

STATE OF MICHIGAN
IN THE SUPREME COURT

REPRODUCTIVE FREEDOM FOR ALL, a Supreme Court No. 164760
Michigan Ballot Question Committee,
PETER BEVIER, an individual, and JIM
LEDERER, an individual,

Plaintiffs

v

BOARD OF STATE CANVASSERS,
JOCELY BENSON, in her official capacity
as secretary of state, and JONATHAN
BRATER, in his capacity as Director of
Elections,

Defendants.

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

**BOARD OF STATE CANVASSERS' RESPONSE TO PLAINTIFFS'
COMPLAINT FOR MANDAMUS AND BRIEF IN SUPPORT**

ORAL ARGUMENT NOT REQUESTED UNLESS THE COURT ORDERS IT

Bryan W. Beach (P69681)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Board of
State Canvassers
P.O. Box 30736
Lansing, Michigan 48909
(517) 335-7659
beachb@michigan.gov
grille@michigan.gov

Dated: September 7, 2022

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Statement of Jurisdiction	v
Counter-Statement of Question Presented.....	vi
Constitutional Provisions and Statutes Involved.....	vii
Introduction	1
Counter-Statement of Facts	2
Argument	6
I. The Board requires direction from this Court in this unprecedented situation.....	6
A. Standard of Review	6
B. Overview of the Board of State Canvassers’ duties.....	8
C. Form requirements for petitions to amend the Constitution.....	11
D. Analysis	12
Conclusion and Relief Requested.....	14
Word Count Statement.....	14

INDEX OF AUTHORITIES

Cases

<i>Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand), 195 Mich App 613 (1992)</i>	7, 10
<i>Citizens for Protection of Marriage, 263 Mich App 487 (2004)</i>	10
<i>Citizens Protecting Michigan’s Constitution v Sec’y of State, 280 Mich App 273 (2008), aff’d in result, 482 Mich 960 (2008).....</i>	7
<i>Coalition to Defend Affirmative Action v Board of State Canvassers, 262 Mich App 395 (2004)</i>	10
<i>Gillis v Bd of State Canvassers, 453 Mich 881(1996)</i>	10
<i>Hayes v Parole Bd, 312 Mich App 774 (2015)</i>	8
<i>Leininger v Secretary of State, 316 Mich 644 (1947).....</i>	10
<i>Lickfeldt v Dept of Corrections, 247 Mich App 299 (2001)</i>	8
<i>Michigan Civil Rights Initiative v Bd of State Canvassers, 268 Mich App 506 (2005)</i>	10, 12
<i>Michigan United Conservation Clubs v Sec’y of State, 463 Mich 1009 (2001).....</i>	9
<i>Parkwood Ltd Dividend Hous Ass’n v State Hous Dev Auth, 468 Mich 763 (2003).....</i>	7
<i>Tuggle v Dep’t of State Police, 269 Mich App 657 (2005)</i>	7
<i>Univ Med Affiliates, PC v Wayne Co Executive, 142 Mich App 135 (1985)</i>	8
<i>White-Bey v Dept of Corrections, 239 Mich App 221 (1999)</i>	9

Wolverine Golf Club v Secretary of State,
 24 Mich App 711 (1970) aff'd 384 Mich 461 (1971)..... 7

Statutes

MCL 168.1..... 1
 MCL 168.22..... 9
 MCL 168.22d(2) 6
 MCL 168.32(1) 9
 MCL 168.471..... 3
 MCL 168.475..... 11
 MCL 168.476..... 11
 MCL 168.476(1) 1, 3, 6, 11
 MCL 168.476(2) 12
 MCL 168.477..... 11
 MCL 168.477(1) 1, 3, 6, 11
 MCL 168.479..... v
 MCL 168.479(1) v
 MCL 168.479(2) v
 MCL 168.482..... 14
 MCL 168.482(1) 12
 MCL 168.482(2) 12
 MCL 168.482(3): 13
 MCL 168.482(4) 13
 MCL 168.482(5) 13
 MCL 168.482(6) 13
 MCL 168.544c(1)..... 13

MCL 168.841..... 9

Rules

MCR 7.315(C)..... 15

Constitutional Provisions

Const 1963, art 12, § 2..... 1, 10, 11

Const 1963, art 2, § 7..... 9

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

1. 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 Reproductive Freedom for All’s petition, the Board was unable to pass a motion and deadlocked on this issue. Under these circumstances, are Plaintiffs entitled to a determination of the sufficiency of its petition?

