

STATE OF MICHIGAN
IN THE SUPREME COURT

UNLOCK MICHIGAN, GEORGE FISHER
and NANCY HYDE-DAVIS,

Supreme Court No. 162949

Petitioners,

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,

**The appeal involves a ruling
that a provision of the
Constitution, a statute, rule or
regulation, or other state
governmental action is invalid.**

Respondents,

and

KEEP MICHIGAN SAFE,

Proposed Intervenor Respondent.

_____ /

**RESPONDENT BOARD OF STATE CANVASSERS' RESPONSE TO
PETITIONERS' COMPLAINT FOR MANDAMUS**

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

“[A]ny person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.” MCL 168.479(1). An action under MCL 168.479 must be initiated within seven business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. MCL 168.479(2). Petitioners filed this action on April 30, 2021 challenging the Board of State Canvassers’ failure to certify their initiative petition as sufficient during the Board’s April 22, 2021, meeting. Because the action was filed within seven days of the Board’s action and more than 60 days before the November 8, 2022 general election, this case is within the Court’s jurisdiction.

STATEMENT OF QUESTION PRESENTED

1. A writ of mandamus may issue only when the requesting party demonstrates that it has a clear legal right to performance of the specific duty sought, and where the respondents have a clear legal duty to perform the act requested. While the Board of State Canvassers has a legal duty to declare the sufficiency or insufficiency of Unlock Michigan's petition, it was unable to do so because the Board deadlocked on a motion to certify the petition as sufficient. Under these circumstances, is further direction from the Court in the form of mandamus relief warranted?

Petitioners' answer: Yes.

Respondent's answer: Unable to answer.

CONSTITUTIONAL PROVISION, STATUTES INVOLVED

Const 1963, art 2, § 9 provides:

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. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.

If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless

otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.

The legislature shall implement the provisions of this section.

MCL 168.476 provides, in relevant part:

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

(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, but shall complete the canvass at least 2 months before the election at which the proposal is to be submitted.

(3) At least 2 business days before the board of state canvassers meets to make a final determination on challenges to and sufficiency of a petition, the bureau of elections shall make public its staff report concerning disposition of challenges filed against the petition. Beginning with the receipt of any document from local election officials pursuant to subsection (1), the board of state canvassers shall make that document available to petitioners and challengers on a daily basis.

MCL 168.477 provides, in relevant part:

(1) The board of state canvassers shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted. If the board of state canvassers declares that the petition is sufficient, the secretary of state shall send copies of the statement of purpose of the proposal as approved by the board of state canvassers to the several daily and weekly newspapers published in this state, with the request that the newspapers give as wide publicity as possible to the proposed amendment or other question. Publication of any matter by

any newspaper under this section shall be without expense or cost to the state of Michigan. . . .

MCL 168.482 provides, in relevant part:

(1) Each petition under this section shall be 8- ½ inches by 14 inches in size.

(2) If the measure to be submitted proposes a constitutional amendment . . . the heading of each part of the petition shall be prepared in the following form and printed in capital letters in 14-point boldfaced type:

INITIATION OF LEGISLATION

* * *

(3) The full text of the amendment so proposed shall follow and be printed in 8-point type. If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words:

“Provisions of existing constitution altered or abrogated by the proposal if adopted.”

(4) The following statement shall appear beneath the petition heading:

“We, the undersigned qualified and registered electors, [_____] city (strike 1) residents in the township of _____ in the county of _____, state of Michigan, respectively petition for (amendment to constitution)”

(5) The following warning shall be printed in 12-point type immediately above the place for signatures, on each part of the petition:

WARNING

A person who knowingly signs this petition more than once, signs a name other than his or her own, signs when not a qualified and registered elector, or sets opposite his or her signature on a petition, a date other than the actual date the signature was affixed, is violating the provisions of the Michigan election law.

(6) The remainder of the petition form shall be as provided following the warning to electors signing the petition in section 544c(1). In addition, the petition shall comply with the requirements of section 544c(2)

MCL 168.482a provides:

(1) If an individual who circulates a petition under section 482 is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer.

(2) Any signature obtained on a petition under section 482 by an individual who has not filed the required affidavit under subsection (1) is invalid and must not be counted.

(3) If the circulator of a petition under section 482 provides or uses a false address or provides any fraudulent information on the certificate of circulator, any signature obtained by that circulator on that petition is invalid and must not be counted.

(4) 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.

(5) Any signature obtained on a petition under section 482 that was not signed in the circulator's presence is invalid and must not be counted.

