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.

Supreme Court No. 164755

THIS MATTER INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

PLAINTIFF PROMOTE THE VOTE 2022'S REPLY IN SUPPORT OF ITS COMPLAINT FOR IMMEDIATE MANDAMUS RELIEF AND DECLARATORY JUDGMENT AND MOTION FOR ORDER TO SHOW CAUSE AND IMMEDIATE CONSIDERATION

*****IMMEDIATE AND EXPEDITED CONSIDERATION BY SEPTEMBER 8, 2022 REQUESTED*****

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INTRODUCTION

By attempting to silence the voices of half-a-million Michiganders and the electorate at large, DYV's Brief reinforces why this Court must grant PTV22's Complaint for Writ of Mandamus and direct the Board to perform its pure ministerial duty and certify the Proposal for placement on the November General Election Ballot.

The Board approved the PTV22 petition as to form and content in February 2022. There is no dispute that PTV22 has more than sufficient signatures for certification. *See* Staff Report at 6 ("Based on the results of the random sample, it is estimated that the petition contains 507,780 valid signatures (at a confidence level of 100%) . . . . Staff Recommends that the Board approve certification of this petition."). DYV's challenge converted the Board's simple and ministerial task of determining whether PTV22 listed all provisions it believed were altered-or-abrogated into a debate by non-lawyers on the constitutional implications of the Proposal. The field trip by the Board's two Republican Members into constitutional construction goes well-beyond their limited statutory and constitutional authority.

DYV's arguments also lack merit. This Court has previously held that a constitutional provision is abrogated only when it is rendered "wholly inoperative" and "it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together." *Protect Our Jobs v Board of State Canvassers*, 492 Mich 763, 783; 822 NW2d 534 (2012). As demonstrated in PTV22's opening papers and below, DYV's abrogation arguments do not withstand the slightest scrutiny much less meet the exacting standard of showing that these provisions are "wholly eviscerated" such that they are legally nullified or that such provisions cannot be read in harmony, when they clearly can.

This Court should reject DYV's Challenge and certify the Proposal for placement on the November 2022 General Election Ballot.

ARGUMENT

A. The Board Already Approved the Form of the Proposal's Petition, Which PTV22 Relied Upon in Circulating and Gathering more than 660,000 Signatures.

As a threshold matter, the Court should find that the Board was estopped from considering a challenge to the form the Proposal of the petition when the Board already approved the form back on February 11, 2022. (Compl. ¶¶ 57–59, 150–171.) This case is no different than *Unlock Michigan v Bd of State Canvassers*, 507 Mich 1015; 961 NW2d 211 (2021), which this Court decided a little more than a year ago. In *Unlock Michigan*, the proponent of a legislative initiative petition received approval as to form on July 6, 2020. Following this approval, approximately one year later, the proponent submitted signatures and sought certification of the proposal. An opposing committee filed a lengthy challenge alleging a host of issues, including fraud in the signature gathering process, and issues with the form of the petition. In rejecting the challenge, this Court relied upon the Board's prior, conditional certification as to form:

> In the present case, the Board approved the form and content of the petition in July 2020. The Bureau of Elections analyzed the signatures using a random sampling method and estimated that Unlock Michigan submitted at least 460,000 valid signatures when it only needed about 340,000. The Board rejected, by deadlocked vote, a motion to investigate the collection of signatures. Therefore, the Board has a clear legal duty to certify the petition. [*Unlock Michigan*, 507 Mich at 1015.]

The result should be the same here. The Board already reviewed and approved PTV22's petition as to form and content before circulation, which it "urge[s]" sponsors to do. *Canvassing Manual* at 9. It cannot now backtrack after an eleventh-hour challenge that should have been brought earlier. *League of Women Voters of Michigan v Secy of State*, 508 Mich 520, 567–68; 975 NW2d

840 (2022) ("the Board … has long offered the opportunity to ballot proposal committees to have their petitions preliminarily approved as to form prior to circulation in order to prevent the late discovery of defects in those forms—discoveries that, without preapproval, might not be detected until after circulation is complete.").

