



State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

Ohio Supreme Court Clears Way for August Vote on Legislative Effort to Curb Direct Democracy

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In a ruling with major implications for direct democracy in Ohio, the Ohio Supreme Court greenlighted the state legislature's controversial plan to have Ohioans vote in August on a proposed constitutional amendment that would make it harder to amend Ohio's Constitution in the future. Lawmakers had pushed for a quick vote on their proposed amendment with an eye toward derailing a citizen-led abortion rights initiative that is expected to be on the ballot in November.

The case is *State ex rel. One Person One Vote v. LaRose*,¹ and it is a part of a national trend of state lawmakers seeking to make it tougher for citizens to change laws or amend state constitutions through ballot measures. Such legislative efforts have proliferated as voters have increasingly turned to the ballot to secure abortion rights.²

Background: A Race to the Ballot

Shortly after the 2022 general election, the Ohio Secretary of State and a state legislator proposed amending the Ohio Constitution to raise the voter approval threshold for future constitutional amendments from a simple majority to a 60% supermajority.³ Under the state constitution, such a change requires the support of three-fifths of the members of each legislative chamber and the support of a majority of voters at a special election.⁴ When asked, the duo initially denied that their proposal was intended to thwart a planned initiative drive to enshrine abortion access in the state constitution, but both later admitted privately to their colleagues and to supporters that it was intended to do just that.⁵

Over the next six months, the General Assembly was locked in a tense debate over the supermajority proposal while supporters of the abortion rights initiative moved closer to their goal of submitting their measure to the voters in November 2023.⁶ Eventually, lawmakers expanded the supermajority proposal to include a requirement that future initiative campaigns collect a minimum number of signatures from *all* of the state's 88 counties, doubling the current requirement to collect a minimum number of signatures from 44 counties.⁷ The proposal would

also eliminate a provision that gives ballot petitioners a limited 10-day period to collect additional signatures if their initial petition is found to lack a sufficient number of valid signatures.⁸

The Ohio Secretary of State and the state legislators initially hoped to submit their proposal to the voters at a May 2023 election, but after missing that deadline, they began pushing to hold a special election in August 2023. They and other supporters contended that August would be the legislature's last opportunity to put the supermajority requirement in place before the anticipated abortion rights initiative goes to the voters in November 2023.⁹

There was one problem: Just a few months earlier, the General Assembly had enacted a law that effectively prohibited most August special elections, instead generally limiting special elections to the dates of regularly scheduled primary and general elections, which are ordinarily in May and November.¹⁰ An August election could still be held in narrowly defined circumstances, but these did not include legislatively referred constitutional amendments. The Ohio Secretary of State and a broad bipartisan coalition of local elections officials supported this change due to the high cost and low turnout in August special elections.¹¹

The General Assembly tried but failed to change state law to expressly authorize August special elections for the purpose of submitting a legislatively referred constitutional amendment to the voters.¹² Faced with an early-May deadline to submit the supermajority proposal at an August special election, the General Assembly pressed ahead and approved a joint resolution that purported to authorize it.¹³ The Ohio Secretary of State, as the state's chief elections official, promptly directed local elections official to prepare for the August election,¹⁴ and this directive was quickly challenged in an action filed directly in the Ohio Supreme Court.

The Legal Issue: Legislation vs. Legislative Resolutions

The primary legal issue in *One Person One Vote v. LaRose* was whether the General Assembly could set an August special election for a referred constitutional amendment *by joint resolution* when a recently enacted statute appeared to require the special election to be held no sooner than November. Joint resolutions ordinarily do not have the force of law, and they cannot be used to amend or repeal duly enacted legislation. In the case of legislatively referred constitutional amendments, however, the General Assembly argued that a provision in the Ohio Constitution and an Ohio Supreme Court decision from the 1960s authorized legislators to schedule an August special election through a joint resolution without repealing the existing statute.

