STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES,

Appellants/Plaintiffs,

v

JOCELYN BENSON,

Appellee/Defendant.

Supreme Court No. 160908

Court of Appeals No. 351073

Court of Claims No. 19-000092-MZ

Consolidated with:

LEAGUE OF WOMEN VOTERS OF MICHIGAN, MICHIGANDERS 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,

Appellee/Defendant.

Supreme Court No. 160907

Court of Appeals No. 350938

Court of Claims No. 19-000084-MM

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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THE MICHIGAN SENATE AND HOUSE'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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I. The Legislature must have standing when the Attorney General declines to defend or affirmatively seeks to invalidate Michigan law.

As explained in the Application, this Court has never addressed whether the Legislature has standing as an institution to defend a validly enacted Michigan law in the unique circumstance where the Attorney General declines to defend or to appoint an assistant attorney general to do so. The closest case is *House Speaker (Dodak) v State Administrative Bd*, 441 Mich 547; 495 NW2d 539 (1993), in which the Court addressed individual legislator standing and held that a single legislator has standing when "suing to maintain the effectiveness of his [or her] vote," *id.*at 560, the same situation the Senate and House find themselves in here.

In contrast, federal courts have often confronted the problem when a chief law enforcement officer fails to uphold the law. The U.S. Supreme Court has "long held" that each House of Congress is a "proper party to defend the validity of a statute when an agency of government . . . agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v Chadha*, 462 US 919, 940 (1983) (citations omitted). Any other result gives the Attorney General power to "nullify [the Legislature's] enactment solely on its own initiative," posing "grave challenges to the separation of powers." *United States v Windsor*, 570 US 744, 762 (2013). The U.S. Supreme Court and dozens of lower federal courts have thus recognized Congress's standing as an institution and allowed one or both chambers to intervene in these types of cases. App'n 20–22.

Unlike Article III's strict, jurisdictional standing requirement, Michigan standing is a "limited, prudential doctrine." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 360–372; 792 NW2d 686 (2010). The only practical question is whether there is an "actual controversy," *id.* at 371; MCR 2.605(A)(1), a standard satisfied here. It would be a jurisprudential anathema to say that Congress has standing to defend its laws but the Michigan Legislature does not.

The Secretary and the League of Women Voters respond to all the federal cases by—ignoring them entirely. As a result, the arguments they do make carry little weight.

The Secretary begins by criticizing the Senate and House for not passing resolutions to authorize this lawsuit. Secretary Br 8–9 & n8. But whether to require such a vote is a legislative procedural prerogative that courts should not second guess, as this Court established in a case the Attorney General successfully litigated on behalf of the House. *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 646; 825 NW2d 616 (2012) ("A general challenge to the governing procedures in the House of Representatives is not appropriate for judicial review.").

Next, the Secretary says that under *Dodak*, the Senate and House have not been deprived of a legally cognizable interest peculiar to them as a legislative body. Secretary Br 9–14. But in establishing that standard, the *Dodak* Court cited *federal* standing precedents. 441 Mich at 555–556. And as just reiterated above, the federal courts routinely recognize Congress's ability to defend federal laws that the Executive Branch will not. Those cases recognize that an executive veto power exercised in the form of a failure to defend *does* deprive Congress of a legally cognizable interest peculiar to them as a legislative body: an "interest in the continued enforceability of its own statutes." *Maine v Taylor*, 477 US 13, 137 (1986). And states share the identical interest. Accord, e.g., *Diamond v Charles*, 476 US 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute.").

The Secretary than pivots to *Lansing School Education Association* and argues that the Senate and House have not pled an "actual controversy" because they do not need a ruling to guide their future conduct. Secretary Br 14–17. But the "actual controversy" standard does not hinge on such a guide. A plaintiff need merely plead and prove facts demonstrating "an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012). PA 608's validity satisfies that lenient standard.

This, says the Secretary, creates the absurd situation where "the Legislature would seemingly have standing to bring a lawsuit against any government entity that fails to enforce or comply with a statute." Secretary Br 16. Not true. The Senate and House assert standing only in the (hopefully) rare situation where the Attorney General fails to defend or affirmatively attacks a Michigan law. In the present environment, that may mean several opportunities for the Legislature to assert its institutional standing. But if so, it is only because the Attorney General has continued the course of thwarting Michigan law rather than upholding it.

The Secretary tries to fix this problem by pointing to the lower courts' consideration of the Legislature's PA 608 legal arguments as an *amicus*. Secretary Br 17–18. But that does not solve the problem. Notably, neither the Secretary nor the League filed an application for leave from the Court of Appeals opinion. They didn't have to; the Court of Appeals struck down every PA 608 provision that the Secretary and the League agreed was invalid. As a mere *amicus*, the Legislature would have no standing to file its own application for leave. So all the points remain about the loss of our democracy when the Attorney General refuses to defend.

Finally, the Secretary says that rather than filing their own lawsuit, the Senate and House should have sought to intervene in the League's case. Secretary Br 18. The Secretary indicates that had the Legislature done so, "it is extremely unlikely that Secretary Benson would have opposed the motion under the circumstances of this case." Well, the Senate and House recently *did* file a motion to intervene in the League's case, so the Secretary's magnanimity will soon be tested. If the Court grants intervention, then perhaps the practical problem is solved in this case and the constitutional crisis avoided. But it is wrong to say that intervention was the only way for the Legislature to defend PA 608. Otherwise, if an Executive Branch member and the Attorney General team up to nullify a law and *no* party sues, the Legislature would have no remedy. Either the Attorney General has the power to override the Legislature or she does not.

The League disregards all of the Legislature's cited federal precedents because "[f]ederal standing principles do not apply here." League Br 8. The League misses the point. If federal courts recognize Congress's standing to defend federal law when the Executive Branch will not, then certainly Michigan courts should do the same for the Senate and House. As already explained, Michigan's standing jurisprudence is more relaxed than federal standing and is discretionary, not jurisdictional. At a bare minimum, this Court should exercise its discretion to grant the Legislature standing in this case.

The League also says that the Senate and House lack "organizational standing" because their individual members lack standing under *Dodak*. League Br 8-10. The League is confused. "Associational standing" is where an organization is allowed to sue on behalf of its members to protect their interests. E.g., *Hunt v Washington State Apple Advertising Comm'n*, 432 US 333, 343 (1977). "Organizational standing" is where an organizational sues on its own behalf to protect its own interests. E.g., *Nat'l Treasury Employees Union v United States*, 101 F3d 1423, 1427–28 (CA DC, 1996). In the latter case, the organization shows that it satisfies a traditional standing inquiry. And under Michigan's deferential standing approach, the Senate and House have shown they have an institutional interest that requires the sharpening of issues.

Alternatively, the League says the Legislature delegated all authority to the Attorney General to decide the validity of laws under MCL 14.28. League Br 10–11. If the Attorney General cooperates with a sympathetic plaintiff's group, the law is gone. If the Attorney General orchestrates a sue-and-settle, the law is gone. If the Attorney General sues to invalidate legislation and the chosen defendant agrees, the law is gone. But the statute does not prohibit another interested branch from picking up the slack if the Attorney General declines to defend or, as here, affirmatively attacks a statute. The Attorney General doesn't even view her own power that way, or her brief on behalf of the Secretary would not invite the Legislature's intervention.

Lastly, the League suggests that the Legislature should pass a statute to grant itself standing or defund the Office of the Attorney General. League Br 11. But the U.S. Supreme Court and lower federal courts have not denied Congress the right to vindicate undefended federal laws by instructing Congress to pass a statute or defund the Department of Justice. The proper resolution is to remind the Attorney General that she has a duty to defend and hold that when she ignores that duty or actively seeks to undermine Michigan laws she does not like, the Legislature has the ability to step in. As Judge Boonstra recognized in distinguishing MCL 14.28 and concluding that the Legislature *does* have standing in this extraordinary situation, "much angst and gnashing of teeth could have been avoided" if the Attorney General had simply done her job. Slip Op 4 n1 (Boonstra, J, dissenting in part). When the Attorney General does her job, the Legislature is content to participate as an *amicus*, as in the recent "adopt and amend" proceeding in this Court, or in the pending Court of Appeals action in which the Attorney General seeks to invalidate the legislation authorizing construction of the utility tunnel under the Straits of Mackinac to house Line 5.

II. PA 608's geographic-distribution requirement is constitutional.

The Secretary and the League do not dispute that the Legislature has constitutional authority under Article 2, § 4 of the Michigan Constitution to preserve the purity of elections and guard against abuses of the elective franchise. This broad authority includes adding a geographic-distribution requirement. As the Utah Supreme Court held in upholding a substantively identical statutory requirement, geographic distribution "ensure[s] that [citizen] support was throughout the statewide population," and it does "not offend[ ]" the right to initiative. *Utah Safe to Learn-Safe to Worship Coalition, Inc v State of Utah*, 94 P3d 217, 229 (Utah, 2004). The requirement no more offends the right to initiative than other legislative petition requirements, including ballot-proposal summaries, setting forth abrogated constitutional provisions, the inclusion of warnings in a prescribed font size, and a time deadline. App'n 32.