MCL 168.482e provides:

(1) An individual shall not do any of the following regarding a petition under section 482:

(a) Sign a petition with a name other than his or her own.

(b) Make a false statement in a certificate on a petition.

(c) If not a circulator, sign a petition as a circulator.

(d) Sign a name as circulator other than his or her own.

(2) Except as otherwise provided in subsection (3), an individual who violates subsection (1) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both.

(3) An individual shall not sign a petition under section 482 with multiple names. An individual who violates this subsection is guilty of a felony.

(4) If an individual signs a petition in violation of this section, any signature by that individual on the petition is invalid and must not be counted.

MCL 168.544c provides, in relevant part:

(8) An individual shall not do any of the following:

- (a) Sign a petition with a name other than his or her own.
- (b) Make a false statement in a certificate on a petition.
- (c) If not a circulator, sign a petition as a circulator.
- (d) Sign a name as circulator other than his or her own.

(9) Except as otherwise provided in subsection (10), an individual who violates subsection (8) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both.

(10) An individual shall not sign a petition with multiple names. An individual who violates this subsection is guilty of a felony.

(11) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has knowingly and intentionally failed to comply with subsection (8) or (10), the board of state canvassers may impose 1 or more of the following sanctions:

- (a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (8) or (10) occurred, without checking the signatures against local registration records.
- (b) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed the violation of subsection (8) or (10) on a petition to nominate that candidate.

(12) If an individual violates subsection (8) or (10) and the affected petition sheet is filed, each of the following who knew of the violation of subsection (8) or (10) before the filing of the affected petition sheet and who failed to report the violation to the secretary of state, the filing

official, if different, the attorney general, a law enforcement officer, or the county prosecuting attorney is guilty of a misdemeanor, punishable by a fine of not more than \$500.00 or imprisonment for not more than 1 year, or both:

(a) The circulator of the petition, if different than the individual who violated subsection (8) or (10).

(b) If the petition is a nominating petition, the candidate whose nomination is sought.

(c) If the petition is a petition for a ballot question or recall, the organization or other person sponsoring the petition drive.

(13) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has violated subsection (12), the board of state canvassers may impose 1 or more of the following sanctions:

(a) Impose on the organization or other person sponsoring the petition drive an administrative fine of not more than \$5,000.00.

(b) Charge the organization or other person sponsoring the petition drive for the costs of canvassing a petition form on which a violation of subsection (8) or (10) occurred.

(c) Disqualify an organization or other person described in subdivision (a) from collecting signatures on a petition for a period of not more than 4 years.

(d) Disqualify obviously fraudulent signatures on a petition form on which a violation of subsection (8) or (10) occurred without checking the signatures against local registration records.

(e) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed a violation of subsection (8) or (10) on a petition to nominate that candidate.

(14) If an individual refuses to comply with a subpoena of the board of state canvassers in an investigation of an alleged violation of subsection (8), (10), or (12), the board may hold the canvass of the petitions in abeyance until the individual complies.

(16) The provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law.

INTRODUCTION

Petitioners Unlock Michigan, George Fisher, and Nancy Hyde-Davis are the proponent and supporters of a statewide ballot proposal to repeal the Emergency Powers of Governor Act, 1954 PA 302, under article 2, § 9 of the Michigan Constitution.

Under Michigan's Election Law, the Board of State Canvassers has a duty to certify whether Unlock Michigan's petition contains a sufficient or insufficient number of valid signatures by registered voters for presentment to the Legislature and possible placement on the November 2022 General Election ballot.

But the Board voted 2-2 on a motion to certify the petition as sufficient, which means the Board deadlocked. Because action of the Board is effective only upon concurrence of at least one member of each major political party appointed to the Board, the deadlock effectively denied Unlock Michigan's initiative a place on the November 2022 General Election ballot.

The Board was unable to pass the motion to certify. Two members believed the Board should first investigate claims of circulator misconduct and should promulgate rules for canvassing petition signatures before taking up certification of the petition. The other two disagreed that the petition should be investigated or that rulemaking was required before certification could be addressed.

The Board acknowledges that it has a legal duty to formally declare the sufficiency or insufficiency of Petitioners' petition. The Board will comply with any order this Court issues regarding the legal sufficiency or insufficiency of the petition.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Brief overview of the Respondents' duties with respect to initiative petitions.

Article 2, § 9 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Const 1963, art 2, § 9. With respect to initiatives, § 9 provides in relevant part:

The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent for initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

* * *

Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. . . .

If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. . . [Const 1963, art 2, § 9 (emphasis added).]

