STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEAGUE OF WOMEN VOTERS OF MICHIGAN, PROGRESS MICHIGAN, COALITION TO CLOSE LANSING LOOPHOLES, AND MICHIGANDERS FOR FAIR AND TRANSPARENT ELECTIONS,

Plaintiffs-Appellants-Appellees,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant-Appellee,

v

DEPARTMENT OF ATTORNEY GENERAL,

Intervening-Defendant-Appellant-Appellee.

Court of Appeals Case Nos. 357984, 357986
Court of Claims No. 21-000020-MM

THE APPEALS INVOLVE A RULING THAT A STATUTE IS UNCONSTITUTIONAL

/

PLAINTIFFS' COMBINED BRIEF AS APPELLANTS AND APPELLEES

ORAL ARGUMENT NOT AUTHORIZED

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BASIS OF JURISDICTION

The Court of Appeals has jurisdiction under MCR 7.203(A)(1) over the Court of Claims Opinion and Order dated July 12, 2021 (copy in Joint Appendix ("JA") at 95a).

STATEMENT OF QUESTIONS INVOLVED

1. Does the 15% cap on ballot proposal signatures per congressional district in PA 608 violate the express self-executing terms of Mich Const 1963 Art 2, § 9 and Art 12, § 2?

   The Court of Claims said, "Yes."
   Plaintiffs LWVMI et al say, "Yes."
   Defendant Benson says, "Yes."
   Intervening Defendant Department of Attorney General says, "No."

2. Does the 15% cap on the ballot proposal signatures per congressional district in PA 608 violate the rights to free speech, association, and petition of Mich Const 1963 Art 1, §§ 3 and 5?

   The Court of Claims said, "Yes."
   Plaintiffs LWVMI et al say, "Yes."
   Defendant Benson says, "Yes."
   Intervening Defendant Department of Attorney General says, "No."

3. Are PA 608's new requirements targeting paid circulators constitutional?

   The Court of Claims said the petition check box disclosing a paid circulator was unconstitutional but that requiring a paid circulator to file a pre-circulation affidavit was constitutional.
   Plaintiffs LWVMI et al say both requirements are unconstitutional.
   Defendant Benson says both requirements are unconstitutional.
   Intervening Defendant Department of Attorney General says both requirements are constitutional.

CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

2018 Public Act 608 was introduced during the Legislature's lame duck session as House Bill 6595 on December 6, 2018 and rushed to passage. The House held a committee hearing and passed the bill in one session day; the Senate held a committee hearing and passed a substitute bill over two session days; and the House enacted the Senate substitute on the day it was received (after suspending the one day holdover rule). The Governor signed the bill on December 28, 2018.

Changes to the Election Code Made by PA 608

Public Act 608 made a number of significant changes to the election code that will dramatically impede citizens' exercise of the direct democracy rights provided under Const 1963, art 2, § 9 and art 12, § 2.

Among the changes made by PA 608 are the following.

1. The Congressional District Signature Cap

PA 608 introduced a new geographically-based limit on signatures that will be counted for petition qualification. Public Act 608 requires petitions to be circulated by congressional district instead of by county, MCL 168.482(4), and amended MCL 168.471 to provide that: "[n]ot more than 15% of the signatures to be used to determine the validity of' a petition described in this section shall be of registered electors from any 1 congressional district." Under PA 608 otherwise valid petition signatures that exceed the 15% limit will not be counted: "Any signature submitted on a petition above the limit described in this section must not be counted." MCL 168.471. "The Board of State Canvassers may not count toward the sufficiency of a petition described in this section any valid signature of a registered elector from a congressional district submitted on the petition that is above the 15% limit described in Section 471." MCL 168.477(1). Proponents must now sort petitions by congressional district and must file with the

Secretary of State a written "good-faith estimate" of the number of signatures from each congressional district along with their petitions. MCL 168.471.

2. New Requirements Targeting Paid Circulators

Public Act 608 amended MCL 168.482(7) to require that each petition include a check box at the top of the petition "to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer." Failure to correctly check a box is a crime. MCL 168.482c. In addition, before circulating any petitions, a paid circulator must now "file a signed affidavit with the secretary of state that indicates that he or she is a paid signature gatherer." MCL 168.482a(1), (2). Volunteer circulators are not required to file an affidavit. These requirements are in addition to those already applicable to petition circulators, which include the following: a circulator must sign a certificate attesting that he or she is a U.S. citizen over 18 years old; that each signature on the petition was signed in his or her presence; that no one has signed more than once; and that each signature is the genuine signature of a registered voter in the city or township indicated who was qualified to sign the petition; and if the circulator is a resident of another state, he or she must check a box so indicating and agree to accept Michigan's jurisdiction for any legal proceedings concerning the petition and must fill in his or her full address and county of registration. MCL 168.482(6) (incorporating MCL 168.544c(1)).[1]

Legal Proceedings

On May 22, 2019, in response to a request for an advisory opinion by the Secretary of State, the Attorney General issued an Opinion addressing various questions regarding the constitutionality of PA 608. The Opinion stated that the 15% signature cap, circulation by congressional district, the check box requirement, and the paid circulator affidavit filing requirement were unconstitutional. The Opinion found those provisions severable and stated that

[1] PA 608 made numerous other changes to the election law not at issue in these appeals.

