STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

VICTORIA FERNANDEZ and KATHERINE HAUSER,

Petitioners,

v.

NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI, in his capacity as Republican Co-Chair of the New York State Board of Elections; HENRY T. BERGER, in his capacity as Democratic Co-Chair of the New York State Board of Elections; ANTHONY J. CASALE, in his capacity as Republican Commissioner of the New York State Board of Elections; and ESSMA BAGNUOLA, in her capacity as Democratic Commissioner of the New York State Board of Elections,

Respondents,

For an Order and Judgment Pursuant to New York Election Law § 16-104

Decision & Order
Index No. 907584-24

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David A. Weinstein, J.:

By petition filed August 2, 2024, petitioners Victoria Fernandez and Katherine Hauser, voters registered in the State of New York, challenge the language promulgated by the New York State Board of Elections (the "BOE" or "Board") for the form and abstract to be presented with Ballot Question One, known colloquially as the Equal Rights Amendment ("ERA"). The petition names as respondents BOE Democratic Co-Chair Henry T. Berger, BOE Republican Co-Chair Peter S. Kosinski, BOE Democratic Commissioner Essma Bagnuola; and BOE Republican Commissioner Anthony J. Casale.

The petition has been brought pursuant to CPLR Article 78 and New York Election Law § 16-104. Petitioners' primary legal argument is that in approving the language of Ballot Question One, the Board did not comply with New York Election Law § 4-108. Amendments to that provision enacted in 2023 (the "Plain Language Law") – which are at the heart of this case and construed here as a matter of first impression – set forth and explicate the requirement that ballot questions be presented to the voters using "plain language."

Election Law § 4-108

In its present form[1], section 4-108 requires that the Board prepare the following in connection with any ballot question (the "form" of the amendment):

> "a. a descriptive title of up to fifteen words, which describes the topic, goal, or outcome of the ballot question in plain language];
>
> b. a summary of the text ballot proposal of up to thirty words, written in plain

[1] Pre-2023, the requirement of the statute was that the Board prepare, with advice from the Attorney General, "an abbreviated title indicating generally and briefly, and in a clear and coherent manner using words with common and every-day meanings, the subject matter of the amendment, proposition or question" (*see* amendments made by Chapter 648 of the Laws of 2023).

> language, that describes the change in policy to be adopted and not the legal mechanism; and
>
> c. a statement of what a YES or NO vote means in up to thirty words written in plain language that identifies the practical outcome of each election result and not the legal mechanism" (Election Law § 4-108[2]).

The New York Attorney General ("AG") is to "advise in the preparation of such form of submission, and such recommendations shall be in plain language" (*id.* § 4-108[3]).

The BOE must also prepare an "abstract" of the proposed amendment in "plain language" (*id.* § 4-108[1][d]).

The 2023 amendments to section 4-108 also require, in order "[t]o evaluate compliance with the plain language requirements of this section," that "the state board of elections . . . calculate an Automated Readability Index ["ARI"] score, separately, for each statewide form of ballot proposal and abstract"[2] (*id.* § 4-108[6]). The statute provides the following formula by which ARI is to be calculated: (a) the number of characters is divided by the number of words, with the result multiplied by 4.71; (b) the number of words is divided by the number of sentences and multiplied by 0.5; (c) the results of (a) and (b) are added, and 21.43 is subtracted from the result (*id.*). Under this formula, two variables define readability: the number of characters in each word and the number of words in each sentence.

The statute provides that the language used in the ballot question require "no higher than an eighth grade reading level (a score of 8 on the Automated Readability Index), unless the state board of elections shall state the basis for its determination that the plain language requirements of this section are met"[3] (*id.* § 4[b]). It includes the following proviso, however:

> "No specific Automated Readability Index score shall be required; provided, however, the board shall use best efforts to score at an eighth grade reading level or below and meet the definition of plain language in subdivision five of this section. In addition, the board shall expend their best efforts not to exceed the

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[2] The sponsors' memorandum in support of the legislation states that "[t]he Automated Readability Index (ARI) was chosen as a reliable and validated measurement tool developed by federal agencies to assess technical text" which is "easier and more reliable to calculate than other readability measures" (*see* Affirmation of Renee Zaytsev, Esq. In Support of Petitioners' Application by Order to Show Cause ["Zaytsev Aff"], Ex 1 at 2).

[3] The statute does not otherwise state how an ARI rating is to be translated into grade level.

> word limits in subdivision two of this section but may do so when plain language clarity is improved thereby" (*id.* § 4-108[7]).

The definition of "plain language" provided by the statute is that the text is

- in "easily comprehended, concise language";
- shall "not contain more the one passive sentence";
- shall "not use semicolons, using multiple sentences as necessary"; and
- "shall not contain double negatives" (Election Law § 4-108[5]).

The purpose of the 2023 legislation, according to its sponsors, was to address voter complaints that "proposed constitutional amendments and other questions are submitted on the ballot for voter approval are difficult to read and understand," which leads voters to refrain from voting on them (Zaytsev Aff, Ex 1, "Justification"). The solution advanced by the legislation was to require that proposals be written in plain language, i.e., language that allows voters to "understand the practical outcomes of voting yes or no on a ballot question and confidently vote their intent" (*id.*).

Proposition One

Proposition One, the proposed constitutional amendment at issue in this case, was introduced into both houses of the Legislature on July 1, 2022, a week after the Supreme Court's decision in *Dobbs v Jackson Women's Health Organization* (597 US 215 [2022]), overturning *Roe v Wade* (410 US 113 [1973]). The amendment made the following changes to Article I, Section 11 of the Constitution:

> "§ 11. a. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed [or], religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in ~~[his or her]~~ their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law.
>
> b. Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this

section."

The Committee Report prepared by the sponsors of the legislation states that the amendment would, among other things:

- "ban [] disability discrimination . . . by affording enforceable legal rights to people with disabilities";
- Ensure that "[t]he State shall further not use its police power or power of the purse to burden, limit, or favor any type of reproductive decision making at the expense of other outcomes, and, as consistent with Article 17 of this Constitution[4], shall guarantee rights and access to reproductive healthcare services"; and
- "prohibit the adoption of laws, policies, or practices in New York that target people for discrimination or criminal prosecution based on their sexual orientation or gender identity" (Zaytsev Aff, Ex 12).

In regard to abortion, the memo said the following:

"this amendment clarifies that any action that discriminates against a person based on their pregnancy, pregnancy outcome, reproductive healthcare, or reproductive autonomy is sex-based discrimination in their civil rights that would be explicitly prohibited by the State Constitution. This is critical given the Supreme Court's rescission of the federal constitutional right to abortion care" (*id.*).

The drafting of the Language of the Ballot Proposal

Pursuant to its advisory role, on May 16, 2024 the AG submitted its proposal for the form for Proposition One, which was as follows:

"Amendment to Protect Rights in New York.

Protects against unequal treatment by New York and local governments no matter your sex, age, disability status, ethnicity, or national origin. Protects LGBT and pregnant people. Protects abortion.

A yes vote protects against unequal treatment for these reasons.
A no vote leaves this protection out of the State Constitution" (Zaytsev Aff, Ex 2).

The Attorney General calculated the ARI for this proposal, indicating it was at a 9th grade reading level (*id.*).

The Attorney General did not prepare a proposed abstract, as that is not required by the

[4] Article 17 sets forth the social welfare provisions of the State Constitution.

statute.

Following the Board's receipt of the AG's suggested form of proposal, the Board's Republican and Democratic staff engaged in extended deliberations, the record of which is appended to the affirmation of Kevin Murphy, the BOE Deputy Counsel representing the Republican Party (Affirmation of Kevin Murphy, dated August 12, 2024 ["Murphy Aff"], Ex A). Initially, draft language was prepared by the BOE's Democratic and Republican Counsel, which was compared on a spreadsheet. The Democratic language for the form hewed fairly closely to the AG's language, while the Republican version was closer to the language ultimately adopted by the Board (*see id.* at 10-11). Both counsels prepared language for the abstract, each of which had ARI scores above the statutory target: the Democratic version at 12; the Republicans at 15 (*see id.* at 10). The spreadsheet explained that the "reason for the high readability score is the list of civil rights protections" which "makes the description difficult to break into shorter sentences" and elevated the ARI (*id.*).