The Legislature has enacted laws to provide for the initiative process and prescribed certain duties for the Secretary and the Board to perform.

1. Overview of the Secretary of State's duties.

The Legislature has delegated the task of conducting proper elections to the Secretary of State, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 2, § 4, art 5, §§ 3, 9. Section 21 of the Michigan Election Law makes the Secretary the "chief election officer" with

“supervisory control over local election officials in the performance of their duties under the provisions of this act.” MCL 168.21.

But the Secretary of State’s duties with respect to initiative petitions is limited. *Citizens Protecting Michigan’s Constitution*, 280 Mich App 273, 286 (2008). The Secretary acts as the filing official to receive petitions for referendum, initiative, and constitutional amendment. MCL 168.471. The first task attendant to the Secretary’s office is to “immediately” notify the Board upon the filing of any petition. MCL 168.475(1). Thereafter, if the Board certifies the sufficiency of the petition and approves the statement of purpose, the Secretary certifies the statement of purpose to the counties, MCL 168.648, and communicates the ballot wording to the media, counties, and local precincts. MCL 168.477(2), MCL 168.480. The Secretary must also transmit the petition to the Legislature for enactment or rejection within 40 session days as required by the Constitution. Const 1963, art 2, § 9. If the Legislature fails to enact the proposal within the 40 days, the question is placed on the ballot. *Id.*

2. Overview of the Director of Elections’ duties.

The Director of Elections is appointed by the Secretary of State and supervises the Bureau of Elections. MCL 168.32(1), MCL 168.34. The Director of Elections is “vested with the powers and shall perform the duties of the secretary of state under . . . her supervision, with respect to the supervision and administration of the election laws.” *Id.* As “a nonmember secretary of the state board of canvassers,” the Director of Elections supervises the Bureau as it assists the Board

in canvassing petitions, like the Unlock Michigan petition. *Id.* The Director is also responsible for preparing ballot language for proposals with the approval of the Board. MCL 168.32(2).

3. Overview of the Board of State Canvassers' duties.

The Board is a bi-partisan constitutional board created by Const 1963, art 2, § 7, and its duties and responsibilities are established by law. See MCL 168.22, MCL 168.841. The Legislature has empowered the Board to enforce the technical requirements set forth in the Michigan Election Law relating to the circulation and form of various petitions, including petitions to initiate legislation. With respect to petitions, generally the Board's "duty . . . is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v Sec'y of State*, 492 Mich 588, 618 (2012).

These duties are generally ministerial in nature, and in reviewing a petition the Board may not examine questions regarding the merits or substance of a proposal. *Leininger v Secretary of State*, 316 Mich 644, 655-656 (1947). See also *Gillis v Bd of State Canvassers*, 453 Mich 881 (1996); *Automobile Club of Michigan Committee for Lower Rates Now*, 195 Mich App at 624 (1992) ("[T]he Board of State Canvassers possesses the authority to consider questions of form."). And in performing its function, the Board generally may not look beyond the four corners of the petition. *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 519-520 (2005).

The Board's duties with respect to an initiative petition are two-fold. First, under MCL 168.476(1), the Board must canvass the petition to ascertain if the

petition has been signed by the requisite number of qualified and registered voters. The Board's canvassing duties are carried out by staff at the Bureau of Elections under the supervision of the Director of Elections. MCL 168.32(1), 168.34. Second, under MCL 168.477(1), the Board "shall make an official declaration of the sufficiency or insufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted." Essentially, the Board determines whether the petition has enough valid signatures, and whether the petition is in the proper form.

In conducting this review, the Board is empowered to "hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions." MCL 168.476(2). But this investigatory power is generally confined to the Board's duties of determining whether there are sufficient signatures, and whether the petition is in proper form. See *Michigan Civil Rights Initiative*, 268 Mich App at 516.

B. The Unlock Michigan petition

Petitioner Unlock Michigan is a registered ballot question committee.¹ In June 2020, Unlock Michigan submitted its initiative petition to repeal the Emergency Powers of Governor Act, 1954 PA 302,² to the Board of State Canvassers

¹ See Unlock Michigan's electronic filings at [Michigan Committee Statement of Organization \(nictusa.com\)](https://nictusa.com) (accessed May 28, 2021).