PA 608's other provisions were enforceable. *See* Attorney General Opinion No 7310. The Secretary of State and Board of Canvassers are applying PA 608 based on that Opinion, i. e., not enforcing several provisions while enforcing others. *See* "Sponsoring a Statewide Initiative, Referendum or Constitutional Petition" (March 2021).

1. The Prior Litigation

On May 23, 2019, a group of Plaintiffs led by the League of Women Voters of Michigan (collectively "LWVMI") filed a Verified Complaint for Declaratory and Injunctive Relief against the Secretary of State in the Court of Claims, challenging the above-described provisions of PA 608 as invalid under various provisions of the Michigan Constitution. (Ct Cl Case No 19-000084-MM) The Complaint was accompanied by a motion seeking expedited consideration based on the fact that petition proponents would soon be beginning to plan and prepare petition campaigns for the 2020 general election and needed finality as to the controlling law.

In September, 2019 the Court of Claims issued an Opinion and Order granting summary disposition to LWVMI on their claims that the 15% signature cap, congressional district circulation requirement, and the petition paid circulator check box were unconstitutional; the Court upheld the paid circulator affidavit. Appeals were filed as to the 15% cap and circulator requirements. (Court of Appeals Nos. 350938 and 351073). LWVMI filed an Emergency Bypass Application for Leave to Appeal Before Decision by the Court of Appeals which was denied but the Supreme Court ordered the Court of Appeals to expedite the appeal.

The Court of Appeals found the 15% cap, check box requirement, and affidavit requirement unconstitutional. *See League of Women Voters of Michigan v Benson*, 331 Mich App 156; 952 NW2d 491 (2020), *vacated as moot*, 506 Mich 561; 957 NW2d 731 (2020) (a copy of the prior opinion of this Court is at JA 120a).

On appeal the Michigan Supreme Court vacated both lower court decisions as moot

because the pandemic had halted the petition drive of plaintiff MFTE. *See id*.

2. The Current Litigation

A new complaint with a broadened set of plaintiffs, including plaintiffs supporting 3 ballot proposals for 2022, was filed in February, 2021. JA 7a. On July 12, 2021 the Court of Claims issued a decision identical in substance to its 2019 decision as to PA 608 striking down the 15% cap and paid circulator check box but upholding the paid circulator affidavit. *See* JA 95a.

The Court of Claims decision on the 15% cap, the check box requirement, and the affidavit requirement were appealed to this Court and bypass was sought to the Michigan Supreme Court. That Court denied bypass but ordered this Court to expedite the appeal and render a decision by November 1, 2021. *See* Order of Sept. 10, 2021.

Ballot Proposal Petition Activity

While the current legal proceedings are occurring, there are at least seven (7) current, planned, or possible ballot proposal petition drives seeking placement on the 2022 ballot.

For a statutory initiative these groups must collect at least 340,047 valid signatures (plus a cushion for the inevitable defective signatures) and file them by June 1, 2022. Constitutional amendments have a later deadline, July 11, 2022, but more signatures are needed – 425,059 plus a cushion. Groups seeking constitutional amendments will have to collect over half a million signatures, perhaps close to 600,000. *See* "Sponsoring a Statewide Initiative, *supra*.

Time is short to collect those record-breaking numbers of signatures – requirements driven by the record-breaking 2018 gubernatorial election turnout. *See* Mich Const art 2, § 9; art 12, § 2 (basing petition signature requirements on gubernatorial turnout)

These are current, planned, or possible petition drives of which LWVMI is aware.

1. Progress Michigan

Progress Michigan formed a ballot question committee (No 519301) to support a proposal on lobbying reform. *See* MIRS, "Business Isn't Paying Enough Dough To State, Coalition Says" (October 9, 2019). This petition has been drafted and approved as to form by the Board of State Canvassers. Verified Complaint ⁋ 7 (JA at 11a).

Progress Michigan is also drafting a proposal to reform the Freedom of Information Act. *Id*.

2. Michiganders for Fair and Transparent Elections

Plaintiff MFTE formed a ballot question committee in 2018 (No 518715) for the purpose of a 2020 ballot proposal reforming Michigan's campaign finance laws. Although the pandemic halted its petition effort in 2020, MFTE plans to place its proposal on the 2022 ballot. *Id* ⁋ 9 (JA at 12a).

3. Unlock Michigan

A statutory initiative petition to limit the duration of state and local public health orders was approved as to form by the Board of Canvassers on July 13, 2021. *See* MIRS, "New Unlock Michigan Petition Off and Running with New Language" (July 13, 2021).

4. National Popular Vote

A statutory initiative to have Michigan join the agreement among the states for a national popular vote to elect the President has been disclosed. *See* MIRS, "Next Frontier for NPV: GOP Grassroots . . . Possible Ballot Proposal?" (March 10, 2021).

5. Ranked Choice Voting

On June 1, 2021 a statewide ballot question committee was registered (No. 520099) to advocate for Michigan to adopt ranked choice voting (RCV).