After an extended back and forth, the Democratic Co-Counsel agreed to much of the Republican proposed language, e-mailing: "Team D is good to post this as the staff draft language"(*id.* at 36). The Republican staff agreed as well (*id.* at 40). On July 5, 2024, the Board issued its proposed form for public comment. It read as follows:

"Adds Certain Protections to the State Bill of Rights

Adds anti-discrimination provisions to State Constitution. Covers ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity and pregnancy. Also covers reproductive healthcare and autonomy.

A 'YES' vote puts these protections against discrimination in the New York State Constitution.
A 'NO' vote leaves these protections out of the State Constitution" (*id.*).

The Board also published the following abstract of the amendment:

"This proposal amends Article 1, Section 11 of the New York State Constitution. It prohibits any person, business, or organization, as well as state and local governments from discrimination pursuant to law. The current protections in the Constitution cover race, color, creed, and religion. The proposal will add ethnicity, national origin, age, disability, and sex, sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive

healthcare and autonomy. The amendment allows laws to prevent or undo past discrimination"

During the statutory period for notice and comment, the Board received 1,500 comments "many of which criticized the proposed form and abstract and recommended revisions" (Pet ¶ 29). These included critiques of the proposed language by groups such as Common Cause, the New York Civil Liberties Union ("NYCLU") and New Yorkers for Equal Rights. The NYCLU comment consisted of an extensive memorandum, which cited among other things focus groups and surveys conducted by "Global Strategy Group on behalf of New Yorkers for Equal Rights" (Zaytsev Aff, Ex 5). The affidavit said that in the focus groups "just two out of 32 respondents knew, based on the currently proposed ballot language, that Prop. One would protect abortion rights," and that in a survey of 1,200 likely New York voters, "the words 'reproductive health care and autonomy' were among the words highlighted as most confusing," as was "gender identity" (*id.* at 4 n 14 & 5 n 16). The memo also cited a survey by the same group of 1,000 likely voters, which said that 57% found the phrase "gender identity and expression" to be "very clear," while 73% said the same about the phrase "LGBT" (*id.* at 5 n 16). Polling was also cited in the comment submitted by New Yorkers for Equal Rights, stating among other things that in a "text highlighting exercise" the terms "reproductive health care and autonomy" and gender identity were highlighted by some as "confusing" – although it does not say what percentage gave this response (Zaystev Aff, Ex 9 at 4).

Comments were also received from Senator Leroy Comrie and Assembly Member Stefani Zinerman, who co-sponsored the 2023 Plain Language Law, and from 31 Senators in support of the Attorney General's proposed language. The former argued that the BOE proposal "failed to meet both the spirit and intent of the law by proposing language that is currently at college grade reading levels far exceeding the intended and now legislated goal of an 8th grade reading level" (*id.*, Ex 7). The latter contended, among other things, that because abortion rights are "in jeopardy, voters must understand Proposal Number One will protect abortion rights in the state constitution" (*id.*, Ex 10). The respondents opposing the petition also note, however, that many of the comments consisted of form letters raising the same concerns in virtually identical language (Kosinski Aff ¶ 22 & Ex B).

The BOE staff proposal came before the Board at its July 29, 2024 meeting. Republican Co-Chair Kosinski noted that the Commissioners had the opportunity to review the "1500" comments received, and Commissioner Casale then moved the adoption of the Board's language. Before the vote, however, Democratic Co-Chair Berger asked to make a statement, which was as follows:

> "The law requires the Board to certify language for ballot proposals no later than three months before the General Election. As required by recent adopted changes to the ballot proposal process, the Board is now responsible for publishing a proposed form of question and abstract four months before the General Election and taking public comments. We did that, and note that the Attorney General proposed language in May, which would have included the word "abortion" and the descriptor "LGBT" in place of the more legalistic words in the text of the amendment to the Constitution. The Board's staff, however, did not recommend either the term "abortion" or "LGBT." In absence of such consensus, they defaulted to the language from the amendment itself in their form of question and abstract. So advances the draft which is now before us for consideration.
>
> We have received more than 1,500 public comments, in addition to the Attorney General's advice. Overwhelmingly, I assert the term "abortion" is more completely understandable than 'reproductive healthcare and autonomy', and more importantly, the legislative history clearly establishes – as a letter signed by thirty-one State Senators attests – that the amendment was spurred by a desire to protect abortion rights in the Constitution of this state. Similarly, the words 'protects LGBT people' more clearly conveys protecting persons on the basis of sexual orientation, gender identity, and gender expression. I would ask my colleagues that after having received and considered the many comments, if they would be willing to entertain using the Attorney General's proposed language for the form of the question. If there is no such willingness, I understand our obligation to adopt the language timely, but I also understand our language may be reviewed in court. I am going to vote for this proposal because it's our obligation to do so, but I understand that our word may not be the last word on this, and we will move forward. But I will vote for the proposal" (Affidavit of Peter S. Kosinski in Opposition to Order to Show Cause ["Kosinski Aff"], Ex C at 19-20).

Commissioner Bagnuola then expressed her agreement with Berger's statement (*id.* at 20).

Commissioner Casale responded as follows:

> "The only thing I want to say is that the Legislature gave us the statute; we took the wording from the statute and placed it into the proposition. I understand there is concern about readability, but the statute itself the readability is 35, I understand that's an issue. I also understand that if the Legislature wanted to do

> so, the Legislature could have prescribed the exact wording of the proposition, as is their right to do so. And they did not do so. So, accordingly, I'm voting for this, because as far as I'm concerned, the proposed language of the proposition mirrors very closely the language of the statute and the language of the statute becomes it's part of the New York State Constitution, as they sent to us" (*id.*).

The Commissioners then voted to approve the proposed language, with all four voting in favor.[5]

The Board's proposal has an ARI score of 14 for the form and 15 for the abstract. The Board provided the following statement regarding these results:

> "While the Automated Readability Index of the Proposition is higher than the statutory goal of 8, the enacting legislation for the Proposition includes a list of protected classes, all of which would be added to the Constitution if approved. These terms must all be included in the Proposition language to ensure voters are fully informed of the proposed additions.
>
> Best efforts have been made to reduce ARI wherever possible. It is worth noting that Article 1, Section 11 of the New York State Constitution scores at 16 in its current form, even without the proposed additions to the list of protected classes.
>
> Given the foregoing, the ARI score of 14 represents the New York State Board of Elections' best efforts to present the details of the proposed constitutional amendment to the voters in plain language pursuant to the provisions of Election Law 4-108" (*see* https://elections.ny.gov/2024-statewide-ballot-proposal).

Petitioners then commenced this proceeding, challenging the Board's language. Papers in opposition have been filed by the two respondent Republican Commissioners, Kosinski and Casale (the "Republican Commissioners" or "respondents"[6]), who have moved to dismiss the petition. Commissioners Berger and Bagnuola (the "Democratic Commissioners") filed papers

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[5] The Democratic Counsel, representing Berger and Bagnuola, explained at oral argument that the agreement of these Commissioners was compelled by the looming statutory deadline for posting the amendment, the time pressures of which were exacerbated by the fact that the amendment's place on the ballot had been enjoined for several weeks by a trial court decision based on claims of procedural deficiencies in the amendment process, which was ultimately overturned by the Fourth Department (*see Byrnes v Senate of the State of New York*, 2024 WL 2006346, *rev'd* 228 AD3d 1363 [4th Dept 2024], *appeal dismissed* 41 NY3d 1024 and 41 NY3d 1032 [2024]).

[6] Although all four Commissioners are named as respondents, for simplicity's sake only the Republican Commissioners are referred to as "respondents" below, since only they are opposing the petition.

supporting the relief sought by petitioners.[7]

A hearing was conducted on the petition on August 14, 2024, at which the parties presented legal arguments, which are discussed when relevant below.

