STATE OF MICHIGAN
IN THE SUPREME COURT

PROMOTE THE VOTE 2022,

Plaintiff,
v

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

Defendants
and

DEFEND YOUR VOTE

Proposed Intervenor-Defendant

Supreme Court Case No. 164755

This case involves a claim that state governmental action is invalid

PROPOSED INTERVENOR DEFEND YOUR VOTE'S BRIEF IN OPPOSITION TO PLAINTIFF PROMOTE THE VOTE 2022'S COMPLAINT FOR IMMEDIATE MANDAMUS RELIEF AND DECLARATORY JUDGMENT AND MOTION FOR ORDER TO SHOW CAUSE AND IMMEDIATE CONSIDERATION

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Counterstatement of Jurisdiction

Defend Your Vote (DYV) takes no position regarding whether this Court has jurisdiction to consider Promote the Vote's complaint.

Statement of Question Presented

I.

Did Defendants have a clear legal duty to declare the insufficiency of Promote the Vote's petition to amend the Michigan Constitution where the petition failed to republish several constitutional provisions that it would abrogate if adopted and, thus, is not in the "form…prescribed by law."

Plaintiff Promote the Vote answers: No.

Proposed Intervenor-Defendant Defend Your Vote answers: Yes.

Defendant Michigan Secretary of State presumably takes no position on this issue.

Defendant Bureau of Elections Director presumably takes no position on this issue.

Defendant Michigan Board of State Canvassers deadlocked 2-2 on this question at its August 31, 2022 hearing and failed to declare the sufficiency of PTV's deficient petition.

- Board Members Daunt and Houskamp appear to agree that the Board has a clear legal duty to declare the insufficiency of PTV's petition because it does not comply with the form requirements prescribed by Michigan law.

- Board Members Gurewitz and Bradshaw appear to disagree that the Board has a clear legal duty to declare the insufficiency of PTV's petition because it does not comply with the form requirements prescribed by Michigan law.

Introduction

Michigan law is clear that those who seek to amend the state's Constitution through a ballot initiative must strictly adhere to several important rules to ensure the state's electorate is properly informed before they fundamentally alter the governance of their state. One of those rules says this: if a proposal to amend Michigan's Constitution does harm to—i.e., "alters or abrogates"—an existing Constitutional provision, then the petition circulated in favor of that proposal needs to say so. Indeed, under Article 12, § 2 and MCL 168.482(3), a petition must specifically identify and republish every provision of the Constitution that would be adversely affected.[1] The reason for these requirements is obvious: Michigan voters need to know exactly what is at stake when someone asks them to amend the Constitution.

Promote The Vote ("PTV") has sponsored a proposal to amend the Constitution that would fundamentally change the way we do elections in Michigan. But, regardless of the merits of those changes, PTV's petition did not identify several provisions of our existing Constitution that would be adversely affected by its proposal's language. So it fails to comply with alter-or-abrogate form requirement imposed by MCL 168.482(3) and Const 1963, Article 12, § 2.

Defend Your Vote ("DYV") recognized this fundamental deficiency and filed a challenge to the form of PTV's petition with the Board of State Canvassers. And, last week—after lengthy public comment, extensive oral argument, and internal deliberation—the Board declined to certify PTV's proposal for the November ballot. PTV now asks this court to salvage its proposal through this mandamus action.

PTV's petition failed to republish several constitutional provisions that will be abrogated if its proposal is adopted. By doing so, PTV failed to supply required information to the voters who signed its petition and rendered the form of its petition legally deficient. This makes PTV's proposal unfit for the November ballot. None of the heated rhetoric contained in PTV's complaint for mandamus and declaratory

[1] *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 95; 921 NW2d 247 (2018).

relief changes that fact. Michigan law and this Court's precedent are clear on these points. So this Court should refuse PTV's invitation to certify its deficient petition for the November ballot and instead dismiss PTV's complaint in its entirety.

Counterstatement of Facts

A. Promote The Vote's ballot initiative petition and Defend Your Vote's form challenge.

In July 2022, PTV filed 660,000 signatures with the Bureau of Elections in support of its petition to amend the Michigan Constitution.[2]

In August 2022, DYV filed a form challenge to PTV's petition.[3] DYV claimed that the petition failed to republish several provisions of the Michigan Constitution that its proposed amendments would abrogate if they were adopted, in direct violation of Article 12, § 2 and MCL 168.482(2)-(3).[4] Specifically, DYV argued that PTV failed to republish five provisions that would be abrogated in whole or in part: (1) Article 2, § 5's requirement that Election Day be conducted on a single date in November;[5] (2) Article 2, § 2's grant of legislative authority allowing the Legislature to exclude otherwise qualified prisoners or mentally incompetent individuals from voting;[6] (3) Article 2, § 9's reservation of the initiative power (which is coextensive with the general grant of legislative authority that PTV has conceded would be abrogated);[7] (4) Article 7, § 8's grant of legislative authority to county boards of supervisors;[8] and (5) Article 6, § 5's grant of exclusive authority to promulgate rules of practice and procedure to this Court.[9]

A few days later, PTV filed its response to DYV's challenge.[10]

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[2] **Exhibit 1**, PTV's Petition.
[3] **Exhibit 2**, DYV's Challenge.
[4] See generally *id.*
[5] *Id.* at 9-13.
[6] *Id.* at 13-15.
[7] *Id.* at 15-17.
[8] *Id.* at 17-19.
[9] *Id.* at 19-21.
[10] **Exhibit 3**, PTV's Response to DYV's Challenge.

Subsequently, the Bureau of Elections issued its staff report on PTV's petition.[11] The Bureau recognized that DYV challenged the form of the petition based on PTV's failure to republish certain provisions of the Michigan Constitution: "*Defend Your Vote (DYV) submitted a challenge to the form of the petition*, arguing that the petition fails to include all the constitutional provisions that would be abrogated by the proposed amendments."[12] It also summarized PTV's response to DYV's form challenge.[13] However, after citing the legal architecture for alter-and-abrogate form challenges, the Bureau decided that because DYV's challenge "raises legal arguments," its staff report "ma[de] no recommendation as to the merits of the legal arguments raised."[14]

B. <u>The Board of Canvassers deadlocked on the sufficiency of Promote The Vote's petition, preventing the petition from appearing on the November ballot</u>.

The Board considered PTV's petition at its August 31, 2022 meeting. Following extensive public comment, the attorneys from both PTV and DYV presented oral argument.

Counsel for DYV argued, among other things, that: (1) the Board's duty to ensure a petition is in the form prescribed by law; (2) the alter-or-abrogate republication is a matter of form that falls within the Board's jurisdiction; (3) PTV's petition should be rejected because it failed to republish several provisions of the Michigan Constitution that would be abrogated if it were adopted; and (4) the Board's preliminary approval of the form of PTV's petition in February 2022 was irrelevant because of the Board's duty (and because DYV did not exist at the time).

In response, counsel for PTV argued, among other things, that: (1) the alter-or-abrogate requirement is a matter of substance, not form; (2) as long as the petition listed some provisions that would be altered or abrogated, the Board had no authority to determine whether additional constitutional provisions should have

[11] **Exhibit 4**, PTV 2022 Bureau Staff Report.
[12] **Exhibit 4**, PTV 2022 Bureau Staff Report at 3-4 (emphasis added).
[13] *Id.* at 4.
[14] *Id.* 4-5.

been published; (3) alter-or-abrogate is a matter that should be addressed *after* the people have voted and the petition has been adopted; and (4) the provisions addressed in DYV's challenge would be completely unchanged if PTV's petition is adopted.

Following oral argument and lengthy deliberation, the Board deadlocked 2-2 on a motion to declare that PTV's petition was sufficient, thereby declining to certify the petition for the November ballot.[15]

Standard of Review

In determining whether to grant mandamus, this Court's "task is to decide whether the Board of State Canvassers has a clear legal duty to certify the petition," a question it considers "independently of the decisions reached by the Bureau of Elections or the Board of State Canvassers."[16]

Argument

Defendants had a clear legal duty to declare the insufficiency of Promote the Vote's petition to amend the Michigan Constitution because the petition failed to republish several constitutional provisions that it would abrogate and, thus, is not in the "form…prescribed by law."

A. The Board of State Canvassers has a duty to determine that the "form" of a petition complies with the Michigan Constitution and the Michigan Election Law.

The Michigan Constitution requires that, to be submitted to the voters, a petition to amend the Constitution "shall be in the form…as *prescribed by law*."[17] The Board has a constitutional duty to strictly enforce this requirement.[18] In reviewing petitions, the Board must follow the statutory requirement that petitions "be in the form, and shall be signed and circulated in such a manner, *as prescribed by law*."[19] Even

[15] **Exhibit 6**, Transcript of August 31, 2022 Board of State Canvassers Meeting at 184-185.
[16] *Protecting Mich Taxpayers v Board of State Canvassers*, 324 Mich App 240, 244; 919 NW2d 677 (2018).
[17] Const 1963, Article 12, § 2.
[18] *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 276, 285; 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, which ignore the pathways specifically set forth by the framers, cannot be tolerated.") (emphasis added).
[19] Const 1963, art 12, § 2.

mistakes in drafting are a basis for the Board to reject a petition.[20] The Board must utilize a standard of strict compliance in its review of the form.[21]

The Legislature is authorized to prescribe by law the form of petitions that propose constitutional amendments.[22] According to this Court, the Board has a "duty with respect to petitions" to "determin[e] the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification."[23]

This Court has held that "a petition must fully comply with mandatory statutory provisions that pertain to a petition's requirements regarding form."[24] The Board must review petitions for strict compliance with the mandatory form requirements of the Michigan Election Law (including MCL 168.482) and "arrest[] the initiation and enjoin[] submission" of any proposal that does not strictly adhere to the Legislature's prescribed form.[25]

Specifically, MCL 168.482(2) applies to petitions to amend the Constitution. It provides that "[i]f the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum

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[20] (*Michigan Campaign for New Drug Policies v Board of State Canvassers*, (Dkt No. 243506).

[21] See *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 161; 822 NW2d 159 (2012) ("[B]ecause MCL 168.482(2) uses the mandatory term 'shall' and does not, by its plain terms, permit certification of deficient petitions with regard to form or content, a majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification."); *Citizens Protecting Michigan's Constitution v Secretary 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, which ignore the pathways specifically set forth by the framers, cannot be tolerated.") (emphasis added).

[22] *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986).

[23] *Unlock Michigan v Board of State* Canvassers, 507 Mich 1015; 961 NW2d 211 (2021), quoting *Stand Up for Democracy v. Secretary of State*, 492 Mich. 588, 618, 822 N.W.2d 159 (2012).

[24] *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 778; 822 NW2d 534 (2012).

