STATE OF MICHIGAN
IN THE SUPREME COURT

RAISE THE WAGE MI,

Plaintiff,

Case No. 166312

v

BOARD OF STATE CANVASSERS,

Defendant.
_____/

GOODMAN ACKER, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com
Attorneys for Plaintiff
_____/

BRIEF IN SUPPORT OF PLAINTIFF'S VERIFIED COMPLAINT FOR MANDAMUS

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Treatises

Other Authorities

STATEMENT OF JURISDICTION

This Court has jurisdiction under MCL 168.479(2) and MCR 7.303(B)(6).

STATEMENT OF QUESTION PRESENTED

1. Did the Board of State Canvassers violate its legal and ministerial duty to certify a ballot proposal that had sufficient signatures and whose petition summary and form it had unanimously approved before petition circulation?

Plaintiff's Answer: Yes.

INTRODUCTION

The Board of State Canvassers ("BOSC") is at it again. On October 20, 2023, the BOSC failed to perform its ministerial duty to certify Raise the Wage MI's petition for the ballot. By a vote of 2–2, the BOSC refused to certify a petition for which it had previously unanimously approved both the summary and form, and which the nonpartisan, professional staff of the Bureau of Elections had determined collected sufficient signatures. In failing to perform their duties, two members of the BOSC relied on challenges to the proposal's summary and text—challenges that are barred by statute, laches, and numerous precedents of this Court and the Court of Appeals.

Raise the Wage MI seeks mandamus from this Court, ordering the BOSC to perform its legal duty to certify the proposal.

STATEMENT OF FACTS

Raise the Wage MI's Petition Summary Is Prepared and Approved

In order to preempt challenges to a petition summary as misleading or deceptive, the Michigan Election Law provides a mechanism for a summary to be prepared by the Director of Elections and approved by the BOSC before a petition is circulated:

> (1) A person who circulates a petition . . . may, before circulating any petition, submit the summary of the purpose of the proposed amendment or question proposed . . . to the board of state canvassers for approval as to the content of the summary. The board of state canvassers must issue an approval or rejection of the content of the summary not more than 30 days after the summary is submitted. . . .
>
> (2) If a person submits the summary of the purpose of the proposed amendment or question proposed as provided in subsection (1), all of the following apply:
>
> (a) The summary of the purpose of the proposed amendment or question proposed must be prepared by the director of elections, with the approval of the board of state canvassers.

MCL 168.482b(1), (2)(a).

If the summary is approved by the BOSC, no challenge may thereafter be made that it is misleading or deceptive:

> The board of state canvassers may not consider a challenge to the sufficiency of a submitted petition on the basis of the summary being misleading or deceptive if that summary was approved before circulation of the petition.

MCL 168.482b(1). This language is absolute and permits of no exceptions.

Raise the Wage MI used this process. On December 22, 2021, Raise the Wage MI submitted a proposed summary. The Director of Elections prepared a summary that was reviewed by the BOSC at its meeting on January 19, 2022, where there was ample opportunity for public input and comment. The summary was unanimously approved by the BOSC that day. *See* Board of State Canvassers, Meeting Minutes (January 19, 2022), available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Meeting-Minutes/Jan-19-2022-BSC-Meeting-Minutes.pdf?rev=18c5c028324545b2b6721e7ceeda2bf7&hash=76070B5A61DBB0F0A5797F8E42DFB241.

No one ever appealed the BOSC's approval of the summary. No one ever sought reconsideration of the BOSC's approval of the summary. In reliance on the BOSC's approval, that approved summary was used on Raise the Wage MI's petitions.

Raise the Wage MI's Petition Form Is Reviewed and Approved

To assist ballot proposal sponsors in avoiding disqualification due to defects in their petition forms, the BOSC has also established a process for reviewing and approving the form of ballot proposal petitions before they are circulated. *See* Department of State, Bureau of Elections, *Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition* (February 2022), pp 9–10, available at https://www.michigan.gov/-/media/Project/Websites/sos/08delrio/

Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=298aaf6a87224081a047796dc17a9d07.

