STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellants,
v

JOCELYN BENSON

Defendant-Appellee.

LEAGUE OF WOMEN VOTERS OF MICHIGAN, MICHIGANERS FOR FAIR AND TRANSPARENT ELECTIONS, HENRY MAYERS, VALERIYA EPSHTEYN, and BARRY RUBIN,

Appellants/Plaintiffs,
v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant-Appellee.
_____/

Supreme Court No. 160907

Court of Appeals No. 351073

Court of Claims No. 19-000092-MZ

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

Consolidated with:

Court of Appeals No. 350938

Court of Claims No. 19-000084-MM

DEFENDANT-APPELLEE SECRETARY OF STATE JOCELYN BENSON'S BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS MICHIGAN HOUSE AND SENATE'S APPLICATION FOR LEAVE TO APPEAL

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Defendant-Appellee
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: February 10, 2020

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

COUNTER-STATEMENT OF JURISDICTION

Defendant-Appellee Secretary of State Jocelyn Benson concurs in Plaintiffs-Appellants Michigan Senate and House of Representative's statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the trial court's dismissal of the Legislative Plaintiffs' complaint for lack of standing?

   Plaintiffs-Appellants' answer: No.

   Defendant-Appellee's answer: Yes.

   Court of Appeals' answer: Yes.

2. Whether the Court of Appeals correctly affirmed the trial court's dismissal of the Legislative Plaintiffs' complaint where the challenged statutes, as amended by 2018 PA 608, are unconstitutional?

   Plaintiffs-Appellants' answer: No.

   Defendant-Appellee's answer: Yes.

   Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, art 2, § 4(2), provides, in part:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. . . .

Const 1963, art 2, § 9 provides, in part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> ***
>
> The legislature shall implement the provisions of this section.

Const 1963, art 12, § 2, provides, in 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.

MCL 168.471 states, in relevant part:

> Not more than 15% of the signatures to be used to determine the validity of a petition described in this section shall be of registered electors from any 1 congressional district. Any signature submitted on a petition above the limit described in this section must not be counted.

MCL 168.482(7) provides, in relevant part:

> Each petition under this section must provide at the top of the page check boxes and statements printed in 12-point type to indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer.

MCL 168.482a(1)-(2):

> (1) If an individual who circulates a petition under section 482 is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer.
>
> (2) Any signature obtained on a petition under section 482 by an individual who has not filed the required affidavit under subsection (1) is invalid and must not be counted.

INTRODUCTION

The Michigan Constitution has long provided the people of this State the right to petition to amend the Constitution and to enact or reject legislation. This appeal involves several election statutes that unconstitutionally infringe upon that right. The Michigan Senate and House of Representatives filed suit against Secretary of State Jocelyn Benson seeking a declaration that these statutes are constitutional. But the trial court concluded that the Senate and House did not have standing to bring their claims because they failed to demonstrate a particularized injury as discussed in *House Speaker (Dodak) v State Administrative Board*.

The Court of Appeals affirmed. The issue of legislative standing is significant and raises separation of powers concerns. The Supreme Court in *Dodak* held that a legislative plaintiff must assert more than a general grievance that a law is not being followed, and instead must show the deprivation of a legally cognizable interest peculiar to the legislative plaintiff. The Senate and House failed to do so here where their arguments amounted to nothing more than a general complaint that a law they passed was not being enforced. This Court's decision in *Lansing Sch Ed Ass'n (LSEA) v Lansing Bd of Ed* does not require a different result. The *LSEA* Court did not overrule *Dodak* and even under *LSEA*, as the Court of Appeals concluded, the Senate and House fail to demonstrate an actual controversy supporting standing under MCR 2.605. This Court should affirm.

Regardless, even if the Senate and House had standing to bring their complaint, it was properly dismissed because, as the Court of Appeals concluded,

the challenged statutes are unconstitutional. Although article 2, § 4(2) of the Constitution authorizes the Legislature to enact laws to preserve the purity and integrity of elections in Michigan, it does not authorize the Legislature to enact unconstitutional statutes. The amendments imposing a geographic signature distribution requirement and other requirements on circulators relating to their paid or unpaid status, exceed the Legislature's authority to enact statutes regulating the initiative process under article 2, § 9 and article 12, § 2, or otherwise violate the First Amendment and Michigan's constitutional analogue, art 1, § 5.

Thus, even if there was any error by the trial court and Court of Appeals in their decisions regarding standing, the Senate and House were not entitled to summary disposition, and the dismissal of the complaint must be affirmed.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

This action involves 2018 PA 608 which made significant changes to the Michigan Election Law, 1954 PA 116, MCL 168.1, *et seq*, relating to the initiative and referendum process in Michigan. Public Act 608 was introduced as House Bill 6595 on December 6, 2018.[1] It passed the House, as substituted, on December 12, 2018, by a vote of 60 to 49, and was given immediate effect.[2] The Senate made several amendments and passed a substituted bill on December 21, 2018, by a vote of 26 to 12, and gave the bill immediate effect.[3] The bill was returned to the House the same day, where the Senate substitute was concurred in and passed on a 57 to 47 vote. Former Governor Rick Snyder signed the bill on December 31, 2018, and it became immediately effective.[4]

On January 22, 2019, Secretary of State Benson sent Attorney General Dana Nessel a letter requesting a formal opinion[5] regarding the legality of several of the amendments effectuated by Public Act 608. On May 22, 2019, Attorney General Nessel issued an opinion, OAG No. 7310, concluding that several of the

---

[1] See http://www.legislature.mi.gov/(S(vcpxxi2t1ljspspqg3rkmk0d))/mileg.aspx?page=getObject&objectName=2018-HB-6595.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] See MCL 14.32 ("It shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer[.]").

amendments made by Public Act 608 were unconstitutional but that other amendments were constitutional.[6]

On May 23, 2019, the League of Women Voters of Michigan (LWV), Michiganders for Fair and Transparent Elections, Henry Mayers, Valeriya Epshteyn, and Barry Rubin (LWV) filed a lawsuit. The LWV Plaintiffs challenged the constitutionality of many of the amendments made by PA 608 that were addressed in OAG 7310.

Instead of seeking to intervene as a defendant in the pending action by LWV, on June 5, 2019 the Legislative Plaintiffs filed the instant complaint for declaratory relief against Secretary Benson seeking a declaration that the amendments made by PA 608 are constitutional.[7]

On July 3, 2019, the Court of Claims consolidated the instant case with the action brought by the LWV Plaintiffs, Case No. 19-000084-MZ. Although neither LWV nor the Legislative Plaintiffs followed consolidation with a motion to intervene, LWV and the Legislative Plaintiffs filed motions for summary disposition in each other's cases.

On July 8, 2019, the LWV Plaintiffs filed a motion for summary disposition in Case No. 19-000084-MM. In her August 19, 2019 response, Secretary Benson argued consistent with the analysis set forth in OAG 7310, meaning that she

---

[6] OAG, 2019-2020, No. 7310 (May 22, 2019) is available at https://www.ag.state.mi.us/opinion/datafiles/2010s/op10389.htm.

[7] On the same day, the Legislative Plaintiffs also filed a complaint for mandamus in this Court against Secretary Benson, COA Docket No. 349225, but that action has since been dismissed.

conceded certain amendments were unconstitutional, but defended those amendments upheld as constitutional in OAG 7310.

