullet point 5 is false or inaccurate in any way. Factual accuracy is key to the determination of whether Ballot Language is misleading.

See Cincinnati Pension Reform, 137 Ohio St.3d at 51, ¶ 34 (“This court has disapproved Ballot Language on the grounds that it is misleading when the language would lead an average reader to draw a conclusion that is *false*.”) (emphasis in original). Bullet point 5 is accurate and not misleading.

2. Relators have attempted to hide the date limitations on the 1,000 “restriction.”

Relators attempt to bury the date limitations applicable to the 1,000 foot requirements – first, by omitting them from their Amendment Summary and then by tacking them on to in the “General Provisions” of the Proposed Amendment as restrictions. And, because the 1,000 foot requirements are written in a restrictive form, they are not easy to understand without essentially diagramming the sentence:

No marijuana establishment shall be located within 1,000 feet of the primary building structure used for any of the following: a house of worship exempt from taxation under the revised code; a publicly-owned library; a public or chartered non-public elementary or secondary school; or a state licensed child day-care center, or within 1,000 feet of any public playground or playground adjacent to any of the foregoing primary building structures, so long as such house of worship, library, playground, school or day-care center was in existence within the 1,000-foot zone on or before January 1, 2015 in the case of a MGCE facility or the date of an applicant’s first application for a license in the case of a MPM facility, retail marijuana store, or not-for-profit medical marijuana dispensary.

(Proposed Amendment, § 12(J)(1).) The Ballot Language makes the substance more readable without any inaccuracy or omission. By explaining the relationships between the dates and 1,000 foot restrictions in permissive, as opposed to restrictive, terms, the Ballot Language succinctly puts voters on notice of the consequence of the Proposed Amendment.

Relators do not like the Ballot Language because it does inform the citizens that certain marijuana establishments can be located within 1,000 feet of a daycare, school or church etc. if such is built after January 1, 2015, something voters are entitled to know without reading the

entire text of the Proposed Amendment. But “the language an amendment’s proponents may regard as a negative description of the law’s consequence could seem to its opponents merely a necessary explanation of the law’s meaning.” *Cincinnati Pension Reform*, 137 Ohio. St.3d at 55, ¶ 53. Explaining the meaning of the Proposed Amendment is exactly what the permissive form accomplishes.

3. The precise cutoff dates by facility and building type are not essential information.

Relators’ complaints about the failure of bullet point 5 to distinguish between the cutoff date of January 1, 2015 or later upon the date a license application is made for different marijuana establishments lack merit. Initially, such arguments are undermined by their imbedded Amendment Summary. Their Amendment Summary makes no mention of the date cutoffs for the 1,000 foot requirements, saying only – and inaccurately – that “[n]o marijuana establishment may be within 1,000 feet of a house of worship, a publicly-owned library, playground, an elementary or secondary school, or a state-licensed child day-care center.” (Proposed Amendment, § 12(A).) Thus, the description contained in bullet point 5 of the Ballot Language is *more* detailed and more accurate than their Amendment Summary contained in the Proposed Amendment itself.

The substance of the proposal at issue is that marijuana facilities may not be located within 1,000 feet of certain structures in existence prior to a certain time period but that marijuana facilities may be located within 1,000 feet of such structures that did not exist prior to that time period. Specific dates applicable to specific facility types are peripheral details. *See Cincinnati Pension Reform*, 137 Ohio St.3d at 56, ¶ 60. Bullet point 5 accurately reflects the substance of the Proposed Amendment, omits no material information, and does not lead the reader to draw a false conclusion, its validity should be upheld.

F. The Ballot Language summarizes the zoning provision of the Proposed Amendment fairly and accurately.

1. Local zoning or land use regulations cannot prohibit development of marijuana stores.

The voters are entitled to know that they cannot prohibit, through local zoning laws, the development of marijuana establishments in their communities. The substance of Section 12(J) of the Proposed Amendment provides that: “no local zoning, land use law . . . or similar provisions shall prohibit the development or operation of marijuana establishments...” The Ballot Language accurately relates that substance, stating that the Proposed Amendment would:

Prohibit any local or state law, including zoning laws, from being applied to prohibit the development or operation of marijuana growth, cultivation, and extraction facilities, retail marijuana stores, and medical marijuana dispensaries unless the area is zoned exclusively residential....