The key provision in the Ohio Constitution is Article XVI, Section 1, which authorizes the General Assembly to refer proposed constitutional amendments "at either a special or general election as the General Assembly may prescribe." In a 1967 decision, *State ex rel. Foreman v. Brown*, the

Ohio Supreme Court interpreted the “may prescribe” language as authorizing the General Assembly to decide through legislation or by joint resolution when to submit a legislatively referred constitutional amendment to the voters.¹⁵ Importantly, *Foreman* did not involve a scenario where an election date set in a joint resolution appeared to conflict with an existing statute. But the *Foreman* majority nevertheless addressed this then-hypothetical and said that, in such a scenario, the statute would have to give way to the joint resolution due to what the majority viewed as the General Assembly’s constitutional authorization to “prescribe” the special election date.¹⁶

The challengers who filed *One Person One Vote* sought to distinguish *Foreman* by arguing that the state law on special elections had changed since the 1960s. They contended that, by enacting a law limiting the dates for nearly all special elections to the dates of regularly scheduled primary and general elections, legislators had effectively disclaimed the authority to use joint resolutions to schedule special elections for legislatively referred constitutional amendments on any other dates. In response, the Secretary of State argued that the General Assembly’s constitutional authority to “prescribe” the date of a special election for a legislatively referred constitutional amendment meant that the legislature always retained the authority to use a joint resolution to pick any date for the election notwithstanding the constraints of statutory law.

A 4-3 majority of the Ohio Supreme Court, split along partisan lines, agreed with the Secretary of State’s argument. The lead, per curiam opinion, which was joined by three of the Court’s four Republican justices, followed *Foreman* and concluded that the General Assembly retained its constitutional authority to set the election date by joint resolution “regardless” of what statutory law says:

Regardless of what the Revised Code may provide for the holding of elections generally, Article XVI, Section 1 of the Ohio Constitution authorizes the General Assembly to call for a special election on a constitutional amendment proposed by a joint resolution and to specify the date of the special election in the joint resolution, subject only to the limitations contained in the constitutional provision itself.¹⁷

In other words, the per curiam reasoned that the General Assembly could not disclaim its ability under the state constitution to set the election date by joint resolution even if it passed legislation purporting to do just that. The fourth Republican justice did not join this opinion, instead concurring in the judgment without issuing an opinion.

The Court’s three Democratic justices dissented in two opinions. Both dissents argued that the General Assembly had “abolished” August special election dates (with minor exceptions), and that the General Assembly’s options were, therefore, limited to changing the recently enacted statute concerning election dates or scheduling the election in accordance with statutory law.¹⁸

Because the legislature had failed to amend the statute, neither dissent viewed it appropriate for the Court to “fix [the General’s Assembly’s] mess and do their work for them.”¹⁹

With today’s decision, the special election will be held on August 8. If the proposal is approved, then the abortion rights initiative—and any other future proposed constitutional amendment—will need at least 60% support from voters to be approved.

A Consequential Year for Direct Democracy Jurisprudence in Ohio

In addition to today’s decision approving the August special election, the Ohio Supreme Court has already decided several other important direct democracy cases this year, and it is also poised to decide several more.

Earlier this week, the Court decided a challenge to the description of the supermajority proposal that will appear on voters’ ballots in August, *State ex rel. One Person One Vote v. Ohio Ballot Board*.²⁰ The contested language was written by a state board chaired by the Ohio Secretary of State, and the challengers contend that it contained several material omissions, misleading statements, and biased language. For example, they argued that the title for the measure, which reads “Elevating the Standards to Qualify for and to Pass Any Constitutional Amendment,” was improperly persuasive and implies that the standards to amend the state constitution are too low.²¹ The Court split 4-3 on that particular issue, with the majority finding the language to be accurate and declining to order the state board to change it.²² But the Court did order a few other minor changes to the language, including omitting the word “any” from the title to avoid misleading voters into thinking that the proposal would change ballot qualification standards for amendments proposed by the General Assembly.²³ Following the decision, the state board promptly reconvened and approved new ballot language.²⁴

Another important direct democracy case was decided at the beginning of June when the Ohio Supreme unanimously rejected a lawsuit that sought to force the backers of the abortion rights initiative to revise their petition and start over their signature collection effort.²⁵ The case was *State ex rel. DeBlase v. Ohio Ballot Board*, and at issue was a state board’s certification that the initiative petition complies with what amounts to a single-subject requirement for initiatives. Under Ohio law, this certification is necessary before initiative proponents can circulate a petition. If the Court had overturned the board’s determination, then backers of the abortion rights initiative would have had to change their proposal to comply with the decision and begin the whole signature-gathering process again, missing their window to appear on the November 2023 ballot.

