

STATE OF MICHIGAN
IN THE SUPREME COURT

PROMOTE THE VOTE 2022,

Supreme Court No. 164755

Plaintiff

v

THE BOARD OF STATE CANVASSERS,
JOCELYN BENSON, in her official
capacity as secretary of state, and
JONATHAN BRATER, in his official
capacity as director of elections,

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

Defendants.

**DEFENDANT BOARD OF STATE CANVASSERS' BRIEF IN RESPONSE TO
PLAINTIFF'S COMPLAINT FOR IMMEDIATE MANDAMUS RELIEF AND
DECLARATORY JUDGMENT AND MOTION FOR ORDER TO SHOW
CAUSE AND IMMEDIATE CONSIDERATION**

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STATEMENT OF JURISDICTION

“[A]ny person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.” MCL 168.479(1). An action under MCL 168.479 must be initiated within seven business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. MCL 168.479(2). Plaintiffs filed this action on September 1, 2022, challenging the Board of State Canvassers’ failure to determine the sufficiency of Plaintiffs’ proposal to amend the Constitution during the Board’s August 31, 2022, meeting. Because the action was filed within seven business days of the Board’s action and more than 60 days before the November 8, 2022 general election, this case is within the Court’s jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

- I. A writ of mandamus may only issue when the requesting party demonstrates that it has a clear legal right to performance of the specific duty sought, and where the defendant has the clear legal duty to perform the act requested. Although the Board of State Canvassers has a clear legal duty to make a declaration regarding the sufficiency or insufficiency of Promote the Vote 2022’s petition, the Board was unable to pass a motion and deadlocked on this issue. Under these circumstances, is Promote the Vote’s 2022 entitled to a determination of the sufficiency of its petition?**

Board of Canvassers answers: “Deadlocked and unable to answer.”

Secretary Benson and Director Brater answer: “Yes.”

Promote the Vote 2022 answers: “Yes.”

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 12, § 2:

Amendments may be proposed to this constitution by petition of the registered electors of this state. . . . Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

MCL 168.32 (2);

The director of elections, with the approval of the state board of canvassers, shall prepare a statement for designation on the ballot in not more than 100 words, exclusive of caption, of the purpose of any proposed amendment or question to be submitted to the electors as required under section 9 of article II, section 34 of article IV, or section 1 or 2 of article XII of the state constitution of 1963. The statement shall consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against the proposed amendment or question. The powers and duties of the state board of canvassers and the secretary of state with respect to the preparation of the statement are transferred to the director of elections. The secretary of state shall certify the statement of the purpose of any proposed amendment or question to be submitted to the electors not later than 60 days before the date of the election.

MCL 168.476 (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.

MCL 168.477 (1):

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. 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 shall be without expense or cost to the state of Michigan.

MCL 168.485:

A question submitted to the electors of this state or the electors of a subdivision of this state shall, to the extent that it will not confuse the electorate, be worded so that a “yes” vote will be a vote in favor of the subject matter of the proposal or issue and a “no” vote will be a vote against the subject matter of the proposal or issue. The question shall be worded so as to apprise the voters of the subject matter of the proposal or issue, but need not be legally precise. The question shall be clearly written using words that have a common everyday meaning to the general public. The language used shall not create prejudice for or against the issue or proposal.

INTRODUCTION

On July 11, 2022, PTV22 filed a petition with the Secretary of State's Bureau of Elections for the purpose of initiating an amendment to the Michigan Constitution under Const 1963, art 12, § 2.

Under MCL 168.476(1) and 168.477(1), the Board has a duty to certify as sufficient or insufficient the petition filed by PTV22. On August 31, 2022, the members of the Board deadlocked on a motion to certify the petition as sufficient or insufficient, which had the effect of denying the PTV22's initiative a spot on the November 8, 2022 General Election ballot. PTV22 filed the instant complaint for a writ of mandamus on September 1, 2022.

