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,

KEEP MICHIGAN SAFE,

Intervening Defendant.

Supreme Court No. 162949

ORAL ARGUMENT REQUESTED

INTERVENING DEFENDANT KEEP MICHIGAN SAFE'S BRIEF IN OPPOSITION TO PLAINTIFFS' COMPLAINT FOR IMMEDIATE MANDAMUS RELIEF

Christopher M. Trebilcock (P62101)
Vincent C. Sallan (P79888)
CLARK HILL PLC
500 Woodward Avenue
Detroit, MI 48226
(313) 965-8300
ctrebilcock@clarkhill.com
vsallan@clarkhill.com

Mark Brewer (P35661)
GOODMAN ACKER, P.C.
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Attorneys for Intervening Defendant Keep Michigan Safe

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page(s)**

Statutes

Constitutional Provisions

Public Acts

Other Authorities

INTRODUCTION

Plaintiffs seek to have this Court do for them what is has no obligation to do and what it has no jurisdiction to do. Plaintiffs want this Court to direct the Board of State Canvassers to certify Unlock Michigan's petition to repeal a statute that has already been declared unconstitutional by this Court and is thus of no legal or practical effect. Because the statute has been declared unconstitutional, it is as though it never existed. Unlock Michigan's ballot initiative is therefore moot and neither this Court nor the Board can award Plaintiffs any further relief. Accordingly, the Court lacks jurisdiction to hear this case and should dismiss it on that basis.

Even assuming this Court has jurisdiction, Plaintiffs ask this Court to ignore the statutory authority the Board possesses to protect the integrity of the ballot initiative process. Here, Plaintiffs claim that the Board has no authority to investigate whether Unlock Michigan's signatures were gathered illegally – that is whether circulators left petitions unattended (they did), whether individuals signed for family members and friends (they did), or whether Unlock Michigan's vendors trained circulators to violate the Michigan Election Law (again, they did). The problem for Plaintiffs is that the Michigan Election Law expressly provides the Board with the statutory authority to conduct such an investigation and the Court of Appeals has confirmed this authority, contrary to Plaintiffs' misunderstanding of the case law upon which they rely. For this additional reason, this Court should dismiss Plaintiffs' Complaint.

Beyond these failings, this Court cannot grant any relief in this case until the Secretary of State complies with the Administrative Procedures Act by promulgating rules for the verification of ballot question signatures as the Michigan Election Law requires. For twenty years, the office of the Secretary of State has ignored that MCL 168.31(2) required rules governing the review of ballot initiatives, including signature verification. Absent this mandatory rulemaking, any writ of

mandamus issued by this Court directing the Board to take any ministerial action is fatally flawed because the mandatory rules governing these duties are absent. In addition, given that the Board's canvassing manuals – which have only been promulgated informally – implement substantive Michigan Election Law standards and are of general applicability, they should have been promulgated as rules under the APA and were not. As such, the Board cannot proceed with reviewing Unlock Michigan's petition until such rulemaking is completed.

Plaintiffs' Complaint also ignores that the Board violated Keep Michigan Safe's procedural due process rights. Michigan law requires that all interested parties be provided sufficient notice prior to a contested hearing of the evidence or information that will be considered. However, when the Board met and considered challenges to Unlock Michigan's petition summary (which was the only item related to Unlock Michigan on the meeting notice), the Board failed to provide notice that it was also going to review the *form* of Unlock Michigan's petition or that Unlock Michigan had submitted an amended form *after* the Board released its meeting notice. The first time anyone other than the Board or Unlock Michigan saw the form of the petition was when Unlock Michigan began circulating its petition. This type of procedural unfairness cuts against every due process requirement embedded in our system of government.

Finally, even if these jurisdictional and procedural issues were not enough to dismiss Plaintiffs' Complaint, there are substantive issues with Unlock Michigan's petition, including the form of the petition. This Court has previously held that strict compliance is required with all aspects of the Michigan Election Law, including format and typeface requirements. Unlock Michigan's petition fails to strictly comply with the Michigan Election Law in a host of ways. For example, the petition summary on Unlock Michigan's petitions uses a nonexistent public act name. And the full text of the proposal does not follow the proposal summary on Unlock Michigan's

petitions. Where Unlock Michigan was required to use 8-point type, it did not. And the petition circulator statement does not appear on top of the petitions. Many more deficiencies are outlined below. Because of these deficiencies, none of Unlock Michigan's petition signatures are valid and they cannot be counted.

For any of these reasons, the Court should dismiss Plaintiffs' Complaint and uphold the Board's decision to not certify Unlock Michigan's petition.

BACKGROUND

Unlock Michigan used the petition summary process outlined in MCL 168.482b by request dated June 12, 2020. *See* Department of State, Bureau of Elections, "Deadline Established for Public Comments Regarding Petition Summary, Statewide Ballot Proposal Sponsored by Unlock Michigan" (June 16, 2020) (Appx. 001). On July 2, 2020, the Board provided notice of a meeting to consider this 48-word summary prepared by Director Brater:

> An initiation of legislation to repeal the Emergency Powers of Governor Act, 1945 PA 302, MCL 10.31 to 10.33, 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." [*See* Michigan Department of State, Bureau of Elections, "Notice of July 6, 2020 Board of State Canvassers Meeting" at 2 (Appx. 002–003).]

The July 2 notice did not mention that the Board was going to take any other or further action with respect to Unlock Michigan's petition. However, at its July 6 meeting, the Board not only approved the above summary, but also the form of Unlock Michigan's petition, despite the fact that the form of Unlock Michigan's petition was not on the agenda and that Unlock Michigan submitted an amended petition form at the end of the day on July 2 after the Board released its notice. *See* July 6, 2020 Meeting Minutes (Appx. 004–005). Unlock Michigan then began circulating that amended petition.

On or about October 2, 2020, Unlock Michigan submitted signatures to the Secretary of State in support of its ballot initiative. Compl. ¶ 41 and its Exhibit 1. Due to administering the November 2020 General Election, which included a presidential race, review of Unlock Michigan's petition was delayed. The Bureau of Elections released its initial sample in March 2021, and on April 19, 2021, the Bureau of Elections released its staff report. *Id.* at ¶¶ 41–50 and its Exhibit 1.

Keep Michigan Safe submitted a challenge on April 9, 2021 outlining many of the defects in Unlock Michigan's petition. *See* Keep Michigan Safe Challenge with Exhibits (Appx. 006–115). On April 22, 2021, the Board met to consider the sufficiency of Unlock Michigan's petition. The Board deadlocked 2–2 on whether to certify Unlock Michigan's petition, on whether to promulgate rules under the APA, and whether to investigate Keep Michigan Safe's signature gathering tactics to determine whether Unlock Michigan submitted sufficient, legally gathered signatures in support of its proposal. On April 30, 2021, Plaintiffs filed this lawsuit.

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' Complaint.

As a threshold matter, this Court lacks jurisdiction to hear Plaintiffs' Complaint because of mootness. This Court recently reiterated its well-established standard for mootness, which renders the Unlock Michigan petition moot and thus depriving this Court of jurisdiction:

> It is universally understood by the bench and bar . . . that a moot case is one which seeks to get . . . a judgment upon some matter which, when rendered, *for any reason cannot have any practical legal effect upon a then existing controversy.* [*League of Women Voters of Michigan v Secretary of State*, 506 Mich 561, 580; 957 NW2d 731 (2020) (emphasis added) (quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920).]

This case is moot because Unlock Michigan cannot repeal – nor can the Board approve a petition seeking to repeal – a statute that has already been declared unconstitutional and is no longer in effect. The Board thus did not have a clear legal duty to certify Unlock Michigan's petition. It is axiomatic that the Board cannot have a ministerial duty to certify a petition to repeal a law that has been held to be unconstitutional and thus is of no effect.

On October 2, 2020, this Court issued an opinion in *In re Certified Questions From United States District Court*, --- NW2d ---; 506 Mich 332, 2020 WL 5877599 (2020). There, the Supreme Court held that MCL 10.31, *et seq.* – the statute Unlock Michigan seeks to repeal – was an unconstitutional delegation of power to the executive branch. *Id.* at 372 ("We accordingly conclude that . . . MCL 10.31(1), constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional[.]"). This Court went on to conduct a severability analysis and ultimately determined the delegation was not severable from the rest of the statute and declared the entire statute unconstitutional. *Id.* at 374.

Under long-standing principles of constitutional law and statutory interpretation, when a court declares a statute unconstitutional, that "unconstitutional statute is void ab initio." *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144–45; 235 NW2d 114 (1977). This means that "an unconstitutional statute, though having the form and name of law, is in reality no law, **but is wholly void, and ineffective for any purpose**; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, **an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed**." *Id.* (quoting 16 Am Jur 2d, Constitutional Law, § 177, pp. 402–03 and noting that "this rule has been consistently followed in Michigan" and citing authorities) (emphases added); *see also Norton v Shelby Cty*, 118 US 425, 443, 6 S Ct 1121, 1125, 30 L Ed 178 (1886) ("An

unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). MCL 10.31, *et seq.* is thus "void . . . for any purpose" including an attempted repeal by initiative petition.

By declaring the law unconstitutional in October 2020, this Court already did what Unlock Michigan seeks to accomplish through its initiative petition – preventing governors from exercising powers under MCL 10.31, *et seq*. Unlock Michigan's ballot initiative – and the relief it seeks through this lawsuit – are moot. Unlock Michigan already has all the relief it seeks and neither the Board nor this Court can grant them any better or further relief. *Detroit Edison Co v Pub Serv Comm*, 264 Mich App 462, 474; 691 NW2d 61 (2004) ("Because [Plaintiff] has already effectively obtained the relief it seeks with regard to this issue and this Court cannot provide further meaningful relief regarding the matter, the issue is moot."). Unlock Michigan's efforts are wholly unnecessary as the statute can never be used again given this Court's opinion in *In re Certified Questions*. *See, e.g.*, Oliver P. Field, The Effect of an Unconstitutional Statute 1, 4 (1935) ("[U]nder the void ab initio view . . . the rule is properly applied that a statute, once declared unconstitutional, need not be pleaded and assailed in subsequent cases."); *see also Kentucky Right to Life, Inc v Terry*, 108 F3d 637, 644 (CA 6, 1997) (where statute no longer in effect, it is moot); *Libertarian Party of Ohio v Husted*, 497 F App'x 581, 583 (CA 6, 2012) (case rendered moot when statute was no longer in effect).