6. Michigan Republican Party

The Chair of the Michigan Republican Party has announced a petition drive to change

Michigan's election laws through a ballot question. *See* MIRS, "Up Next for Republicans – Ballot Reform By Law or Petition" (March 30, 2021). This petition is pending before the Board of Canvassers for approval of its summary and form.

INTRODUCTION

In reaction to the success of direct democracy in Michigan in 2018 and to prevent the people of Michigan from repeating that success in the future the lame duck Legislature adopted 2018 PA 608.

With PA 608 the longtime nemesis of direct democracy in Michigan – the Legislature – seeks to hobble its exercise. The people of Michigan once again turn to the protector of their rights – the courts – to overturn the egregious unconstitutional overreach of 2018 PA 608 in time for citizens to exercise their constitutional rights to place proposals on the 2022 ballot.

The question of 2018 PA 608's constitutionality was previously before the courts but the case was mooted when the pandemic halted petition drives. *See League of Women Voters v Benson*, 506 Mich 561; 957 NW2d 731 (2020). The original organizational Plaintiffs in that case together with others now bring the same constitutional issues to this Court in this appeal with their resolution again being urgent because the petition circulation season for the 2022 ballot is fast approaching.

The Court of Claims' decision holding the 15% requirement and paid circulator check box unconstitutional was correct and should be affirmed as this Court did in 2020. However the Court of Claims decision upholding the paid circulator affidavit should be reversed as this Court did in 2020.

ARGUMENT

I. THE 15% CAP IS AN UNCONSTITUTIONAL "LEGISLATIVE AMENDMENT"

This Court unanimously found the 15% cap unconstitutional in the previous case and with good reason. *See League of Women Voters of Michigan v Secretary of State*, Ct App No 350938, slip op at 9-15 (majority opinion), 1 (Boonstra, J, concurring in part and dissenting in part) (January 27, 2020) (entire slip opinion in JA at 120a).

This Court's published opinion in the prior case was vacated solely on procedural grounds as moot, not on the merits of its decision regarding PA 608. *See League of Women Voters of Michigan v Secretary of State*, 506 Mich 561, *supra*. Thus while it lacks precedential value it retains persuasive value. *See, e g, Krohn v Home-Owners Ins Co*, 490 Mich 145, 175-76; 802 NW2d 281 (2011) (citing and agreeing with the analysis of a vacated Court of Appeals decision); *compare* MCR 7.215(C) (unpublished opinion may be cited if relevant to the issues before the Court of Appeals). The panel here should follow the thorough analysis and correct conclusion of its colleagues in 2020.

Michigan's Constitution reserves to the people the rights of initiative and referendum, Const 1963, art 2, § 9, and the power to propose constitutional amendments, *id* art 12, § 2. These rights of direct democracy are exercised through the process of circulating petitions to collect the required number of valid signatures to qualify the proposal for the ballot. The Constitution provides specific signature thresholds that must be satisfied in order for the people to invoke the power of direct democracy:

> 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.

Const 1963, art 2, § 9. Petitions for constitutional amendments must:

> be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected.

Id art 12, § 2.

These provisions contain no cap on signatures from a congressional district or from any other geographic unit. Under our constitutional scheme, all registered voters regardless of where in the state they live have an equal right to sign ballot measure petitions and have their signatures counted toward the constitutional thresholds. The Legislature's addition of a 15% limitation in

PA 608 will result in large numbers of qualified electors – indeed, a substantial majority of them – being deprived of the opportunity to sign petitions or having their petition signatures counted.

The Constitution's direct democracy provisions, including the petition signature thresholds, were expressly intended and understood to be self-executing, meaning that they are to be implemented without additional legislation that limits or interferes with them. *Thompson v Secretary of State*, 192 Mich 512, 520; 159 NW 65 (1916). The drafters of Article 2, § 9 stated this clearly in their *Address to the People*, at p. 21:

> Matters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear, however, that this section is self-executing and the legislature cannot thwart the popular will by refusing to act.

Official Record of the Constitutional Convention, vol. 2, p. 3367.

The Supreme Court has made it clear that the Legislature also is prevented from thwarting the popular will by adding new requirements to those stated clearly in the Constitution. In *Wolverine Golf Club v Secretary of State*, 384 Mich 461; 185 NW2d 392 (1971), the Supreme Court affirmed a decision striking down the Legislature's attempt to impose by statute a time limit for filing initiative petitions that the 1962 Constitutional Convention had intentionally declined to continue from the prior constitution. The Court adopted Court of Appeals Judge Lesinki's conclusion that the initiative procedure in art 2, § 9 was intended to be self-executing, 24 Mich App 711, 727-728, *aff'd*, 384 Mich at 466. On that basis, the Court held that the Legislature was not empowered to establish a different or additional petition filing timetable from that stated in the Constitution:

> It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. . . . The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon.

Id, 384 Mich at 466 (citations and quotation marks omitted). The same result necessarily follows

for the petition requirements for amendment in Const 1963, art 12, § 2.

