

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,

Supreme Court Case No. 164760

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.

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

**THIS IS AN ELECTION MATTER,
ACTION IS REQUESTED BY
SEPTEMBER 7, 2022**

Steven C. Liedel (P58852)
Courtney Flynn Kissel (P74179)
Olivia R.C.A. Flower (P84518)
DYKEMA GOSSETT PLLC
201 Townsend St., Suite 900
Lansing, MI 48933
(517) 374-9100
sliedel@dykema.com
ckissel@dykema.com
oflower@dykema.com
*Attorneys for Plaintiffs Reproductive
Freedom For All, Peter Bevier and Jim
Lederer*

Heather S. Meingast (P55439)
Erik Grill (P64713)
Assistant Attorneys General
DEPARTMENT OF ATTORNEY
GENERAL
PO Box 30736
Lansing, MI 48909
(517) 335-7659
meingasth@michigan.gov
grille@michigan.gov
*Attorneys for Defendants Secretary Benson and
Director Brater*

Bryan W. Beach (P69681)
Assistant Attorney General
DEPARTMENT OF ATTORNEY
GENERAL
PO Box 30736
Lansing, MI 48909
(517) 335-7659
beachb@michigan.gov
*Attorney for Defendant Board of State
Canvassers*

DYKEMA GOSSETT PLLC - Capitol View, 201 Townsend Street, Suite 900, Lansing, Michigan 48933

Eric E. Doster (P41782)
DOSTER LAW OFFICES, PLLC
2145 Commons Parkway
Okemos, MI 48864
(517) 977-0147
eric@ericdoster.com

Michael F. Smith (P49472)
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Avenue N.W.
Suite 1025
Washington, D.C. 20006
(202) 454-2860
smith@smithpllc.com

John J. Bursch (P57679)
BURSCH LAW PLLC
9339 Cherry Valley Ave. SE
Unit 78
Caledonia, MI 49316
jbursch@burschlaw.com
(616) 450-4235
*Counsel for Proposed Intervening Defendant
Citizens to Support MI Women and
Children*

**REPRODUCTIVE FREEDOM FOR ALL'S
REPLY TO CITIZENS TO SUPPORT MI WOMEN AND CHILDREN'S
BRIEF IN OPPOSITION TO COMPLAINT**

***** EXPEDITED DECISION BY SEPTEMBER 7, 2022 REQUESTED*****

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Citizens to Support MI Women and Children (“WAC”) filed a motion¹ to intervene on September 2, 2022. Because WAC’s arguments are without merit and its interests are adequately represented by counsel for the Board of State Canvassers (the “Board”), Plaintiffs in this case oppose WAC’s motion to intervene. On September 5, 2022, WAC filed a Brief in Opposition to Complaint for Immediate Mandamus Relief and *Ex Parte* Motion for Order to Show Cause. Because this matter is an elections case under significant time constraints, Reproductive Freedom for All files only this Reply to WAC’s Brief in Opposition.

INTRODUCTION

It is unclear what WAC means when it declares that “Michigan is under enough political stress.” (WAC Brief at 2.) Michigan’s 1963 Constitution does not limit the People’s right to exercise direct democracy only when convenient. See *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 536; 975 NW2d 840 (2022). As the supporters, organizers, circulators, and signers of the Reproductive Freedom for All (“RFFA”) petition can attest, direct democracy is hard-fought. Even—to use WAC’s language describing the substance of the petition—in regards to the “hottest of hot-button issues”, the People have “reserved certain powers to themselves” including “the right to amend the Constitution by petition and popular vote.” *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763, 772; 822 NW2d 534 (2012).