The Bureau of Elections ("BOE") and BOSC urge ballot proposal sponsors to submit their petitions for approval as to form:

> **E. Optional Pre-Circulation "Approval as To Form" Process**
>
> Sponsors of petitions to initiate legislation, amend the constitution, or invoke the right of referendum are urged to submit a proof copy of the petition to the Board of State Canvassers for approval as to form prior to the circulation of the petition.
>
> **Best Practice:** Although Michigan election law does not require the sponsor of a statewide proposal petition to seek pre-approval of the petition form, *such approval greatly reduces the risk that signatures collected on the form will be ruled invalid due to formatting defects*.

Id (emphasis added).

Virtually all ballot proposal sponsors take advantage of this process in order to minimize the risk that, after a petition drive spends millions of dollars to collect hundreds of thousands of signatures, all of that investment will be wasted due to an avoidable defect in the petition form.

Raise the Wage MI used this process. On February 9, 2022, Raise the Wage MI submitted its petition for routine approval as to form at the BOSC meeting on February 11, 2022. At the meeting on February 11, 2022, BOE staff reported that they had reviewed the petition, concluded that its form conformed to Michigan law, and recommended that the form be approved.

An opponent of the petition, Michigan Opportunity, opposed approval as to form, objecting, *inter alia*, to the union label on the petition because its text was not in 8-point type. Two members of the BOSC stated that they were refusing to approve the petition form on the basis of this objection to the size of the text contained within the union label. As a result, the BOSC deadlocked 2–2 on the motion to approve the petition form, meaning that the BOSC determined

that the petition form was not approved. Based on a complaint filed by Raise the Wage MI, this Court promptly overruled the BOSC on March 21, 2022. *Raise the Wage MI v Bd of State Canvassers*, 509 Mich 876; 970 NW2d 677 (2022).

On March 10, 2022, Raise the Wage MI submitted a petition proof with a revised union logo. *See* Exhibit 1 (petition proof date-stamped March 10, 2022).

In the wake of this Court's decision in *Raise the Wage Mich*, the BOSC met on March 23, 2022, and unanimously approved the form of the petition submitted by Raise the Wage MI on March 10, 2022. *See* Board of State Canvassers, Meeting Minutes (March 23, 2022), available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Meeting-Minutes/Signed-03-23-2022-Meeting-Minutes.pdf?rev=527a925174c241d290d707340a078918&hash=C0E121360E1F4417C6E43AF389771F26.

The BOSC decision of March 23, 2022, approving the form of the petition, was never appealed. No one ever sought reconsideration of the BOSC's decision on March 23, 2022, approving the form of the petition. In reliance on the BOSC approval of its petition form, Raise the Wage MI used the BOSC-approved form for its petition.

Raise the Wage MI Circulates Its Petition, and Collects and Files Nearly 570,000 Signatures

With an approved summary and petition form in hand, Raise the Wage MI began collecting signatures. Raise the Wage MI's proposal to raise the minimum wage to $15/hour, index it for inflation, and apply it to tipped workers was very popular. After only five months of collecting signatures, Raise the Wage MI filed 567,934 signatures on July 26, 2022. *See* Exhibit 2.

The Raise the Wage MI Petition Signatures Are Reviewed and the Bureau of Elections Staff Recommends Certification

The BOE staff conducted its standard review of the petition signatures. Michigan

Opportunity filed challenges, to which Raise the Wage MI responded. After reviewing the signatures and considering the challenges and responses, the nonpartisan, professional staff at the BOE recommended certification of Raise the Wage MI's petition. *See* Exhibit 2. The BOSC ignored that recommendation and on October 20, 2023, deadlocked 2–2 on a motion to certify the proposal.

ARGUMENT

THE COURT SHOULD GRANT THE COMPLAINT FOR MANDAMUS AND ORDER THE BOARD OF STATE CANVASSERS TO CERTIFY THE PETITION OF RAISE THE WAGE MI

I. THE BOARD OF STATE CANVASSERS HAS A CLEAR LEGAL DUTY TO CERTIFY THE PETITION AND RAISE THE WAGE MI HAS A CLEAR LEGAL RIGHT TO HAVE ITS PETITION CERTIFIED.

A writ of mandamus is issued by a court to compel public officers to perform a clear legal duty. *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003) (*en banc*). "Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (*per curiam*) (internal quotation marks and citation omitted).