On July 29, 2019, the Legislative Plaintiffs filed a motion for summary disposition in Case No. 19-00092-MZ. Secretary Benson filed her response to that motion on August 19, 2019 as well. (Def's App'x, pp 001-030, Resp to MSD w/o exs). As in the *LWV* case, Secretary Benson argued consistently with the analysis set forth in OAG 7310. *Id.*

The Court of Claims heard the motions for summary disposition in the consolidated cases on September 16, 2019. From the bench, the court ruled that the Legislative Plaintiffs did not have standing to bring their action (Case No. 19-00092), but that they would be allowed to participate as amicus curiae in Case No. 19-000084. The court partially ruled from the bench, concluding that the 15% signature distribution requirement and the petition checkbox requirement were unconstitutional but took the remaining arguments under advisement. The court suggested that the parties agree to an order preserving the status quo, which would continue the effect of OAG 7310 pending appeal. Counsel for LWV and Secretary Benson stipulated to such an order, and it was entered by the court on September 24, 2019. (Def's App'x, p 031-032, 9/24/19 Order).

On September 27, 2019, the court issued its opinion and order in the consolidated cases. (Pls' Brf, Ex B, 9/27/19 Opinion). In the LWV's case, the trial court granted summary judgment in favor of LWV regarding the claims as to the 15% signature distribution requirement and the petition check-box requirement.

The court denied summary judgment as to the petition affidavit requirement, which was contrary to both LWV's and Benson's arguments. Finally, the trial court denied summary disposition as to several other amendments affecting the form of petitions and the collection of signatures and granted summary disposition in favor of Secretary Benson regarding those statutes. In the instant case, the trial court held that the Legislative Plaintiffs lacked standing to bring their case and dismissed their claims but accepted their filings as amicus curiae.

LWV filed a claim of appeal in the Court of Appeals on October 7, 2019. (See Docket No. 350938). The Legislative Plaintiffs filed their claim of appeal on October 14, 2019. The two appeals were consolidated by order of the Court of Appeals. On November 5, 2019, LWV filed a bypass application in this Court, along with a motion for immediate consideration. The request for bypass was denied on December 18, 2019. (See MSC Case No 160492, 12/18/19 Order). However, this Court ordered the Court of Appeals to expedite resolution of the consolidated appeals and issue a decision by January 27, 2020. *Id.* The Court of Appeals followed with its own order setting forth an expedited briefing schedule in the appeals. (COA Order 12/20/19). Per this Court's order, the Court of Appeals issued its decision on January 27, 2020. (Pls' Brf, Ex A, 1/27/20 Opinions).

The majority opinion by Judges Servitto and Gadola held that the Legislative Plaintiffs were not aggrieved parties for purposes of appealing, but regardless had not demonstrated an actual controversy sufficient to support standing to sue. *Id.*, Opinion, pp 6-9. The majority further held that the 15% geographic signature

distribution requirement, the check-box requirement, and the affidavit requirement (reversing the trial court on that statute) were unconstitutional. *Id.*, Opinion, pp 9-20. Finally, the majority concluded these statutes were severable from the remainder of PA 608. *Id.*, Opinion, pp 20-21. Thus, the majority affirmed in part, and reversed in part, the trial court's opinion.

In his concurring and dissenting opinion, Judge Boonstra concurred with the majority opinion regarding the unconstitutionality of the 15% geographic signature distribution requirement and the affidavit requirement. *Id.*, Opinion, Boonstra, J., concurring and dissenting in part, pp 1, 5, 7. But Judge Boonstra dissented on the question of standing, and further dissented regarding the check-box requirement, concluding that that statute was constitutional. . *Id.*, Opinion, Boonstra, J., concurring and dissenting in part, pp 1-7.

ARGUMENT

I. The Court of Appeals did not err in affirming the dismissal of the Legislative Plaintiffs' complaint for declaratory relief because the Plaintiffs lacked standing to bring suit.

In her briefing in the trial court, Secretary Benson urged that court to determine whether the Legislative Plaintiffs had standing in this case but did not advocate a particular result. The trial court concluded the Legislative Plaintiffs did not have standing, and Secretary Benson agreed with that result. Thus, Secretary Benson defended that decision in the Court of Appeals, and she likewise does so now in this Court with respect to the majority's opinion.

A. Issue Preservation

Secretary Benson raised the issue of standing in her response in opposition to the Legislative Plaintiffs' motion for summary disposition. (Def's App'x, pp 001-030, MSD Resp w/o exs).

B. Standard of Review

This Court reviews de novo the legal question whether a party has standing. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 595 (2000); *Olsen v Chikaming Twp*, 325 Mich App 170, 180 (2018).

C. Analysis

1. The Michigan Senate and House are not proper Plaintiffs in this case.

As Secretary Benson observed below, this suit was purportedly brought by the Michigan Senate and House of Representatives as the institutional bodies constituting the state legislature, and "vested" with the "legislative power of the State of Michigan." (Compl., ¶¶ 2-4), quoting Const 1963, art 4, § 1.) But a review of legislative activity in the Senate and House did not reveal the approval of—by a majority vote—resolutions by the chambers authorizing suit on behalf of the Senate and House.[8] Further, there is nothing in the Senate or House rules that suggests

[8] Resolutions are the form the Legislature uses to express a determination or direct particular action. *Kalamazoo Municipal Utilities Ass'n v City of Kalamazoo,* 345 Mich 318 (1956). The House and the Senate have used resolutions to authorize litigation in the past. See, e.g, Senate Resolution No. 6, January 23, 2019 (authorizing intervention in federal redistricting case), available at http://legislature.mi.gov/documents/2019-2020/resolutionadopted/Senate/pdf/2019-SAR-0006.pdf, and House Resolution No. 17, February 5, 2019 (authorizing action

that litigation can be brought on behalf of either body in its institutional capacity absent approval by the body itself.[9] Thus, the Michigan "Senate" and "House" do not appear to be properly named as Plaintiffs in this case. At best, it was and is an undisclosed group of individual legislators pursuing this action.

2. The Michigan Senate and House do not have standing under *Dodak v State Administrative Board* or *Lansing Sch Ed Ass'n v Lansing Bd of Ed.*

The majority concluded that Plaintiffs lacked standing to seek declaratory relief under the principles articulated by this Court in *Lansing Sch Ed Ass'n (LSEA) v Lansing Bd of Ed*, 487 Mich 349 (2010).[10] Specifically, the majority concluded that the Legislative Plaintiffs had not shown the existence of an "actual controversy" for purposes of MCR 2.605. (Pls' Brf, Ex. A, Majority Opinion, pp 6-7). The majority further concluded that this Court's decision in *House Speaker* (*Dodak) v State Administrative Board*, 441 Mich 547 (1993) warranted against standing in this case. *Id.*, Majority Opinion, pp 7-8.

---

in federal redistricting case), available at http://legislature.mi.gov/documents/2019-2020/resolutionadopted/House/pdf/2019-HAR-0017.pdf.

[9] The rules of the Senate and House are available at, http://www.legislature.mi.gov/(S(hykztfhqmidntkwm2h10oix0))/mileg.aspx?page=Rules.

[10] The majority opinion first concluded that the Legislative Plaintiffs were not aggrieved parties for purposes of appealing. (Pls' Brf, Ex. A, Majority Opinion, p 6). Secretary Benson does not disagree with this conclusion.

a. The Senate and House have not been deprived of a legally cognizable interest peculiar to them as a legislative body.

