STATE OF MICHIGAN
IN THE 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,

Intervenors-Appellants,

v

SECRETARY OF STATE,

Defendant-Appellee.
_____/

Supreme Court No. 160907

Court of Appeals No. 350938

Court of Claims No. 19-000084-MM

SENATE and HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellants,

v

SECRETARY OF STATE,

Defendant-Appellee

Supreme Court No. 160908

Court of Appeals No. 351073

Court of Claims No. 19-000092-MZ

AMICUS BRIEF OF THE MICHIGAN MANUFACTURERS ASSOCIATION

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STATEMENT OF QUESTIONS PRESENTED

The MMA adopts the Statement of Questions Presented set forth in The Michigan House and Senate's Application for Leave to Appeal.[1]

[1] Under MCR 7.312(H)(4), MMA confirms that no counsel for any party authored this brief in whole or in part and that no party made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The debate at the heart of this case is as old as our republic itself. On one side of the debate: pure democracy. Let the people decide. On the other: republican government. Let the people decide, through their elected representatives. Both sides have their virtues and vices. Pure democracy gives instant voice to the people on every issue but can lead to rash decisions and mob rule. Republican government tempers the passions of the people but can lead to gridlock and tyranny of the minority.

Michigan's constitution contains elements of both direct democracy and republican government. Michigan is predominantly a republic. The laws are passed by the Legislature, the peoples' representatives. But the constitution reserves to the people a limited power to propose, enact, and reject laws, through the initiative and referendum processes. Const 1963, art II, § 9. The Michigan constitution thus attempts to blend the best elements of both direct democracy and representative government.

With the good comes the bad, though, and the people, in their wisdom, built in additional safeguards to smooth things out. Their initiative and referendum power is not unchecked, unbridled direct democracy. Instead, the constitution makes clear that "The power of referendum . . . must be invoked in the manner prescribed by law," and "The legislature shall implement the provisions of this section." Const 1963, art II, § 9. As this Court has noted, "[i]n the very constitutional provision creating this right of petition by initiative and referendum, the Legislature is required to prescribe the rules by which such petitions may validly be made." *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 599; 822 NW2d 159 (2012). This provision, like the constitution as a whole, therefore aims for the best of both worlds: a direct voice for the people, on the one hand, tempered by sensible rules passed by the peoples' representatives, on the other.

This case involves a set of sensible rules passed by the peoples' representatives. The rules, passed in PA 608, require that no more than 15% of signatures on a petition be from any single congressional district; that petitions contain a check-box revealing whether the petition circulator is being paid; and that paid circulators file an affidavit with the Secretary of State.

Passions understandably run high in cases like this. Plaintiffs here claim "egregious unconstitutional overreach" by "the longtime nemesis of direct democracy—the Legislature[.]" (Appellees' Resp at 7.) The Michigan Manufacturers Association (MMA) humbly submits, however, that the Legislature is no enemy of democracy, and there was no constitutional overreach here. The constitution itself envisions a role for the Legislature to play in the petition process. And the rules that the Legislature passed in PA 608 promote the same sorts of salutary interests that the constitution as a whole strives to serve: broader representation, more deliberation, and more information for voters. These are exactly the sort of sensible checks and balances on the direct-democracy process that the people themselves built into their constitution.

The MMA has a strong interest in promoting a healthy business climate in Michigan, and the foundation for that is a healthy legal system. Michigan's constitution does not envision pure, unchecked direct democracy. The MMA believes that is for the best, and believes that the people of Michigan were wise to allow their elected representatives to enact sensible rules governing the petition process. Their elected representatives enacted PA 608 here, and the MMA submits that this was well within the bounds of the constitution. The MMA urges this Court to reverse the Court of Appeals' decision to the contrary. The MMA further urges the Court to allow the Legislature to participate fully in this case, to ensure that all sides of important issues like these are heard, in this case and in the future.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Manufacturers Association is an association of Michigan businesses. The MMA was organized and exists to promote the interests of Michigan businesses and the public in the proper administration of laws, to study matters of general interest to its members, and otherwise to promote the general business and economic climate of the State of Michigan. A significant aspect of the MMA's activities involves representing its members' interests before the state and federal courts, legislatures, and administrative agencies. Through effective representation of its membership before the judicial, legislative, and executive branches of government on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan. The MMA appears before this Court as a representative of approximately 1,600 private business concerns, all potentially affected by the dispute in this case.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan. Simply put, manufacturing is the backbone of Michigan's economy. Manufacturing generates 15.1 percent of the gross state product, comprises 13.9 percent of total nonfarm employment, and employs 602,500 people in Michigan. And growing: From June 2009 through April 2016, employment in Michigan's manufacturing sector rose by 169,600 jobs (39.2 percent), and 34.4 percent of nonfarm jobs added in Michigan since the recession ended have been in the manufacturing sector. Michigan has been the national leader in new manufacturing job creation since the recession, outpacing neighboring states by more than 50 percent.

