STATE OF MICHIGAN
IN THE SUPREME COURT

REPRODUCTIVE FREEDOM FOR ALL, a Michigan ballot question committee, PETER BEVIER, an individual, and JIM LEDERER, an individual, Plaintiffs, v BOARD OF STATE CANVASSERS, JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his capacity as Director of Elections, Defendants.	Supreme Court Case No. 164760 THIS MATTER INVOLVES A CLAIM THAT A PROPOSED STATE GOVERNMENTAL ACTION IS INVALID Election matter – Plaintiffs have requested action by September 7, 2022

***AMICI CURIAE* BRIEF OF PROSECUTING ATTORNEYS SAVIT, LEYTON, SIEMON, GETTING, WIESE, MCDONALD, AND WORTHY IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR IMMEDIATE MANDAMUS RELIEF AND *EX PARTE* MOTION FOR ORDER TO SHOW CAUSE**

Eli Savit (P76528)
Victoria Burton-Harris (P78263)
P.O. Box 8645
Ann Arbor, Michigan, 48107
(734) 222-6620
savite@washtenaw.org

Jonathan B. Miller (*pro hac vice* to be submitted)
Michael Adame (*pro hac vice* to be submitted)
Public Rights Project
4096 Piedmont Avenue, #149
Oakland, CA 94611
(646) 831-6113
jon@publicrightsproject.org

Counsel for Eli Savit, Prosecuting Attorney, Washtenaw County

September 6, 2022

ADDITIONAL COUNSEL

Brian MacMillian (P73702)
Office of the Prosecuting Attorney-Civil Division
900 South Saginaw St., Suite 102
Flint, MI 48502

Counsel for David S. Leyton, Prosecuting Attorney, Genesee County

Bonnie G. Toskey (P30601)
Sarah K. Osburn (P55539)
Cohl, Stoker & Toskey, P.C.
601 N. Capitol Ave.
Lansing, MI 48933

Counsel for Carol Siemon, Prosecuting Attorney, Ingham County and Jeff S. Getting, Prosecuting Attorney, Kalamazoo County

Matthew J. Wiese (P40805)
Marquette County Prosecutor's Office
234 W. Baraga Avenue,
Marquette, MI 49855-4710

Prosecuting Attorney, Marquette County

Karen D. McDonald (P59083)
David W. Williams (P55611)
1200 North Telegraph Road
Pontiac, MI 48341

Melvin Butch Hollowell (P37834)
Angela L. Baldwin (P81565)
The Miller Law Firm
1001 Woodward, Ste. 850
Detroit, MI 48226

Counsel for Prosecuting Attorney Karen D. McDonald, Oakland County

Sue Hammoud (P64542)
Wayne County Corporation Counsel
500 Griswold, 30th Floor
Detroit, MI 48226

Counsel for Kym L. Worthy, Prosecuting Attorney, Wayne County

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1. Did the Defendants violate their clear legal duty to qualify and certify the Reproductive Freedom For All petition and ballot question to appear on the November 8, 2022 general election ballot when: (1) the form of the petition meets all the statutory requirements of MCL 168.482, and (2) the Reproductive Freedom For All petition collected more than the required number of valid signatures to propose a constitutional amendment to the electorate?

   Plaintiffs' answer: Yes

   Proposed *Amici Curiae* Prosecuting Attorneys' answer: Yes

   Proposed Intervenor-Defendant's answer: No

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici are the prosecuting attorneys of Washtenaw, Genesee, Ingham, Kalamazoo, Marquette, Oakland, and Wayne counties.[1] The combined population of our respective counties (4,388,068) constitutes 43% of Michigan's population (10,116,069). All of us serve counties which include at least one abortion provider.

In June, the United States Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). In the aftermath, chaos and confusion reigned regarding abortion's legality in Michigan. Michigan maintains an archaic law, dating back to 1846, which criminalizes abortion in virtually all circumstances. *See* MCL 750.14. That archaic law (as well as the direction charted by the United States Supreme Court in *Dobbs*) threatens the reproductive rights that many Michiganders long believed were sacrosanct.

Faced with these looming legal threats to their personal and intimate choices, Michigan residents mobilized. Over three-quarters of a million Michiganders—including hundreds of thousands of our residents—signed an amendatory constitutional petition proposed by Reproductive Freedom For All ("RFFA"). That petition seeks to amend the Michigan Constitution to expressly protect the right to pre-viability abortion, contraception, and other foundational reproductive rights. The 750,000-plus residents who signed the RFFA petition did so in the good-faith belief that their efforts would allow Michiganders to vote on the future of reproductive freedom in November.