² This Court held that the Emergency Powers of the Governor Act unconstitutionally delegated legislative power to the Executive branch of Government. See *House v Governor*, ___ Mich ___ (2020).

both for approval as to form and for approval of the proposal's summary.³ The Board approved the form of the petition and its summary on July 6, 2020. (Ex A, 7/6/20 Minutes.) Proposed Intervenor Keep Michigan Safe (KMS) filed a mandamus action against the Board and Director of Elections Jonathan Brater challenging the summary of the proposal as approved, but the complaint was denied. See *Keep Michigan Safe v Board of State Canvassers, et al*, Court of Appeals Docket No. 354188, 8/17/20 Order denying complaint and Michigan Supreme Court Case No. 161960, 9/25/20 Order denying leave to appeal.

In September 2020, Attorney General Dana Nessel opened a criminal investigation into the circulation practices of the Unlock Michigan ballot proposal committee. (Ex B, 9/28/20 Press Release.) On October 2, 2020, Unlock Michigan filed its initiative petition with the Secretary of State. (Ex C, Unlock Challenge Deadline, 3/26/20.) Because this petition was filed during the run-up to the November 2020 general election, the Bureau of Elections determined it could not begin to canvass the petition on behalf of the Board until after the new year began. The Bureau's plan to canvass the petition in 2021 was challenged in a lawsuit filed by Petitioner Unlock Michigan; however, no relief was granted. See *Unlock*

³ The statutes provide for the Board's review of the petitions after they have been circulated and signatures obtained. See MCL 168.475, 168.476, 168.477. But for many years the Board has permitted committees to come before the Board and obtain pre-approval as to the form of their petitions before they are circulated. Committees may also obtain pre-approval of the 100-word summary of the proposal required to appear on a petition. MCL 168.482(3), 168.482b(1). All petition sponsors must file their petition with the Secretary of State before circulation. See MCL 168.483a.

Michigan v Board of State Canvassers, et al, Michigan Supreme Court Case No. 162132, 10/28/20 Order denying complaint.

In February 2021, counsel for KMS wrote to the Board of State Canvassers and requested that the Board suspend any canvassing activity with respect to the Unlock Michigan petition until the Attorney General completed her criminal investigation. (Ex D, 2/15/21 Letter.) Counsel threatened legal action if the Board did not do so. *Id.* The Board considered KMS's request at its February 25, 2021 meeting, but did not suspend canvassing activity. KMS did not file a lawsuit at that time.

The Bureau of Elections continued its canvass of the petition and on March 26, 2021, announced the challenge deadline with respect to the Unlock Michigan petition and made the signature sample for the petition available to the public. (Ex C.) The deadline to submit challenges to the petition was April 9, 2021. *Id.* On April 9, KMS filed a challenge to Unlock Michigan's petition. (Ex E, KMS Challenge.) So too did private attorney Steven C. Liedel. (Ex F, Liedel Challenge.) In its challenge before the Board of Canvassers, KMS argued that the Board should investigate the circulation practices of Unlock Michigan, that the Board's petition and signature review practices violate the Administrative Procedures Act (APA) because they were not promulgated as rules, that the form of the petition is defective, including the summary, and that there are insufficient valid signatures. (Ex E.) Unlock Michigan responded to the challenges. (Ex F, Unlock Response.)

Norm Shinkle expressed opposition to the motion. *Id.*, pp 48-49. The Board voted on the motion, with Members Matuzak and Bradshaw voting in favor, and Members Daunt and Shinkle voting against the motion; this resulted in a 2-2 vote, meaning that the motion failed. *Id.*, pp 51-52. See MCL 168.22d(2) (establishing quorum of the Board as three members but requiring the vote of at least one member of each political party in order for action to be effective.)

Member Matuzak then moved that the Board and the Bureau engage in the rulemaking process under the APA to establish rules for the canvassing of petition signatures. *Id.*, pp 52-53. Member Bradshaw supported the motion. *Id.*, p 53. Members Daunt and Shinkle spoke in opposition to the motion. *Id.*, pp 53-59. The Board then voted upon the motion, with Members Matuzak and Bradshaw voting in favor and Members Daunt and Shinkle voting against the motion; this resulted in a 2-2 vote, meaning that the motion failed. *Id.*, pp 61-62. Member Daunt then moved that the Board determine that the petition contained sufficient signatures, which motion was supported by Member Shinkle. *Id.*, p 62. During discussion on the motion, Member Matuzak stated that she would vote no because she was committed to an investigation and rulemaking. *Id.*, p 62. The Board then voted upon the motion, with Members Shinkle and Daunt voting in favor and Members Matuzak and Bradshaw voting against the motion; this resulted in a 2-2 vote, meaning that the motion to certify failed. *Id.*, pp 63-64.

