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

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

SECRETARY OF STATE'S AND DIRECTOR OF ELECTIONS' RESPONSE TO PLAINTIFF'S COMPLAINT FOR MANDAMUS AND BRIEF IN SUPPORT

ORAL ARGUMENT NOT REQUESTED UNLESS THE COURT ORDERS IT

Heather S. Meingast (P55439)
Assistant Attorney General
Attorney for Defendants Secretary of State and Director of Elections
P O Box 30736
Lansing, Michigan 48909
(517) 335-7659

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STATEMENT OF JURISDICTION

"[A]ny person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court." MCL 168.479(1). An action under MCL 168.479 must be initiated within seven business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. MCL 168.479(2). Plaintiff Promote the Vote 2022 filed this action on September 1, 2022, challenging the Board of State Canvassers' failure to determine the sufficiency of Plaintiff's proposal to amend the Constitution during the Board's August 31, 2022, meeting. Because the action was filed within seven business days of the Board's action and more than 60 days before the November 8, 2022 general election, this case is within the Court's jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. The Board of State Canvassers has a clear, legal duty to certify a petition to amend the state constitution as sufficient for placement on ballot if the petition is in the proper form and is supported by the required number of valid signatures by registered electors. Where Plaintiff Promote the Vote filed sufficient valid signatures, and the form of the petition complied with existing laws, did the Board of State Canvassers have a clear, legal duty to certify the petition as sufficient?

Plaintiff's answer:	Yes.
The Board's answer:	Deadlocked and unable to answer
The Secretary's and Brater's answer:	Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 12, § 2 provides, in relevant part:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and 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. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.
>
> Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. *Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law.* Copies of such publication shall be posted in each polling place and furnished to news media as provided by law. [Emphasis added.]

MCL 168.476 provides, in relevant part:

> (1) Upon receiving notification of the filing of the petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. . . .
>
> (2) The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions. To conduct a hearing, the board may issue subpoenas and administer oaths. The board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes, but shall complete the canvass at least 2 months before the election at which the proposal is to be submitted.

(3) At least 2 business days before the board of state canvassers meets to make a final determination on challenges to and sufficiency of a petition, the bureau of elections shall make public its staff report concerning disposition of challenges filed against the petition. Beginning with the receipt of any document from local election officials pursuant to subsection (1), the board of state canvassers shall make that document available to petitioners and challengers on a daily basis.

MCL 168.477 provides, in relevant part:

(1) Except as otherwise provided in this subsection, the board of state canvassers shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted. The board of state canvassers shall make an official declaration of the sufficiency or insufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted. . . . If the board of state canvassers declares that the petition is sufficient, the secretary of state shall send copies of the statement of purpose of the proposal as approved by the board of state canvassers to the several daily and weekly newspapers published in this state, with the request that the newspapers give as wide publicity as possible to the proposed amendment or other question. Publication of any matter by any newspaper under this section must be without expense or cost to this state. . . .

MCL 168.482 provides, in relevant part:

(1) Each petition under this section shall be 8- ½ inches by 14 inches in size.

(2) If the measure to be submitted proposes a constitutional amendment . . . the heading of each part of the petition shall be prepared in the following form and printed in capital letters in 14-point boldfaced type:

INITIATIVE PETITION

AMENDMENT TO THE CONSTITUTION

* * *

(3) A summary in not more than 100 words of the purpose of the proposed amendment or question proposed must follow and be printed

in 12-point type. The full text of the amendment so proposed must follow the summary and be printed in 8-point type. *If the proposal would alter or abrogate an existing provision of the constitution, the petition must so state and the provisions to be altered or abrogated must be inserted, preceded by the words:*

"Provisions of existing constitution altered or abrogated by the proposal if adopted." [Emphasis added.]

INTRODUCTION

The people of Michigan have reserved to themselves the right to amend the state constitution by direct initiative. Const 1963, art 12, § 2. "[T]here is no more constitutionally significant event than when the wielders of '[a]ll political power' under that document . . . choose to exercise their extraordinary authority to directly approve or disapprove of an amendment thereto." *Blank v Dep't of Corrections*, 462 Mich 103, 150 (2000) (Markman, J., concurring).