To be sure, the constitutional provisions governing direct democracy petitions specifically grant *some* powers to the Legislature. *See* Const 1963, art 2, § 9 ("The legislature shall implement the provisions of this section."); art 12, § 2 (a petition for constitutional amendment "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law"). But these confined grants of implementing authority to the Legislature do not affect the established principle that the specific constitutional requirements included by the framers cannot be altered or embellished by statute. In *Wolverine Golf Club* the Court concurred, at 384 Mich at 466, in Judge Lesinski's statement:

> We view the term 'self-executing' to be more than an after-the-fact description of the operative effect of the constitutional provision. It is a term intended to cloak the provision with the necessary characteristics to render its express provisions free from legislative encroachment. And this is so irrespective of the implementing provision contained therein. [24 Mich App at 728-729]

The Constitution's statewide petition signature thresholds are not, as described in the *Address to the People*, "[m]atters of legislative detail . . . left to the legislature."

The absence of a geographic cap was not an oversight calling for a legislative correction or "updating;" it was a deliberate decision by the framers. The Constitutional Convention was presented with proposals to amend art 12, § 2 that were indistinguishable from PA 608's 15% cap other than in detail. For example, on May 9, 1962, delegates voted down a proposal to add to the requirement that each petition be signed by at least 10% of the total vote cast for governor in the previous gubernatorial election the following: "not more than 25 per cent of such signatures to be obtained from residents of any one county." Verified Complaint, Exhibit I: *Official Record of the Constitutional Convention*, vol. 2 pp. 3200-3201 (JA at 89a). The delegates had previously rejected similar proposals. *Id* p. 3200. Public Act 608 adds the type of geographic limit that the Convention definitively rejected.

PA 608 amounts to nothing other than an unconstitutional "legislative amendment" to the foundational document that is exclusively the people's to amend. It is not the province of the Legislature to "update" the petition qualification requirements carefully written into the direct democracy provisions of the Constitution.

Public Act 608 should be declared unconstitutional because it burdens and limits the exercise of self-executing constitutional rights, and because it is an attempt by the Legislature to amend the Constitution by statute – arrogating power that is reserved exclusively to the people. The initiative power "is a reservation of legislative authority which serves as a limitation on the powers of the Legislature" and it "is constitutionally protected from government infringement once invoked" *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985).

The Court of Claims should be affirmed on this issue.

II. THE 15% CAP VIOLATES THE RIGHTS OF FREE SPEECH AND ASSOCIATION AND THE RIGHT TO PETITION UNDER CONST 1963, ART 1, §§ 3, 5

Plaintiffs Progress Michigan's, CTCLL's, and MFTE's rights to propose legislation and constitutional amendments by circulating petitions to qualify such measures for the ballot are protected under the free speech clause of Const 1963, art 1, § 5, and the freedom of association and petition clause, Const 1963, art 1, § 3. Further, members of Plaintiff League have the right to solicit signatures on a petition:

> The individual right to solicit signatures to qualify an initiative petition is protected by the rights of free expression, assembly, and petition, guaranteed in sections 3 and 5 of article 1, 'The Declaration of Rights.

Woodland, supra, 423 Mich at 215.

Among the types of constitutionally-protected speech, political speech occupies the highest rank. *Citizens United v FEC*, 558 US 310, 339-40; 130 S Ct 876; 175 LEd2d 753 (2010).

In *Meyer v Grant*, 486 US 414; 108 S Ct 1886; 100 LEd2d 425 (1988), the Supreme Court recognized that the circulation of initiative petitions is "core political speech," *id* at 422, restrictions on which are subject to "exacting scrutiny," *id* at 420. These federal constitutional decisions are applied to the interpretation and application of Michigan's Constitution. *Woodland, supra*, 423 Mich at 208.

Public Act 608's 15% cap will infringe on all of Plaintiffs' exercise of their rights to engage in political speech, association, and petitioning as proponents of a ballot proposal. As described in Paragraph 16 of the Verified Complaint, complying with PA 608 will dramatically increase the cost of circulating petitions for constitutional amendments or legislative initiatives or referenda. In order to avoid unnecessary expenditures, campaigns will now be forced to continuously monitor their signature gathering on a district-by-district basis to ensure that they do not collect more signatures than needed from any single district. Proponents will have to carefully monitor and count signatures from each congressional district on an ongoing basis, which also will multiply costs. (JA at 17a-20a) As the Sixth Circuit Court of Appeals said in overturning Ohio's ban on paying circulators by the signature, "[b]y making speech more costly, the State is virtually guaranteeing that there will be less of it." *Citizens for Tax Reform v Deters*, 518 F3d 375, 388 (6th Cir 2008).

The geographic cap also imposes a speech-limiting burden at the moment when a petition circulator can communicate with a potential signer. Under PA 608, petitioners must now use separate sheets for each congressional district. *See* MCL 168.482(4). Before obtaining a signature, the circulator must first ascertain the congressional district where the voter lives. Many voters cannot reliably identify their congressional district. If the circulator has a smartphone or a suitable map they can look up that information, but that will take additional time. Some voters will find the process too much of a bother and will walk away without

signing. Verified Complaint, Exh. D: Paparella Aff. ¶¶ 14-19 (JA at 69a). The time spent looking up one voter's address is time that a circulator cannot spend speaking with another voter. These effects burden protected speech, because they "limit the size of the audience of the petition" and as a result, "lower the likelihood that a measure will qualify for the statewide ballot." *Citizens for Tax Reform*, 518 F3d at 383.