Manufacturing has always contributed substantially to Michigan job growth and economic output, and the promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic survival of this state. The issues in this case therefore substantially affect not only the manufacturing sector, but also the economy of the State of

Michigan as a whole, including employment levels, economic growth, and the ability of Michigan industries to compete in the regional, national, and global marketplaces.

The issues before the Court affect all businesses in Michigan, including thousands of MMA members.

STATEMENT OF FACTS

The MMA adopts the statement of facts set forth in The Michigan House and Senate's Application for Leave to Appeal.

STANDARD OF REVIEW

The MMA adopts the standard of review set forth in The Michigan House and Senate's Application for Leave to Appeal.

ARGUMENT

I. MICHIGAN'S CONSTITUTION ESTABLISHED A REPRESENTATIVE DEMOCRACY WITH BUILT-IN CHECKS ON THE INITIATIVE AND REFERENDUM POWERS

A. Our Republican Government

Michigan is a constitutional republic, not a pure majority-rules direct democracy. *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 599; 822 NW2d 159 (2012). Its republican form of government, where the people have delegated to representatives the legislative power, is guaranteed in the United States Constitution, US Const, art IV, § 4, cl 1, and enshrined in Michigan's Constitution, Const 1963, art IV, § 1. Michigan thus vests "[t]he legislative power of the State of Michigan . . . in a senate and a house of representatives." *Id*.

Advocating for the adoption of the federal constitution, James Madison reasoned that pure democracy was unsuitable to guarantee personal freedom and property rights because of its susceptibility to temporary passions, faction, and the tyranny of an overbearing majority. See

The Federalist No 10 (Madison) (Clinton Rossiter ed., 1961), p 72-76. Representative government was his solution:

> The effect . . . is . . . to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true intent of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

Id., p 76-77.

Under this system, representatives answerable to the people through regular elections are tasked with translating the popular will into public policy that serves the overall good of the people. To ensure adequate deliberation and consideration of long-term interests, Madison also foresaw the need for bicameral legislatures with different terms of office. See The Federalist No 63 (Madison), p 382 ("The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objectives. . . . [S]uch an institution may sometimes be necessary as a defense to the people against their own temporary errors and delusions."). Constituted this way, bicameral legislatures, like Michigan's, provide a stable, deliberative government that represents the short- and long-term concerns of all people and interests in the state.

B. Constitutional Checks on the Initiative and Referendum Powers

In their constitution, however, the people of Michigan also reserved "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." Const 1963, art II, § 9. "When groups or individuals can bypass deliberative bodies and enact these passions by plebiscite, the state departs from republican lawmaking." Linde, *On Reconstituting "Republican*

Government," 19 Okla City U L Rev 193, 206 (1994). The rights at issue in this case—the right to initiative and referendum—are thus the exception, not the rule. *Stand Up*, 492 Mich at 599; see also 2 Official Record, Constitutional Convention 1961, p 2394 ("[T]he legislative power should be in the house and the senate. . . .The people should not be writing laws. That's what we have a senate and house of representatives for."). As exceptions to republican government, the rights of initiative and referendum are limited.