Here, Promote the Vote 2022 (PTV) and its supporters seek to exercise their right to propose an amendment to the constitution to protect and enhance voting rights in Michigan. The Board of State Canvassers has a legal duty to certify whether PTV's petition contains a sufficient number of valid signatures by registered voters and that its petition is in the proper form such that it may be certified for placement on the November general election ballot.

But the Board voted 2-2 on a motion to certify the petition as sufficient, which means the Board deadlocked. Because action of the Board is only effective upon concurrence of at least one member of each major political party appointed to the Board, the deadlock effectively denied PTV's initiative a place on the ballot.

The Board was unable to pass the motion to certify because two members believed the form of PTV's petition was insufficient because, in these members' opinions, it failed to set forth – republish – all existing provisions of the Michigan constitution that would be altered or abrogated by the proposal.

While the Board has a ministerial duty to determine that PTV's petition form complied with the statutory republication requirement, it does not have the

authority to second-guess PTV's designation of the constitutional provisions that would be altered or abrogated by its proposal. That is because such a determination would require the Board to look beyond the face of the petition and make a complex, legal determination that is plainly not ministerial in nature, and thus not within the Board's duties. Instead, the Board had (and has) a duty to certify PTV's petition as sufficient. It is for the courts, not the Board, to determine whether PTV has failed to republish any provisions that would be altered or abrogated by its proposal.

Because the Board has a legal duty to determine the sufficiency of the petition, and the Board was unable to perform that duty, the Secretary and Director of Elections agree that direction from the Court as to the performance of this duty is warranted. A decision by this Court is needed before or by September 9, 2022, the date by which the Secretary must certify all candidates and ballot proposals to the counties for inclusion on the November 8, 2022, general election ballot.[1]

[1] The Board is scheduled to meet at 10:00 a.m. on September 9, 2022 and would be able to take any action ordered by the Court.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The relevant facts of this case are generally set forth in Plaintiff Promote the Vote's (PTV) complaint for mandamus. Particularly pertinent facts relating to the challenge to this petition are set forth in the Bureau of Elections' August 26, 2022, Staff Report, as follows:

> CHALLENGE
>
> On August 18, 2022, Defend Your Vote (DYV) submitted a challenge to the form of the petition, arguing that the petition fails to include all of the constitutional provisions that would be abrogated by the proposed amendments. Specifically, the challenge alleges that two sections of the petition would abrogate provisions in the Michigan Constitution and that those sections of the Constitution should have been listed in the petition.
>
> First, DYV argues that the ten-day voting period proposed in the amendment would abrogate the constitutional provision for a single election day. They argue that this requires inclusion of Article II, section 5, designating a single day, every other year, for elections—the "first Tuesday after the first Monday of November." Second, DYV argues that the petition's language in proposed Article II, § 4(1)(a)(1)—which prohibits any person from enacting or using any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure that has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote—would remove that power from the people of Michigan and other legislative and judicial bodies. As such, DYV argues that the following sections should have been listed as being abrogated by the petition:
>
> •Article II, section 2, allowing the legislature to by law exclude persons from voting "because of mental incompetence or commitment to a jail or penal institution."
>
> • Article II, section 9, providing for the people's power to "propose laws and to enact and reject laws."
>
> • Article VII, section 8, granting legislative authority to county boards of supervisors.

• Article VI, section 5, providing for the Michigan Supreme Court to modify, amend, and simplify by general rules the practice and procedure in all Michigan courts.

PROMOTE THE VOTE'S RESPONSE TO CHALLENGE

In its response, PTV argues the Board should reject the legal challenge because the petition language does not abrogate Michigan's constitution. Specifically, PTV argues that " 'an amendment only abrogates an existing provision when it renders that provision wholly inoperative.'" Quoting *Protect Our Jobs v Board of State Canvassers*, 492 Mich 763,773 [ ] (2012). They further argue that neither section of Michigan's constitution are rendered wholly inoperative or represent a change that would "eviscerate an existing provision." *Id*.