To be entitled to a writ of mandamus, a plaintiff must show that: "(1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014) (*per curiam*).

The BOSC has a clear legal and ministerial duty grounded in statutory law and the numerous precedents of this Court to certify the Raise the Wage MI petition. *See, e g, Reproductive Freedom for All v Bd of State Canvassers*, 510 Mich 894, 894–895; 978 NW2d 854 (2022) (where

the form of a petition is sufficient and there are enough signatures, "the Board . . . has a clear legal duty to certify the petition"); *Unlock Mich v Bd of State Canvassers*, 507 Mich 1015, 1015; 961 NW2d 211 (2021) (where the Board previously approved the form of the petition and there are sufficient signatures, "the Board has a clear legal duty to certify the petition"); *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 493; 688 NW2d 538 (2004) (*per curiam*) ("[T]he Board approved the form of the petition and there is no dispute that there are sufficient signatures. . . . [T]he Board was obligated to certify the petition."). Based on the same authorities, Raise the Wage MI has a legal right to certification. *See id.*[1]

II. THE OBJECTIONS TO CERTIFICATION ARE MERITLESS.

In the face of the clear legal duty of the BOSC to certify the proposal, a group called Michigan Opportunity ("MO") made two legal arguments against certification before the BOSC.

First, they quarreled with the text of the proposal over which the BOSC had no jurisdiction, claiming that the text violated Article 4, § 25 of the Michigan Constitution and that it was "internally inconsistent." Second, they tardily claimed—a year and a half late—that the approved petition summary is faulty. Neither argument is valid based on statutes and case law—case law that MO failed to even cite to the BOSC, let alone distinguish.

A. There Is No Violation Of Article 4, § 25.

The courts have repeatedly made it clear that the BOSC has no authority whatsoever over the text of the proposal and cannot use the text to deny certification. If there are sufficient signatures and the form of the petition has been approved, the proposal must be certified. *See, e g, Reproductive Freedom for All*, 510 Mich at 894–895 (spacing between words of text not a basis to

[1] Under all of these authorities, the BOE staff report's statement that the BOSC had "discretion" to decide MO's legal objections is clearly wrong. *See* Exhibit 2, p 8.

deny certification); *Unlock Mich*, 507 Mich at 1015 (where the Board previously approved the form of the petition and there are sufficient signatures, "the Board has a clear legal duty to certify the petition"); *Citizens for Protection of Marriage*, 263 Mich App at 493 ("[T]he Board approved the form of the petition and there is no dispute that there are sufficient signatures. . . . [T]he Board was obligated to certify the petition."). The BOSC acknowledges its lack of authority over the text of a proposal every time it approves a petition as to form through its standard motion language:

> The Board's approval does not extend to: (1) The substance of the proposal which appears on the petition; or (2) The manner in which the proposal language is affixed to the petition.

In order to evade this bedrock prohibition on the BOSC taking action based on a proposal's text, MO argued to the BOSC that the numeral "21" in the proposal somehow violates Article 4, § 25 of the Michigan Constitution and that the BOSC can refuse to certify the petition on that basis, denying nearly 570,000 signers their constitutional right to petition.

There is no constitutional violation giving the BOSC the authority to refuse to certify the proposal. Article 4, § 25 contains two very simple commands, easily satisfied here by the petition's text:

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

MO did not complain about the lack of a title but claimed that there was a failure to republish. That is not true.

One of the sections of the law amended by the petition currently reads as follows:

> (d) "Employer" means a person, firm, or corporation, including this state and its political subdivisions, agencies, and instrumentalities, and a person acting in the interest of the employer, who employs 2 or more employees at any 1 time within a calendar year. An employer is subject to this act during the remainder of that calendar year. Except as specifically provided in the franchise agreement, as

> between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages.

MCL 408.932(d). The petition simply changes this language by striking the final sentence and adding a "1" after the "2," changing "2" to "21":

> (d) "Employer" means a person, firm, or corporation, including this state and its political subdivisions, agencies, and instrumentalities, and a person acting in the interest of the employer, who employs 21 or more employees at any 1 time within a calendar year. An employer is subject to this act during the remainder of that calendar year. ~~Except as specifically provided in the franchise agreement, as between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages.~~

MCL 408.932(d), as amended by the petition. *See* Exhibit 1. That is it—all of the previous language of subsection (d) is in the petition, "republished" as the Constitution requires, together with the proposed changes. It is very clear and straightforward.