Those democratic efforts were stymied, however, by two unelected members of the Board of State Canvassers (hereinafter the "Board"). Last week, the Board was charged with determining

[1] Pursuant to MCR 7.312(H)(4), *amici curiae* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici and their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

whether (1) the RFFA petition had garnered enough valid signatures to qualify it for the November ballot; and (2) the petition met the statutory requirements for a petition's "form." *See* MCL 168.482. But two of the Board's four members—Chairman Anthony Daunt and Member Richard Houskamp—voted against the RFFA amendment. Absent this Court's intervention, the Board's deadlock will render the RFFA amendment ineligible for the November ballot.

Crucially, the Board members who voted against the RFFA initiative did not do so for any statutorily defined reason. There was no question that the RFFA petition had garnered sufficient signatures. Nor was there any question that the circulated petition met every statutory element for a petition's "form." MCL 168.482. Instead, Chairman Daunt and Member Houskamp voted to keep the RFFA petition off the ballot because they subjectively believed that there was *not enough spacing between the words on the circulated petitions*.

In response, RFFA filed the instant case in this Court, seeking mandamus relief directing the Board to certify the proposed amendment for the November ballot. *Amici* urge this Court to grant the requested relief. Our specific interests in this case are threefold.

First, as the chief law-enforcement officers in our respective counties, we have an especial interest in ensuring enforcement of the "law as it is written."[2] *Layzell v. J.H. Somers Coal Co.*, 156 Mich. 268, 280, 120 N.W. 996, 998 (1909). Here, the "law as it is written" dictates that the RFFA amendment be placed on the ballot. The Board's authority to reject a ballot measure for "form" is limited by the text of MCL 168.482. That statute says *nothing* about the spacing between words on circulated petitions.

[2] *Unlike* the Board of State Canvassers (whose duties are ministerial, *see* Argument Part I, *infra*), prosecutors do have discretion, but in the course of our law-enforcement duties, even we may not go beyond what the Legislature has written. That principle applies *a fortiori* to the Board of State Canvassers' ministerial duties.

Second, as prosecutors, all of us understand that we are limited to the confines of our legal authority—and that we must apply the law clearly and fairly. Those same standards must apply to all government actors, including the Board of State Canvassers. The two Board members who voted against the RFFA amendment did so for ill-defined, vague, and subjective reasons. That is flatly inconsistent not just with our statutory scheme, but with the rule of law.

Third, in the course of our day-to-day work, we represent the People of the State of Michigan. Indeed, our authority derives from the People. *See* Mich. Const. Art. 1, § 1 ("all political power is inherent in the people."). If, *for subjective word-spacing reasons,* the People are denied their lawfully earned right to vote on what the law should be, it will erode public confidence in our government at a time where faith in those institutions already have been eroded.

That is particularly true given the importance of the issues presented by the RFFA petition. For a half-century—until the Supreme Court's decision in *Dobbs*—the right to an abortion had been protected under the U.S. Constitution. Faced with the potential criminalization of that heretofore protected right, Michiganders mobilized to secure lasting protection for their personal and intimate choices. If, Lucy-and-the-football style, the ability of Michiganders to chart their own reproductive choices is once again pulled away, it will significantly undermine public confidence in our democracy and our legal system.

Amici thus have a strong interest in the outcome of this case. We respectfully urge this Court to vindicate the People's foundational ability to decide for themselves what the law should be and to order the RFFA initiative placed on the November ballot.

ARGUMENT

Viewed one way, this is a case is about words, and the spaces between them. On a superficial level, this Court is asked to decide whether the Board may refuse to certify an

amendatory petition because two of its members subjectively dislike the spacing between words on circulated petitions. Less superficially, the question is whether the Board is bound by *words in our statutes*—which specify the form of amendatory petitions, MCL 168.482—or whether, instead, canvassers may engraft their own invented standards atop the words the Legislature enacted.