This Court has not addressed legislative standing since its decision in *Dodak*. There, several individual members of the House and Senate brought suit challenging interdepartmental transfers by the State Administrative Board. *Id*. at 550-554. With respect to "standing," the Court observed that it "is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large." *Id*. at 554 (internal citation omitted). The Court noted that the plaintiffs' claimed "standing on the basis of their status as legislators" and alleged that the transfers "reduced their effectiveness as legislators and nullified the effect of their votes." *Id*. at 555.

Citing federal precedents, the *Dodak* Court observed that "[u]nder limited circumstances, the standing of legislators to challenge allegedly unlawful executive actions has been recognized in the federal courts." *Id*. at 555 (citation omitted). "However, to establish standing, a legislator must overcome a heavy burden. Courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *Id*. (citation omitted). "*For these reasons, plaintiffs who sue as legislators must assert more than 'a generalized grievance that the law is not being followed.' Instead, they must establish that they have been*

deprived of a 'personal and legally cognizable interest peculiar to [them].'" *Id*. at 556 (internal citations omitted) (emphasis added).

Applying these principles, the *Dodak* Court concluded that only one legislator, Representative Jacobetti, had standing as a member of the House Appropriations Committee because the Board's interdepartmental transfers denied Jacobetti his statutory right to approve or disapprove of such transfers—a personal and legally cognizable interest peculiar to Jacobetti. *Id*. at 559-560. "For these reasons, we conclude that only plaintiff Jacobetti, in his capacity as an individual member of the House Appropriations Committee has demonstrated a personal injury sufficient to confer standing to sue." *Id*. at 561.

As the Legislative Plaintiffs note, the *Dodak* case involved individual legislators, not a legislative body. (Pls' Brf, p 18). But the *Dodak* analysis is relevant to both individual legislatures and to the body as a whole. A legislative body, too, must allege that it has been deprived of a cognizable interest peculiar to the body. The U.S. Supreme Court and the Sixth Circuit have observed that "[a] legislative body may, in some circumstances, sue as an institutional plaintiff if it has suffered an institutional injury." *Tennessee General Assembly v US Dep't of State*, 931 F3d 499, 507 (2019), citing *Ariz State Legislature v Ariz Independent Redistricting Comm*, ___ US ___; 135 S Ct 2652, 2664 (2015) ("The Arizona Legislature . . . is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers[.]"). "An institutional injury 'constitutes some injury to the power of the legislature as a

whole rather than harm to an individual legislator.' Such an injury is not confined to a single legislator, or a small group, but affects each member of the body equally." *Id*. at 507-508 (internal citations omitted).

Just as "a generalized grievance that the law is not being followed" is not a sufficient injury to confer standing on an individual legislator, *Dodak*, 441 Mich at 556, neither is it a sufficient "institutional injury" to support standing of the Senate and House as an institutional body. See, e.g, *Virginia House of Delegates v Bethune-Hill*, ___ US ___, 139 S Ct 1945, 1953 (2019) (discussing legislative standing to defend constitutionality of statutes). Rather, an institutional injury is generally one that disrupts the legislative body's process or threatens its exercise of specific powers thus impacting the entire legislature. *Tennessee General Assembly*, 931 F3d at 511-512.

Here, the Legislative Plaintiffs' allege an injury to their legislative power to enact election regulations under article 4, § 1 and article 2, § 4(2) of the Constitution. (Pls' Brf, pp 17-18). They argue "the effectiveness of their constitutional *mandate* to regulate elections is at risk," and that they are not "merely asserting a generalized grievance" because "they are about to be deprived of a personal and legally cognizable authority that is peculiar to those chambers alone." *Id*., p 19 (emphasis in original). But as the Legislative Plaintiffs acknowledge, nothing interfered with their enactment of PA 608. *Id*. And nothing is standing in their way of enacting new election regulations pursuant to their legislative power. What they have been deprived of here is the full enforcement of

PA 608 as enacted because portions of it are unconstitutional. But that injury or deprivation is no different than that accruing to the ordinary citizen. See *Dodak*, 441 Mich at 554. "This is particularly so, given that once the votes of the legislators have been counted and the statute enacted, 'their special interest as lawmakers has ceased,' " (Pls' Brf, Ex. A, Majority Opinion, p 8), quoting *Killeen v Wayne Co Road Comm*, 137 Mich App 178, 189 (1984). Thus, the Legislative Plaintiffs do not sufficiently allege the deprivation of a legally cognizable interest peculiar to them as an institutional body.

And as warned of in *Dodak*, finding standing here raises separation of powers concerns. The Legislative Plaintiffs argue there are no such concerns here because this case is not about a "political battle" that Plaintiffs "lost." (Pls' Brf, p 19). But Plaintiffs, the legislative branch of our government, sued the Secretary of State, an elected member of the executive branch of our government. And Plaintiffs sued the Secretary because she exercised her statutory right under MCL 14.32 to request an opinion from another member of the executive branch, Attorney General Nessel, regarding the constitutionality of portions of PA 608. The Attorney General opined that portions of PA 608 were both constitutional and unconstitutional, and Secretary Benson has acted and defended consistent with that opinion. See *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300-301 (1985) (discussing nature and effect of Attorney General opinions). As the majority noted in its opinion, the Legislative Plaintiffs are "plainly challenging the actions of members of the Executive Branch." (Pls' Brf, Ex A, Majority Opinion, p

8). Where the Legislative Plaintiffs have not shown a sufficient injury to an institutional interest and where their action against the Secretary (and their criticism of the Attorney General) raises separation of powers concerns, Plaintiffs did not "overcome [their] heavy burden" to establish standing. *Dodak*, 441 Mich at 555.

b. The Senate and House failed to show an actual controversy to support standing under MCR 2.605.

The Legislative Plaintiffs fair no better under this Court's holding in *LSEA*. "[A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." 487 Mich at 372. "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Comm'r of Ins*, 174 Mich App 467, 471 (1988). Where a cause of action has not been provided by law, a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large[.]" *LSEA*, 487 Mich at 372. Thus, a plaintiff may have standing if (1) the plaintiff has a special right that will be detrimentally affected in a manner distinct from the citizenry at large, or has met the requirements of MCR 2.605 or (2) when the Legislature has intended to confer standing on the litigant under a particular statutory scheme. *Id.*

Here, the Legislative Plaintiffs filed a complaint for declaratory relief under MCR 2.605. Where a party seeks declaratory relief, "meeting the requirements of

the court rule governing declaratory actions [is] sufficient to establish standing." *LSEA*, 487 Mich at 372. MCR 2.605(A)(1) provides, "In a *case of actual controversy* within its jurisdiction, a Michigan court of record *may* declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." (Emphasis added). "The declaratory judgment rule [ ] 'incorporates the doctrines of standing, ripeness, and mootness.' " *UAW v Central Mich Univ Trustees,* 295 Mich App 486, 495 (2012).

A case of actual controversy is a "condition precedent to invocation of declaratory relief." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55 (2000). "In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Lansing Sch Educ Ass'n v Lansing Bd of Educ (On Remand),* 293 Mich App 506, 515 (2011), citing *Leemreis v Sherman Twp,* 273 Mich App 691, 703 (2007).

"In general, 'actual controversy' exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights*." *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Tr Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 624 (2015), quoting *Shavers v Attorney General*, 402 Mich 554, 588 (1978) (emphasis added). See also *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126 (2005), overruled in part on other grounds, 487 Mich at 371 n 18. "The essential requirement of the term 'actual controversy' under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening

of the issues raised." *UAW v Central Mich Univ Trustees,* 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted).