The Board’s role is simply to examine the form of a petition for compliance with the Michigan Election Law and to canvass the petition to determine whether it garnered the required number of signatures. *Unlock Mich v Bd of State Canvassers*, 507 Mich 1015; 961 NW2d 211 (2021). After failing to challenge the validity of a single signature before the Board, WAC now argues that the uneven spacing between certain words in the proposed constitutional amendment “means that it gathered zero valid signatures.” (WAC Brief at 33.) WAC confuses the requirements of the Michigan Election Law. RFFA was only required to submit the petition to the Secretary of State prior to circulation. MCL 168.48a. RFFA did so on March 30, 2022. RFFA submitted the required

¹ WAC filed a motion to intervene in this matter without filing an accompanying pleading stating the claim for which intervention is sought, as required by MCR 2.209(C). While it is within the Court’s discretion to permit WAC to intervene if justice requires, *SNB Bank & Trust v Kensey*, 145 Mich App 765, 772-773; 378 NW2d 594 (1985), the Board is represented by individual counsel from the Department of Attorney General. With the constitutional deadline to certify all matters for the November 8, 2022 general election ballot approaching, the Court should proceed with this matter on an expedited basis. WAC’s positions in this matter are well documented in the record provided to this Court.

number of valid signatures and this is supported by the report of Elections Bureau staff. (August 26, 2022 Amended Staff Report, Vol I, App'x J, at 228.)

WAC also wrongly claims that RFFA's petition fails to comply with statutory petition form requirements. First, WAC alleges that RFFA did not include the full text of its proposed constitutional amendment in its petition form (RFFA did). WAC argues that there is a legal distinction between the petitions submitted to the Secretary of State. (WAC's Brief at 32.) The only distinction between the March 7 petition and the March 30 petition is the removal of the word "the" on the face of the petition as requested by the Board at its March 23rd meeting. As observed by the Bureau in its Amend Staff Report, the RFFA petitions include the "same letters, arranged in the same order[.]" Smaller spacing between the letters has no legal impact on the content or substance of the proposal because, as Amicus and RFFA have demonstrated, the electronic proof definitively shows that the spaces between the words are included. (Professors' Amicus at 14; RFFA Complaint at 17.) Most of the support for WAC's "full text" argument relies on examples where petition sheets were mutilated or on case law that is otherwise irrelevant.

WAC also newly claims that the *spaces* on the petition do not satisfy the 8-point type requirement of MCL 168.482. (See WAC Brief at 19-20.) A space, by its very nature, is the absence of type and cannot be *printed*. "Type" is defined as "printed letters."² Spaces vary based on typographic alignment, font, and kerning. The Legislature did not impose a spacing requirement in MCL 168.482. Both WAC and the Board are foreclosed from creating one. See *Raise the Wage MI*, __ Mich __; 970 NW2d 677 (2022) (declining to extend type-size requirements beyond the actual type appearing on the petition).

This is not WAC's first attempt to disqualify the entirety of the RFFA petition—it is not even the second attempt. This case comes to the Court as WAC's *third* attempt to invalidate the exercise of a constitutional right based on offbeat and strained interpretations not based on the plain text of the Michigan Election Law. This Court can end these continued efforts by granting mandamus and ordering the certification of the RFFA proposal to appear on the November 8, 2022 general election ballot with the language drafted by the Director of Elections and approved at the August 31, 2022 meeting of the Board. (Vol II, App'x O, at 311.) Efforts to disenfranchise over seven hundred and fifty thousand voters should not stand.

² Merriam-Webster, *Type*, available at <<https://www.merriam-webster.com/dictionary/type>> (accessed September 5, 2022).

ARGUMENT

I. **RFFA Satisfied Both the Signature Number Requirements and the Petition Form Requirements under the Constitution and the Michigan Election Law.**

The Board “has no inherent power.” *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004) The Legislature has delegated the Board the limited tasks of counting signatures and checking petition forms. *Id.* There is no valid challenge to the number of signatures collected by RFFA. WAC failed to challenge the validity of a single signature and its new position that RFFA filed zero valid signatures confuses the optional pre-circulation approval as to form described in the Secretary of State’s petition handbook³ with the pre-circulation filing requirement in MCL 168.483a. Chairman Daunt’s assertion that “we did not approve what was circulated” is belied by the actual record in this case, WAC Challenge, March 23, 2022 Meeting Tr. at 52-53 App’x C, at 68, and the fact that Board approval is not provided for by statute. RFFA submitted its revised petition to the Secretary of State on March 30, 2022, prior to circulation. Thus, there is no colorable challenge to the number of signatures collected. WAC’s only remaining challenge is to the form of the RFFA petition.