For these reasons, the Court should find that Unlock Michigan's petition drive is moot and dismiss this action due to lack of jurisdiction.

II. Unlock Michigan's Illegal Signature Gathering Casts Doubt on Whether Unlock Michigan Submitted Sufficient Signatures to Warrant Certification.

Even if this Court determines that it has jurisdiction to hear Plaintiffs' Complaint, Plaintiffs are not entitled to any of the relief they seek because the Board did not breach any clear ministerial duty allegedly owed to Unlock Michigan. Plaintiffs' failure in this respect also dooms their Complaint.

A. The Board Does Not Have a Clear Duty to Certify Unlock Michigan's Petition, Nor Did it Breach any Duty, Because the Board Has Not Determined that Unlock Michigan Submitted Sufficient Signatures Required for Certification Given Well-Documented Illegal Signature Gathering Committed.

Plaintiffs' Complaint contains a single mandamus count. Compl. ¶¶ 96–143. "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004). A court will only issue a writ of mandamus if the party seeking the writ meets all of the following four requirements:

> (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy. [*Id.*]

"A clear legal duty, like a clear legal right, is one that 'is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *Hayes v Parole Bd*, 312 Mich App 774, 782; 886 NW2d 725 (2015) (cleaned up). "A ministerial act is one in which 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 Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016) (cleaned up).

With respect to ballot question petitions, the Board has a ministerial duty to certify the petition *only if* the petition strictly complies with form requirements and has sufficient signatures based on uncontroverted facts to warrant certification. *See Mich Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 506, 517; 708 NW2d 139 (2005) (collecting authorities; decided before *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 603–04; 822 NW2d 159 (2012), which required "strict" compliance with election law requirements and repudiated the concept of substantial compliance); *Hayes*, 312 Mich App at 782.

The first perquisite for mandamus relief – uncontroverted facts – is absent here. Unlock Michigan claims that the Board does not dispute that Unlock Michigan has submitted enough valid signatures. *See* Compl. at p. 2. Not so. Members Matuzak and Bradshaw repeatedly questioned the genuineness and sufficiency of the signatures Unlock Michigan gathered and submitted, which if found to have been illegally gathered, would result in disqualification of petition sheets and Unlock Michigan potentially having *not enough* signatures:

> But we are really looking -- our job is to look at these signatures in light of any, frankly, illegal gathering of signatures. It's different when someone says, "Petition A does this" when it really doesn't. It's an entirely different thing to violate the warnings and rules on the petition itself. Questions about observing the signatures, questions about signing, who can sign, who doesn't sign. And the Attorney General did, in fact, investigate. **Her report indicates that there were a number of folks engaged in if not outright illegal, certainly questionable activities** . . . . **And so I'm concerned about the validity of some of these signatures**, not the questions about are they registered, not does their signature match, **but rather how these signatures were gathered**. And I think it behooves us to actually exercise our power to look at that. We are the gatekeepers of election integrity and election integrity includes petitions. **And I think we let down voters if we don't exercise the power we have to make sure signatures were collected legally**. [Hrg. Tr. 45:23–46:8, 46:21:47:5 (emphases added) (Appx. 161–163).]

* * *

> So I would rather us get this right and if that means establishing new procedures about how we look at things -- and the other thing is John Pirich gave us a letter back in the fall about this very petition drive and how these signatures were gathered. We didn't do anything formally with it. We accepted it. And he's been -- he was doing this work longer than I've been doing this work **and he commented in that letter that he had never seen anything quite as egregious as this in terms of how these signatures were gathered**. So I do think it is worth pursuing an investigation. That's my final comment. Sorry. [Hrg. Tr. 50:23–51:8 (emphasis added) (Appx. 166–167).]

Clearly, Members Matuzak and Bradshaw – half the Board – did not believe that there were sufficient, legally gathered signatures to certify Unlock Michigan's petition absent an investigation into whether the submitted signatures were legally gathered. Nor can Unlock Michigan rely on the Bureau of Elections staff report recommending certification because the staff report did not look at *any* of the issues raised by Keep Michigan Safe with respect to illegally gathered signatures. *See* Keep Michigan Safe's Challenge (Appx. 006–115); Staff Report (Appx. 198–200).[1] The facts here about whether there are sufficient signatures are in dispute and therefore mandamus is unavailable.

Keep Michigan Safe's request for an investigation – which is what Member Matuzak based her motion for an investigation on, a motion seconded and voted for by Member Bradshaw – was based on Unlock Michigan's illegal signature gathering tactics as shown in Keep Michigan Safe's challenge. *See* Keep Michigan Safe's Challenge (Appx. 006–115).

[1] As discussed below, the statutory authority for the Board to rely on the staff report to conclude that there are sufficient signatures is non-existent. The process of sampling used by the staff to complete its report is not authorized by statute or by rule. Rather, the process is a creation of the Bureau of Elections and imposed by informal guidance as opposed to the required rulemaking process under the APA.

Those tactics would nullify many signatures submitted by Unlock Michigan. For example, the evidence thus far indicates that Unlock Michigan and the firms it hired to circulate petitions:

- educated or trained circulators as to how to abuse, evade, or violate clear statutory requirements contained in 1954 PA 116, the Michigan Election Law, MCL 168.1 et seq.;

- informed or instructed circulators that "... its really hard to get caught doing s---- except for, like forgeries."

- informed or instructed circulators how to engage in illegal activities such as leaving petitions unattended and signed by circulators at a later date. [*See* Keep Michigan Safe Challenge (Appx. 012).]

Unlock Michigan hired and paid the petition firms that violated the law and those firms in turn hired the circulators that violated the law. Volunteer circulators violated the law as well. *Id.* For example, Mark Jacoby, the owner of one of those firms, Let the Voters Decide, has a criminal record for falsifying voter registrations, fraudulent signature-gathering, and other unsavory tactics elsewhere in the United States, including Arizona and California. *See* P. Egan, In secret recording, trainer for Unlock Michigan advises on unlawful tactics, Detroit Free Press (Sep 22, 2020); P. Egan, Unlock Michigan petition circulator has criminal record, history of 'bait and switch', Detroit Free Press (Aug 28, 2020); S. Fenske, Mark Jacoby, Accused of Voter Fraud in AZ, Is Arrested, Phoenix Sun Times (Oct 27, 2008); Staff, State rep 'appalled' at convicted petition circulator potentially gathering signatures in Arkansas, Legal Newsline (July 10, 2020). He brought in many out of state circulators. *See* Keep Michigan Safe Challenge (Appx. 068–070) (photos of unattended petitions) and (Appx. 013–014) (out of state circulators).

For example, out of state circulator Christian Epting from Arkansas, a Jacoby recruit, had four signatures on three sheets – 11176, 11177, and 42159 – in the sample. All four of those signers were not registered to vote. A review of all the signers on those sheets revealed that 16 of

25, nearly two-thirds, were not registered. Plainly, Epting was not checking voter registration status as the circulator certificate requires. Mychael Bluntson, from California, had four signatures on four sheets from the sample – 193684, 59912, 66966, and 38945. None of those signers were registered to vote and 60% of the signers of his petitions in the sample were not registered to vote. As with Epting, Bluntson was clearly not checking voter registration status as the circulator certificate requires.

In general the out of state circulators had far more errors than Michigan circulators. While out of state circulators circulated 29% of the sheets in the sample, 52% of the defective signatures were on those sheets. There is also evidence from throughout the state that Unlock Michigan petition circulators illegally allowed signers to sign the names of others on the petition. *See* Keep Michigan Safe Challenge, Transcripts (Appx. 090–092); *see also* P. Eagan, New video shows Unlock Michigan circulator telling woman she can sign husband's name, Detroit Free Press (Sep 30, 2020).

Erik Tisinger of In The Field, another paid circulator hired by Unlock Michigan, *trained circulators* to leave petitions unattended:

> **Tracker** I have a friend who has a store. Could I like, if I talk to him and I'm like, "hey, man, can I just keep this? Can you have this petition on your counter? So when customers come in, they can sign it?"
>
> **Erik (petition manager)** Technically, no. It. None of you are recording anything right now are you?
>
> **Petition gatherer trainee** No.
>
> **Erik (petition manager)** Yes.
>
> **Erik (petition manager)** Don't ever tell me about it again.
>
> **Tracker** Ok

> **Erik (petition manager)** I'm, and I never heard this conversation. You guys never heard this conversation. Umm, You can. The thing is, is that we'll get. People. This is real. This can be a real shady job. And when I say shady, I mean, people do all sorts of illegal shit all the time and never get caught. It's really hard to get caught doing shit except for, like, forgeries. I'm not going to tell you the things that people do because I don't want you guys to do that shit, but you can do that. The thing, is, is that legally speaking, you're supposed to witness everybody who gets, who signs. [*See* Keep Michigan Safe Challenge (Appx. 014).]

Keep Michigan Safe also documented numerous instances of Michigan residents illegally gathering signatures. For example circulator Julie Compagner of Petition 0023702 in the sample obviously signed the names of at least three other family members to that petition as the handwriting and printing clearly reveal on lines 1, 2, 3, and 7:

	SIGNATURE	PRINTED NAME	STREET ADDRESS OR RURAL ROUTE
1.	Julie Beth Compagner	Julie Beth Compagner	3874 30th St.
2.	Marissa Dawn Compagner	Marissa Dawn Compagner	3874. 30th St.
3.	Megan Lynelle Compagner	Megan Lynelle Compagner	3874 30th St
4.	[redacted]	[redacted]	[redacted]
5.	Cris Allen Compagner	Cris Allen Compagner	3874 30th St
6.	Larson Scott Compagner	Larson Scott Compagner	3632, 144th Ave
7.	Melanie Ann Compagner	Melanie Ann Compagner	3874 30th St
8.	Joshua Mark Groenheide	Joshua Mark Groenheide	3914 142nd Ave

See Keep Michigan Safe Challenge (Appx. 015). Attorney General Nessel conducted a criminal investigation of the allegations against Jacoby, Tisinger, and others, and contrary to Unlock Michigan's assertions, she did not absolve them of illegal activity. Far from it, Attorney General Nessel documented ***numerous instances of illegal signature gathering*** by Unlock Michigan, but chose not to prosecute because of concerns over whether she could obtain convictions given her burden of proof:

> Notwithstanding his denials, the evidence establishes that this paid petition circulator left petitions for voters to sign unattended at a store and signed petitions making certifications as a circulator before the voters signed the petition. [Unlock Michigan Investigative Report, p. 18 (Appx. 218).]