Again, the sum of the Legislative Plaintiffs' deprivation is that they passed a law and now parts of it are not being enforced by Secretary Benson. If that was enough to create an actual controversy, the Legislature would seemingly have standing to bring a lawsuit against any government entity that fails to enforce or comply with a statute. Nor do the Legislative Plaintiffs adequately explain how declaratory relief is needed here to guide the Senate and House's future conduct in order to preserve their legal rights. *Lansing Sch Ed Ass'n,* 293 Mich App at 515. The majority concluded as much in its opinion:

> Given the definition of "actual controversy" for purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgment is necessary to guide the Legislature's future conduct in order to preserve its legal rights. The Legislature's authority to enact laws is separate and distinct from this Court's role in determining whether any law passes constitutional muster. These "rights" and obligations of the two separate branches of government will remain the same, no matter what the outcome in this matter, such that the preservation of the Legislature's legal rights is not at issue. [Pls' Brf, Ex A, Majority Opinion, p 7.]

Because the Legislative Plaintiffs cannot meet the requirements of MCR 2.605, their complaint was properly dismissed for this reason as well.

The Legislative Plaintiffs also argue they have standing because they have a special right and substantial interest that will be detrimentally affected in a manner different from the citizenry at large—their constitutional right to enact election legislation. (Pls' Brf, pp 17-18). See *LSEA*, 487 Mich at 372 ("Where a cause of action is not provided at law, then a court should, in its discretion,

determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large[.]"). To the extent this test applies where a party has sought declaratory relief, the Plaintiffs fail because there is no threat to their power to enact legislation at issue here.

c. The Senate and House's alleged interest in defending undefended statutes.

The Legislative Plaintiffs also argue they should have standing because otherwise there is no person or entity fully advocating the constitutionality of PA 608. (Pls' Brf, pp 16, 20-22). The trial court acknowledged that there was an absence of advocacy as to the statutes Secretary Benson was not defending due to the Attorney General's opinion. (Pls' Brf, Ex A, 9/27/19 Opinion, pp 8-9). The trial court observed that while "neither the House nor the Senate have demonstrated a particularized injury [for purposes of standing], they do offer this Court a valuable perspective." *Id*., p 9. Accordingly, the trial court accepted the Legislative Plaintiffs' filings as amici in *LWV*, *id*., and in fact counsel for the Legislative Plaintiffs appeared and argued at the hearing. In its opinion, the trial court addressed the Legislative Plaintiffs' arguments. *Id*., pp 14, 20. Between Secretary Benson and the Legislative Plaintiffs, the constitutionality of all the challenged statutes was advocated for below in the *LWV* case. The majority recognized as much in its opinion. "Here the Legislature's arguments were fully considered and addressed by the [trial court], despite its holding that the Legislature had no

standing. Indeed, the Legislature was permitted to file briefs in the *League of Women Voters'* case in the [trial court] and with this Court." (Pls' Brf, Ex A, Majority Opinion, p 6).

The Legislative Plaintiffs fully participated below (and on appeal to the Court of Appeals) despite not having the status of a "party." They do not explain what they would have done or argued differently had they been permitted to proceed as party Plaintiffs in their own lawsuit—likely because the answer is nothing. To the extent they have a cognizable interest in defending an undefended statute against a charge of unconstitutionality, Plaintiffs were not deprived of that right here.

The Legislative Plaintiffs cite a plethora of federal cases that permitted one or both houses of Congress to *intervene* in cases in which a federal executive-branch agency agreed that a federal statute was unconstitutional or otherwise declined to defend a federal law. (Pls' Brf, pp 21-22). However, the Legislative Plaintiffs did not move to intervene in the first-filed *LWV* case. This certainly would have been the appropriate action. And had they done so it is extremely unlikely that Secretary Benson would have opposed the motion under the circumstances of this case. And declining to oppose intervention is not inconsistent with opposing Plaintiffs standing to bring suit. While standing is relevant to intervention, *see Karrip v Cannon Twp*, 115 Mich App 726, 732 (1982) (intervenors "must also demonstrate that they have standing to assert their claims"), standing to bring suit "requires a substantial interest in an issue, intervention requires less. Intervention is a pragmatic procedural device designed to permit those with some interest in the

litigation to participate in its outcome under certain circumstances." *Estate of Lyle v Farm Bureau Gen Ins Co of Michigan*, Docket No. 343358, 2019 WL 4555993, at *6 (Mich. Ct. App. Sept. 19, 2019). But instead of intervening, Plaintiffs chose the nuclear option—filing suit—thereby subjecting themselves to a more rigorous scrutiny regarding their standing, which they failed to sustain under *Dodak* or *LSEA*. Because the Court of Appeals did not err in holding that Plaintiffs lacked standing to bring their suit, this Court should deny leave to appeal.

II. The Court of Appeals did not err in affirming the dismissal of the Legislative Plaintiffs' complaint for declaratory relief because the challenged statutes, as amended by 2018 PA 608, are unconstitutional.

Even if there was error regarding the question of standing, the Legislative Plaintiffs' complaint was properly dismissed nevertheless because the challenged statutes are unconstitutional.

A. Issue Preservation

Secretary Benson addressed the constitutionality of the challenged statutes in her response in opposition to the Legislative Plaintiffs' motion for summary disposition. (Def's App'x, pp 001-030, MSD Resp w/o exs).

B. Standard of Review

This Court "reviews de novo a circuit court's decision whether to grant or deny summary disposition. Similarly, [the Court] review[s] de novo issues of statutory interpretation as questions of law." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205 (2012) (citations omitted). Cases involving questions of constitutional

interpretation are also reviewed de novo. *Midland Cogeneration Venture Ltd Partnership v Naftaly,* 489 Mich 83, 89 (2011).

C. Analysis

Secretary Benson responded below to the Legislative Plaintiffs' motion for summary judgment consistent with the opinion of the Attorney General. Secretary Benson does so again on appeal, and further notes that her arguments are now supported by the Court of Appeals' opinions as well.

1. The 15% signature-distribution requirement (MCL 168.471, 168.477, and 168.482(4)) is unconstitutional.

In Michigan, the people retained for themselves the power to initiate or refer legislation and to propose constitutional amendments that, if certain requirements are met, may be placed on the ballot and voted on by the people. Const 1963, art 2, § 9; art 12, § 2. PA 608 amended MCL 168.471, 168.477, and 168.482(4). These statutes, as amended, impose a signature-distribution requirement regarding initiative and referendum petitions circulated under article 2, § 9 and petitions to amend the Constitution circulated under article 12, § 2.[11]

[11] Of the 24 states that permit initiatives or referendums, 17 have some form of signature distribution requirement, most of which are provided for in that state's constitution. See Alaska Const, art 11, § 3; Ark Const, art 5, § 1; Colo Const, art 5, § 1; Fla Const, art 11, § 3; Idaho Code Ann § 34-1805, Md Const, art 16, § 3; Mass Const, art XLVIII, Part VI, General Provisions, § 2; Mo Const, art 3, §§ 50, 52a; Miss Const, art 15, § 273(3); Mont Const, art 3, § 4; Neb Const, art 11, § 2; Nev Const, art 19, § 2; NM Const, art 4, § 1; Ohio Const, art 2, § 1g; Utah Code Ann, § 20A-7-201(a)(ii); Wyo Const, art 3, § 52. Various courts have addressed the constitutionality of distribution requirements. See *Semple v Williams*, 290 F Supp 3d 1187, 1193-1194 (D Colo, 2018) (collecting cases), *rev'd* 934 F3d 1134 (CA 10, 2019).

As amended by PA 608, MCL 168.471 now limits the number of petition signatures that may be counted from any one congressional district:

> *Not more than 15% of the signatures to be used to determine the validity of a petition described in this section shall be of registered electors from any 1 congressional district. Any signature submitted on a petition above the limit described in this section must not be counted.* When filing a petition described in this section with the secretary of state, a person must sort the petition so that the petition signatures are categorized by congressional district. In addition, when filing a petition described in this section with the secretary of state, the person who files the petition must state in writing a good-faith estimate of the number of petition signatures from each congressional district. [Emphasis added.]

Michigan is currently divided into 14 congressional districts, all of which span multiple counties, except for District 13, which includes only Wayne County. See 2011 PA 128.

Consistent with this amendment, MCL 168.477 was amended to provide that the Board of State Canvassers[12] "may not count toward the sufficiency of a petition described in this section any valid signature of a registered elector from a congressional district submitted on that petition that is above the 15% limit described in section 471."

In keeping with these changes, the Legislature also specified the use of a different petition format for circulating these petitions. MCL 168.482(4) was amended to require that petitions be circulated on a congressional district form:

---

[12] The Board of State Canvassers is a constitutional board created by the Michigan Constitution, Const 1963, art 2, § 7, and its duties and responsibilities are established by law, MCL 168.22(2) and MCL 168.841. The Board is charged with performing various duties relating to the canvass of petitions filed under article 2, § 9 and article 12, § 2. See, e.g., MCL 168.475, 168.476, 168.477.

> The following statement must appear beneath the petition heading:
>
> "We, the undersigned qualified and registered electors, residents in the _____ *congressional district* in the state of Michigan, respectively petition for (amendment to constitution) (initiation of legislation) (referendum of legislation) (other appropriate description)." [Emphasis added.]

Sponsors of initiative petitions must obtain signatures from registered electors totaling 8% (now 340,047) of the total votes cast for all candidates for governor at the last preceding general election. Const 1963, art 2, § 9. Referendum sponsors must obtain signatures from 5% (now 212,530) of registered electors. *Id.* And sponsors of petitions to amend the Constitution must obtain signatures from registered electors totaling 10% (now 425,059) of the total votes cast for all candidates for governor at the last general election. Const 1963, art 12, § 2.

Before the amendments, these petitions were generally circulated countywide and there was no limit on how many signatures could be collected from any one county. Depending on the size of a county,[13] a petition sponsor could, in theory, collect all 340,047 signatures required for an initiative petition from one county. But under the amendments, no more than 15%—now 51,007 signatures—from any one of the 14 congressional districts may be counted in support of the petition.[14] The 15% limitation therefore has the effect of requiring a sponsor to obtain signatures from roughly half of Michigan's 14 congressional districts.[15] Proponents

---

[13] The population of Michigan's 83 counties varies widely. See http://www.senate.michigan.gov/sfa/Economics/MichiganPopulationByCounty.PDF.

[14] Fifteen percent of 340,047 is 51,007.05.

[15] Michigan election law does require candidates running for certain statewide elected offices to obtain at least 100 signatures on nominating petitions from "at

of the legislative amendments argued that a "maximum percentage from each congressional district would ensure that petitions destined for the ballot were supported by a more representative geographic cross-section of Michiganders[.]" House Fiscal Analysis, HB 6595, December 13, 2018, p 2.[16]

The Legislative Plaintiffs argue that the geographic distribution requirements are constitutional exercises of their authority under article 4, § 1 and article 2, § 4(2). But they are not. Neither of these constitutional provisions empower the Legislature to enact unconstitutional legislation. See *Oakland Cty Taxpayers' League v Bd of Sup'rs of Oakland Cty*, 355 Mich 305, 323 (1959) ("[T]he State legislature is the repository of all legislative power subject only to limitations and restrictions imposed by the State or Federal Constitutions as constitutional provisions are to be regarded as limitations on State legislatures and not a grant of power to them[.]"). And the plain language of § 4(2) makes it subject to other provisions in the Constitution, like article 2, § 9. Because the challenged amendments violate article 2, § 9, they are unconstitutional.

When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent. Further, when considering a claim that a statute is unconstitutional . . . the wisdom of the

---

least ½ of the congressional districts of the state." See MCL 168.53, 168.93. See also MCL 168.590b(4).

[16] The analysis is available at http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-6595-718A3730.pdf (last accessed January 6, 2020).

legislation" is not part of the inquiry. *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003) (citations omitted). "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (quotation marks and citations omitted).

> Article 2, § 9, regarding initiatives and referendums, provides in part:
>
> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. . . . *To invoke the initiative or referendum*, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected *shall be required*.
>
> * * *
>
> The legislature shall implement the provisions of this section. [Emphasis added.]

The plain language of § 9 does not include a distribution component with respect to signatures. In other words, § 9 does not *limit* the number of signatures that can be counted from any particular geographic region or political subdivision in Michigan, nor does it *require* that petitions be signed by a certain number of registered electors in different geographic or political subdivisions. Rather, "[t]o invoke the initiative or referendum" process only a specific percentage of signatures of registered electors in the State of Michigan "shall be required."

Article 12, § 2, regarding petitions to amend the Constitution, similarly does not contemplate geographic dispersion of supporting signatures:

> 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. . . .* [Emphasis added.]

Like article 2, § 9, article 12, § 2 does not limit the number of signatures collected from any one geographic region or political subdivision in order to obtain the required 10%. Rather, only a specific percentage of signatures of registered electors in the State of Michigan is required.

The question then is whether the Legislature was authorized to "implement" under article 2, § 9 or to "prescribe[ ]" under article 12, § 2, the 15% signature distribution limitation.

When interpreting the Constitution, the primary duty is to "ascertain . . . the general understanding and therefore the uppermost or dominant purpose of the people when they approved the provision or provisions." *Michigan Farm Bureau v Sec'y of State,* 379 Mich 387, 390-391 (1967). A constitutional provision must be interpreted in the "sense most obvious to the common understanding." *House Speaker v Governor,* 443 Mich 560, 577 (1993). A court may also consider the circumstances surrounding the adoption of the provision, which may include consideration of the constitutional convention record and reference to existing law and custom at the time of the Constitution's adoption. *Id.* at 580-581.

Moreover, there is an overriding rule of constitutional construction that requires that the referendum process "forming as it does a specific power the people themselves have expressly reserved, be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Michigan Farm Bureau,* 379 Mich at 393. Thus, "constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Kuhn v Dep't of Treasury,* 384 Mich 378, 385 (1971); *Farm Bureau Mutual Ins Co of Michigan v Comm'r of Ins,* 204 Mich App 361, 367 (1994).

In *Wolverine Golf Club v Secretary of State*, this Court addressed whether a statute "requiring initiative petitions to be filed not less than 10 days before the start of a legislative session [was] a constitutionally permissible implementation of" article 2, § 9. 384 Mich 461, 465-467 (1971). The Court determined that the statute drew its viability from the 1908 Constitution, and that the relevant provision no longer appeared in § 9. As a result, the Court could "not regard this statute as an implementation of the provision of Const 1963, art 2, § 9." *Id*. at 466. The Court "read the stricture of that section, 'the legislature shall implement the provisions of this section,' *as a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate. This constitutional procedure is self-executing*." *Id.* (emphasis added). Citing other precedents, the Court continued:

> It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision.
>
> > "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing

> constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon".
>
> Whether we view the ten day filing requirement in an historical context or as a question of constitutional conflict, the conclusion is the same—the requirement restricts the utilization of the initiative petition and lacks any current reason for so doing. [*Id.* (citations omitted; internal quotations omitted).]

