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,

v

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.

Supreme Court Case No. 164760

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

ORAL ARGUMENT REQUESTED

Election matter – Plaintiffs have requested action by September 7, 2022

PROPOSED INTERVENOR-DEFENDANT'S BRIEF IN OPPOSITION TO COMPLAINT FOR IMMEDIATE MANDAMUS RELIEF AND *EX PARTE* MOTION FOR ORDER TO SHOW CAUSE

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Dated: September 5, 2022

* Motion to Intervene and Motion for Immediate Consideration pending

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Reproductive Freedom for All (RFFA) circulated a petition to amend Michigan's Constitution that was so chock full of errors the language is unreadable in many places, making it impossible for courts or officials to apply the language's plain meaning. Rather than correct the petition, RFFA instead encouraged many Michigan citizens to sign it—apparently without reading it first. The Board of State Canvassers declined to certify the petition for the ballot because it did not meet the form requirements of Const 1963, art 12 and MCL 168.482(3), since it did not set forth the "full text" of anything readable. Given the Board's clear duty to so act, is RFFA's request for mandamus precluded?

Plaintiff RFFA Answers:	No
Defendants Benson and Brater Answer:	No
Defendant Canvassers Bradshaw and Gurewitz Answer:	No
Defendant Canvassers Daunt and Houskamp Answer:	Yes
Proposed Intervenor-Defendant Citizens to Support MI Women and Children Answers:	Yes

2. Whether injunctive relief should be denied where RFFA cannot establish any of the prerequisites for that extraordinary form of relief.

Plaintiff RFFA Answers:	No
Defendants Benson, Brater and Board of State Canvassers	Did not answer
Proposed Intervenor-Defendant Citizens to Support MI Women and Children Answers:	Yes

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases (cont'd)

Cases (cont'd)

Cases (cont'd)

Other authorities

Other authorities (cont'd)

INDEX OF ATTACHMENTS

JURISDICTION

Citizens to Support MI Women and Children agrees that jurisdiction over this action is appropriate under MCR 7.303(B)(6) and MCL 168.479.

INTRODUCTION

After submitting its constitutional amendment Petition through the Bureau of Elections' voluntary pre-approval process in March 2022, RFFA had one task: remove a single non-conforming use of the word "the." Instead, RFFA removed not only that word, but also spacing between dozens of other words, eliminating them and substituting long passages of nonsensical *non*-words. After printing the Petition, RFFA officials and circulators surely must have noticed the problem. But rather than stop and fix the errors RFFA pushed ahead, gathering signatures from many voters – many, presumably, without actually having read the gibberish. When RFFA presented the Board of State Canvassers (Board) its perplexing amendment – which looked significantly different than the March one the Board conditionally approved – the Board rightly declined to place the garbled proposal on the ballot.

This Court has made clear that petition sponsors like RFFA must show actual, strict compliance with the law before a proposal can be presented to voters. RFFA now comes to this Court complaining that only its two partisan allies on the Board of State Canvassers were willing to overlook its disregard of the Constitution and Election Law, and put an incomprehensible amendment on the ballot for possible inclusion in the Constitution. As RFFA concedes, it bears the burden of proof, and it has failed to provide *a single example* of any time in Michigan's history where the Bureau of Elections, the Board of State Canvassers, or this Court has allowed a ballot proposal so riddled with errors to appear on the ballot. Historically, it is the exact opposite: proposals with typographical errors are *always* excluded.

Michigan is under enough political stress. The last thing it needs is to cast aside the clear, explicit directives of Michigan's Election Law and Const 1963, art 12, § 2 and ask voters to amend their organic governing document with nonsensical non-words – on the hottest of hot-button issues, no less. Granting RFFA's request will merely increase the temperature and leave courts, lawyers, and the public arguing for years over the "plain meaning" of non-words.

This case is not about abortion, nor "disenfranchising hundreds of thousands of voters." Brief, p 21. It's about making sure that before Michigan's Constitution is amended, those proposing the change comply with the straightforward rules the People have mandated in both the Constitution and the Election Law – as well as language conventions every fourth-grader follows. RFFA had every opportunity to comply with those rules. But rather than fixing many dozens of obvious mistakes, it pushed ahead. Having abandoned the rules in favor of expediency, RFFA left the Board with no choice but to exercise its clear legal duty to withhold certification. The Board has done the same to other advocacy groups' proposals, for typographical errors far less problematic than the non-words RFFA presents. In following that consistent course of action, the Board saved Michigan from becoming a laughingstock.

Because RFFA can point to no law or case establishing that the Board has a "clear legal duty" to certify petitions with typographical errors that do not reflect the actual "text" of a proposed amendment, this Court should deny mandamus and

direct RFFA to follow the same rules as everyone else. The Court should decline to make an exception just because this Petition involves abortion.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. A clear-cut Petition gets replaced with gibberish.

RFFA is a ballot-question committee seeking to amend Michigan's Constitution to add a "new individual right to reproductive freedom." *See* https://mireproductivefreedom.org/learn-more/ (accessed Aug. 31, 2022).On March 7, 2022, RFFA submitted a Petition to the Bureau of Elections for voluntary pre-circulation review as to form by Defendant Board of State Canvassers at the Board's March 23, 2022 meeting. App'x 34 RFFA Petition submitted March 7, 2022. That petition's "full text of the proposed amending article" section consisted entirely of legible, commonly recognized English-language words, organized in nine paragraphs and separated by spacing and/or punctuation. App'x 36. At its March 23, 2022 meeting, the Board unanimously gave conditional approval *to the March 7, 2022 version,* on the motion of then-Member Daunt:

> I move that the Board of State Canvassers conditionally approve the form of the constitutional amendment submitted by Reproductive Freedom For All provided sponsors remove the definite article "the" prior to the word "constitution" in the "we, the undersigned" sentence prior to circulation with the understanding that the Board's approval does not extend to, one, the substance of the proposal which appears on the petition or, two, the manner in which the proposal language is affixed to the petition. [App'x 68-69].

MCL 168.483a(1) requires the sponsor of a petition proposing a constitutional amendment to file its petition with the Secretary of State prior to circulation; RFFA did so on March 30, 2022. App'x 29. Though the Petition removed the word "the" as

Defendant Board required, RFFA also made at least 60 changes *that were never reviewed by the Bureau of Elections and never approved as to form by the Board – and never could have been approved as to form by the Board*. *See* App'x 31. Those changes removed spaces that eliminated dozens of words previously set forth in the text, replacing them with nonsensical gibberish. *Compare* App'x 36 (conditionally approved petition) and App'x 31 (altered Petition); *see also* App'x 70, Walcott Aff.

As revised, the Petition contains numerous non-words that possess no meaning whatsoever:

- DECISIONSABOUTALLMATTERSRELATINGTOPREGNANCY
- INCLUDINGBUTNOTLIMITEDTOPRENATALCARE
- POSTPARTUMCARE
- ORALLEGEDPREGNANCYOUTCOMES
- INCLUDINGBUTNOTLIMITEDTOMISCARRIAGE
- ORABORTION
- TAKEADVERSEACTIONAGAINST
- FORAIDINGORASSISTINGAPREGNANT
- THEPOINTINPREGNANCYWHEN
- PROFESSIONALJUDGMENTOFANATTENDINGHEALTHCA REPROFESSIONAL
- ANDBASEDONTHEPARTICULARFACTSOFTHECASE
- THEREISASIGNIFICANTLIKELIHOODOFTHEFETUS'SSUS TAINEDSURVIVALOUTSIDETHE.

App'x 31 Petition; App'x 71 Walcott Affidavit; App'x 73-74 Marnon Affidavit.

Those non-words are found in no dictionary and are incapable of having any meaning. They were not contained in some boilerplate, but rather in the heart of the verbiage proposed to become part of the State's organic governing document – including passages setting forth key definitions. The incoherencies were not in the March 7, 2022 Petition conditionally approved by the Board; rather they were added later.

Without question, at least one RFFA official or circulator must have noticed the massive problem and raised a red flag. Nonetheless, RFFA ignored the mistakes and pushed ahead to collect signatures that RFFA submitted to the Board July 11, 2022. App'x 224 Amended Staff Report. The same flaw was in the "full text of the proposed amendment" of each petition Citizens to Support MI Women and Children reviewed, App'x 74 Marnon Affidavit, and RFFA does not contest that it is on *all* of them.

II. Citizens to Support MI Women and Children challenges the form of the Petition.

On August 18, 2022, Citizens to Support MI Women and Children, a duly formed ballot question committee, filed a Challenge to the Form of RFFA's Petition. App'x 10. The Challenge noted the Petition was not in the form prescribed by Michigan law, since it did not set forth the "full text" of the proposed amendment. *Id*, citing, *inter alia*, Const 1963, art 12, § 2, MCL 168.482, and MCL 168.482a. The Petition's non-words cannot constitute the "full text" of a proposed amendment, it noted, and even if they were dismissed as mere "typos," it was beyond the Board's authority to correct the Petition.

RFFA responded. App'x 190 8/23/22 Response. Ignoring both the Challenge's name ("Challenge to the Form of Petition") and its content, RFFA argued it was a substantive challenge to the Petition that was outside the scope of the Board's ministerial duties, and that the Petition in any event met form requirements. Proffering an affidavit from its printer, RFFA argued the Petition "***does*** contain spaces, and "that spaces ***are*** included in the full text…." App'x 200 Response, citing

App'x 220, Ketchum Affidavit (RFFA's emphasis) – though neither RFFA nor its witness said anything about ***word*** spaces. *Id*.

The Bureau of Elections issued its Staff Report on August 25, 2022, App'x 229, and the following day issued an Amended Staff Report, App'x 223. It erroneously described the Challenge to Form as raising a challenge "within the substance of the petition," apparently referring to the "full text of the proposal" section. App'x 225-227. It noted "the Michigan Election Law is silent on the amount of space that must be between letters and words in a petition," and observed that the Petition "includes the same letters, arranged in the same order, as the petition conditionally approved at the March 23rd Board meeting…." App'x 227.

The Bureau avoided making a recommendation on the Challenge, claiming it was outside the Board's limited authority "to determine whether the form of the petition complies with statutory requirements" and contains a sufficient number of signatures. App'x 228 (citing cases). Based on its sidestepping, the Bureau recommended that the Board of State Canvassers certify the Petition for the November ballot. *Id*. (The Amended Staff Report also corrected the Bureau's initial misstatement of the law, noting that the Election Law requires the Petition to "strictly comply" with the statute's form requirements, not just substantially comply. App'x 224 n1; 228 n6).

Though the Bureau had immediately forwarded the Challenge to RFFA upon its filing August 18, it *did not* forward RFFA's Response to Citizens to Support MI Women and Children, which learned of it only after the August 25 Staff Report

referenced it. Citizens to Support MI Women & Children filed a Supplement – *not* a "second challenge," as RFFA tells this Court – to which RFFA responded. That Supplement, and RFFA's second Response, was so destructive of RFFA's arguments that RFFA withheld it from its Appendix to this Court. Citizens to Support MI Women and Children attach both here, at **Tabs 1** and **2**. It also distributed its Supplement to Canvassers at the August 31 meeting. **Tab 3**, TR 8/31/22, p 213.

III. The Board of State Canvassers declines to certify the Petition.

The Board of State Canvassers met August 31, 2022. Dozens of speakers urged the Board not to certify the Petition; a few said the opposite. **Tab 3**, TR 8/31/22. Citizens to Support MI Women and Children introduced five hearing exhibits (which RFFA also left out of its Appendix; attached hereto at **Tab 4**). Citizens to Support MI Women and Children also pointed out it was the *very first time* the Board was considering the language of *this* Petition, which contained different "words" than the March 7 petition the Board conditionally approved. **Tab 3**, p 214.

In sharp contrast to RFFA's depiction, Brief, p 8, both Chairman Daunt and Member Hauskamp discussed in detail the legal basis for deciding the petition did not meet the statute's "full text" form requirements. Chairman Daunt noted the Board would not have approved the form in March with the gibberish in it. "If what was circulated had come to us for review, it would not have received approval because of the severe defect in the spacing and in the form of the language as it was laid out." **Tab 3**, TR 8/31/22, pp 232-233. "It's a tragedy that it happened…[b]ut it

happened." *Id* at 233. He called RFFA's gibberish "an egregious *error of the form*." *Id* at 234 (emphasis added).

Member Hauskamp discussed the extensive efforts he made to see if the form requirements were met, blowing the petition up on a variety of screens, even projecting it on a wall, in an unsuccessful attempt to find actual words. *Id* at 237.

The Board deadlocked 2-2, thus declining to certify the language for the November ballot. **Tab 3**, pp 251-252. Its action was consistent – "almost exactly the same" – as that which it took last year regarding Secure MI Vote, which had substituted an "L" for semicolons and was told to "come back and fix it." *Id*, p 242 (Chairman Daunt). It also was consistent with the Board's disqualification of entire petitions in Michigan Values Life's 2019 petition drive, where a single letter in a single word was missing because of a rip from petitions being folded. **Tab 4**, Hearing Ex 5; *see also* **Tab 3**, TR 8/31/22, pp 219-220. This consistent treatment of previous petitions by the Board further highlights RFFA's failure to provide *a single example* of any time in Michigan's history where the Bureau of Elections, the Board of State Canvassers, or this Court has allowed a ballot proposal so riddled with errors to go forward.

RFFA on September 1, 2022 filed this action seeking an order of mandamus.

IV. RFFA's admission that two other petitions, identical to each other but dramatically different from the gibberish one it circulated, set forth the "full text" of its proposed amendment.

RFFA does not dispute that the March 7, 2022 petition sets forth the amendment's "full text." App'x 36. Further, RFFA's website today has posted what

it calls "[t]he full text of the proposed amendment." **Tab 4**, Hearing Ex 3. That wording, identical to the March 7 petition, is set forth with crystal clarity, divided into easily readable words by word spaces. *Id*. Both are radically different from the gibberish petition RFFA circulated, App'x 31. As discussed below, RFFA's admission about it is fatal.

V. RFFA's misstatements to this Court.

RFFA's pleading makes several misstatements:

1. RFFA says the "RFFA petition form received approval from the Board on March 23. 2022…." Brief, p 1. But even Bureau of Elections Director Brater stated the "version that the Board conditionally approved as to form previously did not have the space issues on it." **Tab 3**, TR 8/31/22, p 225. At no time has the Board *ever* approved the form of the RFFA Petition before this Court.

2. RFFA labels the August 29 Supplement as an untimely "second challenge," and implies the "full text" argument was only raised for the first time in it. Brief, p 1 & n 1. Not so. The "full text" issue was the heart of the original Challenge, App'x 15-17, and the Supplement was a reply to RFFA's Response and raised no new legal or fact issues. RFFA Brief, p 5 n7. These filings – omitted from RFFA's Appendix – show that experts, including RFFA's own, agree that removing spaces between words significantly hinders reader comprehension, if signers even bother trying to read at all. **Tab 1** Supplement, pp 6-9.

3. RFFA says Citizens to Support MI Women and Children has altered the appearance of the Petition's nonsense words. Brief, pp 15-16, citing Affidavits. Not so. Compare App'x 71, 73-74 Affidavits with App'x 31 Petition.

4. RFFA says the Canvassers provided no legal support for their position. Brief, p 8 & n 10. But Chairman Daunt made plain he was carrying out the mandate of MCL 168.482(3): "[T]his is an egregious error of the form in the way this is laid out and so I just want to make sure that I'm clear on that." TR 8/31/22, p 234. And Member Hauskamp detailed the extensive efforts he made to try to see "text" on the Petition, to no avail. Both acted in accord with the Board's statutory role.

5. RFFA paints the Canvassers' conditional approval of a proposal number and ballot language August 31 as proof the Canvassers "expect" this Court to reverse. Brief, p 8. Not so. The Canvassers took those actions – as they also did with Promote the Vote – because Staff warned that if there *is* a reversal, there could be "very little time to implement" it. TR 253 (Chairman Daunt); 185-186 (Director Brater). Such prudence should be commended, not taken advantage of.

6. RFFA suggests that anyone confused by the unreadable Petition could have reviewed the corrected text on its website. Brief, p 16. But RFFA does not disclose that as of August 9, 2022, weeks *after* signatures were submitted, RFFA's website did *not* have the correct language posted, and never had it posted during the entire time it was circulating petitions. Hearing Ex 4, **Tab 4**.

STANDARD OF REVIEW

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).

SUMMARY OF ARGUMENT

Const 1963, art 12, § 2 requires any petition to amend the Constitution to set forth the "full text" of the amendment in its body. The Michigan Election Law does the same and expressly directs the Board of State Canvassers not to certify a petition unless that mandatory requirement is met. Defendant Board of State Canvassers carried out that duty and refused to certify RFFA's petitions because they contained gibberish, and thus could not be the "full text" of anything. RFFA

concedes this by admitting that two *other* versions of the petition – both of which differ fundamentally from the submitted petition – actually *do* set forth the "full text" of its proposed amendment.

In these circumstances, the Board of State Canvassers had a clear legal duty to reject the Petition full of non-words. Indeed, the Board has similarly rejected petitions as to form for far less egregious form errors than those presented here. What's unfortunate is that RFFA could have easily prevented this whole mess if it had just stopped and taken the time to correct its own mistakes. Having chosen not to take that corrective course, RFFA has to live with the consequences, just like any other advocacy group. RFFA's mandamus action and corresponding request for injunctive relief should be dismissed.

ARGUMENT

I. RFFA has no legal right to certification of a Petition that did not comply with the form mandated by the Constitution and statute, and the Board had a clear legal duty not to certify.

The party seeking a writ of mandamus must show 1) it has a clear, legal right to performance of the specific duty sought, 2) the defendant has a clear legal duty to perform, 3) the act is ministerial, and 4) 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 in this case are two sides of the same coin, and bar mandamus for RFFA. It had no legal right to have the Board certify its petition containing

nonsensical text that even RFFA admits is *not* "the full text of the amendment so proposed." In such circumstances, the Board's clear legal duty was *not* to certify.

It cannot be overemphasized: RFFA has failed to provide a single example of any ballot proposal in Michigan's history that has been allowed to go forward riddled with the types of form errors its Petition contains. RFFA is seeking from this Court an adjudication in uncharted waters – but 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). In other words, mandamus is the method of compelling the performance of a duty or enforcing a clearly defined existing right, rather than deciding what that right or duty is. The extraordinary remedy of mandamus is not appropriate here.

A. The Board had a clear legal duty not to certify RFFA's gibberish, since it did not set forth the "full text" of a constitutional amendment, which requires actual words.

As this Court has made clear, "[t]here may be an 'overarching right' to the initiative petition, *but only in accordance with the standards of the constitution*; otherwise, there is an 'overarching right' to have public policy determined by a majority of the people's democratically elected representatives." *Citizens Protecting Michigan's Const v Sec'y of State*, 503 Mich 42, 60; 921 NW2d 247 (2018) (emphasis added; citation omitted). The onus was on RFFA to establish its Petition was in the proper form and set forth the "full text" of its proposed amendment, as required by the Constitution and the Election Law. *Stand Up for Democracy v Sec'y of State*, 492

Mich 588, 619; 822 NW2d 159 (2012). Defendant Board properly refused to find that RFFA had met its burden.

Const 1963, art 12, § 2 governs amendment of the Constitution by petition and vote. *Citizens Protecting Michigan's Const v Sec'y of State*, 324 Mich App 561, 599; 922 NW2d 404, *aff'd* 503 Mich 42 (2018). It requires that "[e]very petition shall include the full text of the proposed amendment…." *Id*, 324 Mich App at 587, quoting Const 1963, art 12, § 2. Article 12, § 2 also addresses the circulation of petitions and provides that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." The Legislature thus is authorized to prescribe the manner of approving, signing and circulating petitions that propose 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 done so, establishing the form requirements for petitions in § 482 of the Michigan Election Law, MCL 168.482, entitled **"Petition; size; form and contents."** It provides that each petition must be 8 ½ by 14 inches in size, and, in the case of a constitutional amendment or initiative or referendum legislation, a specific heading must be affixed in capital letters and 14-point type. MCL 168.482(1) & (2). The next subsection, in addition to requiring an amendment petition to contain a summary of up to 100 words in 12-point type, sets forth two

form requirements for the material that follows: "***The full text of the amendment so proposed must follow the summary and be printed in 8-point type.***" MCL 168.482(3) (emphasis added). That language echoes Const 1963, art 12, § 2 with only a minor change in wording, And the Secretary of State's guidance repeats this "full text" requirement multiple times. *See* App'x 92-94, Michigan Department of State, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition*. The Board correctly refused to certify the Proposal since it contains nonexistent words that cannot constitute the "full text" of anything.

Because neither the Constitution nor statute define the term "text," it "must be given [its] usual and ordinary meaning." *People v Alger*, 323 Mich 523, 530; 35 NW2d 669 (1949); *John Hancock Mut Life Ins Co v Ford Motor Co*, 322 Mich 209, 222; 33 NW2d 763 (1948) (cleaned up) ("Words used in a constitutional provision are to be given their natural, obvious and ordinary meanings and not a technical meaning"); *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 517; 857 NW2d 529 (2014). The main dictionary definitions of "text" all require *words*:

> **text**, *n.*
> **1.**
>
> **a.** The original words of something written or printed, as opposed to a paraphrase, translation, revision, or condensation.
> **b.** The words of a speech appearing in print.
> **c.** Words, as of a libretto, that are set to music in a composition.
> **d.** Words treated as data by a computer….

The American Heritage Dictionary, available at www.ahdictionary.com (entry: text) (accessed Sept. 4, 2022).

Thus, text consists of words. And only words can be put into the Constitution. Justice Cooley's long-accepted rule of "common understanding" interprets the meaning of the Constitution by looking to the *words* the People actually put into it:

> …as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning **in the words employed**, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. [1 Cooley, Constitutional Limitations (6th ed), p 81 (emphasis added), *quoted by Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971); *see also Federated Publications, Inc v Bd of Trustees of Michigan St Univ*, 460 Mich 75, 85; 594 NW2d 491 (1999)].

See also, *League of Women Voters v Sec'y of State*, 508 Mich 520, 535; 975 NW2d 840 (2022) (Cavanagh, J) ("We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification; *accord Paquin v City of St Ignace*, 504 Mich 124, 129-130; 934 NW2d 650 (2019) (Bernstein, J); *People v Cain*, 498 Mich 108, 132; 869 NW2d 829 (2015) (Viviano, J, dissenting, joined by McCormack, CJ) ("in interpreting the constitutional phrase 'trial by jury,' the guiding principle is to give the text the meaning it was understood to have at the time of its adoption by the people") (cleaned up).

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*, 508 Mich at 536-

537 n7 (Cavanagh, J). Here, those sources mirror contemporary definitions and establish without question that when the People directed via Const 1963, art 12, § 2 that any initiative petition must set forth "the full text of the amendment so proposed," they meant *actual words*:

> **text**, *n*.…**1.** the actual or original words of an author, as distinguished from notes, commentary paraphrase, translation, etc. **2. t**he main body or substance of a book or manuscript, as distinguished from headings, marginal notes, etc. **3**. the actual structure of words in a piece of writing or printing; wording…. [*Webster's New Twentieth Century Dictionary of the English Language, Unabridged Edition* (1963)].
>
> and
>
> **text**…**1a** (1) : the original or printed words and form of a literary work…(2) : an edited or emended copy of the wording of an original work < the ~ that was printed showed the results of an editor's blue pencil > <prepared a new ~ of Shakespearean comedies>…. [*Webster's Third New International Dictionary, Unabridged Edition* (1965)].

In the 1960s, as today, "text" required actual words.

Meanwhile, a "word" in the English language is "*n.* **1.** 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." *Webster's College Dictionary* (Random House, 2001) (emphasis added).

Thus, without actual words, there can be no "text." Incoherencies such as:

"DECISIONSABOUTALLMATTERSRELATINGTOPREGNANCY," or

"ORALLEGEDPREGNANCYOUTCOMES" or

"FORAIDINGORASSISTINGAPREGNANT" or

"THEPOINTINPREGNANCYWHEN"

bear none of those indicia. They carry no meaning, are not "the smallest such unit capable of independent use," are not distinguished phonologically, and certainly are not "separated from other such units by spaces in writing." They are nonsense; letters run together in meaningless fashion, signifying nothing.

There is no support for RFFA's position that the "proposed text" of an amendment can include non-words. This is especially so since our Constitution's framers understood the importance of carefully drafting amendment petitions, given that there is no quality-control backstop:

> MR HUTCHINSON: When a constitutional amendment is initiated by petition, [it] is written by a group which wants to accomplish something, of course, and however it fashions its proposal that is what is submitted to the people….There is no way that an initiated amendment to the constitution can be submitted to a body like the legislature which can amend it and can perfect it in the course of debate to improve its language, to see the weaknesses of what is proposed…. [2 Official Record Constitutional Convention 1961, p 2463].

The Board properly refused to "fix" RFFA's flawed Petition, because there is no mechanism to do so. App'x 21 Challenge, citing *Citizens for the Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493; 688 NW2d 538 (2004). And like filling in words missing in a statute, this Court also may not correct the Petition. *Ross v Fisher*, 352 Mich 555, 559-560; 90 NW2d 483 (1958) ("For us to supply the fatally missing words would not be permissible judicial construction but judicial legislation of the boldest kind.")

The importance of having actual words on a valid petition cannot be overemphasized. As this Court has recognized, "the purpose of any statutory text is communicated through the words actually enacted." *State v McQueen*, 493 Mich 135, 155 n 57; 828 NW2d 644 (2013). And specifically regarding constitutional provisions, now-Chief Judge Gleicher of the Court of Appeals has recognized that "Constitutional interpretation begins with the text: *the words approved by the ratifiers*." *Council of Orgs & Others for Educ About Parochiaid v State*, 326 Mich App 124, 157; 931 NW2d 65 (2018) (Gleicher, J. concurring in part and dissenting in part) (emphasis added), *aff'd by equally divided Court*, 506 Mich 455; 958 NW2d 68 (2020). Non-words, such as the Petition's, cannot be approved for the ballot.

B. Statutory silence about word spacing is irrelevant, since the requirement for the proposed amendment's "full text" necessarily implies the text will comprise actual words.

RFFA parrots the Bureau's position that nonsensical strings of letters are permissible because the Election Law "does not provide requirements as to spacing or 'kerning'…." Brief, p 2, citing App'x at 227-228 (Amended Staff Report). For one thing, kerning has nothing to do with this matter, since it deals with the spaces between *letters*. At issue is "tracking" or "word spacing" – the spacing RFFA removed between *words* in the March 23 petition the Board approved. *See What's the Difference Between Leading, Kerning, and Tracking?* (Creative Market, 2021), available at https://creativemarket.com/blog/whats-the-difference-between-leading-kerning-and-tracking (accessed Sept. 4, 2022); *see also* Wikipedia, *Word Spacing, available at* https://eb,wikipedia.org/wiki/Word_spacing (accessed Sept. 4, 2022)

("Word spacing in typography is space between words, as contrasted with letter-spacing (space between letters of words) and sentence spacing (space between sentences").

RFFA's insistence that "[t]here are indeed spaces in between the words of the proposed amendment," Brief, p 2, is meaningless. Of course there are – otherwise each line of letters would be a bar of near-solid black. But those spaces are the ones that separate letters within a word; not the much larger spaces that serve to separate groups of letters into words, i.e., word spacing. *See Word Spacing, supra.* The Ketchum Affidavit, App'x 220-222, does nothing to establish words from within the gibberish, since it attests merely to "spaces" between letters within it – not "word spaces." The Petition, App'x p 31, clearly shows the nonsense letter collections RFFA created by removing word spacing before circulating the petitions.

More fundamentally, the statutory (and constitutional) silence as to both kerning and tracking is irrelevant. Even the omitted-case canon of statutory construction, which directs that a matter not covered in a statute generally is to be treated as not covered, provides that "[n]othing is to be added to what the text states *or reasonably implies*." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 93 (emphasis added). By its terms, that principle recognizes there are things reasonably implied by a statute that are not addressed in its text. *Id* at 96 ("The omitted-case canon – the principle that what a text does not provide is unprovided – must sometimes be reconciled with the principle that a text does include not only what is express but also what is

implicit"). Certainly, many things are reasonably implied within the statutory command that the "full text" of the proposed amendment appear on a valid petition – not only word spacing, but letter order, that the words (and letters) run forward, i.e. left-to-right, and that they be printed right-side up.

Under RFFA's extreme theory, if statutory and Constitutional silence about word spacing allows this example of its Petition gobbledygook to be part of the "full text" of a proposed constitutional amendment:

ORALLEGEDPREGNANCYOUTCOMES

it must also allow letters in a different order, like this:

OLGPGNOCERLERNCUOSAEDEAYTM

and letters running backward, i.e. to be read right to left, like this:

SEMOCTUOYCNANGERPDEGELLARO

and letters flipped upside-down, like this:

Because, after all, MCL 168.482 also says nothing about the "full text" having to have its letters in their regular order, or running left-to-right, or right-side up. In RFFA's house-of-mirrors world, any illegibility goes on the ballot for this Court to sort out later.

"A Constitution is made for the people and by the people." *Paquin*, 504 Mich at 130 (Bernstein, J) (citations omitted). It is not a Wordle game people must pore and puzzle over. Our society has not (yet) reached a point where a statute must spell out absolutely every detail explicitly. "It is part of the skill, and honesty, of the

good judge to distinguish between filling gaps in the text and determining what the text implies." Scalia & Garner, p 97. When MCL 168.482(3) and Const 1963, art 12, § 2 require a petition to set forth the "full text" of the amendment to be certified for the ballot, it is reasonably and necessarily implied that that "full text" will be divided into actual words ordinary people can read and understand. RFFA's Petition failed that test, and the Board had a clear legal duty not to certify it.

Since the Nation's founding it has been universally understood that a constitution comprises actual, comprehensible words. "The framers of the Constitution, and the people who adopted it, must be understood to have employed *words* in their natural sense, and to have understood what they meant." 1 Cooley, Constitutional Limitations (1st ed), p 58 (emphasis added), quoting *Gibbons v Ogden*, 9 Wheat 1, 188 (1824) (Marshall, CJ). Conversely, RFFA cannot point to a single constitutional provision, from any jurisdiction, over the centuries of experience with written constitutions, where a People has decided to put nonsensical strings of letters into their Constitution.

Michigan's Constitution is made up of text, i.e. written words. Both it and the Election Law require that any petition proposing to revise the former set forth the actual text, i.e. written words, of the amendment. Because the Petition failed to use actual words in the "full text" in its proposed amendment, the mandatory (and necessary) requirements of the art 12, § 2 and MCL 168.482(3) have not been fulfilled. Regardless of how many signatures were collected, or what RFFA's "Mr. Science" experiments show in manipulating the electronic version of the Petition,

Brief, p 2, the Board of State Canvassers had a clear legal duty *not* to grant certification, and RFFA correspondingly has no legal right to certification. To quote Attorney General Nessel, as a result of RFFA's refusal to fix its illegible petitions before gathering signatures, the Petition is "not entitled to placement on the ballot." OAG, 2019, No. 7310, p 20 (May 22, 2019), citing *Stand Up for Democracy*, 492 Mich at 601-619.

C. The Board declined to certify based not on the Petition's substance but on its improper form, which did not comply with art 12, § 2 or MCL 168.482(3).

"An executive agency may have a clear legal duty when there is a statute that plainly instructs that agency to perform a certain action." *Barrow v Wayne Ctr Bd of Canvassers*, __ Mich App __ (COA No. 358669) (2022) (citation omitted). Here, the Constitution and the Michigan Election Law gave Defendant Board specific marching orders to do exactly what it did: review the Petition for compliance with the form requirements of art 12, § 2 and MCL 168.482(3), and refuse to certify signatures contained on any that did not comply – in RFFA's case, all of them.

The Board of State Canvassers is established by Const 1963, art 2, § 7. As an agency it has no inherent power, and "[a]ny authority it may have is vested by the Legislature, in statutes, or by the Constitution." *Mich Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 515; 708 NW2d 139 (2005) (citation omitted).

Upon the filing of petitions, the Board is statutorily directed to "canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). In reviewing petitions, it must

follow the requirement (discussed above) that petitions "be in the form, and shall be signed and circulated in such a manner, *as prescribed by law*." Const 1963, art 12, § 2 (emphasis added). The Board reviews the form of petitions to amend the Constitution pursuant to MCL 168.482, including subsection (3).

The Board must require strict compliance in its review of the form. *Stand Up for Democracy*, 492 Mich at 593. ("[T]he doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification"); *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 276; 761 NW2d 210 (2008) ("Constitutional modification requires *strict adherence* to the methods and approaches included in the constitution itself. Shortcuts and end runs to revise the constitution. . .cannot be tolerated") (emphasis added).

Even mistakes in drafting are a basis for the Board to reject a petition. App'x 75, *Michigan Campaign for New Drug Policies v Bd of State Canvassers*, unpublished order of the Court of Appeals, issued Sept. 6, 2002 (Docket No. 243506), *lv denied*, 467 Mich 869; 650 NW2d 327 (2002). In determining whether a petition is sufficient, the Board should only review the "four corners of the petition." *Mich Civil Rights Initiative*, 268 Mich at 519. The responsibility to protect the Constitution from proposals brought forth by invalid petitions is great—a submitted petition not satisfying the Legislature's prescribed form will "arrest[] the initiation and enjoin[] submission of the mentioned proposal." *Carman v Sec'y of State*, 384 Mich 443, 449; 185 NW2d 1 (1971).

Attempting to salvage its Petition, RFFA portrays the Challenge, and the Board's refusal to certify, as improperly based on its proposal's substance, rather than its form. Brief, pp 15-16. But the portrayal is belied by the facts.

For one thing, the challenge was titled, "**Challenge to the *Form of* Petition**…," (bold in original; italics added). In addition, review of the Challenge, App'x 11-27, the Supplement, **Tab 1**, and counsel's hearing presentation, **Tab 3**, TR 8/31/22, pp 213-226, 249-251, shows the substance of the amendment was irrelevant – the Challenge focused solely on the Petition's form defect of failing to set forth the "full text" of the amendment.

Of greatest import, there was zero discussion by Canvassers of the substance of RFFA's proposed amendment, or of any legal issues pertaining to it: no Canvasser mentioned its possible conflict with Federal constitutional provisions, nor the sweeping effect it will have on existing Michigan abortion-related statutes if passed – nothing remotely like that. To the contrary, the discussion was confined exclusively to the Petition's form, and RFFA's replacement of text from the approved March 23 Petition with extended nonsensical strings of letters.

Chairman Daunt made clear his vote was based on the Petition's form and the Board's past actions in rejecting similarly flawed petitions: "Content is not the issue here for me. I want us to be consistent with how we treat these things. And this is an egregious error of the form in the way this is laid out and so I just want to make sure that I'm clear on that." **Tab 3**, TR 8/31/22, p 234; *Id* at 242 ("It is in my mind exactly the same as the issue with Secure MI Vote months ago, almost a year

ago, I think. Where the 'L' had been substituted for semicolons…We made them come back and fix it. I am insistent on being consistent").

When RFFA's counsel improbably tried to tell Canvassers that the circulated Petition's "text is identical" to the approved March 23 petition, and that "[t]he only difference is the word spacing in four lines, but that's not something that the Board approves or considers [because] there's no statutory provision for that," *Id* at 232, Chairman Daunt was emphatic that the Petition's fatal flaw was its *form*:

> MR. DAUNT: I think it's very important to point out from my perspective -- and I don't dare to speak for the rest of the people on this Board -- if what was circulated had come to us for review, it would not have received approval *because of the severe defect in the spacing and in the form of the language as it was laid out*. I think there's ample history of our work on this Board to reject things because of issues exactly like that. So I have trouble understanding why we should let this one go. It's a tragedy that it happened….[b]ut it happened." [*Id* at 232-233 (emphasis added)].

Likewise, Member Hauskamp voiced no concerns about the Petition's substance. He described his extensive efforts to determine if the gibberish passages had word spaces, ultimately finding none. *Id*, pp 237, 247. Even the two Canvassers supporting the Petition did not discuss its substance. Member Gurewitz complained that the Challenge was "based upon challenges to the content of the petition," but she commented only on whether the text was readable. TR 8/31/22, pp 241-242. And Member Bradshaw stated the Board's only proper concern was whether RFFA had enough signatures. *Id*, pp 243-244

Accordingly, this matter is nothing at all like the cases RFFA and the Bureau cite, Brief, p 7; App'x 228, involving improper consideration of a petition's

substance. Those cases confirm that improper substance challenges relate to the merits or constitutionality of a proposed amendment. Thus, in *Citizens for Protection of Marriage*, the Board of State Canvassers at its first meeting to certify a petition proposing a constitutional amendment defining marriage deadlocked when two Canvassers refused, based on their conclusion that its content was unlawful and unconstitutional. 263 Mich App at 489. At a second meeting four days later to adopt the statement of purpose in the event the measure was ordered onto the ballot, the same two Canvassers persisted, expressing concerns that the 100 words did not reflect that the measure "could be interpreted to prohibit the recognition of existing or future domestic partnerships between a man and a woman or between a same-sex couple, or to prohibit health insurers from providing a plan allowing for benefits for unmarried couples, either opposite sex or same-sex." 263 Mich App at 490-491.

The Court of Appeals had little trouble granting mandamus, both because the Board had "no authority to consider the lawfulness of the proposal," and because any such substantive challenge would not be proper until after voters approved the measure. *Id* at 493 (citations omitted). *Citizens for Protection of Marriage* thus has no relevance to the Board's deadlock here, which was in no way related to the Petition's substance. *See also Council About Parochiaid v Sec'y of State*, 403 Mich 396, 397; 270 NW2d 1 (1978) (affirming Board's determination that form of petition complied with MCL 168.482 despite attachment of descriptive material at time of circulation, since material was not part of the petition and not deceptive); *Leininger*

v Alger, 316 Mich 644, 651; 26 NW2d 348 (1947) (Secretary of State's duty under 1908 Constitution was to determine "whether the petition, in form, meets the constitutional requirements" and not whether the substance of the proposed law violates the federal or state Constitutions; Secretary improperly certified language of initiative with the form defect of having no title).

RFFA's one-paragraph discussion of the "ministerial act" requirement for mandamus relief harbors the fundamental flaw in its argument. As RFFA acknowledges, "[t]he act of accepting or rejecting a petition *that complies with the Michigan Election Law with respect to the form of the petition* and has gathered the required number of signatures is ministerial." Brief, p 12 (emphasis added). What the Board of State Canvassers concluded is that the Petition did *not* comply with the law regarding petition form, MCL 168.482(2).

The Bureau below also erred in calling the Challenge one of "substance." While it acknowledged that Citizens to Support MI Women and Children called its challenge one "to the form of the petition," App'x 226, it repeatedly referenced the incomprehensible non-text as being located "in the substance of the petition," *Id* at 226-227, then used that as a reason to punt on making a recommendation. App'x 228. The Bureau thus treated "the substance of the Petition" as a physical *place*, i.e. the "full text of the proposal amending" portion of the Petition.

That is incorrect. The substance/form distinction turns not on the location of the challenged material within the Petition, but rather on the nature of the Challenge raised. "While challenges regarding the *substance* of petitions have

historically been viewed as premature if brought before the initiative legislation comes into effect, such is not the case for challenges regarding the legality or sufficiency of the *form of the petitions themselves*." *Stand Up For Democracy v Sec'y of State*, 297 Mich App 45, 63; 824 NW2d 220, *rev'd on other grounds*, 492 Mich 588; 822 NW2d 159 (2012) (court's emphasis; citations omitted). "In other words, any substantive constitutional challenges regarding the validity of a ballot proposal are premature when made before the voters adopt the proposition in question. But challenges regarding *whether a petition meets the necessary constitutional or statutory requirements* are properly brought before the board certifies any petition as valid." *Id* (citations omitted). This Challenge fell into the latter category, since it alleged the Petition does not comply with the statutory and Constitutional requirements for proper form. By setting forth nonsensical strings of letters in several places, it violates the requirements of both Const 1963, art 12, § 2 and MCL 168.482 that a petition set forth a proposed amendment's "full text."

If the Bureau were correct that challenges relating to the "full text of the proposal" portion of a petition automatically "pertain to the substance of the petition" and thus are substantive challenges, the Board could never enforce the form requirements of MCL 168.482(3). It would be reduced to a cipher charged only with tallying up signatures. The Bureau's view is not the law.

The Bureau's own actions are indeed contrary to its stated view that anything implicating the "full text of the proposal" portion of a petition is a substantive challenge. Attached at **Tab 5** is a petition the Bureau invalidated *in*

toto because bleed-through Sharpie marks invalidated one or two letters in the "full text of the proposal" portion. *See also* TR 8/31/22, pp 219-220. That petition was *not* invalided for 8-point type, but for the missing letters – a "form" objection dealing with the text – and RFFA upon information and belief never challenged it. If the Bureau were correct that any challenge to the text of a proposal other than a lack of 8-point type is a substantive, it would not have invalidated **Tab 5**.

Neither this Challenge nor the Board's refusal to certify was based on either the merits or constitutionality of RFFA's proposed amendment. Neither the Challenge nor any Canvasser raised any of the myriad legal challenges that will arise should the proposed amendment be adopted, such as its violation of Federal Constitutional rights such as Equal Protection or the fundamental right to parent one's child. Instead, the Challenge noted, and the Board acted upon, a fatal defect as to the Petition's form: its failure to include the "full text" of the amendment. The Board had a legal duty to uphold the Challenge, and RFFA has no legal right to mandamus.

D. RFFA ignores one of the two statutory form requirements, that the petition set forth the "full text" of the proposed amendment.

The crux of this dispute is RFFA's flawed reading of MCR 168.482(3) as imposing only one "form" requirement – that of 8-point type. It asserts that "[t]he only statutory provision that applies to the text of the proposed constitutional amendment is the requirement that it be printed in 8-point typeface (see the bolded, italicized language, above." Brief, p 14. The statutory text states unequivocally, "***The full text of the amendment so proposed must follow the summary and***

be printed in 8-point type." *Id*, quoting MCL 168.482(3) (RFFA's emphasis). That imposes two form requirements, not one.

This Court's "primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Stand Up for Democracy v Sec'y of State*, 492 Mich at 598 (citation omitted). "The words of the statute are the most reliable evidence of the Legislature's intent and this Court must give each word its plain and ordinary meaning." *Id* (cleaned up). In interpreting a statute, this Court considers "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Id* (cleaned up). "The word 'and' must generally be read as a conjunctive." *Smith v Straughn*, 331 Mich App 209, 218-219; 952 NW2d 521 (2020) (citations omitted); *see also Black's Law Dictionary* (6th ed) ("A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first").

The plain words of MCL 168.482(3)'s second sentence give the Board of State Canvassers *two* determinations to make in deciding whether a petition for constitutional amendment is in the correct form: 1) does it set forth "the full text of the amendment" following the summary, and 2) is it printed in 8-point type? The statute requires both of those to be in proper form, not just one. Indeed, art 12, § 2 also imposes the "full text" form requirement, with no mention of type size. Under RFFA's theory the Board would have to certify to the ballot any collection of letters provided it is in 8-point type, in derogation of the "full text" requirement. Incredibly, that is RFFA's admitted position: "[i]f someone wanted to propose a constitutional

amendment that did contain actual non-words…then the Board would still be required to certify the petition and the People could vote on the proposal (and the courts could litigate its meaning and/or application)." Brief, p 1 n 1. That is not and never has been the law in Michigan.

Equally important, RFFA admits that the text that appeared on the Petition is *not* the text of its proposal. RFFA's proposal appears on the March 7 petition that the Board of State Canvassers preliminarily approved, and appears again on RFFA's website today. RFFA never has claimed that the text of its proposal is exactly what it proffered to Michigan citizens to review and sign, because that *isn't* RFFA's proposal.

The consequences of violating any of § 482's form requirements are unequivocal: "If a petition under section 482 is circulated and the petition does not meet all of the requirements under section 482, any signature obtained on that petition is invalid and must not be counted." MCL 168.482a(4). As Attorney General Nessel has opined in affirming the constitutionality of that statute, "mandatory petition form and content requirements must be complied with, and… nonconforming petitions are not entitled to placement on the ballot." OAG, 2019, No. 7310, p 20 (May 22, 2019), citing *Stand Up for Democracy*, 492 Mich at 601-619. "Entitlement to be placed on the ballot requires a showing of actual compliance with the law." *Id*, quoting *Stand Up for Democracy*, 492 Mich at 219. MCL 168.482a(4) "essentially implements [*Stand Up for Democracy*'s] holding by confirming that form and content errors will result in the invalidation of signatures. This result is

mitigated to some extent by the fact that petition sponsors may seek approval as to the form of their petition *before* circulating." *Id* (Attorney General Nessel's emphasis). While RFFA trumpets gathering many signatures, its refusal to fix the nonsensical petitions before circulation means it gathered zero *valid* signatures.

This Court has long recognized the twofold task required for approving a constitutional amendment's form. Analyzing Const 1908, art 17, § 2's requirement that, upon receipt of an amendatory petition, the secretary of state "shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors," this Court a century ago noted:

> Such petition? A petition including the full text of the amendment so proposed, signed by not less than 10 per cent. of the legal voters of the state. The ascertainment of these fact***s***, which are to appear before [the Secretary] is charged with the performance of further duties, involves the exercise of no discretion-the performance of none but a ministerial duty. [*Scott v Vaughan*, 202 Mich 629, 644; 168 NW 709 (1918) (emphasis added)].

"Facts" – plural. The prior Constitution imposed the same two pre-certification requirements now set forth in MCL 168.482(3): the petition must set forth "the full text of the amendment" and be signed by enough voters.

Scott went on to note that "ministerial" did not equate to mere rote action, unaccompanied by judgment:

> The performance of a purely ministerial duty may involve something more than doing a prescribed thing in a prescribed way. Knowledge of the correlation of facts, the exercise of reason, the application of established principles and rules, may be required before performance of a duty is indicated, before the fact upon the existence of which the duty arises can be said to be established. *One must appreciate the meaning and effect of what appears upon the face of a petition before he*

> *can determine whether, upon its face, it imports one thing or another*. [*Id* (emphasis added)].

So too, here. In determining the Petition did not set forth "the full text" of the proposed amendment, the Board properly applied its knowledge of the facts, exercised its reason, and applied established principles and rules. The Petition with its numerous instances of gibberish was materially different from the one approved March 23, App'x 36, and the language on RFFA's website, **Tab 4**, Hearing Ex 3 – both of which RFFA admits set forth the "full text" of the amendment. It had flaws to its form the same as other petitions the Board has rejected, telling their proponents to try again another time. That in no way makes the Challenge "substantive," or going to the Petition's content – to the contrary, *Scott* makes it quintessentially one of form.[1]

RFFA's admission about the "full text" set forth on the March 23 petition and its own website, **Tab 4**, Hearing Ex 3, defeats its claim. If two items set forth the exact same words in the exact same order, and both constitute the "full text" of the amendment, it follows *a fortiori* that the third item, which replaces dozens of those words with nonsensical strings of letters without meaning, does not.

Finally, RFFA's theory that the Board may invalidate only for lack of 8-point type is done in by its own signed petition that the Bureau invalidated because

[1] Even if the Board's task was merely to count signatures, **Tab 3**, TR 8/31/22, p 234 (Member Bradshaw), its determination of improper form is an essential part of that, since signatures on an improper petition are invalid and must not be counted. *See* MCL 168.482a(4) and OAG, 2019, No. 7310 (May 22, 2019).

bleed-through Sharpie marks invalidated a letter or two on the back. **Tab 5** hereto; *see also* **Tab 3**, TR 8/31/22, pp 219-220. That petition was not invalided for 8-point type but for the missing letters, a "form" objection dealing with the text – and RFFA upon information and belief never challenged it. If the Bureau were correct that there is no authority to invalidate a petition based on the text of the proposal (other than a lack of 8-point type), it never would have invalidated **Tab 5**. And if actual words were not required for petitions, it also would not have been invalidated. The disqualified RFFA petition at **Tab 5** exposes the legal insufficiency of RFFA's argument.

E. Even if the Petition's nonsense letter strings are dismissed as dozens of "typos," the Board consistently rejects petitions with such errors.

While RFFA cannot point to a single example of an error-riddled petition such as its own ever being allowed to go forward, past Board decisions give multiple examples of them being rejected.

1. Defendant Board's refusal to certify Secure MI Vote.

At the September 23, 2021 Board of State Canvassers meeting, a petition sponsor known as Secure MI Vote sought approval as to form of its submitted petition, but it contained typographical errors. App'x 117. As explained by Director of Elections Jonathan Brater:

> MR. BRATER: Ten instances in which a colon has been printed as an "L." So you can see one at the top?
>
> MR. SHINKLE: Yeah.

> MR. BRATER: So those are typos. [App'x 106, TR 9/23/21 Board of State Canvassers Meeting].

Canvassers disagreed on whether the petition should be given conditional approval, subject to fixing the errors, but *no member would approve it with typographical errors*. The comments of then-Member Daunt (who spoke in favor of conditional approval if the typos were fixed) and Matuzak (who spoke against conditional approval, even if the typos were fixed) show that the Board of State Canvassers *will not approve a petition form with typographical errors*:

> MR. DAUNT: So if the "L's" aren't fixed – let's say the "L," you guys don't heed this advice and you don't fix "L's" and you go out and circulate this, it's going to get – we're not going to approve it, right, because it's incorrect? Or – I want to make sure we're doing this correctly and that those who are submitting this and want to circulate it have done things appropriately and have – are not setting themselves up for failure and that we're not unnecessarily delaying….
>
> * * *
>
> So really if they don't fix this, they're harming themselves. They're not harming any – so in that vein I don't see a reason to not provide conditional approval, but we –
>
> MS. MATUZAK: I'm going to be a no vote. This is not the 100 words that we usually do. These are 100 words, these are typos, this is an error on the printer's certificate. Fix it all and bring it back.
>
> * * *
>
> And I don't care if they circulated a petition with typos because they thought they could get away with it. People are signing that. *That's important that people sign a correct petition.* So I'm a no vote in terms of approving the form. I want to see a clean affidavit. I want to see a clean petition. [App'x 115-116 (emphasis added)].

Thus, Defendant Board at its September 23, 2021 meeting made it abundantly clear: it will not approve the form of a petition with typographical

errors. Even if one could dismiss as mere "typographical errors" the Petition's repeated use of language that bears more resemblance to Klingon than to commonly understood English, the Board consistent with its past practice properly refused to certify. This, too, fatally undercuts RFFA's argument it has a clear legal right to certification.

2. The refusal to certify Michigan Campaign for New Drug Policies.

Michigan courts also have affirmed the Board's rejection of a petition's form for typographical errors far less significant than RFFA's gibberish. In 2002, the Michigan Campaign for New Drug Policies, a ballot question committee, filed an initiative petition to amend the Constitution. App'x 123, 129, 9/6/02 Brief in Opposition to Complaint for Mandamus in *Michigan Campaign for New Drug Policies v Bd of State Canvassers,* Court of Appeals No. 243506 (hereinafter "Canvassers' Brief"). The Bureau and the Board determined that the petition contained sufficient signatures for certification. *Id*. But it also contained a typographical error, indicating it would add art 1, § 24 to the Michigan Constitution when the Constitution already had an art 1, § 24. The Board of State Canvassers rejected the petition based on that typographical error, and a mandamus action was filed.

In defending the rejection, the Director of Elections and the Board of State Canvassers stated that 1) the actual language of the petition controlled and could not be altered, 2) the petitioner's intention that this was "merely a technical error" was properly rejected, and 3) the Secretary of State had no ability to "cure" this

defect. App'x 139. Relying upon *Bailey v Muskegon County Bd of Comm'rs*, 122 Mich App 808, 823-24; 333 NW2d 144 (1983), they rejected the "argument that the unambiguous language of an amendment to the Constitution should be construed in light of the ballot language used to describe the proposed amendment" and that the Secretary of State had any authority to cure the defective petition. App'x 138-139 Board's Brief.

The Court of Appeals agreed:

> Although the proponents claim that it was never their intent to replace art I, § 24, and that the numbering error can be remedied, they have not shown that they have a clear legal right to certification of a defective petition. Accordingly, mandamus is inappropriate. [App's 75, *Michigan Campaign for New Drug Policies v Bd of State Canvassers*, unpublished Order of the Count of Appeals, issued Sept. 6, 2002 (Docket No. 243506)].

Consistent with that precedent, the Board here reached the same result, following these principles laid down in that case 20 years ago and confirmed by the Court of Appeals: 1) the actual language (or lack thereof) of the current Petition controls and may not be altered, 2) any RFFA claim that its Petition flaws are "merely a technical error" must be rejected, and 3) the Secretary of State has no ability to "cure" those deficiencies. Indeed, the 2002 position of the Director of Elections and Board of State Canvassers shows the futility of RFFA arguing it has a clear legal right to certification.

Where *Bailey* makes clear that a reviewing Court "would be constrained to give the unambiguous language of the proposed amendment its clear meaning," that task is hopelessly futile where the proposed amendment has neither "unambiguous

language" nor "clear meaning." It is nonsense, gibberish. The two Board members who refused to certify recognized this.

F. None of RFFA's other arguments have merit.

1. Academic and professional literature, including that cited by RFFA and RFFA's own filings, backs the Board's decision not to certify.

As noted, RFFA did not submit to this Court the timely Supplement submitted to the Board by Citizens to Support MI Women and Children. That Supplement set forth the extensive academic literature that rebuts RFFA's claim that nonsensical strings of letters are read the same way as actual words. It established:

- Rather than a mere kerning issue, the Petition improperly employs *scriptio continua*, the practice of running all words together without word spaces. That practice arose in antiquity, when most people could not read so text was read aloud by performers, but disappeared by the Middle Ages. **Tab 1** Supplement, p 5 (citation omitted). By saving the reader the taxing process of interpreting pauses and breaks, word spaces enable the brain to comprehend written text more rapidly. *Id* (citation omitted).

- RFFA's own authority supports rejection of its gibberish, noting that removing word spacing disrupts two distinct process, saccade programming and word identification. *Id*, p 6 (citation omitted).

- Academic research overwhelmingly shows the typical reader of English has difficulty comprehending text when spaces between words are eliminated. *Id* at 6-7 (citations omitted). "[R]eaders had particular difficulty in identifying words when boundary information was lacking." *Id* (citation omitted).

- Typography experts agree, finding word separation "crucial" for understanding written English. *Id*, p 8, citing Lupton, *Thinking With Type* (Princeton Architectural Press 2d ed 2010), p 91.

As Prof. Lupton put it, "Spaces were introduced after the invention of the Greek alphabet to make words intelligible as distinct units. Tryreadingalineoftextwithoutspacingtoseehowimportantithasbecome." *Id.*

RFFA's own writings confirm this. In its brief to this Court, and in its many other filings, RFFA separated its letters into words because it wanted them to be read and understood. When the Bureau issued its Staff Reports, it separated their letters into words because it wanted the Staff Reports to be read and understood. The same with this brief, and with every single document this Court issues – indeed, as of last week, this Court now sets briefing limits based on the number of words, not pages. Written English is separated into words for a reason – so readers may understand it. Removing spaces between words creates an unreadable mess most people fail to fully comprehend, if they even bother to read it at all.

RFFA's contention that its mishmash collection of letters will be understood by readers of the Constitution, despite not being separated into words, flies in the face of reality, human experience, and its own conduct. The argle-bargle it put into its Petition was insufficient to constitute the "full text" of anything, much less a proposed constitutional amendment.

2. This Court only breaks Board deadlocks when the rigorous conditions for the extraordinary relief of mandamus are present.

RFFA incorrectly suggests this Court automatically grants mandamus in instances of Board deadlock. Brief, pp 19-20. Not one of the three cases it cites involve the straightforward call the Board made here, where it found one of the two

form requirements of the statute and Constitution completely absent. Mandamus in this case is unwarranted.

3. Granting RFFA relief would not only disregard the Constitution and Election Law, but reward sloppiness and cause future havoc for Michigan elections.

RFFA offers a parade of horribles if this Court declines to excuse RFFA's own failure to correct a Petition that did not properly reflect its own actual proposal. Brief, 17-18. But the Petition's flaws are in no way comparable to trivialities such as the Oxford Comma, or line spacing, or the number of spaces after a sentence. As this Court noted in imposing a requirement of "strict compliance" with the Election Law's form requirements, those requirements matter profoundly when it comes to amending Michigan's Constitution. "This appeal concerns a big constitutional issue, even though its focus is something as small as $^{14}/_{72}$ of an inch. This matter turns on what many citizens may regard as a trivial issue: Whether a heading on a petition signed by over 200,000 people satisfies the statutory requirement that the petition heading be in '14–point boldfaced type.'" *Stand Up For Democracy v Sec'y of State*, 492 Mich at 598-599, citing MCL 168.482(2) (brackets omitted). "*As technical as this appears, the rule of law is implicated here because this issue concerns the constitutional foundation of how we govern ourselves*." *Id* at 599 (emphasis added).

So it is with this Petition. Citizens to Support MI Women and Children challenged the Petition's form because it does not contain the "full text" of a proposed constitutional amendment. As in *Stand Up for Democracy*, the rule of law

required the Board to reject both RFFA's cavalier "so what?" approach, and the Petition itself. It correctly did so.

Allowing any advocacy group to pollute the Constitution's text with nonsensical strings of letters would have corrosive effects on both society and Michigan's reputation. As was noted for the Board by a ninth-grader:

> Our constitution should not be taken lightly. If an amendment is being proposed, it should be written with care – clear understandable and thorough. RFFA clearly lacks these qualities. Can we let an amendment written so carelessly go on the ballot? Think of what that would look like in our constitution. [**Tab 3**, TR 8/31/22, p 59 (Ari Kauffman)].

As Ms. Kauffman continued:

> Our constitution defines how our state works, so think how that would label our state. Michigan would be seen as careless and sloppy, a state that didn't bother to pay attention to the guidelines. No, I do not want that for our state. You should not want that for our state. That is your job. You should make sure that this amendment does not go on the constitution. To keep our constitution a constitution to be proud of. [*Id* at 59-60].

The Canvassers did their job – two of them, anyway – and there is no basis to second-guess their sound decision. *Nelson v Wayne County*, 289 Mich 284; 286 NW 617 (1939) ("It is a basic principle of law that in mandamus proceedings, no court has the right to substitute its own discretion for the discretion of the duly elected (or appointed) officers…."). This Court should dismiss the Complaint for mandamus.

II. Injunctive relief is inappropriate.

Like mandamus, injunctive relief is an extraordinary remedy. *Mich Coalition of State Emp Unions v Civil Serv Comm*, 465 Mich 212, 219; 634 NW2d 692 (2001). The moving party must show 1) the likelihood it will prevail on the merits, 2) the

risk of irreparable harm absent an injunction; 3) the risk it will be harmed more by the absence of an injunction than the opposing party will be harmed by its issuance, and 4) harm to the public interest if an injunction issues. *Alliance for the Mentally Ill of Mich v Dep't of Comm Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1998). RFFA can show none of those.

1. "A particularized showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction," and "the mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Loc 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (cleaned up). By its own account RFFA's petition drive was sparked by a fear that *Dobbs v Jackson Women's Health Org*, 142 S Ct 2228 (2022), would upend Michigan's abortion regulation regime. Not one but two injunctions have entered, however, to prevent that from happening. Not only have they kept pro-life Michigan laws from going into effect, but by enjoining all enforcement of MCL 750.14 – parts of which were enforceable even pre-*Dobbs* – these injunctions have *loosened* regulation of abortion. RFFA will suffer no harm, much less irreparable harm, from being held to the same standard as every other amendment proponent.

2. For the reasons discussed in Section I above, RFFA has no likelihood of establishing the Board had a clear legal duty to certify petition language that did not comply with MCL 168.482(3) and Const 1963, art 12, § 2, or that it had a clear legal right to such certification.

3. RFFA will suffer no harm by the invalidation of its fatally flawed Petitions, which it no doubt knew contained gibberish before it circulated them.

4. Michigan's public has an overriding interest in keeping its Constitution readable and coherent, and in not having the State become a global laughingstock.

Injunctive relief should be denied.

CONCLUSION/RELIEF REQUESTED

Strict compliance is required for the form of petitions to amend the Michigan Constitution. Under Const 1963, art 12, § 2 and MCL 168.482(3), the form of such petitions must include the "full text" of the proposed amendment, and "full text" must include actual words – not extended passages of nonsensical letters. The Board of State Canvassers had a clear legal duty not to certify RFFA's Petition, and RFFA has no legal right to have its gibberish amendment on the ballot. The Complaint for Mandamus should be dismissed, and injunctive relief denied.

Respectfully submitted,

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September 5, 2022

* Motion to intervene and motion for immediate consideration pending

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 11,939 countable words[2] in 12-point Century Schoolbook, a proportionally spaced font with serifs, according to the word-count function of the system used to prepare it, Microsoft Word 2013. MCR 7.212(B)(3); MCR 7.306(D)(1)(a). It also complies with the additional requirements of MCR 7.212(B)(5).

/s/ Michael F. Smith
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[2] *i.e.* a unit of language, consisting of one or more spoken sounds or their written representation, that function 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. *Webster's College Dictionary* (Random House, 2001) (emphasis added).