More fundamentally, though, this case is about people, and their authority to exercise power. The very first sentence of the Michigan Constitution provides that "[a]ll political power is inherent in the people." Mich. Const. Art. 1, § 1. Consistent with that principle, Michigan's Constitution reserves for the People the right to propose and adopt constitutional amendments. Art. 12, § 2. And this year—faced with an unprecedented threat to reproductive rights—an unprecedented number of Michiganders exercised their "inherent" political power to amend the constitution. RFFA turned in a record-shattering 753,759 petition signatures for its proposed ballot amendment. The RFFA coalition reported that its effort had been aided by 62,000 people who signed up to support RFFA.[3]

The State Board of Canvassers' refusal to place RFFA on the ballot violated the statutes that govern the Board's authority. But the Board's refusal to certify the amendment also threatens to disenfranchise hundreds of thousands of Michiganders. Were the Board's deadlock to stand, it would undermine the People's reserved democratic authority—and undercut faith in legal institutions. *See, e.g.*, *Stand Up for Democracy v. Sec'y of State*, 492 Mich. 588, 599; 822 N.W. 2d 159, 163 (2012) ("[T]he rule of law is implicated here because this issue concerns the constitutional foundation of how we govern ourselves."). At a moment when trust in many

[3] ACLU of Michigan, *Reproductive Freedom For All Turns In Record-Breaking 753,759 Signatures to Michigan Secretary of State to Qualify for the November 2022 Ballot* (July 11, 2022), *available at* https://www.aclumich.org/en/press-releases/reproductive-freedom-all-turns-record-breaking-753759-signatures-michigan-secretary.

democratic institutions is already at a nadir, subversion of the People's constitutionally reserved authority will make matters worse.

I. THE BOARD EXCEEDED ITS STATUTORY AUTHORITY AND THWARTED THE EXERCISE OF POPULAR WILL BY REJECTING THE PETITION.

The People of Michigan have retained the authority to propose and enact laws, including amendments to the constitution, through the initiative process. Mich. Const., Art. 12, § 2. Here, it is the will of hundreds of thousands of Michiganders that the proposed RFFA amendment appear on the general election ballot in November. The statutory requirements as to form for the Petition have been met and the requisite signatures have been gathered. *See* MCL 168.476. Nevertheless, the Board deadlocked and effectively rejected the Petition on grounds outside the statutory requirements. In doing so, the Board has exceeded its very limited authority, and subverted the authority of the People. As it has before, this Court must intervene and reject the Board's disregard of state law and allow the proposed RFFA amendment to go to the voters. *See, e.g.*, *Stand Up for Democracy*, 492 Mich. at 595; 822 N.W. 2d at 161.

A. The Board's Power is Ministerial and Circumscribed by Statute.

Under state law, the Board of State Canvassers' authority is limited and circumscribed. The Board is an unelected body that consists of two members nominated by the Democratic Party and two members nominated by the Republican Party. *See* Mich. Const. Art. 2, § 7. Consistent with its unelected nature—and with the Michigan Constitution's reservation of "political power" for "the people," *id.* at Art. 1, § 1—the Board has only circumscribed authority to reject a proposed ballot initiative. The Board's authority, which itself derives from the limited rule-making powers of the Legislature,[4] is ministerial in nature. Indeed, this Court has described the Board's responsibilities

[4] Earlier this year, this Court emphasized the limited authority of the *Legislature* in regulating the petition process. *See League of Women Voters of Michigan v Sec'y of State*, 508 Mich. 520; 975 N.W. 2d 840 (2022). As the Court explained: "'the principle that the Legislature may not unduly burden the self-executing constitutional procedure

as "limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Unlock Mich. v Bd. of State Canvassers*, 507 Mich. 1015; 961 N.W. 2d 211 (2021) (quoting *Stand Up for Democracy*, 492 Mich. at 618).

State law grants the Board the authority to certify (or reject) petitions based only on (1) the number of signatures collected, and (2) certain form requirements outlined specifically in MCL 168.482. *See, e.g.*, *Auto Club of Mich Comm for Lower Rates Now v Secretary of State*, 195 Mich. App. 613, 624; 491 N.W. 2d 269 (1992). All parties recognize that RFFA satisfied the statutory signature requirements: the RFFA coalition gathered a number of signatures that far exceeded *any* ballot measure in Michigan's history.[5] The RFFA petition also met the statutorily delineated form requirements. These requirements include the size of the paper, font size and content of the heading, and the requirements of the summary. *See* MCL 168.482. There are *no other* specifications as to form under Michigan law, including no requirement for the spacing between words, letters, or lines. As recognized by the Bureau of Elections in its August 26, 2022 Staff Report to the Board: "Michigan Election Law is silent on the amount of space that must be between letters and words in petitions."[6]

The Board's statutory mandate is thus relatively simple. Once the Bureau of Elections has confirmed that a petition has received the requisite signatures and has recommended certification of petition to the Board, the Board must review the petition against the statutorily mandated

applies equally to both' initiated legislation and initiated constitutional amendments." 508 Mich. at 549–50; 975 N.W. 2d at 857 (quoting *Ferency v. Sec'y of State*, 409 Mich 569, 591 n.10; 297 N.W. 2d 544, 549 (1980)).