Regarding the Election Day provision in Article 2, section 5, PTV argues that the provision is not rendered wholly inoperative because the proposal would provide that voters could cast their ballot in person prior to Election Day and that Election Day would remain as currently prescribed by the Constitution.

PTV urges the Board to reject the remaining arguments as the challenged sections of Michigan's Constitution are not altered or abrogated by PTV's petition. Namely, PTV argues the petition does not prescribe who is or is not a qualified voter (Article 2, section 2); it does not prohibit or limit the authority of a citizen-led initiative (Article 2, section 9); it does not implicate county commissions (Article 7, § section); and does not impact the Supreme Court's powers (Article 6, section 5).

STAFF EVALUATION OF CHALLENGE

Article XII, section 2 of the Constitution requires that all of the following must be published as provided in law, posted at each polling place, and provided to news media: the proposed amendment; existing provisions of the constitution that would be altered or abrogated by the proposed amendment; and the question as it will appear on the ballot. The Michigan Election Law provides that the circulated form of the petition include a list of provisions of the constitution that would be altered or abrogated by the proposal if adopted. MCL 168.482. The circulated petition includes the language required by section 482 and a list of sections to be altered or abrogated; the question raised by the challenge is whether additional sections of the Constitution should have been included.

In 1933, the Michigan Supreme Court set forth the following standard:

> [T]he ordinary elector, not being a constitutional lawyer, would be confused rather than helped by a publication of all the other constitutional provisions which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment. We think the requirement in substance is this: That in case a proposed constitutional provision amends or replaces ("alters or abrogates") a specific provision of the Constitution, that such provision should be published along with the proposed amendment; that other provisions which are still operative, though possibly they may need thereafter to be construed in conjunction with the amending provision, need not necessarily be published. *School Dist v Pontiac*, 262 Mich 338 [ ].

That case was decided under a previous version of the Michigan Constitution, but more recently a similar standard has been applied in evaluating the Michigan Constitution of 1963: "An existing constitutional provision is altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative." *Ferency v Secretary of State,* 409 Mich 569, 597 [ ] (1980) The fact that a provision will be affected by a proposed amendment does not necessarily mean it is "altered or abrogated." *Id* at 596-597; see also *Protect Our Jobs*, 492 Mich 763, 781 (2012); *Citizens Protecting Michigan's Constitution v. Sec'y of State,* 503 Mich 42 (2018).

> The challenge alleges not that a required element on the form (sections of the constitution abrogated) was wholly omitted, but rather that additional sections should have been included as part of this element under the Michigan Constitution. This challenge raises legal arguments pertaining to the meaning of the Michigan Constitution as interpreted by the Michigan Supreme Court; staff makes no recommendation as to the merits of the legal arguments raised. [PTV's Ex 1, Staff Report.]

The Board met to determine the sufficiency of PTV's petition on August 31, 2022. At the meeting Director Brater presented the results of the Staff Report to the Board and recommended that the Board certify the petition as sufficient. (Defs' Benson Brater Appx, 8/31/22 Trans, pp 18-21.) But the Board ultimately deadlocked on a motion to certify the petition as sufficient for placement on the

ballot. *Id.*, pp 70-73. Recognizing that litigation would be filed and that there was the possibility that the Board would be ordered to certify the petition as sufficient, the Board performed its other duties by conditionally assigning the proposal a number designation and approving ballot language. *Id.*, pp 73-96. See MCL 168.32(2), MCL 168.474a.

The Secretary of State must certify all proposals and candidates to the November ballot by September 9, 2022, so that counties may be begin preparations for ballot printing. MCL 168.648. Accordingly, this case and any actions the Board may be ordered to take must be resolved and taken by that date.

