

STATE OF MICHIGAN  
IN THE SUPREME COURT

LEAGUE OF WOMEN VOTERS OF  
MICHIGAN, PROGRESS MICHIGAN,  
COALITION TO CLOSE LANSING  
LOOPHOLES and MICHIGANDERS FOR  
FAIR AND TRANSPARENT ELECTIONS,

Supreme Court No. 163711

Court of Appeals Nos. 357984,  
357986

Plaintiffs-Appellants,

Court of Claims No. 21-000020-MM

v

SECRETARY OF STATE,

Defendant-Appellant,

DEPARTMENT OF ATTORNEY  
GENERAL,

Intervening Defendant-Appellant.  
\_\_\_\_\_ /

**The appeal involves a ruling  
that a provision of the  
Constitution, a statute, rule or  
regulation, or other State  
governmental action is invalid.**

**AMICUS BRIEF OF BOARD OF STATE CANVASSERS**

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## STATEMENT OF JURISDICTION

Defendant Secretary of State Jocelyn Benson is appealing an October 29, 2021 decision by the Michigan Court of Appeals. This Court has discretion to exercise jurisdiction in this case. See MCL 600.215(3); MCR 7.303(B)(1). The Court's exercise of jurisdiction is warranted under MCR 7.305(B)(2) because this case involves the people's constitutional right to initiate legislation or to amend the Constitution, which are matters of significant public interest, and the case is one against an officer of the State—Secretary Benson—in her official capacity.

This amicus curiae brief is submitted by the Attorney General on behalf of the Michigan Board of State Canvassers, and so is filed under MCR 7.312(H)(2).

## STATEMENT OF QUESTION PRESENTED

1. Should any relief granted in this matter be prospective only, so that any approvals by the Board of State Canvassers based upon the law at the time of such approval may be considered valid?

The Secretary of State's answer: Yes in part, but the Secretary holds that the checkbox requirement should apply from 10/29/21 forward, even to previously approved petitions.

The Plaintiffs' answer: Did not answer.

The Department of Attorney General's answer: Did not answer.

Amicus Board of State Canvassers' answer: Yes.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

## STATUTES INVOLVED

### **MCL 168.476 Petitions; canvass by board of state canvassers; use of qualified voter file; hearing upon complaint; investigations; completion date; disposition of challenges; report.**

(1) Upon receiving notification of the filing of the petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. The qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid. If the board is unable to verify the genuineness of a signature on a petition using the digitized signature contained in the qualified voter file, the board may cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which the petitions were circulated, to determine the authenticity of the signatures or to verify the registrations. Upon request, the clerk of any political subdivision shall cooperate fully with the board in determining the validity of doubtful signatures by rechecking the signature against registration records in an expeditious and proper manner.

(2) The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions. To conduct a hearing, the board may issue subpoenas and administer oaths. The board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes, but shall complete the canvass at least 2 months before the election at which the proposal is to be submitted.

(3) At least 2 business days before the board of state canvassers meets to make a final determination on challenges to and sufficiency of a petition, the bureau of elections shall make public its staff report concerning disposition of challenges filed against the petition. Beginning with the receipt of any document from local election officials

pursuant to subsection (1), the board of state canvassers shall make that document available to petitioners and challengers on a daily basis.

**MCL168.477 Petition and initiative petition; official declaration of sufficiency or insufficiency by board of state canvassers; publication of statement of purpose; expense; effectiveness of law that is subject of referendum.**

(1) Except as otherwise provided in this subsection, the board of state canvassers shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted. The board of state canvassers shall make an official declaration of the sufficiency or insufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted. The board of state canvassers may not count toward the sufficiency of a petition described in this section any valid signature of a registered elector from a congressional district submitted on that petition that is above the 15% limit described in section 471. If the board of state canvassers declares that the petition is sufficient, the secretary of state shall send copies of the statement of purpose of the proposal as approved by the board of state canvassers to the several daily and weekly newspapers published in this state, with the request that the newspapers give as wide publicity as possible to the proposed amendment or other question. Publication of any matter by any newspaper under this section must be without expense or cost to this state.

(2) For the purposes of the second paragraph of section 9 of article II of the state constitution of 1963, a law that is the subject of the referendum continues to be effective until the referendum is properly invoked, which occurs when the board of state canvassers makes its official declaration of the sufficiency of the referendum petition. The board of state canvassers shall complete the canvass of a referendum petition within 60 days after the petition is filed with the secretary of state, except that 1 15-day extension may be granted by the secretary of state if necessary to complete the canvass.

**MCL168.482b Summary of purpose of the proposed amendment or question; requirements; approval by the board of state canvassers; form.**

(1) A person who circulates a petition under section 482 may, before circulating any petition, submit the summary of the purpose of the proposed amendment or question proposed that is required under

section 482(3) to the board of state canvassers for approval as to the content of the summary. The board of state canvassers must issue an approval or rejection of the content of the summary not more than 30 days after the summary is submitted. The board of state canvassers may not consider a challenge to the sufficiency of a submitted petition on the basis of the summary being misleading or deceptive if that summary was approved before circulation of the petition.

