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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

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

Plaintiffs-Appellees,

and

SENATE AND HOUSE OF REPRESENTATIVES,
Proposed Intervenors-Appellants,

v

JOCELYN BENSON,
Defendant-Appellee.

Supreme Court No. 160907
Court of Appeals No. 350938
Court of Claims No. 19-000084-MM

THIS APPEAL INVOLVES A RULING THAT SEVERAL PROVISIONS OF THE MICHIGAN ELECTION LAW ARE UNCONSTITUTIONAL

MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES,
Plaintiffs-Appellants,

v

JOCELYN BENSON,
Defendant-Appellee.

Supreme Court No. 160908
Court of Appeals No. 351073
Court of Claims No. 19-0000092-MZ

RESPONSE OF LEAGUE OF WOMEN VOTERS OF MICHIGAN, ET AL. IN OPPOSITION TO SENATE AND HOUSE'S MOTION TO INTERVENE IN CASE NO. 160907

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STATEMENT OF FACTS

This case involves the constitutionality of 2018 PA 608, a law passed by the Michigan Legislature in its lame duck session, which sought to make significant changes in the ability of Michigan citizens to petition for a constitutional amendment or a legislative initiative or referendum. The statute provided, inter alia, that petitions be circulated by congressional district, rather than by county; that no more than 15% of the total signatures in support of the ballot proposal could be from any one congressional district; that paid petition circulators file a pre-circulation affidavit; and that the petition sheets contain a checkbox indicating whether the circulators were paid.

Defendant Secretary of State Benson requested an opinion from the Attorney General about the constitutionality of a number of the provisions in PA 608. On May 22, 2019, the Attorney General issued OAG 7310, stating that the provisions of PA 608 referenced above were unconstitutional. Defendant Benson thereafter enforced the election law in accordance with the Attorney General opinion, as she is required to do.

On May 23, 2019, Plaintiffs League of Women Voters of Michigan (LWVMI) and others filed suit, Court of Claims Case No. 19-000084-MM, alleging that the above-referenced provisions of PA 608 were unconstitutional. On June 5, 2019, the Michigan Senate and House of Representatives filed suit, Court of Claims Case No. 19-000092-MZ, requesting a declaratory judgment that the statute was constitutional and requesting that the Secretary of State be ordered to enforce PA

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608 as written. The Court of Claims consolidated the cases for hearing and decision.

The Court of Claims granted summary disposition to LMVWI on their claims that the 15% geographic distribution requirement and the checkbox indicating paid status were unconstitutional. The court denied summary disposition on the claim that the pre-circulation affidavit for paid circulators was unconstitutional. The Court of Claims denied summary disposition to the House and Senate, holding that they lacked standing to enforce the law, although it allowed them to participate as amicus curiae. LWVMI and the Senate and House each filed an appeal. LWVMI filed a motion in this Court for a bypass appeal. In denying that motion, this Court ordered the Court of Appeals to expedite the appeal of the cases and to issue an opinion by January 27, 2020, and further ordered that any appeal be filed by February 3, 2020.[1] The Court of Appeals issued its opinion on January 27, holding

[1] It is important for the Court to consider that, while this matter has been expedited, ballot question committees are actively circulating petitions for proposals to be placed on the 2020 ballot. LWVMI's answer to the Senate and House's application for leave to appeal, filed on February 10, 2020, sets forth the status of current petition drives. Following the decision of this Court in *Stand Up for Democracy v Secretary of State,* 492 Mich 588 (2012), involving whether a petition would be rejected and a proposal kept off the ballot because of an alleged failure to comply with the type size requirements of the statute, a procedure has been implemented by which the Board of State Canvassers will review a petition for compliance with the form requirements prior to the petition being circulated. Petition sponsors are "strongly encouraged" to comply with this approval as to form process. *Secretary of State Publication: Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition.* (Plaintiff League of Women Voters of Michigan et al.'s Application for Leave to Appeal Before Decision of the Court of Appeals – Emergency Bypass Application, Ex. 3) The Board of State Canvassers will only approve a petition as to form if it complies with OAG 7310 and will not approve a petition which complies with PA 608. All of the petitions

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that that the provisions of PA 608 challenged by LWVMI, including the paid circulator affidavit, were unconstitutional, and that the Senate and House lacked standing to sue to enforce the law.

