Written Testimony

to the Ohio Constitutional Modernization Commission

by Ron Alban

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Statehouse Room 313

Co-chairs Senator Tavares and Representative Dever and Commission members, my name is Ron Alban from Kettering, Ohio. I offer testify about the Initiative and Referendum Report and Recommendation submitted to you by the Constitutional Revision and Updating Committee.

I founded and led a number of initiative campaigns over the past eight years. I can testify that the initiative can advance policies supported by the People, but which legislative bodies are hesitant or unwilling to act upon.

My experience is consistent with observations by the Ohio Supreme Court that "the people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government." and that "the greatest efficiency of the [initiative and referendum] rests in the wholesome restraint imposed automatically upon the general assembly and the governor and the possibilities of that latent power when called into action by the voters."

My testimony is on the recommendations about initiated constitutional amendments, specifically the proposed Article II, Section 1(a). Section 1(a) recommends adding extraordinary burdens and restrictions on initiated amendments compared to legislature-proposed amendments. These double standards violate equal treatment of the law and are profoundly anti-democratic. **I ask you to formally vote to reject double standards between methods of amending the constitution and vote to endorse uniform standards for all methods of amending the constitution.**

Some recommendations in other sections of the report are intertwined with the double standards of Section 1(a) and other sections contain additional double standards. Thus, **I ask the committee to return the Report to the Constitutional Revision and Updating Committee for revision to remove all double standards and to include recommendations covering all methods of amending the constitution.**

I will also bring to the attention of the Commission actions of the committee that are inconsistent with the procedures and rules adopted by the Commission.

Double Standard 1. <u>The report recommends that an initiated amendment should require 55% of the vote for passage, while one proposed by the legislature should require 50%.</u>

Reasonable people can disagree on what the threshold should be for passage of an amendment, but a position cannot be sustained that different thresholds should apply based on who brings an amendment to the ballot.

All states with the initiative have identical passage requirements for constitutional amendments, regardless of the method. An inadvertent error in the report states that "Colorado, which on November 8, 2016, increased the percentage requirement on initiated amendments *only* from 50% to 55%." The percentage requirement approved by Colorado voters is the same for initiated

amendments and legislature-referred amendments: 55% for new provisions; 50% for repeal of provisions.

The legislature-proposed amendment on the November 2015 ballot "Anti-monopoly amendment; protects the initiative process from being used for personal economic benefit" was approved with only 51% of the vote—but under the logic of the committee's recommendation had the proposed amendment been put on the ballot by the People, it would have failed.

Double Standard 2. The report recommends that an initiated amendment shall only appear on a November ballot of an even numbered year, while one proposed by the legislature can appear on any ballot in any year—including low turnout May or special election ballots.

The legislature-proposed amendment "Anti-monopoly amendment; protects the initiative process from being used for personal economic benefit" appeared on the odd-year November ballot of 2015 for vital timeliness reasons. The recommendation to restrict initiated amendments to even-numbered years denies the People the same timeliness opportunity.

Presently an initiated amendment can appear on any November ballot while one proposed by the legislature can appear on any ballot. This existing double standard should be eliminated. All amendments, regardless of method, should appear on November ballots.

Double Standard 3. The vehicle for proposing an initiated amendment is a petition; the vehicle for one proposed by the legislature is a joint resolution. The constitution presently permits petitions and joint resolutions to contain more than one amendment. After certification by the Secretary of State of an initiated amendment or one proposed by the legislature, the constitution authorizes the Ballot Board to separate the amendments on the ballot so the voters may vote on each one separately.

The Ballot Board has exercised this power for both initiated amendments and legislative-proposed amendments. For instance, in 1992 the Ballot Board separated on the ballot three amendments that had been certified via the circulation of one petition (term limits for the General Assembly, term limits for statewide officeholders, and term limits for Congress).

The report recommends that only "one amendment" shall be permitted in an initiative petition before circulation may begin (the "one amendment" decision to be made by the Ballot Board), while a joint resolution of the legislature can contain multiple amendments that are not subject to Ballot Board review until after certification by the Secretary of State.

The constitution presently grants no authority to the Ballot Board regarding initiated amendments until after certification by the Secretary of State. From 1913 until 2006, the Ballot Board had no involvement in the initiated amendment process until after certification by the Secretary of State. The General Assembly passed a statute in 2006 that authorized the Ballot Board to review petitions prior to circulation and to split a petition into multiple petitions if the Ballot Board feels the petition contains more than one amendment. The "one amendment" requirement is nebulous and subjective. The Ballot Board is a political entity that currently consists of three members of the General Assembly, the Secretary of State, and one private citizen. The splitting of a petition into multiple petitions vastly increases the number of signatures required—and vastly increases the cost of signature collection, often to the point of infeasibility. The stated purpose for the 2006

statute was to “enable the voters to vote on that proposal separately.” As previously explained, the Ballot Board has always had the authority to ensure that the voters can vote separately on separate amendments by separating them after certification. It is hard to conclude anything other than the purpose of the 2006 statute was to create a double standard and an obstacle for initiated amendments.