(2) If a person submits the summary of the purpose of the proposed amendment or question proposed as provided in subsection (1), all of the following apply:

(a) The summary of the purpose of the proposed amendment or question proposed must be prepared by the director of elections, with the approval of the board of state canvassers.

(b) The summary is limited to not more than 100 words and must consist of a true and impartial statement of the purpose of the proposed amendment or question proposed in language that does not create prejudice for or against the proposed amendment or question proposed.

(c) The summary must be worded so as to apprise the petition signers of the subject matter of the proposed amendment or question proposed, but does not need to be legally precise.

(d) The summary must be clearly written using words that have a common everyday meaning to the general public.

(3) If the board of state canvassers approves the summary of the purpose of the proposed amendment or question proposed, the person who circulates the petition under section 482 shall print the full text of the approved summary in 12-point type in the place required by section 482(3).



## INTRODUCTION

The Board of State Canvassers submits this amicus curiae brief for the limited purpose of urging that any relief or determination to be issued in this case should be completely prospective, and that any approval of the form of petitions by the Board based upon the law as it existed at the time of such approval should be accepted as valid. As various stages of this litigation proceeded, the Board has continued to perform its statutory duty to review and approve summary language for initiative petitions. The Board also provides optional review of the form of petitions prior to circulation.

The Board of State Canvassers believes that retroactive application of any ruling on the issues presented in this case would be unfair to petition proponents who relied on the Board's form approvals that applied the law as it was understood at the time. The Board's position is that petitions approved by the Board in the past several months should be considered valid, absent some other cause to challenge any individual petition's validity.

## STATEMENT OF FACTS AND PROCEEDINGS

The Board adopts the recitation of facts and proceedings presented by Defendant-Appellant Secretary of State Jocelyn Benson.

The Board would further note the following facts pertinent to the Board's interest here. Although the Board is not statutorily required to do so, the Board of State Canvassers has historically offered the opportunity to ballot proposal committees to have their petitions preliminarily approved as to form prior to circulation. While entirely voluntary, pre-circulation review helps avoid discovering defects in the form only after circulation is complete and signatures have already been gathered. By statute, the Board officially approves the form and sufficiency of a petition after circulation is completed and the petition has been filed with the Secretary of State. See MCL 168.476, MCL 168.477. The current filing deadline for petitions to initiate legislation is June 22, 2022, and the filing deadline for petitions to amend the Constitution is July 11, 2022. See MCL 168.471.

## STANDARD OF REVIEW

Whether a court's ruling applies retroactively is a question of law that appellate courts review de novo. *Estate of Pearce by Pearce v Eaton Co Road Comm'n*, \_\_\_ Mich \_\_\_, \_\_\_ (June 4, 2021); 2021 Mich LEXIS 1037 at \*4, citing *People v Maxson*, 482 Mich 385, 387 (2008).

## ARGUMENT

### I. **This Court should determine that any decision in this matter is given complete prospective effect only.**

Under Michigan law, “ ‘the general rule is that judicial decisions are to be given complete retroactive effect’ ” while “ ‘complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.’ ” *Lincoln v General Motors Corp*, 461 Mich 483, 490 (2000), quoting *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 189 (1999) (additional citations omitted).

As argued by the Secretary of State, prospective application of a decision requires consideration of whether relief under the new rule of law should be available going forward only based upon equitable principles and “there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances.” *Placek v City of Sterling Heights*, 405 Mich 638, 665 (1979). A decision to apply a judicial decision prospectively “is not a matter of law but a determination based on weighing the merits and demerits of each case.” *Id.* at 664. This Court has recognized that some decisions are of such significance and so change legal expectations that prospective application is “appropriate.” *Id.*, citing *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 586 (2005). Courts thus consider (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski v City of Allen Park*, 465 Mich 675, 696-97 (2002).

Here, the Court of Appeals' decision absolutely did change the legal landscape with respect to circulating and pending petitions. As noted by the Secretary of State, the Board of State Canvassers has already issued pre-circulation approvals as to form on three petitions—Unlock Michigan II, Secure MI Vote, and Yes on National Popular Vote. In approving the form of petitions, it is the Board's practice to apply the law as it exists at the time of the Board's decision. As a result, two of those circulating petitions do not include checkboxes, but were subject to the paid circulator affidavit requirement, while the third includes the checkbox but is not subject to the affidavit requirement.

The Board is also aware of at least two additional petition efforts that are expected to seek approval as to form before this Court is likely to issue a decision here. The Board also anticipates that several existing petitions may—in the coming weeks—seek approval of revised petition forms that have been modified to comport with the Court of Appeals' ruling. Those existing petitions—if they end up filing signatures—would likely have signatures gathered both under the original petition and after the revised petitions are approved. The Board would, consistent with its obligations under MCL 168.476 and MCL 168.477, be required to determine whether the petitions are sufficient or insufficient and will, therefore, be called upon to determine whether signatures gathered under the original petitions are valid or invalid.