DYV argues that the Board's approval as to form does not apply to alter-or-abrogate challenges, but that assertion undermines their argument because if it is not a question of form or sufficiency of signatures, then the Board has no authority.[1] Michigan Election Law sets forth in detail the requirements as to form of an initiative form. MCL 168.482. The requirements as to form include the precise warnings required, font size, page size, bolding, and other such similar technical provisions. These are all items that can be evaluated by the Board and Bureau Staff within the four corners of the petition. As DYV concedes, the alter-or-abrogate requirement is only mandatory if the proponent believes it alters or abrogates a current provision of the constitution. (DYV Br. at 34 ("The only duty to ensure compliance with the alter-or-abrogate requirement lies with the petition sponsor (here, PTV)."). And once the proponent determines that a provision does alter-or-abrogate a specific provision of the current constitution, those provisions must be listed with the specific mandatory introductory clause. MCL 168.482(3). That is the part of the form that the Board can review: did the petition's sponsor, here PTV22, include the mandatory introductory clause and provisions that it believed to be altered-or-abrogated. PTV22 unquestionably complied with this requirement, publishing a number of such provisions in its Proposal. It was thereafter approved by the Board. DYV contends that the Board should go further and substantively assess

[1] The manual specifically states that "while staff consultations include a thorough review of whether the petition complies with [] technical formatting requirements," its consultation do not include whether a "petition properly identifies provisions of the existing constitution which may be altered or abrogated by a proposal constitutional amendment[.]" Canvassing Manual at 7.

whether the alter-or-abrogate requirement was met, which in this circumstance requires substantive constitutional analysis, something which the Board lacks authority to undertake. This is why approval as to form does not include such a determination. Simply put, Section 482 does not authorize the Board to conduct a discretionary evaluation as to whether something is in fact altered-or-abrogated – something that its members are not qualified to do and that DYV admits requires an analysis beyond the four corners of the form. (DYV Br. at 11 ("Abrogation is not necessarily something that jumps off the page, obvious to any reader.").) Rather, the Board's duties are limited and ministerial. If a proponent believes its proposal alter-or-abrogates, it must list those provisions and include the language required by MCL 168.482(3). That is the requirement – a requirement with which PTV22 unquestionably satisfied.

In sum, there was no basis for the Board to engage in a post-approval substantive alter-or-abrogate analysis. The only questions properly before the Board were did PTV22 (1) list the provisions it believed were altered or abrogated and (2) include the mandatory introductory language MCL 168.482(3) requires? The answer to these questions is a resounding yes, which is why the Board approved the petition form in a 4-0 vote in February 2022.

B. Sensing How Frivolous Its Challenge Was, DYV Actually Abandoned One of Its Arguments Altogether.

In its response brief, DYV does not respond to PTV22's arguments about why the Proposal does not abrogate Article 7, Section 8. (Compl. ¶¶ 103–127.) Thus, DYV appears to concede the frivolity of at least one of its claims – that the Proposal would abrogate the non-existent role of county commissions in the election administration process. This argument is thus considered abandoned. *Seifeddine v Jaber*, 327 Mich App 514, 520; 934 NW2d 64 (2019).

C. DYV Ignores The Complete Text Contained in Article II, Section 1.

The leading argument proffered by DYV is that "the Petition would destroy Article 2, § 2's grant of legislative authority root and branch" to regulate voter qualifications. According to DYV, to understand how the Proposal does this, would take "two steps." First, argues DYV, the Proposal grants "every existing 'qualified elector … the fundamental right to vote.'" Second, the Proposal "would bar the Legislature from enacting any law that prevented an otherwise-qualified elector, including one who is incarcerated, from voting." The result, according to DYV, is that "if the Petition moves forward, any effort to exclude [incarcerated felons or the mentally incompetent] from the electorate would be an interference with the fundamental right to vote of a qualified elector." (DYV Br. at 17-18). Thankfully this Court understands and applies the rules of constitutional construction in a manner that is not result driven and is tempered by the rationale reading of this Court's controlling precedent.

First, any constitutional analysis that requires two-steps, by definition, fails to meet the standard of review established by this Court in *Protect Our Jobs*, which states that abrogation occurs only where "it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are read together." *Id*. at 783.