[25] *Carman v Secretary of State*, 384 Mich 443; 185 NW2d 1 (1971); see *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 161; 822 NW2d 159 (2012) ("[B]ecause MCL 168.482(2) uses the mandatory term 'shall' and does not, by its plain terms, permit certification of deficient petitions with regard to form or content, a majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification.").

of legislation, the heading of each part of the petition *must* be prepared in the following form."[26] "The term 'must' indicates a mandatory requirement."[27] So MCL 168.482(2)'s use of the term "must" means that the "form" requirements following subsection (2) are mandatory.[28]

This Court has held that "[e]ntitlement to be placed on the ballot requires a showing of actual compliance with the law."[29] As such, PTV has the burden of demonstrating that its petition complies with the form requirements of Article 12, § 2 and MCL 168.482. Although PTV attempts to dodge and shift this burden onto DYV, PTV must demonstrate its entitlement for its proposal to be placed before voters.

B. <u>Republication of altered and abrogated constitutional provisions is one of the "form" requirements mandated by MCL 168.482 and the Michigan Constitution</u>.

"Article 12, § 2 of the 1963 Constitution governs amendment of the Constitution by petition and vote."[30] It requires that "[s]uch proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law."[31] That is, "Article 12, § 2 requires that the proposal republish for the voters any portion of the present Constitution that the proposed amendments would alter or abrogate."[32]

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[26] MCL 168.482(2).

[27] *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 290; 833 NW2d 331 (2013) (); *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009) ("The term 'must' indicates that something is mandatory."); *Barrow v City of Detroit Election Com'n*, 301 Mich App 404, 416; 836 NW2d 498 (2013) ("[T]he charter provision's use of the term 'must,' like the term 'shall,' denotes that the conditions following it are mandatory."); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127; 573 NW2d 61 (1997) ("Our Supreme Court's use of the word 'must' indicates that the award of costs is mandatory, not discretionary."); *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532-533; 660 NW2d 384 (2003) ("Subsections 2607(3)(a) and 2607(3)(b) contain the mandatory 'must' in terms of notice.").

[28] *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 290; 833 NW2d 331 (2013)

[29] *Stand Up for Democracy v State*, 492 Mich 588, 619; 822 NW2d 159 (2012)

[30] *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 599; 922 NW2d 404 (2018), aff'd 503 Mich 42; 921 NW2d 247 (2018).

[31] Const 1963, art 12, § 2.

[32] *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 95; 921 NW2d 247 (2018); *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 599; 922 NW2d 404 (2018), aff'd 503 Mich 42; 921 NW2d 247 (2018) ("Proposals to amend the Constitution must publish those sections that the proposal will alter or abrogate.").

Similarly, MCL 168.482(3) provides that "[i]f 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.'"[33] As this Court has held, "Const. 1963, art. 12, § 2 and MCL 168.482(3) together establish the requirements for publishing existing constitutional provisions."[34] MCL 168.482(3) is one of the particular rules of form that according to MCL 168.482(2) "must" be followed.[35] Any other reading violates the interpretive canon that the text of a statute must be construed as a whole.[36] The form requirements in MCL 168.482(3), therefore, including the alter-or-abrogate republication requirement, are mandatory and must be strictly enforced by the Board.

Strict compliance with the Constitutional and statutory republication requirements means that the "failure" to republish a constitutional provision that would be abrogated by a petition "is *fatal* to the proposed amendment."[37] As a result, an initiative petition is invalid and must be rejected, without exception, unless it identifies and republishes the constitutional provisions it would abrogate.[38]

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[33] MCL 168.482(3) (emphasis added). *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 600; 922 NW2d 404 (2018), aff'd 503 Mich 42; 921 NW2d 247 (2018). The Secretary of State's guidance say the same thing. **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 18-19.

[34] See *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 778; 822 NW2d 534 (2012).

[35] *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) (this Court "start[s] by reviewing the text of the statute, and, if it is unambiguous, we will enforce the statute as written because the Legislature is presumed to have intended the meaning expressed."); *Ricks v State*, 507 Mich 387, 397; 968 NW2d 428 (2021) ("The primary goal of statutory interpretation is to give effect to the Legislature's intent.").

[36] *Ally Financial, Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018) (citations omitted) (This Court "examine[s] the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme" and "consider[s] the entire text, in view of its structure and of the physical and logical relation of its many parts."); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 167 ("Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.")

[37] See *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 791; 822 NW2d 534 (2012).

[38] See *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 773; 822 NW2d 534 (2012).

C. PTV's argument that the alter-or-abrogate requirement relates to substance, not form, is contrary to law, precedent, and the entire purpose of the statute.

At the August 31, 2022 Board of State Canvassers' meeting, counsel for PTV erroneously argued that alter-and-abrogate is a matter of substance, not form. Similarly, in its complaint, PTV acknowledges that the Board has authority and a duty to determine that a petition's form complies with the statutory requirements, but then incorrectly maintains that an alter-or-abrogate challenge does not relate to the form of a petition.[39] Indeed, PTV claims that "the Board is not permitted to consider an alter-or-abrogate challenge" and that "the Board's conduct in considering DYV's alter-or-abrogate challenge was an *ultra vires* act."[40] Along the same lines, PTV alleges that "DYV offered no statutory or constitutional authority permitting the Board to consider an 'alter or abrogate' challenge…because there is no such authority."[41]

PTV is wrong for a host of reasons.

First, PTV's disregards this Court's precedent. For instance, this Court's opinion in *Protect Our Jobs*, explicitly recognized that the alter-or-abrogate republication requirement relates to the "form" of the petition:

> In *Stand Up For Democracy v. Board of State Canvassers*, this Court held that a petition must fully comply with mandatory statutory provisions that pertain to a petition's requirements regarding form. MCL 168.482(3) uses the mandatory language "shall." Accordingly, the principle articulated in *Stand Up* applies with equal force here and, thus, the petition supporters must fully comply with the requirement that the petition republish any existing constitutional provision that the proposed amendment, if adopted, would alter or abrogate.[42]

Second, PTV's argument is also contrary to the plain language of MCL 168.482. MCL 168.482(2) provides that if a "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 accordance with

[39] PTV's Complaint, ¶29, 39, 40, 44, 174.
[40] PTV's Complaint, ¶44, 174.
[41] PTV's Complaint, ¶41
[42] See *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 778; 822 NW2d 534 (2012)

particular "form" requirements set forth in the "following" subsections. The very next subsection of that statute, MCL 168.482(3), imposes the alter-or-abrogate republication requirement. So, republishing altered or abrogated provisions is one of the components that make up the "form" of a petition.

Third, the authority PTV repeatedly relies on to support its argument is lower court authority that is not even on point. PTV relies on a citation to the Court of Appeals decision *Citizens Protecting Michigan's Constitution*, which relates to whether "a proposal is a general revision or an amendment to the Constitution" or one that "serves more than a single purpose."[43] While the distinction between general revision and amendment may be substantive, it is beside the point here. DYV has not challenged PTV's Petition as a general revision or for serving more than a single purpose. In any event, later in the very same opinion, the Court of Appeals, relying on this Court's precedents, unequivocally recognized that alter-and-abrogate challenges relate to form:

> Our Supreme Court has held that an initiative petition must comply with the mandatory statutory provisions that set forth requirements regarding a petition's form. Given that MCL 168.482(3) contains the mandatory term "shall," petitions must comply with the republication requirement.[44]

So not only does the authority cited by PTV undercuts its position, it also bolsters DYV's position.

Fourth, accepting PTV's argument that "abrogate" arguments should be resulted after the election is over would frustrate the entire purpose of the alter-or-abrogate republication requirement. The reason that altered or abrogated provisions must be republished is "to definitely advise the elector 'as to the purpose of the proposed amendment and what provision of the constitutional law it modified or supplanted.'"[45] Or, in other words, the republication requirement ensures that Michiganders who do not have advanced training

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[43] PTV's Complaint, ¶41, 174, both quoting *Citizens Protecting Michigan's Const v Sec'y of State*, 324 Mich App 561, 585; 922 NW2d 404, aff'd, 503 Mich 42; 921 NW2d 247 (2018).

[44] *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 600-601; 922 NW2d 404 (2018) (citations and footnotes omitted).

[45] *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 401; 686 NW2d 287 (2004); citing *Massey v Secretary of State*, 457 Mich 410, 417; 579 NW2d 862 (1998).

in the law will be informed about the consequences of the proposed amendments for which they are asked to vote. But, at the August 31 meeting, PTV's counsel asserted that alter or abrogate challenges "should be brought up after the people vote."[46] If PTV is right that alter-or-abrogate challenges can only be brought up *after* the people have voted, the entire purpose of the alter-or-abrogate requirement would be frustrated because once the voting has occurred it would be impossible to go back in time after a successful challenge and advise the electors of the actual consequences of a petition. Long story short, if a petition fails to include all of the Constitutional provisions that are specifically altered or abrogated, the form of the petition does not comply with Article 12, Section 2 or MCL 168.482 and the proposal cannot be placed on the ballot.[47]

Finally, PTV's argument is nonsensical. A challenge to a petition based on its failure to republish a constitutional provision it would abrogate has nothing to do with the substance of the petition. Put differently, whether a proposed constitutional amendment abrogates a current constitutional provision has nothing to do with whether the proposed amendment is substantively good, bad, or ugly. Rather, an alter-or-abrogate challenge focuses solely on whether the petition includes a list of all the constitutional provisions that would be changed or nullified. That is form, not substance.

D. A petition abrogates a current constitutional provision if it would "essentially eviscerate" that provision or render any discrete part of it "wholly inoperative".

This Court has recognized that "alter" and "abrogate" have separate meanings.[48] Only the latter is at issue here.[49]

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[46] See **Exhibit 6**, Transcript of August 31, 2022 Board of State Canvassers Meeting at 159-160, available at https://www.youtube.com/watch?v=XV5HqYjIPJs (1:57:30-1:57:40).
[47] See *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 791; 822 NW2d 534 (2012)
[48] *Id.* at 781-783.
[49] In the challenge DYV filed with the Board of Canvassers, it argued that several constitutional provisions that would be abrogated if PTV's petition were adopted but were not republished. DYV has never argued that there are provisions of the Constitution that would be altered but that were not republished.