On February 3, 2020, the Senate and House filed an application for leave to appeal from the adverse decision of the Court of Appeals. Their appeal was docketed in this Court as Case No. 160908. The League of Women Voters of Michigan, which prevailed in the Court of Appeals, did not file an appeal. However, a case was docketed in this Court as Case No. 160907, with LWVMI identified as Plaintiffs-Appellees and the Senate and House as Intervenors-Appellants. In an order issued on February 4, 2020, this Court stated, "an application for leave to appeal the January 27, 2020 judgment of the Court of Appeals having been filed on February 3, 2020, and a motion to intervene being forthcoming, any answer to the

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currently in circulation rely upon and are in compliance with OAG 7310. If this Court were to reverse the decision of the Court of Appeals, and uphold the constitutionality of PA 608, the hundreds of thousands of signatures collected on approved petitions would be invalidated unless the Court's decision were prospective only. In *Consumers Power Co. v Attorney General*, 426 Mich 1 (1986), this Court reversed an attorney general opinion and declared to be constitutional a law which said that petition signatures more than 180 days old were presumed to be stale and void. Subsequently, in *Line v Michigan*, 173 Mich App 720 (1988), the Court of Appeals held that *Consumers Power* applied only prospectively and that petition signatures in support of campaigns which had been undertaken while the 180 day limitation was not in effect could not be invalidated. Emphasizing the importance of reliance, the court recognized that invalidation of prior petitions would be "impractical, probably impossible and therefore unjust." The same must be recognized here. Were the Court to hold PA 608 to be constitutional it would be unjust if the ruling were applied retroactively to any petitions which had been approved by the Board of Canvassers and were being circulated at the time of such a decision.

motion to intervene and application for leave to appeal shall be filed no later than 5:00 p.m. on February 10, 2020."

The motion to intervene was not forthcoming. It was not filed until February 11, 2020, a day *after* the deadline to respond. This Court then issued a subsequent order on February 14, 2020, setting oral argument for March 11, and stating that additional briefs could be filed by February 28, addressing four issues: whether the Court should grant the motion to intervene; whether the Senate and House have standing to seek declaratory relief in the Court of Claims; whether the 15% cap on ballot proposal signatures per congressional district is constitutional; and whether the pre-circulation affidavit and checkbox disclosure for paid circulators are constitutional.

In accordance with the Court's February 4 order, LWVMI filed, on February 10, 2020, a response to the application for leave to appeal, addressing the issues of the Senate and House's standing and the constitutionality of PA 608. We respond here to the Senate and House's motion to intervene and to their further arguments on standing.

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ARGUMENT

I. THE SENATE AND HOUSE'S MOTION TO INTERVENE IN LEAGUE OF WOMEN VOTERS OF MICHIGAN V BENSON SHOULD BE DENIED AS LWVMI DID NOT APPEAL AND THERE IS NO ACTION IN WHICH TO INTERVENE.

Secretary Benson has correctly responded in answering the motion of the Senate and House to intervene in Case No. 160907 that intervention should be denied because there is no case in which to intervene. The League of Women Voters of Michigan, et al. prevailed in their action, Court of Appeals No. 350938. They had no reason to appeal and did not do so. The Senate and House filed an application for leave to appeal, docketed as Supreme Court No. 160908, and misled the Court by using a caption which included both cases resulting in the Court docketing Supreme Court No. 160907. As a result, in this Court's orders both Plaintiffs LWVMI and Defendant Benson are identified as appellees, while the Senate and House are identified as intervenors-appellants. It is readily apparent that the Senate and House cannot be the appellants in a case in which they are not a party and cannot be intervenors in an appeal which was not brought. MCR 7.305 governs applications for leave to appeal in this Court and provides that, "To apply for leave to appeal, a *party* must file . . . " (Emphasis added.) The Michigan Senate and House did not seek to intervene as a party in the League's case but chose instead to file their own action. While the cases were consolidated by the Court of Claims for argument and decision the Senate and House did not become a party in LWVMI's action.

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As argued by Secretary Benson, *Federated Insurance Co v Oakland Co Road Comm*, 475 Mich 286 (2006), is precisely on point. A non-party cannot appeal and there can be no intervention where there is no case.

II. HOLDING THAT THE LEGISLATURE DOES NOT HAVE STANDING DOES NOT GIVE THE EXECUTIVE BRANCH THE POWER TO THWART MICHIGAN LAW.

The Senate and House were in no way disadvantaged by the Court of Claims' decision that they did not have standing to seek declaratory relief. The Court of Claims allowed them to participate as amicus curiae and to participate in oral argument. Their arguments regarding the constitutionality of PA 608, as well as their argument regarding standing, were also fully considered and addressed by the Court of Appeals and are being considered in this Court. Nevertheless, the Senate and House and amicus Michigan Chamber of Commerce suggest that it is necessary for the Legislature to have standing to defend a law where the Attorney General has found it to be unconstitutional and does not take an adversarial position when the law is challenged. The Legislature essentially accuses the Secretary of State and the Attorney General of nefarious conduct, "team[ing] up to nullify a law"[2] when, in fact, the Attorney General simply exercised her duty, under MCL 14.32, to respond to the Secretary of State's request for an opinion as to the constitutionality of PA 608. Once that opinion issued the Secretary of State was bound to follow it and did so. Further, the Court of Claims and the Court of Appeals have agreed with the Attorney General's opinion, finding that PA 608 violates the Michigan

[2] Senate and House Reply in Support of Application for Leave to Appeal, p 3.

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Constitution. PA 608 has been nullified by the courts. The Attorney General, in issuing OAG 7310, enforced the constitution, which is the fundamental law of the State, and was obligated, in responding to the actions brought against the Secretary of State, to defend the suit as she saw fit. MCL 14.28, 14.29.

The Senate and House seem to contend that it is necessary for them to have standing so that the Attorney General's opinion can be challenged, but that is incorrect as they themselves indirectly acknowledge. Thus, in the same sentence in which they refer to the Executive and Attorney General "team[ing] up to nullify a law", they say they would have no remedy "if *no* party sues." (Emphasis in original.) Parties interested in enforcing a law which has been "nullified" by an Attorney General's opinion have long had the ability to litigate the constitutionality of that law. Where, as here, the law at issue governs the actions of the Board of State Canvassers, that body's actions, whether approving or refusing to approve a petition as to form, or certifying or refusing to certify a question to the ballot, for example, can be challenged by way of mandamus by the affected ballot question committee or by someone opposing the ballot question. *See, e.g., Stand Up for Democracy v Secretary of State and Board of State Canvassers,* 492 Mich 588 (2012); *Consumers Power Co v Attorney General, supra.* In the absence of a judicial determination as to the constitutionality of PA 608, a party contending that OAG 7310 was incorrect could challenge a Board of Canvassers action which was in conformity with it. That is precisely what happened in *Consumers Power, supra.* The power companies, seeking to avoid a ballot question addressing utility regulation, argued that an

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Attorney General opinion, which had held the 180 day period for signature collection unconstitutional, was wrong. Their argument was sustained by this Court, although, as noted above, the Court gave the decision only prospective application so as to avoid injustice to the ballot question committees which had relied on the Attorney General opinion.

CONCLUSION AND RELIEF SOUGHT

In conclusion, the League of Women Voters of Michigan and the other plaintiffs submit that the Michigan Senate and House's Motion to Intervene in Case No. 160907 should be denied.

Respectfully submitted,

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