Discussion

I. The Standard of Review

As an initial matter, respondents argue that because the petition seeks relief under Article 78 of the CPLR, to succeed petitioners must show that the Board's actions were "arbitrary and capricious or an abuse of discretion" (Memorandum of Law of Respondents Peter S. Kosinski and Anthony J. Casale in Opposition ["Mem in Opp"] 7). Further, they contend that because the relief sought was in the nature of mandamus, it is only available to compel an agency to carry out a ministerial duty, which does not apply to the crafting of the form and abstract of a ballot proposition (*see id.* at 6-7).

The problem with this analysis is that there is a specific statute which provides for the proceeding brought and the relief sought here, which does not impose such a standard.

Under Election Law § 16-104(2), the "wording of the abstract or form of submission of any proposed amendment, proposition or question may be contested in a proceeding instituted by any person eligible to vote on such amendment, proposition or question." This provision "establishes a process for judicial review" of ballot provisions (*see Snyder v Walsh*, 41 Misc 3d 1213[A], *4 [Sup Ct, Albany County Oct 16, 2013]). In that process, a petition may be brought to challenge compliance with section 4-108, and the language of a ballot proposition may be struck down if it is "misleading, ambiguous, illegal or inconsistent with existing law" (*Matter of Gruskoff v County of Suffolk*, 132 AD3d 923, 924 [2d Dept 2015], quoting *Matter of Gaughan v Mohr*, 77 AD3d 1475, 1476-1477 [4th Dept 2010]; *see also Matter of Mavromatis v Town of West Seneca*, 55 AD3d 1455, 1456 [4th Dept 2008] [citations omitted] [proposed proposition may be invalidated if it is misleading or "contains blatant ambiguities or illegal provisions"]; *Matter of Association for a Better Long Island v County of Suffolk*, 243 AD2d 560, 561 [2d Dept 1997], *lv denied* 90 NY2d 811 [striking ballot proposition since "the referendum question which

[7] In addition to these parties, Conservative Party of New York State Chairman Gerard Kassar moved to intervene as a respondent to oppose the petition, which motion I denied by Decision & Order dated August 13, 2024.

the appellants seek to place on the ballot is misleading and does not indicate 'in a clear and coherent manner . . . the subject matter' of the proposed local law"] [citing prior version of Election Law § 4-108[2]).

There is no hint in this language that a court is barred from striking or altering language of a misleading or illegally drafted ballot proposal because it does not involve a "ministerial" act by the Board, or that it must apply an "arbitrary and capricious" standard. As one court noted in rejecting the same arguments for application of an "arbitrary and capricious" standard proffered by respondents here: "Respondents are advocating for a standard not employed by any appellate court that has considered this issue; rather, the courts simply determined whether the proposed language is clear, coherent, or misleading" (*see Leib v Walsh*, 45 Misc 3d 874, 877 [Sup Ct, Albany County 2014]). With the caveat that courts have recognized that language may also be struck if it is "illegal" – in this case if it violates the requirements of section 4-108 – *Leib* has accurately summarized the controlling caselaw on this issue.[8]

That said, neither section 16-104 or 4-108 grant the Court authority to select which of the proposed wordings is "better" in some way, i.e., more clear or understandable to a broader segment of the population. Rather, unless petitioners can show that the BOE's text meets one of the criteria for relief listed above – in particular if it is ambiguous, illegal or misleading – I am without power to select between the proposals before me (*see* Oral Argument Transcript ["Tr"] 58 [Counsel for Democratic Commissioners: "If you find the language is in compliance with the statute then you would need to deny the relief"]).[9] Thus, in *Matter of Schulz v New York State*

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[8] Respondents argue that notwithstanding the cited caselaw, because petitioners invoke Article 78 in their Petition, it must be subject to "arbitrary and capricious" review. But many of the cases that articulate the appropriate standard cited above were, like the present petition, brought under both Article 78 and the Election Law (*see Matter of Association for a Better Long Island, supra* [action brought pursuant to CPLR article 78 and Election Law § 16-104]; *Matter of Mavromatis, supra* [action brought under Election Law article 16 and CPLR article 78]; *Snyder, supra* [petition brought under Article 78]). The fact that petitioners use Article 78 as the procedural vehicle for bringing this action does not alter the appropriate standard (*see Leib, supra* at 877 ["While the petition states that it is a 'special proceeding brought pursuant to Article 78 of the [CPLR],' it is premised on the contention that the phrase 'independent' [used in the ballot question] is misleading, . . . and [is] thus subject to review in a proceeding brought pursuant to Election Law § 16-104[2]"]).

[9] Although the Democratic Commissioners stated their support for the AG's language before voting for the proposal – and join the petitioners in seeking to implement that language here – their counsel acknowledged that the language approved by the Board is the agency's official position (*see* Tr 81 ["the democratic commissioners are not denying that they did vote for it, and, as a matter of law, it is the board's position"]).

Bd. of Elections (214 AD2d 224 [3d Dept 1995], *lv dismissed* 86 NY2d 848 [1995]), the Court noted that while the Board "could arguably have worded" the ballot proposal "in a number of different ways," it upheld the language adopted by the BOE, since it "met the requirements of the drafting standards" as then set forth in section 4-108 (*id.* at 230; *see also Leib*, 45 Misc 3d at 882 [rejecting certain additional language proposed by petitioners because court "does not find anything incomplete, inaccurate or even misleading about the text in its current form"]).

While the primary relief sought by petitioners is for the Court to direct that the Attorney General's recommendation be instituted as to the form of Proposition One on the November 2024 ballot, the arguments for the petition boil down into a number of specific challenges to the Board's language. Initially, petitioners contend in general that the Board failed "to use best efforts to score at an eighth grade level or below and meet the definition of plain language" as required by the 2023 legislation, and failed to apply the appropriate standard in evaluating whether the summary and abstract were legally compliant (Petitioners' Memorandum of Law ["Pet Mem"] at 16). In addition, petitioners challenge certain aspects of the specific language used by the Board in the both the form and abstract, arguing as follows:

- The terms "abortion" and "pregnant people" are clearer and more understandable than "Reproductive Health Care and Autonomy" (*id.* at 12-13).
- The term "LGBT" reflects more common usage than the terms "sexual orientation" and "gender identity" used by the BOE, as the latter are "overly complex and esoteric" (*id.* at 13).
- The BOE's proposal "misleads voters about the Amendment's impact on private actors," as in petitioners' view case law indicates that notwithstanding the facial application of the amendment to individuals and corporations, it is not "self-executing" between private actors, and thus "would not impose legal requirements on 'any person, business, or organization,' as the abstract suggests" (*id.* at 15-16).
- The language used by the Board stating that the amendment "adds anti-discrimination provisions to State Constitution" describes a "legal change" instead of a "practical policy effect," in violation of section 4-108.

I address each of these concerns below.

I. Challenges to the Board's ARI Score and Process

Petitioners make two related assertions which go to the manner in which the Board approved the proposal. The first concerns the way in which the Board addressed the ARI score of its language, and the second relates to the characterization of the Republican Co-Chair as to its role in drafting the title and abstract.

The Petition notes that "the ARI scores for the form and abstract of Prop 1 substantially exceed the recommended eighth grade reading level," and asserts that "[t]he Board did not provide any justification for its failure to adopt plain and accessible language, such as that proposed by the Attorney General, that is at or near an eighth grade reading level" (Pet ¶ 41).

The statute states the following in regard to the ARI of the title and abstract: "No specific Automated Readability Index score shall be required; provided, however, the board shall use best efforts to score at an eighth grade reading level or below and meet the definition of plain language in subdivision five of this section" (Election Law § 4-108[7]). To prevail on this argument, then, it is not enough for petitioners to prove that the BOE approved language exceeded the statutory ARI target; they must show that the Board failed to use "best efforts" in this regard.