A petition "abrogates" a provision if it "would essentially eviscerate" it by rendering it "wholly inoperative."[50] "An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together."[51] That is, "if two provisions are incompatible with each other, the new provision would abrogate the existing provision and, thus, the existing provision would have to be republished."[52]

Abrogation is not necessarily something that jumps off the page, obvious to any reader. Rather, assessing whether a petition is incompatible with a current provision requires "careful consideration of the actual language used in both the existing provision and the proposed amendment."[53] This analysis "requires consideration of not just the whole existing constitutional provision, but also the provision's discrete subparts, sentences, clauses, or even, potentially, single words."[54] That is because abrogation occurs and "republication of the existing [Constitutional] language is required" if "the proposed amendment would render the entire provision *or some discrete component of the provision* wholly inoperative."[55] As a result, if the petition would do more than effect a potential change in the meaning of a provision, if it would render any part or subpart of it—even a single word—inoperative, republication is required.[56]

This Court has recognized that "a proposed amendment more likely renders an existing provision inoperative if the existing provision creates a mandatory requirement or uses language providing an

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[50] *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 782-783; 822 NW2d 534 (2012), citing *Massey v Secretary of State*, 457 Mich 410, 418; 579 NW2d 862 (1998).
[51] *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 782-783; 822 NW2d 534 (2012) (footnotes omitted).
[52] *Id.* at 783.
[53] *Protect Our Jobs*, 492 Mich at 783.
[54] *Protect Our Jobs*, 492 Mich at 784.
[55] *Protect Our Jobs*, 492 Mich at 792; *id.* at 784.
[56] *Protect Our Jobs*, 492 Mich at 783-784; *School Dist. of City of Pontiac v City of Pontiac*, 262 Mich 338, 344; 247 NW 474 (1933); *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 401; 686 NW2d 287 (2004).

exclusive power or authority."[57] That is because "any change to such a provision would tend to negate the specifically conferred constitutional requirement."[58] As a result, provisions conferring "complete" or "exclusive" authority are abrogated by a petition even if it would only have "affected only a small fraction" of the authority at issue.[59] This Court explained that is "[b]ecause complete control necessarily communicates the exclusivity of control, *any* infringement on that control abrogates that exclusivity" and "an amendment that contemplates anything less than complete control logically renders that [exclusive] power…inoperative."[60] Thus, a petition that "tak[es] specific decisions" away from a body granted exclusive Constitutional authority over that area "erodes[s] the exclusive and total control" of that body, "thereby constituting an abrogation" and "requiring republication of the entire constitutional section."[61]

In *Protect Our Jobs*, following a 2-2 deadlock by the Board of State Canvassers on this issue, this Court held that an initiative that a "ballot proposal relating to casinos…abrogates an existing constitutional provision" because "the casino amendment's requirement that the casinos authorized by the amendment 'shall be granted' liquor licenses by the state of Michigan renders wholly inoperative the 'complete control of the alcoholic beverage traffic within this state' afforded to the Liquor Control Commission under an existing provision of the Constitution—Const. 1963, art. 4, § 40."[62] As a result, it held that "article 4, § 40 was required to be republished on the petition to inform the people of this abrogation," but that the petition's failure to do so meant that the sponsor's complaint for mandamus was subject to dismissal.[63]

The Court reasoned that, even though the petition would "affect[] only a small fraction of the [Liquor Control Commission's] power to control alcoholic beverage traffic" it still "abrogated" the constitutional

[57] *Protect Our Jobs*, 492 Mich at 783.
[58] *Id.*
[59] *Protect Our Jobs*, 492 Mich at 790-791, 791 n 32.
[60] *Protect Our Jobs*, 492 Mich at 791-792.
[61] *Protect Our Jobs*, 492 Mich at 790-792
[62] *Protect Our Jobs*, 492 Mich at 773.
[63] *Id.* at 773-774.

provision that gave the Liquor Control Commission "complete" and exclusive control over alcohol traffic.[64] The Court explained that "[b]ecause complete control necessarily communicates the exclusivity of control, *any* infringement on that control abrogates that exclusivity" and "an amendment that contemplates anything less than complete control logically renders that [exclusive] power…inoperative."[65] It thereafter concluded that the proposed amendment "would nullify the 'complete' control currently established by the Constitution by taking specific decisions whether to grant or deny a liquor license to the newly established casinos out of the 'control' of the commission."[66] Thus, the Court held that "the proposed amendment would erode the exclusive and total control of the commission, thereby constituting an abrogation of § 40" and "requiring republication of the entire constitutional section."[67]

E. <u>Promote the Vote's Petition abrogates several existing provisions of the Michigan Constitution that were not republished</u>.

1. The Petition abrogates Const. 1963, Art. 2, § 2's grant of authority to the Legislature to exclude from voting otherwise qualified voters because they are incarcerated or mentally incompetent.

Article 2, § 2 of the Michigan Constitution permits the Legislature to exclude from voting two groups of persons: those who are mentally incompetent and those who are incarcerated. The provision specifically says:

> The legislature may by a law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution.

Meanwhile, PTV's Petition would amend Article 2, § 4(1)(a) to provide that

> "Every Citizen of the United States who is an elector qualified to vote in Michigan shall have":
>
> THE FUNDAMENTAL RIGHT TO VOTE, INCLUDING BUT NOT LIMITED TO the right, once registered, to vote a secret ballot in all elections. NO PERSON SHALL: (1) ENACT OR USE ANY LAW, RULE, REGULATION, QUALIFICATION, PREREQUISITE, STANDARD,

[64] *Protect Our Jobs,* 492 Mich at 790-791, 791 n 32.
[65] *Id.* at 790-791.
[66] *Id.* at 791.
[67] *Id.*

> PRACTICE, OR PROCEDURE; (2) ENGAGE IN ANY HARASSING, THREATENING, OR INTIMIDATING CONDUCT; OR (3) USE ANY MEANS WHATSOEVER, ANY OF WHICH HAS THE INTENT OR EFFECT OF DENYING, ABRIDGING, INTERFERING WITH, OR UNREASONABLY BURDENING THE FUNDAMENTAL RIGHT TO VOTE.[68]

By its plain language, Article 2, § 2 expressly authorizes our State's Legislature to exclude persons from voting if they are mentally incompetent or incarcerated. The Legislature exercised this authority to enact MCL 168.492a. That statute provides that although "[a]n individual who is confined in a jail *and who is otherwise a qualified elector* may, before trial or sentence, register to vote…[a]n individual who is confined in a jail after being convicted and sentenced is not eligible to register to vote."[69] That is, the Legislature exercised its authority under Article 2, § 2 to: (1) exclude otherwise-qualified electors from voting if they have been convicted and sentenced and are currently incarcerated; and (2) allow otherwise-qualified voters to vote if they are currently incarcerated but have not yet been convicted sentenced.

If adopted, the Petition would destroy Article 2, § 2's grant of legislative authority root and branch. The Petition accomplishes this abrogation in two steps. First, it provides that every existing "qualified elector" has "the fundamental right to vote."[70] In Michigan, a qualified elector is someone who: (1) is a United States citizen; (2) has attained the minimum age; (3) resides in this state; and (4) satisfies local residency requirements.[71] Anyone who satisfies those four requirements—including someone who is currently incarcerated—is a qualified elector. Thus, PTV's petition would extend a fundamental right to vote to any incarcerated individuals (even convicted felons serving long prison sentences) who satisfies those four qualifications for being an elector. Second, PTV's petition restricts the Legislature, among others, from enacting any law that "has the intent or effect of denying, abridging, interfering with or unreasonably

[68] **Exhibit 1**, PTV's Petition at 1
[69] MCL 168.492a.
[70] **Exhibit 1**, PTV's Petition at 2.
[71] Const 1963, art. 2, § 1; MCL 168.492.

burdening the fundamental right to vote."[72] This restriction would bar the Legislature from enacting any law that prevented an otherwise-qualified elector, including one who is incarcerated, from voting. But that is exactly what Article 2, § 2 authorized the Legislature to do.

PTV argues that the Petition would not abrogate the Legislature's authority to enact prison or incompetence exclusions under Article 2 § 2 because such exclusions are really disqualifications.[73] In other words, PTV contends that any action to disenfranchise incarcerated persons would not deny or abridge, or interfere with an otherwise qualified person's fundamental right to vote. It would merely disqualify such persons from voting. This argument fails to grapple with the text of its own proposal, the language of Article 2 § 2, and the distinct meaning "qualification" has under Michigan law.

Article 2, § 1 of Michigan's Constitution sets forth the exclusive and exhaustive list of "Qualifications of electors." It provides that, to be "an elector…qualified to vote in any election," a person must: (1) be a United States citizen; (2) have attained the minimum age; (3) have resided in Michigan for six months; and (4) have satisfied local residency requirements.[74] Similarly, MCL 168.492, which implements that constitutional provision, states that: "Each individual who has the following qualifications of an elector is entitled to register as an elector in the township or city in which he or she resides. The individual must be a citizen of the United States; not less than 17- ½ years of age; a resident of this state; and a resident of the township or city." Conspicuously absent from either the constitutional or statutory list of qualifications is any reference to incarceration or mental incompetence. Those categories cannot be engrafted onto Article 2, § 1 or MCL 168.492 as additional qualifications for being an elector.[75] In other

[72] *Id*.
[73] PTV's Complaint, ¶87.
[74] Const 1963, art. 2, § 1.
[75] *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 336; 915 NW2d 338 (2018) ("This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, to avoid rendering any part of the statute nugatory or surplusage."); *Mich Association of Home Builders v City of Troy*, 504 Mich 204, 212-213; 934 NW2d 713 (2019) (citations omitted) ("[A] court may read nothing into an

words, incarcerated and mentally incompetent people who meet the requirements of Art 2 § 1 as implemented by MCL 168.492 are, as a matter of constitutional law, qualified electors.

If the framers of the Constitution wanted mental competence and not being in prison to be qualifications for voting, they could have said so. But they did not. As this Court has said, "different words…are generally intended to connote different meanings."[76] And the fact that the Constitution uses different words to describe the qualifications in Art 2 § 1 and the possibility for exclusions in Art 2 § 2 means that this Court cannot treat them as the same.

It follows, then, that under the plain language and structure of the Michigan Constitution and MCL 168.492, restrictions based on criminal confinement status or mental incompetence are not "*qualifications*" for an elector to vote in an election. As a result, any incarcerated felons and mentally ill people who meet the four qualifications of Article 2, § 1 and MCL 168.492 are, absent legislation to the contrary, "qualified to vote." Thus, the Legislature's power under Article 2, § 2 is the power to restrict from the franchise incarcerated or mentally incompetent persons *who are otherwise qualified to vote*.[77] That means that any limitation on those individuals' ability to vote that could be enacted under Article 2, § 2 would run afoul of the Petition's proposed amendment's restriction that "no person shall…enact or use any law…which has

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unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself."); *Hobbs v McLean*, 117 US 567, 579, 6 S Ct 870, 29 L Ed 940 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."); *UAW v Green*, 498 Mich 282, 286-287; 870 NW2d 867 (2015) (Our primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of 'common understanding.'…. We identify the common understanding of constitutional text by applying the plain meaning of the text at the time of ratification."); *Bond v Pub Sch of Ann Arbor Sch Dist*, 383 Mich 693, 699; 178 NW2d 484 (1970) ("The first rule a court should follow in ascertaining the meaning of words in a constitution is to give effect to the plain meaning of such words as understood by the people who adopted it.").

[76] *United States Fidelity Ins. & Guaranty Co. v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14, 795 NW2d 101 (2009)

[77] Const 1963, art. 2, § 2.

the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote."[78] But, again, that is exactly what Article 2, § 2 allows the Legislature to do.

Essentially, PTV conflates the qualifications for voting under Article 2, § 1 and MCL 169.492 with the exclusion of an otherwise qualified voter under Article 2, § 2 and MCL 168.492a or MCL 168.785b. By doing so, PTV ignores the reality that the only people who need to be excluded from voting are those who are otherwise qualified to vote (which means they would be entitled to the fundamental right to vote under PTV's petition). This is demonstrated by the language of a statute passed by the Legislature pursuant to the grant of authority in Article 2, § 2. MCL 168.492a provides that, while "[a]n individual who is confined in a jail *and who is otherwise a qualified elector* may, before trial or sentence, register to vote…[a]n individual who is confined in a jail after being convicted and sentenced is not eligible to register to vote."[79] Thus, the Legislature's exercise of its Article 2, § 2 authority recognizes that an exclusion created pursuant to that provision is not itself a qualification for being an elector; rather, it excludes a person from voting even though they are otherwise qualified to vote. Tellingly, while PTV cites MCL 168.492a, it fails to quote it or address its plain language, which fatally undermines its argument.

Furthermore, PTV's argument that Article 2, § 2 exclusions are mere "disqualifications" is difficult to take at face value. According to PTV, the Legislature could easily evade the Petition by simply enacting laws that disqualify large classes of people from the state's electorate. If PTV is correct, the Petition's proposed amendment would not stop the Legislature from disqualifying 18-year-olds, those who do not own property, or those without a minimum net worth from voting. PTV's position would mean that these would not be abridgments or interferences with the fundamental right to vote; rather, they would be disqualifications. That makes no sense whatsoever and underscores that the Petition abrogates the

[78] **Exhibit 1**, PTV's Petition at 1-2.
[79] MCL 168.492a.

Legislative authority provided by Article 2, § 2 to exclude otherwise qualified persons from the electorate on account of certain statuses.

Moreover, the Petition does not just prohibit the enactment of laws abridging the right to vote of qualified electors—it also prohibits the *use* of laws to accomplish that result. That means that any laws on the books right now that exclude otherwise-qualified mentally incompetent persons or incarcerated felons from voting, such as MCL 168.492a and MCL 168.758b, would be unenforceable. Given that incarcerated felons are, absent legislation authorized by Article 2, § 2, otherwise qualified to vote, the Petition would block enforcement of laws that address the voting rights of mentally incompetent persons or people serving a prison sentence. As a result, if the Petition is adopted, it would obliterate the Legislature's ability to exclude incarcerated and mentally incompetent individuals from voting, thereby rendering Article 2, § 2 "wholly inoperative."[80]

Put simply, there is no way that the Michigan Legislature could, consistent with the Petition, invoke its Article 2 § 2 authority to place any restriction or burden on the franchise of, for example, incarcerated felons serving a life sentence are otherwise qualified to vote under Article 2 § 1 and MCL 168.492. Whereas today, the Legislature can expand and restrict the franchise to felons and the mentally infirm as it sees fit (subject to any applicable constitutional or federal restraints), the Petition wholly eviscerates that authority. If the Petition is adopted, any effort to limit the franchise of an incarcerated felon who is otherwise "qualified to vote" would be out of bounds.

The current Constitution and the Petition are simply incompatible. No legislation or activity pursuant to Article 2 § 2 could survive review under the Petition. Today, incarcerated felons and the mentally incompetent are qualified, but excludable and excluded, electors. Tomorrow, if the Petition moves forward, any effort to exclude them from the electorate would be an interference with the fundamental right

[80] *Ferency v Secretary of State*, 409 Mich 569, 597; 297 NW2d 544 (1980), 409 Mich at 597 (emphasis added); see *Protect Our Jobs*, 492 Mich at 781 (citations omitted).

to vote of a qualified elector. In short, they would no longer be either excluded or excludable from voting.[81] Yet the Petition fails to highlight that conflict for our State's voters. That is an incurable defect, and for that reason alone, PTV's mandamus and declaratory relief claims fails as a matter of law and must be dismissed.

2. The Petition abrogates Const. 1963, Art. 2, § 5 by expanding Election Day from a single day in November to ten days in October and November.

Article 2, § 5 of the Michigan Constitution deals with the "Time of Elections." It states: "Except for special elections to fill vacancies, or as otherwise provided in this constitution, all elections for national, state, county and township offices shall be held on the first Tuesday after the first Monday in November in each even-numbered year or on such other date as members of the congress of the United States are regularly elected."

If the Petition is adopted, Article 2, § 4, which addresses the "Place and Manner of Elections," will state that "[e]very Citizen of the United States who is an elector qualified to vote in Michigan shall have":

> (M) THE RIGHT, ONCE REGISTERED, TO VOTE IN EACH STATEWIDE AND FEDERAL ELECTION IN PERSON AT AN EARLY VOTING SITE PRIOR TO ELECTION DAY. VOTERS AT EARLY VOTING SITES SHALL HAVE THE SAME RIGHTS AND BE SUBJECT TO THE SAME REQUIREMENTS AS AN ELECTION DAY POLLING PLACE, EXCEPT THAT AN EARLY VOTING SITE MAY SERVE VOTERS FROM MORE THAN SIX (6) PRECINCTS AND MAY SERVE VOTERS FROM MORE THAN ONE (1) MUNICIPALITY WITHIN A COUNTY. AN EARLY VOTING SITE SHALL ALSO BE SUBJECT TO THE SAME REQUIREMENTS AS AN ELECTION DAY PRECINCT, EXCEPT THAT ANY STATUTORY LIMIT ON THE NUMBER OF VOTERS ASSIGNED TO A PRECINCT SHALL NOT APPLY TO AN EARLY VOTING SITE. EACH EARLY VOTING SITE SHALL BE OPEN FOR AT LEAST NINE (9) CONSECUTIVE DAYS BEGINNING ON THE SECOND SATURDAY BEFORE THE ELECTION AND ENDING ON THE SUNDAY BEFORE THE ELECTION, FOR AT LEAST EIGHT (8) HOURS EACH DAY, AND MAY BE OPEN FOR ADDITIONAL DAYS AND HOURS BEYOND WHAT IS REQUIRED HEREIN AT THE DISCRETION OF THE ELECTION OFFICIAL AUTHORIZED TO ISSUE BALLOTS IN THE JURISDICTION CONDUCTING THE ELECTION. JURISDICTIONS CONDUCTING ELECTIONS WITHIN A COUNTY MAY ENTER INTO AGREEMENTS TO SHARE EARLY VOTING

[81] See, e.g., *Protect Our Jobs*, 492 Mich at 783.

> SITES. A JURISDICTION CONDUCTING AN ELECTION MAY ENTER INTO AN AGREEMENT WITH THE CLERK OF THE COUNTY IN WHICH IT IS LOCATED AUTHORIZING THE COUNTY CLERK TO CONDUCT EARLY VOTING FOR THE JURISDICTION. JURISDICTIONS CONDUCTING NON-STATEWIDE ELECTIONS MAY OFFER EARLY VOTING FOR SUCH ELECTIONS IN ACCORDANCE WITH THE PROVISIONS OF THIS PART (M) OF SUBSECTION (4)(1). NO EARLY VOTING RESULTS SHALL BE GENERATED OR REPORTED UNTIL AFTER EIGHT (8) PM ON ELECTION DAY.[82]

It is not disputed that under Michigan's existing Constitution, in-person, non-absentee voting in regular "elections" must take place "on the first Tuesday after the first Monday in November in each even-numbered year or on such other date as members of the congress of the United States are regularly elected."[83] Under current law, this is a monumental day for the voters of this state. It is *necessarily* the day that any Michigander who wants to take part in the state's elections by the traditional means of voting in person goes to the polls. To be sure, Michigan's Constitution provides for other means of being a voter—including even in-person absentee balloting. But under the current Election Day provision, the only means to vote by way of the traditional in-person format is on the first Tuesday after the first Monday in November—full stop.

The Petition would change all that, enabling voters who wish to avail themselves of the traditional in-person format to disregard that particular Tuesday in November entirely. For the first time in Michigan history, all traditional in-person voters would be able to complete their task well before that date, leaving polling places devoid of any in-person voters on Election Day. Although various courts have struggled to fully define precisely when an "election" has or has not occurred, the United States Supreme Court has defined it, at a minimum, as the "*combined* actions of voters and officials meant to make a final selection

[82] **Exhibit 1**, PTV's Petition at 2.
[83] Const. 1963, Art. 2, § 5.

of an officeholder."[84] Further, our Legislature has spoken about Election Day as being on a single date.[85] And so has this Court.[86] As one of the members of this Court recently noted, Michigan law recognizes that "[o]n Election Day, votes are cast."[87] In other words, some *voting must* occur on Election Day. If no in-person voting needs to occur on the Tuesday specified in the Constitution—as would become possible under the Petition's proposals—it is impossible to conclude that any election must be held on that day. The Petition simply eliminates voter activity as an otherwise necessary ingredient of the current Constitution's "Tuesday-as-Election-Day" recipe.

None of this is a matter of legal construction, but of factual reality. Today, "the first Tuesday after the first Monday in November in each even-numbered year" is a date of monumental significance. It is the day the people of this state exercise their collective will and vote—at a single point in time—for the direction and future of their state. Under the Petition, that Tuesday would become little more than an administrative deadline. Nothing of any particular significance would need to happen on that day. No person wishing to affect Michigan's future needs to cast a ballot on that previously all-important date. It is necessarily nothing more than the last date for emptying the ballot box. The election that would have occurred that day absent the Petition may very well have been decided in the preceding days and weeks.

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[84] *See Foster v. Love*, 522 U.S. 67, 71, 118 S.Ct. 464, 467 (1997) (emphasis added); *see also Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000) (discussing federal election day preemption of state early voting scheme); *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001) (same); *see generally Lamone v. Capozzi*, 396 Md. 53 (2006) (analyzing election process in terms of Election Day); *see also League of Women Voters v. Sec'y of State*, 333 Mich. App. 1, 21-22 (2020) (recognizing voting as a "process").

[85] *See* MCL 168.2(j) (defining "general election" as "the election held on the November regular election *date* in an even numbered year."); MCL 168.641(1) ("[A]n election held under this act shall be held on 1 of the following regular election dates…[t]he November regular election *date*, which is the first Tuesday after the first Monday in November.").

[86] *Attorney General v. Clarke*, 489 Mich 61, 63; 802 NW2d 130 (2011) ("Michigan law defines 'general election' as 'the election held on the November regular election *date* in an even numbered year.'"); *Groesbeck v. Bolton*, 206 Mich. 403, 410; 173 NW 542 (1919) ("The term 'general election' means, as here used, the general election held in November in the even years.").

[87] *Johnson v Secretary of State*, 506 Mich 975; 951 NW2d 310 (2020) (Clement, J, concurring).

So, although the Election Day provision is currently an entrenched feature of Michigan's Constitution, it would lose all meaning if the Petition is adopted.[88]

As a result, the proposed amendment cannot be harmonized with and would render wholly inoperative the existing requirement that "all elections…shall be held on the first Tuesday after the first Monday in November in each even-numbered year."[89] Accordingly, the proposed constitutional amendment would abrogate Const 1963, art 2, § 5 if approved "and republication of the existing language is required."[90]

Absentee voting does not change this reality. This Court recently addressed the constitutional provision for absentee voting as an *exception*, established by the Constitution, to the Election Day provision that is available to voters in special need or under certain circumstances with its own unique set of safeguards.[91] The Legislature has similarly recognized this reality.[92]

It is simply wrong for PTV to conflate absentee voting, even in-person absentee voting, with early voting. Not only are they constitutionally distinct, which is why DYV has not argued abrogation of the absentee voting provision in Article 2, §4, but they are very different forms of voting. As a practical matter, early in-person voting *would be* Election Day voting, just on days other than the date specified for such voting in the Constitution. Both allow same-day voter registration (not permitted with absentee voting), both require the voter to appear and cast his or her vote at a polling site (not required with absentee voting), and both have the same polling location requirements (not relevant for absentee voting). Indeed, the text of the Petition's proposed amendments make this clear: "An early voting site is a polling place and shall be subject to the same requirements as an election day polling place…."

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[88] See Const 1963, Article 3, § 1.
[89] Const 1963, art. 2, § 5.
[90] *Protect Our Jobs*, 492 Mich at 792.
[91] *See League of Women Voters of Michigan v. Sec'y of State*, 333 Mich App 1 (2020) (referencing the right to vote by absentee ballot as distinct from Election Day); see also Const 1963, Article 3, § 1 (using Election Day as a single day to denote the final day to return absentee ballot).
[92] MCL 168.761 (referring to "absentee voting" rather than "Election Day voting").

Finally, PTV's assertion that the Petition would still require that votes not be "tabulated" until Election Day is unavailing. Such administrative matters that require no voter engagement at all, are not the stuff of "elections."[93] Elections are understood from the prospective of the voter, "in terms of the voter, not in terms of the election process."[94]

The Petition transforms a monumental event like Election Day into a prosaic "vote tabulation day," essentially eviscerating the word "election" from the Constitution. That is an abrogation.[95] While Michiganders are well within their rights to seek to amend the state Constitution to allow for early voting, doing so abrogates the current Election Day provision and therefore must be republished. But, because the Petition failed to republish Article 2, §5, its form is defective. So the Board had a clear legal duty to declare the Petition insufficient for failing to republish that provision and thereby depriving the people of this state of proper notice of its transformative effect on the constitutional significance of Election Day.

3. Because PTV concedes that its proposal abrogates the Legislature's grant of legislative authority in Article 4, § 1, its proposal necessarily also abrogates the People's initiative power under Article 2, § 9 but did not republish that provision.

Article 2, § 9 of the Michigan Constitution deals with "Initiative and referendum; limitations; appropriations; petitions." It states:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

[93] *Id*.
[94] *Lamone*, 396 Md. at 84.
[95] *See, e.g., Protect Our Jobs*, 492 Mich. at 783.

Again, if the proposed amendments contained in the Petition are adopted, Article 2, § 4 (1)(a) will state that "[e]very Citizen of the United States who is an elector qualified to vote in Michigan shall have":

> THE FUNDAMENTAL RIGHT TO VOTE, INCLUDING BUT NOT LIMTIED TO the right, once registered, to vote a secret ballot in all elections. NO PERSON SHALL: (1) ENACT OR USE ANY LAW, RULE, REGULATION, QUALIFICATION, PREREQUISITE, STANDARD, PRACTICE, OR PROCEDURE; (2) ENGAGE IN ANY HARASSING, THREATENING, OR INTIMIDATING CONDUCT; OR (3) USE ANY MEANS WHATSOEVER, ANY OF WHICH HAS THE INTENT OR EFFECT OF DENYING, ABRIDGING, INTERFERING WITH, OR UNREASONABLY BURDENING THE FUNDAMENTAL RIGHT TO VOTE.
>
> ANY MICHIGAN CITIZEN OR CITIZENS SHALL HAVE STANDING TO BRING AN ACTION FOR DECLARATORY, INJUNCTIVE, AND/OR MONETARY RELIEF TO ENFORCE THE RIGHTS CREATED BY THIS PART (A) OF SUBSECTION (4)(1) ON BEHALF OF THEMSELVES, THOSE ACTIONS SHALL BE BROUGHT IN THE CIRCUIT COURT FOR THE COUNTY IN WHICH A PLAINTIFF RESIDES. IF A PLAINTIFF PREVAILS IN WHOLE OR IN PART, THE COURT SHALL AWARD REASOANBLE ATTORNEYS' FEES, COSTS, AND DISBURSEMENTS.
>
> FOR PURPOSES OF THIS PART(A) OF SUBSECTION (4)(1), "PERSON" MEANS AN INDIVIDUAL, ASSOCIATION, CORPORATION, JOINT STOCK COMPANY, LABOR ORGANIZATION, LEGAL REPRESENTATIVE, MUTUAL COMPANY, PARTNERSHIP, UNINCORPORATED ORGANIZATION, THE STATE OR A POLITICAL SUBDIVISION OF THE STATE OR AN AGENCY OF THE STATE, OR ANY OTHER LEGAL ENTITY, AND INCLUDES AN AGENT OF A PERSON.[96]

The Petition abrogates Article 2, § 9, which reserves for the people of Michigan "the power to propose laws and to enact and reject laws" through the citizen-initiative petition process.[97] This is known as the "initiative" power.[98] Whereas the existing Constitution empowers the people to enact on their own any laws the state legislature may enact,[99] the Petition would restrict both the people, through initiative, and

[96] **Exhibit 1**, PTV's Petition at 1.
[97] Const 1963, Article 2, § 9.
[98] Const 1963, Article II, § 9.
[99] *See* Article 4, § 1.

the Legislature, through the regular lawmaking process, from "enact[ing]…any law… which has the intent or effect" of "interfering" with "the fundamental right to vote." This prohibition encompasses reasonable and otherwise constitutional restrictions and interferences. It would block all manner of legislation, from whatever source, previously understood to be perfectly constitutional, including laws regarding felon voting, registration, and polling hours of operation. It thereby places a one-way ratchet on election law, stripping away from both the people and Legislature powers they would otherwise maintain to regulate the voting process in several important respects.

The Petition itself effectively *concedes* that it abrogates Article 2, § 9 by admitting that it abrogates Article 4, § 1.[100] That concession is fatal because a proposal that abrogates Article 4, §1 *necessarily* also abrogates Article 2, §9. The two provisions reflect coextensive authorities to enact laws. Under the Constitution, "[t]he power of initiative extends only to laws which the legislature may enact under this constitution."[101] And this Court has recognized that the Legislature's legislative power and Michiganders' initiative power are just different sides of the same coin.[102] If the Petition abrogates the Legislature's power by removing from its plenary jurisdiction the power to regulate voting, it likewise abrogates the people's initiative power. Yet whereas the Petition republishes Article 4, § 1, as it is required to do, it fails to republish Article 2, § 9. The omission of the latter is "fatal."[103]

PTV's arguments that its Petition does not abrogate Art. 2, § 9 mischaracterize and distort DYV's arguments, its own record, constitutional text, and Supreme Court precedent. First, PTV implies that DYV contests that qualified electors in Michigan do in fact have a fundamental right to vote. Although the truth or falsity of this accusation is irrelevant to this case, nothing could be further from the truth. DYV, its

[100] **Exhibit 1**, PTV's Petition at 1.
[101] Const 1963, Article 2, § 9.
[102] *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 66; 340 NW2d 817 (1983) (citations, quotation marks, and footnotes omitted).
[103] *Protect Our Jobs*, 492 Mich at 791.

members, and its representatives all believe that qualified voters should—and do—have a fundamental right to vote.

DYV does, however, maintain that under current law both the people via initiative and the Legislature through enacted laws would maintain the authority to enact all manner of laws that affect the fundamental right to vote. Such laws would have to conform to federal law and the state's Constitution. Provided they do so, however, they could, for example, interfere with the fundamental right to vote. Indeed, groups like PTV routinely complain that constitutionally valid election integrity laws interfere with the right to vote. PTV's Petition would abrogate the people's authority to enact such laws, alongside its conceded abrogation of the Legislature's authority to do so.

In its complaint, PTV fails to even acknowledge that the initiative and legislative authorities are coextensive. Instead, it tells the Board that the powers are merely "related," because one is exercised by the people and the other by the Legislature.[104] But it is irrelevant which constitutional actor invokes which authority. The key point is that the authorities being invoked fully overlap, with no excess on either side.

Finally, PTV contends that DYV's argument would compel republishing Article 2, §9 along with every constitutional amendment.[105] But that is simply wrong. Not every constitutional amendment restricts legislative—and by extension, coextensive initiative—authority. Many constitutional amendments are *grants* of authority that could not possibly abrogate either Article 2, § 9 or Article 1, § 4.

Because PTV failed to republish Article 2, § 9 even though it abrogates that provision, the petition is not in the form prescribed by law. PTV is not entitled to mandamus relief for yet another independent reason.

[104] PTV's Complaint, ¶ 98.
[105] PTV's Complaint, ¶99.

4. By preventing this Court from making specific decisions regarding election or voting-rights litigation, PTV's Petition would abrogate this Court's exclusive rulemaking authority regarding practice and procedure under Article 6, § 5 of the Michigan Constitution.

Article 6, § 5 of the Michigan Constitution is entitled "Court rules; distinctions between law and equity; master in chancery." It states:

> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.
>
> The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

If the Petition is adopted, Article 2, § 4 (1)(a) will state that "[e]very Citizen of the United States who is an elector qualified to vote in Michigan shall have":

> THE FUNDAMENTAL RIGHT TO VOTE, INCLUDING BUT NOT LIMTIED TO the right, once registered, to vote a secret ballot in all elections. NO PERSON SHALL: (1) ENACT OR USE ANY LAW, RULE, REGULATION, QUALIFICATION, PREREQUISITE, STANDARD, PRACTICE, OR PROCEDURE; (2) ENGAGE IN ANY HARASSING, THREATENING, OR INTIMIDATING CONDUCT; OR (3) USE ANY MEANS WHATSOEVER, ANY OF WHICH HAS THE INTENT OR EFFECT OF DENYING, ABRIDGING, INTERFERING WITH, OR UNREASONABLY BURDENING THE FUNDAMENTAL RIGHT TO VOTE.
>
> ANY MICHIGAN CITIZEN OR CITIZENS SHALL HAVE STANDING TO BRING AN ACTION FOR DECLARATORY, INJUNCTIVE, AND/OR MONETARY RELIEF TO ENFORCE THE RIGHTS CREATED BY THIS PART (A) OF SUBSECTION (4)(1) ON BEHALF OF THEMSELVES, THOSE ACTIONS SHALL BE BROUGHT IN THE CIRCUIT COURT FOR THE COUNTY IN WHICH A PLAINTIFF RESIDES. IF A PLAINTIFF PREVAILS IN WHOLE OR IN PART, THE COURT SHALL AWARD REASONABLE ATTORNEYS' FEES, COSTS, AND DISBURSEMENTS.
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> FOR PURPOSES OF THIS PART(A) OF SUBSECTION (4)(1), "PERSON" MEANS AN INDIVIDUAL, ASSOCIATION, CORPORATION, JOINT STOCK COMPANY, LABOR ORGANIZATION, LEGAL REPRESENTATIVE, MUTUAL COMPANY, PARTNERSHIP, UNINCORPORATED ORGANIZATION, THE STATE OR A POLITICAL SUBDIVISION OF THE STATE OR AN AGENCY OF THE STATE, OR

ANY OTHER LEGAL ENTITY, AND INCLUDES AN AGENT OF A PERSON.[106]

The Petition abrogates Article 6, § 5 by "erod[ing]" this Court's "exclusive and total control" over practice and procedure.[107] The Petition, on its face, would foreclose reasonable practices and procedures that have "the intent or effect" of "interfering" with "the fundamental right to vote."[108] It further creates a cause of action to enforce the rights provided in the provision; designates who has standing in such a case; and establishes venue for such actions.[109]

Yet, absent the Petition, under Article 6, § 5, such matters of "[p]ractice and procedure" in Michigan's courts are "constitutionally confided to the Supreme Court,"[110] and this Courts' "exclusive province."[111] Indeed, it is axiomatic—and "beyond question"[112]—that this Court's constitutional authority to adopt rules of practice and procedure is "exclusive."[113] Further, it is indisputable that this Court derives its "exclusive" authority to control policy and procedure from Article 6, § 5.[114]

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[106] **Exhibit 1**, PTV's Petition at 1.
[107] *Protect Our Jobs*, 492 Mich at 791.
[108] **Exhibit 1**, PTV's Petition at 1.
[109] **Exhibit 1**, PTV's Petition at 1.
[110] *Assoc of Businesses Advocating Tariff Equity v Pub Serv Com'n*, 173 Mich App 647, 658-659; 434 NW2d 648 (1988).
[111] *Stenzel v Best Buy Co, Inc*, 320 Mich App 262; 906 NW2d 801 (2017) ("It is beyond rational argument that the question whether a pleading can be amended as a matter of course or right or whether a motion for leave to amend must be filed is indeed purely an issue of practice and procedure, falling within the exclusive province of our Supreme Court.").
[112] *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999) (citations omitted) ("It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court. Indeed, this Court's primacy in such matters is established in [Article 6, § 5 of] our 1963 Constitution.").
[113] *People v Comer*, 500 Mich 278, 299; 901 NW2d 553 (2017) ("But this Court is constitutionally vested with the exclusive authority to establish and modify rules of practice and procedure in this state."); *Staff v Johnson*, 242 Mich App 521, 531; 619 NW2d 57 (2000), citing Const. 1963, Article 6, § 5 ("The Supreme Court is given exclusive rulemaking authority in matters of practice and procedure."); *In re MCI Telecommunications Complaint (Worldcom Network Servs, Inc v Pub Serv Com'n)*, 255 Mich App 361, 365; 661 NW2d 611 (2004); *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999), citing *Perin v. Peuler (On Rehearing)*, 373 Mich. 531, 541, 130 NW2d 4 (1964) ("The function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court.").
[114] *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012) (recognizing "the Court's exclusive authority under Const. 1963, art. 6, § 5 to promulgate rules regarding the practice and procedure of the

PTV's assertion that the Legislature often enacts rules of procedure is irrelevant. Under Michigan law, Supreme Court rules of practice and procedure trump conflicting statutes that affect procedural matters, like venue.[115] This Court has recognized this reality in the election-law context.[116] And, in election-law matters, the Petition prevents this Court from making certain decisions when creating rules of practice and procedure related to election and voting rights litigation. For example, PTV's proposal creates a cause of action based on alleged violations of the fundamental right to vote. This Court might conclude that, like mandamus actions, it makes good sense to enact a rule requiring that lawsuits alleging such claims against a state-level entity—e.g., the Secretary of State, the Governor, the Legislature, a state agency, or any other state officer—be brought in the Court of Claims or the Court of Appeals. But PTV's proposal would prevent the promulgation of such a rule because it requires such suits to be filed "in the circuit court for the county in which a plaintiff resides."

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courts."); *People v Glass*, 464 Mich 266, 269; 627 NW2d 261 (2001) ("Pursuant to Const. 1963, art. 6, § 5, this Court has exclusive authority to determine the rules of practice and procedure."); *McDougall v Schanz*, 461 Mich 15, 18; 597 NW2d 148 (1999) (recognizing the Supreme Court's "exclusive authority under Const.1963, art. 6, § 5, to promulgate rules governing practice and procedure in Michigan courts."); *People v Davis*, 337 Mich App 67, 85; 972 NW2d 304 (2021) (citations omitted) ("Under Const. 1963, art. 6, § 5, and separation-of-powers principles, the Supreme Court has 'exclusive rule-making authority in matters of practice and procedure' concerning Michigan courts."); *People v Conat*, 238 Mich App 134, 162; 605 NW2d 49 (1999) ("Under Const. 1963, art. 6, § 5, the Supreme Court is given the exclusive rulemaking authority in matters of practice and procedure."); *Assoc of Businesses Advocating Tariff Equity v Pub Serv Com'n*, 173 Mich App 647, 658; 434 NW2d 648 (1988) ("[I]t is in Const. 1963, art. 6, §§ 5, 10 that the Supreme Court's exclusive power to prescribe practice and procedure in this Court is set forth.").

[115] *People v Parker*, 319 Mich App 664, 667; 903 NW2d 405 (2017) ("Under our Constitution, a court rule will trump a statute when the two irreconcilably conflict on a procedural matter."); *Staff v Johnson*, 242 Mich App 521, 530; 619 NW2d 57 (2000) ("When resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure."); see also *Hunt v Drielick*, 507 Mich 908; 956 NW2d 514, 520 n 6 (2021) (Viviano, J., dissenting) ("Our authority to promulgate court rules that trump statutes extends…to matters of practice and procedure.")

[116] *Cf. Schwarzberg v Board of State Canvassers*, 649 NW2d 73 (Mich July 3, 2002) (Table) (citing MCR 7.203(C)(5), MCR 3.305(A) ("Despite the language of MCL 168.552(12) [stating that such an action shall be filed in the Supreme Court], a mandamus action against the Board of State Canvassers is properly filed in the Court of Appeals or the circuit court.")); *Callahan v Board of State Canvassers*, 646 NW2d 470 (Mich June 20, 2002) (Table) (same).

And "by taking specific decisions" about matters of practice and procedure—even entirely constitutional and pragmatic decisions—"out of the [Court's] control," the Petition's proposed amendments interfere with the Supreme Court's exclusive constitutional rulemaking authority.[117] As this Court recognized in *Protect Our Jobs*, that means that the Petition abrogates the Supreme Court's exclusive rulemaking authority under Article 6, § 5 because "an amendment that contemplates anything less than complete control logically renders that [exclusive] power…inoperative."[118] And, since the Petition failed to identify or republish Article 6, § 5 among the provisions that the proposed amendments alter or abrogate, the Petition is invalid and republication was required.

For yet another reason, the Board did not have a clear legal duty to certify PTV's petition. Indeed, certifying PTV's petition would have been reversible legal error. PTV is not entitled to mandamus relief.

F. PTV's mandamus claims fails because the Board did not have a clear legal duty to certify PTV's petition. On the contrary, because the petition failed to republish constitutional amendments it would abrogate, the Board had a clear legal duty to *reject* the petition because its form was deficient.

"Mandamus is a discretionary writ and an extraordinary remedy."[119] PTV bears the burden of demonstrating entitlement to a writ of mandamus.[120] "The writ is one of grace" and "equitable principles" apply.[121] Mandamus is "not to be entertained lightly and may issue only under limited circumstances."[122] The purpose of mandamus is to enforce existing rights and not to adjudicate rights.[123] So "mandamus will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts, or where the legal

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[117] *Protect Our Jobs*, 492 Mich at 790-792.
[118] *Id.* at 790-791.
[119] *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 335 Mich App 384, 394; 966 NW2d 742 (2021)
[120] *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004) (observing that the party seeking mandamus "bears the burden of demonstrating entitlement")
[121] *Franchise Realty Interstate Corp v Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962).
[122] *Dettore v Brighton Twp*, 58 Mich App 652, 655 (1975).
[123] *Klatt v Marschner*, 212 Mich 590, 599; 180 NW 625 (1920) ("[M]andamus proceedings do not adjudicate rights, but are a mode of enforcing existing rights.")

result of the facts is subject of legal controversy. If the right is reasonably in serious doubt, from either cause mentioned, the discretionary power rests with the [public] officer to decide whether or not he will proceed to enforce it[.]"[124] Thus, mandamus "will issue only where the plaintiffs prove that they have a clear legal right to performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform the requested act."[125]

Mandamus is appropriately used to enforce the Board of State Canvassers' "observance" of the Michigan Election Law.[126] But a body like the Board can never have a clear legal duty to act contrary to the requirements of the Michigan Election Law.[127] Mandamus cannot be used to compel an action which is contrary to the requirements of the Michigan Election Code or the Michigan Constitution.

A party seeking mandamus must show four elements: "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy."[128]

1. There is no clear legal right to have the Board certify a petition that does not comply with the form requirements of the Michigan Election Law.

"A clear legal right is a right 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'"[129]

The Board has a duty to certify petitions that have sufficient signatures and comply with the form requirements set out by the Michigan Election Law. But, as noted above, PTV's petition does not comply

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[124] *Miller v City of Detroit*, 250 Mich 633, 636; 230 NW 936 (1930).
[125] *University Medical Affiliates, PC v Wayne County Executive*, 142 Mich App 135, 142 (1985).
[126] *Groesbeck v Board of State Canvassers*, 251 Mich 286, 290-291; 232 NW 387 (1930).
[127] *Industrial Bank of Wyandotte v Reichert*, 251 Mich 396, 401 (1930); *Childers v Kent County Clerk*, 140 Mich App 135 (1985).
[128] *Wilcoxon v City of Detroit Election Com'n*, 301 Mich App 619, 632-633; 838 NW2d 183 (2013) (citations omitted); *Deleeuw v State Bd of Canvassers*, 263 Mich App 496, 500; 693 NW2d 179 (2004).
[129] *Attorney General v Board of State Canvassers*, 318 Mich App 242, 249; 896 NW2d 485 (2016) (quotation marks and citation omitted).

with the form requirements imposed by MCL 168.482(2)-(3) because it failed to republish all of the constitutional provisions it would abrogate if adopted. So no one, including PTV, had a clear legal right to have the Board certify the petition.

2. The Bureau did not have a clear legal duty to certify a petition that fails to republish constitutional provisions that it would abrogate.

A clear legal duty exists when the defendant has a statutory obligation to perform a specific act.[130] Further, a "clear legal duty" exists where the relevant statutory language is "mandatory and nondiscretionary."[131] This Court has held that the "clear legal duty" element of an action for mandamus is "plainly met" where the Michigan Election Law requires that Defendants "shall" do something.[132] And the Supreme Court has recognized that the Board of State Canvassers has a duty to "observ[e]" the Michigan Election Law that "may be enforced by mandamus" because "[t]he provisions are all mandatory in the sense that the election officials are bound to obey them."[133]

PTV argues that the Board "has a clear legal duty to certify the petition" just because they submitted more than the minimum number of signatures.[134] But this ignores this Court's holding that, in addition to ensuring that a petition has enough signatures, the Board has a "duty with respect to petitions" to "determin[e] the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification."[135] And, under the plain language of MCL 168.482(2)-(3) and this Court's opinion in *Protect Our Job*, the alter-or-abrogate republication requirement is a matter of form.[136] And, because of

[130] *Barrow v City of Detroit Election Com'n*, 301 Mich App 404, 412; 836 NW2d 498 (2013).
[131] *Wayne County v State Treasurer*, 105 Mich App 249, 256; 306 NW2d 468 (1981).
[132] *Berry v Garrett*, 316 Mich App 37, 44; 890 NW2d 882 (2016).
[133] *Groesbeck v Board of State Canvassers*, 251 Mich 286, 290-291; 232 NW 387 (1930).
[134] PTV's Complaint, ¶144-146.
[135] *Unlock Michigan v Board of State* Canvassers, 507 Mich 1015; 961 NW2d 211 (2021), quoting *Stand Up for Democracy v. Secretary of State*, 492 Mich. 588, 618, 822 N.W.2d 159 (2012)
[136] See *Protect Our Jobs v Bd. of State Canvassers*, 492 Mich 763, 778; 822 NW2d 534 (2012).

MCL 168.482(3)'s statement that the altered or abrogated provision "shall" be published, the republication requirement is mandatory.

It follows then, that the Board cannot have a clear legal duty to certify the petition without determining whether the petition complies with the form requirements of the Michigan Election Law. And, despite PTV's emphatic assertions to the contrary, the form requirements include the alter-or-abrogate republication requirement. Thus, the Board has a clear legal duty to perform its statutory duties, and the fact that PTV's petition was deficient because it failed to republish constitutional provisions that it would abrogate means that the Board had a clear legal duty to reject PTV's petition, not the other way around.

PTV tries to sidestep the deficient form of its petition by arguing that the Board had a clear legal duty to certify based on the Board's "preliminary" approval of the form of its petition at a February 2022 meeting where no one raised an alter-or-abrogate challenge.[137] This is nothing but a distraction for several reasons.

First, PTV's reliance on the Board's February 2022 pre-circulation, preliminary approval as to form ignores—and conflicts with—the guidance from the Secretary of State regarding the preliminary approval process. In guidance titled "*Sponsoring a Statewide Initiative, Referendum Or Constitutional Amendment Petition*," Secretary Benson describes an "Optional Pre-Circulation 'Approval as To Form' Process" by which petition sponsors can "to submit a proof copy of the petition to the Board of State Canvassers for approval as to form prior to the circulation of the petition."[138] But Secretary Benson makes clear that this pre-circulation approval process "does *not* include…consideration of whether the petition properly identifies provisions of the existing Constitution which may be altered or abrogated by a proposed constitutional amendment."[139] Accordingly, even if DYV had raised the alter-or-abrogate issue in advance

[137] PTV's Complaint, ¶163-164.
[138] **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 9.
[139] **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 9 (emphasis in original).

of the February 2022 meeting, it would not have mattered because the Board could not, and would not, have considered it. So the fact that PTV obtained preliminary approval of the form absolutely does not preclude the Board or this Court considering the alter-or-abrogate issue.

This is especially true because, unlike other pre-circulation processes that can preempt a subsequent challenge,[140] Secretary Benson provides no indication that a preliminary form approval precludes future challenges. Indeed, by claiming that preliminary approval "greatly reduces the risk that signatures collected on the form will be ruled invalid due to formatting defects," Secretary Benson implicitly recognizes that it does not eliminate that risk. So, bottom line, the February 2022 preliminary approval is simply irrelevant and has no bearing on the Board's or this Court's decision.

Second, even if the Board could have considered the alter-or-abrogate issue at the February 2022 meeting, PTV provides no authority whatsoever for the proposition that the Board's grant of "preliminary" approval to the form of its petition permanently insulates it from form-based challenges. Indeed, a "preliminary" approval is necessarily non-final. PTV also fails to provide any authority that, after giving preliminary approval to a petition form, the Board is required to stick its head in the sand and ignore any problems with the petition form that subsequently come to light. So, put simply, the preliminary approval is immaterial.

Third, PTV fails to establish that waiver is a relevant concept. The only duty to ensure compliance with the alter-or-abrogate requirement lies with the petition sponsor (here, PTV).[141] There is simply no basis for PTV's assertion that a challenger must raise a challenge to the petition's form at the pre-approval stage or forever waive the ability to bring that challenge. Despite his assertions to the contrary, PTV's counsel

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[140] **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 8 ("If the Board of State Canvassers approves the summary as prepared by the Director of Elections…the Board will be barred from considering a subsequent challenge alleging that the summary is misleading or deceptive.")

[141] *Stand Up for Democracy v State*, 492 Mich 588, 619; 822 NW2d 159 (2012)

understands this. During a Board of Canvassers meeting regarding the pre-approval of the form of the Secure MI Vote petition (which directly competes with PTV), PTV's counsel (on behalf of a different ballot question committee) appeared for the purpose of challenging Secure MI Vote and argued that the pre-approval process is not "the real deadline" for challenging a petition, and that, while it was his position that "there are still errors in the form of [Secure MI Vote]," he was "not going to detail all of them" but would instead preserve challenges to those errors for another day.[142] It makes no sense that a body like the Board that has a duty to ensure that petitions comply with Michigan Law can be precluded from fulfilling its duties just because it previously decided to give preliminary approval that turned out to be incorrect. And even if waiver is theoretically relevant to these proceedings (it is not), it does not apply here. "[W]aiver is the intentional relinquishment of a known right."[143] There is no evidence or allegation that the Board, the Secretary of State, or DYV ever intentionally relinquished the right to consider or challenge whether PTV's petition complied with the alter-or-abrogate requirement. This is especially true because, at the Board's February meeting "No one challenged the form of PTV22's petition at that time on the basis that it failed to list all constitutional provisions that a third-party believed were altered-or-abrogated."[144] Further, as noted above, even if someone had raised an alter-or-abrogate challenge in advance of the February 2022 meeting, the Board could not have considered it.[145] So waiver simply does not apply here.

Fourth, it would be unjust to bar the Board from considering DYV's alter-or-abrogate challenge based on its February 2022 preliminary approval because, even if alter-or-abrogate challenges could have

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[142] **Exhibit 7**, Transcript of September 27, 2022 Board of Canvassers Hearing at 6-7, 10.
[143] *Progress Michigan v Attorney General*, 506 Mich 74, 93; 954 NW2d 475 (2020) (citations omitted); *Bailey v Jones*, 243 Mich 159, 162; 219 NW2 629 (1928) ("Waiver is the intentional relinquishment of a known right.")
[144] PTV's Complaint, ¶159.
[145] **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 9 (Stating that the Board's "Optional Pre-Circulation 'Approval as to Form' Process" "does not include…consideration of whether the petition properly identifies provisions of the existing Constitution which may be altered or abrogated by a proposed constitutional amendment.").

been properly considered at that time, DYV did not exist when that occurred. DYV was not formed until July 2022. It would be deeply unfair to void its challenge because of events that occurred before DYV came into existence. This is especially true because there is no statutory requirement that a challenger to a petition to amend the constitution assert its challenge before a certain time.[146]

At the end of the day, the Board did not have a clear legal duty to certify PTV's petition because it failed to republish constitutional provisions that it would abrogate and, thus, failed to comply with the form requirements contained in MCL 168.482(2)-(3) and Const. 1963, Article 12, §2. Indeed, the exact opposite is true—the Board had a clear legal duty to reject PTV's petition. Regardless, because the Board did not have a clear legal duty to certify PTV's petition, PTV's mandamus claim fails as a matter of law and must be dismissed.

3. Mandamus is not warranted because PTV has other adequate (but legally meritless) remedies available.

A plaintiff is only entitled to mandamus if it "has no other adequate legal or equitable remedy."[147]

Here, PTV has other legal remedies available. In fact, it pursued them—in addition to its mandamus claim, PTV asserted claims alleging due process violations, equitable estoppel, and declaratory relief. PTV also could have asserted a claim for injunctive relief. Accordingly, as PTV's complaint demonstrates, PTV has other adequate legal or equitable claims available besides mandamus, even if those claims are similarly meritless. PTV's mandamus claim, therefore, fails for yet another reason.

G. PTV's due process claim is meritless for several reasons.

PTV asserts a claim labeled "violation of due process."[148] PTV believes that the Board "violated PTV22's due process rights" by "refusing to certify the Proposal despite the Board approving the Proposal's

[146] See MCL 168.476 (referencing a challenge to an initiative petition, but not providing any deadline for filing).
[147] *Wilcoxon v City of Detroit Election Com'n*, 301 Mich App 619, 632-633; 838 NW2d 183 (2013) (citations omitted); *Deleeuw v State Bd of Canvassers*, 263 Mich App 496, 500; 693 NW2d 179 (2004).
[148] PTV's Complaint, ¶149-163.

petition as to form and Bureau of Elections Staff determining the Proposal had adequate signatures."[149] Although it is not entirely clear, PTV appears to believe that once the Board gave preliminary approval to its petition form, the Board could not consider any form-based arguments such as alter-and-abrogate without violating PTV's due process rights. There are several reasons why PTV's due-process arguments fail.