This language accurately tracks the Proposed Amendment and expressly refers to the inability of local laws to prohibit the *future* development or operation of marijuana establishments.

2. Regulations related to health, safety, and building codes expressly apply only to the already-developed marijuana establishments, but do not affect the permission to build such establishments.

Relator attempts to mask this sweeping edict by claiming that the Ballot Language should also include additional language that marijuana establishments “shall be subject to all applicable state and local laws and regulations related to health, safety and building codes, including signage.” (Relators’ Br. at 27) (citing Proposed Amendment, § 12(J)(10).) But this language would add nothing. The additional language says simply that once a marijuana establishment is built or is being built, it is subject to laws of general application – health, safety and building codes. But neither those laws, nor any other local or zoning laws, may be used to prohibit the development and operation of a planned and approved marijuana establishment. Statements that certain existing general laws are unaffected by the Proposed Amendment can and should be

omitted from the Ballot Language as “nonessential” and tending to make the Ballot Language less accurate. See *Cincinnati Pension Reform*, 137 Ohio St.3d at 56-57, ¶¶ 58-60; *Voters First*, 133 Ohio St.3d at 269, ¶ 49 (where there is no indication that the amendment “represents a departure” from the already-existing law, the Ballot Language restating that existing law is not appropriate).

Tellingly, Relators do not complain that the Ballot Language does not pick up language from Section 12(F) of the Proposed Amendment – language that conditions issuance of licenses to the growing facilities on their compliance with health, safety, prevailing wage laws, etc. – effectively conceding that the length, breadth and convolution of their own authorship simply preclude all details and exception to the general rule from being included.

The Ballot Board and the Secretary of State must inform and put the voters on notice of the material aspects of the proposed constitutional amendment upon which they are voting. Certainly, it would not be surprising or unexpected that the establishment must comply with health, safety and building laws when built. Leaving out the obvious is not a material omission.

G. Marijuana establishments will receive different tax treatment.

1. The Proposed Amendment will change tax rates for the exclusive few, as it aims to establish special state tax rates for production and sales of marijuana.

The ballot language correctly states that the proposed amendment “would create a special tax rate” for growers and sellers of marijuana. That is the **change** to the existing business tax structure that the amendment aims to establish and that Ohio voters are being asked to approve. As this Court stated in *Voters First*, the ballot language prescribed by the Board must “properly identify the substance of the proposal to be voted upon.” 133 Ohio St.3d at 263, ¶ 24. While Relators argue that the ballot language is misleading in that it omits a reference to “all other taxes applicable to businesses” that marijuana establishments would purportedly pay “in

addition” (emphasis original) to the special tax rates set forth in the amendment, nowhere does the proposed amendment state that marijuana establishments are subject to all state taxes applicable to Ohio businesses in general. Moreover, it is clear from the text of the proposed amendment that other businesses operating in Ohio will pay taxes over and above the entire package of taxes that a marijuana business may ultimately pay.

2. Privileged owners pay no income tax on distributed income.

Notably, the Proposed Amendment allows a marijuana business and its investors to avoid Ohio income tax and, possibly, local income tax on their distributed income that other Ohio businesses may pay. (*See* Proposed Amendment, § 12(E)) (“No additional taxes, assessments, fees or charges shall be levied on the operations, revenue, or distributed income of a marijuana establishment, other than the license fees authorized under this section.”). Also, other Ohio businesses pay a variety of state taxes that marijuana establishments might be able to avoid through the special allowance set forth in the Proposed Amendment, such as general sales and use taxes and a variety of “sin” taxes. Consequently, the ballot language in fact (1) accurately reflects the substance of the proposed amendment and (2) identifies the tax treatment for marijuana establishments that is different from the currently existing tax structure for other businesses.

3. Including in the Ballot Language special fund allocation percentages would only introduce a persuasive argument in favor of the Proposed Amendment.

The Ballot Language must be concise and sufficiently detail the “critical substance” of the proposed amendment, *State ex rel. Kilby v. Summit Cty. Bd. of Elections*, 133 Ohio St.3d 184, 191, 2012-Ohio-4310, 977 N.E.2d 590, ¶ 24, but it may not amount to an “inducement calculated to appeal” to the electorate, *Cincinnati Pension Reform*, 137 Ohio St.3d at 52, ¶40. Contrary to the Relators’ argument, identification of percentages of tax revenues that would go to various

special funds and a recitation of the causes that those taxes would help finance would not add any “critical substance” to the ballot summary. Voters know that taxes are collected for the public good.