Second, DYV does not address and ignores ***the full*** constitutional text found in Article II, Section 1. By its plain terms, Article II, Section 1 incorporates Section 2 as a constitutional limitation on who is eligible as "an elector and qualified to vote" by specifically stating "***except as otherwise provided in this constitution***." The only other provision in the constitution that discusses the qualifications of voters is Section 2, which grants the Legislature the authority to exclude incarcerated felons and mentally incompetent individuals as qualified voters. Accordingly, if the Legislature exercises its authority to exclude such individuals as qualified voters (which it has

done to incarcerated felons) they would not be entitled to the "fundamental right to vote" as set forth in the Proposal.

This is not a complicated analysis. DYV's argument ignores the most basic principle of constitutional interpretation that "[constitutional provisions should be read as a whole, in context, and with an eye to harmonizing them so as to give effect to all." *Lucas v Wayne Cty Election Comm'n*, 146 Mich App 742, 747; 381 NW2d 806 (1985). Reading Article II, Section 1 in harmony with Article II, Section 2, leads to the only rational conclusion that if the Legislature exercises its authority to exclude "persons from voting because of mental incompetence or commitment to a jail or penal institution," such individuals are not qualified to vote. The Proposal has absolutely no impact on whether a person is qualified to vote, whether pursuant to Section 1 or 2 of Article II.

Third, DYV ignores the plain text of Article II, Section 4 as would be amended by the Proposal. Specifically, DYV argues that the "fundamental right to vote" that the Proposal would enshrine in Section 4 "would bar the Legislature from enacting any law that prevented an otherwise-qualified elector, including one who is incarcerated, from voting." Not so. The plain language of the Proposal does not eliminate the requirement that the fundamental right to vote only attaches "to an elector qualified to vote in Michigan." As such, the plain language of the Proposal cannot possibly eviscerate the Legislature's ability under Article II, Section 2. These provisions can easily be read harmoniously because they do not conflict in any regard.

Finally, this Court should reject DYV's "straw-man" argument that if the Proposal does not abrogate Article II, Section 2, then:

> 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. [DYV Br. at 17].

DYV's assertion is absurd. Article 2, Section 2 grants the permissive authority to the Legislature to exclude from voting incarcerated felons and mentally incompetent individuals. No more and no less. To the extent the Legislature would impose other restrictions on the right to vote, then other provisions of the Michigan Constitution and federal law would apply, including, for example, Michigan's Equal Protection Clause. This Court has recognized that the Equal Protection Clause of the Michigan Constitution is coextensive with the Equal Protection Clause of the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Equal protection applies when a state either classifies voters in disparate ways or places undue restrictions on the right to vote, such as those suggested possibilities by DYV. *Obama for America v Husted*, 697 F3d 423, 428 (CA 6, 2012).

D. The Proposal Does Not Wholly Eviscerate "Election Day."

DYV's Brief continues to shift the goal posts with respect to its "Election Day" arguments. While conceding that Michigan has long permitted absentee voting, which permits registered voters to cast their votes months prior to Election Day, DYV nonetheless contends that the Election Day clause somehow requires **ALL** in-person voting to occur on a single day. DYV now worries that with early in-person voting options, polling places would be left "devoid of any in-person voters on Election Day." (*See* DYV Br. at 20.) If the argument sounds absurd, that is because it is. Indeed, the argument requires this Court to engage in conjecture that is undercut by the data from the twenty other states that have implemented early voting.

More to the point, the Proposal does not "wholly eviscerate" the Election Day provision in Article 2, Section 5 such that it is rendered a legal nullity. Election Day will still exist just as it does now. Voters who want to vote absentee for any reason or no reason whatsoever – as Proposal 3 of 2018 provided – will be able to continue to cast absentee votes well-prior to Election Day.

Voters who want to vote in-person during the early voting period will be able to do so. And voters who want to cast their vote on the first Tuesday after the first Monday in November in each even numbered year will continue to do so.