Accordingly, the Court in *Wolverine Golf Club* held the statute unenforceable. *Id.* at 466-467.

A similar result is compelled here under article, 2, § 9. The Legislature's authority in § 9 to "implement" that section is limited to "formulat[ing] the *process* by which initiative petitioned legislation shall reach the legislature or the electorate." *Id.* at 466 (emphasis added). The Legislature cannot impose an additional obligation that does not appear in article 2, § 9 and that curtails or unduly burdens the people's right of initiative and referendum.

Here, the 15% distribution requirement goes beyond a process requirement by imposing a substantive limitation on the number of voters within a congressional district whose signatures may be counted under article 2, § 9. Attempting to ensure a geographic subset of the population's *support* for the underlying policy in a ballot petition is an inherently qualitative, substantive consideration. See House Fiscal Analysis, HB 6595, December 13, 2018, p 2. Yet § 9 only requires petition sponsors to obtain a specific percentage of signatures from registered electors anywhere in the State of Michigan in order to *invoke* the right of initiative and referendum. The plain language of article 2, § 9 cannot be interpreted to authorize the Legislature's imposition of the 15% distribution requirement added by 2018 PA 608.

Turning to article 12, § 2, this section provides that petitions to amend the Constitution "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." Const 1963, art 12, § 2. This language "clearly authorizes the Legislature to prescribe by law for the *manner* of signing and circulating petitions to propose constitutional amendments." *Consumers Power Co v Attorney General*, 426 Mich 1, 6 (1986) (emphasis added). See also *Citizens for Capital Punishment v Secretary of State,* 414 Mich 913, 914-915 (1982). Even so, in a recent challenge to a petition to amend the Constitution, this Court cautioned against interference with legislative petitions under the guise of setting procedure:

> While the right to propose amendments by initiative must be done according to constitutional requirements, we have observed that "it may be said, generally, that [the right] can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises." Indeed, we have held that Article 12, § 2 is self-executing, although the Constitution explicitly allows the Legislature to prescribe by law *procedures* regulating the initiative. [*Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42, 63 (2018) (emphasis added) (footnotes omitted).]

And this understanding is supported by the 1963 Constitution's Address to the People with regards to article 12, § 2 , which states that "[d]etails as to form of petitions, their circulation and other elections *procedures* are left to the determination of the legislature[.]" 2 Official Record, Constitutional Convention 1961, p 3407 (emphasis added).[17] See also, OAG, 1963-1964, No. 4285, p 289 (February 20, 1964).

[17] To ascertain the purpose sought to be accomplished by a constitutional provision, the "Address to the People" may be consulted. *Regents of the Univ of Michigan v State*, 395 Mich 52 (1975).

Of course, in *Consumers Power Co* this Court determined that a statute could create a rebuttable presumption that petition signatures were stale after 180 days concluding that the statute was within the Legislature's authority:

> [T]he Legislature has followed the dictates of the constitution in promulgating MCL 168.472a [ ]. The statute sets forth a requirement for the signing and circulating of petitions, that is, that a signature which is affixed to a petition more than 180 days before that petition is filed with the Secretary of State is rebuttably presumed to be stale and void. The purpose of the statute is to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment. [426 Mich at 7–8.]

But unlike the statute in *Consumers Power Co* that created a rebuttable presumption regarding the validity of signatures, the 15% distribution requirement imposes an absolute limitation that denies many registered electors the right to have their signatures counted—a limitation without any basis in the language of article 12, § 2. See *Scott v Vaughan*, 202 Mich 629, 643 (1918) (the right to petition "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."). As a result, the amendments imposing the 15% distribution requirement are unconstitutional under article 12, § 2 as well.

Indeed, the Legislative Plaintiffs' argument that they are empowered to enact this requirement under either constitutional provision is hard to square with the fact that the drafters of the Constitution rejected a specific proposal to add a geographic distribution requirement. (Pls' Brf, Ex A, Majority Opinion, pp 14-15). "The constitutional provisions relating to petitions simply do not reference a geographic requirement that is tied to the power of initiative, referendum, or

constitutional amendment, and a geographic component is clearly outside not only the language of the relevant constitutional sections but also the intent of the drafters of these sections." *Id*., p 15.

In summary, the Legislature exceeded its constitutional authority under article 2, § 9 and article 12, § 2 of the Michigan Constitution in enacting a 15% signature distribution requirement based on congressional districts, and the amendments to MCL 168.471, 168.477, and 168.482(4) are unconstitutional. The Court of Appeals unanimously agreed that this requirement was unconstitutional. The majority wrote that "PA 608, specifically the provision set forth in MCL 168.471 imposing a 15% geographic limit constitutes an unnecessary and, therefore, unreasonable restraint on the constitutional right of the people to initiate laws. It is thus unconstitutional. The same holds true for MCL 168.477 and 168.483(4), involving the 15% geographic requirement." (Pls' Brf, Ex A, Majority Opinion, p 15).

In their application, Plaintiffs cite *Utah Safe to Learn-Safe to Worship Coalition, Inc v State*, 94 P3d 217 (Utah, 2004), which upheld as constitutional a statute that imposed a similar distribution requirement in Utah. (Legislative Brf, p 31). But Utah's constitutional provision is quite different, providing "[t]he legal voters of the State of Utah *in the numbers, under the conditions, in the manner,* and within the time provided by statute*,* may[ ] initiate any desired legislation and cause it to be submitted to the people for adoption . . . as provided by statute[.]" Utah Const, art VI, § 1, cl (2)(a)(i) (emphasis added). This is a much broader grant

of authority to the Utah Legislature than that given our Legislature, and the Utah statute's validity is not surprising. The case is thus distinguishable for that reason.

Plaintiffs also complain that the Court of Appeals ignored the legitimate legislative purpose for the distribution requirement—ensuring support from a more representative cross-section of Michigan voters. (Pls' Brf, pp 28, 31-32). But even a good policy will fall where its enactment contravenes the Constitution. Thus, regardless of the merit of the distribution requirement, because it is contrary to the plain language of article 2, § 9 and article 12, § 2, it is unconstitutional. The Legislative Plaintiffs' claims to the contrary are without merit.

2. The check-box requirement (MCL 168.482(7), 168.482c) is unconstitutional.

The form of a petition to initiate or refer legislation or to amend the Constitution is generally provided for in MCL 168.482. Public Act 608 amended MCL 168.482 by adding subsection 7, which requires that "[e]ach petition under this section must provide at the top of the page *check boxes* and *statements* to clearly indicate whether the circulator of the petition *is a paid signature gatherer or a volunteer signature gatherer*." (Emphasis added.)[18]

In *Woodland v Michigan Citizens Lobby*, this Court clarified that the state's speech and association clauses, article 1, §§ 3 and 5, applied to the "individual right to solicit signatures" for petitions. 423 Mich 188, 215 (1985); Const 1963, art 1, §§ 3,

[18] Public Act 608 defined a "paid signature gatherer" in MCL 168.482d as "an individual who is compensated, directly or indirectly, through payments of money or other valuable consideration to obtain signatures on a petition."

5. The free speech rights guaranteed by article 1, § 5 have been interpreted as coterminous with those of the First Amendment, and Michigan courts have applied First Amendment jurisprudence in analyzing speech rights under the Michigan Constitution. *Id.* at 202; *Michigan Up & Out of Poverty Now Coal v State*, 210 Mich App 162, 168-69 (1995); U.S. Const, Am I.