The Michigan constitutional rights of the members of the League and many other voters to express their support for placement of a proposal on the ballot by signing a petition also will be suppressed. Their signatures now may be refused if the petition proponent decides (possibly erroneously) that it has "too many" signatures; and even if they are given the opportunity to sign a petition, their signature will be disregarded in the canvass if the proponent has reached the 15% cap in their congressional district.

Because the 15% cap imposes significant burdens on petition proponents and it completely silences the speech of millions of potential petition signers, the obstacles to citizens' exercise of their state constitutional rights must be justified by a compelling state interest. The asserted interest in a geographically wider "buy-in" for placement of a proposal on the ballot is not compelling, given that voters from every corner of Michigan will have the opportunity to express their support or opposition in the voting booth once the proposal qualifies for the ballot.

Moreover, the 15% cap is not the least restrictive means of achieving the stated objective. Broadening the geographic distribution of demonstrated support for ballot qualification (assuming the Constitution permits it) could have been achieved without silencing the voices of the great majority of eligible speakers, such as by requiring a minimum showing of support in a wider geographic area rather than by imposing a cap. Even if the state's asserted interest were deemed sufficiently compelling, it could be achieved without curtailing protected speech and petition rights.

The 15% cap violates the state constitutional rights of free speech, association, and petition.

III. THE NEW BURDENS ON PAID CIRCULATORS VIOLATE CONST 1963 ART 1, §§ 3, 5

The Court of Claims decision striking down the paid circulator check box should be affirmed but its decision upholding the paid circulator affidavit should be reversed as the Court of Appeals panel in the previous case did when it found *both* of these burdens unconstitutional. *See* slip op at 15-20 (JA at 120a).

The rights of speech, association and to petition under Michigan's Constitution are coextensive with those under the First Amendment to the U.S. Constitution. *Woodland, supra,* 423 Mich at 208 ("'[the] same liberty of speech . . . is secured by the Constitution of the State of Michigan' as is guaranteed by the First Amendment," *quoting Book Tower Garage, Inc v UAW Local No 415*, 295 Mich 580, 587; 295 NW 320 (1940)); *Michigan Up & Out of Poverty Now Coalition v State of Michigan*, 210 Mich App 162, 168-169; 533 NW2d 339 (1995) ("We thus review plaintiff's challenges to the new procedures in accordance with federal authority construing the First Amendment.") (citing Michigan Supreme Court authority).

The federal courts, applying the First Amendment, have recognized that paid circulators are often the most effective and efficient way of gathering signatures for ballot measures. "The First Amendment protects [campaigns'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer, supra,* 486 US at 424. The U.S. Constitution accordingly forbids states from banning paid petition circulators, *Meyer,* and from imposing undue burdens on paid circulators, *Buckley v Am Const Law Foundation, Inc,* 525 US 182, 200; 119 S Ct 636; 142 L Ed 2d 599 (1999) (invalidating requirement that campaigns file reports containing the names of their paid circulators and the amount paid to each); *Citizens for Tax Reform, supra* (invalidating a ban on payment of circulators on a per-

signature basis). While this action is based solely on rights under Michigan's Constitution, the federal courts' recognition of the speech enabling role of paid petition circulators is equally applicable to the Michigan constitutional rights at issue here.

PA 608 added new requirements that apply *only* to paid petition circulators but not to volunteer circulators, compelling paid circulators to publicly disclose their paid status in two (2) ways. First, under MCL 168.482(7) added by PA 608, each petition must include a check box at the top of the page "to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer." In addition, before he or she may circulate any petitions a paid circulator must now "file a signed affidavit with the secretary of state that indicates that he or she is a paid signature gatherer." MCL l68.482a(l). Volunteer circulators are not required to file an affidavit.[2]

These requirements both violate well-established Supreme Court precedent:

> forc[ing] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts .. fail[s] exacting scrutiny."

Buckley v American Constitutional Law Foundation, 525 US at 204 (1999). In *Buckley*, the Court considered whether a Colorado statute requiring the disclosure of the names of paid circulators in campaign finance reports violated the Constitution. *Id* at 201-04. The Court found that disclosure by the proponents of a proposal that they were paying for signatures satisfied the state's interest, *id* at 202-03, but that disclosure of the *actual names of paid circulators* served no legitimate state interest and therefore "fail[ed] exacting scrutiny," *id* at 204.

The same is true here. The stated goal of these requirements in PA 608 was to target and end the anonymity of paid circulators, an anonymity which is constitutionally protected under

[2] These requirements are in addition to those already applicable to petition circulators, which include the following: a circulator must sign a certificate attesting that he or she is a U.S. citizen over 18 years old; each signature on the petition was signed in his or her presence; that no one has signed more than once; and that each signature is the genuine signature of a registered voter in the city or township indicated who was qualified to sign the petition; and if the circulator is a resident of another state, he or she must check a box so indicating and agree to accept Michigan's jurisdiction for any legal proceedings concerning the petition and must fill in his or her full address and county of registration. MCL 168.482(6) (incorporating MCL 168.544c(l)).

