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, JOCELY BENSON, in her official capacity as secretary of state, and JONATHAN BRATER, in his capacity as Director of Elections,

Defendants
_____/

Supreme Court No. 164760

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 PLAINTIFFS' COMPLAINT FOR MANDAMUS AND BRIEF IN SUPPORT

ORAL ARGUMENT NOT REQUESTED UNLESS THE COURT ORDERS IT

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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). Plaintiffs filed this action on September 1, 2022, challenging the Board of State Canvassers' failure to determine the sufficiency of Plaintiffs' 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 Reproductive Freedom For All 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?

Plaintiffs' 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, Reproductive Freedom for All (RFFA) and its supporters seek to exercise their right to propose an amendment to the constitution to preserve and protect the reproductive rights of women in Michigan. The Board of State Canvassers has a legal duty to certify whether RFFA's petition contains a sufficient number of valid signatures by registered voters and that its petition is in the proper form such that it should be certified for placement on the 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 RFFA's initiative a place on the ballot.

The Board was unable to pass the motion to certify because two members believed the form of RFFA's petition was insufficient because, in these members' opinions, it included fatal errors in the manner in which the full text of the proposal was affixed to the petition. Specifically, the full text included passages lacking spacing between words, resulting in a string of nonsensical gibberish – not recognizable words.

While the Board has a ministerial duty to determine whether RFFA's petition form complied with constitutional and statutory requirements to affix the "full text" of its proposal to the petition, it does not have the authority to reject a petition based on perceived errors in the substance of the proposal. That is because neither the constitution nor any statute prescribes how the full text of a proposal must be affixed to a petition, other than that it must appear in a certain order on the petition sheet and in a specified type-size. Accordingly, the Board had (and has) a duty to certify RFFA's petition as sufficient.

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 Reproductive Freedom For All (RFFA), Peter Bevier, and Jim Lederer's complaint for mandamus and brief in support of the complaint. Particularly pertinent facts relating to the challenge to this petition are set forth in the Bureau of Elections' August 26, 2022, Amended Staff Report, as follows:

> CHALLENGE:
>
> On August 18, 2022, Citizens to Support MI Women and Children (Citizens) submitted a challenge to the form of the petition. The challenge did not call individual signatures into question but instead challenged the entirety of the drive. Citizens argued that the Board should reject the petition because minimal spacing throughout the text of the constitutional amendment language within the substance of the petition resulted in series of words being condensed into long, nonsensical letter combinations. Citizens argued that a petition cannot insert nonexistent words into the Constitution.
>
> REPRODUCTIVE FREEDOM FOR ALL'S RESPONSE TO CHALLENGE:
>
> RFFA responded, arguing that the challenge did not question the validity of any individual signatures or any of the mandatory elements that must compose the petition's form, but rather relied on a challenge to the substance of the petition, a determination that is beyond the purview of the Board. In response to Citizens' allegations that the minimal spacing renders the petition unreadable and the words "gibberish," RFFA provides an affidavit from the printer of the petition, stating that spaces are included in the full text of the proposed constitutional amendment. Moreover, RFFA states that people can read and understand the proposed amendment notwithstanding any issues with word spacing, and those who signed the petition understood it.

STAFF EVALUATION OF CHALLENGE:

On March 7, 2022, RFFA submitted a petition form for a constitutional amendment for consideration at the Board's March 23, 2022 meeting.[2] At that meeting, the Board provided conditional approval of the form, provided that an extraneous "the" be removed from language appearing on the face of the petition. Specifically, the Board conditionally approved the form "provided sponsors remove the definite article 'the' prior to the word 'constitution' in the 'we, the undersigned' sentence prior to circulation with the understanding that the Board's approval does not extend to, one, the substance of the proposal which appears on the petition or, two, the manner in which the proposal language is affixed to the petition."

