STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellants/Cross-Appellees,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant,

and

DEPARTMENT OF ATTORNEY GENERAL,

Intervenor Defendant-Appellee/Cross-Appellant.
_____/

Court of Appeals Nos. 357984, 357986

Court of Claims No. 21-000020-MM

REPLY BRIEF OF CROSS-APPELLANT DEPARTMENT OF ATTORNEY GENERAL

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Dated: September 27, 2021

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ARGUMENT[1]

I. Plaintiffs' claim that the 15% Rule facially violates freedom of speech guarantees is unpreserved and lacks merit.

Because the Court of Claims did not evaluate whether the 15% Rule would facially violate the free speech protections in the Michigan Constitution, it has not been preserved for appeal and this Court should not review it. But even if it did, that alternative claim—lodged in addition to the Plaintiffs' claim that the 15% Rule was not authorized by the Constitution—lacks merit.

A. Plaintiffs' free speech claim is not preserved for appeal.

In their complaint, Plaintiffs claimed that the 15% Rule violates the free speech guarantees in Const 1963, art 1, §§ 3, 5, which are coextensive with the federal protections under the First Amendment. *Burns v City of Detroit (On Remand)*, 253 Mich App 608, 620–621 (2002) (subsequent history omitted). Although Plaintiffs raised this claim and argued it in their motion for summary disposition, it was not addressed below—the Court of Claims did not need to address the claim since it struck down the 15% Rule on the lead argument advanced by the Plaintiffs.

No matter, a claim that was not decided by the trial court is not preserved for appellate review. *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 562 (1991); *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 278 (1997). Should this

[1] Although the Department challenged the Plaintiffs' standing in the Court of Claims, it does not raise that argument before this Court.

Court reject the Plaintiffs' argument that the 15% Rule was an unconstitutional legislative veto (as it should), the proper remedy would be to remand to the Court of Claims to consider this claim in the first instance.

B. Even if this Court did decide to reach this unpreserved claim, the Plaintiffs fail to meet their heavy burden to prove facial invalidity.

Like its other constitutional claims, Plaintiffs' is one for *facial* invalidity.[2] In a facial challenge, a plaintiff must show that the challenged law is "invalid in toto—and therefore incapable of any valid application" to a set of facts. *Steffel v Thompson*, 415 US 452, 474 (1974). In other words, Plaintiffs here are required to show that "no set of circumstances exists under which [the 15% Rule] would be valid." *Straus v Governor*, 459 Mich 526, 543 (1999).

1. The Ninth Circuit rejected a free speech claim levied against Nevada's similar regulation, finding only a minimal burden on the plaintiffs' rights.

"States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*

[2] Plaintiffs, however, base at least part of their claims on speculative facts that are not appropriate even for an as-applied challenge, let alone a facial challenge. They allege that "[m]any voters cannot reliably identify their congressional districts"; that "look[ing] up that information . . . will take additional time"; and that "[s]ome voters will find the process too much of a bother and will walk away without signing" a petition. (App, 27a.) In support of these claims, Plaintiffs rely on one affidavit from an individual who has "managed and owned several firms that circulate petitions for signatures in support in support [sic] of nominations and ballot proposals." (App, 66a–67a.) But the claims in this affidavit are not based on actual attempts to comply with the 15% Rule; rather, they are based on speculation of how compliance *might* go in the future. (See, e.g., App, 16a–21a.)

v Twin Cities Area New Party, 520 US 351, 358 (1997). Like the Plaintiffs' other claims, this one is subject to the *Anderson-Burdick* test, which calls for measuring "the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Id.* at 358–359.

The Ninth Circuit applied the *Anderson-Burdick* test to another state law that bears a striking resemblance to the 15% Rule, upholding Nevada's "All Districts Rule" against First Amendment challenges virtually identical to those raised here. *Angle v Miller*, 673 F3d 1122, 1126 (CA 9, 2012) (analyzing Nevada's rule that requires statewide initiative petitions to include signatures from at least 10% of the registered voters in each of that state's congressional districts).

To understand why the 15% Rule does not severely burden Plaintiffs' free speech rights, it is important to consider the practical effect of the law. Simply put, an initiative petition will now need to contain signatures from at least seven of Michigan's 14 congressional districts, since no more than 15% of the total signatures may be from any one district. MCL 168.471. This requirement does not restrict any direct communications between the circulators seeking to gather signatures and the voters who are eligible to sign the petitions. Unlike the ban on paid petition circulators struck down in *Meyer v Grant*, this requirement does not "limit[ ] the number of voices who will convey [the circulators'] message," nor does it "limit[ ] the size of the audience they can reach." 486 US 414, 422–423 (1988). And unlike a requirement that petition circulators wear badges, which was struck down

by the U.S. Supreme Court, the 15% Rule does not "discourage[ ] participation in the petition circulation process" by impinging on a circulator's interest in anonymity. *Buckley v Am Constitutional Law Found, Inc*, 525 US 182, 199–200 (1999).