The record does not support such a contention. The staff communications show that they assessed the ARI in each draft, with neither side's staff able to bring down the measure for the abstract below 12 (*see generally* Murphy Aff, Ex A). Both Democratic and Republican staff explained the key difficulty in reducing this number: Because the amendment contains a long list of items, and one of two variables on which ARI is based is sentence length, reducing the ARI was difficult without leaving off some items or arbitrarily dividing the list (*see id.* at 6 [Democratic co-counsel: "The reason for the high readability score is the list of civil rights protections" which "makes the description difficult to break into shorter sentences"]).[10] This was the justification ultimately given by the Board in its public disclosure for the high ARI for the abstract: "While the [ARI] of the Proposition is higher than the statutory goal . . . the enacting

[10] The Attorney General and Democratic staff produced a lower ARI in large measure by breaking out two, two-word sentences addressing abortion and LGBT issues separately. Whether that specific change was required by the Plain Language Law is discussed below.

legislation for the Proposition includes a list of protected classes, all of which would be added to the Constitution if approved" and thus "these terms must all be included in the Proposition language to ensure voters are fully informed of the proposed additions"[11] (*id.* at 32; https://elections.ny.gov/2024-statewide-ballot-proposal]).

During oral argument, petitioners' counsel maintained that the BOE's non-compliance with the Plain Language Law was also demonstrated by the words of Republican Co-Chair Kosinski in approving the proposed form and abstract, in particular his statements that "we took the wording from the statute and placed it into the proposition," that "the statute itself the readability is 35" and that he would vote for the proposal because "as far as I'm concerned, the proposed language of the proposition mirrors very closely the language of the statute and the language of the statute becomes it's part of the New York State Constitution, as they sent to us" (Kosinski Aff, Ex C at 20). Counsel argued that "what he's admitting, in this statement, is that they didn't even try to write the proposal in plain language" but rather "[t]hey looked to the legal wording of a constitutional amendment, that has a readability score of 35, and then mirrored that language" (Tr 11). This, according to counsel, would "gut[] the very purpose of the plain language law" (*id.* at 11-12).

I do not read that statement as indicating that the Board failed to comply with the best efforts standard. As noted, the ARI was checked and discussed as to each proposed draft. Moreover, nothing in the statute says that the language in the proposal cannot mirror the terms in the statute, and the fact that is uses similar terms to those in the amendment does not on its face mean that it is not compliant with section 4-108. The statute explicitly states that a particular ARI is not required, but rather that the drafters make their best efforts to meet the standard and explain why they have not been able to do so. The Board's explanation is sufficient in this regard, as well as accurate: the extensive list of covered categories, made up of a series of long

[11] These circumstances illustrate a general difficulty with the ARI measure: the relation between the variables it uses and the reading level of the passage becomes attenuated when the passage is just a few words, like those at issue here. For example, breaking out certain items into shorter sentences, even if those sentences don't actually make the text more comprehensible. Indeed, if a two-word sentence such as "Protects abortion" is added to the Board's form of proposal, the ARI goes down by more than half a level, even though all of the same words as before are still in the text. That is because anything that reduces the average sentence length – even by adding additional text – will result in a lower grade level.

words, presents a significant obstacle to achieving the target score without altering the meaning of the provision.

Finally, it is difficult to know what the remedy would be in the event I were to find that the Board did not use "best efforts" to meet the ARI target. There were relatively small differences in ARI between the Democratic and Republican language – indeed, the ballot proposal language for both had an ARI of 12 until the final bridging language by Democratic staff to allow the parties to reach agreement raised it to 14 (*see* Murphy Aff, Ex A at 19, 32). Given the size of the texts at issue, small changes in language can have significant impact on ARI, and thus it is not a variable that can be isolated from the other issues discussed in this opinion. To the extent petitioners suggest that I ignore the BOE's work and simply impose the AG's version, I note that there is no AG draft for the abstract, and there are other issues with its form discussed below. And a remand for the Board to redraft is impractical.

In light of the foregoing, I find that petitioners have not demonstrated that the Board has failed to meet the "best efforts" standard, or that the ARI measurements warrant any relief. Whether the language otherwise meets the requirements of the Plain Language Law is a different question, which I take up below.

III. Specific Challenges to the Board's Language

A. The Meaning of the Amendment

Since section 4-108 requires that the BOE create a brief statement explaining in "plain language" what will be the "practical outcome" of this change, petitioners' challenges cannot be addressed without some understanding as to what the impact might be of the ERA's addition of various categories to the second sentence of Article I, Section 11 of the State Constitution – what has come to be known as the Constitution's Civil Rights Clause. That, in turn, requires some background into how this clause has been construed by the Courts. Providing that background turns out to be a complicated task, however. One interpretation of the limited caselaw construing this provision is set forth the Committee Report on the ERA, and it underpins certain arguments made by petitioners. My reading of that caselaw, however, is not entirely consistent with that in the Report.

The Committee Report provides the following history of the Civil Rights Clause:

> "The section prohibits discrimination in 'civil rights' and has been interpreted by New York courts to be 'non-self-executing.' This means that it requires specific executing legislation in order to establish a cause of action between private actors, *see Dorsey vs. Stuyvesant Corp.*, 299 N.Y. 512 (1949), or in actions for damages, *see Brown v. State*, 89 N.Y.2d 172 (1996). However, even in the absence of specific executing legislation, the section operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category. *See People v. Kern*, 75 N.Y.2d 638, 652-53 (1990)(prohibiting racial discrimination in the exercise of peremptory challenges, noting the state action involved, and limiting the permissible scope of CPL270.25)."

In short, the sponsors view the clause being amended as essentially a dead letter in regard to private parties, but as having broad application when applied to governmental acts and legislation. Petitioners embrace that view; at argument, counsel asserted that "for private actors there has to be some other right that's articulated somewhere else in order for it to apply to them" (Tr 77). This distinction is central to petitioners' proposed language – which would exclude the amendment's application to private parties altogether, while describing the Act as providing broad protections against government actions.

The problem is this: the distinction between public and private actors made by the cited caselaw only related to the first sentence of Section 11 (known generally as its "Equal Protection Clause"), which applies only to state action but is not at issue here. Neither the constitutional language nor the caselaw draws such distinctions between public and private actors for purposes of the second sentence, i.e. the Civil Rights Clause, which is what would be amended by Proposition One. Rather, the limitations placed on this provision by the case law arise out of the clause's overall language and history, and nothing therein indicates that it applies differently to the government.

The current language of the clause states (with emphasis added) that no person shall be subject to "discrimination in [his or her] their civil rights *by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.*" Thus, on the face of the clause, the same terms apply to private and public entities.

The first case to address the meaning of this language is *Dorsey*, which concerned a challenge under the Civil Rights Clause to racial exclusion by a housing development. The Court found that "[t]he first sentence [of Section 11], which is obviously an equal protection

clause, is no more broad in coverage than its Federal prototype," i.e., its application is limited to the government (*see* 299 NY at 530; *see also id.* at 532 [noting in regard to "the equal protection clauses of the Federal and State Constitutions" that "[f]or many years it has been unquestioned that the great prohibitions of the Fourteenth Amendment are addressed to that action alone which 'may fairly be said to be that of the States' "] [citation omitted]). As to the second clause – the one now at issue – the Court said as follows:

> "The second sentence of section 11 is a civil rights clause and, although applicable to private persons and private corporations, protects only against 'discrimination in * * * civil rights'. Obviously such rights are those elsewhere declared. Again this conclusion is strongly supported by the statement of the chairman of the Bill of Rights Committee made at the convention to the effect that the provision in question was not self-executing and that it was implicit that it required legislative implementation to be effective. Furthermore, it was stated at the convention that the civil rights protected by the clause in question were those already denominated as such in the Constitution itself, in the Civil Rights Law or in other statutes" (*id.* at 531 [citations omitted]).

Although the case discussed the clause in the context of private parties, it stated broadly that the "provision in question" is not self-executing, and did not say the government was treated any differently in this regard.[12] The language construed – "discrimination . . . in civil rights" – applies to both.