H. The Ballot Language describing the marijuana testing facilities is fair and practically a direct quote from the Proposed Amendment.

Relator’s objection here has no merit because, as voters are likely to understand, “testing” and “research” are synonyms and voters may reasonably understand one to include the other. See “Research,” *Oxford English Dictionary*, available at http://www.oxforddictionaries.com/us/definition/american_english/research⁶; see also “Testing,” *English Thesaurus, Collins Dictionary*, available at <http://www.collinsdictionary.com/dictionary/english-thesaurus/testing> (synonyms of “test” include, *inter alia*, “check, try, investigate, assess, research, prove”) (emphasis added).

And, the phrase “marijuana testing facilities” is a defined term Relators created in the Proposed Amendment. (Proposed Amendment, § 12(L)(12).) The Proposed Amendment requires that “marijuana testing facilit[ies] ... shall be situated near colleges and universities....” (*Id.*) Thus, as to this discrete point, the Ballot Language is a nearly direct quote from the Proposed Amendment.

Omitting the word “research” from the Ballot Language is eminently fair, since the Proposed Amendment does not require that any marijuana testing facility also conduct research. Rather, the Proposed Amendment provides that marijuana testing facilities shall have “the explicit and limited purposes of engaging in research related to, and/or certifying the safety and potency of, medical marijuana and marijuana-infused products.” (*Id.*) The plain language of the Proposed Amendment – “research . . . and/or certifying” – makes clear that a testing facility

⁶ http://www.oxforddictionaries.com/us/definition/american_english/research.

might only certify product safety and potency and need not engage in research. It is immaterial that the Ballot Language did not include the word “research.”

There is no merit to Relators’ demand to add the word “research” to the statement that the Proposed Amendment would “locate marijuana testing facilities near colleges and universities.” (See Compl., ¶ 84; Relators’ Br. at 31.). Omission of the word “research” does not prevent readers from knowing the substance of the proposal being voted upon. See *Cincinnati Pension Reform*, 137 Ohio St.3d at 56, ¶ 60. An omission that is not material or an “essential part” of the Proposed Amendment will not invalidate Ballot Language. *Id.*, ¶ 58

I. The Proposed Amendment places express limitations on the Ohio General Assembly’s legislative powers to regulate the marijuana industry.

The Proposed Amendment limits the legislative power of the General Assembly in numerous, novel respects. Relators’ characterization of the Amendment as granting the General Assembly unlimited authority because the Amendment “authorizes” or “mandates” the General Assembly to enact regulations in two specific paragraphs ignores the balance of the Amendment. (See Relators’ Br., 33-34.)

1. The elected representatives of the people are restrained in historic fashion.

No law passed by the General Assembly can conflict with the Amendment. (Proposed Amendment, § 12(K)) (“All provisions of this section * * * shall supersede all conflicting state and local laws * * *”). While there is nothing remarkable about constitutional supremacy, the Proposed Amendment takes the concept beyond bounds never seen before in Ohio’s history. Nearly every division in the Amendment etches specific policies into the Constitution that the General Assembly is barred from changing. For example:

- Medical marijuana use cannot be outright banned on school grounds, at state-licensed day care centers, at correctional facilities, or community corrections facilities, (Proposed Amendment, § 12(J)(2));
- No employer in the state, including the State, can be enabled through the Ohio Revised Code to outright ban the use of medical marijuana by employees who “self-administer” the drug while at work, (*id.*, § 12(J)(4));
- Individuals of all ages cannot be outright banned from purchasing, possessing, transferring, transporting, using or sharing medical marijuana accessories, (*id.*, § 12(J)(7));
- The special tax rates and distribution of those tax revenues are locked and cannot be altered, (*id.*, § 12(E)); and
- Notwithstanding any future needs or unanticipated costs to the public, “[n]o additional taxes, assessments, fees or charges shall be levied on the operations, revenue, or distributed income of [a MGCE facility, a MPM facility, a retail marijuana store, or a medical marijuana dispensary], (*id.*).