Buckley:

> [The bill] makes sure that people circulating these petitions can't. . . conceal the fact they they're paid by out-of-state billionaires and special interest groups. If that is something that they're going to do, that should be transparent and that should be in front of people and they should know that when they are deciding whether or not to sign a petition.[3]

(emphasis added). The same goal was stated at the hearing of the Senate Committee on Elections and Government Reform. *See* Recording of Senate Committee on Elections and Government Reform hearing, December 20, 2018; available at: https://drive.google.com/open?id=luM69UMXmOZWZglBXi2EN7gYlERqUMvnr (at: J 1:0H3:29) [last accessed on May 13, 2019].

As in *Buckley*, the state's interest in disclosing the sources of financial support for a proposal is fully satisfied by the ballot question committee reporting requirements imposed on petition sponsors by the Michigan Campaign Finance Act, MCL 169.201 et seq. Committees are required to report the names, addresses, and amounts contributed by their financial supporters on an ongoing basis, and the information is publicly available. *See, e g,* MCL 169.225, 169.226(1)(b)-(j), 169.232. The MCFA also already requires petition proponents to report whether they are hiring firms which employ paid circulators. *See, e g*, MCL 169.206 (defining reportable expenditures). Under *Buckley*, the state has no legitimate interest in the disclosure of paid circulator identities through the petition check box or the pre-filing affidavit.

The State may assert that these provisions compelling disclosure of the names of paid circulators serve its interest in preventing fraudulent petition signatures. While the State has a legitimate interest in deterring fraudulent petition signatures, *Deters, supra*, 518 F3d at 387, the Court in *Meyer* categorically rejected the argument that paid circulators are more prone to fraud than volunteer circulators. *See* 486 US at 426; *see also Buckley, supra*, 525 US at 203-04 (quoting *Meyer*). In fact, the opposite is typically the case. As the Court observed, professional

[3] Statement of bill sponsor Rep. Lower, video recording of December 12, 2018 House Elections and Ethics Committee hearing, available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2nd video) at: 7:15-7:35) [last accessed on May 13, 2019].

vendors using paid circulators compete based on their reputations and their results based on the quality of valid signatures collected; they have a business incentive to be scrupulous and supervise their circulators closely. *Id.*

Thus, the petition check box and the paid circulator affidavit pre-filing requirements not only violate *Buckley*, but serve no compelling state interest. They only create more paperwork and in the case of the affidavit delays the deployment of circulators.

All of the information the state needs and is constitutionally entitled to know about each circulator, volunteer or paid, is already included in the circulator's certificate on the face of each petition. *See* MCL 168.544c(l)-(3), (5), and (15), incorporated by reference in MCL 168.482(6), The paid circulator check box and the paid circulator pre-filing affidavit requirement selectively impose additional administrative burdens only on petition proponents that employ paid circulators, without any countervailing benefit or justification. They both are unconstitutional under *Buckley* and *Meyer* as this Court previously held.

IV. THE DEFENSES ASSERTED BY THE INTERVENOR DEFENDANT-APPELLANT-APPELLEE ARE MERITLESS.

In the Court of Claims the Intervenor-Defendant asserted a number of arguments which that Court rejected. In anticipation of the reassertion of those arguments we address them. Among other things, the Intervenor-Defendant urged the Court of Claims to ignore several controlling decisions of the United States and Michigan Supreme Courts and instead rely on a handful of distinguishable if not irrelevant lower federal court decisions.

A. *Plaintiffs Have Standing.*

Intervening Defendant incorrectly argued below that the Plaintiffs lacked standing. Plaintiffs have standing as the Court of Claims held. JA at 102a-105a.

Actions for declaratory judgments are governed by MCR 2.605(A)(1) which provides:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

"[A]n 'actual controversy' exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019). "[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

The Michigan Supreme Court has long held that a declaratory judgment is available when a plaintiff seeks guidance as to future conduct before injury or losses occur:

> The existence of an "actual controversy" is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights*. . . . This requirement of an "actual controversy" prevents a court from deciding hypothetical issues. However, a *court is not precluded from reaching issues before actual injuries or losses have occurred*.

Shavers v Attorney General, 402 Mich 554, 588-89; 267 NW2d 72 (1977) (citations deleted, emphasis added).

Plaintiffs easily meet this threshold because they need guidance as to their future conduct before they are injured by PA 608. That future conduct is 3 petition drives for 2021-22 by Plaintiffs Progress Michigan, the Coalition to Close Lansing Loopholes, and Michiganders for Fair and Transparent Elections. *See* Verified Complaint ¶¶ 4, 7-9, 17, 18 (JA at 9a-10a, 11a-12a, 20a-21a). The injuries they wish to avoid include, *inter alia*, the uncertainty, additional work and cost, and violation of their constitutional rights created by PA 608. *See id* ¶¶ 4, 7-9, 16, 17, 18, 55-62, and Counts I-V (JA at 9a-10a, 11a-12a, 17a-21a, 34a-36a, 23a-33a). They need to

know their rights before spending millions of dollars on petition drives which is the very purpose of declaratory relief. They have an adverse interest to the Department which defends PA 608.

Plaintiff League of Women Voters has associational standing to protect the constitutional rights of its members who are voters to participate in petition drives, including circulating and signing petitions. *See id* ¶¶ 6, 19, 20, 21, 55-62, and Counts I-V (JA at 10a-11a, 21a-23a, 34a-36a, 23a-33a). *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505-06; 688 NW2d 847 (2004) (recognizing the special nature of election cases and the standing of voters to enforce the law in election cases); *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987).