STANDARD OF REVIEW

Although courts have held that mandamus is the appropriate remedy for a party seeking to compel action by election officials, see, e.g., *Wolverine Golf Club v Secretary of State*, 24 Mich App 711 (1970), aff'd 384 Mich 461 (1971); *Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand),* 195 Mich App 613 (1992), a writ of mandamus remains an extraordinary remedy and will only be issued where: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result," *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 284 (2008), aff'd in result, 482 Mich 960 (2008), citing *Tuggle v Dep't of State Police*, 269 Mich App 657, 668 (2005).

The specific act sought to be compelled must be of a ministerial nature, which is prescribed and defined by law with such precision and certainty as to leave

nothing to the exercise of discretion or judgment. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 286. "A clear legal duty, like a clear legal right, is one that 'is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.' " *Hayes v Parole Bd*, 312 Mich App 774, 782 (2015) (citation omitted). "The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff." *White-Bey v Dept of Corrections*, 239 Mich App 221, 223 (1999).

At times, courts have resolved "threshold" legal questions involving the constitutionality of an action or statute in the context of a mandamus action. See, e.g., *Citizens Protecting Michigan's Constitution*, 280 Mich App at 283, quoting *Michigan United Conservation Clubs v Sec'y of State,* 463 Mich 1009 (2001). See also *Wolverine Golf Club v Sec'y of State*, 384 Mich 461, 466 (1971).

ARGUMENT

I. The Board of State Canvassers has a clear, legal duty to declare the PTV petition as sufficient under existing law and certify it for placement on the November 8, 2022, general election ballot.

The Board has a clear, legal duty to declare the PTV petition as sufficient under existing law and certify it for placement on the November general election ballot.

A. Overview of the Defendants' roles with respect to petitions to amend the constitution.

1. The Secretary's role in the initiative petition process.

The Secretary of State's role with respect to the acceptance of initiative petitions for the general election ballot is limited. *Citizens Protecting Michigan's*

Constitution, 280 Mich App at 286. The Secretary prescribes the format of petitions that will be circulated countywide. MCL 168.544d. The Secretary then acts as the filing official to receive petitions for referendum, initiative, and constitutional amendment. The first task attendant to the Secretary's office is to "immediately" notify the Board of State Canvassers of the filing of any signed petition. MCL 168.475(1). If the Board certifies the sufficiency of the petition and approves the statement of purpose, the Secretary then certifies the statement of purpose to the local clerks, MCL 168.648, sends copies of the text of proposed amendments to the local clerks, MCL 168.480, and communicates the ballot wording to the media. MCL 168.477(2), MCL 168.480.

2. The Director of Elections' role in the initiative petition process.

The Director of Elections is appointed by the Secretary of State and supervises the Bureau of Elections. MCL 168.32(1), MCL 168.34. The Director of Elections is "vested with the powers and shall perform the duties of the secretary of state under . . . her supervision, with respect to the supervision and administration of the election laws." *Id.* As "a nonmember secretary of the state board of canvassers," the Director of Elections supervises the Bureau as it assists the Board in canvassing petitions. *Id.* The Director is also responsible for preparing petition summaries (if requested by the proponents) and the statement of purpose or ballot language for proposals with the approval of the Board. Const 1963, art 12, § 2; MCL 168.32(2), MCL 168.482b.

3. The Board of Canvassers' role in the initiative petition process.

The Board is a constitutional board created by Const 1963, art 2, § 7, and its duties and responsibilities are established by law. See MCL 168.22(2) and MCL 168.841. The Legislature has empowered the Board to enforce the technical requirements set forth in the Michigan Election Law, 168.1, *et seq*., relating to the circulation and form of various petitions, including petitions to amend the Constitution.

This Board's authority with respect to petitions to amend the constitution is limited to that entrusted the Board by statute or Constitution:

> The Board comes within the definition of an "agency" in the Administrative Procedures Act. An agency has no inherent power. Any authority it may have is vested by the Legislature, in statutes, or by the Constitution. [*Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493 (2004) (emphasis added; internal citations omitted) .]

And with respect to petitions, generally the Board's "duty . . . is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 618 (2012).