As this Court reiterated in *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1; 740 NW2d 444 (2007), involving a statute that required voters to present photo ID at the polls, the Legislature's Article 2, § 4 power is in *addition to* the Legislature's responsibility to regulate the "time, place and manner" of elections. *Id* at 17. And the Legislature can exercise its Article 2, § 4 power *even though* "a citizen's right to vote is fundamental." *Id.* at 20. That is because the right is "not unfettered" and subject to the "Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise." *Id.* So the only question is whether the geographic-distribution requirement is inconsistent with the plain text of Article 2, § 9 or Article 12, § 2. It is not.

The Application explained that the plain language of Article 2, § 9 ("*not less than* . . .") and Article 12, § 2 ("*at least* . . .") sets the *floor* for the number of signatures required to place a measure on the ballot, leaving it to the Legislature whether to increase the requirement. App'n 30–31; contrary League Br 14. The Secretary and the League do not even address this argument in their responses. Their best counter is that because Article 2, § 9 and Article 12, § 2 do "not include a distribution component with respect to signatures," the Legislature has no power to add one, despite Article 2, § 4's broad grant of authority to preserve the purity of elections and guard against abuses of the elective franchise. Secretary Br 24–25; League Br 12-13. Not so. Nothing in either of those two constitutional provisions restricts the Legislature's Article 2, § 4 power. To accept the Secretary's argument, this Court would have to overrule *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), which upheld 1973 PA 112, a law that voided *every* signature collected on petitions if the signature was made more than 180 days before filing with the Secretary of State. Neither Article 2, § 9 nor Article 12, § 2 includes a time requirement; the Legislature had to *add* the 180-day limit to preserve the purity of elections and guard against abuses of the elective franchise. If 1973 PA 112 was valid, then PA 608 must be valid, too.

The Secretary attempts to distinguish *Consumers Power*, arguing that 1973 PA 112 merely "created a rebuttable presumption regarding the validity of signatures," while the geographic-"distribution requirement imposes an absolute limitation . . . without any basis in the language of article 12, § 2" or Article 2, § 9. Secretary Br 29. But the 180-day limit in 1973 PA 112 was also "without any basis in the language" of the two petition provisions. The Legislature's authority to enact it was Article 2, § 4. And there is nothing in the plain text of any of these three constitutional provisions suggesting a distinction between a rebuttable presumption versus an absolute limitation. The Secretary just makes it up.

The Secretary's parting shot is to distinguish the Utah Supreme Court's decision in *Utah Safe* on the ground that the Utah Constitution's grant of constitutional authority over petition procedures is broader than Michigan's. Secretary Br 30–31. That's a red herring, because nowhere in her answer does the Secretary argue that the Legislature's Article 2, § 4 is insufficiently broad to sustain the geographic-distribution requirement.

For its part, the League says that the geographic-distribution requirement somehow violates the rights of Free Speech, Free Association, and the Right to Petition, League Br 15–24, a theory adopted by not even one member of the Court of Appeals panel. There is insufficient space in a reply brief to respond fully to these points, but even a cursory treatment shows they are unfounded.

First and foremost, the League's arguments apply equally to the Legislature's imposition of the 180-day limit in 1973 PA 112. The League does not explain why invalidating *all* collected signatures in PA 112 is constitutional, but a geographic-distribution requirement is not.

In addition, the geographic-distribution requirement does not prohibit anyone from speaking, associating, or petitioning. It certainly does not "completely silence political expression by the vast majority of Michigan voters." League Br 17. The requirement simply ensures that all voters have a voice, just like the Electoral College requirement in the U.S. Constitution.

As for the League's kitchen-sink list of the geographic-distribution requirement's impacts, League Br 19–22, many already exist in the pre-PA 608 requirement that signatures be gathered by county. Uncertainty and questions about the petition and a citizen's eligibility to sign it already cause time delays and hassles for the signor and the circulator, necessitating training. Yet no one has suggested that existing formats or eligibility requirements are unconstitutional. And to the extent the League complains about other PA 608 changes—such as preparing a good-faith estimate of the number of signatures collected, or no longer requiring the Board of State Canvassers to certify a petition count—those provisions are not even at issue in this proceeding.

The only precedents the League relies on involve total bans on paid petition circulators, *Meyer v Grant*, 486 US 414 (1988), and bans on paying circulators on a per-signature basis, *Citizens for Tax Reform v Deters*, 518 F3d 375, 383 (CA 6, 2008), prohibitions that PA 608 does not include. League Br 22-23. And in arguing that the geographic-distribution requirement is not the least restrictive means of requiring statewide buy-in before a measure is put on the ballot, the League recommends that the Legislature should have instead "require[ed] a minimum showing of support in a wider geographic area." League Br 24. The effect of such a requirement *is exactly the same* as what PA 608 accomplishments. That the League thinks such a proposal passes constitutional muster is fatal to all its arguments against PA 608.

III. PA 608's disclosure and affidavit requirements are constitutional.

A. PA 608's check-box disclosure

The federal court's decision in *Citizens in Charge v Gale*, 810 F Supp 2d 916 (D Neb, 2011), and Judge Boonstra's opinion below, Slip Op 5–7 (Boonstra, J, dissenting in part), explain in detail why PA 608's paid-circulator requirement is valid. In sum, the requirement burdens paid and volunteer circulators equally, it does not require the circulator to disclose any personal information, and no content-based speech restriction is at issue. App'n 33–36.

As Judge Boonstra elucidated, "[n]othing akin" to a paid-circulator ban "exists in this case," distinguishing the U.S. Supreme Court's decision in *Meyer*. Slip Op 6 (Boonstra, J, dissenting in part); contra Secretary Br 32–34 and League Br 26. Equally inapplicable is *Buckley v ACLF*, 525 US 182 (1999), which forced circulators to wear name badges disclosing their name. "*Buckley* does not support a finding of unconstitutionality here." Slip Op 6 (Boonstra, J, dissenting in part); contra Secretary Br 34–37 and League Br 25. And *Libertarian Party of Ohio v Husted*, 751 F3d 403 (CA 6, 2014), see Secretary Br 37, supports PA 608's validity, as the Sixth Circuit *upheld* the less intrusive requirement that paid circulators provide the names and addresses of their employers. App'n 36. The Secretary and the League offer no new arguments suggesting that it is unconstitutional to ensure that Michigan citizens are informed that they are being approached by a paid circulator before they exercise their right to sign a petition. It is disappointing that Appellees would protest a provision that merely gives citizens more information before exercising the franchise.

B. PA 608's affidavit requirement

Turning to PA 608's affidavit requirement, the Court of Claims upheld this provision because it does not require a circulator to give their identifying information to a citizen at the time of signature and imposes a minimal burden on speech. 9/27/19 Op 21. Indeed, concluded the Court of Claims, the Secretary and the League have not "presented a compelling argument as to how disclosure by affidavit will inhibit speech by paid petition circulators." *Id.* at 21–22. The affidavit "provides [ ] additional information and transparency about the petition process, but without a burdensome imposition on the petition circulator." *Id.* at 22. And on these basic points, the Secretary and the League do not offer anything new in rebuttal.

The more substantial objection to the affidavit requirement is that PA 608 imposes it only on paid circulators, not volunteer circulators. Secretary Br 41; League Br 27; Slip Op 7 (Boonstra, J, dissenting in part). But even that objection is misplaced.

Under Michigan election law, all circulators—paid and unpaid—must file an affidavit with the Secretary of State that includes the circulator's name and complete address. MCL 168.554c. This requirement is even-handed and, as the U.S. Supreme Court has held, is a constitutionally valid requirement that advances a state's "strong interest in policing lawbreakers among petition circulators," including ensuring "that circulators will be amenable to the Secretary of State's subpoena power." *Buckley*, 525 US at 196. Adding an additional disclosure to the Secretary about a circulator's paid status is a reasonable extension of that law, because the Legislature could reasonably believe that the risk of fraud or mischief is greatest when an individual has a monetary incentive to collect signatures. And the additional disclosure is not unevenly applied in an unconstitutional manner; the information the Legislature desires the Secretary to collect and keep is only available from paid circulators. If the Legislature had instead adopted a provision requiring *all* circulators to submit an affidavit indicating their paid or volunteer status, the Secretary and the League would presumably not object. But PA 608 as written has the exact same substantive effect without wasting the time of those who volunteer. It is not unconstitutional.

CONCLUSION AND REQUESTED RELIEF

The Legislature's application for leave presents an issue of monumental jurisprudential significance—whether the Attorney General has the unilateral and unchecked power to effectively veto any Michigan law in existence, a power that will be used in this and future administrations. And it presents several jurisprudentially important issues involving admittedly close questions of law regarding PA 608's substantive provisions. As the Court of Appeals anticipated, this is precisely the type of case that warrants this Court's attention and a published opinion.

The Michigan Senate and House respectfully ask the Court to grant the application, order oral argument, hold that the Senate and House have standing when the Attorney General declines to defend or affirmatively attacks an enacted law, and uphold PA 608 in its entirety.

Respectfully submitted,

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