The proposed Article 1, section 28(3) within the substance of the petition from the March 7th submission is included below:

(3) THE STATE SHALL NOT PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST AN INDIVIDUAL BASED ON THEIR ACTUAL, POTENTIAL, PERCEIVED, OR ALLEGED PREGNANCY OUTCOMES, INCLUDING BUT NOT LIMITED TO MISCARRIAGE, STILLBIRTH, OR ABORTION. NOR SHALL THE STATE PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST SOMEONE FOR AIDING OR ASSISTING A PREGNANT INDIVIDUAL IN EXERCISING THEIR RIGHT TO REPRODUCTIVE FREEDOM WITH THEIR VOLUNTARY CONSENT.

On March 30, 2022, RFFA re-submitted the petition to the Bureau of Elections, this time for circulation. 168.483a. While the petition included the changes to the face of the petition specified in the conditional approval, it also revised the spacing between words in the substance of the petition; the version of the petition with this spacing was not presented to the Board.

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[2] The statutes actually provide for the Board's review of the 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. 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.) This approval as to form is a courtesy and does not bind the proponents of an initiative, who could still choose to circulate a petition not given form approval as long as a copy has been submitted under MCL 168.483a. Nor does the approval bind the Board when the petition ultimately comes before it for a sufficiency determination under the law.

The same paragraph, from the March 30th submission, is included below:

(3) THE STATE SHALL NOT PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST AN INDIVIDUAL BASED ON THEIR ACTUAL, POTENTIAL, PERCEIVED, OR ALLEGED PREGNANCY OUTCOMES, INCLUDING BUT NOT LIMITED TO MISCARRIAGE, STILLBIRTH, OR ABORTION. NOR SHALL THE STATE PENALIZE, PROSECUTE, OR OTHERWISE TAKE ADVERSE ACTION AGAINST SOMEONE FOR AIDING OR ASSISTING A PREGNANT INDIVIDUAL IN EXERCISING THEIR RIGHT TO REPRODUCTIVE FREEDOM WITH THEIR VOLUNTARY CONSENT.

> The Michigan Constitution of 1963 requires that the "petition shall include the full text of the proposed amendment" and that it be "in the form, and shall be signed and circulated in such manner, as prescribed by law." Const 1963, art [12], § 2.
>
> The RFFA petition includes the same letters, arranged in the same order, as the petition conditionally approved at the March 23rd Board meeting, accounting for the removal of the word "the" which was the subject of the conditional approval. Certain portions of the petition have smaller spaces between words; the spacing between words in some instances appears similar to the spacing between letters within words. The Michigan Election Law is silent on the amount of space that must be between letters and words in a petition. Section 482 sets strict requirements for the size of the petition sheet and the various font sizes for the headings, the 100-word summary, and the full text of the amendment. MCL 168.482. It does not provide requirements as to spacing or "kerning"—the term for adjusting the space between characters in proportional font.
>
> Staff makes no recommendation as to the merits of these legal arguments as they pertain to the substance of the petition. Courts in Michigan have found that the board's duty is limited to determining whether the form of the petition complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal. . . . [RFFA Appx Vol 1, pp 232-234 (footnotes omitted).]

The Board met to determine the sufficiency of RFFA'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' Appx, 8/31/22 Trans, pp 208-211.) But the Board ultimately deadlocked on a motion to certify the petition as sufficient for placement on the ballot over the perceived spacing errors. *Id.*, pp 251-252. 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 253-274. 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 RFFA 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 RFFA 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 Mich 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.[3] 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 received preliminary approval as to form.

[3] 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.)

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, RFFA 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 the RFFA petition sufficient for placement on the ballot.

In this case, there is no question that the RFFA 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,"[4] and the *"full text of the amendment so proposed must follow the summary*

[4] 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.

and be printed in 8-point type." (Emphasis added.) This is consistent with the Constitution, which requires that "[*e*]*very petition shall include the full text of the proposed amendment*[.]" Const 1963, art 12, § 2. 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[.]" MCL 168.482(3). See also 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).