In the context of Constitutional amendments, this Court says that “the constitutional division of powers mandates that the courts not interfere with legislative action by fabricating standards not constitutionally required.” See *Advisory Opinion on Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 469 (1973) (cleaned up), questioned on other grounds in *Williams v Payne*, 131 Mich App 403; 346 NW2d 564 (1984). If the Court denies mandamus relief, it would sanction the Board’s fabrication of standards beyond those imposed by the Legislature.

A. **WAC’s interpretation of the “full text” argument is misleading and relies primarily on inapplicable case law and irrelevant examples.**

The full text argument proposed by WAC is wholly fabricated to bootstrap its substantive challenge into a challenge to the petition form. The Secure MI Vote example cited by WAC is entirely inapplicable here. (WAC Challenge at 11.) There are no “typos” in the text of the proposal, there are no additional letters or symbols that are included in error. Furthermore, nothing in the example cited by WAC indicates that: (1) the petition at issue failed to comply with the statutory

³ Department of State, *Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition* (Feb 2022), available at https://www.michigan.gov/-/media/Project/Websites/sos/08delrio/Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca (accessed September 6, 2022).

requirements for the form of the petition, or (2) that the Board exercised statutory authority when it suggested a revised petition. As the transcript demonstrates, the Secure MI Vote petition was *withdrawn* by advocates, not acted on by the Board as a body. There also was an “issue with the printer’s affidavit” for that petition, which “had the name of the ballot proposal incorrect.” (August 31, 2022 Meeting Transcript, Vol. II, App’x P, at 558, lns 9-22.) This example is not relevant here.

Finally, the primary case relied upon by WAC, *Michigan Campaign for New Drug Policies v Bd of State Canvassers*, unpublished order of the Court of Appeals in Case No. 243506 (Sept. 6, 2002), is not only inapplicable but also unpublished and therefore not binding to the instant matter. *Michigan Campaign* dealt with an attempt to amend the Constitution by attempting to add a new section identified as Article 1, Section 24. But, there was already an existing Article 1, Section 24. The Board rejected the petition and found that the actual amendment citation in the petition was controlling and therefore required the petition to be rejected. Here, there is no such error. There is not an existing provision of the Michigan Constitution that shares the new section number proposed by RFFA. There is nothing for the Secretary of State to “cure” here because there is no error. The electronic version of the RFFA petition provided to the Secretary of State plainly includes text in a PDF format with spaces included. The full text of the actual amendment language is included on the petition and is complete in compliance with MCL 168.482. No substitution of new provisions for an existing constitutional provision are proposed. *Michigan Campaign* is not applicable.

WAC claims to have “timely” submitted its supplemental challenge to the RFFA petition, and that its second response was “so destructive” that RFFA withheld it from the Court. (WAC Brief at 7.) This is not true. WAC submitted its second challenge 11 days after the challenge deadline elapsed. (WAC Brief at Tab 2 at 3-4.) Nonetheless, RFFA responded. The only party that referenced WAC’s supplement at the August 31, 2022 meeting was WAC. It is apparent from the record that the supplemental challenge was untimely and regurgitates WAC’s existing arguments.

WAC attempts to argue that because RFFA did not challenge the Board’s ruling on mutilated petition sheets, that it is incongruent that the “full text” of the proposed amendment is included in the RFFA petition. (WAC Brief at 29-30.) This does not make sense. RFFA, having collected hundreds of thousands of signatures more than required (and not facing a challenge to the validity of its signatures), had no need to attempt to rehabilitate mutilated petition sheets. This

inaction does not make the form requirements of MCL 168.482 any different in scope. All of the letters, words, and spaces, are present on all of the RFFA petition sheets that staff counted as valid.

B. A space is the absence of type. WAC’s new argument that a space must conform to a typeface requirements is unsupported.

