STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN SENATE and MICHIGAN SENATE MAJORITY LEADER WINNIE BRINKS, in her official capacity

Plaintiffs-Appellees/Cross-Appellants,

-v-

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN HOUSE CLERK SCOTT STARR, in his official capacity,

Defendants-Appellants/Cross-Appellees,

and

MICHIGAN HOUSE SPEAKER MATT HALL, in his official capacity,

Defendant.
_____/

Supreme Court No. 169381
Court of Appeals No. 374786
Court of Claims No. 25-000014-MB

AMICUS CURIAE BRIEF OF SAMUEL R. BAGENSTOS

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QUESTION PRESENTED

Whether the Michigan Constitution permits a single legislative leader to unilaterally keep a bill that has received majority votes in both houses of the Legislature from being presented to the Governor and thus prevent it from being enacted into law.

Amicus answers: No.

INTEREST OF *AMICUS CURIAE*[1]

Amicus Samuel R. Bagenstos is a professor and scholar of, among other things, constitutional law and remedies. Since 2009, he has taught at the University of Michigan, where he currently serves as the Frank G. Millard Professor of Law at the University of Michigan Law School and the Arlene Susan Kohn Professor of Social Policy at the University of Michigan Gerald R. Ford School of Public Policy. He has also taught at the Harvard Law School, Washington University Law School, and UCLA Law School. *Amicus* has taught constitutional law, constitutional litigation, and remedies, and published significant scholarship on those topics. *Amicus* files this brief in his personal capacity only.

Amicus filed a brief in the Court of Appeals to address the remedial question in this case—whether, having found a violation of the Michigan Constitution, the Court of Claims erred by limiting its remedy to declaratory relief. The Court of Appeals correctly concluded that the constitutional violation required a more effectual remedy than that. App for Lv, Exh 1, at 12-13.[2] This brief accordingly does not repeat the arguments of the brief *Amicus* filed below. Instead, *Amicus* files this brief to address a fundamental premise of the Defendants' arguments on both the merits and the remedial question: That, as a constitutional matter, one Legislature ceases to exist at the end of its biennial term, with the consequence that a single legislative leader can thwart the will of a majority of the body by simply refusing to present a bill that has passed both houses until after the term ends. That position is inconsistent with the basic principle of majoritarian democracy

[1] Pursuant to MCR 7.312(H)(5), amicus states that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made such a monetary contribution.

[2] In this brief, "App for Lv" refers to Defendants' Application for Leave to Appeal, and "Ans in Opp" refers to Plaintiffs' Answer in Opposition to Defendants' Application for Leave to Appeal.

that underlies our Constitution, it conflicts with the text and structure of that instrument, and it would create untold opportunities for mischief and corruption. The Court of Appeals correctly rejected that argument, and this brief explains why that court was correct to do so.

INTRODUCTION

This case involves nine bills that received majority votes in each of the Michigan House and Senate, and thus were "passed by the legislature" pursuant to Const 1963, Art. 4, §§ 33 and 26. Yet the Legislature did not "present[]" them "to the governor" as required by Article 4, Section 33. Defendants take the position that if a single legislative leader refuses to present to the Governor a bill that has received majority votes in both houses, that leader can singlehandedly prevent the bill from becoming law. That position flies in the face of the provisions of the Michigan Constitution that vest the legislative power in the Legislature as a body, which acts through bicameral majorities, rather than in a single person appointed by the Legislature. Contrary to Defendants' arguments, there is nothing in the Constitution that permits a single legislative leader to subvert the will of bicameral majorities simply by waiting out the end of an even-year legislative session. Defendants' position would give individual legislative leaders the power to exercise a pocket veto of laws passed by both houses of the Legislature. But the Constitution gives that power only to the Governor—and indeed does not empower individuals in the Legislature to exercise any form of veto.

Defendants contend that a bill passed by majorities in both houses must die if it is not presented to the Governor by the end of an even-year legislative session. But that argument conflicts with the text of Article 4, Section 33, disregards prior case law and longstanding practice, and rests on misreading of the "carry over" provision in Article 4, Section 13. Defendants' arguments provide no basis for affording a single legislative leader the power unilaterally to thwart the will of majorities in both houses.