The RFFA petition satisfied these requirements. It set forth a 100-word summary of the proposal drafted by the Director of Elections and approved by the Board. Further, the proponents affixed the text or substance of their proposal to the petition. The requirement that the "full text" appear on the petition in 8-point type 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 text designated as the "full text" of the proposal, and the text is in 8-point type. But the Board has neither constitutional nor statutory authority to determine a petition

insufficient based on perceived errors in the text or substance of a proposal that, on their face, do not violate a constitutional or statutory provision.

This is because the proponents of initiatives are, and must be, the masters of their own proposals. They draft the proposals and determine what language should be affixed to the petition. The Bureau of Elections provides guidance to proponents but does not provide advice as to the wording of a proposal (other than advising that it must be in 8-point type.)[5] If Bureau staff notice typos or similar errors, staff may point those out to the proponents as a courtesy. Similarly, if a proponent opts to have the Board approve the form of a petition before circulation (again, as a courtesy), the Board may also note typos or similar errors before approving the petition as to form. The Board is free to do so in this context since the approval-as-to-form process is provided as a service, and not expressly required or controlled by statute.

But as long as the font is in 8-point type as required by statute, it is ultimately up to the proponent to determine what is the text of its proposal, and how it should be affixed to the petition. That is why when the Board approves a petition as to form, like RFFA's, the motion to do so makes clear that the Board's "approval does not extend to the substance of the proposal which appears on the

[5] 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.)

petition or the manner in which the proposal language is affixed to the petition." (RFFA Appx, 3/23/22 Trans, p 65).

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 authority extends only to matters of form. And here, neither the constitution nor the Legislature (despite the constitution's invitation to "prescribe" the "form" of a petition, art 12, § 2) has defined what the term "full text" means or placed any parameters on that term, other than the Legislature has provided for the location of the full text on a petition sheet and its type-size.[6]

Further, court decisions interpreting what the "full text" requires are not squarely on point. See, e.g., *City of Jackson v Nims,* 316 Mich 694, 704-705 (1947) (holding the term "full text" as used in article 17, § 2 of the 1908 Constitution *did not require* inclusion of the sales tax act where the proposal did not seek to reenact that act); *Scott v Secretary of State*, 202 Mich 629 (1918) (holding the term "full text" as used in article 17, § 2 of the 1908 Constitution *did require* inclusion of 1887 PA 313 where the proposal sought to reenact that act).

The Legislature has not mandated that the "full text" be free from real or perceived typographical errors, grammar or punctuation errors, or pertinent here, perceived word-spacing issues. The Director of Elections correctly advised the

[6] The type-size requirement is a mandatory element. See, e.g., *Stand Up for Democracy v Sec'y of State*, 492 Mich 588 (2012).

Board on these matters at the August 31 meeting. As the Director stated, the Bureau reviewed the petition as circulated and reported in the Staff Report that:

> The RFFA petition includes the same letters, arranged in the same order, as the petition conditionally approved at the March 23rd Board meeting, accounting for the removal of the word "the" which was the subject of the conditional approval. Certain portions of the petition have smaller spaces between words; the spacing between words in some instances appears similar to the spacing between letters within words. [RFFA's Appx, Amended Staff Report, p 223.]

In other words, the substance or "full text" of the proposal was the same as that affixed to the petition that was conditionally approved as to form except for reduced spacing between words in some but not all the text. But as noted by the Director in the Staff Report, the law does not address spacing requirements:

> The Michigan Election Law is silent on the amount of space that must be between letters and words in a petition. Section 482 sets strict requirements for the size of the petition sheet and the various font sizes for the headings, the 100-word summary, and the full text of the amendment. MCL 168.482. It does not provide requirements as to spacing or "kerning"—the term for adjusting the space between characters in proportional font. *Staff makes no recommendation as to the merits of these legal arguments as they pertain to the substance of the petition. Courts in Michigan have found that the board's duty is limited to determining whether the form of the petition complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal.* [RFFA's Appx, Amended Staff Report, p 223 (emphasis added).]

While the presence of the spacing issues in the full text of the proposal raises a novel legal question as to the legality of the form of RFFA's proposal, it is not within the Board's ministerial authority to make such a legal determination. Accordingly, because the "full text" of the RFFA petition was included on the petition sheet and appeared in the correct type-size, the Board had a clear, legal duty to determine the form of the petition sufficient. And where the RFFA 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.

C. This Court should determine that the form of the RFFA petition is sufficient for placement on the general election ballot.

While it is beyond the Board's authority to determine, as a matter of law, the impact of the word-spacing issues on the requirement that the "full text" of the proposal be included on the petition, this Court may do so.

In the addressing the legality of a different proposed constitutional amendment, this Court noted the following with respect to its obligations:

> 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." In this case, we must determine the scope of the voters' power to initiate amendments.
>
> In answering this question, we do not consider whether the proposed amendment at issue represents good or bad public policy. Instead, we must determine whether the amendment meets all the relevant constitutional requirements. There may be an "overarching right" to the initiative petition, "but only in accordance with the standards of the constitution; otherwise, there is an 'overarching right' to have public policy determined by a majority of the people's democratically elected representatives." 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."

> Our inquiry here, then, is to determine the extent of the people's right to initiate constitutional amendments and whether any clear limitations may be found in the Constitution. [*Citizens Protecting Michigan's Constitution v Sec'y of State,* 503 Mich 42, 59–61 (2018) (footnotes omitted).]

With that guidance in mind, the question before the Court is whether the RFFA petition has satisfied the constitutional requirement that the petition "include the full text of the proposed amendment." Const 1963, art 12, § 2. Secretary Benson and Director Brater respectfully submit that the petition is compliant.

The plain language of the constitution does not elaborate on the manner in which the full text of the proposal must be affixed to the petition. Opponents of the petition have argued that the full text was not properly included on the petition because portions of the petition set forth unrecognizable gibberish. Opponents in essence argue for a readability requirement.

The requirement that the full text of a proposal be included on the petition appears to serve multiple purposes.

First, it serves to provide voters with notice and an opportunity to read the complete language to be added to the constitution before signing a petition. See, e.g., *Michigan Civil Rights Initiative v Board of State Canvassers*, 475 Mich 903 (2006) (Markman, J., concurring) (noting in response to claims that voters were misled into signing petitions that "the signers of these petitions did not sign the oral representations made to them by circulators; rather, they signed written petitions that contained the actual language of the" proposal.) Second, it provides the Secretary with the text of the proposal so that she may publish it to the local clerks.

See Const 1963, art 12, § 2 ("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.") See also MCL 168.480, MCL 168.481. And third, it provides the text of the amendment that, if passed, will be certified by the Board to the Secretary, who in turn will transmit the language to the Michigan Department of Management and Budget. MCL 168.486. See also Const 1963, art 12, § 2 ("If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved.")

Given the above, it is not unreasonable to conclude that the people, in requiring that the "full text" of a proposal be affixed to a petition, contemplated that it be affixed in a format that renders the proposal capable of being read by ordinary citizens. For instance, if the proponent of a measure affixed the full text of its proposal in 3-point type, that type-size would likely render it unreadable by an ordinary citizen without significant aid. Of course, the Legislature has already acted in that case by requiring that the full text of proposals be affixed to petitions in 8-point type. MCL 168.482(3). However, it has not acted with respect to word-spacing requirements, or other elements like the choice of font or typestyle to be used on a petition.[7]

[7] The Bureau does recommend the use of particular fonts. See Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment petition, February 2022, pp 22-23, available at https://www.michigan.gov/sos/-

Here, as explained in RFFA's brief, the text of the proposal as prepared for printing contained spaces between the words. But regardless, the full text of the proposal as affixed to the petition is capable of being read by an ordinary citizen. The tightly-spaced words remain recognizable as independent words upon review. Indeed, given that other portions of the text contain traditional spacing, the tight spacing between other words would have signaled an obvious spacing error to a reader. It would have taken more effort, but an ordinary citizen reading the full text of the proposal would have been able to determine the wording, especially in context with the other words of the proposal and the summary that describes the content of the proposal.

Moreover, it is worth observing that the full text of the proposal does not appear on the ballot; rather the "statement of purpose" will appear as the ballot language. Const 1963, art 12, § 2; MCL 168.32(2). And continuing concern as to whether voters were able to read the text of the proposal prior to signing are unpersuasive if not moot at this stage. Over 750,000 voters signed the petition. (RFFA's Appx, Amended Staff Report, p 223.) This is well-over the minimum number required to access the ballot. *Id.* If voters had significant issues reading the text or were concerned about the text, it stands to reason that an insufficient number of voters would have signed the petition. Instead, a record number of voters signed RFFA's petition. As one former member of this Court has remarked, the

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/media/Project/Websites/sos/08delrio/Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca&hash=1AC56EE016D8EC2CC57F3081F2D3E94B (accessed September 7, 2022.)

burden is on the voter to inform themselves as to a petition's content. See *Michigan Civil Rights Initiative*, 475 Mich at 903 (Markman, J., concurring) ("when the citizen acts in what is essentially a legislative capacity by facilitating the enactment of a constitutional amendment, he cannot blame others when he signs a petition without knowing what it says. It is not to excuse misrepresentations, when they occur, to recognize nonetheless that it is the citizen's duty to inform himself about the substance of a petition before signing it, precisely in order to combat potential misrepresentations.") For these reasons, and under the present circumstances, concerns over readability with respect to voters who signed the petitions do not support denying placement of the RFFA petition on the ballot.

Likewise, the Secretary's publication requirement, see art 12, § 2, MCL 168.480, MCL 168.481, and the requirement for certification of the amendment's language if passed, MCL 168.486, do not compel denying placement of the RFFA petition on the ballot. None of the provisions require the Secretary or the Board to "cut-and-paste" the text of the proposal directly from the petition such that the minimal spacing between words would be provided to local clerks as the text of the amendment or added to the constitution as the text of the amendment. For example, § 480 simply provides that the Secretary "shall [ ] furnish the county clerks in this state 2 copies of the text of each constitutional amendment . . . ." MCL 168.480. And § 486 states that the Board "shall certify to the secretary of state the language of the amendment," and the Secretary "shall transmit the language of the

amendment . . . to the director of the department of management and budget [DTMB]." MCL 168.486.

The Secretary can certainly prepare a copy of the full text of the proposal that includes the text from the petition with spacing as designated in RFFA's affidavit from its graphic designer and printer attesting to the spacing. (RFFA's Appx Vol 1, Ketchum Affidavit, p 220.) This copy may thereafter be provided to the local clerks for publication and ultimately to the Board for certification and provision to DTMB.

For the reasons set forth above, the perceived spacing errors in the full text of the proposal on RFFA's petition do not support denying the proposal a place on the November 8, 2022, general election ballot. The words "full text" as used by the people and the Legislature do not appear to require that the text of a proposal be free from any defect in the manner in which it is affixed to the petition, so long as it is capable of being read. In *Ferency v Secretary of State*, this Court stated that "where . . . there is doubt as to the meaning of legislation regulating the reserved right of initiative, that doubt is to be resolved in favor of the people's exercise of the right." 409 Mich 569, 593 (1980) (interpreting new statutory requirement that petition proponents identify existing provisions of the constitution on their petitions that would be altered or abrogated by the proposed amendment). Here, there certainly is some doubt as to the scope and meaning of the terms "full text" as used by the people and the Legislature. Under *Ferency*, these doubts should be resolved in favor of the people's exercise of the right of initiative. This Court should hold that the form of the RFFA petition sufficiently satisfies form requirements under

existing law and as interpreted by the courts. And because the petition is in the proper form, this Court should further hold that the Board of State Canvassers has a clear, legal duty to certify it as sufficient for placement on the ballot, and order the Board to do so on or before 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 Plaintiffs' complaint for mandamus and order the Board of State Canvassers to certify the petition submitted by RFFA as sufficient for placement on the November 8, 2022, general election ballot by September 9, 2022. Defendants further request that this Court give any order immediate effect under MCR 7.315(C).

Respectfully submitted,

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PROOF OF SERVICE

Heather S. Meingast certifies that on September 7, 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

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