Before the BOSC, MO claimed that this portion of the petition somehow violates Article 4, § 25. MO is wrong as a matter of law for several reasons.

First, as the courts have repeatedly explained, there are only two requirements for the text of a proposal on a petition:

> MCL 168.482(3) requires *only* that "[t]he full text of the amendment so proposed must follow the summary and be printed in 8-point type."

Reproductive Freedom for All, 510 Mich at 894 (emphasis added). The petition here meets both of these requirements and nothing more is necessary.

MO complained to the BOSC that the meanings of the words in § 932(d) have changed. Of course they have—that is the entire purpose of a petition: to change the meanings of words in a law. That is not a constitutional flaw; rather, it is part of the constitutional process of initiative. There are no "misrepresentations" as claimed by MO below—the petition clearly defines an

"employer" in § 932(d) for all signers to read and has done so since it was filed with the BOE on March 10, 2022. Nothing is hidden or misrepresented—any signer could read the simple definition of "employer." The prior law is republished together with the changes—striking a sentence and adding a numeral.

Before the BOSC, MO also relied on the Secretary of State's non-binding "guidance" to claim that § 932(d) of the petition is defective, but MO failed to highlight for the BOSC that this guidance is *not* mandatory, it is only *permissive*:

> If the petition offers a legislative proposal or a referendum of legislation which involves alterations to existing provisions of Michigan law, the alterations *may* be presented by showing any language that would be added to the provision or provisions in capital letters and any language that would be deleted from the provision or provisions struck out with a line.

Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition, p 22 (emphasis added). None of these "suggestions" are required by the Constitution or statute—they are nothing more than suggestions that need not be followed.

MO erroneously claimed below that these guidelines are "consistent" with the Legislature's rules. As is clear from the rules, they are mandatory for legislative bills as an internal legislative matter. There is no such mandate for petitions. If the Legislature desired to impose its bill drafting rules on petitions, it could easily have done so by enacting a law. But it has enacted no such law. The law it did enact only requires the full text of the proposal in 8-point type, nothing more. MCL 168.482(3).[2]

The petition text does not violate Article 4, § 25.

[2] MO similarly wrongfully complained before the BOSC about an allegedly omitted word in § 2(c). Not only is this objection meritless as set forth above, but it concerns an immaterial word that is to be deleted by the proposal.

B. Even If There Is A Violation Of Article 4, § 25, The Court-Mandated Remedy Is Certifying The Proposal And Leaving Legal Issues To Be Resolved Post-Election.

Even if the BOSC could consider a challenge to the proposal's text—it cannot—and even if there is a violation of Article 4, § 25—there is not—the draconian remedy of refusing to certify the proposal is not available to the BOSC under controlling judicial precedents.

In *Auto Club of Mich Comm for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613; 491 NW2d 269 (1992) (*per curiam*), *lv den* 440 Mich 913; 489 NW2d 763 (1992), the Court of Appeals addressed the issue of whether a petition could be certified for the ballot despite alleged violations of Article 4, § 25. In that case, several entire sections of the affected law were missing from the petition. The Court held that the petition should be certified despite those missing sections because the correct remedy was *not* to bar the entire proposal from the ballot but to certify it and allow post-election judicial correction of the allegedly unconstitutional provisions if the proposal was adopted. The Court analyzed this issue at length in reaching that conclusion:

> The next contention is that the petitions are invalid because of the violation of Const 1963, art 4, § 25 with respect to the proposed amendment of § 2111 of the Insurance Code. . . .
>
> These petitions, with respect to § 2111, republish at length only subsections beginning with 6 to the end of the amended section, and thus, on its face, the petitions arguably violate Const 1963, art 4, § 25 in this respect. Is the issue cognizable at this time rather than only after submission to the electorate?
>
> Intervening defendants seem to assume, without citation of relevant supporting authority, that if the initiative is constitutionally defective in this respect, then it is wholly defective and it cannot be submitted to the electorate. However, it seems apparent that the usual doctrines of constitutional adjudication apply. *If legislation is unconstitutional in part because one of numerous sections otherwise validly enacted violates Const 1963, art 4, § 25, then it is only that section, and not the entire bill, that is unconstitutional.* That was the result achieved in this Court's decision in *Berrien Co v Michigan*, 136 Mich App 772, 788-789; 357 NW2d 764 (1984), where this