* * *

> The owner of Howell Western Wear probably aided and abetted the improper circulation of petitions by allowing Scott to leave the petitions at her store for people to sign. [*Id.*]

* * *

> The video taken at the Brighton Farmers Market clearly shows that Ms. Reyes told a person that it was all right to sign her husband's name. While not correct, such advice is not per se a violation of law. But the total facts and circumstances indicate that Reyes intended to have the person sign so that she could collect payment for an additional signature. [*Id.*]

* * *

> It would actually be charitable to say Mr. Tisinger exemplifies the worst of the worst in the occupation of professional petition circulators. The evidence indicates that he is fully aware of the requirements of law and takes relish in finding ways around rules that would come between him and the money that can be made from circulating petitions. [*Id.* at 19–20; (Appx. 219–220.)]

* * *

> **The investigation did, however, find incidents where the conduct went beyond being simply misconduct and questionable practices, and were actually violative of criminal statutes.** However, in each of those identified instances there was simply insufficient admissible evidence to support criminal charges. [*Id.* at 21; (Appx. 221) (underlined emphasis in original; bold emphasis added).]

There are many more examples than those detailed above. Moreover, as set forth in Keep Michigan Safe's Answer, it has been discovered that Unlock Michigan was untruthful to the Attorney General when it told her that all signatures from circulators named in her report had not been filed. *See* Keep Michigan Safe's Answer, ¶ 58.

Given the doubts Members Matuzak and Bradshaw raised about Unlock Michigan's signature gathering tactics in light of Keep Michigan Safe's challenge, the Attorney General's

report, and the significant media attention surrounding Unlock Michigan's illegal signature gathering tactics, the Board *did not* conclude that Unlock Michigan had submitted sufficient signatures to warrant certification. Accordingly, there was no duty to certify Unlock Michigan's petition and no duty was breached because the fact of whether there are enough signatures is in dispute. Mandamus relief is not available to Plaintiffs.

B. The Board Has the Statutory Authority to Conduct an Investigation.

Unlock Michigan claims that it is being treated differently than any other petition before the Board and that the Board does not have the authority to conduct an investigation of Unlock Michigan's signature gathering tactics. Again, Unlock Michigan is simply wrong – the Board has the clear legal authority to conduct its own investigation and disqualify illegally collected signatures:

> **(2) The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions.** To conduct a hearing, the board may issue subpoenas and administer oaths. The board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes. [MCL 168.476(2) (emphasis added).]

In addition, if an individual refuses to comply with the Board's subpoena, the Board can "hold the canvass of the petition in abeyance until the individual complies." MCL 168.544c(14). After the investigation, the Board *must* disqualify signatures on petitions which circulators left unattended or in any way failed to witness the signing of the petition. *See* MCL 168.482a(5) ("Any signature obtained on a petition that was not signed in the circulator's presence is invalid and must not be counted."); *see also* 168.544c(11)(a).[2] The entire scope of Keep Michigan Safe's request for an

[2] The Board's broad authority to investigate ballot proposal petitions and signatures is very different from its narrow, ministerial duty to certify election results. *See, e.g., McLeod v State Board of Canvassers*, 304 Mich 120, 137; 7 NW2d 240 (1942).

investigation was limited to whether Unlock Michigan submitted enough, legally gathered signatures, which is well within the scope of the Board's statutorily delineated authority. *See* Keep Michigan Safe's Challenge (Appx. 006–115). Keep Michigan Safe reiterated this at the April 22, 2021 hearing:

> **We're not asking the Board to investigate fraud. We're only asking the Board to investigate illegal signature collection, unattended petitions, people signing a circulator so we're not (inaudible) which the Board has the power to do under the statutes we have cited in our challenge** . . . . We're asking for an investigation of the signature . . . . **Page 9 of their response they quote the Auto Club case which says, "The Board of State Canvassers possesses the authority to consider whether there are sufficient, valid signatures." That is exactly what we are asking for. On page 10 of their response they acknowledge that, "This means the Board can examine 'the validity of signatures.'"** That is exactly what we are asking for here. [Hrg. Tr. 20:7–17, 20:22–21:13 (emphases added) (Appx. 136–137).]
>
> * * *
>
> But the statute is very clear that you have the authority to investigate the validity of signatures that were collected, **specifically things like were they collected in the presence of a circulator or was a petition left unattended as we have alleged in our challenge and as the Attorney General found yesterday**, that there were several examples of that, that she found in just the limited investigation that she did. **You can also investigate, for example, whether that is a valid signature of that person. Did somebody else sign for them or not? If somebody signed for somebody else, that's an invalid signature. It has nothing to do with the verbal exchange between a circulator and a potential signer.** [Hrg. Tr. 25:17–26:10 (emphases added) (Appx. 142–143).]

Unlock Michigan's argument that the Board lacks the authority to investigate its signature gathering tactics principally relies on *Mich Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 506; 706 NW2d 139 (2005). *See* Hrg. Tr. 33:3–15 (Appx. 149). But Unlock Michigan completely misreads *MCRI*. In *MCRI*, the request for an investigation was based on a belief and reports that petition circulators were making false and misleading statements about the

petition at issue to electors and potential signers. *MCRI*, 268 Mich App at 513. The Board requested clarification from the Court on whether they could investigate "the claims of fraudulent misrepresentations presented by the challengers." *Id.* The Court of Appeals *only* held that the Board lacked the authority to investigate statements made by circulators to signers:

> Because the Legislature failed to provide the board with authority to investigate and determine whether **fraudulent representations were made by the circulators of an initiative petition**, we hold that the board has no statutory authority to conduct such an investigation. [*Id.* at 519–20 (emphasis added).]

That is all the Court of Appeals held, and in fact the Court of Appeals specifically recognized that the Board has the authority to conduct an investigation into "the validity of the signatures," *id. at* 519–20, which is what the Board Members sought with respect to Unlock Michigan's petition.

At bottom, the Board has the authority to conduct an investigation of Unlock Michigan's signatures within the parameters Keep Michigan Safe requested. Unlock Michigan's cases say so. Given the questions raised about the genuineness of the signatures Unlock Michigan submitted, the Board was clearly not satisfied that Unlock Michigan submitted sufficient signatures in support of their petition, and so there was no duty to certify. The Board correctly chose not to certify Unlock Michigan's petition and mandamus is neither warranted nor appropriate.

III. The Board, Secretary Benson, and the Director of Elections Have All Failed to Comply with the APA, Which Nullifies Any Actions Taken With Respect to Unlock Michigan.

A. The Secretary of State Failed to Promulgate Rules as Required by Law.

Under the Michigan Election Law, the Secretary of State shall "issue instructions and **promulgate rules pursuant to the administrative procedures act of 1969**, for the conduct of elections and registrations in accordance with the laws of this state." MCL 168.31(1)(a) (emphasis added). Since the enactment of PA 220 in 1999, effective March 10, 2000, the Michigan Election

Law has required the Secretary of State to promulgate rules pursuant to Michigan's APA setting uniform standards for the verification of ballot question petition signatures:

> (2) Pursuant to the administrative procedures act of 1969, 1969 PA 306 MCL 24.201 to 24.328, the secretary of state **shall promulgate rules establishing uniform standards** for state and local nominating, recall, and **ballot question petition signatures**. The standards for **petition signatures may include**, but need not be limited to, standards for all of the following:
>
> (a) Determining the validity of registration of a circulator or individual signing a petition.
> (b) Determining the **genuineness of the signature of a circulator or individual signing a petition**, including digitized signatures.
> (c) Proper designation of the place of registration of a circulator or individual signing a petition. [MCL 168.31(2) (emphases added).]

As the House Legislative Analysis noted, the amendments to the Michigan Election Law – in particular HB 5064 – had the "stated intention of improving the efficiency and safeguarding the integrity of the state's election system. A number of [amendments] address recent problems with the circulating and approving of petitions, both candidate petitions and petitions for ballot questions. For example, new standards have been proposed for determining the validity of petition signatures and to provide stiffer penalties for petition of fraud."). *See* House Legislative Analysis Section, Election Law Changes (Appx. 277–283).

However, despite this clear statutory requirement, every single individual who has held the position of the Michigan Secretary of State has failed to promulgate rules pursuant to the APA setting uniform standards for the verification of ballot question petition signatures as MCL 168.31(2) requires. The Michigan Administrative Code is entirely devoid of any such rules.

The only materials promulgated by the Secretary of State – including Secretary Benson – on the topic of "standards" for the verification of ballot question petition signatures by the Board are two unofficial memos, one of which is a 25-page self-described "publication" geared towards

members of the public seeking "guidance . . . in launching a petition drive to initiate new legislation." *See* Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition, pp. 1, 10-11 (June 11, 2019) (Appx. 284–308)[3]; Circulating and Canvassing Countywide Petition Forms (April 2020) (Appx. 309–323). In relevant part, the 2021 manual reads as follows:

> VALIDATION OF SIGNATURES BY RANDOM SAMPLING, CHALLENGE PROCEDURE: The Board of State Canvassers uses a random sampling process to determine whether initiative, referendum, and constitutional amendment petitions contain a sufficient number of valid signatures to warrant certification. The random sampling process yields two important bits of data: A projection of the number of valid signatures in the entire filing, and the probability that the sample result accurately determined whether or not the petition contains a sufficient number of valid signatures (known as the confidence level).
>
> There are two different random sampling options: (1) A single-stage process whereby a relatively large sample is taken (usually 3,000 to 4,000 signatures depending on the percentage of signatures which must be valid in order for the petition to qualify); or (2) A two-stage process where a much smaller sample is drawn (approximately 500 signatures), and the result determines (a) whether there is a sufficient level of confidence to immediately recommend certification or the denial of certification, or (b) if the result indicates a "close call," a second random sample must be taken (usually 3,000 to 4,000 signatures) to provide a definitive result with the maximum confidence level that can be obtained.
>
> Under the Board's established procedures, staff reviews the entire petition filing sheet-by-sheet so that wholly invalid petition sheets can be identified, culled, and excluded from the "universe" of potentially valid signatures from which the random sample is drawn. The total number of potentially valid signatures from the universe is entered into a computer program, along with the minimum number of signatures required, the total number of petition sheets in the universe, and the number of signature lines per sheet. The program

[3] The Secretary of State issued an updated publication on March 1, 2021. *See* Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition (Mar 1, 2021) (Appx. 324–348). This updated publication did not substantively alter the relevant signature review procedures.