ARGUMENT

I. Defendants' Position Would Allow a Single Legislative Leader to Unilaterally Thwart the Will of Bicameral Legislative Majorities, in Conflict with the Text and Basic Premises of the Michigan Constitution

Start with first principles. The Michigan Constitution vests "the legislative power of the State of Michigan" in "a senate and a house of representatives." Const 1963, art 4, § 1. That constitutional language expressly grants power to the Legislature as a body, not any individual legislator. And, as this Court has explained, "'[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.'" *In re Certified Questions From United States Dist Court, Western Dist of Michigan, Southern Div*, 506 Mich 332, 358; 958 NW2d 1 (2020) (quoting Cooley, Constitutional Limitations (1886) at 116-117). The Legislature accordingly lacks the power to delegate its constitutional lawmaking authority to any individual agent, including individual legislative leaders. Cf. *Bowsher v Synar*, 478 US 714, 737 (1986) (Stevens, J, concurring in the judgment) ("In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office.") (relying on *INS v Chadha*, 462 US 919 (1983)); *Blank v Dep't of Corrections*, 462 Mich 103, 115; 611 NW2d 530 (2000) (opinion of Marilyn J. Kelly, J.) (finding "*Chadha* persuasive and applicable to the Michigan Constitution").

When the Legislature acts in passing laws, the Michigan Constitution requires that it act through majorities in the House and the Senate. Article 4, Section 26 makes the point clear by requiring bills to have "the concurrence of a majority of the members elected to and serving in each house." Pursuant to that provision, a bicameral majority rules in the Legislature. The notion

that a single legislative leader could unilaterally thwart the will of a bicameral majority is simply inconsistent with that core provision. *Mothering Justice v Attorney Gen*, 515 Mich 328, 351; 29 NW3d 346, opinion clarified 515 Mich 920; 10 NW3d 845 (2024) (noting that "constitutional interpretation requires courts to consider the 'object sought to be accomplished and the mischief to be guarded against' through a constitutional provision") (quoting *Kearney v Bd of State Auditors*, 189 Mich 666, 671, 155 NW 510 (1915)).

And, indeed, the drafters of the Constitution specifically rejected efforts to stifle the will of bicameral majorities. In the Convention that drafted the 1908 Constitution, delegates noted the then-existing "practice of committees refusing to report out bills in their hands, and thereby prevent[ing] action thereon" by the Legislature as a whole. J of the Const'l Convention of the State of Michigan 1907-1908, Vol II, at 1549. That practice enabled "a minority" of legislators "to prevent a bill coming before the legislature." *Id* at 1550. They thus adopted the language that currently appears in Const 1963, art 4, § 16, which bars either house from adopting "any rule that will prevent a majority of the members elected thereto and serving therein from discharging a committee from the further consideration of any measure." As the delegates explained, "[t]his amendment will place control of all bills in the hands of the majority where it clearly belongs." J of the Const'l Convention of the State of Michigan 1907-1908, Vol II, *supra*, at 1550.

The Convention proceedings thus underscore the principle that is clear from the Constitution's text: When the Legislature exercises its power to make laws, it must do so through bicameral majorities. Granting a single legislative leader the power to thwart those majorities is flatly inconsistent with that principle.[3]

[3] As explained in text, the Speaker here acted in a way that directly thwarted the expressed will of majorities in both houses of the Legislature. That fact makes this case very different than *LeRoux v Secretary of State*, 465 Mich 594, 614; 640 NW2d 849 (2002), which allowed legislative staff to

If the Court were to accept Defendants' argument, it would be granting the Speaker of the House exactly that power—and it would be doing so in a circumstance primed for abuse. Under Defendants' position, the Speaker may thwart a bicameral majority vote by waiting until the end of the term, when many legislators who voted for a bill will be gone and no longer able to impose any consequence on him. Cf. *Mothering Justice*, 515 Mich at 353 (noting that "adopting and amending during a lame duck session is an especially pronounced violation of the people's direct democracy rights because many of the lame duck legislators cannot be held accountable at the polls"). At that point, under Defendants' position, he can effectively exercise a pocket veto of the bill. Notably, although the Constitution gave a pocket veto power to the Governor, Const 1963, art 4, § 33, it did not give a pocket veto power—or any veto power whatsoever—to individual legislative leaders. Because it would grant the Speaker such a power, Defendants' argument is flatly inconsistent with the Constitution.

II. The Constitution's Text Confirms That the Expiration of an Even-Year Legislative Session Does Not Eliminate the Presentment Obligation

Defendants contend that any duty to present the nine bills to the Governor expired with the biennial term at the end of 2024, and that any order requiring the current Speaker or Clerk to present the bills would thus violate the principle that "an act of one legislature is not binding on, and does not tie the hands of, future legislatures." *LeRoux*, 465 Mich at 616 (cleaned up; quoted in App for Lv 3, 36). Defendants are incorrect.

As the reference to "an act" makes clear, *LeRoux* merely stands for the quotidian proposition that a law enacted by the Legislature today cannot prohibit the Legislature from changing or repealing that same law tomorrow. That reading is even more apparent from the

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make a merely ministerial "correction of" a clerical error in statutory text "to reflect the actual legislative intent" before presentment of a bill to the Governor.

language the *LeRoux* Court used to introduce the relevant section of its opinion. See *id* at 615 ("It is a fundamental principle that one Legislature cannot bind a future Legislature or limit its power to amend or repeal statutes. Absent the creation of contract rights, the later Legislature is free to amend or repeal existing statutory provisions."). The issue there was whether the Legislature in 2001 could enact a redistricting statute that departed from standards it had adopted, also by statute, in 1999. The Court concluded that "the 2001 Legislature was not bound to follow the guidelines in M.C.L. § 3.63(c) adopted by the 1999 Legislature. It could repeal, amend, or ignore them, as it pleased." *Id* at 616.

But that commonsense holding does not at all support Defendants' argument. Defendants do not merely contend that the Legislature tomorrow is free to enact a law that overrides a law it enacted today. Rather, they contend that a bill that has received affirmative majority votes in both houses of the Legislature dies as a constitutional matter at the end of the legislative session in an even-numbered year, such that a single legislative leader can kill the bill by refusing to present it to the Governor before the session expires. *LeRoux* simply has nothing to say about that argument.

To the contrary, the text of the Constitution's pocket veto provision demonstrates that Defendants' argument is incorrect. That provision explicitly provides that the Governor has 14 days after presentment to decide whether to sign a bill *even if* the Legislature has "finally adjourned the session at which the bill was passed." Const 1963, art 4, § 33. If the Governor does sign the bill during that time, it is fully effective as law—just as fully effective as it would have been if the Governor had acted before the Legislature's adjournment. That provision would make no sense if a bill adopted by majority votes in both houses died as a constitutional matter at the end of the session.

Indeed, as Plaintiffs show, in the years since the adoption of the 1963 Constitution the Legislature has presented over a hundred bills to the Governor after the close of an even-year legislative session, and the Governor has signed several of them into law. See Ans in Opp 3. That practice is consistent with this Court's holding in *City of Detroit v Chapin*, 108 Mich 136, 143; 66 NW 587 (1895), which "upheld the authority of the Governor to review bills enacted by the Legislature within the constitutionally authorized review period, even though the Legislature had finally adjourned." 1 OAG, 1982, No 6,114, p 779, at 780 (Dec 22, 1982). The *Chapin* Court referred specifically to "instances where the governors of this state have signed bills under similar circumstances, one as early as 1873, and many since." *Chapin*, 108 Mich at 143.

Rejecting that entrenched practice, Defendants point to Article 4, Section 13 of the Constitution. They contend that section 13 requires that bills that have not been presented to the Governor before the conclusion of an even-year legislative session must die. But they fundamentally misread that provision. Article 4, Section 13 provides that "[a]ny business, bill or joint resolution pending at the final adjournment of a regular session held in an odd numbered year shall carry over with the same status to the next regular session." Because "the Constitution omits any similar language for 'business' or bills pending at final adjournment in an even-numbered year," they argue, that provision necessarily implies that any measure that has not been presented to the Governor before the end of an even-numbered session will die. App for Lv 33.

Defendants make a labored effort to parse the difference between "business" and "bills" in this provision. *Id* at 33-37. But they elide the crucial word in Article 4, Section 13—"pending." Even if that section does contain a negative implication that bills or business pending at the end of an even-year session do not carry over to the next session, that implication applies only to "pending" bills or business—not matters that have already "passed" both houses of the Legislature.

Article 4 consistently distinguishes between "pending" matters—those that have not received majority votes in both houses—and matters that have "passed" by bicameral majorities. See 1 OAG, 1982, No 6,114, *supra* (drawing this distinction). Thus, Article 4, Section 26 describes the procedure for "final passage" of a bill: The bill must be "printed or reproduced and in the possession of each house for at least five days"; it "shall be read three times in each house"; it must receive "the concurrence of a majority of the members elected to and serving in each house"; and "the votes and names of the members voting thereon shall be entered in the journal." Once the nine bills at issue in this litigation went through that process and received majority votes in each house, they were "passed by the legislature" and subject to the presentment requirement in Article 4, Section 33. They were no longer "pending" matters addressed by Section 13.

Defendants suggest that perhaps the *bills* passed, but their passage created new "pending" matters of *business—viz.*, that the Legislature had to present the passed bills to the Governor. But that is mere wordplay. Once the bills passed, the presentment obligation kicked in under Section 33. To allow legislative leaders to avoid that obligation by simply characterizing presentment as a new matter of business would be to enable them to evade the fundamental constitutional principle that bicameral majorities rule in the Legislature. Just as "the Legislature may not evade, parry, or thwart the people's Article 2, § 9 powers," *Mothering Justice*, 515 Mich at 347 (cleaned up), legislative leaders may not evade, parry, or thwart the powers of a bicameral majority under Article 4. Defendants would take a negative implication from Section 13's "carry over" provision regarding "pending" matters and use it to nullify the plain import of Section 33's presentment requirement for legislation that has "passed" both houses. That argument flies in the face of this Court's consistent holding that "every provision" of the Constitution "must be interpreted in the

light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003).

The Legislature thus had a duty to present the nine bills at issue here to the Governor and allow her to sign or veto them. The expiration of an even-year session does not limit that obligation or the Court's obligation to provide effectual relief. The Court must "remed[y] the Legislature's constitutional mischief," *Mothering Justice*, 515 Mich at 366, lest the Constitution become "only a voluntary obligation that a person can fulfill or not at his whim, or merely a hope or a wish." *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 691; 983 NW2d 855 (2022).[4] The Court of Appeals correctly held that Defendants had violated the Constitution, and that the Court of Claims must award effectual relief for that violation.

[4] In his partial dissent below, Judge Murray concluded that, although the Legislature violated the Constitution, there could be no remedy for that violation now that we have passed the second Wednesday of January 2025. App for Lv, Exh 2. In so holding, he relied on federal cases stating that constitutional violations do not demand a remedy, *id* at 5—a proposition that directly conflicts with this Court's decisions in *Bauserman* and *Mothering Justice*. He also relied on what seemed to him an insoluble puzzle: If the Legislature were required *now* to present the bills to the Governor, and she were to veto them, "does that mean that the current Legislature can override any veto of that legislation, which again, was passed by a different Legislature? Or even more fundamentally, can the Governor exercise her constitutional veto power?" *Id* at 4-5. But the Constitution's text provides clear answers to these questions. Pursuant to Article 4, Section 33, if the Governor "does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law." Because these nine bills were "passed" at a session that has now been "finally adjourned," the Governor has the power to disapprove them, and if she exercises that power they "shall not become law" under the plain terms of the Constitution.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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