> Court found that a portion of an appropriations bill violated the reenactment and publication requirements of art 4, § 25. Accordingly, that portion of the appropriations act was deemed unconstitutional; the entire act was not, however, stricken as unconstitutional.
>
> This result is consistent not only with judicially developed principles of constitutional law, but with legislative codification of those principles as set forth in MCL 8.5; MSA 2.216:
>
> > In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
> >
> > If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.
>
> *Thus, if this initiative legislation had been enacted by the Legislature, this Court might declare that § 2111 is invalid as being in violation of art 4, § 25, thus reinstating the preamendment version of § 2111, the attempted amendment consequently being a nullity. That would not preclude amendment of any other portion of the Insurance Code, by this or other legislation.*
>
> *Accordingly, this alleged defect does not warrant precluding submission of the initiative to the electorate*, just as this Court would not be warranted in enjoining the Legislature from adopting a bill that contained such a defect. *The time to consider whether to declare the affected portion invalid is after its adoption.*

Id at 622–624 (emphasis added). The principle recognized in *Auto Club*—that legal challenges to ballot proposals should only be resolved by the courts *after* a proposal is adopted—is well-established in Michigan law. *See, e g, Beechnau v Secretary of State*, 42 Mich App 328, 331; 201 NW2d 699 (1972) (*per curiam*), *lv den* 388 Mich 771; ___ NW2d ___ (1972) (challenge that a ballot proposal violated the title-object requirements of Const 1963, art 4, § 24 is "premature"

until after the proposal is submitted to the voters); *Newsome v Riley*, 69 Mich App 725, 730; 245 NW2d 374 (1976) (same); *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 270 n 5; 553 NW2d 679 (1996) (*per curiam*) (ordering a charter amendment to be placed on the ballot because the legality of proposed city charter provisions can be decided only after the election); *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 374; 820 NW2d 208 (2012), *lv den* 491 Mich 932; 813 NW2d 752 (2012) (ordering that a proposed ordinance be placed on the ballot because the legality of proposed city ordinances can be decided only after the election).

Auto Club and *Berrien Co* control here.

In *Auto Club*, a petition was certified for the ballot despite *allegedly missing five entire subsections of the law being amended*. Plainly under that controlling decision, the Raise the Wage MI petition must be certified to the ballot, leaving the Article 4, § 25 allegations about a single numeral and a missing word for judicial resolution *if* the proposal becomes law.

The Article 4, § 25 challenge by MO does not prevent the petition from being certified.

C. The Proposal Is Not Fatally Inconsistent And Even If It Is, That Is An Issue For Courts To Resolve Post-Adoption, Not For The Board Of State Canvassers To Use To Deny Certification.

In yet another attempt to block certification based on the proposal's text, before the BOSC, MO cited alleged "inconsisten[cies]" in the text. But even if those inconsistencies existed—and they do not—MO cited no authority that can be used to block the proposal from being certified by the BOSC. Michigan courts have been adamant that questions of interpretation of ballot proposals are for the courts *after* a proposal is adopted, not for the BOSC. *See, e g, Hamilton v Secretary of State*, 212 Mich 31, 34; 179 NW 553 (1920) (question of a proposal's constitutionality is for the courts post-adoption); *Beechnau*, 42 Mich App at 331 (same). *Citizens for Protection of Marriage*,

263 Mich App 487, succinctly summarized the BOSC's lack of a role in interpreting or assessing the lawfulness of a proposal:

> We further conclude that the Board erred in considering the merits of the proposal. . . . [B]ut it is also well established that a substantive challenge to the subject matter of a petition is not ripe for review until after the law is enacted.

Id at 493.

Alleged "fatal inconsistencies" of a proposal's language is not within the BOSC's purview and cannot be a basis to deny certification.

III. THE APPROVED SUMMARY OF THE PROPOSAL ON THE PETITION CANNOT BE USED TO BLOCK CERTIFICATION.

MO also made a tardy challenge to the accuracy of the petition's approved summary. This challenge fails for several reasons.