2. The people’s representatives cannot pass laws regarding the parameters for the use of medical marijuana.

The General Assembly is not even permitted to legislate a key aspect of the entire Amendment – *who* can use medical marijuana. (Proposed Amendment, § 12(L)(4)) (prescribing the conditions that qualify as “Debilitating medical condition[s]” and limiting future changes to be made by the Marijuana Control Commission.) As set forth in the Amendment, any person with a medical condition who experiences “severe pain” is eligible to qualify for medical marijuana. (*Id.*) (prescribing “Debilitating medical condition[s]” to include “chronic or debilitating disease **or medical condition** * * * which produces, for a specific patient **one** or

more of the following * * * severe pain * * *”) (emphasis added) The General Assembly is forever foreclosed from enacting legislation that would tighten this subjective eligibility threshold because only the Marijuana Control Commission may make future adjustments. (*Id.*)

3. The Proposed Amendment handcuffs elected representatives by its overwhelming detail.

The fifty-nine paragraph Amendment grafts great detail into the Constitution. It then directs the General Assembly to pass laws that do not conflict with the convoluted provisions of the Proposed Amendment – all of which are made self-executing under the Proposed Amendment (itself an extraordinary act at the constitutional level). (Proposed Amendment, § 12(K).) Consequently, it handcuffs future legislators from enacting any law that conflicts with these policy details that would be frozen into the Ohio Constitution. (Proposed Amendment, § 12(K).) Rather than describing this burden, the Ballot Language states that the Amendment “[l]imits the ability of the legislature * * * from regulating the manufacture, sales, distribution and use of marijuana and marijuana products.” (Compl., Ex. 7.) This distillation reflects “a clear, concise description” to the voters of the General Assembly’s authority that is restricted under the Amendment. *See Jurcisin*, 35 Ohio St.3d at 142.

J. The Marijuana Control Commission has limited authority under the Proposed Amendment.

The Amendment also limits the Marijuana Control Commission’s regulatory authority just as it limits the Ohio General Assembly’s – the Commission cannot impose regulations that conflict with the Proposed Amendment’s policy specifications. (Proposed Amendment, § 12(K).) The drafters of the Amendment could not have been clearer, the Commission does not have unlimited authority to regulate the marijuana industry. The Amendment contains several express provisions that shield the industry from the Commission’s regulatory purview.

1. The Proposed Amendment creates, then hobbles, the Commission in its enforcement obligations.

The Amendment broadly prohibits the Commission from attempting to enforce any regulation that – in the eyes of the industry – would make a marijuana business or home growing operation not worth pursuing simply because compliance would require “a high investment of risk, money, time, or any other resource or asset.” (*Id.*, § 12(I) (“Regulatory rules shall not prohibit the operation of marijuana establishments or home growing, either expressly or through regulations that make their operation unreasonably impracticable.”) and § 12(L)(20) (defining “unreasonably impracticable” to mean that “the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.”).) Additionally, the Amendment also expressly imposes a permanent ceiling on the Commission’s licensing and renewal fees, (*id.*, § 12(I)), and prohibits the Commission from fully regulating the location of “marijuana testing facilit[ies]” which “at a minimum, * * * shall be situated near colleges and universities in Athens, Cuyahoga, Lorain, Mahoning, Scioto and Wood Counties”, (*id.*, § 12(L)(16)).

2. The Commission is forced to ignore the protections of Ohio’s Administrative Procedure Act.

The Proposed Amendment also pushes the Commission to act outside of the well-established procedure afforded under the Ohio’s Administrative Procedure Act. For example, the Proposed Amendment directs that the “initial regulatory rules required to be adopted herein by specific dates shall be adopted by the Commission notwithstanding any other provision of law regarding promulgation of administrative rules, provided that the Commission shall offer an opportunity for public input.” (Proposed Amendment, § 12(I).) And, the Proposed Amendment requires the Commission to renew the license of a marijuana establishment “unless the

Commission determines that the licensee has **repeatedly** failed to comply with its remedial orders (emphasis added).” (*See also id.*) (“Ohio’s administrative procedure statutes generally applicable to other licensing bodies not in conflict with this section shall apply to rulemaking, license denials, suspensions and revocations by the Commission.”).

Because the Commission will have only limited authority under the Amendment, the Ballot Language is factually accurate and will not mislead voters to draw a false conclusion regarding the Commission’s authority. *Cincinnati Pension Reform*, 137 Ohio St.3d at 52, ¶ 35.

CONCLUSION

For all these reasons, amici ask that mandamus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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