PTV22 seeks a writ of mandamus from this Court directing the Board to certify the petition as sufficient because its form complies with the Michigan Election Law, MCL 168.1, *et seq.* The Board acknowledges that it has a legal duty to issue an official declaration of the sufficiency or insufficiency of PTV22's petition. The Board attempted to fulfill its statutory duty but deadlocked 2-2 on a motion declaring PTV22's petition sufficient. Because any action of the Board is effective only upon concurrence of at least one member of each major political party appointed to the Board, the deadlock has the effect of denying certification of PTV22's petition.

The Board was unable to pass a motion to approve because of a dispute over the language. While all 4 members concluded that there were enough signatures to support the petition, 2 members concluded that the form of the petition was non-compliant because petition failed to identify additional sections of the state

constitution that would be abrogated by the proposal. Under these circumstances, the Board will comply with any order this Court issues regarding the sufficiency of the petition.

COUNTER-STATEMENT OF FACTS

PTV22 is a Michigan ballot question committee and is the sponsor or proponent of a proposal to amend the Michigan Constitution. On July 11, 2022, PTV22 filed its petition with the Secretary of State as required by MCL 168.471. Upon filing with the Secretary of State, the Board was required to canvass the petition to determine whether the petition appeared in the proper form and whether there are sufficient valid signatures. MCL 168.476. The Board's canvass is accomplished with the assistance of the Bureau acting as staff for the Board. By law, the Board was required to complete its canvassing duties and make a declaration of the sufficiency or insufficiency of the petition at least two months before the November 8, 2022 general election. MCL 168.477(1). Also, under MCL 168.648, the Secretary of State must notify county clerks of any constitutional amendments no later than 60 days before the election. For purposes of the November 8, 2022, the 60-day deadline is September 9, 2022.

On August 18, 2022, Defend Your Vote (DYV), another ballot question committee, filed a challenge to PTV22's petition.¹ (Complaint, Exhibit 3.) DYV argued that PTV22's petition failed to comply with constitutional and statutory requirements because it did not list all the constitutional provisions that would be altered or abrogated by the amendment. *Id.* PTV22 filed a response to the

¹ A person or entity may submit a "complaint" regarding a petition to the Board. MCL 168.476(1)-(2). This process is generally referred to as the "challenge" process. A person submits a complaint or "challenge" to the petition by filing it with the Bureau of Elections. The Bureau of Elections reviews and processes the challenge, and then prepares a staff report with the Bureau's results for the Board's review.

challenge on August 24, 2022, asserting that the petition language does not abrogate the state constitution. (Complaint, Exhibit 4.)

The Board met on August 31, 2021, to resolve the challenge filed by DYV, and to determine the sufficiency of PTV22's petition. Defendant Director of Elections Jonathan Brater presented the Bureau of Elections' staff report, which concluded that the petition contained sufficient valid signatures based on the results of the random sample.² The Staff Report also contained a synopsis of the challenge posed by DYV but made no recommendation as to the merits of the legal arguments raised or as to how the Board should resolve the challenge.

The Board then heard presentations by DYV, (Def's Appx, 8/31/22 Transcript, pp 137-153), and PTV22, (*Id.*, pp 154-175), followed by a rebuttal from DYV. (*Id.*, pp 176-177.) The Board also permitted additional comment from PTV22. (*Id.*, pp 178-179.) Both DYV and PTV22 made arguments to the Board consistent with their filings (Complaint, Exhibits 3 and 4.) After these presentations, Board Member Jeannette Bradshaw moved that the Board accept the recommendation of the staff report and find the petition submitted by PTV22 sufficient. (Def's Appx, 8/31/22 Transcript, p 182.) Board Vice-Chair Mary Ellen Gurewitz supported Member Bradshaw's motion and a vote was held. *Id.* The Board deadlocked two-to-two with Members Bradshaw and Gurewitz voting in favor of the motion, and Board Chair

² See, <https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Staff-Reports/Staff-Report-Promote-the-Vote.pdf?rev=93c285d1974b489c8ebea722f16ff886&hash=A42288FB3B155782428E0FA60C4B5A0C>. (Last accessed September 7, 2022.)