The next case to discuss this clause was *Brown*, which concerned an action brought by a class of African-American men seeking damages for improper and discriminatory police conduct as a violation of section 11. The Court noted that the Civil Rights Clause applied to private as well as public actors:

> "There are, however, some constitutional provisions that explicitly regulate private conduct and the prohibition against discrimination contained in section 11 is one of them. Article I, § 11 prohibits discrimination by 'any ... person or by any firm, corporation, or institution, or by the state'. Thus, the rights guaranteed by

[12] The Committee Report may be read as referring broadly to section 11, and thus referencing the differential treatment afforded public entities under the Equal Protection Clause. But the language added to the amendment does not affect that clause, and broadens only the application of the Civil Rights Clause, and thus it is only that clause that matters for understanding the impact of the amendment. It bears noting that given the breadth of protections afforded by the first sentence of section 11, it is not surprising that the limited caselaw addressing the second sentence only has concerned private actors, since before this amendment, any protection afforded by the Civil Rights Clause vis-a-vis the government was subsumed within the broader protections of the Equal Protection Clause in any case.

that constitutional provision may be enforced in Supreme Court to recover damages for private acts of discrimination although enabling legislation was required before the action could be maintained because the provision was not self-executing" (89 NY2d at 183).

The Court went on to state:

"The remainder of section 11 [i.e., the Civil Rights Clause] prohibits discrimination. It is implicit in the language of the provision, and clear from a reading of the constitutional debates, that this part of the section was not intended to create a duty without enabling legislation but only to state a general principle recognizing other provisions in the Constitution, the existing Civil Rights Law or statutes to be later enacted. The Legislature subsequently implemented those guarantees by provisions of various statutes *which regulate the conduct of both State officers and private individuals*" (*id.* at 190 [emphasis added]).

In contrast, the Court found as to the first sentence, i.e., the equal protection clause:

"Manifestly, . . . that part of section 11 relating to equal protection [is] self-executing. [It[define[s] judicially enforceable rights and provide[s] citizens with a basis for judicial relief against the State if those rights are violated" (*id.* at 186).

In short, the distinction *Brown* drew between private and public actors only concerned the Equal Protection Clause, and its statement that the Civil Rights Clause was not self-executing was not limited to private entities.

The final case in the trilogy is *Kern*, which addressed the use of peremptory challenges to strike African-American members of the jury pool by criminal defendants (i.e., private individuals). The Court of Appeals explained section 11 as follows:

"While the first sentence of this section is an equal protection provision which, like the Federal equal protection right, is addressed to 'State action' *the Civil Rights Clause contained in the second sentence prohibits private as well as State discrimination as to civil rights. . . .The term 'civil rights' was understood by the delegates at the 1938 Constitutional Convention to mean 'those rights which appertain to a person by virtue of his citizenship in a state or community' . . . . The Civil Rights Clause is not self-executing, however, and prohibits discrimination only as to civil rights which are 'elsewhere declared' by Constitution, statute, or common law*"[13] (*People v Kern*, 75 NY2d 638, 651

[13] There is essentially no other decisional law regarding the Civil Rights Clause besides these three cases, with the exception of a few *pre-Kern* trial court decisions addressing the same issue (and reaching the same conclusion) (*see e.g. People v Davis*, 142 Misc 2d 881 [Sup Ct, Bronx County 1988]; *People v Gary M.*, 138 Misc 2d 1081 [Sup Ct, Kings County 1988), and one opinion which, after recognizing that the first sentence of section 11

[1990], *cert denied* 498 US 824 [emphasis added]).

The Committee Report is correct that *Kern* also construed the action of private counsel during jury selection as "state action," but that is because it struck down the practice of racially discriminatory challenges on two grounds: first as discrimination by a private actor in violation of the Civil Rights Clause (*see id.* at 651-653 [Section II.B]) and as state action due to the role played by the courts in the jury selection process, under the State Equal Protection Clause [*see id.* at 653-658 [Section II.C]). Only the latter section turned on whether the conduct at issue was state action.

In sum, in its present form the second sentence of section 11 applies to both private and public actors, and in both instances it is not "self-executing," and its reach is limited to discrimination regarding an individual's civil rights established elsewhere by the Constitution and statute.

These principles would, if applicable to the amended language, result in a much narrower reading of its impact than that described in the Committee Report. There are several reasons, however, why the provision might well be read more broadly if the proposed amendment comes into effect.

The first is that it was clearly the sponsors' intent that the protections afforded by the ERA be read more expansively in regard to government actors (*see Matter of Hoffmann v New York State Ind. Redistricting Commn.*, 41 NY3d 341, 352 [2023] [citing sponsors' memorandum as setting forth purpose of constitutional amendment]; *but see Knight-Ridder Broadcasting, Inc. v Greenberg*, 70 NY2d 151, 159 [1987] [noting, in regard to sponsor's memorandum, that "[t]he views of one legislator . . . are not necessarily revealing of the legislative intent"]). The Committee Report made clear their understanding that "even in the absence of specific executing legislation, the section operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category" (*see* Zaytsev Aff, Ex 12). And the list of impacts expected to be brought about by the ERA, as set forth in the memorandum,

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requires state action while the second "applies to actions by individuals and groups," dismissed a claim under the Civil Rights Clause because it did not allege discrimination (*see Holy Spirit Assn for Unification of World Christianity v State Congress of PTA*, 95 Misc 2d 548 [Sup Ct, New York County 1978]).

follow from on this understanding.

Second, the nature of the categories added to the amendment may, even under the limitations set forth in the caselaw cited above, invite a much broader impact. For example, the use of criminal law against particular covered characteristics (i.e., those who have made use of their "reproductive rights" or who are pregnant) would appear to affect their "civil rights" as encompassed by the provision – particularly when read against the backdrop of the provision's history, and the declared purpose of the sponsors that the amendment have such an impact.

Third, the amendment would add to the end of Section 11 the phrase "pursuant to law." The memorandum in support gave the following explanation: "And by clarifying that the amended section applies to all government actions taken 'pursuant to law,' this amendment is intended to apply to any action with force of law, including action by the executive or legislative branch, local governments, or any subdivision thereof" (Zaytsev Aff, Ex 12 at 2). While the explanation in the Committee Report appears to evince an intent to broadly define governmental action, it also could limit those circumstances in which the amendment applies to private parties.

Finally, many of the rights addressed by the memorandum are the subject of various statutory and constitutional provisions, and requiring that those be applied in a non-discriminatory manner may have substantive impacts – although such matters are not discussed by the parties, and in any case any rights granted only by statute will not themselves be constitutionally protected.

All this is to say in very broad strokes that while the memorandum in support makes clear that the intent of the amendments was to enact far-reaching civil rights protections, the Legislature has done so by extending to new groups the terms of a provision that had previously been construed narrowly, to reach only discriminatory conduct affecting civil rights already established elsewhere in law, and which itself gives rise to no private cause of action unless one has been created under separate legal authority.

In other words, the parties in the present action are fighting about how the practical impacts of a broadly worded amendment are to be explained to the public, while the precise contours of what those impacts will be are unclear, and will need to be fleshed out by the courts. It is with that uncertainty in mind that I approach petitioners' arguments.

B. LGBT/Abortion vs Sexual Orientation/Gender Identity/Gender Expression

Petitioners argue that the terms used in the Attorney General's proposal "more clearly convey []" the purpose of the statute than the terms used in the BOE's proposed abstract (*see* Pet ¶ 35 [citing statement of respondent Berger]). Specifically, they contend that the term "'LGBT' is a brief, inclusive, and well-understood term that voters will immediately recognize" and is "used considerably more often in everyday language" compared to the terms used by the BOE (and in the amendment itself) – "sexual orientation," "gender identity" and "gender expression" (Pet Mem 14). Similarly, they assert that the phrase "reproductive healthcare and autonomy" selected by the BOE is "inaccessible and incomprehensible to most voters" and "disguises one of Prop 1's most pressing impacts—constitutional protection for abortion—which was a core impetus for its passage by the Legislature and would have a major impact on voters' lives" (*id.* at 11).