> generates a list of signatures (identified by page and line number) that comprise the random sample.
>
> Copies of signatures selected for the random sample are made available to petition sponsors, challengers and the general public. The deadline for challenging signatures sampled from an initiative, constitutional amendment or referendum petition elapses at 5:00 p.m. on the 10th business day after copies of the sampled signatures are made available to the public. Challenges must identify the page and line number of each challenged signature and describe the basis for the challenge (i.e., signer not registered to vote; signer omitted signature, address or date of signing; circulator omitted signature, address or date of signing; etc.). A challenge alleging that the form of the petition does not comply with all legal requirements must describe the alleged defect.
>
> After the random sample is canvassed and any challenges are addressed, a staff report is prepared and released to the public at least two business days before the Board of State Canvassers meets to make a final determination regarding the sufficiency of a petition. The staff report includes an assessment of any challenges and estimate of the total number of valid signatures contained in the filing based on the validity rate. [*See* Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition (Mar 1, 2021), pp. 10–11 (Appx. 324–348).]

The *Canvassing Manual* has several pages of standards for evaluating the validity of petition sheets and signatures.

The Michigan Administrative Procedures Act of 1969 governs the "effect, processing, promulgation, publication, and inspection of state agency rules, determinations, and other matters," among other provisions. *See* MCL 24.201. The rulemaking process under the APA exists to ensure "public participation in the rule-making process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent, notify affected and interested persons of the existence of the rules and make the rules readily accessible after adoption." *See Michigan Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 604; 873 NW2d 827 (2015) (cleaned up).

Because the Board's petition and signature review practices were not promulgated under the APA, they cannot be used to review the Unlock Michigan petition. The language in MCL 168.31(2) is clear and mandatory: "Pursuant to the [APA], the secretary of state **shall promulgate rules establishing uniform standards** for state and local nominating, recall, and **ballot question petition signatures**." MCL 168.31(2) (emphases added); *see also Stand up for Democracy*, 492 Mich at 601 ("The legislature's use of the term shall indicates a mandatory and imperative directive.") (cleaned up).

There is no dispute that the Secretary of State has failed to comply with the mandatory language of MCL 168.31(2). Neither the Secretary of State nor the Board has ever properly adopted the Board's practices for reviewing ballot questions petitions and their signatures under the APA, from the initial "face check" to sampling to signature matching. The Board is essentially operating on its own, with no properly promulgated rules or standards of review, which this Court has previously recognized are important. *In re Complaint of Rovas against SBC Mich*, 482 Mich 90; 754 NW2d 259.

Because the Board's petition and signature review practices were not promulgated under the APA, they cannot be used to review the Unlock Michigan petition. Michigan courts have routinely held that a rule that does not comply with the procedural requirements of the APA is invalid under Michigan law. *See Detroit Base Coalition for Human Rights of Handicapped v Dep't of Soc Servs*, 431 Mich 172, 183; 428 NW2d 335 (1988) (holding a rule that does not comply with the procedural requirements of the APA is invalid under Michigan law); *Pharris v Secretary of State*, 117 Mich App 202; 323 NW2d 652 (1982) (guidelines for Secretary of State hearing examiners published in an internal policy manual were not binding because they were not promulgated pursuant to the APA); *Michigan State AFL-CIO v Sec'y of State*, 230 Mich App 1,

28; 583 NW2d 701 (1998) (holding that the Secretary of State could enforce certain interpretations of the MCFA only through formal rules promulgated in accordance with the APA); *Pletz v Sec'y of State*, 125 Mich App 335, 367; 336 NW2d 789 (1983) ("[T]he Secretary of State is directed to promulgate rules and issue directives to effectuate the [Administrative Procedures] Act."); *Danse Corp v City of Madison Heights*, 466 Mich 175, 176; 644 NW2d 721 (2002) (holding guidelines utilized by the Tax Tribunal were not determinative, since they were not rules promulgated in accordance with the Administrative Procedures Act and there is no indication the legislature intended to waive the requirements of the APA).

The Secretary of State has previously recognized that its powers are limited by the APA and authorizing statutes, and that actions taken in contravention of the APA or the underlying statute are invalid. *See* 12/9/13 Interpretative Statement to State Bar of Michigan, at 3 ("This is precisely what you have asked the Department to do, contrary to both the MAPA and MCFA. The Department cannot create a new disclosure policy, applicable to the general public, through a declaratory ruling or interpretative statement.") (Appx. 349–351).

Additionally, in March of this year, the Court of Claims struck down the Secretary of State's signature matching standards for the absentee ballot process because they were not promulgated under the APA. *See Genetski v Benson*, Court of Claims No. 20-000216-MM (Murray, J) (Mar 9, 2021) (Appx. 388–403).[4] And in *Genetski*, there was not a statute requiring the Secretary of State to promulgate rules as there is here. The reasoning set forth in *Geneteski* should control and the same result should issue in this case.

[4] Pursuant to MCR 7.215(C)(1), Keep Michigan Safe cites *Genetski* for its applicability with respect to the proposition that the Secretary of State must utilize the formal APA rulemaking process in certain circumstances, for its persuasive value, and the recency of the decision.

At bottom, the Secretary of State has failed to promulgate rules governing the signature canvassing process under the APA despite a clear legislatively mandated directive to do so. There is no room for ambiguity – the Secretary of State has been required for years to promulgate the rules that MCL 168.31(2) calls for. Therefore, the Board's petition and signature canvassing procedures are invalid. Until the Secretary of State promulgates such rules, the Board may not consider or canvass the Unlock Michigan's petition signatures. *Martin v Dept of Corrections*, 424 Mich 553, 560–65; 384 NW2d 392 (1986) (where Legislature directed a state department to promulgate rules pursuant to the Administrative Procedures Act, department was not permitted to substitute policy directives for rules); *Palozolo v Dep't of Social Servs*, 189 Mich App 530, 532–33; 473 NW2d 765 (1991) ("We agree that the DSS' failure to promulgate PEM 515 pursuant to the rule-making procedures set forth in the APA renders it invalid[.]"); *see also Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993); *Oshtemo Charter Twp v Kalamazoo Co Rd Comm*, 302 Mich App 574, 584; 841 NW2d 135 (agencies are limited to the power and authority conveyed by statute).

Because the Board's practices were promogulated in violation of the APA, the Board may not take any actions with respect to Unlock Michigan's petition and there is no clear duty to justify this Court to issue a writ of mandamus.

1. Unlock Michigan's Arguments Against Rulemaking Ignore the Michigan Election Law and Fall Flat.

Before the Court of Claims in an unrelated case, Unlock Michigan argued that the Secretary of State essentially has no duty to comply with the requirements of MCL 168.31(2) because "shall" really does not mean "shall." Unlock Michigan relied on a bevy of unrelated cases to support this argument. The problem with this argument, however, and what Unlock

Michigan ignores, is that the Michigan Supreme Court has previously recognized that "shall" *really does* mean "shall" in the context of mandatory Michigan Election Law requirements:

> However, because MCL 168.482(2) uses the mandatory term "shall" and does not, by its plain terms, permit certification of deficient petitions with regard to form or content, a majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification. [*Stand up for Democracy*, 492 Mich at 593.]
>
> * * *
>
> The Legislature's use of the term "shall" "'indicates a mandatory and imperative directive.'" Nowhere does the language of this provision indicate that compliance with the 14–point–type requirement may be achieved despite deficiencies. Indeed, other provisions of the Michigan Election Law, MCL 168.1 et seq., demonstrate that the Legislature knows how to construct language specifically permitting substantial compliance with regard to form and content requirements. [*Id.* at 601–02.]
>
> * * *
>
> Indeed, the use of the mandatory term "shall" in MCL 168.482(2), in the absence of any language indicating that substantial compliance with the statute's requirements suffices, indicates a clear intent that such a petition must strictly comply with the type requirement. [*Id.* at 602.]

Simply put, strict compliance with mandatory Michigan Election Law provisions is required and the cases Unlock Michigan relies upon to excuse this failure to comply are not cases decided under the Michigan Election Law.

For example, Unlock Michigan relied on *Dep't of State Compliance & Rules Div v Michigan Educ Ass'n-NEA*, 251 Mich App 110, 114; 650 NW2d 120, 123 (2002). There, MEA-NEA argued that the Secretary of State could not enforce the Michigan Campaign Finance Act against it because the Secretary of State failed to promulgate a rule further defining terms, which the MEA-NEA allegedly violated. *Id.* at 121. The Court of Appeals rejected that argument,

noting that "an administrative agency need not always promulgate rules to cover every conceivable situation before enforcing a statute." *Id.* (cleaned up). Importantly, in *MEA-NEA*, there was no specific requirement that the Secretary of State promulgate specific rules dealing with that section of the MCFA as there is here with respect to the Michigan Election Law. This case does not help Unlock Michigan.

Unlock Michigan's reliance on *Jim's Body Shop, Inc v Dep't of Treasury*, 328 Mich App 187, 192; 937 NW2d 123 (2019) is similarly misplaced. In *Jim's Body Shop*, again, there was no requirement that the Department of Treasury promulgate specific rules as there is here. And *Jim's Body Shop* merely dealt with allegations by the plaintiff that the Department of Treasury failed to follow its own manuals. The Court of Appeals' discussion there actually supports Keep Michigan Safe's argument that that the Board's manuals are not binding law and that they cannot be relied upon when rules are required. *Id.* at 200–01 ("In any event, the manual is not binding law, but merely guidance."). This case does not help Unlock Michigan either.

