STATE OF MICHIGAN
IN THE COURT OF APPEALS

HORACE SHEFFIELD III and RODRICK HARBIN, Individuals,

and

ALLEN A. LEWIS and INGRID D. WHITE, Individuals,

Plaintiffs/Appellees,

v.

JANICE WINFREY, in her official capacity as Clerk for the City of Detroit, and CITY OF DETROIT ELECTION COMMISSION,

Defendants,

DETROIT CHARTER REVISION COMMISSION,

Intervening-Defendant/Appellant.

Court of Appeals Nos. 357298, 357299

Wayne Co. Circuit Court
Case No. 21-006043-AW
Case No. 21-006040-AW

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REPLY BRIEF IN SUPPORT OF INTERVENOR DETROIT CHARTER REVISION COMMISSION'S EMERGENCY CLAIM OF APPEAL AS OF RIGHT[1]

[1] Appellant submits this reply in response to the briefs filed by both the *Sheffield* Plaintiffs/Appellees (the *Sheffield* Appellees) and the *Lewis* Plaintiffs/Appellees (the *Lewis* Appellees). The term "Appellees" refers collectively to both sets of appellees.

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I. INTRODUCTION

Appellees' arguments suffer from three major flaws. First, they principally rely on the history, text, and case law surrounding the wrong Constitution. The current 1963 (not 1908) Constitution controls and, as the Michigan Supreme Court recently held, it significantly expanded the power of municipalities. There is simply no way to square the express text of Article VII, Section 22, which vests the right to adopt charters with the electors, with Appellees' demand that the Governor have the decisive vote (a position not even taken by the Governor herself).

Second, even ignoring the 1963 Constitution, Appellees' statutory interpretation ignores the plain text of the relevant statute, which clearly states that a charter revision is not required to be transmitted to the Governor *before* the charter revision is submitted to the electors. See MCL 117.22 (requiring transmission prior to the commission's expiration). If the charter is not even required to be submitted to the Governor for approval before the vote, then her approval could not possibly be a prerequisite to the vote. Relatedly, Appellees' entire premise—that the Governor serves as an important "check" on the charter process—is belied by the statute they rely on, which expressly allows amendments to proceed to election over her objections (i.e., the Governor is never a decisive "check" on the rights of electors).

Finally, the *Lewis* (not *Sheffield*) Appellees continue to peddle confusion over "ballot wording" versus "charter revisions." Section 23 of the Home Rule Cities Act ("HRCA") is unequivocal: a proposed charter revision "before submission to the electors shall be published as the charter commission . . . may prescribe." MCL 117.23(1). All agree that June 19th is the first day when any elector could possibly vote (by absentee), so that is the earliest date by which the final charter revisions must be published. The publication of the final charter has nothing, statutorily or practically, to do with the perfunctory process of printing the actual paper ballot with

the statutorily prescribed ballot proposal language. And all parties agree that the deadlines surrounding submission of the "ballot wording" have been met.

II. ARGUMENT

A. APPELLEES IGNORE THE IMPLICATIONS OF THE 1963 CONSTITUTION.

The *Sheffield* Appellees spend a significant portion of their brief tracing the history and case law of the HRCA as interpreted under the *1908 Constitution*, while failing to address the seismic shift that took place with the advent of the 1963 Constitution. See Sheff Br at 13-15, 20-22. The 1963 Constitution notably added Section 34, which states that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." 1963 Const, Art VII, § 34.[2] Both briefs similarly brush aside the requirements of Article VII, Section 22, which states that it is "the electors or each city and village [that] shall have the power and authority to frame, adopt, and amend [their] charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village." *Id.* § 22.

As the Michigan Supreme Court held in *Associated Builders & Contractors v City of Lansing* (a case which garnered only a passing mention in Appellees' briefs), the 1963 Constitution "expresse[d] the people's will to give municipalities even greater latitude to conduct their business," and "there is simply no room for doubt about the expanded scope of authority of Michigan's cities [under the 1963 Constitution]." 499 Mich 177, 186-87; 880 NW2d 765 (2016). In that case, Court held that under the "plain language of the 1963 Constitution," cities have "broad powers over 'municipal concerns, property and government' *whether those powers are enumerated*

[2] Tellingly, the *Lewis* Appellees do not even *mention* Section 34 in their entire brief, despite Section 34 being the most relevant and authoritative canon of interpretation concerning the powers of local governments.

or not." *Id.* at 188 (emphasis added). Appellees ask this court to ignore this precedent and instead grant the Governor unchecked power to overrule the will of home rule cities and voters, even though it is undisputed that MCL 117.22 does not "expressly deny" this power. See *In re Piland*, ___Mich App___; ___NW2d___; 2021 WL 1431623, at *3 (Apr 15, 2021) (a court must choose an interpretation of statute "that renders the statute constitutional").

