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.

Supreme Court Case No. 164760

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

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

PROPOSED INTERVENOR-DEFENDANT'S MOTION FOR LEAVE TO FILE OMNIBUS RESPONSE TO BRIEFS OF DEFENDANTS BENSON AND BRATER AND *AMICI CURIAE*

Proposed Intervenor-Defendant Citizens to Support MI Women and Children, through counsel and pursuant to MCR 7.311, respectfully moves this Court for leave to file the Omnibus Response to *Amicus* Briefs attached at **Tab A**. In support of this motion, Proposed Intervenor-Defendant states:

1. Proposed Intervenor-Defendant filed its brief in Opposition to the Complaint for Mandamus on September 5. On September 5-6, seven *amicus curiae* briefs were filed, all but one of which support certifying RFFA's Petition. Defendants Benson and Brater also filed their brief this morning.

2. Proposed Intervenor-Defendant has prepared a short response brief addressing several themes common to each *amicus* brief, as well as the Benson-

Brater brief. It asks this Court to grant this motion, accept the proposed brief for filing and consider it in connection with this Court's resolution of this matter.

3. As the proposed brief explains, the *amici* arguments are not well grounded in Michigan law:

- While there is a broad right to propose constitutional amendments by initiative, that right can be exercised "*only in accordance with the standards of the constitution*." *Citizens Protecting Michigan's Const v Sec'y of State*, 503 Mich 42, 60; 921 NW2d 247 (2018) (emphasis added; citation omitted). A decision to place a deficient petition on the ballot would disenfranchise the more than 9 million Michigan citizens who refused to sign or did not sign RFFA's garbled Petition.

- As Director Brater concedes, the Board has *never* approved the form of the Petition that RFFA circulated and is now before this Court. TR 8/31/22, p 225.

- Any honest assessment of the hearing video[1] would agree that both Canvassers who declined to certify the Petition gave the matter thoughtful, careful consideration and applied legal authority – relevant Board precedent – in concluding the Petition's non-words did not meet the constitutional and statutory requirement of the "full text" of an amendment.

- *Amici* consistently overlook or outright ignore MCL 168.482(3)'s requirement that a petition include the "full text" of the proposed constitutional amendment. RFFA's Petition did not include the "full text," but a modified text containing numerous non-words.

- The Board of Canvassers has consistently rejected petitions with form problems like the ones here—with the approval of the Court of Appeals. Given that RFFA bears the burden of showing that its Petition strictly complied with the form requirements of Const 1963, art 2, § 12 and MCL 168.482(3), and further bears the burden of showing a "clear legal right" to mandamus relief, that past practice is dispositive on RFFA's claim to mandamus relief. The failure by any *amicus* to provide just one example of just one petition which contains

[1] https://youtu.be/htL4A2DyfO8

the errors that plague RFFA's petition and still be allowed to appear on the ballot, speaks volumes.

- Secretary Benson and Director Brater suggest the Petition text could be modified, with instruction from RFFA's printer, *into* the "full text" of the proposed amendment. Not only does Secretary Benson lack any authority to unilaterally fix RFFA's defective Petition, the suggestion concedes the Petition does *not* now contain the "full text."

WHEREFORE, Proposed Intervenor-Defendant Citizens to Support MI Women and Children requests that this Court grant this motion and accept for filing the brief attached at **Tab A**.

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Respectfully submitted,

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September 7, 2022

* Motion to intervene and motion for immediate consideration pending

Tab A

Proposed Response

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,

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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

OMNIBUS RESPONSE OF PROPOSED INTERVENOR-DEFENDANT CITIZENS TO SUPPORT MI WOMEN AND CHILDREN TO BRIEFS OF DEFENDANTS BENSON AND BRATER AND *AMICI CURIAE*

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Dated: September 7, 2022

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Citizens to Support MI Women and Children, Proposed Intervenor-Defendant, files this omnibus Response to the *amicus* briefs filed September 5-6 and today's brief of Defendants Benson and Brater:

1. Several *amici* point to the number of Petition signers and suggest that alone warrants mandamus; nearly all complain about "disenfranchisement." To be sure, the People reserved in our Constitution important initiative amendment powers. But they simultaneously created a system in which that "overarching right" may be exercised "*only in accordance with the standards of the constitution*." *Citizens Protecting Michigan's Const v Sec'y of State*, 503 Mich 42, 60; 921 NW2d 247 (2018) (emphasis added; citation omitted). Where it is not, "there is an 'overarching right' to have public policy determined by a majority of the people's democratically elected representatives." *Id.* In other words, the 9.2 million Michiganders who either refused to sign or did *not* sign a Petition full of nonsensical strings of letters—who may not wish to have the Constitution sullied and confounded by it—have equally important rights at stake in this litigation.

2. Some *amici* echo RFFA's incorrect claim that its Petition was approved. But Director Brater, who supports certification, says the "version that the Board conditionally approved as to form previously did *not* have the space issues on it." TR 8/31/22, p 225 (emphasis added). The Board has n*ever* approved the form of the Petition that RFFA circulated and is now before this Court.

3. While several *amici* accuse Canvassers of not giving legal reasons for their vote, the transcript and video/audio of the August 31 hearing are to the

contrary.[1] Opponents don't like the conclusion Chairman Daunt and Member Houskamp reached, but any honest assessment reveals that both gave the matter thoughtful, careful consideration and applied relevant Board precedent before concluding the Petition's non-words did not meet the constitutional and statutory requirement of the "full text" of an amendment.

4. A few *amici* employ the *expressio unius* canon to argue that MCL 168.482(3)'s mention of 8-point type necessarily excludes every other form requirement, such as spacing. This ignores completely the "full text" requirement in the very same sentence. (Only Michigan United is candid enough to admit the "full text" directive *is* a form requirement in MCL 168.482. Brief, p 10). And no *amicus* tries to reconcile *expressio unius* with Const 1963, art 12, § 2, which expresses just one form requirement – not 8-point type, but "the full text of the proposed amendment."

Further, no *amicus* addresses the omitted-case canon, under which the statutory form requirement includes what MCL 168.482(3) states *and reasonably implies* from the phrase "full text" – actual words, with word spacing, and read left-to-right. The statute also doesn't say "right-side up," but no Petition with inverted letters ever would be approved. Intervenor's Brief, pp 20-22.

5. *Amici* and Defendants offer a variety of euphemistic labels – "less than ideal spacing," "smaller spacing," "perceived spacing errors," etc – trying to avoid

[1] Video/audio at https://youtu.be/htL4A2DyfO8

calling the Petition what it is: gibberish. Not one acknowledges the unrebutted evidence, from RFFA's own printer, of a lack of *word* spacing. App'x 220-222. Attorney Goldfarb alone among *amici* embraces the run-on strings of non-word letter groupings, before suggesting it's not that important because written Thai doesn't use word spacing, either. Goldfarb brief, p 7.

6. Defendants Benson and Brater confirm why the Board correctly declined to certify. They suggest the Secretary can take the text from the Petition, modify it with the spacing attested to by RFFA's printer, and thus prepare "the full text of the proposal" to send local clerks and DTMB. Brief, p 22. But if one concedes the Petition needs something added to become the "full text," one also concedes it is *not now* the "full text." Defendants' workaround also is foreclosed by Director Brater's predecessor, who correctly convinced the Court of Appeals the Secretary has no legal authority to "cure" Petition defects. Intervenor's brief at 37-38, citing *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) and Canvassers' brief in that case. App'x 75, 138-139.

7. If RFFA's position was as straightforward as its allies portray, someone would have offered at least *one* example of another petition being certified with similar form errors as RFFA's petition. Nobody has. Where RFFA bears the burden of showing its Petition strictly complied with the form requirements of Const 1963, art 2, § 12 and MCL 168.482(3), and further bears the burden of

showing a "clear legal right" to mandamus relief, that silence speaks louder than all the words with which this Court has been bombarded the past week.

The Board of Canvassers has consistently rejected petitions with form problems like the ones here—with the approval of the Court of Appeals—and that unfailing past practice is dispositive of RFFA's claim to mandamus relief. This Court should not create an "abortion exception" to the rules that have governed the approval of initiative petitions since ratification of the 1963 Constitution.

CONCLUSION/RELIEF REQUESTED

The Complaint for Mandamus should be dismissed.

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Respectfully submitted,

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* Motion to intervene and motion for immediate consideration pending

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 854 countable words 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).

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