C. Procedural history

On April 30, 2021, Petitioners Unlock Michigan and several supporters filed the instant complaint for mandamus relief and brief in support of their complaint

against Secretary of State Benson, Director of Elections Jonathan Brater, and the Board. For relief, Petitioners requests that this Court grant a writ of mandamus and order Respondents to take all necessary actions to certify the petition as sufficient and transmit it to the Legislature as required by article 2, § 9.

(Petitioner's Compl, pp 33-34). On May 25, 2021, 29 days after the complaint was filed, KMS moved to intervene as a Respondent in this matter. KMS also filed a brief in opposition to Unlock Michigan's complaint for mandamus. Unlock Michigan filed a response in opposition to the motion to intervene on May 25, 2021. While the state Respondents did not oppose KMS's motion to intervene, it may be necessary for the State Defendants to respond to KMS's brief in opposition to Petitioners' complaint for mandamus relief. The State Respondents will do so as soon possible.

STANDARD OF REVIEW

Although courts have held that mandamus is the appropriate remedy for a party seeking to compel action by election officials, see, e.g., *Wolverine Golf Club v Secretary of State*, 24 Mich App 711 (1970), aff'd 384 Mich 461 (1971); *Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613 (1992), a writ of mandamus remains an extraordinary remedy and will only be issued where: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result," *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 284 (2008), aff'd in result, 482 Mich 960 (2008), citing *Tuggle v Dep't of State Police*, 269 Mich App 657, 668 (2005). The specific act

sought to be compelled must be of a ministerial nature, which is prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 286. “The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff.” *White-Bey v Dept of Corrections*, 239 Mich App 221, 223 (1999).

At times, courts have resolved “threshold” legal questions involving the constitutionality of an action or statute in the context of a mandamus action. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 283, quoting *Michigan United Conservation Clubs v Sec’y of State*, 463 Mich 1009 (2001). See also *Wolverine Golf Club v Sec’y of State*, 384 Mich 461, 466 (1971).

ARGUMENT

- I. While the Board of Canvassers has a clear legal duty to declare the sufficiency or insufficiency of Unlock Michigan’s petition, there is no clear legal duty to act more than a year before the deadline and no clear legal right to have the Board act immediately, so Petitioners’ claim for mandamus should be denied.**

Again, the Board’s duty with respect to Unlock Michigan’s petition is two-fold. First, under MCL 168.476(1), the Board must canvass the petition to ascertain if the petition has been signed by the requisite number of qualified and registered voters. And second, under MCL 168.477(1), the Board “shall make an official declaration of the sufficiency or insufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted.”

For the Court's benefit in rendering a decision, the Board notes that, by law, the Board must complete the canvass of the petition on or before the 100th day before the November 2022 general election, as (a) the Board must approve ballot wording and assign a numerical ballot designation at least 60 days prior to Election Day, or by September 9, 2022, see MCL 168.480 and 168.474a; and (b) the Legislature is afforded a period of 40 session days in which to enact the proposal, reject the proposal, or reject the proposal and submit an alternative proposal on the same subject to the electorate, see Const 1963, art 2, § 9. (Ex K, Malerman Affidavit, ¶ 6.) In order to comply with these deadlines, the canvass of Petitioners' initiative petition must be completed on or before July 29, 2022. *Id.*

Again, a claim for mandamus requires a clear legal duty and a clear legal right to the performance of that duty. *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App at 284. But, while the Board has a duty to determine the sufficiency or insufficiency of a petition, there is no clear legal duty for it to do so *at this time*. There is more than a year before the canvass of Petitioners' petition must be completed. Ample time remains for the Board to consider further action on this petition, either on its own initiative or at Petitioners' request. It is possible that Members Shinkle and Daunt will be persuaded to undertake some investigation to address the concerns of the other Board members, or perhaps Members Matuzak and Bradshaw will reconsider and agree to approve the petition. Either way, there is nothing preventing the Board from taking further action within the time provided by law for it to do so.

Further, Petitioners have no clear legal right to have the Board act immediately, more than a year before the statutory deadline to complete canvassing. The Board has not refused to perform its duty—indeed, it has already begun its consideration of the petition. There has been serious and good-faith debate on what course the Board should take. While Petitioners may be frustrated with the progress, its own subjective expectations do not create a legal right to early action by the Board. Administrative bodies should be allowed to use as much of the time provided to them by law to reach an appropriate decision.

CONCLUSION AND RELIEF REQUESTED

Because there is no clear legal duty, or a clear legal right to the performance of a duty, the Board of State Canvassers respectfully requests that this Honorable Court deny Petitioners' complaint for mandamus.

Respectfully submitted,

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