To the contrary, instead of *restricting* one-on-one communications between circulators and voters, the 15% Rule "likely *increases* the 'total quantum of speech' on public issues, by requiring initiative proponents to carry their messages to voters in different parts of the state." *Angle*, 673 F3d at 1133, quoting *Meyer*, 486 US at 423 (emphasis in original). But unlike Nevada, which requires a certain percentage of signatures from each of its congressional districts, the 15% Rule can be satisfied with signatures from as little as half of Michigan's 14 congressional districts, so it is even less burdensome from a geographic perspective. For example, as Plaintiffs even recognize, the greater Detroit area (and Southeast Michigan generally) is home to at least seven congressional districts. (App, 69a.)

The 15% Rule similarly does not severely burden Plaintiffs' free speech rights by making it more difficult and expensive to get a petition on the ballot. (App, 27a–28a.) The plaintiffs in *Angle* made, and the Ninth Circuit rejected, this very argument. The Court first aptly noted that "[t]here is no First Amendment right to place an initiative on the ballot," and observed that provisions "that make it more difficult to qualify an initiative for the ballot therefore do not necessarily place a direct burden on First Amendment rights." *Angle*, 673 F3d at 1133. The key question is whether the restrictions "significantly inhibit the ability of initiative

proponents to place initiatives on the ballot." *Id.* In their challenge to Nevada's rule, the plaintiffs provided affidavits from individuals stating that (1) it was "impossible to recruit volunteers" to help collect signatures in the northern part of the state for a proposed initiative involving a more local concern about Las Vegas casinos; and (2) based on past experience, one particular district "is very hostile to initiative petitions and it is much more expensive to gather signatures in these rural counties," which made volunteers "afraid" to gather signatures there. *Id.* at 1133–1134. The Court found that these statements amounted to no more than "speculation, without supporting evidence, that the All Districts Rule imposes a severe burden on the First Amendment rights of initiative proponents." *Id.* at 1134. The plaintiffs' shortcoming was their failure to present "any evidence that, despite reasonably diligent efforts, they and other initiative proponents have been unable to qualify initiatives for the ballot as a result of the geographic distribution requirement" set forth in Nevada's rule. *Id.*

Plaintiffs' challenges to Michigan's 15% Rule suffer from similar infirmities. As described above, see footnote 1, the alleged burdens relate to *future* signature-gathering efforts, and speculate as to what *might* happen when circulators communicate with voters. Plaintiffs did not present any evidence or other allegation that they have attempted to comply with the new requirements of Michigan law, and what the results of those efforts have been. As a result, they have not demonstrated that their free speech rights have been severely burdened, and this Court should therefore not apply strict scrutiny to the 15% Rule.

2. The 15% Rule advances the state's important interest in ensuring a modicum of broader support for statewide ballot initiatives.

Because the 15% Rule does not severely burden Plaintiffs' free speech rights, it must be upheld if it furthers the state's "important regulatory interests." *Timmons*, 520 US at 358. Surely, Michigan has "substantial interests in regulating the ballot-initiative process." *Buckley*, 525 US at 204. And ensuring sufficient grassroots support for an initiative plainly falls within a state's interests related to ballot initiatives. See *Meyer*, 486 US at 425; *Buckley*, 525 US at 205. "The issue here is whether a state can assert an important interest in ensuring that this grassroots support be distributed throughout the state." *Angle*, 673 F3d at 1135.

Through the 15% Rule, Michigan has determined that its interest in ensuring sufficient grassroots support for an initiative or constitutional amendment is furthered by requiring a slightly more even distribution of support from at least half of its congressional districts, as opposed to a single, statewide signature requirement. This is precisely the sort of "considerable leeway" states are given to regulate their ballot-initiative processes. *Buckley*, 525 US at 191–192. "Some states may prefer a single, statewide signature requirement, while others may choose a signature requirement with a geographic component, restricting the initiative to proposals having a minimum level of statewide support, rather than only localized support." *Angle*, 673 F3d at 1135. The Court's reasoning and analysis in *Angle* is on all fours with the issues presented here. Should this Court reach the issue, it should uphold Michigan's 15% Rule.

CONCLUSION AND RELIEF REQUESTED

The Department respectfully requests this Court reverse in part and affirm in part, upholding all of the challenged aspects of 2018 PA 608.

Respectfully submitted,

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Dated: September 27, 2021

LF: League of Women Voters v Benson (COA 357986/AG# 2021-0312368-B/reply Brief 2021-09-27