A. The Challenge Is Barred By MCL 168.482b(1).

Michigan election law is unequivocal that:

> The board of state canvassers *may not consider* a challenge to the sufficiency of a submitted petition on the basis of the summary being misleading or deceptive if that summary was approved . . . .

MCL 168.482b(1) (emphasis added). This language is absolute and permits no exceptions.

Despite this clear command, on October 20, 2023, the BOSC considered a challenge by MO to the summary it approved 19 months ago as "erroneous, misleading, and untrue." The time has long since passed for that challenge to be brought or considered. Raise the Wage MI circulated its petition using the BOSC-approved summary in reliance on the BOSC's approval of it and the safe harbor of MCL 168.482b(1) that the summary could not be challenged now. It would be manifestly unfair to now use that summary to block certification. The BOSC had no authority to ignore the Legislature's clear command in MCL 168.482b(1) that *no challenge* can be brought now against Raise the Wage MI's approved petition summary.

B. The Challenge Is Barred By Laches.

Even if the statutory bar of MCL 168.482b(1) could be overcome—and it cannot—MO's challenge to the petition summary is barred by laches.

Laches is an equitable doctrine intended to remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996) (*en banc*) (internal quotation marks and citation omitted). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id, citing Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982); *McGregor v Carney*, 271 Mich 278, 280; 260 NW 163 (1935); 11A Callaghan, Michigan Pleading & Practice (2d ed), § 92.12, p 580. "The doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation." *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 200; 596 NW2d 142 (1999) (*en banc*).

Laches is particularly important in election cases such as this. As the Court of Appeals has observed:

> [E]quity will aid the vigilant, not those that slumber on their rights. The purpose of the rule is to promote diligence, discourage laches, and prevent the enforcement of stale demands. . . . [L]egal challenges that affect elections are especially prone to causing profound harm to the public and to the integrity of the election process the closer in time those challenges are made to the election, making laches especially appropriate to apply in such matters.

Davis v Secretary of State, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 362841); slip op at 17–18 (citations omitted).

Laches bars MO's challenges here. The petition summary recommended by the Director of Elections was unanimously adopted by the BOSC on January 19, 2022—21 months ago. During

that time, neither MO nor anyone else ever challenged the summary as erroneous, misleading, or untrue in court, as was their right under MCL 168.479(1). Moreover, the BOSC met nearly 20 times during those 21 months and neither MO nor anyone else ever asked the BOSC to reconsider its approval and/or change the summary. During those 21 months, in reliance on the BOSC-approved summary, Raise the Wage MI expended millions of dollars to collect signatures, file them, and defend them.

MO has inexcusably delayed raising the issue of the summary's accuracy, despite numerous opportunities to do so over nearly two years. And there has been a material change in conditions, severely prejudicing Raise the Wage MI as it spent considerable resources on its petition drive, while MO did nothing to assert its claims. The very mischief MCL 168.482b(1) was created to avoid—the wasting of resources on a petition drive—will occur if MO can bring a petition summary challenge now.

MO's dilatory conduct and Raise the Wage MI's material change in conditions bars MO's challenge under the doctrine of laches.

C. Signers Had The Remedy Of Reading The Entire Proposal Text On The Petition To Remedy A "Misleading" Summary.

Even if a challenge to the summary can be made now and if it is misleading—neither of which are true—the summary was not the only source of information for signers. Petition signers had the entire proposal available to read before they signed, undermining any claim that signers were misled.

MCL 168.482(3) requires that the full text of the proposal be part of the petition and it was. *See* Exhibit 1. The purpose of that requirement is so that voters can read and understand a proposal before they sign. *See, e g, Walmsley v Martin*, 2012 Ark 370; 423 SW3d 587, 591 (2012) ("We have previously discussed the attachment mandate [i.e., the requirement that a 'full and

correct copy' of the measure be attached to the petition] and have explained that its purpose is to inform voters of what they are signing before they sign it."); *Kerr v Bradbury*, 193 Or App 304, 318; 89 P3d 1227 (2004) (noting that "'[f]ull text' provisions are not uncommon" and "[t]heir general purposes are fairly well-established," namely, facilitating understanding of the proposed measure so that voters can make an intelligent decision); *Mervyn's v Reyes*, 69 Cal App 4th 93, 99; 81 Cal Rptr 2d 148 (1998) ("The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion.").