Although the Court was unanimous in rejecting the challenge brought in *DeBlase*, it was divided in its reasoning. Three of the seven justices embraced a permissive standard previously used by

the Court to find that the petition complied with the single-subject requirement.²⁶ One justice concurred in the judgment without an opinion, though he has previously explained his view that the Court should defer to the board's determinations.²⁷ And the other three justices contended that the legal provisions at issue should not even be interpreted as a single-subject requirement but instead as a requirement for each initiative petition to contain one stand-alone amendment—an interpretation that also garnered three votes when the Court last considered the issue in 2020.²⁸

History suggests that more lawsuits can be expected if the abortion rights campaign does indeed file a petition later this year. There is also an initiative effort underway to propose a statute that would legalize recreational marijuana in the state, and this, too, could draw legal challenges.²⁹ Opponents of either proposal may attempt to argue that the petitions fail to comply with the state's technical requirements for initiative petitions. And opponents or supporters of the measures may find themselves contesting the ballot language ultimately written for either measure, just as opponents of the supermajority proposal did in *State ex rel. One Person One Vote v. Ohio Ballot Board*. With this much activity—and with an August vote on the supermajority proposal—2023 could be a highly consequential year for direct democracy jurisprudence in Ohio.

¹ *State ex rel. One Person One Vote v. Frank LaRose*, Ohio Supreme Court Slip Op. No. 2023-Ohio-1992 available at <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2023/2023-ohio-1992.pdf>.

² See Scott S. Greenberger, *As Abortion Measures Loom, GOP Raises New Barriers to Ballot Initiatives*, Stateline (Feb. 15, 2023), <https://stateline.org/2023/02/15/as-abortion-measures-loom-gop-raises-new-barriers-to-ballot-initiatives/>.

³ See Derek Clinger, *Analysis: Unpacking Ohio's flawed "supermajority" proposal for ballot initiatives*, State Democracy Research Initiative (Dec. 2, 2022), <https://statedemocracy.law.wisc.edu/featured/2022/explainer-unpacking-ohios-flawed-supermajority-proposal-for-ballot-initiatives/>.

⁴ Ohio Const., art. XVI, § 1.

⁵ See Laura Hancock, *Ohioans would have harder bar to pass a constitutional amendment, under proposal from secretary of state*, Cleveland.com (Nov. 18, 2022), <https://www.cleveland.com/news/2022/11/ohioans-would-have-harder-bar-to-pass-a-constitutional-amendment-under-legislation-from-secretary-of-state.html>; See @AndrewJTobias, Twitter (Dec. 14, 2022, 3:50 pm), https://twitter.com/AndrewJTobias/status/1603130384744534016?s=20&t=VwO_MBEHrPVV-CIASKq2UA; Morgan Trau, *Ohio Sec. of State LaRose admits move to make constitution harder to amend is '100% about...abortion'*, News 5 Cleveland (June 2, 2023), <https://www.news5cleveland.com/news/politics/ohio-politics/ohio-sec-of-state-larose-admits-move-to-make-constitution-harder-to-amend-is-100-about-abortion>.



⁶ See, e.g., Nick Evans, *How the bid to make it harder to amend Ohio's constitution fell apart*, Ohio Capital Journal (Mar. 14, 2023), <https://ohiocapitaljournal.com/2023/03/14/lame-duck-debacle-how-the-bid-to-make-it-harder-to-amend-ohios-constitution-fell-apart/> (summarizing developments through mid-March 2023); Nick Evans, *Supermajority roadmap: Backers have until Wednesday to get 60% amendment on August ballot*, Ohio Capital Journal (May 9, 2023), <https://ohiocapitaljournal.com/2023/05/09/supermajority-roadmap-backers-have-until-wednesday-to-get-60-amendment-on-august-ballot/>.

⁷ See Senate Joint Resolution 2 (As Enrolled), The 135th Ohio General Assembly (2023), available at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/EN/06/sjr2_06_EN?format=pdf.