First, Article II, § 9, reserves not an individual right but a collective one. *Woodland v Michigan Citizen Lobby*, 423 Mich 188, 214-15; 378 NW2d 337 (1985). "[T]his reservation of power is constitutionally protected once invoked; once the petition requirements have been complied with, the state may not refuse to act." *Id*. This Court has observed that "[i]n the very constitutional provision creating this right of petition by initiative and referendum, the Legislature is required to prescribe the rules by which such petitions may validly be made." *Stand Up*, 492 Mich at 599-600; see also Const 1963, art II, § 9 ("The power of referendum . . . must be invoked in the manner prescribed by law[.] . . . The legislature shall implement the provisions of this section."). Put differently, when the people adopted Article II, § 9, they delegated to the Legislature the authority to create the procedure for making valid petitions.

Second, consistent with the Legislature's exclusive lawmaking authority and the guarantee of a republican form of government, the Legislature is a check on direct democracy through petition.

- Initiative and referendum may not be invoked without a number of signatures by electors, Const 1963, art II, § 9, registered according to law, *id*., art II, § 4(2) (directing the Legislature to provide for a system of voter registration).

- The people cannot propose laws that the Legislature itself could not enact, or subject certain laws to the referendum process. See *id*., art II, § 9 ("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[.]").

- Initiated proposals cannot become law before the Legislature has a chance to review, enact or reject them, or offer the people a counterproposal. See *id*. (providing the Legislature with 40 session days to enact or reject proposed laws or "propose a different measure upon the same subject").

- And the Legislature may, through a supermajority vote, repeal or revise laws enacted by a popular vote. See *id*. (permitting Legislative amendment or repeal of voter-adopted laws "by three-fourths of the members elected to and serving in each house of the legislature").

Third, the people also delegated to the Legislature the power to "enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, [and] to guard against abuses of the elective franchise[.]" *Id*., art II, § 4(2). The Legislature is empowered to make laws, for example, to deter fraud, ensure the electorate is provided with truthful information about candidates and issues, and protect the people from individuals or entities seeking to take advantage of their right to vote. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16-20; 740 NW2d 444 (2007).

Under the authority derived from its role as the exclusive lawmaking body, its obligation to determine the manner for validly invoking the initiative and referendum, and its duty to safeguard elections and the elective franchise, the Legislature passed and the governor signed Public Act 608 of 2018. The Legislature's application for leave to appeal deals with three of PA 608's provisions: (1) a requirement that no more than 15% of signatures on a petition to invoke the initiative and referendum be from any single congressional district; (2) a requirement that petitions contain a check-box revealing whether the petition circulator is being paid; and (3) a requirement that paid circulators file an affidavit stating as much with the Secretary of State.

Each of these provisions is presumptively constitutional. *In re Advisory Opinion*, 479 Mich at 11. Yet the Court of Appeals held that all three requirements were unconstitutional on their face. As detailed below, MMA disagrees and urges this Court to grant the Legislature's application and reverse the Court of Appeals' decision.

II. THE 15% CAP ON COUNTING PETITION SIGNATURES FROM A SINGLE CONGRESSIONAL DISTRICT SERVES THE STATE'S COMPELLING INTERESTS OF MAINTAINING A REPUBLICAN FORM OF GOVERNMENT, PRESERVING THE PURITY OF ELECTIONS, AND GUARDING AGAINST ABUSE OF THE ELECTIVE FRANCHISE

Under Article II, § 9, the people can invoke the right to petition or referendum through 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[.]" Section 471 of PA 608 provides that "[n]ot 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." MCL 168.471.[2] In addition, "[a]ny signature submitted on a petition above the limit described in this section must not be counted." *Id*.

As noted above, these sections are "presumed to be constitutional." *McDougall v Shanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). Indeed, "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." *Buckley v Am Constitutional Law Found, Inc*, 525 US 182, 191; 119 S Ct 636; 142 L Ed 2d 599 (1999). "[O]nly when invalidity appears so clearly

[2] Elsewhere, the Legislature instructed that "[t]he board of state canvassers 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." MCL 168.477(1); see also MCL 168.482(4) (including on petitions statements of electors by congressional district).

as to leave no room for reasonable doubt that [a law] violates some provision of the Constitution" can a court "refuse to sustain its validity." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

The Court of Appeals held that the 15% cap was an "unnecessary and, therefore, unreasonable restraint on the constitutional right of the people to initiate laws." (COA Op, p 15). It reasoned that Article II, § 9 was a self-executing constitutional provision and, as such, permitted only legislation that was "in harmony with the spirit of the Constitution," furthered "the exercise of the constitutional right and make[s] it more available," and did not "curtail the rights reserved, or exceed the limitations specified." (*Id*., p 11). The 15% cap, according to the Court of Appeals, impaired the people's right to initiate laws by providing an "*additional* requirement in the form of an obligation to limit signatures from specific geographic locations." (*Id*.). This obligation, the court said, conflicted with Article II, § 9, was not authorized under Article II, § 4(2), and unduly burdened the initiative and referendum process.

The Court of Appeals was incorrect. Start with Article II, § 9's text. *House Speaker v Governor*, 443 Mich 560, 577; 506 NW2d 190 (1993). It specifies that the signatures of a number of registered electors are necessary to invoke the initiative and referendum. Const 1963, art II, § 9. Contrary to the Court of Appeals' conclusion, that text does not signal that the people forbade the Legislature from enacting legislation on how to validly obtain the requisite number of signatures. Quite the opposite, by removing all procedural language from the constitution and telling the Legislature to implement Article II, § 9, the people gave the Legislature more room to "prescribe the rules by which such petitions may validly be made." *Stand Up*, 492 Mich at 599-600. That is all the 15% cap is: a content- and viewpoint-neutral procedural step toward a valid petition. In addition to following other procedures—like printing petitions with certain font

sizes, including certain language, making certain certifications, and filing within certain deadlines—PA 608 operates to require sponsors of petitions to circulate the petition in multiple congressional districts to have the petition deemed valid.

As a procedural device to bring multiple congressional districts into the petition and referendum process, the 15% cap stands as a bulwark for Michigan's republican form of government, by dampening the ills of direct democracy. Initiatives "forego the legislative process of translating community preferences into policy through deliberation." Carrillo, et al., *California Constitutional Law: Direct Democracy*, 92 S Cal L Rev 557, 593 (2019). Even proponents of popular lawmaking concede that "the electorate is no less given to abusing its power than any other political actor[.]" *Id*., pp 562-63. So "when exercising legislative power . . . the voters are a legislative branch of government that must be restrained to prevent the voters from abusing themselves." *Id*. What's more, "[b]ecause initiatives are drafted by individuals or small groups, rather than by bodies of representatives elected by the people, they are often controlled by special interests." Du Vivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 Alb L Rev 1045, 1047 (2007). Thus, by discouraging purely local or pet proposals—or encouraging sponsors of such proposals to educate the broader electorate while gathering signatures—PA 608's 15% cap tends to soften the negative elements of direct democracy.

This also tracks Michigan's constitutional preference for general laws, rather than local or special acts. Const 1963, art IV, § 29. See Const 1963, art II, § 9 ("The power of initiative extends only to laws which the legislature may enact under this constitution."). If a petition sponsor must visit multiple districts to produce a valid petition, the sponsor may be more likely to craft her proposal to achieve a broader appeal. This may promote the type of debate, revision,

and refinement found in the legislative process and lead to proposals more beneficial to all of Michigan's residents. See, e.g., *Libertarian Party v Bond*, 764 F2d 538, 543 (CA 8, 1985) (upholding a system requiring signatures from multiple electoral districts as a permissible way to ensure that statewide issues receive statewide support before being put before the electorate as a whole).

The 15% cap may also help promote the same interests that electoral accountability plays in representative democracy:

> [W]hen a legislator casts her vote on a bill addressing any subject, she is accountable to her constituency. A citizen lawmaker, in contrast, is accountable only to himself. Unlike the legislator, he need not worry over angry phone calls or e-mail messages awaiting his return from the ballot box. He need not reflect on his express or implied promise to *represent* as many of his constituents as he can, as well as he can. And from a purely pragmatic standpoint, he need not worry about securing minority constituents' votes if and when he seeks reelection. Some legislators' districts are more demographically and ideologically diverse than others', but all representatives are accountable to a portion of constituents who oppose the majority's position on any given issue.

Specht, *The Government We Deserve? Direct Democracy, Outraged Majorities, and the Decline of Judicial Independence*, 4 U of St Thomas LJ 132, 141 (2006). If a petition sponsor knows she must marshal diverse support for a valid petition, she may be less inclined to push a narrow interest and more likely to take the overall public interest into account. The electorate may not be able to vote the petition sponsor out of office, but it can have some assurance that it will not be asked to support issues that do not advance the interests of the state as a whole.

Fostering more deliberation in the drafting and formulation of petition proposals before signatures are sought also serves the state's compelling interest in preserving the integrity of elections. Voters confronted with a petition to sign are asked to make decisions on short notice, based on one side of the issue, without much time to consider the pros and cons of what is being proposed. Snap judgments don't make good laws. See, e.g., Gillette, *Is Direct Democracy Anti-*

Democratic?, 34 Willamette L Rev 609, 629 (1998) ("In the absence of deliberation . . . inefficient decisions will be made insofar as lawmakers enact laws that impose costs in excess of benefits."). Just as age restrictions are a permissible proxy for maturity, for example, and thus "related to preserving the integrity of ballot issue elections," *Buckley*, 525 US at 191 n10, accounting for diverse points of view and proposing questions more likely to earn broad support can serve as a proxy for the time and consideration the electorate would otherwise take before deciding whether the proposal deserves statewide consideration. In short, it will be harder to abuse the electorate's voting power. That's a compelling state interest. Const 1963, art II, § 4(2).

Next, the 15% cap promotes more speech, not less. This again stems from the need to visit multiple congressional districts and consider the views of the broader public. Petition sponsors necessarily must broadcast their proposal to a wider audience and do so with a more refined message. Thus, voters presented with a petition will receive better information and be better educated on the issue, and better equipped to spread the word to neighbors. Improving the quality and quantity of information presented to voters furthers the state's interest in the purity of elections and preventing abuse of the elective franchise. See *Citizens United v Fed Election Com'n*, 558 US 310, 339; 130 S Ct 876; 175 L Ed 2d 753 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

PA 608's 15% cap neither adds to nor subtracts from the constitutionally prescribed number of signatures in Article II, § 9. It does not prevent anyone from signing a petition. And it does not dictate which congressional districts petitions must be circulated in. The Court of

Appeals, relying on *Wolverine Golf Club v Hare*, 384 Mich 461; 185 NW2d 392 (1971),[3] considered it an impermissible addition to a self-executing constitutional provision. (COA Op at 11). But the Court of Appeals failed to explain why having to circulate petitions in multiple congressional districts is any more problematic than the many other steps that must be followed before a petition can be deemed valid. Petition sponsors must meet filing deadlines, see MCL 168.471, make adequate disclosures on the petition, see MCL 168.482, and take measures to avoid submitting stale signatures, see MCL 168.472a. That these requirements exist in harmony with Article II, § 9 shows that self-executing provisions leave room for the Legislature to act. Article II, § 9 is self-executing in the sense that the Legislature cannot prevent people from invoking the right by declining to enact procedural legislation. But that does not mean the Legislature is powerless to pass laws that it deems appropriate to enable the people's collective rights in Article II, § 9, but also necessary to safeguard individual rights enumerated elsewhere.

The Court of Appeals, placing great emphasis on the debates at the 1961 Constitutional Convention, concluded that it was "manifest that the people specifically and deliberately chose not to add a geographic requirement to the constitution." (COA Op at 14). That conclusion isn't manifest at all. The people never "chose not to add a geographic requirement" because one was never presented to them. This Court has noted that "floor debates in the Constitutional Convention record" can be helpful, *House Speaker*, 443 Mich at 580; but unless there is "a

[3] The way the Court of Appeals read *Wolverine* would seem to preclude virtually all legislation touching on the right to initiative and referendum. Many current statutory requirements were expressly stated in the 1908 constitution yet were not enacted in the 1963 constitution. Compare Const 1908, art V, § 1 with Const 1963, art IV, § 9. Under the Court of Appeals' reading of *Wolverine*, all of these provisions would be invalidated. See 384 Mich at 466 ("There is no specific authority for such statute in Const 1963. On the contrary it was eliminated."). That cannot be so and *Wolverine* should be confined to situations where a statute is based on a constitutional provision later deleted by amendment or revision.

recurring thread of explanation binding together the whole of a constitutional concept," convention debates have little value in determining a text's meaning, see *id*. at 581. At bottom, "whatever may have been the intention of the framers of the constitution . . . that intention is to be sought for in the instrument itself." Hamilton, 8 *The Papers of Alexander Hamilton*, "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank" (Harold C Syrett ed, 1965), p 111. That *the delegates* declined to add a geographic limit to Article II, § 9 does not control how *the people* read and understood the text that the delegates actually proposed. Nothing in the actual text of Article II, 9 can be read as forbidding the Legislature from enacting a procedure that requires petition sponsors to circulate petitions in multiple congressional districts.

On top of that, the 15%-per-district limit is different from the 25% geographic requirement that did not make it to the people for approval. The 25% requirement applied on a county-by-county basis and so tended to give rural counties a disproportionate say when signing petitions to amend the constitution. See 2 Official Record, Constitutional Convention 1961, p 3200 (proposing that in petitions for a constitutional amendment, "not more than 25 percent of such signatures be obtained from residents of any one county"). That's not true of the 15%-per-district requirement because districts have roughly equal population. See *Libertarian Party*, 764 F 2d at 544; *Utah Safe To Learn-Safe To Worship Coalition, Inc v State*, 94 P3d 217, 229 (Utah 2004) ("[W]hereas in *Gallivan* the legislature intended that the rural minority would act as a check and a balance on the urban majority, the Senate District Requirement does not assign disproportionate power to any particular group of voters."). Thus, the Court of Appeals was wrong to give consideration to the delegates' rejection of a dissimilar geographic requirement.

The League says that the 15% cap is unfair because large numbers of registered voters in each congressional district may be "excluded from the process" and it "silence[s] political expression by the vast majority of Michigan voters." (League's Br at 16-17). But that argument assumes that *all registered voters* in a given congressional district will be asked to sign and do sign a given petition. That's not realistic. And the constitution already permits petition sponsors to "ignore" the vast majority of registered voters. There are 7,660,911 registered voters in Michigan.[4] Irrespective of PA 608, petition sponsors are free to ignore 94% of registered voters for constitutional amendments; 96% of registered voters for non-constitutional initiatives; and 97% of registered voters for referendums. The League apparently does not believe that all of those registered voters are unconstitutionally "excluded" or "silenced." PA 608, on the other hand, creates *more* opportunity for *more* registered electors to participate in the initiative and referendum process.[5]

The 15% cap in PA 608 is an important step forward in Michigan's initiative and referendum process. It reaffirms the Legislature's exclusive lawmaking authority and reinforces Michigan's representative form of government. That is essential for the MMA's members, who can neither vote nor sign petitions and therefore must rely on the Legislature to represent and protect their interests.

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[4] Department of State, *Michigan Voter Information Center* <http://mvic.sos.state.mi.us> (accessed Feb 25, 2020).

[5] The Secretary suggests that the 15% cap is burdensome because it requires sponsors to obtain signatures from "roughly half of Michigan's 14 congressional districts." (Secretary's Br at 22). But roughly half of Michigan's 14 congressional districts are clustered in Southeast Michigan. United States Census Bureau, *116th Congressional District State-Based Maps*, <www2.census.gov/geo/maps/cong_dist/cd116/st_based/CD116_MI.pdf> (accessed Feb 25, 2020).

III. THE CHECK-BOX AND AFFIDAVIT REQUIREMENTS ARE CONSTITUTIONAL

A. The Check-Box Requirement in MCL 168.482 is a Valid Measure that Provides Electors with Valuable Information.

Under MCL 168.482(7), petitions must include "at the top of the page check boxes . . . to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer." Petitions must also clearly state below the check box a statement that any signature on the petition will be "invalid and will not be counted" if "the petition circulator does not comply with all of the requirements . . . for petition circulators." MCL 168.482(8). The Court of Appeals majority held that the check-box requirement was unconstitutional because the Legislature's asserted interest in "increas[ing] transparency in elections and accountability for voters" did not outweigh 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[.]" (COA Op, p 17-18). Judge Boonstra disagreed, finding the check-box requirement applied evenly to paid and unpaid circulators, imposed minimal burdens, if any, and advanced the State's important interest in deterring election fraud. (COA Op, Boonstra J, concurring in part dissenting in part, p 6-7).

Judge Boonstra got this one right, and MMA agrees with his analysis. As Judge Boonstra correctly explained, the cases the majority relied on do not support its conclusion. (See *id*.). PA 608 does not prohibit sponsors from paying circulators, so it does not limit the overall pool of circulators. Cf *Meyer v Grant*, 486 US 414; 180 S Ct 1886; 100 L Ed 2d 425 (1988) (invalidating a Colorado statute prohibiting paid circulators). Nor does it remove the cloak of the circulators' anonymity. Cf *McIntyre v Ohio Election Com'n*, 514 US 334; 115 S Ct 1511; 131 L

Ed 2d 426 (1995) (invalidating a statute that prohibited anonymous campaign literature).[6] The majority's analysis, in other words, stands on inapposite authority.

What the majority misses too is that the check-box requirement conveys more information than just whether the petition circulator is paid or unpaid. It also tells voters, at the time they are being asked to support a proposition that might affect the law of the entire state, that the sponsor of the petition is willing to pay people to collect signatures. See *Buckley*, 424 US at 66 (observing that disclosure can be justified by the government's interest in providing the electorate with information about "the sources of election-related spending"). That sponsors pay circulators may not be a fact commonly known to the average voter. Thus, the check-box requirement carries information about whether the petition arises from grass-roots or popular support or represents a narrow interest that requires financial incentive to recruit petition circulators. That type of information can assist voters engaging in "the type of interactive communication concerning political change" when the petition circulator is "persuad[ing] them that the matter is one deserving of public scrutiny and debate that would attend to its consideration by the whole electorate." *Meyer*, 486 US at 421-22.

MMA therefore respectfully asks this Court to hold that the check-box requirement, which has the presumption of constitutionality, is in fact constitutional. The requirement serves the state's compelling interest in ensuring voters are given useful information about the petition's sponsor at the time they are being asked to sign it.

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[6] The adjective "anonymous" derives from the Greek word anṓnumos, meaning without a name, and means "not identified by name" or "of unknown name." The New Oxford American Dictionary (2d ed 2005), p 63. Requiring a petition circulator to disclose her status as paid or unpaid thus does not affect her right to anonymous speech in the same way as the statues invalidated in *McIntyre* and *Buckley*.

B. The Affidavit Requirement Helps to Enforce the Check-Box Requirement and Does Not Impermissibly Burden Paid Petition Circulators.

Under MCL 168.482a(1), paid circulators are required, before circulating petitions, to "file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer." If a paid circulator gathers signatures without first filing an affidavit, the signatures gathered by that circulator are invalid and not counted. MCL 168.482a(1). The Court of Appeals held the affidavit provisions unconstitutional because they imposed requirements only on paid circulators and burdened them without advancing a significant state interest.

In reaching its conclusion, the Court of Appeals read the affidavit provisions in isolation, as if they had no relationship to other sections of PA 608. But statutes must be read as a whole and "in the context of the entire legislative scheme." *Ally Financial, Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018). As the Secretary concedes, the Court must consider "other provisions in the regulatory scheme that serve a similar purpose and how those provisions interact with the challenged law[.]" (Secretary's Br at 40). And here, the affidavit requirements go hand in hand with the check-box requirement; they are the means for policing it.

The Secretary also overlooks the affidavit requirement's relationship to the check-box requirement when she argues that the affidavit is superfluous since circulators must provide their name and contact information on the petitions. (Secretary's Br at 41-42). True, circulators are required under MCL 168.544c to provide contact information and make certain certifications. But that information and those certifications are filed only *after* signatures have been gathered. See MCL 168.544c. That provides no incentive for a circulator to be truthful about her paid status *before and at the time of* gathering signatures. And the affidavit requirement gives the Secretary objective evidence of the circulator's knowledge of her status ahead of time. See MCL 168.482c (requiring the false statement be knowingly made). That makes policing false or

fraudulent statements of paid or unpaid status on the petition easier; the Secretary will have hard evidence with which to compare the check-boxes on the petition, which will deter false statements. And a paid circulator who falsely identifies as unpaid can hardly claim the identification was mistaken if she's already filed an affidavit stating otherwise. The affidavit requirement therefore serves legitimate purposes beyond just giving the Secretary contact information.

The state has a legitimate reason for distinguishing between paid and unpaid circulators too. It is much less likely that a volunteer circulator will falsely identify herself as a paid circulator than the reverse. Whereas a volunteer has no apparent incentive for claiming to be paid, a paid circulator may see an advantage in claiming to be a volunteer—either to avoid hard questions or to make it appear that the proposal is backed solely by volunteers—and therefore be more likely to falsify the check-box. Viewing the affidavit requirement as the teeth to enforce the permissible check-box requirement, it makes sense that the Legislature wrote the affidavit requirement narrowly to apply when the need to enforce the check-box requirement is the greatest. See *In re Advisory Opinion*, 479 Mich at 27-28 (observing that the Legislature is permitted to "take reform one step at a time" and has "discretion to weigh the perceived harm and determine ameliorative priorities"). And it imposes no more of a burden than the constitutionally permissible affidavit in *Buckley*, 525 US at 198-99, or the paid-circulator-only disclosure in *Citizens in Charge v Gale*, 810 F Supp 2d 916, 928 (D Neb, 2011). This Court should grant leave and reach the same conclusion.

IV. THE SENATE AND HOUSE HAVE STANDING UNDER THIS COURT'S JURISPRUDENCE GIVEN THE UNIQUE CIRCUMSTANCES PRESENTED

Finally, the Court of Appeals held that the Senate and House lacked standing to bring their declaratory judgment action. That conclusion is incorrect under the facts of this case.

As Judge Boonstra correctly noted in his partial dissent, under current law "Michigan standing jurisprudence" is "a limited, prudential doctrine[.]" (COA Op, Boonstra, J, concurring in part dissenting in part, p 2 (quoting *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010)). As a prudential doctrine, standing exists when "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[.]" *Lansing Sch Ed Ass'n*, 487 Mich at 372. The Senate and House have a special injury or right in this case, and a substantial interest different from ordinary citizens.

Michigan's constitution provides the basis for the Senate's and House's standing. Together, the Senate and House hold the state's legislative power. Const 1963, art IV, § 1. The constitution unequivocally prohibits the executive branch from exercising legislative power. *Id*., art III, § 2. It also prescribes the exact process for making a law. The legislature passes a bill, *id*., art IV, § 22, and the executive signs it, *id*, art IV, § 33. Repealing a law works the same way. Once a law has been validly made, the executive has no constitutional authority to unmake it on her own. She must instead "take care that the laws be faithfully executed." *Id*., art V, § 8.

But the executive branch's actions in this case—declaring a law unconstitutional, refusing to enforce it, and acquiescing to a court challenge—amount to repeal of a properly enacted law by executive inaction. This process, if left unchecked, would deprive the Legislature of its constitutional role in the lawmaking process.

For this reason, the Court of Appeals was wrong to find that the Legislature does not have an interest in this case distinct from that of the general public. (COA Op, p 8). No other body is vested with the legislative power. The Legislature is acutely harmed when the executive does an end-run around the constitutional procedure for repealing a law. See *INS v Chada*, 462

US 919, 940; 103 S Ct 2764; 77 L Ed 2d 371 (1983). And contrary to the Court of Appeals' conclusion, this does not mean that the Legislature should be entitled to file suit whenever a law is challenged as unconstitutional. Normally when that happens the Legislature's interests are protected when the executive branch defends the law. But when, as here, the executive both deems a validly enacted law unconstitutional and then declines to put up any defense in court, the Legislature's constitutional role is compromised. This Court should therefore grant leave and hold that the Legislature has standing.

CONCLUSION

For all of these reasons, the MMA respectfully requests that the Court grant the application for leave to appeal and reverse the Court of Appeals' decision.

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Respectfully submitted,

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