These duties are ministerial in nature, and in reviewing a petition the Board may not examine questions regarding the merits or substance of a proposal. *Leininger v Secretary of State*, 316 Mich 644, 655-656 (1947). See also *Gillis v Bd of State Canvassers*, 453 Mich 881 (1996); *Automobile Club of Michigan Committee for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 624 (1992) ("[T]he Board of State Canvassers possesses the authority to consider questions of

form."). And in performing its function, the Board may not look beyond the four corners of the petition. *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 519-520 (2005).

With respect to the Board's duties, the Michigan Constitution provides:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. . . . *Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.* [Const 1963, art 12, § 2 (emphasis added).]

The "person authorized by law" in art 12, § 2 is the Board of Canvassers. MCL 168.474. The Legislature implemented art 12, § 2 in part in MCL 168.476, which provides that "[u]pon receiving notification of the filing of the petitions, the board of state canvassers shall canvass the petitions to ascertain if *the petitions have been signed by the requisite number of qualified and registered electors.*" (Emphasis added). Finally, MCL 168.477(1) provides that "[t]he board of state canvassers shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted."

The Board's duties with respect to an initiative petition is two-fold. First, under MCL 168.476(1), the Board must canvass the petition to ascertain if the petition has been signed by the requisite number of qualified and registered voters. Second, under MCL 168.477(1), the Board "*shall* make an official declaration of the

sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted." (Emphasis added). The determination regarding the "sufficiency" of a petition includes whether the form of the petition complies with the relevant technical requirements. Essentially, the Board determines whether the petition has enough valid signatures, and whether the petition is in the proper form.

These statutes provide for the Board's review of the form of petitions after they have been circulated and signatures obtained. See MCL 168.475; 168.476; 168.477. But for many years the Board has provided the service of allowing persons or organizations circulating petitions to come before the Board and obtain pre-approval as to the form of their petitions before they are circulated.[2] See, e.g., *League of Women Voters of Michigan v Secretary of State,* 508 Mich 520, 567-68 (2022) ("the Board of State Canvassers, while not required to do so by statute, 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.")

This approval as to form is an optional courtesy and does not bind the proponents of an initiative, who could still choose to circulate a petition that has not

[2] See Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment petition, February 2022, p 7, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/08delrio/Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca&hash=1AC56EE016D8EC2CC57F3081F2D3E94B (accessed September 7, 2022.)

received preliminary approval as to form. Nor does the approval as to form bind the Board when the petition ultimately comes before it for a sufficiency determination under the law. As noted above in the Staff Report, PTV opted to have the form of its petition approved by the Board prior to circulation. Before circulating any petition, whether approved as to form by the Board or not, a proponent must provide a copy to the Secretary of State for posting on the Secretary's website. MCL 168.483a.

B. The Board has a clear, legal duty to determine PTV's petition sufficient for placement on the ballot.

In this case, there is no question that PTV's petition has sufficient valid signatures; rather, the issue is whether the petition appears in the proper form.

The preparation and circulation of initiative petitions to amend the constitution is provided by law. Const 1963, art 12, § 2 ("Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.") Under MCL 168.482(1) and (2), a petition must be printed on 8 ½ x 14 inch paper, and the "heading" of "INITIATIVE PETITION AMENDMENT TO THE CONSTITUTION" must appear on each part of the petition and "shall be . . . printed in capital letters in 14-point boldfaced type."

Under subsection 482(3), "[a] summary in not more than 100 words of the purpose of the proposed amendment . . . must follow and be printed in 12-point

type,"[3] and the "full text of the amendment so proposed must follow the summary and be printed in 8-point type." In addition, "[i]f the proposal would alter or abrogate an existing provision of the constitution, the petition must so state and the provisions to be altered or abrogated must be inserted, preceded by the words:"

> *Provisions of existing constitution altered or abrogated by the proposal if adopted.* [MCL 168.482(3) (emphasis added.)]

This requirement is in addition to the constitution's requirement that the Secretary publish the provisions that would be altered or abrogated by the proposed amendment: "Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law." Const 1963, art 12, § 2.