Board of State Canvassers answers:	Deadlocked and unable to answer.
Secretary Benson and Director Brater answer:	Yes.
Plaintiffs answer:	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 168.482:

(1) Each petition under this section must be 8-1/2 inches by 14 inches in size.
 (2) If the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum of legislation, the heading of each part of the petition must be prepared in the following form and printed in capital letters in 14-point boldfaced type:

INITIATIVE PETITION
 AMENDMENT TO THE CONSTITUTION
 OR
 INITIATION OF LEGISLATION
 OR
 REFERENDUM OF LEGISLATION
 PROPOSED BY INITIATIVE PETITION

(3) A summary in not more than 100 words of the purpose of the proposed amendment or question proposed must follow and be printed in 12-point type. The full text of the amendment so proposed must follow the summary and be printed in 8-point type. If the proposal would alter or abrogate an existing provision of the constitution, the petition must so state and the provisions to be altered or abrogated must be inserted, preceded by the words:

"Provisions of existing constitution altered or abrogated by the proposal if adopted."

(4) The following statement must appear beneath the petition heading:

"We, the undersigned qualified and registered electors, residents in the _____ congressional district in the state of Michigan,

respectively petition for (amendment to constitution) (initiation of legislation) (referendum of legislation) (other appropriate description).".

(5) The following warning must be printed in 12-point type immediately above the place for signatures, on each part of the petition:

WARNING

A person who knowingly signs this petition more than once, signs a name other than his or her own, signs when not a qualified and registered elector, or sets opposite his or her signature on a petition, a date other than the actual date the signature was affixed, is violating the provisions of the Michigan election law.

(6) Subject to subsections (7) and (8), the remainder of the petition form must be as provided following the warning to electors signing the petition in section 544c(1). In addition, the petition must comply with the requirements of section 544c(2).

(7) Each petition under this section must provide at the top of the page check boxes and statements printed in 12-point type to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer.

(8) Each petition under this section must clearly indicate below the statement required under subsection (7) and be printed in 12-point type that if the petition circulator does not comply with all of the requirements of this act for petition circulators, any signature obtained by that petition circulator on that petition is invalid and will not be counted.

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, Reproductive Freedom For All (RFFA) 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 RFFA. 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 RFFA's initiative a spot on the November 8, 2022 General Election ballot. RFFA filed the instant complaint for a writ of mandamus on September 1, 2022.

RFFA 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 RFFA's petition. The Board attempted to fulfill its statutory duty but deadlocked 2-2 on a motion declaring RFFA'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 RFFA'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 of the spacing between words of the language of 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

RFFA is a Michigan ballot question committee and is the sponsor or proponent of a proposal to amend the Michigan Constitution. RFFA submitted a petition form for consideration at the Board's March 23, 2022 meeting. (Complaint, ¶15.) At that meeting, the Board provided conditional approval of the form. *Id.*

On July 11, 2022, after collecting signatures, RFFA 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, Citizens to Support MI Women and Children (WAC), another ballot question committee, filed a challenge to RFFA’s petition.¹ (Complaint, ¶22; Appx. Exhibit C.) WAC challenged the form of the petition. It argued that RFFA’s petition failed to comply with constitutional and statutory requirements to include the “full text” on the petition because it sought to insert nonexistent words into the Michigan Constitution and therefore the petition was misleading. *Id.* Specifically, the proposed Article 1, section 28(3) within the substance of the petition—that was previously given conditional approval by the Board on March 23, 2022—was as follows:

(3) THE STATE SHALL NOT PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST AN INDIVIDUAL BASED ON THEIR ACTUAL, POTENTIAL, PERCEIVED, OR ALLEGED PREGNANCY OUTCOMES, INCLUDING BUT NOT LIMITED TO MISCARRIAGE, STILLBIRTH, OR ABORTION. NOR SHALL THE STATE PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST SOMEONE FOR AIDING OR ASSISTING A PREGNANT INDIVIDUAL IN EXERCISING THEIR RIGHT TO REPRODUCTIVE FREEDOM WITH THEIR VOLUNTARY CONSENT.

However, WAC argued that the same paragraph from the circulated version of the petition displays different spacing between words than in the original version:

(3) THE STATE SHALL NOT PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST AN INDIVIDUAL BASED ON THEIR ACTUAL, POTENTIAL, PERCEIVED, OR ALLEGED PREGNANCY OUTCOMES, INCLUDING BUT NOT LIMITED TO MISCARRIAGE, STILLBIRTH, OR ABORTION. NOR SHALL THE STATE PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST SOMEONE FOR AIDING OR ASSISTING A PREGNANT INDIVIDUAL IN EXERCISING THEIR RIGHT TO REPRODUCTIVE FREEDOM WITH THEIR VOLUNTARY CONSENT.