As former Justice MARKMAN opined in a case where this Court denied relief on the basis of alleged misrepresentation of the context of a petition, it is a signer's responsibility, and no one else's, to know what a petition says:

> In carrying out the responsibilities of self-government, "we the people" of Michigan are responsible for our own actions. In particular, 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*.
>
> *A necessary assumption of the petition process must be that the signer has undertaken to read and understand the petition. Otherwise, this process would be subject to perpetual collateral attack, and the judiciary would be required to undertake determinations for which there are no practical legal standards and which essentially concern matters of political dispute*.
>
> The ultimate check on the petition process must remain the electoral process. No ballot measure can become part of our [laws] unless it is approved by a majority of the voters of this state in November.

Mich Civil Rights Initiative v Bd of State Canvassers, 475 Mich 903, 904; 716 NW2d 590 (2006) (MARKMAN, J, concurring) (emphasis added).

The remedy of the entire text of the proposal being on the petition for a signer to read undercuts any claims that the summary misled signers. As Justice MARKMAN counseled, the Court should not entertain collateral attacks, such as this, on the summary after the petition has been circulated.

D. Even If The Summary Is Misleading, The Appropriate Remedy Is Certification With Post-Election Judicial Resolution If The Proposal Passes.

As with the attack on the text of the petition under Article 4, § 25, the remedy for a misleading summary is certifying and leaving the legal issue for post-election judicial resolution.

In *Auto Club*, 195 Mich App 613, the Court considered whether a misleading and inaccurate title of a ballot proposal was sufficient to prevent its certification for presentation to the voters. The Court held that a misleading title could *not* bar a proposal from the ballot. Instead, the correct approach was certification with post-election resolution of that legal issue if the proposal passed. *Id* at 621.

The same is true here. A title is a required part of a ballot proposal, while a summary is just that—a summary that is not part of the proposal. If a proposal with missing sections and a misleading title can go to the ballot under *Auto Club* and other precedents, then an allegedly misleading petition summary should not bar ballot access either.

IV. RAISE THE WAGE MI IS ENTITLED TO COSTS.

The BOSC's continuing refusals to acknowledge its limited role in the ballot proposal process have required this Court to repeatedly order the Board to do its job. *See, e g, Reproductive Freedom For All*, 510 Mich at 896 (MCCORMACK, CJ, concurring) (BOSC refused to certify a petition based on text spacing, described by Chief Justice MCCORMACK as "a game of gotcha gone very bad" by two members of the BOSC); *Raise the Wage MI*, 509 Mich at 876 (two members of the BOSC refused to approve a petition's form because of a union label).

The BOSC's refusal to certify this proposal is a continuation of the "game of gotcha" that began with the BOSC using a union label as an excuse not to approve the petition's form. That game must stop. Repeatedly bringing the BOSC's recalcitrance to this Court for resolution is expensive for litigants such as Raise the Wage MI. While attorneys' fees cannot be recovered, Raise the Wage MI asks the Court to award costs under MCL 600.4431 not only as an entitlement but as a deterrent to future BOSC misconduct.

CONCLUSION AND RELIEF SOUGHT

For these reasons, Plaintiff asks that the Court:

1. Grant this complaint for mandamus;
2. Order the Board of State Canvassers to certify the petition of Raise the Wage MI;
3. Award Raise the Wage MI its costs pursuant to MCL 600.4431; and
4. Grant such other relief as necessary or appropriate.

Respectfully submitted,

/s/ Mark Brewer

Goodman Acker, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
mbrewer@goodmanacker.com
Attorneys for Plaintiff

Dated: October 30, 2023

Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCL 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 5,805.

Respectfully submitted,

/s/ Mark Brewer
Goodman Acker, P.C.
MARK BREWER (P35661)
ROWAN CONYBEARE (P86571)
17000 W. Ten Mile Road
Southfield, MI 48075
mbrewer@goodmanacker.com
Attorneys for Plaintiff

Dated: October 30, 2023

Proof of Service

The undersigned certifies that on October 30, 2023, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes