

STATE OF MICHIGAN
IN THE SUPREME COURT

REPRODUCTIVE FREEDOM FOR ALL, a
Michigan Ballot Question Committee, PETER
BEVIER, an individual, and JIM LEDERER,
an individual ,

Plaintiffs,

-vs-

BOARD OF STATE CANVASSERS, JOCELYN
BENSON, in her official capacity as Secretary of
State, and JONATHAN BRATER, in his capacity
as Director of Elections,

Defendants,

and

CITIZENS TO SUPPORT MI WOMEN
AND CHILDREN,

Proposed Intervenor-Defendant.

Steven C. Liedel (P58852)
Courtney Flynn Kissel (P74179)
Olivia R.C.A. Flower (P84518)
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933
(517) 374-9100
sliedel@dykema.com
ckissel@dykema.com
oflower@dykema.com

Counsel for Plaintiffs/Petitioners

David A. Kallman (P34200)
KALLMAN LEGAL GROUP, PLLC
5600 W. Mount Hope Hwy.
Lansing, MI 48917
(517) 322-3207

Supreme Court Case No: 164760

PROPOSED AMICUS BRIEF
AND PROOF OF SERVICE

THIS MATTER INVOLVES A
CLAIM THAT A PROPOSED
STATE GOVERNMENTAL
ACTION IS INVALID

ORAL ARGUMENT
REQUESTED

Election Matter – Plaintiffs have
requested action by 9/7/2022

Eric E. Doster (P41782)
DOSTER LAW OFFICES, PLLC
2145 Commons Parkway
Okemos, MI 48864
(517) 977-0147
eric@ericdoster.com

Michael F. Smith (P49472)
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Avenue N.W., Ste. 1025
Washington, DC 20006
(202) 454-2860
smith@smithpllc.com

John J. Bursch (P57679)
9339 Cherry Valley Ave. SE, Unit 78
Caledonia, MI 49316
(616) 450-4235

dave@kallmanlegal.com

Counsel for Proposed Amici

William R. Wagner (P79021)
5600 W. Mount Hope Hwy., #3
Lansing, MI 48917
(517) 322-3207
prof.wwj@gmail.com

Counsel for Proposed Amici

jbursch@burschlaw.com

**Counsel for Proposed Intervenor-
Defendant**

BRIEF OF PROPOSED AMICI CURIAE

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... iii
JURISDICTIONAL STATEMENT iv
STATEMENT OF FACTS 1
STANDARD OF REVIEW 2
ARGUMENT 3
CONCLUSION..... 9

INDEX OF AUTHORITIES

CASES:

Attorney General v Bd of State Canvassers, 318 Mich App 242; 896 NW2d 485 (2016) 2

Citizens for Protection of Marriage v Bd of State Canv., 263 Mich App 487 (2004). 3

Citizens Protecting Michigan’s Const v Sec’y of State, 324 Mich App 561; 922 NW2d 404, *aff’d* 503 Mich 42 (2018). 5, 6

Comm to Ban Fracking in Mich v Bd of State Canvassers, 335 Mich App 384; 966 NW2d 742 (2021) 2

Consumers Power Co v Attorney General, 426 Mich 1; 392 NW2d 513 (1986). . . 5

Johnson v Bd of State Canvassers, __ Mich App __ (2022), op at 6, citing *Rental Props Owners Ass’n of Kent Co v Kent Co Treas*, 308 Mich App 498; 866 NW2d 817 (2014) 4

Klatt v Wayne Circuit Judge, 212 Mich 590, 599; 180 NW2d 625 (1920). 5

League of Women Voters of Michigan v Secretary of State, 508 Mich 520 (2022). 3, 6

McLeod v Kelly, 304 Mich 120; 7 NW2d 240 (1942), citing *Nat’l Bank v State Land Office Bd*, 300 Mich 240; 1 NW2d 525 (1942) 2

Stand Up for Democracy v Secretary of State, 492 Mich 588 (2012). *passim*

Toan v McGinn, 271 Mich 28, 260 NW 108 (1935) 2

STATUTES:

MCL 168.482(3) *passim*

CONSTITUTIONS:

Const 1963, art 12 *passim*

Const 1963, art 1, § 1 3

US Constitution, Article IV, § 4 4

JURISDICTION

Proposed amici American Decency Association, Faith2Action Michigan, Transformation Michigan, Michigan Heartbeat Coalition, and Michigan Pastors Alliance, agree that jurisdiction over this action is appropriate under MCR 7.303(B)(6) and MCL 168.479.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Proposed amici American Decency Association, Faith2Action Michigan, Transformation Michigan, Michigan Heartbeat Coalition, and Michigan Pastors Alliance, agree with the Statement of Material Proceedings and Facts set forth by proposed intervenor Citizens to Support MI Women and Children in its brief.

STANDARD OF REVIEW

“To obtain a writ of mandamus the plaintiff must show that it has a clear legal right to the performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform the act.” *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618 (2012).

Mandamus is a discretionary writ and an extraordinary remedy. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 335 Mich App 384, 394; 966 NW2d 742 (2021) (citation omitted). The plaintiff bears the burden of demonstrating entitlement to that extraordinary remedy. *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (citation omitted).

Mandamus will issue only when the right asserted is “clear and specific.” *McLeod v Kelly*, 304 Mich 120, 125; 7 NW2d 240 (1942), citing *Nat’l Bank v State Land Office Bd*, 300 Mich 240; 1 NW2d 525 (1942). “Mandamus will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts but is designed to enforce a plain, positive duty upon the relation of one who has a clear legal right to have it performed, and when there is no other adequate legal remedy.” *Id*, citing *Toan v McGinn*, 271 Mich 28, 260 NW 108 (1935). “[I]t does not issue so long as the right or the duty is disputed or doubtful.” *Id* at 125-126 (citations omitted).

ARGUMENT

The question before this Honorable Court is whether the Board of Canvassers decision to decline to certify Reproductive Freedom for All's (RFFA) ballot petition for not meeting the form requirements of Const 1963, art 12, and MCL 168.482(3), because it did not set forth a readable "full text", should be affirmed?

"All political power is inherent in the people", including the power to amend the Constitution. Const 1963, art 1, § 1 and 12, § 2. *League of Women Voters of Michigan v Secretary of State*, 508 Mich 520, 536 (2022). The Board's refusal to certify the petition sponsored by RFFA protects our State's democratic processes for amending the constitution via petition.

Article 12, section 2 of the Constitution provides that a "petition shall include the **full text** of the proposed amendment." MCL 168.482 (3) provides that "[t]he **full text** of the amendment so proposed must follow the summary...." The Board's power concerning the proposed constitutional amendment here includes the authority to "determin[e] whether the form of the petition substantially complies with the statutory requirements...." *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492 (2004). Protecting the democratic processes of the ballot initiative is exactly what the Board of Canvassers did. Here, a valid exercise of their statutory duty existed to make sure the form set forth the "full text" of the proposal. Their "full text" determination properly affirmed that when amending the Constitution via petition real words are required, not nonsensical incomprehensible gibberish.

Contrary to the hyperbole surrounding this case, the Board of Canvassers decision does not disenfranchise Michigan voters. Rather, its action protected the democratic process within our republican form of government. Its decision upholds the rule of law.

We are a constitutional *republic* in which we, as Michigan citizens, elect our representatives to local and state legislative bodies to enact our laws. This republican form of government is guaranteed to us in the United States Constitution (emphasis in original).

US Constitution, Article IV, § 4. *Stand Up for Democracy v Sec’y of State*, 492 Mich 588, 599; 822 NW2d 159, 163 (2012). The Legislature set out the statutory requirements for placing RFFA’s proposal on the ballot. In an exercise of good governance, the Board of Canvassers decision simply complied with the requirements of the statute and should be affirmed.

The party seeking a writ of mandamus must show it has a clear, legal right to performance of the specific duty sought and that the defendant has a clear legal duty to perform it. Further, it must be shown that the act is ministerial, and that no other adequate legal or equitable remedy exists that might achieve the same result. *Johnson v Bd of State Canvassers*, __ Mich App __ (2022), op at 6, citing *Rental Props Owners Ass’n of Kent Co v Kent Co Treas*, 308 Mich App 498; 518; 866 NW2d 817 (2014).

The first two elements are the focus of this brief and bar the granting of mandamus relief to the RFFA. RFFA had no legal right to have the Board certify its petition, especially when it contained unintelligible text that RFFA admits is *not* “the

full text of the amendment so proposed.” (Pet. Br.). In this case, the Board of Canvassers complied with its clear legal duty to *not* certify.

No ballot proposal containing such numerous form errors in the petition has ever been certified. The purpose of mandamus is to enforce existing rights, not to create new ones. *Klatt v Wayne Circuit Judge*, 212 Mich 590, 599; 180 NW2d 625 (1920). Mandamus is the means to compel the performance of a duty or enforcing a clearly defined existing right, rather than deciding what that right or duty is. Mandamus is an extraordinary remedy and is not appropriate here.

RFFA had the burden to establish its Petition was in the proper form and set forth the “full text” of its proposed amendment, as required by Michigan law. *Stand Up for Democracy v Sec’y of State*, 492 Mich 588, 619; 822 NW2d 159 (2012). It failed to meet its burden, so the Board of Canvassers properly carried out its legal duty.

Again, Article 12, section 2 of our Constitution controls petition proposals to amend the Constitution. *Citizens Protecting Michigan’s Const v Sec’y of State*, 324 Mich App 561, 599; 922 NW2d 404, *aff’d* 503 Mich 42 (2018). “Every petition shall include the full text of the proposed amendment....” *Id.*, 324 Mich App at 587, quoting Const 1963, art 12, § 2. Every petition circulated “shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.” The Legislature, therefore, prescribes the manner of approving, signing, and circulating petitions with proposed constitutional amendments. *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986); *see also* Address to the People, 2 Official Record

Constitutional Convention 1961, p 3407 (“Details as to form of petitions, their circulation and other elections procedures are left to the determination of the legislature”).

The Legislature has properly established the form requirements for petitions in MCL 168.482(3). It mandates two form requirements: (1) The full text of the amendment so proposed must follow the summary and (2) be printed in 8-point type. The Board of Canvassers correctly refused to certify the proposal since it did not constitute the “full text” given the nonexistent words contained in the proposed Petition.

This Court interprets a constitutional provision with the objective of determining its “original meaning to the ratifiers, the people, at the time of ratification.” *Citizens Protecting Michigan’s Const*, 503 Mich at 61 (citation omitted). In determining that common understanding, it is appropriate to look to dictionary definitions from the time of ratification. *League of Women Voters v Sec’y of State*, 508 Mich 520, 536-537 n7; 975 NW2d 840 (2022) (Cavanagh, J).

When the Constitution stated that any initiative petition must set forth “the full text of the amendment so proposed,” it meant actual words. The word “**Full**” means:

Abundantly provided, sufficient in quantity or degree, complete, entire, and detailed. . . . Ample, perfect, mature, not wanting in any essential quality.” *Black’s Law Dictionary*, 5th Ed. (1979).

It is also an adjective meaning “not lacking or omitting anything; complete.” *Google English Dictionary, Oxford Languages*.¹ The petition language does not meet this definition. It is not “complete, entire, and detailed.” It lacks the “essential quality” of being words that are comprehensible as opposed to gibberish. It “omitted” the necessary spacing between words so that the words could be easily read and understood.

“**Text**” means “the original words and form of a written or printed work.” *The American Heritage Dictionary*, available at www.ahdictionary.com (accessed Sept. 6, 2022). It is axiomatic that a text must be made up of words.

“**Words**” means:

“Symbols indicating ideas and subject to contraction and expansion to meet the idea sought to be expressed. As used in law, this term generally signifies the technical terms and phrases appropriate to particular instruments, or aptly fitted to the expression of a particular intention in legal instruments.” *Black’s Law Dictionary*, 5th Ed. (1979).

Webster’s College Dictionary (Random House, 2001) defines “word” as a:

unit of language, consisting of one or more spoken sounds or their written representation, that functions as a principal carrier of meaning, is typically seen as the smallest such unit capable of independent use, is separated from other such units by spaces in writing, and is often distinguished phonologically, as by accent or pause.”

¹
https://www.google.com/search?q=definition+of+full&rlz=1C1RXQR_enUS960US960&ei=TIQXY_zAFaCz5NoP9d-hoAg&ved=0ahUKEwj8ltiz2YD6AhWgGVkFHfVvCIQQ4dUDCA4&uact=5&oq=definition+of+full&gs_lcp=Cgdnd3Mtd2l6EAMyBAGAEEMyBQgAEIAEMgUIABCABDIFCAAQgAQyBAGAEEMyBQgAEIAEMgUIABCABDIFCAAQgAQyBQgAEIAEMgUIABCABDoKCAAQRxDWBBCwA0oECEYYAEoECEYYAFCJB1i1F2CmJWgBcAF4AIABXYgB2QeSAQIxMpgBAKABAcgBCMABAQ&scient=gws-wiz

Thus, without actual words, there can be no “text.” The proposed petition fails to meet these definitions and justifies the Board of Canvassers decision. Appellant is not entitled to the requested mandamus relief. Before RFFA presents its proposed constitutional changes² to Michigan voters, it must strictly comply with the law. Here they failed to do so. The Board of Canvassers properly refused to certify. This Court should, therefore, deny the request for mandamus.

² One can legally construe the proposed amendment to invalidate virtually all statutory protection for unborn children and their mothers. Because it can be so construed, the State’s Courts will be inundated with cases when activists contend, for example, that the new right allows a child to obtain a partial birth abortion from an optometrist without parental knowledge or consent, or when someone challenges the state’s child statutory rape laws as violating the new right.

CONCLUSION

Amici respectfully request that this Honorable Court deny Petitioner’s request for mandamus relief, affirm the Board of Canvassers decision, and grant such other and further relief as is just and appropriate.

Respectfully submitted on behalf of
the American Decency Association,
Faith2Action Michigan,
Transformation Michigan, Michigan
Heartbeat Coalition, and Michigan
Pastors Alliance:

DATED: September 6, 2022.

/s/ David A. Kallman
David A. Kallman
Attorney for Proposed Amici

DATED: September 6, 2022.

/s/ William Wagner
William Wagner
Attorney for Proposed Amici

PROOF OF SERVICE

I, David A. Kallman, hereby affirm that on the date stated below I delivered a copy of the Proposed Amici Brief and Motion for Leave to file Brief, upon opposing counsel stated above, via the Court’s MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: September 6, 2022.

/s/ David A. Kallman
David A. Kallman
Attorney for Proposed Amici