In the seminal case *Meyer v Grant*, the U.S. Supreme Court expressly held that "[t]he circulation of an initiative petition" is "core political speech" that "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 US 414, 421-22 (1988). See also *John Doe No. 1 v Reed*, 561 US 186, 195 (2010) ("the expression of a political view [by the signor of a petition] implicates a First Amendment right"). But the Court has also recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v Brown,* 415 US 724, 730 (1974); see *Buckley v American Constitutional Law Found, Inc* (*ACLF*), 525 US 182, 187 (1999); *Timmons v Twin Cities Area New Party,* 520 US 351, 358 (1997); *Anderson v Celebrezze,* 460 US 780, 788 (1983). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *ACLF,* 525 US at 191. And Michigan's Constitution expressly provides that the Legislature "shall enact laws to regulate the time, place, and manner of all nominations and elections, to preserve the purity of elections," and to "guard against abuses of the elective franchise[.]" Const 1963, art 2, § 4(2).

In apparent exercise of that authority, the Legislature amended section 482, adding subsection 7, which requires that a petition form contain check boxes for the circulator to mark, designating his or her status as either a paid or voluntary circulator. 2018 PA 608, § 482(7). Section 482c was also added, providing that the "circulator of a petition under section 482 who knowingly makes a false statement concerning his or her status as a paid signature gatherer or volunteer signature gatherer is guilty of a misdemeanor." 2018 PA 698, § 482c. As a result, the face of a petition circulated under § 482 now raises the issue of whether the circulator is paid or a volunteer, and a circulator who knowingly marks the wrong check box is guilty of a misdemeanor.

The U.S. Supreme Court has decided "a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.' " *John Doe No. 1*, 561 US at 196 (citations omitted). "That standard 'requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.' " *Id.* (citations omitted). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' " *Id.* (citations omitted).

The legislative history for Public Act 608 does not reveal either the purpose for enacting the check-box requirement or the concern that the amendment was intended to address. The U.S. Supreme Court has observed that disclosure

requirements can provide "the electorate with information about the sources of election-related spending" and "help citizens make informed choices in the political marketplace." *Citizens United*, 558 US at 367. See also *Buckley v Valeo,* 424 US 1, 66 (1976) (explaining that disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent," thus aiding electors in evaluating who seeks their vote) (internal quotation marks omitted).

With respect to the use of paid circulators, the U.S. Supreme Court has addressed the validity of various disclosure requirements. In *Buckley v ACLF*, the Court addressed both a requirement that circulators wear badges, which included their name and status as a paid or voluntary circulator, and a requirement that circulators complete an affidavit section of the petition that included the circulator's name, address, and signature. 525 US at 197-198 (1999). Recognizing the badge requirement as different in kind from the affidavit, the Court upheld the affidavit requirement, but held that the badge requirement violated Free Speech principles because it worked to discourage political expression at the crucial moment in the petition process.

The Court's analysis addressed only the requirement that the badge include the circulator's name, and found it unconstitutional because it "force[d] circulators to reveal their identities at the same time they deliver their political message" and "expose[d] the circulator to the risk of heat of the moment harassment." *Id.* at 198-199 (internal citations and quotations omitted). "The affidavit, in contrast, does not

expose the circulator to the risk of 'heat of the moment' harassment." *Id*. (citation omitted).

The Court reasoned that the moment the circulator interacts with the voter is a critical juncture and "[t]he injury to speech is heightened . . . because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *ACLF*, 525 US at 199. The Court contrasted that result with the affidavit requirement, "which must be met only after circulators have completed their conversations with electors[.]" *Id*. (citation omitted). Accordingly, the Supreme Court held that the badge requirement "discourages participation in the petition circulation process" and violated the First Amendment. *Id*. at 200.

The *ACLF* Court contrasted disclosure requirements imposed on initiative proponents and concluded that to the extent the statutes required the *payors* (the ballot initiative proponents) to disclose their expense information, the statutes were constitutional. In particular, the Court addressed whether statutes requiring ballot initiative proponents to file monthly reports and a final report disclosing specific information as to circulators—their names, addresses, and the amount the circulators were paid—were unconstitutional. 525 US at 201. Recognizing that disclosure provisions can further important governmental interests relating to transparency and deterring corruption in the elections process, see *Buckley*, 424 US at 66-68, the Court concluded that "[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for their initiatives, responds

to that substantial state interest." *Id.* at 202-203. But with respect to disclosing the circulators' information, the "added benefit of revealing the names of paid circulators and amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." *Id.* at 203.

The Court also observed that ballot initiatives do not present the same risk of corruption as when money is spent on behalf of candidates. *Id.*, citing *Meyer*, 486 US at 427-428. And with respect to the use of paid circulators, the Court stated that "absent evidence to the contrary, 'we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.,* at 203-204, quoting *Meyer*, 486 US at 426.

Consequently, while recognizing the state's interest in disclosure of petition proponent information, the Supreme Court concluded that "[l]isting paid circulators and their income from circulation 'forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts,' " and that the requirement was only "tenuously related to the substantial interests disclosure serves." *Id.* at 204 (internal citations omitted). Thus, "Colorado's reporting requirements, to the extent that they target paid circulators, 'fai[l] exacting scrutiny.' " *Id.* at 204. The Court noted that Colorado could protect the integrity of the ballot initiative process through less problematic measures and did so through various other statutes. *Id.* at

204-205.[19] See also *Washington Initiatives Now v Rippie,* 213 F3d 1132, 1139 (CA 9, 2000) (striking down a state law that required only paid circulators to disclose their identities).

Like the disclosure requirement found unconstitutional in *ACLF*, the check-box requirement at issue here focuses not on information relevant to the proponent of a petition, but rather on the circulator collecting signatures. It similarly exposes the circulator to the risk of "heat of the moment" harassment, without any apparent state interest in the circulator's personal details. Thus, under *ACLF*'s rationale, the check-box requirement fails to meet the exacting scrutiny necessary for its constitutional validity.

The Sixth Circuit Court of Appeals' recent decision in *Libertarian Party of Ohio v Husted* further supports this conclusion. In *Husted*, the court rejected a facial First Amendment challenge to an Ohio statute that required circulators of candidate nominating petitions to disclose on petition sheets " 'the name and address of the person employing the circulator to circulate the petition, if any.' " 751 F3d 403, 406 (CA 6, 2014). The court upheld the statute where the record demonstrated a small burden on First Amendment activity coupled with an important and well-established governmental interest to which the disclosure requirement was substantially related. That is not the case here.

[19] The Supreme Court noted with approval Colorado's provision making it unlawful to forge signatures and a provision voiding petitions if a circulator violates any provision of the laws governing circulation. *ACLF*, 525 US at 204-205.

The Legislative Plaintiffs and Judge Boonstra in his concurring and dissenting opinion pointed to the decision in *Citizens in Charge v Gale*, 810 F Supp 2d 916 (D Neb, 2011). There, a federal district court upheld a Nebraska statute that required ballot initiative petitions to include a statement on the face of the petition that the circulator is being paid or is a volunteer circulator, whichever was applicable, in large type and red ink. 810 F Supp 2d at 922. That court rejected the plaintiffs' argument that the required language was "pejorative" as to paid circulators and constituted compelled speech and instead appeared to be swayed by the Government's argument that the requirement helped deter circulation fraud and did not impose a significant burden on circulators. Indeed, the record in that case showed that a majority of petition drives after enactment of the statute that had been successful in placing issues on the ballot had used paid petition circulators. *Id.* at 928. Accordingly, the Court held the statute was constitutional.