First, PTV fails to establish that it had a due process right to be free from form-based challenges simply because the Board preliminarily approved the form of its petition. The biggest flaw with PTV's argument is that the preliminary approval process does not encompass consideration of the alter-and-abrogate requirement.[150] Even if that weren't true, as noted above, PTV provides no authority whatsoever for the proposition that the Board's "preliminary" approval of the form of its petition permanently insulates it from form-based challenges. Nor does the Board provide any authority for the proposition that the Board can never revisit the form of a petition after having granted preliminary approval. That makes sense—by definition, "preliminary" approval is necessarily not *final* approval and, thus, not binding on the Board.

Second, it appears that PTV misunderstands the nature of due process under Michigan law. In civil matters like the proceedings before the Board of Canvassers, "due process requires notice and an opportunity to be heard in a meaningful time and manner."[151] A party has a meaningful opportunity to be heard if they have "the chance to know and respond to the evidence."[152] Applying those principles to this situation, due process required that before the petition was declared insufficient for failing to comply with

[149] PTV's Complaint, ¶158.
[150] **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 9 (Stating that the Board's "Optional Pre-Circulation 'Approval as to Form' Process" "does not include…consideration of whether the petition properly identifies provisions of the existing Constitution which may be altered or abrogated by a proposed constitutional amendment.").
[151] *Spranger v City of Warren*, 308 Mich App 477, 483; 865 NW2d 52 (2014); *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (citation omitted).
[152] *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

the form requirements of MCL 168.482(3), PTV was entitled to notice and "a hearing to allow a party the chance to know and respond to the evidence."[153] And That is exactly what PTV received.

PTV was notified of DYV's alter-and-abrogate challenge to the form of its petition and PTV filed a lengthy response.[154] PTV was also notified that its petition would be considered at the August 31, 2022 Board meeting.[155] And, when Director Brater stated that the meeting had been adequately noticed under the Open Meetings Act, counsel for PTV did not object. So the notice prong of the due-process analysis is satisfied.

PTV also had a meaningful opportunity to be heard. As noted above, after DYV filed its alter-and-abrogate challenge, PTV filed a written response containing its arguments in opposition to the challenge.[156] PTV was given the opportunity to have its attorneys appear at the August 31, 2022 meeting and present oral argument, and they did so for more than half an hour.[157] In other words, PTV received, and took advantage of, multiple opportunities to meaningfully respond to DYV's challenge and the concerns posed by members of the Board. PTV therefore had a meaningful opportunity to be heard that satisfies the second due-process prong.

Because PTV received notice of and a meaningful opportunity to be heard regarding DYV's form challenge based on the alter-and-abrogate requirement, the Board's consideration of DYV's challenge did not violate PTV's due process rights in the slightest. PTV's due-process claim therefore fails and must be dismissed.

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[153] *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).
[154] **Exhibit 3**, PTV's Response to DYV's Challenge.
[155] **Exhibit 5**, PTV 2022 Staff Report at 6 ("This staff report is being published on August 25, 2022, at least two business days prior to the August 31, 2022 meeting at which the Board of State Canvassers will consider the sufficiency of the Promote the Vote petition in accordance with MCL 168.476(3).")
[156] **Exhibit 3**, PTV's Response to DYV's Challenge.
[157] See **Exhibit 6**, Transcript of August 31, 2022 Board of State Canvassers Meeting at 153-176, 177-179.

H. PTV's "equitable estoppel" claim fails for many reasons and must be dismissed.

PTV asserts a cause of action for "equitable estoppel" claiming that the Board should "be equitably estopped from considering a challenge to the petition from of the Proposal" after giving "preliminary approval as to form."[158] But PTV's equitable-estoppel claim fails for many reasons and must be dismissed.

First, it is well-established that equitable estoppel is not an independent cause of action.[159] Rather, "it is available only as a defense."[160] Thus, a plaintiff like PTV who "attempts to assert equitable estoppel as a cause of action *misuses the doctrine*."[161] For that reason alone, this Court should dismiss PTV's equitable estoppel claim.

Regardless, equitable estoppel does not function the way PTV claims. "Equitable estoppel…may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact."[162] PTV claims that the Board should "be equitably estopped from considering [DYV's] challenge to the petition form of the Proposal" because PTV "received preliminary approval as to form…before it sought

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[158] PTV's Complaint, ¶163-171.

[159] *Hoye v Westfield Ins Co*, 194 Mich App 696; 487 NW2d 838 (1992) ("[T]he general rule is that equitable estoppel is a doctrine, not a cause of action."); *Van v Zahorik*, 227 Mich App 90, 102; 575 NW2d 566 (1997) ("Equitable estoppel is not a cause of action and therefore provides no remedy."); *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994) ("The doctrine of equitable estoppel is not available to a plaintiff as a cause of action.").

[160] *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006) ("It is well established under Michigan law that equitable estoppel is not a cause of action unto itself; it is available only as a defense."); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 443-444; 505 NW2d 275 (1993) ("Equitable estoppel is usually invoked as a defense; it is not a cause of action in itself and provides no remedy such as damages.").

[161] *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006).

[162] *New Prods Corp v Harbor Shores BHBT Land Dev, LLC*, 331 Mich App 614, 627-628; 953 NW2d 476 (2019), quoting *Conagra, Inc. v. Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999); *West American Ins Co v Meridian Mutual Ins Co*, 20 Mich App 305, 309-310; 583 NW2d 548 (1998) ("Equitable estoppel is not an independent cause of action, but rather a doctrine that may assist a party by preventing the opposing party from asserting or denying the existence of a particular fact."); *Frederick v Federal-Mogul Corp*, 273 Mich App 334, 341 n 7; 733 NW2d 57 (2006) ("[E]quitable estoppel can only preclude an opposing party from asserting or denying the existence of a particular fact; it cannot form the basis of an independent cause of action.").

certification."[163] Leaving aside that "preliminary" approval is, again, by definition not final approval—and, thus, not binding—whether the form of PTV's petition complies with the form requirements of MCL 168.482(3) is not a "particular fact."[164] And the Board's decision to consider DYV's alter-and-abrogate challenge is not "asserting or denying the existence of a particular fact."[165] As such, the equitable-estoppel doctrine does not apply here as a matter of law.

Even if equitable estoppel operates as PTV claims, it still would not apply here because PTV fails to allege or establish the factual requirements for applying the doctrine. This Court has held that "[e]quitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts."[166] However, "[t]his Court has been reluctant to recognize an estoppel absent intentional *or negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action."[167] As a result, "[c]ourts are to apply equitable estoppel sparingly and only in the most extreme cases, for example, when a defendant intentionally or negligently deceives a plaintiff."[168] As demonstrated by the allegations in its complaint, PTV is aware that estoppel only applies when a governmental entity "intentionally or negligently…induces another party to believe facts."[169] But PTV fails to allege—and provides no evidence—that the Board intentionally or negligently induced it to believe that its petition satisfied the alter-and-abrogate form

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[163] PTV's Complaint, ¶163-164.
[164] *New Prods Corp*, 331 Mich App at 627-628.
[165] *Id.*
[166] *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999), quoting *Soltis v. First of America Bank—Muskegon*, 203 Mich.App. 435, 444, 513 N.W.2d 148 (1994); *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997) ("One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party.").
[167] *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997).
[168] *Fuller v GEICO Indemnity Co*, 309 Mich App 495; 872 NW2d 504 (2015).
[169] PTV's Complaint, ¶166.

requirement.[170] Nor could it ever do so. As noted above, Secretary Benson's guidance regarding the process for preliminary approval of a petition's form expressly states that preliminary approval does not extend to the alter-or-abrogate republication requirement.[171] Given Secretary Benson's guidance, it is impossible that PTV could have been induced to believe that the petition satisfied the alter-and-abrogate requirement.

PTV may try to sidestep both Secretary Benson's guidance and its failure to specifically allege that the Board intentionally or negligently deceived it by pointing to paragraph 167 of its complaint, which states that "PTV22 satisfies all of these factors."[172] Regardless, "conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action."[173]

For multiple reasons, therefore, PTV's equitable-estoppel claims is meritless and must be dismissed.

I. PTV's claim for declaratory relief fails.

Based on the two paragraphs that make up PTV's claim for declaratory relief (and its Request for Relief), it is not clear what declaration PTV is asking this Court to make. But it appears that PTV is asking this Court to issue a declaratory judgement stating that "the Board is not permitted to consider an alter-or-abrogate challenge" and that the Board's consideration of DYV's alter-or-abrogate challenge was an *ultra vires* act.[174]

As shown above, PTV is wrong. As this Court ruled in *Protect Our Jobs*, the republication of the provisions that a proposal would alter or abrogate is one of the mandatory form requirements established

[170] See PTV's Complaint, ¶166-171.
[171] **Exhibit 5**, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* at 9 (Stating that the Board's "Optional Pre-Circulation 'Approval as to Form' Process" "does not include…consideration of whether the petition properly identifies provisions of the existing Constitution which may be altered or abrogated by a proposed constitutional amendment.").
[172] See PTV's Complaint, ¶167.
[173] *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45; 852 NW2d 103 (2014); see also *Quinto v Cross and Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996) (holding that "mere conclusory allegations" that are "devoid of detail" are insufficient to avoid dismissal).
[174] See PTV's Complaint, ¶173-174.

by MCL 168.482(2)-(3).[175] The Board's consideration of DYV's alter-or-abrogate challenge is not *ultra vires*—i.e., an "activity that the governmental agency lacks legal authority to perform in any manner."[176] Instead, the Board was required to consider DYV's alter-or-abrogate challenge as part of fulfilling its duty to ensure that PTV's petition was in the form prescribed by law. For that reasons, and for all of the reasons stated above, PTV's declaratory claim fails as a matter of law.

Conclusion & Relief Requested

PTV's petition failed to republish provisions of the constitution that would be abrogated if the proposal is adopted. For the reasons stated above, PTV is not entitled to have its petition certified for the November Ballot, and its claims all fail as a matter of law. This Court should dismiss PTV's complaint with prejudice.

[175] *Protect Our Jobs*, 492 Mich at 778.
[176] *Petipren v Jaskowski*, 494 Mich 190, 222; 833 NW2d 247 (2013), quoting *Richardson v Jackson Co.*, 432 Mich 377, 387; 443 NW2d 105 (1989).

Respectfully submitted,

Date: September 6, 2022

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Certificate of Compliance

I certify that this Brief complies with the type-volume limitations set forth in MCR 7.305(A)(1) and MCR 7.212(b), relying on the word count of the word-processing system used to produce this brief (Microsoft Word). This brief uses a 12-point proportional font (Times New Roman) and the word count is 15,696.

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