Appellees' reliance on *Northrup* is similarly misplaced. See, e.g., *Lewis* Br at 16 (citing *Northrup v City of Jackson*, 273 Mich 20; 262 NW 641 (1935)). As outlined in Appellant's brief, Appellees have locked onto a single phrase in a case unrelated to MCL 117.22 that was decided *28 years before* the adoption of the 1963 Constitution, which the Michigan Supreme Court has already held altered the legal landscape and increased the deference afforded to home rule cities' powers. See *Associated Builders*, 499 Mich at 185-88; see also Appellant's Br at 14.

B. THE PLAIN LANGUAGE OF MCL 117.22 DOES NOT REQUIRE TRANSMITTING THE CHARTER TO THE GOVERNOR BEFORE SUBMISSION TO THE ELECTORS.

For all the space in Appellees' briefs allocated to the implications of the language that *does not* appear in MCL 117.22, they dismiss out of hand what *does* appear: the Charter Revision Commission is not required to submit the revised Charter to the Governor prior to submission to the electors. Section 22 clearly states:

> Every ***amendment*** to a city charter whether passed pursuant to the provisions of this act or heretofore granted or passed by the state legislature for the government of such city, before its submission to the electors, and every ***charter*** before the final adjournment of the commission, shall be transmitted to the governor of the state.

MCL 117.22 (emphasis added). The language of the statute is unambiguous: an amendment to a charter must be transmitted to the governor "before its submission to the electors," while every charter must be transmitted "before the final adjournment of the Commission." See *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007) ("If the meaning of a statute is

clear and unambiguous, then judicial construction to vary the statute's plain meaning is not permitted"); *Watson v Mich Bureau of State Lottery*, 224 Mich App 639, 645; 569 NW2d 878 (1997) ("The Legislature is presumed to have intended the meaning it plainly expressed"). In this case, "before the final adjournment of the Commission" means before August 6, 2021, when the Charter Revision Commission adjourns.

Appellees dismiss the importance this inconvenient language out of hand, arguing that "***when*** the Charter Commission was required to transmit the Proposed Charter to the Governor is not at issue in this case" because it "***did*** transmit the Proposed Charter to the Governor." Sheff Br at 23 (emphasis in original). Appellees appear to be confusing statutory interpretation with estoppel: they argue that because the Governor received the revisions prior to the ballot certification deadline, the Charter Revision Commission cannot now assert that it was not required to transmit the revised Charter to her prior to the ballot proposal deadline. Estoppel plays no role here; according to the plain language of the statute, the Charter Revision Commission could have simply waited until *after* the ballot wording certification deadline to submit the revised Charter to the Governor, *without running afoul of the statute*. See *Warren City Council v Buffa*, No 354663, 2020 WL 5246664 at *3 (Mich Ct App Sept 2, 2020) (holding that the governor's approval does not stand as a prerequisite to for the city clerk to certify the election to the county clerk).

The fact that the legislature decided that only **amendments** must be transmitted to the Governor prior to submission to the electors is even more telling: if the legislature had intended that revisions be transmitted the governor prior to being submitted to the electors, *it would have said so*. See *City of Detroit v Redford Township*, 253 Mich 453, 456 (1931) ("Express mention in a statute of one thing implies the exclusion of other similar things").

C. THE CONSTITUTION AND OTHER LAWS FURTHER DEMONSTRATE THAT THE GOVERNOR *NEVER* HAS UNILATERAL AND UNFETTERED VETO POWER.

The *Sheffield* Appellees rely upon the Governor's general veto power over legislation and on the specific charter-approval provisions of the Home Rule Villages Act ("HRVA") and the Michigan Charter Counties Act ("MCCA"). The *Sheffield* Appellees misstate the law and then argue that those statutes say something the don't.

The first important distinction is timing. Unlike MCL 117.22's requirements for charter revisions, which, as outlined above, must only be transmitted to the Governor prior to the final adjournment of the Commission, the HRVA and MCCA both require that charters be submitted to the governor *prior to their submission to the electors.* See MCL 78.18 ("Every charter framed or revised by a charter commission, and every amendment to a village charter . . . ***shall, before its submission to a vote of the electors be presented to the governor of the state***.") (emphasis added); MCL 45.516 ("Upon approval of the charter by the governor or upon a final favorable judicial interpretation [regarding the proposed charter's conformity to Michigan Constitution and statutes], ***the commission, within 10 days, shall fix the date, by resolution, for the submission of the proposed charter to the electorate for its adoption***") (emphasis added). It makes sense that the Governor can only have veto power (subject to an override procedure) if the Governor will necessarily see the charter before it is submitted to electors, but that's not the case with city charter revisions.