But, as the majority observed, *Gale* is neither binding in Michigan nor consistent with *AFLC*'s concerns about circulators experiencing "heat of the moment harassment" or with the Supreme Court's recognition that there is a more substantial governmental interest in disclosure of information about the petition proponent than disclosure of information about the circulator at the point when the circulator is interacting with the public. Further still, unlike the evidentiary backdrop in *Gale* which served to justify the disclosures, no such evidence exists here. Consequently, *Gale* does not warrant a different conclusion as to Public Act 608's check-box requirement.

In sum, the check-box requirement added to MCL 168.482(7) by PA 608 imposes a significant burden on the free speech rights of petition circulators under the state and federal constitutions without advancing any stated or apparent state interest in contemporaneous disclosure of the circulator's paid or volunteer status. As such, it does not meet the standard of exacting scrutiny applied in *ACLF* and is therefore unconstitutional. The majority agreed:

> The check-box requirement forces petition circulators to make revelations to potential petition signers at the same time the circulators are delivering their political message and at a time "when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned[.]" *Buckley*, 525 U.S. at 199 [ ]. This type of compelled disclosure discourages participation in the petition circulation process and inhibits core political speech. See *id.* Again, for a statute or regulation to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1*, 561 U.S. at 196 [ ] (citation and quotation marks omitted). Where, as here, no real governmental interest has been asserted, let alone been proven, the circulators' right to be free of potential "heat of the moment" harassment and to protect their privacy regarding their status as either a paid circulator or a volunteer, as well as the sponsors' right to have circulators engage in discourse with voters, outweigh the state's generally stated interests in transparency and accountability. [Pls' Brf, Ex A, Majority Opinion, p 18.]

And, because the check-box requirement itself is unconstitutional, the inextricably related provision of § 482c (which makes it a misdemeanor for a petition circulator to knowingly make a false statement concerning his or her status as a paid or volunteer signature gatherer—a statement that would be made in the check box) is likewise unconstitutional.

3. The circulator affidavit requirement (MCL 168.482a(1)-(2)) is unconstitutional.

Public Act 608 also added MCL 168.482a(1) and (2), which require that a "paid signature gatherer" submit a separate affidavit before circulating a petition, and further require that signatures be rejected if the circulator does not do so:

> (1) If an individual who circulates a petition under section 482 is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer.
>
> (2) Any signature obtained on a petition under section 482 by an individual who has not filed the required affidavit under subsection (1) is invalid and must not be counted.

Like the check-box requirement, these statutes are subject to "exacting scrutiny" under the First Amendment. *John Doe No. 1*, 561 US at 196. There must be a "substantial relation" between the affidavit requirements and a "sufficiently important" governmental interest. *Id.* "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' " *Id.* (citations omitted). In making this evaluation, other provisions in the regulatory scheme that serve a similar purpose and how those provisions interact with the challenged law should be considered. See *ACLF*, 525 US at 204-205.

The affidavit requirements "target paid circulators" similar to the provisions struck down in *ACLF*. Subsections 482a(1) and (2) effectively require paid circulators to register to circulate petitions—requirements that do not apply to volunteer circulators. Moreover, the failure to file the affidavit before circulating as a paid circulator will result in the rejection of those signatures that were improperly

collected. Together, these requirements impose a substantial burden on paid circulators that does not apply to volunteer circulators. And this burden appears only tenuously responsive to a sufficiently important governmental interest.

Even if the affidavit requirements do not pose a "significant" or severe risk to speech, the statute still targets/burdens only paid circulators and it does not advance an important governmental interest sufficient to outweigh the burden, even if only moderate, it imposes on circulators. The purpose of the affidavit requirement appears to be to provide the State with pre-circulation notice of a paid circulator's status. As discussed above, the U.S. Supreme Court, in *ACLF*, affirmed that states have a "substantial state interest" in knowing who is sponsoring an initiative or referendum and how much is being spent to support the proposal. *ACLF*, 525 US at 202-203. And the Court concluded that Colorado's reporting statutes requiring the "[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for the initiatives, respond[ed] to that substantial state interest." *Id.* at 202-203.

But here the affidavit requirement does not sufficiently respond to that interest because it does not require the disclosure of any payor information. In fact, it requires nothing about the sponsor, only confirmation of a circulator's status as a paid circulator to the Secretary of State. Under law existing prior to PA 608, filed petitions already must contain the circulator's residential address, city or township, state, and zip code, which can be used in the event it becomes necessary to contact

the circulator.[20] It is not apparent to Defendant Benson why she would need, or be helped by, receiving the additional detail that a circulator is paid. As a result, the affidavit requirement is not substantially related to Michigan's interest in transparency and the protection against corruption in the initiative and referendum process and, to the extent it targets paid circulators, the statute fails exacting scrutiny and is unconstitutional. See *ACLF*, 525 US at 204.

The Court of Appeals unanimously agreed that this requirement was unconstitutional. The majority wrote in its opinion that Plaintiffs had "not shown that the state's interests are furthered by the disclosure requirement, which singles out only paid circulators and burdens the sponsors' political speech by imposing a requirement that circulators must file an affidavit before obtaining signatures. The affidavit requirement is thus unconstitutional." (Pls' Brf, Ex A, Majority Opinion, p 20). Plaintiffs argue that they "could reasonably believe that the risk of election fraud or mischief is greatest when paid circulators are the ones soliciting signatures. And nothing in the U.S. or Michigan Constitutions requires the Legislature to regulate more conduct than is necessary to advance that interest." (Pls' Brf, p 38). But as discussed above, *ACLF* instructs against targeting only paid circulators, and targeting circulators where it is the petition sponsors who possess

[20] MCL 168.544c, which applies to petitions circulated under § 482, requires a circulator to sign a petition and include a residential address, along with other information, before filing the petition with the Secretary of State. See MCL 168.482(6), 168.544c(1)-(3), (5), and (15).

the types of disclosable information noted in *ACLF*. This statute simply targets paid circulators and does so without advancing a substantial interest of the State.

4. The unconstitutional statutes are severable.

The Legislative Plaintiffs do not address the severability of these amendments from the remainder of PA 608. Public Act 608 does not specifically address severability. Nevertheless, the Legislature has generally provided for the severability of invalid statutes in MCL 8.5, which states that "[i]f any portion of an act . . . shall be found to be invalid . . . such invalidity shall not affect the remaining portions . . . of the act which can be given effect without the invalid portion . . . provided such remaining portions are not determined . . . to be inoperable[.]" See also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 346 (2011); *People v McMurchy*, 249 Mich 147, 158 (1930) (when one part of a statute is held unconstitutional, the remainder of the statute remains valid unless all parts of the statute are so interconnected that the Legislature would likely not have passed the one part without the other).

Here, the amendments to §§ 471, 477, 482(4), 482a(1)-(2), 482a(7) and 482c were insular and discrete additions to these statutes, and they may be struck from the Act, leaving the remaining portions operable and in effect. Both the majority and the dissent concluded that any unconstitutional statute was severable. Because there was no error with respect to the severability of the statutes, this Court should deny leave to appeal.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellee Secretary of State Jocelyn Benson respectfully requests that this Court deny Plaintiffs-Appellants Michigan Senate and House of Representatives' application for leave to appeal.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant-Appellee
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: February 10, 2020