⁸ *Id.*

⁹ See, e.g., Jo Ingles and Karen Kasler, *Ohio House votes to send 60% approval amendment to special election in August*, Statehouse News Bureau (May 10, 2023), <https://www.stateneews.org/government-politics/2023-05-10/ohio-vote-60-constitutional-amendment-august>.

¹⁰ See Ohio Rev. Code §§ 3501.01(D), 3501.022 (eff. Apr. 7, 2023).

¹¹ See Press Release, Ohio Secretary of State Frank LaRose, LaRose Statement on Passage of House Legislation Eliminating August Special Elections (Dec. 21, 2021), <https://www.ohiosos.gov/media-center/press-releases/2021/2021-12-09/>.

¹² See Senate Bill 93 (As Passed by the Senate), The 135th Ohio General Assembly (2023), available at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/bills/sb92/PS/02/sb92_02_PS?format=pdf.

¹³ Senate Joint Resolution 2 (As Enrolled), The 135th Ohio General Assembly (2023), available at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/resolutions/sjr2/EN/06/sjr2_06_EN?format=pdf.

¹⁴ Ohio Secretary of State Frank LaRose, Directive 2023-07 (May 10, 2023), available at <https://www.ohiosos.gov/globalassets/elections/directives/2023/dir2023-07.pdf>.

¹⁵ *State ex rel. Foreman v. Brown*, 10 Ohio St.2d 139 (1967) (“Section 1 of Article XVI empowers the General Assembly to provide for submission of a constitutional amendment, proposed by the General Assembly pursuant to that section, at a special election on a certain day; and the General Assembly may authorize such election by a joint resolution without enacting a statute.”).

¹⁶ *Id.* at 142 (“It is argued that a joint resolution cannot ordinarily repeal a statute. However, in our opinion, if action, taken by the General Assembly pursuant to Section 1 of Article XVI and authorizing a special election on a certain day, does conflict with an unrepealed existing statute, the action so taken pursuant to specific constitutional authority would require a holding that the statute was unconstitutional so far as it conflicted with such action.”)

¹⁷ *State ex rel. One Person One Vote v. Frank LaRose*, Ohio Supreme Court Slip Op. No. 2023-Ohio-1992 at ¶ 23.

¹⁸ *Id.* at ¶ 89 (Brunner, J. dissenting); see also *id.* at ¶ 34 (Donnelly, J. dissenting) (“The General Assembly could have easily made the any number of changes to Ohio election laws to allow for its proposed special election.”).

¹⁹ *Id.* at ¶ 34 (Donnelly, J. dissenting).

²⁰ *State ex rel. One Person One Vote v. Ohio Ballot Board*, Ohio Supreme Court Slip Op. No. 2023-Ohio-1928, available at <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2023/2023-Ohio-1928.pdf>.

²¹ See *id.* at ¶ 24-29.

²² *Id.* at ¶ 29.

²³ *Id.* at ¶ 27.

²⁴ See Haley BeMiller, *Ohio Ballot Board approves new ballot language for August constitution issue*, Columbus Dispatch (June 13, 2023), <https://www.dispatch.com/story/news/politics/2023/06/13/ohio-ballot-board-approves-new-language-for-issue-1-after-court-ruling/70314474007/>.

²⁵ *State ex rel. DeBlase v. Ohio Ballot Board*, Ohio Supreme Court Slip Opinion No. 2023-Ohio-1823, available at <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2023/2023-ohio-1823.pdf>.

²⁶ *DeBlase*, Ohio Supreme Court Slip Opinion No. 2023-Ohio-1823 at ¶ 1-28 (per curiam).

²⁷ See *State ex rel. Ohioans for Secure and Fair Elections v. LaRose*, 159 Ohio St.3d 568, 597-99 (2020) (Fischer, J. concurring in part and dissenting in part).

²⁸ *Id.* at ¶ 29-40 (Kennedy, C.J., concurring in judgment only); see also *Ohioans for Secure and Fair Elections*, 159 Ohio St.3d at 583-97 (Kennedy, J. concurring in judgment only).

²⁹ Megan Henry, *Initiative to legalize recreational marijuana could be on November's ballot*, Ohio Capital Journal (May 2, 2023), <https://ohiocapitaljournal.com/2023/05/02/ballot-to-legalize-recreational-marijuana-could-be-on-novembers-ballot/>.