The HRVA and MCCA have another key aspect that again shows why the Governor has no unilateral veto in this case; the people (in the Constitution) and the legislature have **never** given the Governor unilateral veto power with no override. Contrary to Plaintiffs' misstatement that the Governor's approval is necessary in other aspects of the law, the HRVA and MCCA both provide villages and counties with options to send a proposed charter to the voters *over the objection of*

the Governor. See MCL 78.18 (allowing villages to submit proposed charters to voters over the governor's objection if two thirds of the charter commission vote in favor); MCL 45.516 (allowing counties to submit proposed charter to voters over governor's objections following a second submission to the governor and a favorable judicial interpretation). The Constitution also has a similar override for the Governor's legislative veto. 1963 Const, Art IV, § 33 (providing method for the legislature to override governor's veto of legislation). And Section 22 of the HRCA provides for a similar "override" for amendments to charters. See MCL 117.22.

Under Appellees' interpretation in this case, however, the Governor's veto for city charters is a hard stop; she would have an unprecedented veto power unlike anything else in Michigan law. It would also mean that villages and counties are granted powers beyond those of home rule cities. Whereas villages and counties may submit proposed charters to the voters provided that certain prerequisites are met, Home Rule Cities such as Detroit are hamstrung by the whims of a single executive, regardless of the merit of the Governor's objections. This is an absurd and unprecedented result for which Appellees provide no support in the law. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998) ("[S]tatutes should be construed to prevent absurd results, injustice, or prejudice to the public interest."). The Governor's veto in this case is not a hard stop, just like in all other facets of Michigan law.

Appellees claim that such provisions are necessary to "serve as a check on irresponsible, unlawful decision-making" by local authorities, Sheff Br at 2, but the only unchecked power that exists under Appellees' interpretation belongs *to the Governor*, whose objections to a city's revised charter overrides any authority of local governments and the voters.

D. THE GOVERNOR'S ROLE IN THE CHARTER REVISION PROCESS IS ADVISORY, NOT JUDICIAL.

While Appellees claim that they "take no position" with regard to the scope of the Governor's power under the HRCA, see Sheff Br at 21, n9, they are ultimately seeking for her to assume a judicial rule, in which she is the ultimate arbiter of the legality of charter revisions for home rule cities. Such a statutory scheme flies in the face of the 1963 Constitution. See Art VI, § 1 (vesting exclusive judicial power in the courts). The Governor, with or without the assistance of the attorney general, cannot unilaterally decide if proposed charter provisions violate the law and refuse to allow them on the ballot. The role of evaluating the legality of a charter belongs to the courts, who have long held that proper time to make that decision is *after* the law is enacted. See *Coal for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 371-72; 820 NW2d 208 (2012) ("A preelection [sic] determination of the validity of a ballot initiative substantially interferes with the legislative function, and our courts have repeatedly held that a substantive challenge to a proposed initiative is improper until *after* the law is enacted.") (emphasis in original); see also *Hamilton v Sec'y of State*, 212 Mich 31, 34; 179 NW 553 (1920) ("If the Proposed amendment should receive a majority of legal votes cast, there will be time enough to inquire any provision of the federal constitution has been violated. Until that time comes we must decline to express any opinion as to the constitutionality of the proposed amendment").

Appellees echo the circuit court and argue that to deny the Governor absolute power of charter revisions makes "the submission of the draft to the governor an empty and useless gesture if the failure to gain approval is of no consequence." Sheff Br at 17 (quoting Order at 8-9). But, as outlined above, other statutory provisions allow for an override of the Governor's objections. See MCL 117.22 (procedures for amendments); MCL 78.18; MCL 45.516; see also 1963 Const, Art V, § 33. Moreover, amendments by initiatory petitions may go to the electors *regardless of*

the governor's objections. See MCL 117.22 ("If it be an amendment proposed by initiatory petition, ***it shall be submitted to the electors notwithstanding such objections***") (emphasis added). Appellees do not argue that any of these limitations on the Governor's power make transmittal to her "an empty and useless gesture"; they recognize the Governor's opinion on these matters is valuable, but her authority is not absolute.

As outlined in the submitted *amicus* brief in this matter, the Governor's approval or objection to proposed charter revisions has value in furthering the public debate over the proposed revisions. See Amicus Br at 6-8. During the public debate over the proposed revisions, opponents can cite the governor's disapproval as justification for the public to reject the revised Charter. In short, her objections serve as cautionary advice to the public regarding the future of the proposed revisions, while granting authority over the decision to enact the revised Charter where it belongs: with the voters of Detroit. This interpretation has the decisive advantage of being entirely consistent with the 1963 Constitution. See 1963 Const, Art VII, §22 (granting "the power and authority to frame, adopt, and amend" a city charter solely to the electors of the city"). In the event that the voters decide to enact the revised Charter, and questions of constitutionality or legality of specific provisions will be decided by the courts. See *Coal for a Safer Detroit* 295 Mich App at 371-372.

E. THE *LEWIS* APPELLEES IGNORE THE PLAIN LANGUAGE OF THE RELEVANT STATUTES IN FAVOR OF LEGAL RED HERRINGS

The *Lewis* Appellees spend a significant portion of their brief conflating the deadline requirements outlined in MCL 168.646a (requiring that the wording of the *ballot question* be certified to the clerk on the 12th Tuesday prior to the election), MCL 117.22 (requiring that the proposed charter be transmitted to the governor prior to the final adjournment of the commission), and MCL 117.23 (requiring that a proposed charter be published as the charter commission may

prescribe "before submission to the electors"). Lewis Br at 25-28. Despite these deadlines being clearly outlined the plain language in each statute, the *Lewis* Appellees assert that MCL 168.646a provides the "final definitive deadline" for ballot questions and "supersedes" any conflicting deadlines related to charter revision. Lewis Br at 23.[3] The *Lewis* Appellees cite no legal authority for this bizarre assertion beyond the enacting section for Section 646a, that states: "It is the intent of the legislature that . . . MCL 168.646a . . . ***supersedes any and all conflicting provisions of law or charter prescribing the filing deadlines for . . . all ballot questions.***" MCL 168.646a (emphasis added). It is not clear why the *Lewis* Appellees believe this enacting section provides support for their claim that deadlines for charter revisions to be submitted to the electorate are superseded by Section 646a; as in the statute itself, the legislature made it clear that it applied only to the deadline for *ballot questions*, not charters. See also Appellant's Br at 19-20.

The *Lewis* Appellees further claim, without authority, that the approval of the language of the *ballot question* is invalid if the proposed charter is not finalized at the time of the certification under MCL 168.646a, because the "ballot question" is a "stand-in" for the charter. Lewis Br at 34. There is nothing in any of the relevant statutes that suggests that this is the case; as outlined above, the separate deadlines for the certification of the ballot question, the transmittal to the governor, and the publication of the proposed charter to the electorate are laid out in the statutes. Moreover, this court has already definitively stated that the deadlines contained MCL 117.22 and MCL 168.646a are in no way connected. *See Warren City Council v Buffa*, 2020 WL 5246664 at *3 (finding that MCL 117.22 and MCL 168.646a(2) do not share "a 'common purpose' such that this Court should assume that one references or implicates the other" and that the two statutes "seem better categorized as statutes that incidentally refer to the same subject").

[3] Notably, the *Sheffield* Appellees do not join the *Lewis* Appellees in this argument.

Finally, the Lewis Appellees' alarmist concerns about the harm to the electorate because of the passage of the May 11 deadline without a finalized charter are entirely without foundation. As an initial matter, the Charter Revision Commission has complied with all deadlines that have already passed: the ballot language of Proposal P was certified to the City Clerk on May 6, days before the May 11 deadline. See 3 App 396. The deadline for the proposed charter to be published to the electors has not yet passed; no Detroit voters will receive absentee ballots until June 19, and the revised charter will be published to the voters prior to that date in compliance with MCL 117.23.[4] There is no risk of confusion by the voters on what charter version will be enacted, see Lewis Br at 1; the voters will have a published, revised charter prior to that date, and will have six weeks to review prior to the August 3, 2021 primary election and to make an informed choice regarding the future of Detroit's charter.

III. CONCLUSION AND RELIEF REQUESTED

Intervenor-Defendant/Appellant Detroit Charter Revision Commission respectfully requests that this Court reverse the Circuit Court's Order and enter judgment in favor of Defendants and Intervenor-Defendant/Appellant.

Dated: June 2, 2021

Respectfully Submitted,

By: */s/ Aaron M. Phelps*

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[4] The *Lewis* Appellees falsely claim that the Charter Revision Commission believes that it can revise the charter through election day. See Lewis Br at 9. As outlined in its brief, Appellant has always said that the revised charter must be published prior to the start absentee voting on June 19, 2021. See Appellant's Br at 5-6.

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PROOF OF SERVICE

Maryanne Poll, being first duly sworn, deposes and says that on June 2, 2021, she served the foregoing, and a copy of this Proof of Service upon all attorneys of record via electronic delivery by filing same with the Court's MiFile system.

/s/ *Maryanne Poll*
Maryanne Poll