RFFA filed a response to the challenge on August 23, 2022, explaining that the printer inadvertently minimized the spaces between certain words in the proposed amendment on the circulated petitions. (Complaint, ¶23.) As part of RFFA’s response, it supplied an affidavit from the printer attesting there were

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.

spaces between the words but that the “spacing between those words and the words appear closer together as a result of word spacing settings applied Adobe InDesign when preparing the Electronic Proof.” (Complaint, ¶23; Pl’s Appx, Ex. I, p 220-222).

The Board met on August 31, 2021, to resolve the challenge filed by WAC, and to determine the sufficiency of RFFA’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 recommended that the Board approve certification of the petition but made no recommendation as to the legal merits of WAC’s challenge.

The Board then heard presentations by WAC, (Def’s Appx, 8/31/22 Transcript, pp 213-224), and RFFA, (*Id.*, pp 227-247), followed by a rebuttal from WAC. (*Id.*, pp 249-251.) During the presentation, Board Member Richard Houskamp articulated his concerns regarding the lack of spaces between words in the version of the petition that was circulated. (*Id.*, pp 235-237.) Board Chair Anthony Daunt echoed similar concerns stating:

“We did not approve what was circulated. We simply did not. All of us have said repeatedly that this is a le- -- these are legal documents. You would not sign a mortgage that had this type of mistake in it. You wouldn’t turn in a term paper that had this kind of mistake. And if you did, you would likely get knocked down for it. The point being we have rejected language for these exact same reasons and it’s a form issue because it’s how it looks, it’s what’s before the people, it’s what is their

² See, <https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Staff-Reports/Staff-Report-Reproductive-Freedom-for-All.pdf?rev=e4a102e686fc4f4abaed3d41eef7ebac&hash=9012C7F744985BECC32133C1D335AB3F>. (Last accessed September 7, 2022.)

understanding of it ... I did not approve the form of this as it was circulated and I wouldn't approve it now." [*Id.*, pp 240-241.]

Board Vice-Chair Mary Ellen Gurewitz disagreed:

"We're talking about a challenge to the content and that is not within our purview. ... [T]he full text of the petition is there. Obviously people can read it. I can read it and 700-some thousand people could read it. I don't think there's any confusion. But confusion, if people were confused, that's not for us to be concerned about. The full text is there and I think we have no choice but to certify." [*Id.*, pp 241-242.]

After the presentations and discussion by the Board, Vice-Chair Gurewitz moved that the Board accept the recommendation of the staff report and find the petition submitted by RFFA sufficient. (Def's Appx, 8/31/22 Transcript, pp 251-252.) Board Member Jeannette Bradshaw supported Vice-Chair Gurewitz'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 Daunt and Member Houskamp voting against the motion. (*Id.*, p 252.) 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 was unable to render a decision as to the sufficiency or insufficiency of the petition as required by MCL 168.476(1)-(2), 168.477(1).

ARGUMENT

I. **The Board requires direction from this Court in this unprecedented situation.**

A. **Standard of Review**

Both Counts I and II of RFFA’s complaint seek mandamus relief.³ 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); *Automobile Club of Michigan Committee for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613 (1992), a writ of mandamus remains an extraordinary remedy and 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.” *Citizens Protecting Michigan’s Constitution v Sec’y of State*, 280 Mich App 273, 284 (2008), aff’d in result, 482 Mich 960 (2008) citing *Tuggle v Dep’t of State Police*, 269 Mich App 657, 668 (2005).

In relation to a request for mandamus, “a clear, legal right” is “one clearly founded in, or granted by, law; a right which is inferable as a matter of law from

³ Count II is styled as a request for “injunctive 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 II is largely duplicative of Count I and seeks for this Court to compel the Defendants to perform some duty—i.e., approval of RFFA’s petition. Thus, Count II should also be construed as a claim for mandamus.

uncontroverted facts regardless of the difficulty of the legal question to be decided.”

Univ Med Affiliates, PC v Wayne Co Executive, 142 Mich App 135, 143 (1985)

(quotation marks and citation omitted). “Even where such a right can be shown, it

has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is

not possessed by citizens generally.” *Id.* Similarly, “[a] clear legal duty, like

a clear legal right, is one that ‘is inferable as a matter of law from uncontroverted

facts regardless of the difficulty of the legal question to be decided.’” *Hayes v Parole*

Bd., 312 Mich App 774, 782 (2015) (citation omitted).

Michigan courts have identified two circumstances in which a clear legal duty to act exists such that mandamus may compel performance of the duty: (1) when the act sought to be compelled is clearly ministerial, leaving no exercise of discretion or judgment, *Lickfeldt v Dept of Corrections*, 247 Mich App 299, 302 (2001); and (2) when the officer is charged with the duty to perform an act which requires the exercise of discretion. *Teasel v Dept of Mental Health*, 419 Mich 490, 410 (1984). However, this Court in *Teasel* held that while mandamus can require an officer to take action requiring discretion, it will not require the exercise of discretion in a particular manner:

Mandamus is an extraordinary remedy and will not lie to control the exercise or direction of the discretion to be exercised. Moreover, it will not lie for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies. However, the writ will lie to require a body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion. Stated otherwise, mandamus

will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner. [*Teasel*, 419 Mich at 410.]

“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 (1999); *Citizens Protecting Michigan’s Constitution*, 324 Mich App at 584.

At times, courts have resolved “threshold” legal questions involving the constitutionality of an action or statute in the context of a mandamus action. See *Citizens Protecting Michigan’s Constitution*, 280 Mich App at 283, quoting *Michigan United Conservation Clubs v Sec’y of State*, 463 Mich 1009 (2001). See also *Wolverine Golf Club v Sec’y of State*, 384 Mich 461, 466 (1971).

B. 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 168.841.⁴ 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 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

⁴ The Director of Elections is “a nonmember secretary of the state board of canvassers.” MCL 168.32 (1).

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(1947). See also *Gillis v Bd of State Canvassers*, 453 Mich 881(1996); *Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 624 (1992) (“[T]he Board of State Canvassers possesses the authority to consider questions of form.”). The Board may not consider the lawfulness of a proposal, or a substantive challenge to the subject matter of a proposal. *Citizens for Protection of Marriage*, 263 Mich App 487, 493 (2004). 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 (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 article 12, § 2 is the Board. MCL 168.476 and MCL 168.477. The Legislature implemented article 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.”

The Board’s duties with respect to RFFA’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 petition under this chapter at least 2 months before the election at which the proposal is to be submitted.” MCL 168.477(1). The determination regarding the “sufficiency” of a petition includes whether the form of the petition complies with the relevant technical requirements. In short, it is the duty of the Board to determine whether the petition collected enough valid signatures, and whether the petition complies with form requirements.

The Michigan Election Law provide 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 the Board has for years provided the service of

allowing proponents circulating petitions to come before the Board and obtain pre-approval as to the form of their petitions before they are circulated.⁵ This approval as to form is optional and does not bind the proponents of an initiative, who could still choose to circulate an unapproved petition. Nor does the early approval as to form bind the Board when the petition ultimately comes before it for a sufficiency determination under the law.

In conducting its review of the sufficiency of petitions, the Board is empowered to “hold hearings upon any complaints filed or for any purpose 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, and instead the Board split on the question of whether the petition complies with the statutory requirements as to form.

C. Form requirements for 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

⁵ 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.)

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):

A summary in not more than 100 words of the purpose of the proposed amendment or question proposed must follow and be printed in 12-point type. *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.]

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).

D. Analysis

There is no dispute that the Board of State Canvassers has a legal duty to make a declaration as to the sufficiency or insufficiency of RFFA’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.

The Michigan Election Law is silent on the amount of space that must be between letters and words in a petition. As noted above, MCL 168.482 contains requirements for the size of the petition sheet and the various font sizes—but it does not provide requirements as to spacing. Nor is there any existing legal precedent upon which the Board could base its decision regarding the issue of spacing.

The Board reviewed the Staff Report and heard the presentation of the Director of Elections, as well as the testimony of counsel for RFFA and WAC. The Board discussed the matter at length during its August 31 meeting. But the Board members have, in good faith, reached different conclusions about the proper course to take in response to this novel and unprecedented situation. The Board is prepared to follow the direction and determination of this Court as to the correct interpretation of its obligations in this situation.

The Board also agrees that this matter should receive immediate consideration. As stated in RFFA's complaint, the deadline to certify ballot wording for constitutional amendments is September 9, 2022. The Board is also scheduled to meet on that same day. Therefore, because of the issues outlined above, the Board requires direction from this Court on an expedited basis.

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 Reproductive Freedom for All's petition. The Board attempted to fulfill its statutory duty but was unable to do so. 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, 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,

/s/Bryan W. Beach

Bryan W. Beach (P69681)

Erik A. Grill (P64713)

Assistant Attorneys General

Attorneys for Defendant Board of State
Canvassers

P O Box 30736

Lansing, Michigan 48909

(517) 335-7659

Dated: September 7, 2022

WORD COUNT STATEMENT

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 3,603 words.

/s/Bryan W. Beach

Bryan W. Beach (P69681)

PROOF OF SERVICE

The undersigned certifies that on September 7, 2022, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Bryan W. Beach
Bryan W. Beach (P69681)