I note – as counsel for the Democratic Commissioners has acknowledged (*see supra* p 11) – that petitioners' burden in this proceeding is not to show that their wording is preferable to that of the Board, but rather that the BOE's version is contrary to law, and in particular Election Law § 4-108. In this regard, petitioner's primary argument boils down to the claim that the Board's draft is not "easily comprehended, concise language" as required by section 4-108(5)(a).[14]

In its challenge, petitioners rely on (1) statements in the comments in opposition to the proposal (*see* Pet Mem 12 & Zaytsev Aff, Ex 4 [noting that "approximately" 1,300 comments said the term "reproductive health care and autonomy" was "confusing, and the terms "gender identity" and "sexual orientation" were "inaccessible"]; (2) surveys and focus groups which purport to support this contention (Pet Mem at 11); and (3) the opinions expressed by elected officials in their submissions on the proposed wording (*see id.* at 13).

None of this evidence, however, shows persuasively that the terms used by the BOE are

[14] Respondents argue that the requirement of the statute is actually that the Board use its "best efforts" to formulate its proposal using plain language (*see* Election Law § 4-108[7] [the Board "shall use best efforts to . . . meet the definition of plain language"]; *but see id.* § 4-108[5][a] ["plain language shall mean the form of the ballot proposal and abstract . . . *shall* be written in easily comprehended, concise language"][emphasis added]; *id.* § 4-108[1][d] [the text . . . *shall* contain an abstract of such proposed amendment, proposition or question, prepared by the state board of elections in plain language"][emphasis added]). I will presume for present purposes that the requirement is mandatory, since I reach the same conclusion regardless.

not broadly understood, or otherwise run afoul of the Plain Language Law.

In regard to the comments, most are presented by groups advocating in favor of the ERA and of the AG's proposed language, or consist of – as respondents point out – form letters (*see* Kosinski Aff, Ex B [compendium of public comments, most following largely identical form]). Petitioners' argument is ultimately circular: those advocating that the Attorney General's language be used in the ballot question say in comments that the BOE's language is not comprehensible, and then those comments are the basis on which it is suggested that the Court should make such a finding. A determination as to whether a particular draft constitutes plain language must be based on more than the representations of those who prefer the alternative wording.

As to the survey data, no specifics are provided as to the questions used or the manner of selecting the sample, and no affidavit is provided by the entity conducting the survey. There is also no discussion as to how the "focus groups" were conducted. Moreover, the description of the results is incomplete and cherry picked. For example, the NYCLU memo notes that 57% of the voters surveyed found the terms "gender identity and expression" to be "very clear" but it does not disclose what the other choices were or what percentage they garnered, i.e., what percentage found these terms to be "clear." Given the figure disclosed, it is quite possible that the poll results actually rebut the petitioners' argument that such wording is not broadly comprehensible. Moreover, many of the poll results cited concern the clarity of the language used by the AG – but has noting to do with petitioners' burden here, which is to show that the BOE's draft does not comply with the governing statute. In any event, absent some showing that the cited polls were conducted in accordance with a proper methodology, and what they actually found, they cannot serve as a basis for determining whether the BOE's language is clear to most voters.[15]

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[15] There seems to be no apparent caselaw in New York setting forth the standard for admissibility of survey evidence. In the federal courts, some circuits hold that surveys will not be admissible unless conducted in accordance with generally accepted survey principles and in a statistically correct manner (*see Keith v Volpe*, 858 F2d 467, [9th Cir 1988], *cert denied* 493 US 813; *Pittsburgh Press Club v United States*, 579 F2d 751, 755–58 [3d Cir 1978]). The Second Circuit has indicated that in some instances (surveys concerning the state of mind of those polled), flaws in methodology will go to weight and not admissibility – although this may mean the survey is entitled to no weight at all (*see Schering Corp. v Pfizer, Inc.*, 189 F3d 218, 227-230 [2d Cir 1999]). There is no caselaw I

Nor can the assertions of legislators decide the issue. Statements made by the sponsors of the Plain Language Law, made after that act's passage as to how it would apply in this particular case, cannot be used to determine the Legislature's intent, much less how the law should be applied in particular circumstances (*see Matter of Consolidated Edison Co. of N.Y., Inc. v Department of Envtl. Conservation*, 71 NY2d 186, 195 n 4 [1988] [letter by sponsor on intent of legislation passed two years earlier "is not a reliable indicator of what the legislative body as a whole intended"]; *Lorie C. v St. Lawrence County Dept. of Social Services*, 49 NY2d 161, 169 [1980] [letter from executive director of Senate Committee written more than a year after passage of bill "is not entitled to consideration as legislative history" for purposes of determining bill's intent]; *Matter of State of New York v Parker*, 38 AD2d 542, 542 [1st Dept 1971] [in determining application of statue, "we may not rely on evidence of the post-enactment statements of the sponsor of the bill"]).

At argument, it was suggested that I can make the determination that terms such as "reproductive rights," "sexual orientation" and "gender identity" are not "easily comprehended" even without specific proof (*see* Tr 14 [Counsel for Petitioners: "I think that the Court can look at the language itself and determine whether it believes that the words comply with plain language"]). And I agree that in certain instances it might be clear on the face of particular terms that they are overly complex or not readily understood by a large segment of the population. But I cannot find that to be the case with the language at issue here. As the Republican commissioners have pointed out (Mem in Opp 14), the terms used in the BOE formulation have been found by courts to be generally understood against challenges that they are overly vague (*see Otto v City of Boca Raton*, 353 F Supp 3d 1237, 1271 [SD Fla 2019][finding, in upholding statute that prohibited licensed therapists from providing talk-based therapy to minors with goal of changing their "sexual orientation" and/or "gender identity" that "[b]oth phrases have a common and readily ascertainable meaning, such that a person of ordinary intelligence would understand the type of therapy that is prohibited"], *rev'd on other grounds* 981 F3d 854 [11th Cir

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can find, however, which would allow a court to consider hearsay representations regarding survey evidence, with no indication as to the survey's methodology, sampling, questions asked, overall results, etc.

2020][16]; *Slattery v Hochul*, 61 F 4th 278, 294 [2d Cir 2023] ["The term[] 'reproductive health decision making' . . . [is] sufficiently clear that an ordinary reader would know what each term entails."]; *CompassCare v Cuomo*, 465 F Supp 3d 122, 167 [ND NY 2020] [upholding statute prohibiting employment discrimination based on an employee's "reproductive health decision making" against vagueness challenge; finding that a" person of ordinary intelligence" would understand that a drug, device, or medical service in relation to reproductive health] to include products related to reproduction such as condoms, other contraceptives, birth-control pills, and medications designed to end pregnancies"]). Indeed, the terms "sexual orientation" and "gender identity and expression" are used in the notice that the New York State Division of Human Rights requires employers to post to inform their employees of the State's anti-discrimination laws (*see* https://dhr.ny.gov/system/files/documents/2024/06/poster.pdf). These are simply not the sorts of terms which may be characterized, without adequate supporting evidence, as not generally comprehensible to the State's voters.

Finally, petitioners and some of the commenters argue that using the words "abortion" and "LGBT" elucidate for voters what were the most important motivations for the Legislature's passage of the proposed amendment, and thereby show what is at stake in this vote (*see e.g.* Pet ¶ 18 ["A central purpose for which the Legislature enacted Prop 1 was to protect abortion rights in the wake of the Supreme Court's decision in *Dobbs v. Jackson*"]; Pet Mem 11 [BOE language "disguises one of Prop 1's most pressing impacts – constitutional protection for abortion – which was a core impetus for its passage by the Legislature and would have a major impact on voters' lives"; Zaytsev Aff, Ex 10 [Senators' letter: "At a time when abortion rights are in jeopardy, voters must understand Proposal Number One will protect abortion rights in the State constitution"]). Be that as it may, the failure of the Board to adopt the particular emphasis petitioners believe should be given to aspects of the proposal does not mean that it has not met the "plain language" test. Again, the question before me is not whether the Board has highlighted the aspects of the proposal that supporters would prefer, but whether the Board's draft is legally permissible under the plain language requirement.

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[16] The district court's opinion was reversed on the Eleventh Circuit's finding that the statute constituted viewpoint discrimination; the appellate opinion did not address the language cited in the parenthetical.

Petitioners also make a somewhat different argument by highlighting the importance of abortion rights to the passage of the ERA: that the ballot question as presently drafted is improper because (1) it is misleading, in that it does not explain a central policy implication of the amendment; and (2) fails thereby to comply with the requirement in section 4-108[2] that it "describes the change in policy to be adopted and not the legal mechanism."

The central problem with these arguments arises out of the language of the amendment itself. As set forth at length *supra*, the manner in which the amendments to the Civil Rights Clause will actually impact abortion rights will be dependent on how the provision is interpreted, and that issue cannot be easily resolved on the face of the statutory language and prior caselaw. The Legislature could have, if it wished, simply codified the right to abortion. Instead, the language of the amendment it passed as potentially relevant to abortion rights is as follows: "No person shall, because of . . . pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy . . . be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law."

As discussed, the prohibition against discrimination in one's civil rights has thus far been held "not self-executing," and to "prohibit[] discrimination only as to civil rights which are 'elsewhere declared' by Constitution, statute, or common law" (*Kern*, 75 NY2d at 651). Within this context, the question of what the nature and scope of the protection that will be given abortion rights turns on numerous questions, which may be fodder for future judicial resolution: Will courts continue to hold to the narrow reading of this clause set forth in *Dorsey* and *Kern*? What things will be included within the ambit of "civil rights" – a phrase only construed twice in the context of Section 11, and in relatively limited contexts? What does it mean to subject someone to "discrimination in their civil rights . . . because of reproductive healthcare and autonomy"? What weight will be given to the manifest intent of the sponsors that this provision be read as giving broad protection for abortion rights, although the amendment has been worded as an anti-discrimination provision?

Petitioners' view is, in essence, that the BOE should have answered these questions, found on the basis of its answers that the amendment will result in blanket protection for abortion

rights, and put that interpretation (rather than the statutory language or some paraphrase thereof) before the voters. Or as they put it in their brief, the Board's draft is "blatantly misleading" because it does not "account for how the amendment has been and *will be* interpreted" (Pet Mem 16 [emphasis added]).

I do not read the Plain Language Law as requiring the BOE or the Courts to prognosticate on how an amendment will be construed, and to include such in the language on the ballot. Given the complexities outlined above, I lack the requisite crystal ball to predict how the proposed amendment will be interpreted in particular contexts, nor do I believe it appropriate for a court to answer complex interpretive questions regarding the meaning of a proposal before it has even been enacted, or to compel the Board to do so. Such would be tantamount to issuing a forbidden advisory opinion (*Cuomo v Long Island Lighting Co.*, 71 NY2d 349, 354 [1988]["The courts of New York do not issue advisory opinions for the fundamental reason that in this State [t]he giving of such opinions is not the exercise of the judicial function"] [citation omitted]).

For all these reasons, I find that the Board's decision to hew close to the anti-discrimination language of the amendment's actual wording, rather than characterize the amendment as one that will "protect abortion," was not inherently misleading, and thus cannot serve as a basis for striking the certified language.[17]

C. Application to Private Actors

The Board's abstract states that the amendment "prohibits any person, business, or organization, as well as state and local governments from discrimination pursuant to law." Petitioners contend in this regard that the abstract is "blatantly misleading" about its "application to private actors" (Pet ¶ 52). Specifically, it "gives voters the impression that Prop 1 is enforceable against private actors" when it is not (Pet Mem 16). In doing so, the petition adopts the reading of the caselaw set forth in the Committee Report: that the Civil Rights Clause is self-executing as to government actors, but not as to private parties (*id.* at 15).

As set forth *supra* pp 15-19, the distinction between private and public entities as described in petitioners' submissions is not consistent with case law, which holds that the general

[17] In light of this finding, I need not reach respondents' other argument, which opposes the use of the terms "abortion" and "LGBT" in the AG's proposal on the ground that it is under-inclusive (*see* Mem in Opp 10-13).

Equal Protection Clause of section 11 is applicable to governmental actors and is self-executing, but makes no distinction between public and private actors in relation to the Civil Rights Clause. Indeed, the amendment leaves the language regarding its application to any "person, business or organization" intact.

For their part, respondents argue that even though the Civil Rights Clause is not self-executing, the creation of private rights of action under New York Human Rights Law and other statutes now makes its provisions enforceable in damages suits (*see* Tr 29 [it is appropriate to include private discrimination in abstract "[b]ecause New York state already has statutes in effect that prohibit discrimination on the basis of all of these protected classes"]). But this is circular at best. To the extent statutes give individuals the right to sue private actors, it is those laws that create the right of action, not the proposed amendment. Moreover, by limiting the application of the proposed amendment to discrimination carried out "pursuant to law," the amendment may be read to import an "under color of law" component that would significantly restrict its scope on the context of private actors (*see* Zaytsev Aff, Ex 12 at 2). Further, to the extent courts take into account the expressed legislative intent in giving a broader reading to the Civil Rights Clause as amended, the intent of the sponsors in this regard applies only to public entities, not private ones (*see id.*).

In short, I am left with two proposals which are both potentially misleading, albeit in different ways, and depending on how the language at issue will be interpreted. Petitioners would inform the public that the amendment solely applies to public actors, although the Legislature left untouched the specific language stating that the anti-discrimination provisions of the Civil Rights Clause bars discrimination by private entities, and the caselaw does not seem to establish the purported distinction on which this is based. The Board's version would indicate that discrimination by private entities is barred by the statute as to the protected categories, notwithstanding the potential impact of the expressed legislative intent and the new additional language in potentially restricting such coverage.

There is a resolution which avoids such potential misleading of the voters, and that is simply to remove all reference to the specifics of who is covered by the provision. By removing the language about public and private actors, the abstract would not address at this stage the

precise scope of who is covered thereby, but state accurately that the amendment protects against unequal treatment on the grounds at issue. Given the uncertainty as to the application of this provision spelled out in this opinion, this is the only way to present the question to the voters without misleading them about matters that have yet to be decided. Moreover, when coupled with the other changes directed below, the language will not create any implication as to the particular entities that will be subject to the amendment's terms.

D. "Mechanism" not "Change in Policy"

The Plain Language Law requires that the title describe the "topic, goal, or outcome of the ballot question in plain language"; the summary "describe[] the change in policy to be adopted and not the legal mechanism"; and the explanation of the results of a Yes or No vote be "written in plain language that identifies the practical outcome of each election result and not the legal mechanism" (Election Law § 4-108[2]). The statute does not define what is meant by "legal mechanism," but from the context and legislative history, it seems the upshot of these provisions is that the ballot language must describe the practical effects of the amendment rather than the precise manner in which it alters the wording of the law (i.e., the "legal mechanism" would be that the amendment addresses thus and such section, adds a certain phrase, or removes particular wording) (*see* Zaytsev Aff, Ex 1 [Memo in Support of Plain Language Act] ["While lawyers consistently refer to, and emphasize, the legal mechanism for the change, such descriptions have little meaning for the typical voter," and thus the language used must describe "the change" itself, rather than the mechanism by which this is accomplished]). This is consistent with the view taken by the petitioners who argue that the Board's language "describe[s] legal mechanisms instead of explaining Prop 1's practical impacts" (Pet ¶ 52).

Petitioners point to several aspects where the Board's language runs afoul of this requirement (Pet Mem 15), and I find their arguments persuasive. In several instances, the Board's proposal does what section 4-108 clearly contemplates it should not: describe what language has been added or altered, rather than what the wording change will do. In particular, the form states that the amendment "Adds anti-discrimination provisions to State Constitution" and then explains what these new provisions "cover."

In contrast, the Attorney General's language provides an explanation as to what the

amendment will do, i.e. "protects against unequal treatment." Further, stating that the amendment would "protect against" such treatment rather than use a blanket term such as "prohibits discrimination" avoids the use of language which may not comport with the scope of the amendment, noting the limitations and uncertainty I have described. I therefore find that the adoption of the Attorney General's language in this context is the appropriate means of removing this legal infirmity.