[5] The Bureau of Elections determined that there were 596,379 valid signatures based on its sampling process of the 753,759 total signatures submitted. Bureau of Elections, State of Mich., Amended Staff Report: Reproductive Freedom For All at 5 (Aug. 26, 2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Staff-Reports/Staff-Report-Reproductive-Freedom-for-All.pdf?rev=01081b8e3d89482096d538c0b507b2dc&hash=B1BDCDA178ADB0B87E4E28AF06E1D431 (hereinafter, "Bureau of Elections RFFA Amended Staff Report").

[6] *Id.* at 4.

"checklist" in MCL 168.482 before officially adding the petition to the ballot. The Board's is a straightforward and ministerial review.

B. The Board Exceeded its Ministerial Duty by Rejecting the Petition.

In failing to certify the RFFA petition, the Board exceeded its authority. The Board divided along party lines. Democratic-appointed Vice-Chair Mary Ellen Gurewitz and Member Jeannette Bradshaw voted to certify the petition; Republican-appointed Chairman Anthony Daunt and Member Richard Houskamp voted against certification. Board of State Canvassers Meeting, Aug. 31, 2022, Transcript at 252:11–12 (hereinafter "Board Tr."). Chairman Daunt and Member Houskamp cited the petition's purportedly "missing" spacing between words—which they believed resulted in typographical errors—as their reasons for denying certification. *Id.* at 232:21–233:5; 234:11–23; 242:12–20. But Michigan Election Law nowhere mentions required "spacing between words" on a circulated petition. And it certainly does not permit the Board to reject a petition because of insufficient spacing. The entire relevant section provides: "The full text of the amendment so proposed must follow the summary and be printed in 8-point type." MCL 168.482(3). There is no dispute that the full text was provided and that it was printed in 8-point font.[7] The RFFA petition should therefore have been certified.

In any event, notwithstanding that concerns about word spacing are not valid grounds to reject a petition, the alleged spacing issues are ultimately of limited (if any) consequence. That is true for at least four reasons:

[7] RFFA's petition was not the only ballot measure that Republican board members refused to certify on August 31 based on their substantive issues with the proposal rather than their legal authority. At the same meeting, Republican Board members—again grounding their opposition on a challenge to the proposal's substance rather than its form—voted against certifying a proposal to expand voting rights in Michigan, notwithstanding the fact that the Bureau of Elections found that the petition satisfied the statutory and signature requirements and recommended that it be certified. *See* Board Tr. at 132–33; 180–85.

First, the RFFA petition was reviewed and approved. The Bureau of Elections issued conditional approval of RFFA's initial petition on March 23, 2022, pending the removal of a single extraneous word from the Petition. Pursuant to its statutory obligation, *see* MCL 168.43a, RFFA filed with the Secretary of State a revised petition that resolved the condition on March 30, 2022. RFFA Complaint ¶¶ 15–16. The official electronic version of the revised petition filed with the Secretary of State contained none of the alleged spacing issues. *See* RFFA Complaint, App'x E.

Second, the record is unrefuted that there was, in fact, spacing between all of the words on the circulated petitions. The printed version of the petition that was submitted to voters for signatures looked slightly different than the official version that was filed with the Secretary of State as it included "kerning," a well-known and standard printing process used to minimize but not eliminate spaces in proportional font. According to RFFA's printer, when conducting the normal kerning process, the printer mistakenly minimized, *but did not eliminate*, the spaces between certain words in the version circulated before voters. *See* RFFA Complaint, App'x I. In fact, Proposed Intervenor-Defendant Citizens to Support MI Women and Children fails to dispute the record evidence. Proposed Intervenor-Defendant nowhere addresses the fact that spaces are visible if words are copied and pasted from the version circulated to voters or that spaces are unambiguous in the electronic version filed with the Secretary of State.

Third, the "kerning" issues on the circulated petitions will have no bearing on what voters will be asked to decide—or the words that will ultimately be placed in the Michigan Constitution if the ballot initiative is successful. The Board has already conditionally approved ballot language to be placed before the voters if the RFFA proposal makes the ballot. *See* RFFA Complaint ¶ 34. And the actual text of the constitutional amendment will reflect the official version of the

amendment that was filed with the Secretary of State. MCL 168.483a. On that version, spaces are unambiguously visible. *See* RFFA Complaint, App'x E.

Fourth, and finally, over 750,000 Michiganders able to interpret and sign the Petition as it was presented to them despite any supposed kerning concerns. RFFA Complaint ¶ 18. It beggars belief that the purported spacing issues left any Michigan resident confused as to what the RFFA petition was meant to accomplish. Indeed, the group challenging the RFFA petition has not identified a single person who signed the petition and was confused as a result of the spacing concerns. And even if anyone was confused, they had a simple remedy: they could opt not to sign.

Disregarding all of this—and jettisoning their expressly circumscribed authority over the petition's "form," MCL 168.482—Chairman Daunt and Member Houskamp voted to reject the RFFA petition because they subjectively disliked how the spacing on circulated petitions *looked*. That is not hyperbole; Chairman Daunt said as much. Expressing his view that the spacing issues constituted a "form" issue, Chairman Daunt noted: "[I]t's a form issue *because it's how it looks*, It's what's before the people, it's what is their understanding of it." Board Tr. at 241:2–4. But that is not the law. The law specifically provides the elements the Board may consider when determining whether a petition meets the "form" requirements. MCL 168.482. Neither spacing between words, nor "how it looks," is an element in the statute.

Seeking to preserve the Board's deadlock, Proposed Intervenor-Defendant asserts that certain spacing requirements are "reasonably implied" by MCL 168.482. Citing a treatise on statutory construction (but no cases from this State), Proposed Intervenor-Defendant asserts that those newly discovered "implied" spacing requirements means the RFFA initiative should be kept away from voters. Proposed Intervenor-Defendant Br. at 20. That argument, however, runs headlong into "a long line of cases in which the Michigan courts have actively protected and

enhanced the initiative and referendum power." *Ferency*, 409 Mich. at 602, 297 N.W.2d at 558. As this Court has said before, the People's exercise of their reserved power to amend the Constitution "should be facilitated rather than restricted." *Id.*; *see also Amicus Curiae* Brief of Professors Caminker, Deacon, Erman, Katz, Litman, & Mendelson at 1–6. Giving unelected canvassers the ability to discover "implied" petition requirements in MCL 168.42—and thereby keep a valid proposal off the ballot—would undercut the People's inherent power to amend their Constitution.

And the potential for mischief is pronounced. Today, two unelected Board members have rejected a valid ballot proposal because they believe that there was not sufficient spacing on circulated petitions. Tomorrow, some might determine MCL 168.42 impliedly precludes too *much* spacing. Or that it impliedly requires two spaces, not one, between sentences. Or that it impliedly imposes line-spacing requirements, printing in a darker font, or any other number of atextual conditions. Allowing partisan-appointed canvassers to engage in a free-ranging analysis of "how a petition looks" *see* Board Tr. at 241:2–4, is inconsistent with the Board's circumscribed statutory duties. And that proposed standard threatens not just this ballot initiative, but the broader exercise of direct democracy in this State.

In short, then, the People's amendatory power has been stymied by two Board members' disregard for their statutorily mandated role—and their invention of a vague, undefined, extralegal standard for how a petition "looks." Chairman Daunt and Member Houskamp voted against placing the RFFA initiative on the November ballot because (in their view) there was insufficient space between certain words on one version of the Petition. They did this despite being well aware that these ultimately minor kerning issues would have no bearing on the question placed before

voters, or the text placed in the Constitution. In failing to certify the Petition, the Board exceeded its statutory role and failed to follow the law. This Court must correct this clear error.

II. REVERSAL OF THE BOARD'S DECISION IS NEEDED TO MAINTAIN TRUST IN OUR DEMOCRATIC INSTITUTIONS AND LEGAL SYSTEM.

Beneath this seemingly picayune dispute about spacing, however, are more foundational issues. As prosecutors, we enforce the laws. In so doing, we represent the People of the State of Michigan. Our representation of "the People" is far from hortatory. In Michigan, as in "every state in the Union," it is "the people" who are "the source of political power." *Duncan v. McCall*, 139 U.S. 449, 461 (1891); *see also* Mich. Const. Art. 1, § 1; *In re Spangler*, 11 Mich. 298, 308 (1863) ("According to the theory of our government, the sovereign power is in the people.") Our enforcement of the law is "legitimate" only because those laws "may be said to be *those of the people themselves*." *Duncan,* 139 U.S. at 461 (emphasis added). And it would significantly undermine that perceived legitimacy—and further erode trust in our governmental system—if the People's proposed RFFA amendment were kept off the ballot.

A. Denying the People an Opportunity to Vote on the RFFA Petition Will Further Erode Faith in Government and the Legal System.

Like other states, Michigan maintains a constitutional initiative process so that, in exceptional circumstances, the People may "correct[ ] sins of omission" by their representatives, *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 794 (2015) (hereinafter, "*Arizona*")—and decide for themselves the laws that govern them. In 2022, the People of the State of Michigan exercised that power in unprecedented numbers.

This year, over 750,000 people signed petitions to place the RFFA amendment before Michigan voters. *See* Bureau of Elections RFFA Amended Staff Report at 1. They did so largely as a last-ditch effort to correct their representatives' "sins of omission," *Arizona*, 576 U.S. at 794,

and to ensure that Michiganders retain the fundamental right to abortion. Frustrated by the U.S. Supreme Court's decision in *Dobbs*—and the Legislature's refusal to amend or eliminate archaic statutes criminalizing abortion—the People of Michigan exercised the power reserved to them in the Constitution to decide for themselves what the law should be. *See* Mich. Const. Art. 1, § 1; Art. 12, § 2.

Not coincidentally, the People's record participation in the constitutional initiative process came against the backdrop of record-low levels of public confidence in government. The number of Americans who trust the government generally is at historic lows.[8] According to Gallup, the percentage of Americans expressing faith in institutions like Congress and the Presidency is lower than ever before.[9] The U.S. Supreme Court's decision in *Dobbs* has apparently accelerated those trends, and focused distrust of the judiciary specifically. In June, Gallup recorded the lowest-ever results when it comes to public confidence in the U.S. Supreme Court.[10] A September *Pew* report confirmed that Americans' ratings of the U.S. Supreme Court are now as negative as, and more politically polarized than, at any point in the last three decades.[11] Michigan is no exception to these national trends. In Michigan, approval of the U.S. Supreme Court remains low (about 35.9%, according to a recent poll), and the institution is increasingly viewed as a political body like the other branches of the federal government.[12]

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[8] Gallup, *Confidence in Institutions,* https://news.gallup.com/poll/1597/confidence-institutions.aspx.

[9] *Id*.

[10] Jeffrey Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, Gallup, (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

[11] *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, Pew Rsch. Ctr., (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/.

[12] Ken Haddad, *Poll: Where Michigan Voters Stand on Abortion Ruling, Contraception, SCOTUS Job Approval*, Click On Detroit, (July 12, 2022), https://www.clickondetroit.com/news/michigan/2022/07/12/poll-where-michigan-voters-stand-on-abortion-ruling-contraception-scotus-job-approval/ (59.7% of voters said the U.S. Supreme Court makes political decisions compared to 26.4% that make decisions based on sound legal reasoning).

If the People's will were to be discarded due to the subjective spacing preferences of two unelected canvassers, it would further undermine faith the People's faith in our government. That loss of faith threatens broader repercussions for the justice system as a whole. And these legitimacy concerns go far beyond the laws that would be superseded by the RFFA amendment. That is so because Americans' faith in our justice system largely tracks their faith in governmental institutions as a whole. Indeed, consistent with the lack of faith people now express in the broader government, Gallup reports that trust in the criminal-justice system is also at record lows—and falling.[13]

As elected prosecutors, our work rises and falls with the legitimacy of the legal system. Prosecutors rely on members of the community to report crimes and participate in the judicial process. Absent that trust, community members are less likely to report crimes or participate in judicial process, such as by serving as witnesses.[14] Loss of trust in our government thus not only threatens our legal system's legitimacy. It also threatens public safety.

Our legal system, in short, "depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015). And the perceived legitimacy of our governmental legal systems is squarely at issue in this case. If, *for subjective, extralegal font-spacing reasons*, the People are denied their lawfully earned right to vote on what the law should be, it will erode public confidence in our legal system at a time where faith in those institutions is already at a nadir.

[13] Gallup, *supra* note 8.

[14] Thomas C. O'Brien, et. al, *Rebuilding Trust between Police & Communities Through Procedural Justice & Reconciliation*, 5 Behav. Sci. & Pol'y 35 (2019).

B. The Crucial Importance of Reproductive Rights to Many Michiganders Renders it Particularly Important, for Legitimacy's Sake, that the RFFA Petition be Placed on the Ballot.

The legitimacy and public-faith concerns posed by this case are only heightened by the subject-matter of the RFFA petition itself. Of course, there is no need for this Court to engage in abortion-exceptionalism to decide this matter. As emphasized, Chairman Daunt and Member Houskamp plainly exceeded their statutory authority when they refused to certify the RFFA petition due to extralegal "spacing" concerns. That is enough for this Court to decide this case, and to order the RFFA proposal placed on the ballot.

That said—given the democratic-legitimacy concerns in this case—the gravity of the threat to reproductive freedom that Michiganders now face bears emphasis. RFFA's record-shattering levels of support, after all, is no accident. In the aftermath of the U.S. Supreme Court's decision in *Dobbs,* an archaic Michigan law criminalizing abortion threatened to spring back into effect. *See* MCL 750.14. That draconian law, last codified in 1931, dates back to 1846. It contains no exceptions for rape or incest. It would criminalize the provision of abortion in circumstances like those that shocked the nation's conscience in the weeks since *Roe* was overturned. By way of example: Because Michigan's anti-abortion law contains no exception for rape, it would unambiguously criminalize an abortion provided to a 10-year-old victim of sexual assault.[15]

What is more, the law contains only a vague, ill-defined, and never-interpreted exception that allows abortion when "necessary to preserve the life of [a pregnant] woman." MCL 750.14. Today's doctors, however, have little idea what that 19th-century exception means. They have expressed concern that it could prohibit them from providing modern, life-saving medical

[15] *See* Megan Messerly and Adam Wren, *National Right to Life Official: 10-Year-Old Should Have Had Baby,* Politico (Jul. 14, 2022), *available at* https://www.politico.com/news/2022/07/14/anti-abotion-10-year-old-ohio-00045843.

treatment—including (for example) where termination of a pregnancy is needed treat a life-threatening cancer.[16]

The impact of *Dobbs* may not be limited to abortion, either. Across the state, many have expressed concern that Michigan's anti-abortion law could be interpreted to criminalize modern reproductive options like *in vitro* fertilization.[17] What is more, Justice Thomas's concurring opinion in *Dobbs* suggests that the U.S. Supreme Court should next reconsider foundational decisions protecting the right to contraception. 142 S. Ct. at 2301 (THOMAS, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*."). That is no empty threat. Already, in light of Justice Thomas's concurrence, the U.S. Congress has taken steps to try to sure up other substantive due process rights, including marriage equality. *See* H.R. 8404, Respect for Marriage Act, https://www.congress.gov/bill/117th-congress/house-bill/8404.

Faced with these looming issues, it is small wonder that so many Michiganders supported the RFFA petition drive. Many Michigan residents have ordered their lives on the assumption that abortion, contraception, *in vitro* fertilization, and other intimate choices would remain legally protected. With the proverbial rug pulled out from under them—and with the looming specter of criminalization on the horizon—Michiganders mobilized to exercise their "inherent" political power to amend our Constitution. *See* Mich Const. Art. 1, § 1; Art. 12, § 2. In doing so, Michiganders followed the direction of the U.S. Supreme Court: *Dobbs* explicitly purported to return the "authority to regulate abortion . . . to the people." 142 S. Ct. at 2279. By presenting

[16] *See, e.g.*, Lisa Harris, *Navigating Loss of Abortion Services — A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, New Eng. J. Med. (May 11, 2022), https://www.nejm.org/doi/full/10.1056/NEJMp2206246.

[17] Ellen Shanna Knoppow, *If Abortion Is Banned in Michigan, Is IVF Next?*, Pride Source (Jul. 5, 2022), https://pridesource.com/article/if-abortion-is-banned-in-michigan-is-ivf-next/.

Michiganders with the opportunity to put abortion rights to a popular vote, the Petition seeks to do just that.

Of course, this Court is not being asked to decide whether the RFFA amendment is good policy. Suffice it to say, however, these issues are of paramount importance to many Michiganders—and women in particular. Following the *Dobbs* leak and during the Petition signature drive, there was a significant surge in new voter registration by women as compared to registration by men, underlining the saliency of this issue to many Michiganders.[18] Given that saliency, it would only further undermine the People's faith in the law and in our government if they were denied an opportunity to vote on the RFFA amendment. And the People certainly should not be denied their opportunity to vote because of the subjective spacing preferences of two unelected canvassers.

***

In overruling *Roe,* the U.S. Supreme Court assured Americans—and women in particular—that they retained political power to shape state law on abortion. "Our decision," the Court emphasized in *Dobbs*, "allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office." *Dobbs*, 142 S. Ct. at 2277. "Women," the Court reiterated, "are not without electoral or political power." *Id.*

Frightened, outraged, and motivated by the potential criminalization of reproductive rights, over 750,000 Michiganders accepted the Court's invitation to engage in the political process. They signed and circulated RFFA petitions. They "influenc[ed] public opinion." *Id.* And they did so in

[18] Jon King, *Analysis: Reproductive Rights Firing up Women Voter Registration in Michigan and Wisconsin*, Mich. Advance (Aug. 29, 2022), https://michiganadvance.com/blog/analysis-reproductive-rights-firing-up-women-voter-registration-in-michigan-and-wisconsin/.

expectation that their efforts would allow the People to exercise their ultimate "political power": "voting" on what the law should be. *Id*.

Those 750,000 Michiganders signed a petition that met *every* legal requirement for size, form, and content. *See* MCL 168.482. That is enough to decide this case. Like any other petition that meets the legislatively imposed requirements, the proposed RFFA amendment should be placed on the ballot.

But the broader picture should not be ignored. The decision when, whether, and with whom to bear a child is one of the most personal and intimate choices any person will ever make. Faced with the prospect that those choices could soon be criminalized, countless Michiganders—women and others alike—channeled their fear, pain, and anger into the RFFA petition drive. If women truly "are not without electoral or political power," *Dobbs*, 142 U.S. at 2277, they (and all Michiganders) deserve their lawfully secured opportunity to vote on the RFFA amendment. Their efforts certainly should not be stymied by new, extralegal petition "requirements" invented by two unelected men on the Board of Canvassers.

We are, after all, "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. State 137, 163 (1803).

CONCLUSION

For the foregoing reasons, this Court should compel the Board to follow its clear legal duty and certify the RFFA Petition for the November ballot.

Respectfully submitted,

DATED: September 6, 2022

/s/ Eli Savit
Eli Savit
Victoria M. Burton-Harris

/s/ Jonathan B. Miller
Jonathan B. Miller
Michael Adame
Public Rights Project

Counsel for Eli Savit, Prosecuting Attorney, Washtenaw County

DATED: September 6, 2022

/s/ Brian MacMillan
Brian MacMillan
Office of the Prosecuting Attorney-
Civil Division

Counsel for David S. Leyton, Prosecuting Attorney, Genesee County

DATED: September 6, 2022

/s/ Bonnie G. Toskey
Bonnie G. Toskey
Sarah K. Osburn
Cohl, Stoker, & Toskey, P.C

Counsel for Carol Siemon, Prosecuting Attorney, Ingham County and Jeff S. Getting, Prosecuting Attorney, Kalamazoo County

DATED: September 6, 2022

/s/ Matthew J. Wiese
Matthew J. Wiese

Prosecuting Attorney, Marquette County

DATED: September 6, 2022

/s/ Karen D. McDonald
Karen D. McDonald

Prosecuting Attorney, Oakland County

DATED: September 6, 2022

/s/ Sue Hammoud
Sue Hammoud
Wayne County Corporation Counsel

Counsel for Kym L. Worthy, Prosecuting Attorney, Wayne County

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This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(B) because, excluding the parts of the document exempted, this amicus brief contains 5,312 words.

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/s/ Eli Savit
Eli Savit
Prosecuting Attorney
Washtenaw County

CERTIFICATE OF SERVICE

I, Eli Savit, hereby affirm that on the date stated below I delivered a copy of Prosecuting Attorneys Savit, Leyton, Siemon, Getting, Wiese, McDonald and Worthy's *Amici Curiae* Brief in Support of Plaintiffs' Complaint for Immediate Mandamus Relief and *Ex Parte* Motion for Order to Show Cause via the Court's MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: September 6, 2022

/s/ Eli Savit
Eli Savit
Prosecuting Attorney
Washtenaw County