The fundamental problem DYV faces with its series of "what ifs" that are detached from any legal reasoning, case law, or statutory authority, is that there is a difference between *voting* and an *election*. As PTV22 previously explained, the Court of Appeals recently analyzed what it means to "vote" in the context of our Constitution and law, holding that the word "vote" has many meanings and "refers to the entire process" of casting a ballot over time, not a single act on a single day. *League of Women Voters v Secy of State*, 333 Mich App 1, 21-22; 959 NW2d 1 (2020); *Foster v Love*, 522 US 67, 71; 118 SCt 464 (1997).

Nonetheless, DYV equates "voting" with an "election" as if they are the same thing. But as DYV's own authority makes clear, they are not. Voting, as explained in *League of Women Voters*, is the act of voting for a candidate or proposal. Under current law, qualified Michigan electors can vote up to 40 days before an election by absentee ballot. They can exercise this right by voting their ballots by mail or in-person. But a persons' votes cannot be counted until the polls close on Election Day. MCL 168.765(3).

Moreover, contrary to DYV's suggestion, "Election Day" is not a defined term, whether by Constitution or statute. Rather, the Constitution prescribes when an "election" shall occur, which is set forth in Article 2, Section 5. "Election" is defined by law as "an election or primary election at which the electors of this state or of a subdivision of this state choose or nominate by ballot an individual for public office or decide a ballot question lawfully submitted to them." *See* MCL 168.2(g). So while the term "election day" is not in the Constitution, that term and "election"

are used throughout the Michigan Election Law to denote the date of the election – meaning the date on which the votes are tabulated and the voters' choices determined.

E. The Proposal Does Not Nullify Citizen-Led Ballot Initiatives.

Remarkably, DYV posits that the U.S. and Michigan Constitution do not prohibit the Legislature or citizens from enacting laws that "interfere with the fundamental right to vote." (DYV Br. at 26.) DYV just provided the precise reason why this Proposal is so very important, because people and groups like DYV believe the Legislature has the right to interfere with the fundamental right to vote. This Proposal protects the fundamental right to vote from conduct or laws that directly or have the intent of "denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." That is a very direct and intended purpose of this Proposal.

However, protecting the fundamental right to vote in the constitution does not mean that the power of initiative in Article II, Section 9 has been rendered "wholly inoperative." Nothing in the Proposal eliminates the right to propose a statutory initiative. Article II, Section 9 remains in full force and effect as it was when adopted in 1963: citizen-led ballot proposals can initiate any law that the Legislature can enact. And like any law proposed by the Legislature, a statutory initiative must otherwise be constitutional. As such, reasonable laws on the place and manner of voting and elections that meet a compelling state interest would likely be valid under the Proposal provided that the laws did not unreasonably burden the fundamental right to vote. This is largely consistent with current law. *See e.g., Kishore v Whitmer,* 972 F3d 745 (CA 6, 2020). The Proposal would ensure that everyone in Michigan has the fundamental right to vote in the future.

F. The Proposal Does Not Wholly Eviscerate the Legislature's Authority to Make Court Rules.

DYV lastly argues that PTV22 was required to and failed to republished Article 6, Section 5, which deals with this Court's ability to establish court rules and the practice and procedure of lower courts. DYV claims without elaboration that Article 6, Section 5 would foreclose reasonable practices and procedures promulgated by this Court that have the effect of interfering with the fundamental right to vote, but it never explains how the Supreme Court's promulgation of rules governing practice and procedure could possibly do so. This is because the Proposal does no such thing and DYV appears to misunderstand both the Proposal and Article 2, Section 5.

The Proposal explicitly enshrines the fundamental right of qualified electors in Michigan to vote and provides that this right may not be substantively abridged or unreasonably burdened. This is a substantive right that would not implicate much less infringe upon this Court's authority under Article 6, Section 5 to prepare court rules to govern practice and procedure before the state's courts. The Michigan Court Rules remain in effect and untouched by the Proposal, including with respect to litigation arising out of the Proposal itself.

CONCLUSION

For the foregoing reasons and the reasons set forth in PTV22's Complaint, the Court should grant the relief requested in PTV22's Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(B) because, excluding the part of the document exempted, this merits reply brief contains 3,140 words.

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