As the very name “Ballot Board” makes clear, the Ballot Board should never have involvement with a proposed amendment until after it has been certified for the ballot by the Secretary of State, regardless of the amending method.

The elasticity, when elasticity is desired, of the meaning of “one amendment” is illustrated that the report recommends its proposed constitutional text changes of over 5,000 words are “one amendment”, even though a constitutional amendment, a statute, a referendum (the voters’ veto of a statute passed by the legislature), a municipal charter amendment, a municipal ordinance, and a municipal referendum are quite different things. It is unlikely that a proposed amendment to change the constitutional text pertaining to General Assembly proposed amendments, General assembly statutes, a Governor’s veto of statutes, municipal charter amendments proposed by municipal councils, and municipal ordinances of municipal councils would be considered one amendment--even though they are all loosely related to legislative activities.

The inelasticity, when inelasticity is desired, of the meaning of “one amendment” is illustrated by a decision of the Ballot Board, using its authority granted by the 2006 statute, to split a petition into three petitions even though all provisions pertained to the narrow focus of raising the ethical standards of the General Assembly.

Double Standard 4. The report recommends that the Ballot Board prescribe the ballot title and ballot language (transferring control of important parts of the contend of petition from the petitioners to the Ballot Board) before the petition can be circulated and before it is known if the initiated amendment will be certified for the ballot, while the Ballot Board is prohibited from involvement with a legislature-proposed amendment until after it is certified by the Secretary of State.

The Ballot Board should have no involvement until after an amendment has been certified by the Secretary of State to appear on the ballot.

Double Standard 5. The report recommends that an initiated amendment that proposes a restraint of trade or commerce for the benefit of the petitioners (as determined by the Ballot Board) shall be subject to an extra passage requirement, while the identical amendment proposed by the legislature would not be subject to an extra passage requirement.

This is an existing double standard that was contained in the legislature-proposed amendment of 2015 titled “Anti-monopoly amendment; protects the initiative process from being used for personal economic benefit” that was approved by the voters by 51%.

The legislature exempted itself from the extra passage requirement for an amendment that favors the economic interest of a special interest. If the People are to be discouraged from proposing amendments in restraint of trade, then all other methods of amendment should also be discouraged.

Double Standard 6. The report recommends that the petitions for an initiated amendment be submitted before the first day of June in an even numbered year for it to appear on the ballot that year (about 155 days before the election), while one proposed by the legislature could be passed as a joint resolution as late as 90 days before an election to appear on the ballot.

This worsens the present double standard in the constitution that initiative petitions must be submitted 125 days before an election. The deadline for submission to the Secretary of State should be the same for initiated amendments and legislature-proposed amendments.

The present 125 days for initiated amendments has allowed adequate time for the Secretary of State and the Ballot Board to perform their duties. Changing the deadline to four weeks earlier cuts out four weeks of prime, good weather, signature collection conditions.

While the present 90 days for legislative-proposed amendments has been adequate for the Secretary of State and the Ballot Board to perform their duties, it results in a shorter period for public and press scrutiny of a legislature amendment compared to an initiated amendment.

Note: At its May11th meeting the committee passed a motion to change the deadline from before June 1st to before July 1st. However, the Report and Recommendation before the Commission contains the June 1st deadline.

Double Standard 7. The report recommends that an initiated amendment would be required to use gender neutral language, while one proposed by the legislature would not be required to use gender neutral language.

The same standard should apply to both.

Double Standard 8. The report recommends that an initiated amendment would become effective 30 days after approval of the voters, while one proposed by the legislature would become effective immediately upon approval of the voters.

This creates the one-sided opportunity for a legislative-proposed amendment to prevent an initiated amendment from taking effect. This is an existing double standard that should be eliminated.

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Some actions of the committee are inconsistent with the procedures and rules adopted by the Commission.

Rule 8.3 of the Commission's Rules of Procedure and Conduct states: "If the report and recommendation finds that an existing section should be amended, it shall be on the agenda for not less than two meetings for the purpose of allowing discussion by committee members and to receive comment from the public." A common sense understanding of this rule, especially given the use of the singular as regards *the* report and recommendation, is that the *same* report and recommendation must be on a committee's agenda for at least two meetings.