In the Court of Claims the Department relied upon out of context language in *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561, *supra*. However that case is readily distinguishable because there the only plaintiff pursuing a ballot proposal when the case began was no longer doing so, rendering the case moot. *Id* at 570. All of the Department's cites to that case were in the context of those facts which makes that decision inapplicable here. That decision in fact supports Plaintiffs' standing here. The Court recognized that a group pleading plans to circulate petitions and the need to resolve uncertainty and anticipated costs in connection with those efforts had standing to seek declaratory relief *until* it suspended its efforts. *Id* at 579-80. Three of the Plaintiffs here are actively pursuing petition drives and nothing in *LWVMI* denies them standing.

B. *The Legislature Does Not Have More Authority Over Constitutional Amendment Petitions Than Statutory Initiative Petitions.*

The Department argued below that a difference in language regarding legislative authority between Art 2, § 9 regarding statutory initiatives and Art 12, § 2 governing petitions for constitutional amendments justifies upholding the 15% requirement as to constitutional amendments even if the Court strikes it down as to initiatives.

This argument is wrong under controlling 50-year old precedents of the Michigan Supreme Court.

The Department correctly acknowledged in the Court of Claims that despite the difference in legislative language both Article 2, § 9 and Article 12, § 2 are self-executing. Because Article 12, § 2 is self-executing, "the right guaranteed shall not be curtailed or any undue burdens placed thereon" by the Legislature. *Ferency v Secretary of State*, 409 Mich 569, 591; 297 NW2d 544 (1980) (*per curiam*). The "curtailed/undue burden" principle also applies to legislative implementation of the self-executing provisions of Article 2, § 9. *Wolverine Golf Club v Secretary of State*, *supra*, 384 Mich at 466. The Supreme Court held in *Ferency* that the same principle applied to both statutory initiatives and constitutional amendments:

> Although *Wolverine Golf Club* involved popularly initiated legislation under Const 1963, art 2, § 9, rather than, as here, popularly initiated amendments to the constitution under Const 1963, art 12, § 2, *the principle that the Legislature may not unduly burden the self-executing constitutional procedure applies equally to both*.

Ferency, 409 Mich at 591 n 10 (emphasis added).

Therefore, the analysis of the undue burdens imposed by the 15% cap presented *supra* applies to that cap as to *both* statutory initiative petitions and petitions proposing constitutional amendments. The cap is unconstitutional as to both.

Consumers Power v Attorney General, 426 Mich 1; 392 NW2d 513 (1980) (*per curiam*), relied upon by the Department below does not undermine this conclusion. First, in that case the Court was not presented with the question of whether the legislative authority under Article 12, § 2 was broader than under Article 2, § 9. Second, the Court did not overrule *Wolverine* or *Ferency*. The Court simply found that enacting a rebuttable presumption of signature invalidity after 180 days was within the Legislature's power under Article 12, § 2.

Article 12, § 2 does not, contrary to the Department's claim, create a wider lane for legislative regulation than Article 2, § 9.

C. *The 15% Cap Is Subject To Exacting Scrutiny Under U.S. Supreme Court Precedent.*

In the Court of Claims the Department improperly attempted to lower the level of scrutiny of the 15% cap by applying the *Anderson-Burdick* test and its sliding scale of scrutiny.

However the United States Supreme Court has already established the level of scrutiny here. As cited *supra,* in *Meyer v Grant*, the Supreme Court recognized that the circulation of initiative petitions is "core political speech," 486 U.S. at 422, restrictions on which are subject to "exacting scrutiny," *id* at 420. That federal constitutional decision applies to the interpretation and application of Michigan's Constitution. *Woodland v Michigan Citizen Lobby*, *supra,* 423 Mich at 208. *Meyer* did not apply the *Anderson-Burdick* test to establish the level of scrutiny and the Department cannot apply that test here to reduce the level of scrutiny of the 15% cap.

Moreover, the Department's heavy reliance below on *Angle v Miller*, 673 F3d 1122 (CA9, 2012), is misplaced because the law at issue there is fundamentally different from the 15% cap. That Nevada law placed no cap on signatures per congressional district like PA 608 – it was a geographical distribution law that only set a *minimum* number of signatures per district and required signatures from all 3 congressional districts in Nevada. Unlike PA 608, no voter who wants to sign a Nevada petition would have their signature refused, discarded, or not counted because it exceeded an arbitrary cap. Instead every voter's signature in Nevada is counted unlike PA 608 which excludes 80-90% of the voters in every congressional district from validly signing a petition. *See* Verified Complaint ¶ 20 (JA at 21a-22a). *Angle* is completely irrelevant to the constitutional analysis of PA 608's 15% cap.

The Department's reliance on *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291 (CA6, 1993), is similarly flawed.

Austin used the *Anderson-Burdick* approach to analyze and uphold an adminstrative system of reviewing *individual* signatures *after* they are filed for *validity* such as whether a signer was a registered voter as the Michigan Constitution requires, *see* Mich Const 1963, art 2, § 9 and art 12, § 2.

