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 SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S ORDER OF JULY 31, 2020

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SUPPLEMENTAL ARGUMENT

I. This case has not become moot by virtue of the fact that Michiganders for Fair and Transparent Elections is no longer pursuing its ballot initiative.

A. Michiganders for Fair and Transparent Elections' claims are still ripe.

At the time Michiganders for Fair and Transparent Elections (MFTE) filed this lawsuit on May 23, 2019, it had not yet begun to circulate its proposed ballot initiative; MFTE had merely drafted its proposal and expressed an intent to *begin* a ballot-initiative campaign. 5/23/19 V Compl ¶¶ 7, 18. The problem that MFTE and its founder and president, Henry Mayers, identified in the Verified Complaint was that they might have to delay or cancel the campaign altogether because the organization "may not be able to collect sufficient contributions to meet the dramatically more expensive requirements for petition circulation imposed by PA 608." *Id.* ¶ 18 & *id.* Ex G ¶¶ 3–4, 11 & 15.

That problem—administrative inconsistencies and the resulting uncertainty surrounding applicable petition circulator requirements —still exists today. MFTE and Mayers are still confronted with a law that says a ballot-initiative campaign must be conducted a certain way and an Opinion of the Attorney General that says MFTE and Mayers do not have to follow the law. The only thing that has changed is that the Court of Claims and Court of Appeals have issued conflicting opinions about what law now governs ballot initiatives, and even that guidance may be vacated if the Court deems this case moot. See 7/31/2020 Order, p 2.

That reality distinguishes this case from *Anway v Grand Rapids R Co*, 211 Mich 592 (1920), which involved this Court's involvement "not in the determination of actual controversies where rights have been invaded and wrongs have been done, but in the giving of advice to all who may seek it." *Id.* at 606. Here, MFTE and Mayers have alleged an actual controversy about PA 608's validity that impacts their ongoing ability to conduct ballot initiatives.

As this Court recently observed, a case is only moot if the court's ruling "cannot have any practical legal effect upon a then existing controversy." *Paquin v City of St Ignace*, 504 Mich 124, 131 n4; 934 NW2d 650 (2019) (quoting *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018), itself quoting *Anway*, 211 Mich at 610). In *Paquin*, the Court held that a plaintiff's request to be placed on a ballot was not mooted by the passing of the election where his counsel asserted at oral argument that the plaintiff intended to seek office in the future. *Id.* Because MFTE and Mayers certainly intend to pursue ballot initiatives to eliminate lobbyist influence in the future—indeed, that is the very reason for MFTE's existence—their claims are not moot.

B. MFTE's claims also satisfy the public-interest exception to mootness.

In addition, this Court has recognized an exception to mootness: when an "issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), abrogated on other grounds by *Herald Co v Eastern Mich Univ Bd of Regents*, 475 Mich 463; 719 NW2d 19 (2006). At different times, the Court has focused that inquiry on a likelihood of recurrence for the actual litigant or a likelihood of recurrence for anyone. Compare *Mead v Batchlor*, 435 Mich 480, 487; 460 NW2d 493 (1980), abrogated on other grounds by *Turner v Rogers*, 564 US 431 (2011) (recurrence for the actual litigant), with *In re Midland Publishing Co*, 420 Mich 148, 152 n2; 362 NW2d 580 (1985) (recurrence for anyone), and *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001) (same). Either way, this dispute fits that exception.

There will undoubtedly be future ballot-initiative efforts. MFTE and Mayers are likely to pursue them. So are many other organizations and individuals from across the political spectrum. And each time, the initiators will be confronted with the exact same problem MFTE and Mayers alleged in their Verified Complaint: an inability to estimate on the front end how much the effort will cost because of the uncertainty over what legal standards will apply.

And there should be no question as to whether such an issue is capable of repetition yet evading review. Plaintiffs filed this lawsuit on May 23, 2019. It is now August 28, 2020, more than 15 months later, and this Court has not yet issued an opinion resolving the claims that all parties promptly raised. Given the short fuse for gathering and submitting signatures—180 days for gathering with signatures, often submitted as late as 120 days before an election for constitutional amendments and 160 days for statutory amendments—it is difficult to say with confidence that an issue involving a contested future initiative will be timely decided. In any event, MFTE and Mayers' need to know *in advance* what requirements will govern a ballot initiative ensures that there is a concrete, ripe, controversy for this Court to resolve.

II. The remaining plaintiffs—League of Women Voters of Michigan, Henry Mayers, Valeriya Epshteyn, Barry Rubin, *and the Michigan Senate and House*—all have standing.

"[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *House Speaker v Governor*, 443 Mich 560, 572 n15; 506 NW2d 190 (1993) (citation omitted). The doctrine's purpose "is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (cleaned up). In determining standing, a court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *American Family Ass'n of Mich v Mich State Univ Bd of Trustees*, 276 Mich App 42, 45–46; 739 NW2d 908 (2007). So this Court must assume true the allegations that Plaintiffs League, Mayers, Epshteyn, and Rubin wish to exercise their rights as registered voters to support placement of proposals on the general election ballot by signing petitions, and that their signatures may not be counted or accepted under PA 608's requirements, 5/23/19 V Comp ¶¶ 21–23, a special injury different than the populace at large. That is sufficient to allege standing.

Thought not specifically noted in the Court's July 31, 2020 Order, the Legislature, too, has standing. It has suffered a concrete injury, particular to it, by virtue of the Attorney General's decision to join Plaintiffs in attacking PA 608's validity rather than fulfilling her constitutional oath to uphold and defend Michigan law, at the very least by setting up a conflict wall and assigning an assistant attorney general to vindicate PA 608. See generally The Michigan Senate and House's App for Leave to Appeal, Reply in Support of App, and 2/28/2020 Supplemental Br in Case No 160907. Both the Senate and the House are proper parties to defend the validity of a Michigan statute whose constitutionality has been challenged, and the Senate and House are suing to maintain the effectiveness of their votes and the power they have lost to regulate ballot proposals. Indeed, as things stand, the Legislature has lost its Article 2, § 4(2) power to regulate elections unless any proposed act is "in harmony with *the spirit* of the Constitution," 1/27/2020 Slip Op, p 11. And even if the Court were to vacate both lower-court decisions as part of a mootness dismissal, the damage to the Legislature as an institution has already been done by virtue of the Opinion of the Attorney General. For these separate reasons, the Court should hold that the Legislature has standing when the Attorney General declines to defend, reverse the Court of Appeals, and uphold PA 608 in its entirety.

III. If the Court deems this case moot as to Plaintiff MFTE and holds that Plaintiffs Mayers, Epshteyn, Rubin, and the Michigan Senate and House all lack standing, all lower court opinions should be vacated.

If the Court decides that the case is moot as to MFTE and that no other Plaintiff has standing, then it should vacate both lower-court opinions. *Anglers of the AuSable, Inc v Dep't of Environmental* Quality, 489 Mich 884; 796 NW2d 240 (2011). "The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here, or pending our decision on the merits, is to reverse or vacate the judgment below. . . . when that procedure is followed, the rights of all parties are preserved."). *Id.* at 884 (quoting *United States v*

Munsingwear, Inc, 340 US 36, 39–40 (1950)). The reason is simple. Vacating the lower-court judgments in a moot case "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. *Munsingwear*, 340 U.S. at 41. To put it another way, vacating lower-court decisions in a moot case "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which . . . was only preliminary." *Id.* at 40.

The problem here is that the Legislature has already been acutely prejudiced by the Opinion of the Attorney General and the Attorney General's decision to join Plaintiffs in advocating for PA 608's invalidation at all three levels of the Michigan court system. It is not possible to un-ring that bell, which is why the Michigan House and Senate have standing to litigate this case even if Plaintiffs now opportunistically claim that they do not. The Court should reject Plaintiffs' gambit to lock in an Opinion of the Attorney General that purports to bind the Secretary of State in her administration of Michigan's election laws.

IV. Any ruling of this Court should apply retroactively.

As this Court recently explained, unanimously, this "Court's decisions are generally given full retroactive effect absent 'exigent circumstances' that would justify the 'extreme measure' of prospective-only application." *People v Shami*, 501 Mich 243, 257 n34; 912 NW2d 526 (2018) (quoting *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 400; 738 NW2d 664 (2007), and citing *Lincoln v Gen Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000)). As a result, "[c]omplete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Lincoln*, 461 Mich at 491 (quoting *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986)). When a "decision does not even satisfy the threshold criterion for prospective-only application—namely, that it clearly establishes a new

principle of law," then a decision should be given "full retroactive effect." *Shami*, 501 Mich at 257 n34 (cleaned up).

If this Court upholds part or all of PA 608—and the Court should do the latter—it will not be establishing a new principle of law at all but merely upholding the validity of a statute that was effective immediately on December 28, 2018. Any individual or organization that has started a ballot initiative since then has been on notice of the statutory requirements. And though the Court of Claims and a divided Court of Appeals reached different conclusions regarding different aspects of the law, it is not possible to say that a decision of this Court upholding PA 608 in its entirety would "overrule clear and uncontradicted case law." *Lincoln*, 461 Mich at 491. The Court of Claims and Court of Appeals judges who examined PA 608 applied conflicting analyses, and because the case is still on appeal, it is not "settled" in any sense of that word

Given these circumstances, the Court need not weigh the three prospectivity factors in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Since a ruling will not satisfy the threshold prospectivity criterion, any decision should have full retroactive effect.

CONCLUSION AND REQUESTED RELIEF

Because Plaintiff Michiganders for Fair and Transparent Elections has alleged a live controversy, and because Plaintiffs the League of Women Voters, Henry Mayers, Valeriya Epshteyn, Barry Rubin, and the Michigan Senate and Michigan House all have alleged concrete, particularized injuries, each of them has standing, and this case is not moot or without adverse parties.

Accordingly, the Senate and the House ask this Court to (1) grant the Senate and House's application for leave, and (2) issue a merits opinion that (a) recognizes the Senate and House have standing when the Attorney General declines to defend or affirmatively attacks an enacted law, and (b) upholds PA 608 in its entirety.

Respectfully submitted,

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