Including such changes (and those noted above in regard to question of the language's application to private entities), and making certain minor adjustments to wording consistent therewith, the form of the proposal would look like this:

> "Amendment to Protect Against Unequal Treatment
>
> This proposal would protect against unequal treatment based on ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity and pregnancy. It also protects against unequal treatment based on reproductive healthcare and autonomy.
>
> A 'YES' vote puts these protections in the New York State Constitution.
> A 'NO' vote leaves these protections out of the State Constitution."[18]

The statute does not specifically apply the "no legal mechanism" requirement to the abstract. But the language used by the AG – that the statute will "protect against unequal treatment" – again avoids the uncertainty regarding the amendment's application to public and private actors described above, and will therefore not mislead the public by forecasting the Act's precise scope.[19] Amended to reflect such language, the abstract would read:

> "This proposal amends Article 1, Section 11 of the New York Constitution. Section 11 now protects against unequal treatment based on race, color, creed, and religion. The proposal will amend the act to also protect against unequal treatment based on ethnicity, national origin, age, disability, sex, sexual orientation, gender

[18] The "Yes" and "No" provision arguably crosses the line to referencing the "mechanism," i.e., it focuses on what would be added to the Constitution. The same is true of the Attorney General's proposal to the extent that it states a No vote would "leave[] this protection out of the State Constitution." In the overall context of a proposal that specifically states the practical effects of its enactment, I do not find that this language would violate section 4-108. The question, in any case, makes clear what the voters are deciding: whether to add language to the constitution.

[19] It also removes the need to include the language "pursuant to law," which is included in the BOE's abstract but provides no useful information to the public about the impact of the amendment.

identity, gender expression, pregnancy, and pregnancy outcomes, as well as reproductive healthcare and autonomy. The amendment allows laws to prevent or undo past discrimination."[20]

III. Remedy

Finally, the Republican Commissioners argue that I am powerless to direct the Board to adopt different language than that which they have certified; according to respondents, the only thing I have power to do in response to this petition is to remand the matter to the BOE for further action (*see* Mem in Opp 19-20). This contention is premised on caselaw saying that such is the only appropriate remedy when the Court finds that the agency has acted arbitrarily (*see Burkes Auto Body v Ameruso*, 113 AD2d 198, 201 [1st Dept 1985]). But that is not the basis for my ruling here, which is that the agency has violated Election Law § 4-108. Under these circumstances, the appropriate remedy is the issuance of an injunction to compel the Board to use legally compliant language (*see Matter of Association for a Better Long Island*, 243 AD2d at 561 [affirming order enjoining County Board of Elections from placing referendum on ballot]; *Leib*, 45 Misc 3d at 882 [enjoining use of certain language on ballot referendum]).

Respondents contend that these cases are inapplicable, because petitioners did not ask for an injunction, and any application for such now would be barred by laches (*see* Tr 62). But that is not so. The second cause of action in the petition specifically seeks injunctive relief pursuant to Election Law §§ 16-104 and 4-108 (*see* Pet ¶¶ 54-56; *see also* Prayer for Relief ¶¶ (b) & (c) (seeking Order directing Board of Elections to adopt the Attorney General's draft, or in the alternative, direct it to change the language to comport with various provisions of section 4-108).

Indeed, Election Law § 16-104(2) expressly contemplates that an action can be brought challenging the wording of a ballot provision. Such relief would be meaningless if all the Court could do is order a remand to the Board. That would require – after all appeals are exhausted – that the Board meet again and issue a new ballot proposal and abstract consistent with the Court's order, which would then be subject to its own set of appeals. It would be impossible for this to occur within the deadlines for printing ballots, and the standards of section 4-108 would

[20] The language set forth here has a marginal impact on the ARI, decreasing it from 14.17 to 14.24 for the form of proposal (without the title), and from 15.27 to 15.63. I have found no language change which would alter this without impacting clarity, and which is consistent with the limitations described below.

be, for all practical purposes, unenforceable. That is clearly not what the Legislature intended.

It is nonetheless true that a directive that the Board change language is not without problems. In particular, the language of the AG and BOE was made available for notice and comment, while the language provided for in this decision has not. To address this concern, I have tried to use the general phrasing employed either by the Board or the AG to the extent possible, so as not to introduce new terms which might raise there own issues.[21]

Accordingly, the petition is granted in part and denied in part as set forth above, such that I find the language currently posted with the ballot question shall be replaced by the following in regard to the form of Proposition One:

> "Amendment to Protect Against Unequal Treatment.
> This proposal would protect against unequal treatment based on ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity and pregnancy. It also protects against unequal treatment based on reproductive healthcare and autonomy.
>
> A 'YES' vote puts these protections in the New York State Constitution.
> A 'NO' vote leaves these protections out of the State Constitution."

And I further find that the language currently posted with the abstract for Proposition One shall be replaced with the following:

> "This proposal amends Article 1, Section 11 of the New York Constitution. Section 11 now protects against unequal treatment based on race, color, creed, and religion. The proposal will amend the act to also protect against unequal treatment based on ethnicity, national origin, age, disability, sex, sexual orientation, gender identity, gender expression, pregnancy, and pregnancy outcomes, as well as reproductive healthcare and autonomy. The amendment allows laws to prevent or undo past discrimination."

Counsel for the Democratic Commissioners is directed, upon notice, to promptly prepare for the Court's consideration an appropriate form of order to the extent necessary to effectuate the directives set forth in this Decision & Order.

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[21] Petitioners and the Democratic Commissioners have agreed that once I find that the Board's language runs afoul of the statute, I am not limited to the AG's language in crafting a remedy (see Tr 68, 70). Counsel for the Republican Commissioners strongly disagreed, consistent with his overall views on the limitations on the Court's power in this proceeding.

The motion to dismiss by respondents Kosinski and Casale is denied as moot.

This constitutes the Decision & Order of the Court. This Decision & Order is being electronically filed with the County Clerk, with a copy e-mailed to all counsel that have appeared in this proceeding. The signing and filing of this Decision and Order and e-mailing to the parties shall not constitute notice of entry under CPLR 5513, and counsel is not relieved from the applicable provisions of that Rule respecting to filing and service of Notice of Entry.

ENTER.

Dated: Albany, New York
August 23, 2024

David A. Weinstein
Acting Supreme Court Justice

Papers Considered:

08/23/2024

1. Verified Petition dated August 2, 2024.

2. Affirmation of Emergency and in Support of Petitioners' Application by Order to Show Cause of Renee Zaytsev, Esq. dated August 2, 2024, with appended Exhibits 1-13.

3. Petitioners' Memorandum of Law in Support of Verified Petition, dated August 2, 2024.

4. Verified Answer of respondents New York State Board of Elections Co-Chair Henry T. Berger and Commissioner Essma Bagnuola, dated August 12, 2024.

5. Affirmation of L. Brian Quail, Esq., on behalf of Co-Chair Henry T. Berger and Commissioner Essma Bagnuola, dated August 12, 2024, with appended Exhibits A-D.

6. Notice of Motion to Dismiss of respondents New York State Board of Elections Co-Chair Peter S. Kosinski and Commissioner Anthony J. Casale dated August 12, 2024.

7. Affirmation of Nicholas J. Faso, Esq., in support of Motion to Dismiss dated August 12, 2024, with appended Exhibit A.

8. Affirmation of respondent Co-Chair Peter S. Kosinski in support of Motion to

Dismiss dated August 12, 2024, with appended Exhibits A-C.

9. Affirmation of Kevin G. Murphy, Esq. in support of Motion to Dismiss dated August 12, 2024, with appended Exhibit A.

10. Memorandum of Law of Respondents Peter S. Kosinski and Anthony J. Casale in Opposition to the Verified Petition and in Support of Motion to Dismiss, dated August 12, 2024.

11. Transcript of Hearing on August 14, 2024.