The committee's first hearing of the Report and Recommendation occurred on April 13, 2017. The version of the proposed constitutional text was Version 9a, dated 3/26/17. The committee's

second hearing occurred on May 11th. The report contained a different substantive text designated as V10b, dated 5/3/17. The committee voted to approve the report at the May 11th meeting. Thus, the Report and Recommendation before the Commission was not processed in accordance with Rule 8.3.

I brought this problem to the attention of the Acting Director of the Commission via e-mail prior to the May 11th committee meeting. The Acting Director indicated that she would forward my concern to the committee for its consideration. I received no response from the committee.

The Report and Recommendation before the Commission also does not contain four substantive changes to the proposed constitutional text (Version V10b) that was passed by the committee at its May 11th meeting—with only a single hearing held for these changes before a vote was taken. This raises several concerns. First, the Report and Recommendation before the Commission does not reflect the final text as recommended by the committee. Second, it is unclear what status should be afforded to these four changes given that it is unclear that the procedure followed by the committee comports with the Commission Rules and Procedures.

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The constitution is the People's charter for their government. The People reserve to themselves the power to approve amendments based on the principle that government derives its just powers from the consent of the People.

Whosoever has the power to put proposed amendments on the ballot controls the evolution of the constitution. Whosoever controls the evolution of the constitution controls vital aspects of the future of our society. The People cannot vote on a proposed amendment unless it reaches the ballot. Great power rests with those who can put proposed amendments on the ballot.

Liberty and democracy are endangered if the government, which the constitution is intended to control, has monopoly or dominant power to put proposed amendments on the ballot—ceding control of the evolution of the constitution to government officials. To paraphrase James Madison, if people were angels, we would need neither governments nor constitutions. Humans, including legislators, are prone to self-interest—and this reality results in a biased set of proposed amendments emanating from the legislature—and, equally important, many proposed amendments that will never emanate from the legislature.

The People in 1912 created for themselves an independent means from the legislature to put proposed amendments on the ballot—the initiative. Initiated amendments also reflect the interests of their sponsors. However, these interests are not the same interests as those of the legislature. The initiative is necessary to produce proposed amendments that the legislature will not bring forth for the People to consider.

A legislature-proposed amendment can be put on the ballot with little cost or effort. An initiated amendment requires immense cost and effort. The costs include legal work, printing and distribution of thousands of petitions, organization of hundreds or thousands of circulators, interactions with upwards of 700,000 people to collect signatures, processing of petitions, and much more. Most initiated amendment attempts never make it to the ballot because of these immense costs and hurdles.

The 104 year history of initiated amendments shows that the immense cost and effort of initiated amendments greatly limits their use compared to legislature-proposed amendments. From 1913 thru 2016, 154 legislature-referred amendments made it to the ballot versus 69 initiated amendments. Voters have approved 106 legislature-proposed amendments versus 18 initiated amendments. Of the latter, four either never took effect or have been nullified by the courts. Thus, after 104 years, our constitution only contains 14 operational initiated amendments. The evidence is indisputable: the evolution of the Ohio constitution is dominated by legislature-proposed amendments.

If an initiated amendment reaches the ballot, the voters must find sufficient merit to approve it—which they usually don't, because three out of four initiated amendments are defeated. Voters have reliably defeated ill-conceived initiated amendments. A recent example was the 2015 initiated amendment to create a marijuana cartel. The sponsors raised 25 million dollars for their campaign, but voters overwhelmingly rejected their scheme.

The prudence of voters in judging initiated amendments is also demonstrated by the reasonableness of those they have passed. Six operational initiated amendments have been passed since 1990, as listed below. The ones that have passed are well within the mainstream of American public policy.

-term limits on General Assembly members (1992)

-term limits on statewide office holders (1992)

-no wholesale taxes on foods (1994)

-minimum wage indexed to consumer price index (2006)

-authorization for casino gambling (2009)

-healthcare freedom (2011) [largely symbolic]

In recent years, the legislature has repeatedly taken actions to strengthen its dominant control over constitutional amendments by adding additional burdens and restrictions not found in the constitution to initiated amendments. These include banning non-Ohio residents from circulating petitions (twice nullified by federal courts), inserting the Ballot Board (which presently is comprised mainly of General Assembly members) to intervene in the petition process, and restricting when certain signatures can be collected. The Ohio Secretary of State has added burdens by means of administrative rules.

A recent action of the legislature illustrates its aim to hobble the initiative. In last year's lame duck session, the General Assembly passed a law, inserted into a bill on foreclosure, which authorizes Boards of Elections to ban a citizen-initiated local issue from the ballot if the Board deems any portion of it violates the Ohio constitution. So far as I can divine from the legislature journals, this provision was added to the bill by a Senate committee one morning and passed later that day by the Senate and the House without discussion in either chamber. This is an egregious stifling of local initiatives; and, to add insult to injury, is an unconstitutional usurpation of judicial authority.