W Bloomfield Hosp v Certificate of Need Bd, 452 Mich 515, 517; 550 NW2d 223(1996), does not help Unlock Michigan either. For starters, the discussion in *W Bloomfield Hosp* regarding the relaxation of rules has no application here given this Court's previous ruling in *Stand up for Democracy*, 492 Mich at 603–04, that strict compliance with the Michigan Election Law is required. What is more, that principle at least presumes the promulgation of rules to be relaxed. There are no rules to relax here because they have never been promulgated. And *W Bloomfield Hosp* did not involve an administrative agency being required to promulgate a "rule" under the APA, but merely required the administrative agency to adopt a "plan" to help it to determine whether to grant certificates of need – that was a "plan" that "merely assist[ed] the agency in the

exercise of its discretion" of whether to issue certificates of need to applicants. *Id.* at 524. The facts and holding of *W Bloomfield Hosp* have no bearing here.

Vernon v Controlled Temperature, Inc, 229 Mich App 31, 33; 580 NW2d 452 (1998) does not help Unlock Michigan either. Again, it is not a case dealing with the Michigan Election Law, which must be strictly complied with according to the Michigan Supreme Court. *Stand up for Democracy*, 492 Mich at 603–04. In *Vernon*, the plaintiff challenged whether he had to provide a release to his employer for it to obtain information about government benefits he was receiving. *Vernon*, at 35–36. The Court of Appeals rejected the plaintiff's argument that his obligation to authorize the release of information as the statute required under *one section* was dependent on the requirement that the agency promulgate rules setting out standards for how employers were to provide notice of eligibility for social security eligibility benefits under *another section* of that statute. *Id.* at 38. The Court held that the plaintiff had an independent obligation to provide the release upon a request from his employer and that there were not rules promulgated dealing with an entirely different notification provision unrelated to the release was of no effect. *Id.* Here, the requirement to promulgate rules related to the verification of ballot question petition signatures is directly implicated and violated.

The rest of the cases Unlock Michigan relies upon follow this example: cases at first blush that may seem to help Unlock Michigan's position, but after a cursory review do not withstand scrutiny. Unlock Michigan also relies upon a treatise from Professor LeDuc. Those arguments suffer from the same infirmities already discussed. None of what Professor LeDuc discusses is based on the Michigan Election Law, which must be strictly complied with as this Court held in *Stand Up for Democracy*. LeDuc, Michigan Administrative Law, § 4:28 (June 2020). LeDuc admits that the "effect of the failure to do [promulgate rules] has not received a

great deal of consideration Michigan courts." *Id.* LeDuc goes on to discuss a case – *LundBerg v Corrections Commission*, 57 Mich App 327; 225 NW2d 752 (1975) – which held that "shall promulgate" is mandatory and granted a writ of mandamus requiring the agency to promulgate rules and setting a deadline for the initiation of the process. LeDuc, Michigan Administrative Law, § 4:28 (June 2020); *see also* MCL 24.238 ("A person may request an agency to promulgate a rule."). The Michigan Court of Appeals has previously recognized that the failure of an agency to promulgate rules, in light of a statute that required rules to be promulgated, can affect a party's due process rights. *See In re Turner*, 108 Mich App 583; 310 NW2d 802 (1981). That the Court of Appeals in *In re Turner* ultimately held that the opportunity for a contested case proceeding offered sufficient due process protection, *id.* at 589–90, is not dispositive here because that hearing was conducted "pursuant to the contested case provisions" of the APA and the hearings before the Board on the sufficiency of recall petitions are not. *Id.* What is more, at least one panel of the Michigan Court of Appeals has found that when an agency failed to promulgate rules pursuant to a statute that the agency "may" promulgate rules, the underlying statute could not be enforced until the agency promulgated rules to cover applications for renewals of licenses previously granted. *Department of Natural Resources v Bayshore Associates, Inc*, 210 Mich App 71; 533 NW2d 593 (1995). And another panel of the Court of Appeals has held an agency cannot act pursuant to guidelines where the statute requires rules because the failure to follow the statute in developing and implementing the policy deprives parties of due process when it is applied as a rule. *See Williams v Warden, Michigan Reformatory*, 88 Mich App 782; 279 NW2d 313 (1979); *see also In re Turner*, 108 Mich App 583 (recognizing lack of rules can affect due process rights).

At the end of the day, the issue presented is simple and straightforward: a statute requires the Secretary of State to promulgate rules; this Court has previously held that mandatory requirements (*i.e.*, where "shall" is used) must be strictly complied with; and, the Secretary of State has failed to promulgate these rules. Accordingly, pursuant to established case law, *Bayshore Associates, Inc*, 210 Mich App 71, the Board cannot take any action with respect to Unlock Michigan's petition until these rules have been promulgated and there is, therefore, no clear legal duty sufficient to justify a writ of mandamus.

B. Pursuant to *Genetski*, the Board's Canvassing Procedures, Including the Unauthorized Sampling Methodology, Should Have Been Promulgated as Rules Under the APA and Were Not.

Alternatively, even if the Court finds that Secretary of State was not required to promulgate rules pursuant to MCL 168.31(2), the Board's manuals, which outline canvassing procedures for ballot initiatives, including the Bureau of Elections' staff sampling methodology (which is not authorized by the Michigan Election Law) should have been promulgated as rules and were not. Accordingly, any actions taken with respect to Unlock Michigan's petition are invalid. The Court of Claims' recent discussion in *Genetski* is and helpful in this regard.

In *Genetski*, the Allegan County Clerk and the Michigan Republican Party challenged guidance issued by Secretary Benson regarding the inspection of signatures on absent voter ballot applications and ballots. *Id.* at *2. The plaintiffs in *Genetski* based their challenge, in part, on the claim that Secretary Benson's guidance was a "rule" and thus should have been promulgated under the APA. *Id.* at *4–5. The Court of Claims granted summary disposition in favor of the plaintiffs on that particular claim:

> In sum, the standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements amounted to a "rule" that should have been promulgated in accordance with the

> APA. And absent compliance with the APA, the "rule" is invalid. [*Id.* at *14.]

The Court's reasoning was based on long-standing Michigan case law holding that "[a]n agency must utilize formal APA rulemaking procedures when establishing policies that 'do not merely interpret or explain the statute or rules from which the agency derives its authority,' but rather '**establish the substantive standards implementing the program**.'" *Id.* at *8 (quoting *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998)) (emphasis added).[5] Under this framework, the Court of Claims determined the signature verification standards were a "rule," and that as such, the standards should have been promulgated under the APA. The Court of Claims came to this conclusion because the standards were generally applicable to all absent voter applications and ballots and contained a mandatory statement from Michigan's chief election officer that clerks had to perform their duties in accordance with the instructions, in addition to creating a mandatory presumption of validity. *Id.* at *7–8.

Like the instructions and guidance in *Genetski*, both manuals used by the Board implement the substantive standards for canvassing petitions. And like the instructions and guidance in *Genetski*, the manuals the Board uses to canvass petitions are of general applicability to all petitions submitted to the Board review and certification. Because these manuals were not promulgated under the APA they are invalid. *See* MCL 24.243 (compliance with APA required, otherwise rule is not valid); MCL 24.226 (agency may not adopt guidelines in lieu of rules); *Pharris*, 117 Mich App at 205.

[5] Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." *See* MCL 24.207.

Further supporting this argument is the Board's reliance on the recommendations of the Bureau of Elections' staff report, which utilizes a signature sampling methodology. *See* Staff Report (Appx. 198–200). The Michigan Election Law states that the Board "shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." *See* MCL 168.476(1). "Canvass" is not defined in that section of the Michigan Election Law or elsewhere. But to "canvass" is commonly understood to include the counting of total votes received – not estimating how many votes (or signatures) have been received – and this has support elsewhere in the Michigan Election Law. *See, e.g.*, MCL 168.167 ("The candidates of each political party for the office of state senator and representative receiving the greatest number of votes cast for candidates for said offices as set forth in the report of the board of canvassers canvassing said votes[.]"); MCL 168.807 ("Immediately after the canvass has been completed, the result, stating the total number of votes received by each person . . . .").

There is nothing in the Michigan Election Law or otherwise permitting the use of a sampling methodology "to **estimate** of the total number of valid signatures contained in the filing based on the validity rate." *See* Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition (Mar 1, 2021), pp. 10–11 (Appx. 324–348). So it is obvious that the Board is relying on those manuals to implement the substantive standards of their review and canvassing of initiative petitions and these methodologies and manuals should have gone through the rulemaking process and they never did.

On this basis, the Court should deny Plaintiffs' request for relief and dismiss their Complaint. The Board cannot properly canvass without the promulgation of rules.

C. Unlock Michigan's Arguments About Retroactivity of Rules Are Premature and Speculative.

Unlock Michigan argues that rules cannot be applied retroactively to its petition drive. Compl. ¶¶ 37–41. This argument is speculative and premature. It may well be that properly adopted rules could be identical to the existing guidelines which are not compliant with the APA. But that cannot be known until the rules are promulgated. Only after rules are promulgated are issues about retroactivity timely and relevant.

IV. The Board Failed to Provide Proper Notice of the Actions it Was Proposing to Take at its July 6, 2020 Meeting and Deprived Keep Michigan Safe of its Due Process Rights.

In addition to failing to strictly comply with the requirements of MCL 168.482b, the Board's approval of the form of Unlock Michigan's petition is invalid for failing to adhere to the procedural due process requirements required under Michigan law. In this case, the Board's notice for the July 6, 2020 meeting failed to provide notice to the public that the Board would consider whether to approve or deny *the form* of Unlock Michigan's petition or that on July 2, 2020, Unlock Michigan submitted an amended petition form adding reference to the initiative being placed on the November 2022 ballot if not adopted by the Legislature. The notice of the July 6, 2020 Board meeting only indicated that the Board would consider the "100-word summary of the purpose of the initiative petition sponsored by Unlock Michigan." *See* July 6, 2020 Notice (Appx. 001). Nowhere in the notice does the Board give any type of notice that it was planning on approving *the form* of Unlock Michigan's proposed petition or that Unlock Michigan submitted an amended form containing new and additional language on July 2. *See id.*

The notice also provides stringent requirements for how interested members of the public may participate in and be heard at the Board's meetings, including requiring interested members wishing to speak on a topic at the time of its vote to submit a written request to the Chairperson

well prior to the beginning of the meeting. *See id.* However, as noted, the notice for the July 6 meeting did not tell the public that the Board would be approving or denying Unlock Michigan's proposed petition *form* or that Unlock Michigan submitted an amended petition form on July 2 – only that the Board would take "consideration of" the proposed petition summary, thus depriving Keep Michigan Safe of an opportunity to be heard and object.[6]

Michigan courts have long-held that when a public meeting also involves a contested hearing or issue, the notice must provide sufficient advance notice so that members of the public can be meaningfully heard. *Haven v City of Troy*, 39 Mich App 219, 224; 197 NW2d 496 (1972). As the Court of Appeals in *Haven* recognized, "a meeting is not necessarily a hearing," and that "[t]he right to a hearing imports an opportunity to be heard." *Id.* at 224. The *Haven* court went even further with respect to the public's right to be heard requiring that public bodies provide sufficient notice of *particular questions* that will be considered at public meetings that include a contested hearing. *Id.* (requiring "**notice that at a particular meeting of that body a particular question will be considered** and those interested in that question will be given an opportunity to be heard) (emphasis added).

The Board's failure to provide particularized notice that it was going to approve or deny *the form* of Unlock Michigan's petition at the July 6 meeting and that Unlock Michigan had submitted an amended demand on July 2 prevented Keep Michigan Safe and the public from exercising their fundamental rights to attend the meeting and voice their objections on a matter of great importance. *Haven*, 39 Mich App at 224. Few rights are as fundamental as the right to participate meaningfully and equally in the process of government. *Yick Wo v Hopkins*, 118 US

[6] In the past, when the Board has approved the form of a petition, that has been a separate agenda item. (*See, e.g.*, Minutes of January 28, 2020 Meeting (two separate agenda for summary and form of a petition) (Appx. 352–354).

356, 370, 6 SCt 1064, 30 LEd 220 (1886) (political rights are "fundamental" because they are "preservative of all rights").

The Board's failure deprived Keep Michigan Safe and the public of their fundamental rights to be heard on matters of great importance. *Haven*, 39 Mich App at 224. This Court should declare the form of Unlock Michigan's petition invalid.

V. The Petition is Defective in Several Ways.

The cardinal principle of initiative petitions – that signers have a right to know what they are signing – is repeatedly violated by the skeletal, legalese-filled summary and heading of the Unlock Michigan petition which tells signers nothing about the content or effect of the law being repealed. In its entirety the heading says:

> An initiation of legislation to repeal the Emergency Powers of Governor Act, 1945 PA 302, MCL 10.31 to 10.33, 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." If not enacted by the Michigan State Legislature in accordance with the Michigan Constitution of 1963, the proposed legislation is to be voted on at the General Election, November 8, 2022. The full text of the proposed legislation is as follows:
>
> 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 1031 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.

See Unlock Michigan Petition (Appx. 355). That is it – no plain English information of any kind about the law being repealed or the wide-ranging effect of the repeal. Michigan law requires far more information in a petition summary and heading than is provided here.

Public Act 608, which amended the Michigan Election Law, was enacted in December of 2018. Among other provisions, PA 608 added a new section 482a, which imposes new mandatory requirements relating to signatures that must be satisfied before a signature on a petition to initiate legislation may be counted by the Board. Specifically, MCL 168.482a(4) provides:

> If a petition under section 482 is circulated and the petition does not meet all of the requirements under section 482, any signature obtained on that petition is invalid and must not be counted. [*See* MCL 168.482a(4).]

This new legislative mandate creates a strict compliance standard previously not applicable. It renders past practices and precedents applicable to initiative petitions and petition signatures outdated and irrelevant. Past practice and precedent of the Board to approve petitions and signatures that substantially complied with the requirements of the Michigan Election Law, to give the benefit of the doubt to petition initiative groups, or to leave the decision to voters has been superseded by this new legislatively-imposed standard. Michigan law now requires that every element of an initiative petition must comply with each requirement relating to an initiative petition under MCL 168.482, including those in MCL 168.544c incorporated by reference within MCL 168.482. If a petition for the initiation of legislation is circulated and the petition does not meet all of the requirements of MCL 168.482, any signature obtained on that petition is invalid and should not have been counted by the Board.

For the reasons outlined below, none of the Unlock Michigan petitions fully comply with the requirements of MCL 168.482. Because none of the Unlock Michigan petitions strictly comply with the Michigan Election Law, the Board should have found under MCL 168.482a(4) that all of the signatures submitted by Unlock Michigan were invalid.[7]

[7] This Court has denied access to the ballot based on petition defects after petition drives. *See, e.g., Protect Our Jobs v Board of State Canvassers*, 492 Mich 763; 822 NW2d 534 (2012). Nor

A. Unlock Michigan's Petition Fails to Strictly Comply with the Michigan Election Law.[8]

1. Defective Use of a Short Title.

The initiative process is an alternative means to enact legislation and the right of initiative extends only to laws that the Legislature can enact:

> The people reserve 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. The power of initiative extends only to laws which the legislature may enact under this constitution.

Const 1963, Art 2 § 9. Therefore, legislation proposed by initiative petition must meet all of the form and content requirements for legislation. *See id*; *Leininger v Secretary of State*, 316 Mich 644; 26 NW2d 348 (1947).

The Legislative Drafting Manual of the Legislative Service Bureau is clear that Michigan acts must be cited in all legislation by their short title *if they have one*:

> Cite a Michigan act, other than the act being amended, by its short title, if the act has one, and by both its public act number and the Michigan Compiled Law numbers assigned to that act. In general, a public act should be cited as follows:
>
> - the open meetings act, 1976 PA 267, MCL 15.261 to 15.275

[*Id.* at 40 (2020) (footnotes omitted).]

The purpose of this requirement, like most requirements for the contents of legislation, is transparency – to enable legislators reviewing legislation and potential signers reviewing a petition

---

is it relevant that Unlock Michigan obtained an optional "approval as to form" by the Board before circulating petitions. There is no authorization for this process in the Michigan Election Law and the process is neither a complete review of a petition or authorization to use a petition that does not comply with the requirements of the Michigan Election Law.

[8] For ease of reference, a spreadsheet detailing the ways in which Unlock Michigan's petition fails to comply with the mandatory Michigan Election Law requirements is attached. Unlock Michigan Petition Defect Chart (Appx. 356–360).

to know the contents of the legislation or petition. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 472; 206 NW2d 469 (1973). For example, in 2006 there was an initiated proposal to repeal the single business tax. The proposal included the short title as required:

> Enacting section 1. The single business tax act, 1975 PA 228, MCL 208.1 to 208.45, is repealed effective for tax years that begin after December 31, 2007.

2006 Journal of the House of Representatives at 2299 (August 9, 2006) (Appx. 361–378). In this petition, there is a short title in the summary – "Emergency Powers of the Governor Act" – but that short title is missing from the actual legislation reproduced on the petition: "Enacting Section 1 1945 PA 302, MCL 10.31 to 10.33, is repealed." Unlock Michigan cannot have it both ways. If the act has no short title, the summary is defective. Alternatively if the act has a short title, the legislation is defective for omitting it.

However, a review of the act and its amendments reveals *no* short title. *See* 1945 PA 302; 2006 PA 546. This usage stands in marked contrast to other public acts where the Michigan Legislature has specifically assigned a proper name. For example, "[t]his act shall be known and may be cited as the "emergency management act." *See* MCL 30.401; *see also* MCL 37.2101 ("[t]his act shall be known and may be cited as the "Elliott-Larsen civil rights act."). A search of the Michigan Compiled Laws (at http://legislature.michigan.gov) for the phrase "Emergency Powers of Governor Act" returns no results. Thus, the summary is defective for including a short title for a statute that does not have one. Even if Unlock Michigan demonstrates that the act has a short title – and it cannot – then the enacting clause is defective for failure to include it. Either way the petition's use of a short title is a fatal defect.

2. The Full Text of the Proposal Does Not Follow the Proposal Summary on Unlock Michigan Petitions.

Under MCL 168.482(3), the full text of an amendment proposed by a legislative initiative must follow the summary of the proposal. According to Dictionary.com, the word "follow" means (1) to come next after something else in sequence, order of time, etc., or (2) to happen or occur after something else; come next as an event. The petitions submitted by Unlock Michigan do not comply with this requirement for two reasons. *First*, the summary is followed on the petition by the language, "If not enacted by the Michigan State Legislature in accordance with the Michigan Constitution of 1963, the proposed legislation is to be voted on at the General Election, November 8, 2022," which is neither the text of the proposed amendment nor a statement authorized by or provided for anywhere in the Michigan Election Law. *Second*, after this unauthorized sentence, the heading for the proposal is repeated again, as part of the text of the proposal, but the heading is (a) not printed in capital letters in 14-point boldface type as required by MCL 168.482(2), (b) a heading and not a part of the full-text of the amendment, and (c) not followed by a summary of the proposal in 12-point type as MCL 158.482(3) requires for a heading.

3. The Balance of the Unlock Michigan Petitions Do Not Appear in 8-Point Type.

Various provisions of the Michigan Election Law establish type size requirements for elements included on an initiative petition. For example, the summary of a proposal must be printed in 12-point type. *See* MCL 168.482(3). The heading for an initiative petition must be printed in 14-point boldface type. *See* MCL 168.482(2). Under MCL 168.482(6) and 168.544c(1), after satisfying all other applicable typeface requirements, the balance of a petition must be printed in 8-point typeface. The Unlock Michigan petitions do not satisfy this mandate to use 8-point type. *First*, the campaign finance identification statement at the bottom of the Unlock Michigan

petition—"Paid for with regulated funds by Unlock Michigan, 2145 Commons Parkway, Okemos, MI 48864"—appears to be printed in 10-point type, not 8-point type as mandated by MCL 168.482(6) and 168.544c(1). The text used in the identification statement appears noticeably larger than the 8-point type used above the identification statement in the text of the Certificate of Circulator. The Michigan Election Law requires both to appear in the same type size, but the language is clearly of a different type size while the same type face and spacing is used. *Second*, the phrase "**THE PEOPLE OF THE STATE OF MICHIGAN ENACT**" is included in bold type and all capital letters on the Unlock Michigan petitions. Under MCL 168.482 and 168.544c, the only items on a petition to be printed in bold type are (1) the heading of the petition, (2) the two warning statements, and (3) the circulator direction statement. The text of a proposed amendment is required to appear in 8-point type, not 8-point boldface type and not in capital letters. The Unlock Michigan petition is defective in this respect too.

4. Petition Circulator Statement Does Not Appear at Top of Unlock Michigan Petitions.

Under MCL 168.482(8), an initiative petition must clearly indicate below the statement required by MCL 168.482(7) in 12-point type that "[i]f the petition circulator does not comply with all of the requirements of this act for petition circulators, any signature obtained by that petition circulator on that petition is invalid and will not be counted." Because the statement required by MCL 168.482(7) was found unconstitutional by the Attorney General in an OAG, 2019-2020, No 7310 (May 22, 2019), the statement required by MCL 168.482(8) must appear at the top of an initiative petition. On the Unlock Michigan petitions, the petition circulator statement required by MCL 168.482(8) appears after and next to the heading of the petitions, and not at the top of the petitions. Unlock Michigan's petition is defective in this respect too.

In sum, under the standards imposed by the 2018 amendments to the Michigan Election Law, if a petition submitted by Unlock Michigan fails in any way to comply with the requirements imposed by MCL 168.482, then every signature on the petition is invalid and the Board is prohibited from counting any signatures on that petition. If all petitions for the Unlock Michigan proposal include the same deficiency, the Board is prohibited by MCL 168.482a(4) from counting any of the signatures submitted by Unlock Michigan. For the reasons stated above, none of the Unlock Michigan petitions fully comply with the requirements of MCL 168.482. Each of the petitions includes the deficiencies identified above. Because the cause the Unlock Michigan petitions do not comply with requirements imposed by the Michigan Legislature, the Board had a duty under MCL 168.482a(4) to find all of the signatures included on the Unlock Michigan petitions invalid and not count any of those signatures.

B. Other Deficiencies Fatal to Unlock Michigan's Petition.

1. The Full Text of the Legislation Incorrectly Includes "INITIATION OF THE LEGISLATION."

As set forth above, the legislation published in a petition must conform to all the form requirements of a legislative bill. No legislative bill is required or permitted to include the phrase "INITIATION OF LEGISLATION" – that phrase is unique to a petition *heading*. No legislative bill has ever included that phrase. It is a fatal defect for the petition to include that phrase in the text of the legislation. *Leininger*, 316 Mich 644.

2. The Legislation Fails to Include Subsequent Acts.

Section 1 of 1945 PA 302 was reenacted and republished by 2006 PA 546, but Unlock Michigan's petition includes no reference to the 2006 Act. 1945 PA 302 cannot be repealed except by repealing every act that enacted or reenacted it. The legislation in the petition is defective by failing to reference the 2006 Act.

3. The Petition Violates the Constitution's Republication Requirement.

The Legislature cannot alter, revise, or amend a law by reference solely to the law's title. Rather, the affected sections must be published to show the effects of the proposed changes:

> No law shall be revised, altered or amended by reference to its title only. The section of sections of the act altered or amended shall be re-enacted and published at length. [Const 1963, art 4, § 25.]

The publication requirement applies to the revision, alteration, or amendment of a law by the people through the initiative process. *Protect MI Constitution v Secretary of State*, 297 Mich App 553, 575; 824 NW2d 299 (2012), *rev'd on other grounds*, 492 Mich 860; 819 NW2d 428 (2012); *see also Automobile Club of Michigan v Secretary of State*, 195 Mich App 613, 622–24; 491 NW2d 269 (1992) (*per curiam*). As explained by the Court of Appeals in *Protect MI Constitution*, this constitutional republication requirement broadly applies "not only to efforts to *amend* an existing law, but also to proposals that would revise or alter a law. Although similar, principles of construction require us to give meaning to each term, 'revise,' 'alter,' and 'amend,' lest any one of them be rendered surplusage or nugatory." *Protect MI Const*, 297 Mich App at 576. This broad reading fulfills the very purpose of transparency in a petition: giving the voters notice of what the petition does.

Plainly, when a law is repealed it is being "revised, altered, or amended" and therefore a repealer must republish the law being repealed. Unlock Michigan's petition fails to republish the law it is attempting to repeal. All it does is reference its section numbers, MCL 10.31 to 10.33. That is not enough to satisfy art 4, § 25 which requires that the content of those sections be republished in the petition. Certification can and should be denied on this basis alone.

4. The Summary is Defective.

The Michigan Election Law mandates that the Board make an official declaration regarding the adequacy and sufficiency of the petition. *See* MCL 168.477(1). The Board must also approve the summary of the proposed amendment's purpose. *See* MCL 168.482b. "In essence, the Board ascertains whether sufficient valid signatures support the petition and whether the petition is in the proper form." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 585; 922 NW2d 404 (2018). This includes ensuring that a petition strictly complies with each element set forth in the statute. *See e.g.*, *Council About Parochiaid v Secretary of State*, 403 Mich 396, 397; 270 NW2d 1 (1978) (Board determined that the petitioner complied with statutory form requirements when descriptive material was attached to the petitions during circulation); *Stand Up for Democracy v Secretary of State*, 297 Mich App 45, 55; 824 NW2d 220 (2012), *rev'd* 492 Mich 588 (2012) (Board rejected a petition that did not comply with statutory font requirements); *Auto Club of Mich Comm for Lower Rates Now v Secretary of State*, 195 Mich App 613, 624; 491 NW2d 269 (1992) (Board determined that a tear sheet did not comply with statutory form requirements). Unlock Michigan's petition fails to strictly comply with several mandatory requirements as set forth below.

In December 2018, the Michigan Legislature codified this strict compliance precedent, adding new section 482a to the Michigan Election Law, which states: "If a petition under section 482 is circulated and the petition does not meet all of the requirements under section 482, any signature obtained on that petition is invalid and must not be counted." MCL 168.482a(4). Accordingly, if a petition fails in any way to comply with the requirements under MCL 168.482, the petition is invalid and the Board is prohibited from counting any signature on that petition. If all petitions for an initiative include the same deficiency, the Board is prohibited by MCL 158.482a(4)

from counting any of the signatures. In this case as set forth below Unlock Michigan's petition fails in several ways.

a. A 48-Word Summary that Merely Restates the Statutory Title and its Legal Jargon in No Way Satisfies the Requirements of MCL 168.482b.

The summary fails to inform electors of the content and effect of the proposal in violation of the mandatory requirement imposed by the Michigan Election Law. MCL 168.482 requires that "*a summary* in not more than 100 words *of the purpose of the proposed amendment or question proposed must follow* [the petition heading] and be printed in 12-point type." *See* MCL 168.482(3) (emphasis added). In this case, the skeletal 48-word summary of the Unlock Michigan petition merely repeats the technical text of the proposal, *i.e.*, the style and text of a piece of legislation, which *already must be printed on the face of the petition*. *See* MCL 168.482(3). As such the summary does nothing to achieve the fundamental purpose of a summary, which is to inform the voters of the subject matter and purpose of the proposal. The mere repetition of a statutory title, replete with legislative jargon that already appears on the face of the petition, in no way satisfies the requirement of a "summary."

A proposal summary which simply restates the technical text of the proposal renders the mandatory summary requirement of MCL 168.482 and 168.482b surplusage. *South Dearborn Envtl Improvement Ass'n, Inc v Dep't of Envtl Quality*, 502 Mich 349, 360–61; 917 NW2d 603 (2018) (when interpreting a statute, courts must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory).

Plainly, by adding language to MCL 168.482(3) and adding MCL 168.482b, the Legislature intended the summary to be more than that which was already required on the petition prior to the 2018 amendments. Unlock Michigan's petition summary adds nothing to the petition contrary to

the Legislature's clear statutory instructions and therefore violates the Michigan Election Law. *See Stand Up for Democracy*, 492 Mich 588 at 603–04 (requiring strict compliance).

Moreover, the summary's use of legal jargon and the legislative style is contrary to the requirement that the summary use words "that have a common everyday meaning to the general public." *See* MCL 168.482b(2)(d). In this case, the petition summary merely states that if approved, the proposed act will repeal a statute and recites the legislative title of the statute: "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." This statement is anything but common language and is not drafted in a way that the general public can readily understand the powers and duties that Unlock Michigan is trying to strip from the office of Governor. *See, e.g.*, Nat'l Labor Relations Bd., *NLRB Style Manual: A Guide for Legal Writing in Plain English*, 51 (2000) (noting that "hereby, herein, hereinafter, hereto, therefor, therefrom, therein, thereof, therewith, to wit, unto, vis-à-vis, viz., whereby, and wherein" are all "legal jargon that should be omitted or replaced with plain English-words in common usage.").

What is more, the petition summary uses the term "repeal" without explaining the effect of a "repeal." The term "repeal" has specific effect under Michigan law. *See, e.g.*, MCL 8.4a (explaining the effect of repeal and limits); MCL 8.4 (explaining the effect of repealing a repealing statute). Rather than using this legal term of art, the petition summary should have explained in common language that the proposal seeks to *remove, cancel*, or *end* the emergency powers of the Governor. The summary's use of highly technical and unexplained legal jargon directly contradicts the Legislature's mandate to avoid such language. Accordingly, the approved summary does not strictly comply with MCL 168.482b. *See Stand Up for Democracy*, 492 Mich at 603–04.

b. The Unlock Michigan Petition Summary is Not a True and Impartial Statement of the Purpose of the Proposal.

Under MCL 168.482b, a petition summary approved by the Board must be a "true and impartial statement of the purpose" of the proposal that "does not create prejudice for or against the proposed amendment or question presented." MCL 168.482b(2)(b). As detailed below Unlock Michigan's petition summary fails to meet those standards.

i. Three Decades of Michigan Practice Prior to the 2018 Amendments.

The Board's decades-long experience applying the standards of MCL 168.482b provides guidance for the Board to consider and apply to the Unlock Michigan petition summary, which they ignored here. The standards used in MCL 168.482b are taken from several other statutes that have long governed the preparation of ballot summaries of proposals in Michigan. *Compare* MCL 168.482b *with* MCL 168.32(2), 168.485, and 168.643a. The contents of those ballot summaries provide guidance for what constitutes a compliant petition summary under MCL 168.482b.

The Director and Board in their previous ballot summaries have repeatedly disclosed the *effect* of a proposal on existing law if adopted. For example, the summary for 2018 Proposal 1 stated that the proposal would:

> - *Change* several current violations from crimes to civil infractions.

(emphasis added). The ballot summary for 2012 Proposal 2 repeatedly stated how other laws would be affected, including future laws:

> This proposal would:
>
> - Grant public and private employees the *constitutional right to organize and bargain collectively* through labor unions.
>
> - *Invalidate existing or future state or local laws* that limit the ability to join unions and bargain collectively, and to negotiate

> and enforce collective bargaining agreements, including employees' financial support of their labor unions. Laws may be enacted to prohibit public employees from striking.
>
> - *Override state laws* that regulate hours and conditions of employment to the extent that those laws conflict with collective bargaining agreements.

(emphasis added). Similarly, the ballot summary for 2012 Proposal 4 was clear on the proposal's impact on current laws:

> This proposal would:
>
> - *Allow in-home care workers to bargain collectively* with the Michigan Quality Home Care Council (MQHCC). *Continue the current exclusive representative of in-home care workers until modified in accordance with labor laws.*

(emphasis added). Again and again, for decades ballot summaries prepared by the Director and approved by the Board under the same standards as MCL 168.482b have described the *effect* of the proposal on existing laws. For example, the summary for 1998 Proposal B disclosed exemptions from transparency laws:

> The proposal would:
>
> 3) establish a gubernatorially appointed, publicly-funded oversight committee, *exempt from Open Meetings Act* and *whose records, including confidential medical records, and minutes are exempt from Freedom of Information Act*;

(emphasis added). In the summary for 1996 Proposal D, its legal effects are disclosed:

> The proposed law would:
>
> 4) *Allow individuals to sue for damages caused by violations and to seek injunctions.*

(emphasis added). There are many more examples. *See, e.g.*, 1994 Proposal B (disclosing loss of right to a criminal appeal if adopted); 1994 Proposal C (disclosing a limit on the legal right to sue if adopted); 1992 Proposal D (disclosing a limit on legal right to sue if adopted); 1988 Proposal B

(disclosing creation of several legal rights of crime victims) (Appx. 379–387). In a stark departure from past practice, this petition summary fails to disclose its legal effects.

ii. Applying Three Decades of Practice to Unlock Michigan's Petition Summary.

Unlock Michigan's petition summary fails to comply with the standards set forth in MCL 168.482b because the language fails to disclose several material effects of the proposed repeal of the statute. In essence, the petition summary misleads by omission. The petition summary therefore does not comply with the Michigan Election Law's mandate that the summary constitute a "true and impartial statement of the purpose" of the proposal. *Stand Up for Democracy*, 492 Mich at 603–04 (requiring strict compliance).

The petition summary fails to describe the effect of the proposal beyond merely stating that it would result in the repeal of a 1945 statute dealing with states of emergency. The petition summary omits that a repeal of the statute in its entirety would have permanently and severely curtailed *any* governor's emergency powers to respond to disasters and public emergencies in the future by limiting responsive actions to those available to the governor under the Emergency Management Act of 1976. The failure to include this material effect renders the proposal summary untruthful and inaccurate in violation of MCL 168.482b.

This information – that future governors would have been severely curtailed in their ability to respond to and manage public emergencies and disasters – is exactly the type of information that would give an individual "serious ground for reflection," *see Alaskans for Efficient Gov't, Inc v State*, 52 P3d 732, 735 (Alaska 2002), when deciding whether they want to sign any such petition and its absence renders the petition summary untruthful and inaccurate and therefore non-compliant with MCL 168.482b, *see Stand Up for Democracy*, 492 Mich at 603–04, because it is

misleading by omission. The failure of Unlock Michigan's petition summary to advise electors of this material effect of the initiative proposal is a misleading omission that invalidates the summary.

5. Unlock Michigan's Summary Does Not Inform Electors of the Subject Matter of the Petition in Common Everyday Language.

The summary fails to inform electors in common everyday language of the subject matter and effect of the petition. Under MCL 168.482b, the summary "must be worded so as to apprise the petition signers of the subject matter of the proposed amendment or question proposed . . . ." *See* MCL 168.482b(2)(c). In this case, the very text of Unlock Michigan's summary reveals that it does not even attempt to inform voters of the subject matter, which includes the effect and purpose of the petition, stating that the petition seeks to repeal a certain law "*entitled*." Merely reciting the *title* of the statute in the petition summary does not describe or reference the content of the statute. The summary does nothing to achieve the fundamental purpose of a summary, which is to inform the voters of the subject matter and purpose of the proposal. Rather, the summary merely restates the legislative title of the act to be repealed.

Also missing from Unlock Michigan's petition summary is any explanation regarding the "powers and duties of the governor" that will no longer be available to address a "state of emergency." Under the statute, a governor was permitted to "promulgate reasonable orders, rules, and regulations as she or he consider necessary to protect life and property or to bring the emergency situation within the affected area under control." *See* MCL 10.31a. The Legislature declared the intent of the statute was "to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." *See* MCL 10.32. A voter that was asked to sign the petition was not informed or advised that the repeal proposed by Unlock Michigan would have stripped these powers from the office of Governor. In the context

of a ballot proposal to amend the Michigan Constitution, the Michigan Court of Appeals held that a proposal that "contains omissions or defects likely to mislead voters" is invalid. *Bailey v Muskegon Cty Bd of Comm'rs*, 122 Mich App 808, 822; 333 NW2d 144 (1983). The result in this case should be no different.

The Unlock Michigan petition summary contained omissions and defects that likely misled electors asked to sign the petition. As a result, the summary failed "to apprise the petition signers of the subject matter of the proposed amendment or question proposed" and should have been then declared invalid – and now should be declared invalid too – for failing to strictly comply with MCL 168.482b. *Stand Up for Democracy*, 492 Mich at 603–04.

6. Unlock Michigan's Summary Fails To Inform Electors That If Approved By The Legislature, The Initiative Is Not Subject To Gubernatorial Veto.

Under Article 4, Section 33 of the Michigan Constitution, the governor must approve or veto any piece of legislation. *See* Const 1963 art 4, § 33. However, the approved petition summary here omitted that under Article 2, Section 9 of the Michigan Constitution, the governor may not veto legislation enacted by initiative. *Id* art 2, § 9 ("No law initiated or adopted by the people shall be subject to the veto power of the governor[.]"). The summary's failure to disclose this material fact renders the approved summary untruthful and inaccurate, and therefore not in strict compliance with MCL 168.482b as *Stand Up for Democracy* requires, because it misled voters. *Bailey*, 122 Mich App at 822. The summary's omission of this key fact, which would have certainly given most voters "serious ground for reflection" in deciding whether they wanted to sign the petition, flies in the face of what these summaries are intended to provide; that is, so voters can "reach informed and intelligent decisions." *Alaskans for Efficient Gov't, Inc*, 52 P3d at 735 (Alaska 2002).

7. The Petition Confused Signers by Referencing the 2022 Election.

The form of Unlock Michigan's petition contains a sentence after the summary in a smaller font, stating as follows:

> If not enacted by the Michigan State Legislature in accordance with the Michigan Constitution of 1963, the proposed legislation is to be voted on at the General Election, November 8, 2022.

This type of extraneous information is not permitted by MCL 168.482. MCL 168.482 includes only the following three mandatory requirements as to the form of the petition:

> - If the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum of legislation, the heading of each part of the petition must be prepared in the following form and printed in capital letters in 14-point boldfaced type;
>
> - A summary in not more than 100 words of the purpose of the proposed amendment or question proposed must follow and be printed in 12-point type; and
>
> - The full text of the amendment so proposed must follow the summary and be printed in 8-point type. [*See* MCL 168.482(2)-(3).]

Absent from MCL 168.482 is a requirement or the authority to reference the date on which the petition will appear on the ballot. Michigan law does not permit this Board to read into statutes terms and conditions which do not appear in that very statute. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 72; 894 NW2d 535 (2017) (courts will not read requirements into a statute which do not appear in the plain language of the statute). This is especially true where the Legislature has provided a specific list of those statements that are mandatory to appear on a petition, and the date of the election is not one of the mandatory requirements. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (the enumeration of specific conditions eliminates the possibility of other conditions under the legal maxim *expressio unius est exclusio alterius*).

What is more, the statement that the petition initiative would appear on the November 2022 ballot confused and misled signers because the petition was circulated less than three months before the November 2020 election. *Bailey*, 122 Mich App at 808. Courts interpret the words, phrase, and clauses in a statute according to their ordinary meaning. *State News v Mich State Univ*, 481 Mich 692, 699-700; 753 NW2d 20 (2008). "[W]here the statutory language is clear and unambiguous, the statute must be applied as written." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

Here, the plain text of the statute does not permit Unlock Michigan to include such extraneous information on the petition. References to the 2022 election do not tell a potential petition signer anything about the *purpose* of the petition. MCL 168.482(2)-(3). Rather, references to a future election only serve confuse and mislead potential signers about what effect, if any, the 2022 election will have on their choice to sign or not sign the petition in 2020. For example, it is likely that voters were misled into thinking that the repeal of the statute would not have gone into effect until 2022, leaving Governor Whitmer with sufficient powers to respond to the COVID-19 pandemic. This misdirection is, of course, impermissible. *Bailey*, 122 Mich App 808. The inclusion of references to the dates of elections, which is not permitted under the Michigan Election Law, renders the petition form not in strict compliance with the Michigan Election Law as *Stand Up For Democracy* requires, making the form of the petition approved by the Board invalid. *Stand Up For Democracy*, 492 Mich at 603–04. Because extraneous information about the 2022 election is not permitted under the Michigan Election Law and because it serves no purpose other than to mislead or confuse electors, the petition form is invalid.

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' Complaint and uphold the Board's decision not to certify the Unlock Michigan petition.

Respectfully submitted,

/s/ Christopher M. Trebilcock
Christopher M. Trebilcock (P62101)
Vincent C. Sallan (P79888)
CLARK HILL PLC
500 Woodward Avenue
Detroit, MI 48226
(313) 965-8300
ctrebilcock@clarkhill.com
vsallan@clarkhill.com

/s/ Mark Brewer
Mark Brewer (P35661)
GOODMAN ACKER, P.C.
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Attorneys for Intervening Defendant Keep Michigan Safe

Date: May 24, 2021