Anthony Daunt and Member Richard Houskamp voting against the motion.³ (*Id.*, p 184-185.) Because any action of the Board “shall only be effective upon concurrence of at least 1 member of each major political party appointed” to the Board, MCL 168.22d(2), the Board did not render a decision as to the sufficiency or insufficiency of the petition as required by MCL 168.476(1)-(2), 168.477(1).

³ During the proceedings on August 31, 2022, Member Daunt indicated that he had communications with attorney Robert Avers. Mr. Avers spoke at the meeting during public comment, but did not appear on behalf of any entity with business before the board. Such communications do not constitute “ex parte” communications.

ARGUMENT

I. Although the Board of State Canvassers has a clear legal duty to make a declaration regarding the sufficiency or insufficiency of Protect the Vote 2022’s petition, the Board was unable to pass a motion and deadlocked on this issue.

A. Standard of Review

Both Counts I and III of PTV2022 seek mandamus relief.⁴ Although courts have held that mandamus is the appropriate remedy for a party seeking to compel action by election officials, see, e.g., *Wolverine Golf Club v Secretary of State*, 24 Mich App 711 (1970), aff’d 384 Mich 461 (1971), a writ of mandamus remains an extraordinary remedy. Mandamus will only be issued where: (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Tea Party v Bd of State Canvassers*, 487 Mich 860 (Mich, 2010), citing *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492 (2004).

The specific act sought to be compelled must be of a ministerial nature, which is prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment. *Citizens Protecting Michigan’s*

⁴ Count III is styled as a request for “declaratory relief”. However, as this Court has recognized, courts should consider the actual nature of the claim, rather than the phrasing of the request for relief. *Parkwood Ltd Dividend Hous Ass’n v State Hous Dev Auth*, 468 Mich 763, 770 (2003). Count III is duplicative of Count I except that it does not request any specific relief. But it should be assumed that what is again being sought is for this Court to compel the Defendants to perform some duty—i.e., approval of PTV22’s petition. Thus, there is no way to construe Count III as anything other than a claim for mandamus.

Constitution, 280 Mich App at 286. “The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff.” *White-Bey v Dept of Corrections*, 239 Mich App 221, 223; 608 NW2d 833 (1999).

Therefore, PTV22 must have a clear legal right to the performance of a specific ministerial duty that the Board of State Canvassers has a clear legal duty to perform. See *Tea Party*, 787 NW2d at 107.

B. Analysis

The Board of State Canvassers has a legal duty to make a declaration as to the sufficiency or insufficiency of PTV22’s petition. But the Board was unable to pass a motion to do so because two members of the Board determined the petition complied with the law, and two members determined that the petition did not.

1. Overview of the Board of State Canvassers’ duties.

The Board is a constitutional board created by Const 1963, art 2, § 7, and its duties and responsibilities are established by law. See MCL 168.22 and MCL 168.841.⁵ The Legislature has empowered the Board to enforce the technical requirements set forth in the Michigan Election Law relating to the circulation and form of various petitions, including petitions to amend the Constitution.

The Court of Appeals has explained the limits of the Board’s authority and duties with respect to petitions to amend the constitution:

The Board comes within the definition of an “agency” in the Administrative Procedures Act. An agency has no inherent power. Any authority it may have is vested by the Legislature, in statutes, or by

⁵ The Director of Elections is “a nonmember secretary of the state board of canvassers.” MCL 168.32(1).

the Constitution. The Board's authority and duties with regard to proposed constitutional amendments are limited to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal. [*Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493; 688 NW2d 538 (2004) (internal citations omitted). See also *Coalition to Defend Affirmative Action v Board of State Canvassers*, 262 Mich App 395; 686 NW2d 287 (2004); *Deleeuw v State Bd of Canvassers*, 263 Mich App 497; 688 NW2d 847 (2004).]

These duties are generally ministerial in nature, and in reviewing a petition the Board may not examine questions regarding the merits or substance of a proposal. *Leininger v Secretary of State*, 316 Mich 644, 655-656; 26 NW2d 348 (1947). See also *Gillis v Bd of State Canvassers*, 453 Mich 881; 554 NW2d 9 (1996); *Automobile Club of Michigan Committee for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 624; 491 NW2d 269 (1992) (“[T]he Board of State Canvassers possesses the authority to consider questions of form.”) And in performing its function, the Board may not look beyond the four corners of the petition. *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 519-520; 708 NW2d 139 (2005).

With respect to the Board's duties, the Michigan Constitution provides:

Amendments may be proposed to this constitution by petition of the registered electors of this state. . . . Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. *The **person authorized by law** to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.* [Const 1963, art 12, § 2, (emphasis added).]

The person authorized by law in art 12, § 2 is the Board. MCL 168.476 and MCL 168.477. The Legislature implemented art 12, § 2 in part in MCL 168.476, which provides that “[u]pon 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.” Finally, MCL 168.477(1) provides that “[t]he 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.”

Thus, the Board’s duties with respect to PTV22’s petition are two-fold. First, under MCL 168.476(1), the Board must canvass the petition to ascertain if the petition has been signed by the requisite number of qualified and registered voters. Second, under MCL 168.477(1), the Board “*shall* make an official declaration of the sufficiency or insufficiency of a [referendum] petition under this chapter at least 2 months before the election at which the proposal is to be submitted.” MCL 168.477(1) (emphasis added). The determination regarding the “sufficiency” of a petition includes whether the form of the petition complies with the relevant technical requirements.

The Michigan Election Law provides for the Board’s review of the form of petitions after they have been circulated and signatures obtained. See MCL 168.475; 168.476; 168.477. But for many years the Board has provided the service of allowing persons or organizations circulating petitions to come before the Board

and obtain pre-approval as to the form of their petitions before they are circulated.⁶ See, e.g., *League of Women Voters of Michigan v Secretary of State*, 508 Mich 520, 567-68 (2022) (“the Board of State Canvassers, while not required to do so by statute, has long offered the opportunity to ballot proposal committees to have their petitions preliminarily approved as to form prior to circulation in order to prevent the late discovery of defects in those forms-discoveries that, without preapproval, might not be detected until after circulation is complete.”)

This approval as to form is an optional courtesy and does not bind the proponents of an initiative, who could still choose to circulate a petition that has not received preliminary approval as to form. Nor does the approval as to form bind the Board when the petition ultimately comes before it for a sufficiency determination under the law. As noted above in the Staff Report, PTV opted to have the form of its petition approved by the Board prior to circulation. Before circulating any petition, whether approved as to form by the Board or not, a proponent must provide a copy to the Secretary of State for posting on the Secretary’s website. MCL 168.483a.

In conducting its review as to the sufficiency of a petition, the Board is empowered to “hold hearings upon any complaints filed or for any purpose

⁶ See Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment petition, February 2022, p 7, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/08delrio/Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca&hash=1AC56EE016D8EC2CC57F3081F2D3E94B (accessed September 7, 2022.)

considered necessary by the board to conduct investigations of the petitions.” MCL 168.476(2). However, this investigatory power is confined to the Board’s duties of determining whether there are sufficient signatures, and whether the petition is in proper form. See *Michigan Civil Rights Initiative*, 268 Mich App at 516. In this case, there is no dispute whether the petition has sufficient valid signatures, but rather, whether the petition complies with the statutory requirements as to form.

2. Preparation and circulation of initiative petitions to amend the Constitution.

Those seeking to circulate a petition to amend the Constitution must follow certain requirements under the law. Under MCL 168.482(1) and (2), a petition must be printed on 8 ½ x 14 inch paper, and the “heading” of “INITIATIVE PETITION AMENDMENT TO THE CONSTITUTION” must appear on each part of the petition and “shall be . . . printed in capital letters in 14-point boldfaced type.”

Under subsection 482(3):

The full text of the amendment so proposed shall follow and be printed in 8-point type. *If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words:*

“Provisions of existing constitution altered or abrogated by the proposal if adopted.” [Emphasis added.]⁷

⁷ Const 1963, art 12, § 2 similarly requires that: Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

The petition must then include a statement by the electors and a warning to the electors regarding the consequences of signing a petition more than once, or signing another individual's name, etc. MCL 168.482(4) and (5). "The remainder of the petition form shall be as provided following the warning . . . in section 544c(1)," and "shall comply with the requirements of section 544c(2)." MCL 168.482(6). Sections 544c(1) and (2) impose additional formatting requirements relating to information required from electors and the certificate of the circulator. MCL 168.544c(1)-(2).

3. The Board was unable to perform its duty to make a declaration regarding the sufficiency of PTV22's petition because it reached a two-to-two deadlock.

As previously acknowledged, the Board has a clear legal duty to make an official declaration regarding the sufficiency of PTV22's petition. See MCL 168.477(1). The Board attempted to fulfill that legal duty by reviewing the petition, considering testimony and argument presented to it, and voting on the sufficiency of the petition. Despite these best efforts, the Board was unable to reach a decision as to whether its clear legal duty was to certify the petition as sufficient or insufficient. The questions raised at the August 31 meeting regarding the form of the petition divided the Board members on the issue of whether the petition was sufficient, rendering the legal duty unclear to the Board as a whole.

Here, DYV's challenged two sections of PTV22's petition on the basis that they failed to identify all the constitutional provisions that would be altered or

abrogated by the proposed amendment and therefore did not comply with MCL 168.482(3).

This Court previously addressed the alter or abrogate requirement in *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763 (2012) and applied the constructions originally set forth in *Pontiac School Dist v Pontiac*, 262 Mich 338, 344 (1933), as restated in *Ferency v Secretary of State*, 409 Mich 569, 597 (1980), and discussed in *Massey v Secretary of State*, 457 Mich 410, 417 (1998). *Protect Our Jobs*, 492 Mich at 781. The test for whether an existing provision is altered or abrogated is “if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative.” *Id.*, quoting *Massey*, 457 Mich at 417-418. This Court summarized its holding as to the republication requirement as follows:

In concluding, we reiterate our holdings so that the people will hereafter know with all the certainty and precision that is reasonably possible what is required to properly petition to amend the Constitution:

1. When the existing language of a constitutional provision would be altered or abrogated by the proposed amendment, republication of the existing provision is required.
2. The language of the amendment itself, rather than how proponents or opponents of the amendment characterize its meaning, controls whether an existing provision would be altered or abrogated by the proposed amendment.
3. When the existing language of a constitutional provision would not be altered, but the proposed amendment would render the entire provision or some discrete component of the provision wholly inoperative, abrogation would occur and republication of the existing language is required.

4. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, and the new and existing provisions can be harmoniously construed, republication of the existing provision is not required.

5. When the existing language would not be altered or abrogated, but the proposed amendment would only have an effect on the existing language, thereby requiring that the new and existing provisions be interpreted together, republication of the existing provision is not required.

Protect Our Jobs, 492 Mich at 791-792.

The dispute here that divided the Board was the interpretation and application of the test to PTV22's petition, as well as the underlying legal questions involved. (Def's Appx, 8/31/22 Transcript, p 182-184.) DYV argued that while the form of the petition did comply with MCL 168.482(3) by including some sections of the Constitution abrogated, it should be rejected because it failed to include five additional sections. PTV22's response, relying on this Court's decision in *Protect Our Jobs*, was that additional sections were not required because DYV failed to establish that those five provisions of the Constitution would be rendered wholly inoperative or constitute a change that would essentially eviscerate an existing provision. But considering the arguments offered by DYV and PTV22, the Board divided over whether the Board could consider if the proposal would alter or abrogate additional constitutional sections as part of the "form" of the petition, or whether such considerations went to the substance or lawfulness of the proposal. (Def's Appx, 8/31/22 Transcript, p 179-182.)