Section 1(a) proposes new and far-reaching burdens and restrictions be imposed on the initiative method of proposing and enacting constitutional, greatly increasing the existing dominance of the legislature over constitutional amendments.

The justification for these double-standard burdens and restrictions is the "sense" that members of the Constitutional Revision and Updating Committee "felt" that the content of some initiated amendments "do not really belong in the constitution but rather in the Revised Code". The adding of these burdens and restrictions to initiated amendments is "designed to encourage petitioners to take the statutory, rather than the constitutional, route when undertaking the initiative process."

It is no business of the committee from discouraging or encouraging the People on how to make use of the initiative options available to them.

The committee's mission was to examine all methods of amending the constitution: initiative, legislature-proposed, and constitutional convention. Though the committee has been in operation for over four years, the Report and Recommendation before the Commission addresses initiated amendments in isolation from other amendment methods. A provision of a constitution cannot be analyzed in isolation because of the interrelationships and checks and balances that are the hallmarks of American constitutions. All methods of amendment must be evaluated in a holistic manner to analyze the interrelationships and checks and balances between them.

The proper conceptual approach for constitutional amendment provisions is found in the US constitution. The founders consolidated all methods of proposing and ratifying amendments into one article with uniform standards. Had the committee followed this approach, it would have consolidated all methods of amendment (initiative, legislature-referred, and convention) into one Article with uniform standards.

The People judge the content of the proposed amendment at the ballot box. Whether an amendment is brought forth by the initiative, the legislature, or a convention, the same standards should apply.

The committee's focus on comparing the existing initiated amendment process with the existing initiated status process is misplaced. It is like trying to understand what the proper provision should be legislature-proposed amendments by studying the legislature's process for statutes. They are different things for different purposes. You do not learn how to grow apple trees by studying orange trees.

There is not a bright line test to determine whether an amendment brought forward at a specific time under specific circumstances should be in the constitution or in the Revised Code as a statute. While there are proposals that most people would agree always belong in a constitution and proposals that most people would agree always should be a statute, there is a large grey area of proposals that can go either way based on complex, subjective judgments about the specific provision and the specific circumstances. THAT IS WHY IT MUST BE LEFT FOR THE PEOPLE TO DECIDE AT THE BALLOT BOX WHETHER A PROPOSAL THAT MIGHT USUALLY BE A STATUTE SHOULD BE ADDED TO THE CONSTITUTION—irrespective of whether the proposal is brought forward by the legislature or the People.

In 2009 the legislature put on the ballot a lengthy proposed amendment to create a Livestock Care Standards Board. The legislature judged based on the circumstances at that time that it should be part of the constitution rather than a statute---and the People agreed.

In 2009 the necessary voter signatures were obtained to put on the ballot a lengthy proposed initiated amendment to establish casinos in Ohio. The sponsors judged based on the circumstances at that time that it should be in the constitution rather than a statute---and the People agreed.

The passage of the 2009 casino gambling amendment occurred after the People had defeated a number of casino initiated amendments in prior years. Surrounding states had established casinos, but the General Assembly declined to establish casinos in Ohio via statute—even though there was growing public support for casinos. Perhaps the 2009 amendment passed because the People decided casinos would benefit Ohio—but, in the face of General Assembly non-action, the People concluded the only way to establish casinos was via a constitutional amendment. Even as the signature collection was underway, the General Assembly declined to take action—either by passing a statute of its own liking or by putting a competing casino amendment on the ballot.

The casino amendment illustrates that the initiative is a means to advance the public good in the face of an unresponsive legislature. As a result of the initiative, Ohio now has casinos that employ thousands of people, attract out-of-state visitors, and generate significant tax revenues.

If the double standards proposed by the committee were in effect in 2009, the casino amendment would have been prohibited from appearing on the 2009 ballot—and even if it had appeared, it would have failed the super-majority requirement for passage.

The General Assembly has the power to offer the People alternatives to proposed initiated amendments. If the General Assembly judges that a proposed amendment should be a statue, it can pass a statute of its own liking during the signature collection stage of an initiative effort—likely ending the initiative effort. The General Assembly also has the power to place a competing amendment on the ballot so that the People may choose between the initiated version and the General Assembly version. The General Assembly did this in 2015 in response to the marijuana cartel initiated amendment. If the General Assembly does not act to offer alternatives to initiated amendments, which is the choice of the General Assembly—that is not a reason to burden the initiative process with double standards.

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I thank Commission members for your consideration of my testimony.