The petition must then include a statement by the electors and a warning to the electors regarding the consequences of signing a petition more than once, or signing another individual's name, etc. MCL 168.482(4) and (5). "The remainder of the petition form shall be as provided following the warning . . . in section 544c(1)," and "shall comply with the requirements of section 544c(2)." MCL 168.482(6). Sections 544c(1) and (2) impose additional formatting requirements relating to information required from electors and the certificate of the circulator. MCL 168.544c(1)-(2).

[3] In addition to having a petition approved as to form, a proponent may choose to have the summary of the proposal drafted by Director of Elections and approved by the Board prior to circulation. MCL 168.482b.

The PTV petition satisfied these requirements. In particular, it set forth a 100-word summary of the proposal drafted by the Director of Elections and approved by the Board. Further, the proponent affixed the substance of its proposal to the petition in 8-point type, and the petition listed the existing constitutional provisions PTV believes would be altered or abrogated if the proposal is adopted.

The statutory requirement that a petition list constitutional provisions that would be altered or abrogated is a form requirement under the Board's purview; but only in the sense that the Board reviews the petition to determine that the proponents have affixed a listing of provisions to the petition. See *Ferency v Secretary of State,* 409 Mich 569, 593 (1980) (in addressing the new requirement that a petition list the constitutional provisions to be altered or abrogated, the Court "assum[ed]" that the "requirement regarding substantive content" was "a regulation of form" that the legislature could "impose . . . to keep the process fair, open and informed[ ]"). But the Board has neither constitutional nor statutory authority to make a legal determination that a proponent has failed to properly identify existing provisions of the constitution that would be altered or abrogated.

This is because the proponents of initiatives are, and must be, the masters of their own proposals and petitions. They draft the proposals and determine what language should be affixed to the petition, including which constitutional provisions should be listed as altered or abrogated. The Bureau of Elections provides guidance to proponents but does not provide any advice as to substantive content, such as

which constitutional provisions would be altered or abrogated by the proposal.[4] It is ultimately up to the proponent to determine the text of its proposal and what constitutional provisions should be identified and affixed to the petition as being altered or abrogated.

The courts have made clear that the Board has "no authority to consider the lawfulness of [a] proposal[.]" *Citizens for Protection of Marriage*, 263 Mich App at 493; *Citizens Protecting Michigan's Constitution*, 280 Mich App at 285. Rather, the Board's ministerial authority extends only to matters of form. It does not have the power to engage in legal analyses regarding what implications a proposed amendment may have on existing provisions of the constitution.

As this Court noted in *Ferency*, determining which provisions may be altered[5] or abrogated is a complex legal question: "Given the breadth and generality of our constitution and the interrelation of its provisions, it is difficult to see how an assessment of a proposed amendment's constitutional impact could be definitively resolved short of an appeal to this Court." 409 Mich at 608. The Court also observed it was unlikely that the people intended for election officials to make such

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[4] See Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment petition, February 2022, p 7, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/08delrio/Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca&hash=1AC56EE016D8EC2CC57F3081F2D3E94B (accessed September 7, 2022.)

[5] This Court's subsequent determinations as to when a provision is "altered" has made that test simple to apply. See *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763, 782 (2012). However, whether a provision is "abrogated" still "requires careful consideration of the actual language used in both the existing provision and the proposed amendment." *Id.* at 782-783.

judgments: "The people, in reserving to themselves the power to amend their constitution through a self-executing process, cannot have intended to require state election officials to make complex judgments which would require judicial imprimatur in order to establish that the election officials had properly performed their duties under Const. 1963, art. 12, § 2." *Id.* at 609.