The Board of State Canvassers generally concurs with the Secretary of State's arguments that prospective application of the Court of Appeals' ruling and of

this Court’s ultimate ruling is warranted. First, as argued by the Secretary, the purpose of the Court of Appeals’ October 29, 2021 ruling regarding the checkbox—providing information to the public—will not be hindered by prospective application of the ruling.

But second, the Board of State Canvassers reasonably relied upon the four previous opinions finding the check-box requirement unconstitutional. Indeed, until the Court of Appeals’ ruling in *LWV II*, there would have been no basis for the Board to require compliance with a checkbox requirement that had—until the October 29, 2021 ruling—never been held to be constitutional.

These opinions “foster[ed] a reliance interest [and] shaped future . . . conduct.” *Grimes v Dep’t of Transp*, 475 Mich 72, 88 n 49 (2006) (citations omitted). The Board has earnestly sought to comply with each of the opinions as they were issued. The only alternative would have been for the Board to refuse to provide pre-circulation approvals to form. But that would have denied petition sponsors the ability to learn of any format defects before circulation—increasing the risks and potential costs to petitioners. Further, the Board would *still* have been called upon to review petition forms upon their filing after circulation—as it did for the Unlock Michigan I petition, which was approved (without a checkbox) and subsequently adopted into law by the Legislature. Ultimately, the Board was called upon to make decisions based upon the law as it existed at the time.

Similarly, if this Court reverses the Court of Appeals’ October 29, 2021 ruling regarding checkboxes, or even if the Court reaches a new result regarding any of the

other challenges presented in this case, prospective application of this Court’s decision would still be appropriate for the same reasons. Since October 29, 2021, the Board has reasonably relied upon the Court of Appeals’ ruling in approving the form of the “Yes on National Popular Vote” petition. Under these circumstances, the Board reasonably and fully relied on these published and unpublished decisions in shaping its decisions. This factor thus weighs in favor of prospective application.

Perhaps most importantly, prospective application would further the interests of justice far more than retroactivity. As the Secretary of State correctly observed, “the correct interpretation of a statute is better given prospective application when retroactive application seriously undermines parties’ reliance on the rule of law and disrupts the administration of justice.” *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 465 n 6 (2010). Here, retroactive application would seriously and unfairly prejudice petition proponents who requested—and relied upon—the Board of State Canvassers’ determination that their petition complied with all necessary form requirements. Retroactivity would effectively negate any value in the Board’s approval as to form, which may well undermine future reliance on the Board’s determinations. Petition proponents might justifiably lose confidence that the Board’s approval would be honored if there were an intervening litigation challenging the form of petitions.

Retroactivity in this circumstance could also incentivize future challenges to petition form requirements. Persons or organizations that oppose a particular petition might contrive virtually any conceivable challenge to form requirements,

for the purpose of introducing uncertainty by virtue of ongoing litigation. As long as a challenge was being litigated, petition proponents could never be sure that their petition would ultimately be accepted after they expended their resources to gather signatures on a potentially-invalid petition, even if the Board had already provided its approval.

Lastly, retroactively enforcing new form requirements would simply be unfair to petition proponents who sought and obtained the Board's approval as to the form of their petitions only to have that approval rendered meaningless months after they started circulating. Retroactively enforcing court rulings in this circumstance would compel the Board to reject petitions on the basis of form, after the Board had already approved that very same form, rendering the Board's approval meaningless.

The Board provides approval as to form in order to facilitate a fair and open process for initiative petitions, in which petitioners know from the outset that their petitions comply with form requirements and will be accepted in that form if they later seek to file their petitions for canvassing. This also furthers public interest by bolstering public confidence that a petition they sign will later be accepted by the Board. The Board's process—and the public interest it advances—would be frustrated if petitioners saw no benefit to seeking approval as to form.

If petitioners come to view the Board's pre-circulation approval as to form as nothing more than an unnecessary delay with no tangible benefit, they are more likely to skip that optional process. This would invariably lead to more petitions

failing on the basis of avoidable form errors, after building public support and gathering hundreds of thousands of signatures. Worse yet, a rejection as to form after circulation would not necessarily reveal all possible errors in the form—meaning that even if a petition proponent decided to mount a second effort, their petition could *still* be rejected later on the basis of a previously undiscovered error in the form. The optional pre-circulation approval as to form generally avoids all of this and provides some measure of certainty to petition proponents and the public.

Applying the Court of Appeals’ ruling—and any potential ruling by this Court—prospectively only will allow the Board to maintain its optional pre-circulation review process while providing assurance to petitioners and the public that the approval will be honored if the petition is later filed with a sufficient number of signatures. Retroactive application, however, would cast significant doubt on the Board’s past and future determinations, and pull the rug out from under petition proponents who obtained the Board’s approval as to form in good faith on the belief that the Board would honor that approval after they finished circulating the petition. Complete prospective application is appropriate in these circumstances.

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, Amicus Board of State Canvassers respectfully requests that this Court determine that the decision issued by the Court of Appeals on October 29, 2021, and any final decision issued by this Court, have complete prospective effect only—meaning that the decisions would not apply



to any petition that was approved as to form and commenced circulation before October 29, 2021, or before any final decision by this Court.

Respectfully submitted,

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