4. **The Board will abide by any decision rendered by the Court with respect to PTV22's petition.**

Based on the circumstances described above, the Board was deadlocked with respect to whether PTV22's petition should be certified as sufficient or insufficient, and thus did not make an official declaration. However, the Board will abide by any directive this Court issues regarding the sufficiency of the petition. See e.g. *Bingo Coalition for Charity v Bd of State Canvassers*, 215 Mich App 405, 414; 546 NW2d 637 (1996) (granting mandamus relief and ordering Board of Canvassers to vote again on certification of referendum petition).

II. Count II fails to state a claim for a violation of Due Process or equitable estoppel.

A. Standard of Review

Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 28-29 (2005), citing U.S. Const., Am XIV; Const 1963, art. 1, § 17. In civil cases, due process generally requires "notice of the nature of the proceeding, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker." *Klco v Dynamic Training Corp*, 192 Mich App 39, 42 (1991) (citations omitted). "Due process is a flexible concept, however, and determining what process is due in a particular case depends on the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected." *By Lo Oil Co*, 267 Mich App at 29.

“Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts. *Teddy 23, LLC v Michigan Film Office*, 313 Mich App 557, 571 (2015). However, equitable estoppel is a doctrine, not a cause of action. *Hoye v Westfield Ins Co*, 194 Mich App 696, 704 (1992).

B. Analysis

PTV22’s complaint takes issue with the Board for not certifying the petition after pre-approval of the proposed petition form was previously granted. (Complaint, ¶158-159). But as discussed above, there is no legal entitlement to pre-approval of petition language—it is provided only as a service and is not required. And while PTV22 did have its petition preapproved on February 11, 2022, the Michigan Election Law only provides for the Board’s review of the petitions *after* they have been circulated and signatures obtained. See MCL 168.475; 168.476; 168.477. So, PTV22 should have been aware that even though there was pre-approval, it would still be required to seek final review and approval by the Board after signature were gathered and before the proposed amendment was placed on the ballot. At that time, pursuant to MCL 168.476(1)-(2), any challengers would be permitted to submit a complaint as to the form of the petition regardless of any pre-approval. And contrary to what PTV22 alleges, supporting authority does not exist for the proposition that failure by challengers to raise a specific objection during the

early pre-approval process somehow bars later challenges. There is also no dispute that PTV22 was provided with notice of the challenges as required by law, had the opportunity to file a response, and was heard by the Board. Thus, there is simply no basis—legally or factually—for a claim of violation of due process.

PTV22 further alleges that the Board should be equitably estopped from considering a challenge as to form of the petition after signatures were gathered. (Complaint, ¶164.) First and foremost, the doctrine of equitable estoppel is not a cause of action. But also again, pre-approval of petitions is done by the Board simply as a courtesy. It is not required by the Michigan Election Law and is not intended to prohibit challenges as to the form of petitions after signatures are gathered. Therefore, any such reliance by PTV22 on pre-approval somehow barring all future challenges was clearly done so in error. PTV22 also appears to allege that DYV erred by not acting before the completion of the petition drive (Complaint, ¶168.) However, there is no authority for such an assertion and DYV's complaint as to the form of the petition was properly filed in accordance with law. Nor is there any statutory basis for the Board to not consider a challenge that is properly filed. For these reasons, Count II should be dismissed.

CONCLUSION AND RELIEF REQUESTED

Defendant Board of State Canvassers acknowledges that it has a legal duty to issue an official declaration of the sufficiency or insufficiency of Plaintiff Promote the Vote 2022's petition. The Board attempted to fulfill its statutory duty but was unable to do so. The Board also agrees that this matter should receive immediate consideration because the deadline to certify ballot wording for constitutional amendments is September 9, 2022.

For these reasons, the Board of State Canvassers respectfully requests that this Honorable Court enter an Order setting forth whether the Board has a legal duty to declare Plaintiff's petition sufficient under the circumstances, and dismiss Plaintiff's Count II, together with any other relief the Court determines to be appropriate under the circumstances. The Board further requests that this Court give any order immediate effect under MCR 7.315(C).

Respectfully submitted,

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This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(B) because, excluding the part of the document exempted, this **merits brief** contains no more than 16,000 words. This document contains 4,378 words.

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