More recently, in *Citizens Protecting Michigan's Constitution*, the Court of Appeals addressed whether a proposed constitutional amendment would constitute an improper revision of the constitution or was otherwise defective because it failed to identity all existing provisions of the constitution that would be altered or abrogated by the amendment. 280 Mich App 273. The plaintiffs' argued that the Secretary and the Board had the power to make these legal determinations. The Court disagreed noting that such determinations would not be ministerial:

> On their face, these duties of the Board and the Secretary may not include making a "threshold determination" whether a ballot proposal is an "amendment" to, as opposed to a "general revision" of, the constitution or whether the ballot proposal contains more than one purpose. Further, an act is ministerial if it is " ' "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." ' " *Carter v Ann Arbor City Attorney,* 271 Mich App 425, 439 [ ] (2006) (citations omitted). We agree with the Secretary, the Board, and [the proponent] that determining whether a ballot proposal is an "amendment" to, or a "general revision" of, the constitution and determining whether a ballot proposal serves more than one purpose involve, at a minimum, the exercise of judgment. [*Id.* at 286-287.]

Citing this decision, the Court of Appeals reached a similar conclusion in a subsequent case addressing "amendment" versus "general revision" and alter-or-abrogate claims. See *Citizens Protecting Michigan's Const v Sec'y of State*, 324 Mich App 561, 585–586 (2018), aff'd, 503 Mich 42 (2018) ("This Court has settled the

question of whether the Board's and the Secretary's clear legal duties are ministerial where, as here, the parties dispute whether an initiative petition proposal is an "amendment" to, or a "general revision" of, the Constitution.")

Under these and other decisions discussing the Board's limited, ministerial duties, the Board simply does not have the authority to second-guess a proponent's determination as to which existing provisions of the constitution will be altered or abrogated by an amendment. That authority belongs, instead, to the courts.

The only exception to this rule may be for errors or omissions that are so readily determinable from the face of a petition that it would involve, at most, some minimal exercise of discretion or judgment by the Board. See, e.g, *People ex rel Wright v Kelly,* 294 Mich 503, 519 (1940) ("The performance of a ministerial duty may involve the exercise of some discretion and judgment.") For example, if an initiative proposed to remove or replace a specific, existing provision of the constitution but the petition did not list that provision as one that would be abrogated, the petition, on its face, would fail to comply with subsection 482(3). See, e.g*., Michigan Campaign for New Drug Policies v Bd of State Canvassers*, unpublished order of the Michigan Court of Appeals, Docket No. 243506, dec'd September 6, 2002, aff'd 467 Mich 869 (2002) (holding that Board of Canvassers properly denied certification with respect to petition that proposed to replace an existing constitutional provision without listing the same provision as one that would be altered or abrogated since no "legal analysis" was necessary to make that

determination) (Defs' Benson Brater Appx, p 208.) See also *Carman v Secretary of State*, 384 Mich 443 (1971).

But that is not the case here, which is amply demonstrated by the substantial briefing presented to the Board by challenger Defend Your Vote and PTV. (PTV Comp, Ex 3, Challenge & Ex 4, PTV Response). Again, questions regarding whether PTV's proposal will abrogate other provisions of the constitution not identified in the petition raise legal questions requiring judicial determinations that are not within the Board's ministerial authority to make. Accordingly, because PTV complied with subsection 482(3) by identifying provisions it believed will be altered or abrogated by its proposal, the Board had a clear, legal duty to determine the form of the petition sufficient. And where the PTV petition had sufficient valid signatures as well, the Board had a clear, legal duty to determine the petition sufficient for placement on the November 8, 2022, general election ballot.[6]

C. The people's right of initiative should be protected and this Court wary of unduly burdening the exercise of that right through application of the republication requirement.

While it is beyond the Board's authority to determine whether PTV was required to identify additional constitutional provisions under subsection 482(3), this Court may do so. See *Citizens Protecting Michigan's Constitution v Sec'y of*

[6] Defendants observe that in Count II of its complaint, PTV alleges a due process violation and raises the issue of equitable estoppel. (PTV Comp, ¶¶ 149-171.) PTV does not specifically allege that Secretary Benson or Director Brater engaged in any of the conduct upon which that count is based. Further, it is unnecessary for the Court to address that issue where mandamus will provide PTV with complete relief. The same is true with respect to PTV's superficial request for declaratory relief in Count III. (*Id.*, ¶¶ 172-174.)

State, 503 Mich 42, 59–61 (2018). And on that question the Secretary and Director take no position on the merits as PTV has fully addressed that issue. Rather, Defendants urge this Court to consider precedents reflecting wariness of unduly burdening the right of initiative.

In addressing the legality of a different proposed amendment, this Court recognized the importance of this retained, fundamental right:

> Our Constitution is clear that "[a]ll political power is inherent in the people." The people have chosen to retain for themselves, in Const 1963, art 12, § 2, the power to initiate proposed constitutional amendments that, if various requirements are met, will be placed on the ballot and voted on at election time. It has been observed that "there is no more constitutionally significant event than when the wielders of '[a]ll political power' under that document, Const 1963, art 1, § 1, choose to exercise their extraordinary authority to directly approve or disapprove of an amendment thereto. Const 1963, art 12, §§ 1 and 2." [*Citizens Protecting Michigan's Constitution,* 503 Mich at 59.]

But the Court was also careful to observe that this right may only be exercised in " 'accordance with the standards of the constitution[.]' " *Id.* at 60 (footnotes and citations omitted). "In particular, we have stated that the 'right [of electors to propose amendments] is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution.' " *Id.* (footnotes and citations omitted).

This Court has done well in providing additional clarity regarding when a proposal will "alter" or "abrogate" an existing provision of the constitution for purposes of MCL 168.482(3) and article 12, § 2. See *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763, 782-783 (2012). Nevertheless, whether a provision is "abrogated" still "requires careful consideration of the actual language used in

both the existing provision and the proposed amendment," and application of a test requiring the exercise of significant judgment by this Court:

> An existing constitutional provision is rendered wholly inoperative if the proposed amendment would make the existing provision a nullity or if it would be impossible for the amendment to be harmonized with the existing provision when the two provisions are considered together. That is, if two provisions are incompatible with each other, the new provision would abrogate the existing provision and, thus, the existing provision would have to be republished. An existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision, i.e., the two provisions are not incompatible. [*Id.* at 783 (footnote omitted).]

As a result, it is important to draw attention to the concerns this Court has observed relating to voter confusion and the burden on proponents in applying the "alter" or "abrogate" analysis:

> We must take care to enforce the constitutional and statutory petition safeguards that exist to ensure that voters are adequately informed as they exercise their right to amend the Constitution. In doing so, we have reasoned that "the ordinary elector, not being a constitutional lawyer, would be confused rather than helped by a publication of all the other constitutional provisions which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment." We also must use caution not to usher in an interpretation by which we would "effectively require a petition circulator ... to secure a judicial determination of which provisions of the existing Constitution the proposed amendment would 'alter or abrogate.' " [*Id.* at 781 (footnotes omitted); see also *Ferency*, 409 Mich at 596-598, 608.]

Further, as this Court noted in *Ferency*, the burdens imposed in complying with subsection 482(3) "cannot unduly restrict the exercise of the right [to initiative.]" 409 Mich at 593. And there the Court was "mindful" that " 'under a system of government based on grants of power from the people, constitutional

provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed.' " *Id.* (footnote and citation omitted).

Defendants respectfully request this Court keep this guidance in mind in determining whether PTV has complied with the statutory republication requirement set forth in subsection 482(3). If this Court determines that PTV's petition is compliant, and thus in the proper form, this Court should further hold that the Board of State Canvassers has a clear, legal duty to certify the petition as sufficient for placement on the ballot and order the Board to do so before or by September 9, 2022.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Court grant Plaintiff's complaint for mandamus and order the Board of State Canvassers to certify the petition submitted by PTV as sufficient for placement on the November 8, 2022, general election ballot before or by September 9, 2022. Defendants further request that this Court give any order immediate effect under MCR 7.315(C).

Respectfully submitted,

/s/Heather S. Meingast

Heather S. Meingast (P55439)
Assistant Attorney General
Attorney for Defendants Secretary of State and Director of Elections
P.O. Box 30736
Lansing, Michigan 48909
(517) 335-7659

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/s/Heather S. Meingast
Heather S. Meingast (P55439)
Assistant Attorney General