The Court starts any statutory analysis with the actual text of the law in question. The provision applicable in this case, MCL 168.482(3), provides that “[t]he full text of the amendment so proposed must follow the summary and be printed in 8-point type.” MCL 168.482(3). The Michigan Election Law does not define “type”. When assessing the plain meaning of a term, a court may consult dictionaries to ascertain the meaning of an undefined word. *Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 495; 948 NW2d 452 (2019). According to Merriam-Webster’s dictionary, type means “printed letters.”⁴ By contrast, while it is not used in the Michigan Election Law, a “space” is “a blank area separating words or lines.”⁵ WAC admits that “of course there are [spaces in the RFFA petition]—otherwise each line of letters would be a bar of near-solid black.” (WAC Brief at 20.) WAC simply does not like where the spaces are and how big they are with respect to various letters in the petition. This subjective eye test is immaterial. The Board cannot go beyond its statutory authority. *Raise the Wage MI*, __ Mich __; 970 NW2d 677 (2022).

The Court should not be swayed by WAC’s absurd “slippery slope” arguments. None of the language was printed upside-down, backwards, or randomized. (WAC Brief at 21.) A ruling in RFFA’s favor would not extend to circumstances beyond the legal and factual posture presented here to the Court. The RFFA petition, as a result of all-capitalized words and justified type-alignment appears to contain smaller spaces in four lines of the petition than in the remainder of the petition. There is no law mandating denial of certification of a petition for this reason.

C. WAC’s request for adoption of an arbitrary standard for petition form compliance should be rejected.

WAC fundamentally advocates for an entirely new standard for compliance with petition form requirements in Michigan. Until 2012, a petition form was required to only *substantially* comply with petition form requirements, and courts would “liberally” construe constitutional and statutory initiative and referendum provisions “to facilitate rather than hamper the exercise of the

⁴ Merriam-Webster, *Type*, available at <<https://www.merriam-webster.com/dictionary/type>> (accessed September 5, 2022).

⁵ Merriam-Webster, *Space*, available at <<https://www.merriam-webster.com/dictionary/space>> (accessed September 5, 2022).

people of these reserved rights.” See, e.g., *Newsome v Riley*, 69 Mich App 725, 729; 245 NW2d 374 (1976). In 2012, this Court announced a new standard for petition form requirements. *Stand Up For Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012).⁶ In *Stand Up*, this Court found that it was the “Legislature’s intent that petitions *strictly* conform to the requirements of MCL 168.482.” *Id.* at 606 (emphasis added). If the Court declines to order mandamus requiring certification of the RFFA petition, it would implicitly establish a new standard for petition form requirements—the Board may decline to certify a petition for *any* deficiency it finds *anywhere* on a petition (including the substance of a petition) based on its sole and exclusive discretion, *even when* that petition strictly conforms with the express requirements of MCL 168.482. RFFA, the Secretary of State, the Director of Elections, and numerous *amici* in this case argue that the Board does not possess such vast and unchecked power. Failing to order mandamus in this case would sanction an unknowable standard for petition form compliance—not strict compliance, not substantial compliance, but *arbitrary* compliance.

II. The Right of the People to Petition to Amend the Constitution Should be Jealously Guarded.

The spacing concern raised by two members of the Board to justify their failure to certify the RFFA petition is a pretense. It is a pretense without statutory basis apparently used to prevent an important issue of public policy from reach the voters as the Constitution intends. The Board’s duties are ministerial, limited in scope, and clearly defined in state law. See *Unlock Mich*, 507 Mich at 1015. The Board is not the gatekeeper of the People’s constitutional right to petition the government. The Board simply exercises the duties imposed on it by the Legislature. But, even the Legislature has only limited authority to constrain the People’s right to petition. *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 549-551; 975 NW2d 840 (2022) (“the Legislature may not unduly burden the self-executing constitutional procedure” to amend the constitution). Under the Constitution, the Legislature can make laws regarding the form of petition and the manner in which the validity and sufficiency of a petition is canvassed. Const 1963, art 12, § 2. The Legislature has defined the form of petition in MCL 168.482. The objecting Board members did not cite a single applicable provision of law justifying its failure to certify the RFFA petition at the meeting. Any doubtful exercise of the Board’s authority must be construed in favor

⁶ As the Attorney General notes in her amicus brief, this strict compliance standard appears to be dicta, and therefore whether substantial compliance is appropriate for petitions to amend the constitution under Article 12, section 2 remains an open question. (AG Amicus at 8-9, n 2.)

of the hundreds of thousands of voters that exercised their reserved constitutional right to petition to change the constitution. *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980).