In contrast, PA 608 imposes a blanket prospective ban on counting signatures – even if the signatures are of registered voters – if those signatures exceed an arbitrary cap of 15% in a congressional district. Under PA 608, there is no individual review of signatures for validity with the due process protections of the canvassing process at issue in *Austin*. Instead there is complete signature disqualification in advance regardless of signature validity with no individual review or appeal whatsoever.

Austin correctly described the system there at issue as non-discriminatory and "reasonably related to the purpose of administering an honest and fair initiative procedure." *Id* at 297. That is not an accurate description of PA 608's 15% cap. That cap arbitrarily deprives 80-90% of the voters in a congressional district, *see* Verified Complaint ¶ 20 (JA at 21a-22a), of their state constitutional right to sign a petition. There is no relationship, let alone a reasonable one, between the cap and "administering an honest and fair initiative procedure." The system upheld in *Austin* provides "an honest and fair initiative procedure" while an arbitrary prospective blanket 15% cap on which signatures will count is neither nondiscriminatory nor fair.

PA 608 denies petition sponsors, petition circulators, and millions of Michigan voters their state constitutional rights to propose initiatives and to circulate and sign initiative petitions. *See* Mich Const art 1, §§ 3, 5; *Woodland, supra*, 423 Mich at 208, 215.

D. *The New Burdens on Paid Circulators Violate Const 1963, Art 1, §§ 3, 5.*

The previous Court of Appeals opinion analyzed these new requirements in detail and found them unconstitutional.

In the Court of Claims the Department incorrectly tried to reduce the level of scrutiny of these requirements using *Anderson-Burdick* when the Supreme Court rejected that approach in *Meyer* instead requiring "exacting scrutiny" and in *Buckley v Am Const Law Foundation, Inc*, 525 US at 204, where the Court barred "undue burdens" on paid circulators under the same "exacting scrutiny" standard. The sole case the Department cited in support of its argument, *Citizens in Charge v Gale*, 810 F Supp 2d 916 (D Neb 2011), erroneously relied on the *Anderson-Burdick* framework in defiance of *Mayer's* and *Buckley's* "exacting scrutiny" requirement. *Gale* is a wrongly decided outlier.

As part of its efforts to reduce the level of scrutiny the Department attempted to minimize the burdens a checkbox and pre-filing affidavit impose as only an "administrative burden and cost." In fact the Supreme Court has held that the compelled disclosure of paid circulators' identity is an unconstitutional burden if it forces paid circulators to surrender their anonymity *when volunteer circulators do not*:

> forc[ing] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts. . . fail[s] exacting scrutiny.

Buckley, supra, 525 US at 204. It is the *disparate treatment* of paid and volunteer circulators in PA 608 alone makes its checkbox and affidavit requirements an unconstitutional burden.

The stated goal of these requirements was to target and end the anonymity *only* of paid circulators, an anonymity which is constitutionally protected under *Buckley*:

> [The bill] makes sure that people circulating these petitions can't. . . conceal the fact that they're paid by out-of-state billionaires and special interest groups. If that is something that they're going to do, that should be transparent and that should be in front of people and they should know that when they are deciding whether or not to sign a petition.[4]

(emphasis added).

[4] Statement of bill sponsor Rep. Lower, video recording of December 12, 2018 House of Elections and Ethics Committee hearing, available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2nd video) at: 7:15-7:35) [last accessed on May 13, 2019].

In the Court of Claims the Department also incorrectly relied on affidavit requirements upheld in *Buckley* and *Libertarian Party of Ohio v Husted*, 751 F. 3d 403 (CA6, 2014), to attempt to justify the PA 608 affidavit. But neither *Buckley* nor *Husted* support the PA 608 affidavit requirement because the affidavits in those cases are very different from the pre-circulation affidavit required only of paid circulators at issue here.

In *Buckley*, the affidavit applied to *all* circulators when they submit a signed petition to the state, *see* 525 US at 188-89. In that regard it is akin to the certificate of circulator on Michigan petitions which *all* circulators must sign after collecting signatures and before turning in petitions. The affidavit at issue in *Buckley* was not selectively required only of paid circulators as the PA 608 affidavit is, nor was it required in advance of circulation as the PA 608 affidavit is.

Similarly, the affidavit in *Husted* is not made before circulation, but is part of the filing process of the petition *after* it is circulated and signed. *See* 751 F. 3d at 417. So there is no loss of the paid circulator's anonymity until after all encounters with signers have concluded. That is very different from the PA 608 affidavit which is publicly available before and during petition circulation threatening the anonymity of a paid circulator but not of volunteer circulators.

Under *Meyer* and *Buckley*, the discriminatory application of the petition checkbox and pre-filing affidavit requirements to only paid circulators renders them unconstitutional. If more is needed – and it's not – the interference of the checkbox with a circulator's communication with a signer also renders it unconstitutional. Neither serves any compelling government interest which can't be achieved in another way as described in *supra*.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Plaintiffs-Appellants-Appellees ask that the Court of Claims decision striking down the 15% requirement and the paid circulator checkbox be affirmed while

its decision upholding the paid circulator affidavit be reversed.

Respectfully submitted,

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Dated: September 20, 2021

Proof of Service

The undersigned certifies that on September 20, 2021, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes