STATE OF MICHIGAN
IN THE SUPREME COURT

UNLOCK MICHIGAN, GEORGE FISHER, and NANCY HYDE-DAVIS,

Plaintiffs,

v.

THE BOARD OF STATE CANVASSERS, JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of the Bureau of Elections,

Defendants.

Supreme Court No.

Filed under AO 2019-6

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR COMPLAINT FOR MANDAMUS

— Oral Argument Requested —

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STATEMENT OF JURISDICTION

The Michigan Board of State Canvassers deadlocked and refused to certify Unlock Michigan's initiative petition on April 22, 2021. That improper action aggrieved Plaintiffs. Plaintiffs have filed this legal challenge within seven business days of the Board's decision. Jurisdiction is therefore proper in this Court under MCL 168.479, MCL 168.878, and MCR 3.305(A).

STATEMENT OF THE QUESTION INVOLVED

The Board of State Canvassers is charged with the ministerial duty of certifying initiative petitions supported by enough signatures from qualified and registered voters. Unlock Michigan submitted a petition to the Board that exceeded the signature requirement by nearly two hundred thousand signatures. Even so, the Board refused to certify the petition because two Board members thought the Board should (1) undertake an undefined investigation into Unlock Michigan's signature collection efforts and (2) pass formal administrative rules governing initiative petitions. In refusing to act, the Board failed to fulfill its clear duty to certify and violated Plaintiffs' constitutional rights.

Thus, the question presented is: on these facts, should this Court issue a writ of mandamus directing Defendants to take all necessary actions to certify and submit the Petition for consideration by the Legislature under Const 1963, art 2, § 9?

Plaintiffs answer: Yes.

INTRODUCTION

The initiative process is a powerful tool of direct democracy. Its adoption "reflected the popular distrust of the Legislative branch of our state government." *Citizens Protecting Mich's Const v Secy of State*, 503 Mich 42, 62–63; 921 NW2d 247 (2018) (cleaned up). Because of its importance, "the right can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises." *Id.* (cleaned up). And none of these players are permitted to create "unnecessary obstacles to restrict the lawful use of initiative." *Wolverine Golf Club v Hare*, 24 Mich App 711, 733; 180 NW2d 820, 830 (1970).

The Michigan Constitution says that "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. To protect their inherent power, Michigan citizens placed the power of initiative and referendum regarding laws in Article 2 of their Constitution, before enumerating any of the powers of the three branches of government. The initiative process allows citizens to exercise this first right and compels the Legislature to act on behalf of the petitioning citizens. The process has a second step and allows for a vote of the People if the Legislature neglects its responsibility or chooses to continue to ignore the will of the citizens. This provision was enacted to compel the Legislature to act based on the will of the People, as expressed through their petition. Consistent with this extensive grant, "'[c]onstitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights." *Newsome v Bd of State Canvassers*, 69 Mich App 725, 729; 245 NW2d 374 (1976); *see also Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 405-06; 686 NW2d 287 (2004).

The Board of State Canvassers has a specific role to play in this process. The Board must confirm that the initiative petition's form complies with certain requirements set by state law. And the Board must count the number of valid signatures to determine whether enough Michigan voters support the measure. Ultimately, though, "[t]he Board's duty is to certify the proposal after determining whether the form of the petition substantially complies with statutory requirements

and whether the proposal has sufficient signatures in support." *Citizens Protecting Michigan's Constitution v Secy of State*, 324 Mich App 561, 585; 922 NW2d 404 (2018).

Regrettably, the Board abdicated its duty here.

The Board's work should have been easy. By all accounts, Unlock Michigan presented an initiative petition that was supported by more than enough signatures—it exceeded the relevant threshold by 120,000 signatures. The Board agreed. Board Staff agreed. And despite one challenger's suggestion otherwise, no one on the Board or Board Staff disapproved of the form of the petition. The unequivocal Staff Report recommended certification. The Board's sole remaining task, then, was to vote on certification and say "Yes."

But the Board made a hash of it. Two members of the Board first proposed that the Board investigate how Unlock Michigan collected its signatures. That motion failed. The two members next proposed that the Board engage in an "APA rulemaking process" to develop rules for "the form of the petition, the submission of the petition, the gathering of the signatures, and the canvassing of the said signatures." That motion also failed. Then, when it finally came time to vote on whether to certify Unlock Michigan's petition, the same two members refused to certify. Just before voting "no," Board member Julie Matuzak declared: **"I'll be voting against this motion because I really am committed to the investigation and the rulemaking."** So, even though Unlock Michigan's petition met all the requirements that the law imposes, and even though the Board voted *against* an investigation or engagement in an APA rulemaking process, the Board held the petition hostage to the Board's own failures to act on separate, irrelevant, and already-decided issues.

None of this is right. The Court should issue a writ of mandamus because the Board was under a clear legal duty to perform the ministerial act of certifying Unlock Michigan's petitions. The proposed investigation and rulemaking were ill-founded; the Board has no broad power to investigate fraud, and nothing precludes the Board from acting before adopting formal rules. The Board's actions also violated the constitutional rights of all three plaintiffs, as it improperly impinges on

their right to free speech, denies them due process, and deprives them of the equal protection of the laws.

The proper outcome here is plain: the Court should issue a writ of mandamus commanding the Board to certify Unlock Michigan's petition. The Court must protect the initiative process. More than 500,000 Michiganders deserve to have their voices heard.

STATEMENT OF FACTS

I. Unlock Michigan Submits a Valid Petition

After the COVID-19 crisis arose in Michigan in March 2020, Governor Gretchen Whitmer claimed the right to employ broad emergency powers. This Court held that the Governor could not rely on the 1945 Emergency Powers of the Governor Act ("EPGA") to support her emergency orders, as that Act constituted an unconstitutionally overbroad delegation of legislative power. See *House of Representatives v Governor*, 949 NW2d 276 (Mich, 2020); *In re Certified Questions from the United States Dist. Court*, —— Mich ——; —— NW2d —— (2020) (Docket No. 161492), 2020 WL 5877599 ("[T]he EPGA is unconstitutional in its entirety.").

Unlock Michigan was another response to the EPGA. It formed as a ballot question committee in June 2020, and it proposed a petition to repeal the EPGA. The petition reads in full:

> INITIATION OF LEGISLATION
>
> An initiation of legislation to repeal 1945 PA 302, entitled "An act authorizing the governor to proclaim a state of emergency, and to prescribe the powers and duties of the governor with respect thereto; and to prescribe penalties," (MCL 10.31 to 10.33).
>
> THE PEOPLE OF THE STATE OF MICHIGAN ENACT:
>
> Enacting section 1. 1945 PA 302, MCL 10.31 to 10.33, is repealed.

At the beginning of this process, before it began circulating its petition for signature, Unlock Michigan asked the Board to approve both the form and substance of its petition summary. See MCL 168.482b(1)

(providing for such an approval process). Following a public hearing in July 2020, the Board unanimously approved Unlock Michigan's form and petition summary, which Defendant Jonathan Brater had authored. A competing ballot committee—Keep Michigan Safe ("KMS")—then filed an original proceeding in the Court of Appeals challenging that approval. But the Court of Appeals dismissed KMS's complaint, and this Court denied leave to appeal. See *Keep Michigan Safe v. Board of State Canvassers*, unpublished order of the Court of Appeals, entered August 17, 2020 (Docket No. 354188), lv den unpublished order of the Supreme Court, entered September 25, 2020 (Docket No. 161960).

After the Board approved the petition, Unlock Michigan began collecting signatures. From July through the end of September, Unlock Michigan led tens of thousands of circulators backed by millions of dollars in donations to gather over a half million Michiganders' signatures. Plaintiffs Nancy Hyde-Davis and George Fisher were two such circulators. And in the end, their efforts—and the efforts of the many others like them—paid off. On October 2, 2020, Unlock Michigan submitted 82,739 petition sheets to the Secretary of State containing 538,345 signatures in support.

Unlock Michigan's submission exceeded the signature requirement for initiative petitions by nearly *two hundred thousand* signatures. The Michigan Constitution says that a petition to initiate legislation must be signed by a number of registered voters equal to 8% of votes cast in the last gubernatorial election. Const 1963, art 2, § 9. Based on the last gubernatorial election, the eight-percent figure for Unlock Michigan was 340,047—or 198,298 signatures less than the number that Unlock Michigan submitted.

Board Staff then undertook its characteristically thorough review. Staff first disqualified 348 sheets containing 1,614 signatures, leaving 82,391 petition sheets with 536,731 signatures. Exhibit 1, April 19, 2021 Staff Report, p 1. The Board Staff next randomly selected a sample of just over 500 signatures from the remaining signatures and evaluated their validity. Board Staff concluded that 434 of the 506 sampled signatures were registered voters whose signatures could be verified. *Id.* at 2-3. Based on that result, Board staff estimated that the petition "contains 460,358 valid signatures (at a confidence level of 100 percent),

a surplus of 120,000 signatures over the minimum number required by Article II, Section 9 of the Michigan Constitution." *Id.* at 3.

Because its analysis confirmed that Unlock Michigan's submissions had exceeded the constitutional threshold by tens of thousands of valid signatures, Board Staff recommended that the Board certify the petition.

II. KMS Levels Fraud Allegations Against Unlock

KMS filed a challenge before the Board insisting that the Board should not certify until it undertook a broad investigation into purported fraud during the signature gathering process. Among other things, KMS relied on (1) its counsel's view that handwriting on one petition was questionable; (2) an argument that a state legislator could have engaged in fraud where he gathered signatures on the same day that a "tweet" showed he also baled hay; and (3) an attack on the reputation and history of one of the paid circulators that Unlock Michigan used.

KMS's efforts to raise the specter of "fraud" had started several months earlier. In September 2020, reports and a video surfaced showing a paid circulator—Eric Tisinger—making statements that could be construed to endorse illegal circulation practices. Tisinger worked for both Unlock Michigan and Fair and Equal Michigan, another ongoing petition initiative. The Attorney General responded by beginning to investigate Unlock Michigan.

The Attorney General's investigation revealed misconduct on the part of *KMS*. In an April 2021 report, the Attorney General described how a KMS-affiliated group, Farough & Associates, sent "agents provocateur" to spy on Unlock Michigan's signature-gathering activities. Exhibit 2, Attorney General Report (dated February 24, 2021), p 5. The report called the behavior of at least one of these provocateurs, Gretchen Hertz, "problematic." *Id.* at 17. Ms. Hertz "crossed the line" into "inducing criminal conduct," *id.* at 19, the report said, probably violating MCL 168.933a and definitely violating MCL 168.544c, *id.* at 17. Ms. Hertz refused to cooperate with the Attorney General on self-incrimination grounds. *Id.*

Meanwhile, the Attorney General's report did not criticize Unlock Michigan itself. To be sure, the Attorney General found some conduct on the part of four circulators was problematic. The evidence showing such conduct included the video of Tisinger (described above) in which he appears to brag about questionable practices; three videos from agent provocateur Ms. Hertz showing circulators who allowed her to sign someone else's name; one video of an unattended petition; one video of a petition signed before the last voter signed; a spreadsheet from an unnamed source showing complaints about circulator misrepresentations; and one volunteer circulator who self-reported for signing a petition for another circulator. *Id.* at 2–9.

But the Attorney General also found that Unlock Michigan had taken aggressive measures to halt any fraud in its petition process and excise any questionable petition sheets from its submission:

> Unlock Michigan was likewise completely cooperative throughout the investigation. Most importantly its representative provided documentation to support the assertion that the committee had acted appropriately in ensuring that all circulators were aware of the legal obligations regarding the circulation of ballot initiative petitions. Paid circulators were provided with a Circulator Packet that included a "code of conduct" that goes beyond what the Election Law requires, copies of the relevant statutes and the "talking points" in favor of the petition. Volunteer circulators were required to watch the on-line video and were provided with the "talking points."
>
> *Just as soon as Unlock Michigan became aware of the suspect petitions identified herein they pulled those petitions and provided them to the investigator. These suspect petitions were not provided to the Secretary of State to support the ballot initiative.* The committee provided the AG with (1) the petition circulated by Richard Williamson; (2) all the petitions circulated by Tisinger and the local paid circulators he trained; (3) the petitions circulated by Eva Reyes; and (4) the petition signed as circulator by Catherine Tomassoni.

> There is no evidence to directly link this ballot initiative committee to the tactics used by some of the paid circulators who were subcontracted to obtain voter signatures.

Id. at 9-10 (emphasis added). The Attorney General did not bring criminal charges against anyone—not against the four circulators referenced in the report or against any of the tens of thousands of other circulators of the Unlock Michigan petitions.

Despite the Attorney General's conclusions, KMS insisted that the Board should subpoena several named and unnamed circulators, persons affiliated with the companies that employed certain paid circulators, persons affiliated with Unlock Michigan itself, and records from just about everyone in any way connected to the petition effort. KMS asked the Board to then use the results of this far-reaching investigation to disqualify signatures. KMS's arguments ignored one of the key facts that the Attorney General had found important: *Unlock Michigan had submitted no signatures from the so-called questionable circulators in support of its petition*.

In other recent election efforts, the Board had resisted the temptation to use "fraud" as lever through which to deny certification. But the Board wouldn't prove so resistant this time.

III. KMS Attacks the Board's Authority

KMS also challenged Unlock Michigan's petition because of a purported absence of formal rules governing certification. KMS demanded that the Board delay certification of Unlock Michigan's petition until the Secretary of State promulgated rules under the Administrative Procedure Act. KMS argued that MCL 168.31(2) required this "full stop" on certification pending rulemaking—even though the statute had been in place for years, and even though the Board had still certified many petitions without the formal rules that KMS claimed were essential. Put differently, KMS argued that Board should freeze Michiganders' constitutional right to initiate laws (and, for that matter, amend the constitution itself) until the Board—after some indefinite period—decides to complete a rulemaking process.

Not content to raise its rule-focused challenge before the Board alone, KMS also sued the Board and the Secretary in the Michigan Court of Claims. KMS sought an order enjoining the Board from certifying Unlock Michigan's petition until the Secretary implemented formal rules. The Attorney General resisted, explaining that it would be improper for the Court of Claims to "preemptively strike Unlock Michigan's ballot initiative" because of purported APA concerns. Exhibit 3**,** Attorney General Brief (dated April 21, 2021), p 1. To do so would "circumvent the ordinary course of business and preclude the Board from performing its constitutional and statutory duties." *Id.* The Attorney General explained at length how the Board already had existing standards and practices for initiative petitions—and these efforts satisfied Michigan Election Law. *Id.* at 13-20.

And indeed, the Board did have written procedures and guidance on which Unlock Michigan relied. For two decades, the Board has canvassed initiative petitions using two manuals from the Bureau of Elections: a manual titled, "Circulating and Canvassing Countywide Petition Forms," see Exhibit 4 (updated April 2020), and a manual titled, "Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition," see Exhibit 5 (updated March 2021). The Board has approved dozens of referendums and constitutional amendments while these manuals have been in place. From the 2000 election through the 2020 election, 24 constitutional amendments, 7 referendums, and 3 proposed initiated laws have appeared on the ballot after the Board approved the form and substance of the relevant petitions and canvassed them—all through these manuals' standards. The Legislature has adopted 7 initiated laws during the same timeframe—also approved by the Board using these manuals. Many other petitions that did *not* ultimately make it to the Legislature or the ballot were also approved using these manuals.

Unlock Michigan relied on this regulatory framework in launching and submitting its petition. Yet KMS argued that the rules should all be changed in the middle of the process. Unlock Michigan had faith that due process—and some common sense—would prevail. Unlock Michigan's faith would prove to be misplaced.

IV. The Board Refuses to Certify Unlock Michigan's Valid Petition

On April 22, 2021, the Board met to consider (among other things) whether to certify Unlock Michigan's petition. Exhibit 6**,** April 22, 2021 Hr Tr, pp 10:11–64:21.

Director Brater started by explaining the Board Staff's work and why it had recommended that the Board certify the petition. In particular, Brater explained again how Board Staff had "determined that 434 of the 506 signatures" were valid. *Id.* at 11:14–15. This was "well above the minimum threshold that was required … to recommend certification." *Id.* at 11:19–21. Based on that, the Bureau of Elections "does recommend that the Board determine there [are] a sufficient number of valid signatures on the petition." *Id.* at 11:22–24. Brater also addressed some of the arguments that KMS raised, including its APA challenge and fraud arguments. As for the former, Brater agreed with the Attorney General's view that the Board's procedures did not violate the APA. And as to the latter, Brater stressed that "[t]he Bureau does not conduct investigations as to whether signatures are fraudulently obtained or other things that are not apparent from the review of the petition. So that's not something that the Bureau of Elections has previously engaged on," *id.* at 14:23–15:4. An Assistant Attorney General reported to the Board that the Attorney General had closed her investigation into Unlock Michigan without pursuing any charges. *See id.* 16:11–14.

After receiving Director Brater's unequivocal recommendation to certify, the Board considered two motions from Board Vice-Chair Julie Matuzak.

First, Vice-Chair Matuzak moved to investigate alleged fraud in the Unlock Michigan petition process. *See id.* at 44:20–23 ("I make a motion that the Board of State Canvassers initiate an investigation into the collection of signatures on this petition."). Member Jeanette Bradshaw seconded. When Chair Norm Shinkle asked Vice-Chair Matuzak to explain her motion, Vice-Chair Matuzak described how her proposed investigation would look at the "illegal gathering of signatures," *id.* at 45:25, though she also was "not sure what the proper wording would be"

because the Board had "never done this before," *id.* at 45:5-6. Vice-Chair Matuzak generally wanted the Board to investigate "[q]uestions about observing the signatures, questions about signing, who can sign, who doesn't sign." *Id.* at 46:3–5. She believed that the Board could "look[] at the signatures and how they were gathered and were any of them gathered in violation?" *Id.* at 46:11–13. She rejected any notion that this investigation would consider whether the petition's signers were registered or whether their signature matched—she was not "concerned about" these issues. *Id.* 46:21–25. And she even admitted that "the sponsors of the petition say that none of the questionable signatures were submitted." *Id.* at 46:13-15. Vice-Chair Matuzak was concerned only about "how these signatures were gathered," and she insisted that the Board should "have a lot of discussion about those sorts of things." *Id.* at 46:15-16, 46:24-25; *see also id.* at 51:1–2 (saying she wanted to know "how these signatures were gathered"). In other words, Vice-Chair Matuzak herself acknowledged that this so-called "fraud" investigation would have no effect on the number of valid signatures supporting the Unlock Michigan petition. And her statement reflected that this investigation would not contradict the Staff Report, which unequivocally recommended certification of the Unlock Michigan petition.

Both Vice-Chair Matuzak and Member Bradshaw recognized that the Board had never assumed this broad investigatory mantle before. *Id.* at 45:5; *id.* at 45:18 (Matuzak: "So this is an activity we have never done."); *id.* at 47:17–18 (Bradshaw: "we haven't done this, so this is new for us. I sit with Julie on that, that we haven't gone down this road."); *id.* at 50:9 (Matuzak: "So we have never done one of these before[.]"); *id.* at 51:13–14 ("This is all new territory. We're going to figure that out as we go.").

Thus, it likely came as no surprise when two Board members objected to this unprecedented, open-ended, and meaningless fraud investigation. Member Tony Daunt warned that delaying certification for this investigation would be "a Pandora's box," encouraging "delay tactics on things just because we may disagree with" a petition's "content." *Id.* at 48:8–10. Member Durant emphasized that "the evidence before [the Board] is that there are ample signatures and that

there has been no criminal wrongdoing," which should compel the Board to "move forward with certification." *Id.* at 48:19–22. Meanwhile, Chair Shinkle noted that the Board "almost always follow[s] staff recommendations." *Id.* at 49:1–2. He questioned why the Board would insist on further investigation when the Attorney General had concluded her investigation, *id.* at 49:3–7, and noted that investigation by the Board could indefinitely delay certifying Unlock Michigan's petition, *id.* at 49:13. Given Unlock Michigan's "tremendous cushion" of signatures—nearly "30 percent above the threshold," Chair Shinkle concluded that "it's not going to make a difference in the outcome that staff is recommending" even if the investigation did reveal some evidence of fraud. *Id.* at 49:18–23.

The Board voted on the motion to investigate, and it failed on a 2-2 vote. Member Bradshaw and Vice-Chair Matuzak voted in favor, and Chair Shinkle and Member Daunt voted against. *Id.* at 51:23–52:9.

Second, Vice-Chair Matuzak moved that "the Board of State Canvassers and the Bureau of Elections engage in an APA rulemaking process to develop rules for the form of the petition, the submission of the petition, the gathering of the signatures, and the canvassing of the said signatures." *Id.* at 52:21–25. Vice-Chair Matuzak acknowledged that her rules-focused motion "doesn't actually have a lot to do with this petition." *Id.* at 52:17-18. And as with her request for an investigation, Vice-Chair Matuzak's request for rulemaking was somewhat ill-defined; she did not know, for example, how long the process would take or how exactly it would work. But she *did* know that the Board's work in certifying petitions would stop while the rulemaking process unwound—and Unlock Michigan's petition would be stuck with no decision, too. Worse, Vice-Chair Matuzak even said she would consider throwing out Unlock Michigan's petition if the petition did not ultimately comply with whatever rules the Board decided to adopt at the end of Vice-Chair Matuzak's proposed rulemaking process. *Id.* at 54:17-24.

Chair Shinkle and Member Daunt spoke in opposition once more. Chair Shinkle warned that passing this motion would "basically suspend the whole [Board's] process indefinitely." *Id.* at 57:25. At issue, he said, was a "delay of this whole process until those rules are promulgated." *Id.* at 61:2–3. For his part, Member Daunt noted that

the Board had, earlier in the same meeting, approved a new petition to obtain ballot status for the Patriot Party as to form. It did so without mentioning the need for rules that Vice-Chair Matuzak now insisted were necessary before considering Unlock Michigan's petition. He also worried about the basic injustice of applying new rules retroactively: "[I]t flies in the face of fundamental fairness to have it retroactive to folks who started the process, whether that's … Unlock Michigan, or Fair and Equal Michigan or anything else." *Id.* at 58:23–59:1. It would be "unfair," Member Daunt explained, to hold Unlock Michigan to new rules when it had "started the process with an understanding of the rules as they are now." *Id.* at 59:3–11.

The Board ultimately deadlocked 2-2 on the motion to "engage" in a "rulemaking process," so the motion failed. Member Bradshaw and Vice-Chair Matuzak again voted in favor, while Chair Shinkle and Member Daunt again voted against. *Id.* at 61:24–62:10.

At long last, the Board considered whether to certify Unlock Michigan's petition. Member Daunt moved to "accept the report from staff considering the sufficiency … [and] move forward and certify this petition based on this staff report." *Id.* at 62:18-21. After Chair Shinkle supported the motion, Vice-Chair Matuzak offered only a single comment:

> Ms. Matuzak: I'll be voting against this motion because I really am committed to the investigation and the rulemaking.

Id. at 63:5-7. Neither Vice-Chair Matuzak nor Member Bradshaw offered any other explanation for their votes on the motion to certify.

Vice-Chair Matuzak admitted that she would be voting against certifying Unlock Michigan's petition as a protest vote. Her vote did not reflect a judgment that Unlock Michigan's petition failed to meet the requirements of Michigan law; it reflected her disagreement with the Board's choice to reject her earlier motions. Even when Chair Shinkle reiterated that "right now the motion's on approving a certification of the Unlock petitions," and Board Staff could move ahead with rulemaking efforts apart from that, Vice-Chair Matuzak was unmoved. *Id.* at 64:1-7.

Chair Shinkle's admonition to focus on the task at hand fell on deaf ears. The Board voted 2-2 on the motion to certify Unlock Michigan's petition. The votes paralleled the earlier votes: Chair Shinkle and Member Daunt again voted to certify, and Member Bradshaw and Vice-Chair Matuzak again voted against certification. The motion therefore failed, and the voices of more than 500,000 Michiganders were silenced.

Later in the same meeting, the Board heard a status update on another petition that is now circulating, Fair and Equal Michigan. While considering that petition, Chair Shinkle suggested that it might be better to stop all petition work if Vice-Chair Matuzak and Member Bradshaw planned to refuse to certify any petition until the Secretary of State promulgated rules. Vice Chair rejected that idea out of hand, saying that she "accept[ed] the decision of this Board to not be in a rulemaking process" and would therefore approve future petitions if they "meet the qualification." *Id.* at 66:22-67:25. Of course, Vice-Chair Matuzak had *not* "accepted the decision of the Board" only moments earlier when voting on Unlock Michigan's petition. The disparate treatment given Unlock Michigan's petition was thus laid bare.

Plaintiffs therefore filed this action under MCL 168.479, asking the Court to remedy the Board's failure to fulfill its ministerial duties.

SUMMARY OF THE ARGUMENT

The Board had to certify Unlock Michigan's petition. The petition's form complied with all relevant standards and statutes. The Board had said so months earlier—before Unlock Michigan even began collecting signatures—and the Board did not raise any suggestion that its earlier decision was wrong at the more recent meeting. Unlock Michigan also submitted *more* than enough signatures. Board Staff estimated that Unlock Michigan's petition was supported by about 120,000 more signatures than it needed to be. That's all this Court needs to know to issue the writ.

The Board instead detoured into irrelevancies. But the Board has no broad power to investigate fraud—and even if did, no evidence suggests that any otherwise valid signature would be affected The Board also did not have to hold up its own petition process until it implemented a

more formal set of rules that would satisfy KMS. No provision of law *permitted* that outcome, let alone required it. The Board's refusal to certify was therefore premised on improper bases.

The Board violated Plaintiffs' constitutional rights in failing to fulfill their clear legal duty. The right to voice core political speech was trampled with undue restriction. The right to due process was dispensed with when irrelevancies and made-up processes carried the day. And equal protection fell by the wayside when the Board announced that it would hold up Unlock Michigan's petition—and *only* Unlock Michigan's petition—until the investigation and rulemaking demands were met.

The Court should set things straight by issuing a writ of mandamus.

LEGAL STANDARD

'To support mandamus, plaintiffs must have a clear legal right to performance of the specific duty sought to be compelled; defendants must have the clear legal duty to perform such act; and it must be a ministerial act, one where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Dehnke*, 302 Mich 614, 621; 5 NW2d 505 (1942) (cleaned up). "While it is uniformly held that the issuance of a writ of mandamus is a matter of grace or discretion, it does not follow that the courts will overlook a violation of clear and unequivocal public duty[.]" *Muni Fin Com'n v Bd of Ed of Marquette Tp Sch Dist, Marquette Co*, 337 Mich 639, 644; 60 NW2d 495 (1953). "A mandamus in a case where the duty of a public officer is absolute and specific is no more matter of discretion than any other remedy." *Id.* And a "plaintiff's ability to show a clear legal right or a clear legal duty for purposes of mandamus does not depend upon the difficulty of the legal question presented." *Berdy v Buffa,* 504 Mich 876; 928 NW2d 204 (2019).

ARGUMENT

I. The Board failed to fulfill its clear legal to duty to perform the ministerial task of certification.

"The duties and powers of the board of State canvassers are defined and circumscribed by statute." *McLeod v Kelly*, 304 Mich 120, 124; 7 NW2d 240 (1942). "The Board is an agency having no inherent power—any authority it may have is vested by the Legislature, in statutes, or by the Constitution." *Attorney Gen v Bd Of State Canvassers*, 318 Mich App 242, 249; 896 NW2d 485 (2016). The Board of State Canvassers has a defined role to play in the process of petitions, and nothing in Michigan law empowers the Board to assume extra-statutory mandates or deny rights based on extra-statutory considerations. See *Hamilton v Vaughan*, 212 Mich 31, 38; 179 NW 553 (1920) (explaining that, when the Secretary was formerly charged with certifying a proposed amendment, he had to "canvass the same and determine whether it has been signed by the requisite number of qualified voters, and also whether it is in the form prescribed and is properly verified," but he could go no further).

MCL 168.476 defines the Board's authority in certifying a petition initiative. It provides:

> Upon receiving notification of the filing of the petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors. [*Id.* at 168.476(1)]

The statute provides for certain methods that the Board should employ to determine whether the signatures are valid. *Id.* Another statute also explains that signatures are "invalid" when they appear on a petition sheet that does not meet certain form requirements found in still another statute. See MCL 168.482a (referring to instances in which signatures may be found invalid because of non-compliance with MCL 168.482). Taken together, the Board's duties are thus "limited to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient valid signatures to warrant certification of the proposal." *Citizens for Prot of*

Marriage v Bd of State Canvassers, 263 Mich App 486; 693 NW2d 180 (2004); accord *Council About Parochiaid v Sec'y of State*, 403 Mich 396; 270 NW2d 1 (1978); *Leininger v Sec'y of State*, 316 Mich 644; 26 NW2d 348 (1947).

Time and again, both this Court and the Court of Appeals have recognized that the act of accepting or "rejecting the petition" under MCL 168.476 "is ministerial." *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 254; 896 NW2d 485, 491 (2016); see also *Goethal v Bd of Sup'rs.*, 361 Mich 104, 112–14; 104 NW2d 794 (1960) (holding that one under a statutory duty to take actions related to a petition "has no power to pass upon the merits or reasonableness of the petition"); accord *Attwood v Bd of Supervisors of Wayne County*. 349 Mich 415, 420; 84 NW2d 708 (1957); *Bray v Stewart*, 239 Mich 340, 345; 214 NW 193 (1927); *Scott v Vaughan*, 202 Mich 629, 644; 168 NW 709, 713 (1918). Indeed, Michigan courts have held for 170 years that this "legal duty imposed upon the board of canvassers is purely ministerial." *McLeod v Kelly*, 304 Mich 120, 127; 7 NW2d 240 (1942); *Attorney Gen v Van Cleve*, 1 Mich 362, 366 (1850) ("The duties of these boards are simply ministerial[.]"); *Ferency v Bd of State Canvassers*, 198 Mich App 271, 274; 497 NW2d 233 (1993) (saying the Board's "duties are essentially ministerial"); *Auto Club of Mich Comm for Lower Rates Now v Secretary of State*, 195 Mich App 613, 624; 491 NW2d 269 (1992) ("[T]he Board of State Canvassers possesses the authority to consider" only "questions of form" and "whether there are sufficient valid signatures"); accord *Dingeman v Bd of State Canvassers*, 198 Mich 135, 135–36; 164 NW 492 (1917); *Gillis v Bd of State Canvassers*, 453 Mich 881; 554 NW2d 9 (1996) (table).

The Board failed to fulfill its ministerial role here. Board Staff had concluded that Unlock Michigan had submitted more than enough valid signatures to support its petition. No member of the Board questioned that conclusion. Though KMS objected to the form of Unlock Michigan's petition, the Board had approved the form of the petition before Unlock Michigan even began circulating. And when it came time to finally certify, no member of the Board ever suggested that the Board's earlier endorsement of Unlock Michigan's petition was wrong or otherwise worthy of revisiting. That should have been the end of the Board's work.

A simple "yes" vote was the only act that could have appropriately followed.

The Board's failure to act is particularly striking when, as here, the Board Staff unconditionally recommended certification of the Unlock Michigan petition. Exhibit 1, April 19, 2021 Staff Report. In many cases, Michigan courts have required the Board to certify a petition when the Board deadlocked on certification after the Staff Report recommended it. See *Michigan Opportunity v Bd of State Canvassers*, unpublished order of the Court of Appeals entered August 22, 2018 (Docket No. 344619), lv den 920 NW2d 137 (Mich, 2018); *Protecting Michigan Taxpayer s v Bd of State Canvassers*, 324 Mich App 240; 919 NW2d 677 (2018), lv den 911 NW2d 803 (Mich, 2018); *Stand Up v Secy of State*, 492 Mich 588; 822 NW2d 159 (2012); *Citizens for Prot of Marriage v Bd of State Canvassers,* 263 Mich App 487; 688 NW2d 538 (2004). Similarly, Michigan courts have required the Board to certify a petition after the Board deadlocked because of inappropriate arguments from a challenger, where the Staff Report found a sufficient number of signatures. See *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763; 822 NW2d 534 (2012); *Michigan All. for Prosperity v Bd of State Canvassers*, 492 Mich 862; 819 NW2d 570, 571 (2012); *People Should Decide v Bd of State Canvassers*, 820 NW2d 165, 166 (Mich, 2012); *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506; 708 NW2d 139 (2005), lv den 474 Mich 1099; 711 N.W.2d 81 (2006).

In contrast, no apparent Michigan case has *failed* to order certification after the Board deadlocked in the face of a Staff Report recommending certification.

Once the statutory requirements were met, the Board had no excuse for withholding certification. The provisions of Michigan Election Law are "mandatory in the sense that the election officials are bound to obey them. Their observance may be enforced by mandamus." *Groesbeck v Bd of State Canvassers*, 251 Mich 286, 290; 232 NW 387 (1930). That should happen here. See, e.g., *Protecting Michigan Taxpayers v Bd of State Canvassers*, 324 Mich App 240, 250; 919 NW2d 677 (2018) ("[T]he Board of State Canvassers had a clear legal duty to certify Taxpayers' petition, we grant relief on the complaint for mandamus, and we give

this judgment immediate effect."). That is all the Court needs to know to grant the petition and issue the writ.

II. The Board could not withhold certification because some members disagreed with the Board's refusal to conduct a roving investigation of fraud or suspend petition certification pending a rulemaking process.

Rather than follow the statutory requirements, two members of the Board caused it to deadlock—and thus refuse certification—just because they were displeased with the Board's *separate* decisions to decline a broad and ill-defined investigation and decline an indefinite and unnecessary rulemaking process. The Court need not even engage with the protesting members' excuses. It is enough to note that no constitutional provision, Michigan statute, or other authority *permitted* the Board to deny certification on such grounds. No aspect of Michigan law recognizes a board member's right to cast a "protest vote." No aspect of Michigan law permitted the two "no" voting Board members to ignore the signatures and petition before them.

That said, if the Court does choose to probe these extra-statutory justifications, it will find that neither of them hold water.

A. The Board had no power to undertake the sort of investigation that two members demanded.

Two Board members voted "no" on Unlock Michigan's certification because they were "committed" to an "investigation." Yet the Board does not even have the power to investigate how signatures were gathered.

The law is plain: the Board can't investigate fraud. See *McQuade v Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892) (explaining that the Board of State Canvassers "cannot go behind" a return, "especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical"); see also *Johnson v Secy of State*, 951 NW2d 310, 311 (Mich, 2020) (Clement, J., concurring) ("At no point in this process is it even proper for [Board Members] to investigate fraud, illegally cast votes, or the like."). Investigating fraud—even strongly suspected fraud—is the role of other governmental actors. *See Williams*

v Cicott, 16 Mich 283, 311 (1868) (opinion of Christiancy, J.) (noting that the boards "acting thus ministerially" are "often compelled to admit votes which they know to be illegal"); Paine, *Treatise on the Law of Elections to Public Offices* (1888), § 603, p 509 (saying duties of "state canvassers are generally ministerial …. Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal.").

The Court of Appeals addressed this very issue in *Mich Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 512; 708 NW2d 139 (2005). There, two organizations challenged the petition, arguing "that a significant number of the sampled signatures were procured … through fraud"—specifically "that the petition language was deceptive" and "funded by out-of-state interests." After the Board held "a lengthy hearing" and "conduct[ed] an investigation … relating to the allegations of fraud and 'doubtful' signatures,'" it refused to certify the petition. *Id.* at 512–13. The court held that the Board had exceeded its authority. The "board's duty," it said, "is limited to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal." *Id.* at 516. The Board may not look outside these two considerations. *Id.* at 516–17. Challenges "alleg[ing] various violations of election law [is] a subject that is not within the scope of the board's review." *Id.* at 518 (cleaned up).

Nor, explained the Court of Appeals, did the Board's subpoena power under MCL 168.476(2) change this. That provision says the Board "may hold hearings … for any purpose considered necessary by the board to conduct investigations of the petitions," including issuing subpoenas and administering oaths. It was "clear to" the Court of Appeals, however, "that the Legislature has only conferred upon the Board the authority to canvass the petition 'to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.'" *Id.* at 519, citing MCL 168.476(1). This means the Board can examine (1) "the validity of the signatures"; (2) examine "the registration status" of every signatory; and (3) investigate "doubtful signatures." *Id.* MCL 168.476(2)'s grant of investigative power is *not* "a delegation of additional authority or [] an expansion beyond the authority prescribed under § 476(1)." *Id.* Any "investigation that goes beyond the four

corners of the petition itself," for example, "into the circumstances by which the signatures were obtained," "is clearly beyond the scope of the board's authority." *Id.* Simply put, the Legislature has not given the Board the "authority to investigate and determine whether fraudulent representations were made by" petition circulators. *Id.* at 520. Going beyond this authority "undermines the" constitutional reservation to the people of "the power to propose laws through ballot initiatives." *Id.* "Because there is no dispute that the form of the petition is proper or that there are sufficient signatures," the Board had a "clear legal duty to certify the petition." *Id.*

Here, the Board was exercising authority under MCL 168.476, so its powers were circumscribed. The Board could consider only the four corners of the petition to determine whether Unlock Michigan has enough signatures to warrant certification. The Board *may not investigate fraud*. Vice-Chair Matuzak rejected any notion that this investigation would consider whether the petitions signers were registered or whether their signature matched—she was not "concerned about" these issues. See Exhibit 6**,** April 22, 2021 Hr Tr, pp 46:21–25. Thus, Vice-Chair Matuzak's proposed investigation had nothing to do with the actual validity of the signatures, the registration status of signatories, or doubtful signatures—the only issues the Board may investigate under Section (2). Vice-Chair Matuzak wanted the Board to examine the circumstances in which signatures were obtained for evidence of fraud—precisely what *MCRI* recognized the Board could not do.

Even the two "no" voting Board members understand this. Member Matuzak herself recognized the limits on the Board's power to probe signatures just a few months ago. During a February 2021 Board Meeting, Vice-Chair Matuzak addressed an earlier KMS request to delay the review of the Unlock Michigan petition pending a final decision from the Attorney General's investigation. Vice-Chair Matuzak explained:

> I've been on the Board now a long time as have you, Norm, and I don't know how many times we have gotten our hands slapped for talking about fraud on petitions and been told directly that we have no ability to look at fraud, that it's a buyer beware situation

> and that fraud complaints have to be taken to the local prosecutor or the Attorney General. . . . I would like to see us try to figure out a way to deal with fraud in petition gathering, but we've always been told we couldn't sort of do that. So I am heartened that the Attorney General is looking at it. . . . I'm also not clear how the Board can look and make a judgment on signatures[.]

Meanwhile, Member Bradshaw said during the same meeting that, to her memory, the Board has never suspended certification of any petition before to investigate fraud.

These member statements confirm what the cases show: the Board has no power to search for evidence of fraud in signature gathering, let alone ignore signatures because of it. See *May v Wayne Co Canvassers*, 94 Mich 505, 512; 54 NW 377 (1893) (explaining in analogous elections context that "[t]he board had no power to exclude" votes based on fraud allegations); *Protecting Michigan Taxpayer s v Bd of State Canvassers*, 324 Mich App 240, 242; 919 NW2d 677 (2018) (holding that Board of State Canvassers could not refuse to certify an initiative petition based on allegedly fraudulent addresses on the petitions because "the statutory sanctions for any such irregularities do not include disqualifying elector signatures"). The Board should not then have declined to certify Unlock Michigan's petition because of the Board's own refusal to conduct an improper investigation—especially without any suggestion that the alleged fraud affected the number of valid signatures supporting the petition.[1]

B. The Board has neither the right nor need to pass formal rules and retroactively apply them to Unlock Michigan's petition.

Two Board members proposed to hold Unlock Michigan's petition in abeyance while the Secretary of State conducted a formal APA

[1] Unlock Michigan vehemently disagrees with any allegations of fraud that KMS has made against it. As the Attorney General investigation found, Unlock Michigan acted appropriately. See Exhibit 2, Attorney General Report (dated February 24, 2021), pp 9-10. But this Court need not grapple with those factual issues here.

rulemaking process to establish new rules that would govern initiative petitions. But there was no need for such rules given the manuals governing initiative petitions. And even if there were, any new rules could not have applied retroactively to Unlock Michigan—so there was no reason to hold back on certifying Unlock Michigan's petition under the existing framework.

1. The Board's long-standing practice in certifying petitions does not violate Michigan law.

When KMS sued the Board and the Secretary in the Court of Claims, the Attorney General explained at length why KMS's rule-focused challenge failed. For many of the same reasons, the efforts of two Board members to stymie any certifications until the Secretary adopted formal rules were equally misguided.

First, any effort to stop the *Board*'s work while the *Secretary of State* acts would mix up the Secretary of State and the Board. The notion that rules were required comes from MCL 168.31(2). But that statute concerns the Secretary of State, not the Board. Appearing under the title, "Secretary of state; powers and duties generally; promulgation of rules," MCL 168.31(2)'s plain language says that, under the APA, "the *secretary of state* shall promulgate rules establishing uniform standards for … ballot question petition signatures." It says nothing about the Board.

Though the Board's work is closely intermingled with the Secretary of State's, it is a constitutionally independent and distinct body. The Board is created by 1963 Mich Const, art 2, § 7, while the Secretary of State is created by other provisions, see, e.g., 1963 Mich Const art 5, §§ 3, 21. Tracking our Constitution, the Legislature's statutory delegations of rule-making authority distinguish between the Board and Secretary of State. The Legislature knows how to tell the Board to promulgate rules. See, e.g., MCL 168.795a(9). MCL 168.889, for example, says that the "board shall provide … such rules and regulations as in the opinion of the board of state canvassers shall be necessary to conduct [a] recount in a fair, impartial and uniform manner." (The Board has done so. See Mich Administrative Code, Rules 168.901–906a.) The Legislature also knows how to tell the Secretary of State to promulgate rules. MCL

257.309(3), for example, says that "[t]he secretary of state shall promulgate rules under the [APA]" to examine driver's license "applicant's physical and mental qualifications to operate a" vehicle. (The Secretary of State has done so. Mich Administrative Code, Rules 257.851–857.) MCL 168.31(2) tells the Secretary of State, *not the Board*, to promulgate rules. The Board therefore has no duty to delay certification to promulgate rules under MCL 168.31(2) because it doesn't apply to them.

Given that MCL 168.31(2) doesn't require the Board to promulgate rules, the Board's existing materials governing petition signatures allow it to sufficiently apply MCL 168.476. Michigan has accepted the federal view that "defers to the agency's discretion the choice of the vehicle for determination of the policy." LeDuc, *Michigan Administrative Law* §§ 4:16, 4:17; see also *Dep't of State Compliance & Rules Div v Mich Ed Assn-NEA*, 251 Mich App 110, 121; 650 NW2d 120, 127 (2002) (recognizing "that an administrative agency need not always promulgate rules to cover every conceivable situation before enforcing a statute" (cleaned up)); see also *Dykstra v Dir, Dept of Nat Res*, 198 Mich App 482, 492; 499 NW2d 367 (1993). Here, the Board could use the Bureau of Elections' manuals as vehicles to implement MCL 168.476. *Jim's Body Shop, Inc v Dept of Treasur*y, 328 Mich App 187, 200–01; 937 NW2d 123 (2019) (accepting as proper the Department of Treasury's use of a manual governing audits of use-tax deficiencies).

Second, even if MCL 168.31(2) applies to the Unlock Michigan petition, it isn't clear that its "shall" language is mandatory. Michigan administrative law expert Don LeDuc has explained that Michigan courts do not always treat "shall" as the mandatory requirement KMS believes it is: "[Michigan] courts have not established that even the requirement that an agency 'shall' promulgate rules means that an agency must do so prior to enforcement of its underlying statute." LeDuc, *Michigan Administrative Law*, 13 TM Cooley L Rev 341, 385 (1996); see also LeDuc, *Michigan Administrative Law*, § 4:28 (explaining that the Michigan Court of Appeals has "at least implied that the word 'shall' does not mean that an agency cannot enforce an underlying statute until it passes rules," citing *People v Hurn*, 205 Mich App 618, 621; 518 NW2d 502, 504 (1994), overruled on other grounds by *People v*

Anstey, 476 Mich 436; 719 NW2d 579 (2006); *id.* (explaining that although many statutes say an agency "shall" promulgate rules, this "does not always mean that an agency must promulgate rules before attempting to enforce the statute," citing *Mich State Employees Ass'n v. Mich Liquor Control Com'n*, 232 Mich. App. 456, 591 N.W.2d 353 (1998)); see *W Bloomfield Hosp v Certificate of Need Bd*, 452 Mich 515, 523; 550 NW2d 223 (1996) (holding that "the department was not necessarily required" to complete the "shall" requirement before implementing the statute). The default position is that "whether to promulgate rules, in the absence of a direct expression of legislative intent to defer enforcement of a statute pending the promulgation of rules, is a matter for agency discretion." LeDuc, *Michigan Administrative Law*, § 4:28. There is no indication that the Legislature wanted to suspend enforcement of its petition rules pending promulgation of rules under 168.31(2). That would effectively put a critical constitutional right on ice for some period—an unlikely result.

In many contexts, "shall is often read as the permissive may to effectuate legislative intent." *McLogan v Craig*, 20 Mich App 497, 500; 174 NW2d 166 (1969). Here, the Legislature intended MCL 168.31(2) to provide consistency regarding petition circulator and signer information. Both the statute and the Senate Fiscal Agency analysis refer to the need for "uniformity." See MCL 168.31(2); SFA Analysis of 1999 HB 5064. The Board's in-depth manuals already provide comprehensive uniformity for analyzing petition and circulator information. Given that the Board already has guidelines for its implementation of MCL 168.476, the legislative intent of MCL 168.31(2) has been carried out, and Secretary of State rules are unnecessary. In *Vernon v Controlled Temperature, Inc*, 229 Mich App 31, 36; 580 NW2d 452 (1998), the court considered the effect of the Worker's Compensation Agency's failure to promulgate rules as required by MCL 418.354(3)(a) (saying that the agency "shall promulgate rules" to notify employers of possible eligibility of social security benefits). The court's holding ignored the effect of a lack of rules because "[t]he purpose of the unpromulgated rules was satisfied." *Id.* at 39. Because delaying certification to force the Secretary of State to go through a long rulemaking process would do nothing to further legislative intent, MCL 168.31(2)'s "shall" should be read as permissive instead of mandatory.

2. The Board could not retroactively apply any new rules to Unlock Michigan, so it would have had no reason to delay certification while the Secretary implemented new rules.

The premise of Vice-Chair Matuzak's request for rulemaking was that any new rules should apply to Unlock Michigan. Were it otherwise, it would make no sense to withhold certification—as new rules would be irrelevant to that decision. But as it turns out, the premise is flawed: any new rules would *not* have retroactively applied to Unlock Michigan's petition.

Generally, the regulation in effect when the plaintiff filed and completed his submission controls. *Id.*; accord *Bode v Saul*, No. 8:19-CV-2222, 2020 WL 4741055, at *7 (MD Fla, July 28, 2020); *Herrera v Saul*, No. 19-cv-581, 2020 WL 6875942, at *3 n 5 (DNM, September 10, 2020); see also *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 192; 445 NW2d 98 (1989) (explaining that Michigan courts look to federal APA decisions in construing Michigan's analogous APA). Unlock Michigan turned in all its materials to the Board many months ago in October 2020. This point is pivotal: *the relevant statutes and manual provisions focus exclusively on the collection and submission of signatures.*

Thus, the standards in effect in October 2020 should apply to Unlock Michigan's petition. Although the Board has post-submission duties (i.e., checking signatures) and may, if it chooses, consult with parties to accomplish those duties, Unlock Michigan's statutory responsibilities, as explained by the manual, ended with submission. Indeed, Unlock Michigan could not have done more even if it had tried. See MCL 168.475(2) (prohibiting circulators from supplementing filings). That is why the manuals are dedicated to reiterating requirements for petition structure, circulator information, and signatory information: once those tasks are done, a petition circulator has done all they can do. Given that Unlock Michigan completed its submission months ago, the manuals are the proper standard to judge its submission.

As for whether to declare a rule retroactive, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound

guidance." *Landgraf v USI Film Products,* 511 US 244, 270; 114 S Ct 1483; 128 L Ed 2d 229 (1994). Reliance is a key part of this analysis. *Buhl v City of Oak Park,* 329 Mich App 486, 495; 942 NW2d 667, 674 (2019); *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994) ("When a court evaluates whether retroactive operation promotes a sound objective, it must specifically consider the extent of the parties' reliance[.]"). And reliance matters most when handling cases "in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271.

Applying rules retroactively "presents problems of unfairness that are more serious than those posed by prospective [rules], because it can deprive citizens of legitimate expectations and upset settled transactions." *Downriver Plaza Group*, 444 Mich at 666, quoting *Gen Motors Corp v Romein*, 503 US 181, 191 (1992). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Davis v State Employees' Ret Bd* 272 Mich App 151, 166; 725 NW2d 56, 66 (2006) (cleaned up). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* An administrative rule therefore cannot be applied retroactively if it would produce arbitrary or unreasonable results—a determination made by considering party reliance. See *Downriver Plaza Group*, 444 Mich at 668–69.

To count as reliance, a party's "knowledge must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event." *Buhl*, 329 Mich App at 495, quoting *Robinson v. Detroit*, 462 Mich. 439, 467, 613 N.W.2d 307 (2000) (cleaned up). Reliance happens when a party "may have altered their conduct to reduce liability if they had anticipated the imposition of later liability." *Romein v Gen Motors Corp*, 436 Mich 515, 527; 462 NW2d 555 (1990). The length and amount of reliance matters.

A new rule cannot be applied retroactively if "there was profound reliance on the old rule" and the subject matter has "long been governed by the rule." *People v Rich*, 397 Mich 399, 403; 245 NW2d 24 (1976); see also *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct.

1891, 1913 (2020) (stating that "longstanding [agency] policies may have engendered serious reliance interests that must be taken into account" (cleaned up)). Michigan courts have found reliance interests too strong for retroactivity when the interested parties relied for "eight years," *Riley v Northland Geriatric Ctr*, 431 Mich 632, 646; 433 NW2d 787 (1988), twelve years, *Sellers v Hauch*, 183 Mich App 1, 12; 454 NW2d 150 (1990), eight years, *Jolliff v Am Advertising Distributors, Inc*, 49 Mich App 1, 211 NW2d 260 (1973), and "years," *Bd of Trustees of City of Pontiac Police v City of Pontiac*, 502 Mich 868; 912 NW2d 195 (2018) (McCormack, C.J., concurring) (calling this reliance interest significant).

Unlock Michigan's profound reliance on the manuals weighs against retroactivity. When Unlock Michigan created and circulated this petition, it had settled and legitimate expectations about what the Bureau of Elections and Board would require on that petition. This makes sense, given that for *20 years* these manuals guided implementation of MCL 168.476; this is a far longer timeframe than many other Michigan cases refusing to apply retroactivity. And there is no question Unlock Michigan conformed its conduct to comply with the manuals or that, if the manuals had been different, Unlock Michigan would have changed its behavior to comply with them. Unlock Michigan went above and beyond to ensure that the petition form and signatures complied with all relevant requirements flagged by the manuals.

Other cases have refused to apply new rules to a party that reasonably relied on preexisting agency standards and guidance. In *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 585; 624 NW2d 180 (2001), for example, this Court held that the newly enacted Sales Representatives' Commissions Act was not retroactive. Focusing on reliance, the Court said that applying the new act would "unsettle" the parties' expectations: it would speed up payment times and impose unlooked-for penalties based on strategic decisions the defendant had made before the act passed. *Id.* at 585–86. Similarly, here, replacing the manuals with new rules would unsettle Unlock Michigan's expectations for the petition process. And it would jeopardize strategic decisions Unlock Michigan made that it cannot now redo. There is every reason to think, then, that a new rule would not be retroactive. See

Shah v State Farm Mut Auto Ins Co, unpublished opinion of the Court of Appeals, issued February, 25, 2021 (Docket No. 353298), 2021 WL 745671, p *1 (declining to apply legal requirement of agency after agency had previously "blessed" the plaintiff's activities).

These cases are in keeping with the general proposition that an agency's failure to follow the APA should not prejudice a party who followed the agency's non-APA-compliant instructions. In *Huron Valley Hosp, Inc v Mich State Health Facilities Comm*, 110 Mich App 236, 239, 244; 312 NW2d 422 (1981), two organizations applied for a certificate of need that only one could get. The Commission granted one application and denied the other based on unpromulgated rules that both organizations followed. *Id.* at 243. The court held that the use of unpromulgated rules was improper and that the appropriate remedy was awarding the denied applicant a certificate of need. *Id.* at 252. The court reasoned that even if the Commission promulgated new rules, it couldn't go back in time to compare the two applications; its decision to grant was time-sensitive and couldn't just be redone. *Id.* at 244–51.

Similarly, Unlock Michigan's petition drive isn't something that can just be re-run. That drive involved tens of thousands of volunteers specially motivated by the circumstances of their unique time and place—a locked down Michigan in the summer of 2020. Even if the Secretary of State promulgated new rules, there is no way to redo the petition drive to adhere to the yet-to-be-promulgated signature-gathering rules. Unlock Michigan should not be punished for agency failure.

* * * *

"[U]nder a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed[.]" *Kuhn v Dept of Treasury*, 384 Mich 378, 385; 183 NW2d 796 (1971). Yet the Board's approach seems to have done just the opposite—the Board effectively put the brakes on any "direct legislative voice" because of two members' personal displeasure about the internal administrative machinations of the Board. That simply can't be right.

III. The Board's actions have violated Plaintiffs' constitutional rights.

State officials have a clear legal duty to refrain from unconstitutional conduct. Board members are no different. After all, Board members all take an oath to "support the Constitution of the United States and the constitution of this state." Const 1963, art 11, § 1. Yet the Board's actions here violate the U.S. Constitution in at least three distinct ways. The Court should not allow these violations to stand.

A. The Board violated Plaintiffs' First Amendment rights.

In supporting Unlock Michigan's initiative petition, all Plaintiffs have engaged in core political speech that the Board cannot unduly burden. "The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v Grant*, 486 US 414, 421; 108 S Ct 1886; 100 L Ed 2d 425 (1988). Thus, limitations and restrictions on the exercise of that right should be subject to "exacting scrutiny." *Id.* at 420. Indeed, "[p]olitical expression" through the initiative process "must be afforded the broadest protection in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 494; 242 NW2d 3 (1976).

To be sure, Michigan "has a strong interest in ensuring that its elections are run fairly and honestly." *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 297 (CA 6, 1993). And the state may implement content-neutral, nondiscriminatory reasonable measures to advance that interest. *Id.* But even when a state claims an interest in something like prevention of fraud, the state "faces a well-nigh insurmountable obstacle to justify measures that place a severe or significant burden on a core political right[.]" *Citizens for Tax Reform v Deters*, 518 F3d 375, 387 (CA 6, 2008) (cleaned up).

Here, the Board's actions have significantly burdened Plaintiffs' right to petition—with no justification for its actions. Perhaps certain

Board members believed that the generalized allegations of fraud here required some further effort. But the Board made its choice and decided *not* to pursue an investigation—appropriately so given that the Board has no real power to undertake that kind of investigation. Two members of the Board cannot then "punish" Plaintiffs because they disagreed with two other members of the Board on the investigation issue. Similarly, the Board has advanced no discernible state interest by refusing to certify Unlock Michigan's petition for lack of rules while refusing to implement any such rules. In essence, these burdens are great because they place a total roadblock across the exercise of Plaintiffs' constitutional rights of expression and assembly. The Board is denying Plaintiffs their means of expression only because of its contradictory displeasure with its *own* refusal to take certain predicate acts.

And the State's interests could easily be served in other ways. Concerns about fraud can be vindicated, for instance, through enforcement of the criminal statutes and investigation by other authorities, such as what already occurred when the Attorney General investigated Unlock Michigan. *Buckley v Am Constitutional Law Found, Inc*, 525 US 182, 205; 119 S Ct 636; 142 L Ed 2d 599 (1999) (noting the availability of a criminal penalties a less burdensome alternative). Concerns about uniformity and predictability in the process are served by applying the already-existent standards embodied in the Bureau's petition manuals. The many other requirements in Michigan Election Law—including multiple certification requirements and rigorous standards for the petitions themselves—advance these same aims. As Chair Shinkle bluntly noted, "[E]verything we do is under statute. We don't need rules. We have statute. Statute trumps rules." Exhibit 6, p 57:12-13.

The Board's actions here are particularly offensive to the First Amendment right because there's no obvious way for Unlock Michigan to meet the standards imposed and obtain certification. If the Board will refuse certification for any petition where some Board members feel there is cause for an investigation—even where the Board has already said no such investigation will be conducted—then any challenger could freeze a petition sponsor's efforts by raising even the mere suggestion of fraudulent conduct. And if the Board will not certify a petition until it

writes rules that it refuses to write, then no amount of compliance and good-faith effort can get Unlock Michigan past the logjam.

The Court should not let these actions stand given how they violate the First Amendment.

B. The Board's approach has denied Plaintiffs due process.

The U.S. Court of Appeals for the Sixth Circuit has held that the method that the Board Staff used here to assess the validity of the signatures—initial screening followed by sampling—is a procedure that produces rational results consistent with due process. *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 299 (CA 6, 1993). But the Board dispensed with the results of that reasoned approach and instead embraced its own, under which signatures cannot be certified until all investigative demands by members of the Board are met and all signatures comply with yet-to-be-determined formal rules that are crafted after the fact.

To describe these circumstances is enough to flag the problem. "The touchstone of due process is the protection against arbitrary governmental action, including the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Schulkers v Kammer*, 955 F3d 520, 539 (CA 6, 2020). Yet everything about what was seen here is arbitrary. Not one member of the Board alleged—let alone summoned evidence—that Unlock Michigan's petition exceeded the required number of signatures only because of fraudulent activity. Not one member of the Board provided a reasoned explanation for how the Board even *could* launch an investigation. Nor did any member of the Board identify some defect arising from a lack of rules that defeated this petition; indeed, Vice-Chair Matuzak candidly admitted that her request for rules had nothing to do with this petition. No member of the Board suggested that rules were a statutory or constitutional prerequisite for certifying the petition. So in declining to undertake these actions and then withholding certification, the Board rendered its decision based on no obvious standards, no coherent rationale, and with no reference to the statutes that define its work.

At bottom, "[t]he guaranty of due process demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *In re McEvoy*, 267 Mich App 55, 70–71; 704 NW2d 78 (2005). The Board did not achieve any objective at all by withholding certification of Unlock Michigan's petition. And how the Board conducted its business here—losing sight of the question before it and denying certification as some form of protest—is the definition of arbitrariness.

This due process violation cannot stand.

C. The Board has deprived Plaintiffs of equal protection of the laws.

The Board's refusal to certify Unlock Michigan's appropriately supported petition also deprived Plaintiffs of the equal protection of the laws—violating the Equal Protection Clause of the Fourteenth Amendment. An arbitrary denial of an electoral right can violate the Equal Protection Clause. See, e.g., *Harper v Va Bd of Elections*, 383 US 663, 665; 86 S Ct 1079; 16 L Ed 2d 169 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). Such a violation can arise as to a "class of one." "[C]ases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000). The violation can be "occasioned by … a statute['s] … improper execution through duly constituted agents." *Id.* "A 'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by negating every conceivable basis which might support' the government action or by demonstrating that the challenged government action was motivated by animus or ill-will." *Anders v Cuevas,* 984 F3d 1166, 1179 (CA 6, 2021) (cleaned up).

The Board acted with no conceivable basis here. In the past, fraud allegations were no reason to hold up certification of a petition. The

Board had, at least before, acknowledged that its ministerial role did not permit it to look deeper into how petitions were collected. Yet two Board members withheld their approval for certification because of that concern, even while expressing no qualms about certifying a similarly situated petition initiative—Fair and Equal Michigan—who had hired the very same circulator whose odious comments prompted the allegations against Unlock Michigan. Likewise, the Board had routinely approved petitions without formal rules for *two decades*. Recall that 24 constitutional amendments, 7 referendums, and 3 proposed initiated laws have appeared on the ballot after the Board approved the form and substance of the relevant petitions and canvassed using the manuals now thought to be questionable. (KMS's counsel alone was involved in three such initiatives: Raise Michigan (2014), Michigan Time to Care (2018), and Michigan One Fair Wage (2018).) And here again, Board members said later during the same meeting that they would *not* reject the Fair and Equal Michigan petition for lack of formal "rules" when that petition made its way to the Board. That difference in outcome again suggests that the decision here was less about fidelity to administrative rigor and more about an ideological favoritism for one petition over another.

The Board therefore violated Plaintiffs' equal-protection rights, too.

IV. Plaintiffs Have No Other Remedy to Address the Board's Unlawful Action.

The Board has a clear legal duty to certify the Unlock Michigan petition. Its refusal to do so constitutes a violation of clear legal duties that the Board owed to the Plaintiffs under constitutional and statutory law. Only this Court can correct this travesty of democracy and protect the will of Michigan citizens to initiate the legislation contemplated by the petition. See MCL 168.479; see also *Comm to Ban Fracking in Michigan v Bd of State Canvassers*, __ Mich App __; __ NW2d ___ (2021) (Docket No. 354270), 2021 WL 218683, at *5 ("The stated purpose of MCL 168.479 is to have any legal challenge to the sufficiency or insufficiency of an initiative petition decided as promptly as possible, by our Supreme Court."). Accordingly, Plaintiffs are entitled to mandamus under Michigan law to compel the Board to certify the Unlock Michigan

petition. Absent this Court's action, more than 500,000 voters signing the petition will be disenfranchised.

CONCLUSION AND RELIEF REQUESTED

This Court is the last hope for hundreds of thousands of Michiganders. The Board decided to silence their voices by refusing to certify this petition—even though it was in proper form and even though it was resoundingly supported. The Court should act to make this right. The Court should grant the writ and order Defendants to certify the petition and refer the question to the Legislature.

Respectfully submitted,

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Dated: April 30, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 12,086 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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