III. Mandamus and Injunctive Relief are Appropriate to Prevent Widespread Disenfranchisement.

A. RFFA meets the standard for mandamus relief.

For the reasons explained in detail above, the “errors” pointed to by WAC are not errors under the Michigan Election Law. Contrary to WAC’s allegations, RFFA *did* follow “the same rules as everyone else.” (WAC Brief at 2-3.) But these “rules” must be *actual statutory* requirements, not fictitious, subjective, or arbitrary rules concocted to subvert the People’s reserved constitutional rights. There are no “disputed facts” here. (WAC Brief at 11.) The spaces in the RFFA petition are present, but two members of the Board and WAC apparently would like some of those spaces to be bigger. WAC has offered no evidence to refute the affidavit of the RFFA printer, nor the fact that copying and pasting the proposal into a word document shows the spaces even more plainly. Mandamus is the appropriate form of relief.

B. RFFA meets the standard for injunctive relief.

WAC’s argument that injunctive relief is not appropriate in this case is equally as flimsy. (WAC’s Brief at 42-43.) WAC neglects to mention the rights of the electors to vote on the proposed constitutional amendment or that other rights should prevail over their attempt to disenfranchise voters. WAC self-declares that “Michigan’s public has an overriding interest in keeping its Constitution readable and coherent” without legal basis for that claim and fails to rebut the fact that hundreds of thousands of members of the public seek to enact the provision as written—spaces and all. (WAC Brief at 44.)

WAC’s single public interest argument fails to account for the fact that the measuring stick for what is included in Michigan’s constitution is determined by the People, not WAC’s judgment or unilateral pronouncements about what does or does not belong in the People’s governing document. As RFFA has shown repeatedly, its proposal is comprehensible, contains spaces, and is widely understood by the public. Even if, however, this Court considers WAC’s arguments regarding the public interest, they lack any support. The Board simply lacks the authority to determine what *should* or *should not* go into the Michigan Constitution. Only the People have that right. *League of Women Voters of Mich*, 508 Mich at 549-551. WAC’s arguments against the entry of injunctive relief are not supported by law, fact, or recognized public policy considerations.

CONCLUSION

Reproductive Freedom for All respectfully requests that the Court grant mandamus relief ordering the Board to determine that its petition complies with all Michigan Election Law petition form requirements and that it received the required number of valid signatures. Further, Reproductive Freedom for All respectfully requests that the Court order the Secretary of State to certify its ballot question to county clerks for printing on the November 8, 2022 general election ballot using the language approved at the Board's August 31, 2022 meeting.

Dated: September 6, 2022

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ Steven C. Liedel

Steven C. Liedel (P58852)

Courtney Flynn Kissel (P74179)

Olivia R.C.A. Flower (P84518)

201 Townsend St., Suite 900

Lansing, MI 48933

(517) 374-9100

sliedel@dykema.com

ckissel@dykema.com

oflower@dykema.com

*Attorneys for Plaintiffs Reproductive Freedom
For All, Peter Bevier and Jim Lederer*

CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation set forth in MCR 7.212(G). I am relying on the word count of the word-processing system used to produce this document. This brief uses a 12-point proportional font (Times New Roman), and the word count for this brief is 3,196.

Dated: September 6, 2022

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: /s/ Steven C. Liedel

Steven C. Liedel (P58852)
201 Townsend St., Suite 900
Lansing, MI 48933
(517) 374-9100
sliedel@dykema.com
*Attorney for Plaintiffs Reproductive Freedom For
All, Peter Bevier and Jim Lederer*

122896.000001 4867-1670-3537.6