

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,

Respondents,

and

KEEP MICHIGAN SAFE,

Proposed Intervening Respondent.

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

**RESPONDENTS SECRETARY OF STATE JOCELYN BENSON AND
DIRECTOR OF ELECTIONS JONATHAN BRATER'S RESPONSE TO
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. 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 the circumstances, is further direction from the Court in the form of mandamus relief warranted?

Petitioners’ answer: Yes.

The Secretary of State’s answer: Yes.

Director of Bureau of Election’s answer: Yes.

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 (EPGA), 1954 PA 302, under article 2, § 9 of the Michigan Constitution. The EPGA was one of the statutes the Governor relied upon to control the spread of the COVID-19 pandemic through the issuance of executive orders.

Petitioners' proposal has generated significant controversy not only because of its subject matter, but because the media has reported various incidents of questionable circulation practices by Unlock Michigan and its paid and volunteer petition circulators. Certain of these incidents were even investigated by the Department of Attorney General.

Nevertheless, the Secretary of State had a duty to accept the timely filed petition and to refer the petition for canvassing by the Board of State Canvassers. The Board, in turn, has a duty to certify whether Unlock Michigan's petition contains a sufficient or insufficient number of valid signatures by registered voters for placement on the 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 only effective 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 in the event the Legislature does not first enact the proposal.

The Board was unable to pass the motion to certify because two members believed the Board should first investigate the claims of circulator misconduct and should promulgate rules for canvassing petition signatures before taking up certification of the petition.

While the Board has the authority to investigate prohibited conduct related to the circulation of petitions, it is not mandated to do so, and the motion to investigate failed to pass. Further, the question of whether administrative rules should be promulgated is a legal question the Board has no authority to resolve as part of the canvassing and certification process. This is especially so where the Board has no duty or authority to promulgate rules, nor authority to direct the Secretary of State to do so.

While the Secretary of State does not agree with all the arguments made by Unlock Michigan, because the Board has a legal duty to determine the sufficiency of the petition, and the Board was unable to perform that duty, the Secretary agrees that direction from the Court as to the performance of this duty is warranted.

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 for approval as to form and for approval of the proposal's summary.³ The Board

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

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

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

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.

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 expired on April 9, 2021. *Id.* On April 9, KMS filed a challenge to Unlock Michigan's petition. (Ex E, KMS 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. *Id.*) Unlock Michigan responded to the challenges. (Ex F, Unlock Response.)

On April 19, 2021, the Bureau released its staff report with the results of the canvass, including the canvass of the random signature sample, and recommended that the Board certify the petition as sufficient. (Petitioners' Compl, Ex 1, 4/19/21

Staff Report.) Of the 500 signatures sampled, the Bureau determined that 434 signatures were valid, and that 72 signatures were invalid, mostly due to the signer's registration status. *Id.* Application of the Bureau's statistical formula to this result, resulted in a determination that the petition had sufficient signatures for certification. *Id.* The same day, the Board issued its public meeting notice for a meeting to be held on April 22, 2021, to determine the sufficiency of the Unlock Michigan petition.⁴

On April 21, 2020, Attorney General Nessel issued a press statement and accompanying memorandum explaining that the Department of Attorney General had concluded its investigation of Unlock Michigan and was not recommending that any charges be filed. (Ex G, 4/21/21 Press Release).

The Board met on April 22, 2021 to vote on the sufficiency of the petition. After hearing arguments by counsel for both KMS and Unlock Michigan in connection with the challenges to the petition, Board Member Julie Matuzak moved that the Board conduct an investigation into the collection of signatures by Unlock Michigan. (Petitioners' Compl, Ex 6, 4/22/21 Trans, pp 44–46.) That motion was supported by Member Jeanette Bradshaw. *Id.*, p 47. Members Tony Daunt and Norm Shinkle expressed opposition to the motion. *Id.*, pp 48–49. The Board voted upon the motion, with Members Matuzak and Bradshaw voting in favor, and Members Daunt and Shinkle voting against the motion, which resulted in a 2-2

⁴ See meeting notice, available at [BSC Meeting Notice \(michigan.gov\)](https://www.michigan.gov/BSC/0,4570,7-253_7-254_7-255_7-256_7-257_7-258_7-259_7-260_7-261_7-262_7-263_7-264_7-265_7-266_7-267_7-268_7-269_7-270_7-271_7-272_7-273_7-274_7-275_7-276_7-277_7-278_7-279_7-280_7-281_7-282_7-283_7-284_7-285_7-286_7-287_7-288_7-289_7-290_7-291_7-292_7-293_7-294_7-295_7-296_7-297_7-298_7-299_7-300_7-301_7-302_7-303_7-304_7-305_7-306_7-307_7-308_7-309_7-310_7-311_7-312_7-313_7-314_7-315_7-316_7-317_7-318_7-319_7-320_7-321_7-322_7-323_7-324_7-325_7-326_7-327_7-328_7-329_7-330_7-331_7-332_7-333_7-334_7-335_7-336_7-337_7-338_7-339_7-340_7-341_7-342_7-343_7-344_7-345_7-346_7-347_7-348_7-349_7-350_7-351_7-352_7-353_7-354_7-355_7-356_7-357_7-358_7-359_7-360_7-361_7-362_7-363_7-364_7-365_7-366_7-367_7-368_7-369_7-370_7-371_7-372_7-373_7-374_7-375_7-376_7-377_7-378_7-379_7-380_7-381_7-382_7-383_7-384_7-385_7-386_7-387_7-388_7-389_7-390_7-391_7-392_7-393_7-394_7-395_7-396_7-397_7-398_7-399_7-400_7-401_7-402_7-403_7-404_7-405_7-406_7-407_7-408_7-409_7-410_7-411_7-412_7-413_7-414_7-415_7-416_7-417_7-418_7-419_7-420_7-421_7-422_7-423_7-424_7-425_7-426_7-427_7-428_7-429_7-430_7-431_7-432_7-433_7-434_7-435_7-436_7-437_7-438_7-439_7-440_7-441_7-442_7-443_7-444_7-445_7-446_7-447_7-448_7-449_7-450_7-451_7-452_7-453_7-454_7-455_7-456_7-457_7-458_7-459_7-460_7-461_7-462_7-463_7-464_7-465_7-466_7-467_7-468_7-469_7-470_7-471_7-472_7-473_7-474_7-475_7-476_7-477_7-478_7-479_7-480_7-481_7-482_7-483_7-484_7-485_7-486_7-487_7-488_7-489_7-490_7-491_7-492_7-493_7-494_7-495_7-496_7-497_7-498_7-499_7-500_7-501_7-502_7-503_7-504_7-505_7-506_7-507_7-508_7-509_7-510_7-511_7-512_7-513_7-514_7-515_7-516_7-517_7-518_7-519_7-520_7-521_7-522_7-523_7-524_7-525_7-526_7-527_7-528_7-529_7-530_7-531_7-532_7-533_7-534_7-535_7-536_7-537_7-538_7-539_7-540_7-541_7-542_7-543_7-544_7-545_7-546_7-547_7-548_7-549_7-550_7-551_7-552_7-553_7-554_7-555_7-556_7-557_7-558_7-559_7-560_7-561_7-562_7-563_7-564_7-565_7-566_7-567_7-568_7-569_7-570_7-571_7-572_7-573_7-574_7-575_7-576_7-577_7-578_7-579_7-580_7-581_7-582_7-583_7-584_7-585_7-586_7-587_7-588_7-589_7-590_7-591_7-592_7-593_7-594_7-595_7-596_7-597_7-598_7-599_7-600_7-601_7-602_7-603_7-604_7-605_7-606_7-607_7-608_7-609_7-610_7-611_7-612_7-613_7-614_7-615_7-616_7-617_7-618_7-619_7-620_7-621_7-622_7-623_7-624_7-625_7-626_7-627_7-628_7-629_7-630_7-631_7-632_7-633_7-634_7-635_7-636_7-637_7-638_7-639_7-640_7-641_7-642_7-643_7-644_7-645_7-646_7-647_7-648_7-649_7-650_7-651_7-652_7-653_7-654_7-655_7-656_7-657_7-658_7-659_7-660_7-661_7-662_7-663_7-664_7-665_7-666_7-667_7-668_7-669_7-670_7-671_7-672_7-673_7-674_7-675_7-676_7-677_7-678_7-679_7-680_7-681_7-682_7-683_7-684_7-685_7-686_7-687_7-688_7-689_7-690_7-691_7-692_7-693_7-694_7-695_7-696_7-697_7-698_7-699_7-700_7-701_7-702_7-703_7-704_7-705_7-706_7-707_7-708_7-709_7-710_7-711_7-712_7-713_7-714_7-715_7-716_7-717_7-718_7-719_7-720_7-721_7-722_7-723_7-724_7-725_7-726_7-727_7-728_7-729_7-730_7-731_7-732_7-733_7-734_7-735_7-736_7-737_7-738_7-739_7-740_7-741_7-742_7-743_7-744_7-745_7-746_7-747_7-748_7-749_7-750_7-751_7-752_7-753_7-754_7-755_7-756_7-757_7-758_7-759_7-760_7-761_7-762_7-763_7-764_7-765_7-766_7-767_7-768_7-769_7-770_7-771_7-772_7-773_7-774_7-775_7-776_7-777_7-778_7-779_7-780_7-781_7-782_7-783_7-784_7-785_7-786_7-787_7-788_7-789_7-790_7-791_7-792_7-793_7-794_7-795_7-796_7-797_7-798_7-799_7-800_7-801_7-802_7-803_7-804_7-805_7-806_7-807_7-808_7-809_7-810_7-811_7-812_7-813_7-814_7-815_7-816_7-817_7-818_7-819_7-820_7-821_7-822_7-823_7-824_7-825_7-826_7-827_7-828_7-829_7-830_7-831_7-832_7-833_7-834_7-835_7-836_7-837_7-838_7-839_7-840_7-841_7-842_7-843_7-844_7-845_7-846_7-847_7-848_7-849_7-850_7-851_7-852_7-853_7-854_7-855_7-856_7-857_7-858_7-859_7-860_7-861_7-862_7-863_7-864_7-865_7-866_7-867_7-868_7-869_7-870_7-871_7-872_7-873_7-874_7-875_7-876_7-877_7-878_7-879_7-880_7-881_7-882_7-883_7-884_7-885_7-886_7-887_7-888_7-889_7-890_7-891_7-892_7-893_7-894_7-895_7-896_7-897_7-898_7-899_7-900_7-901_7-902_7-903_7-904_7-905_7-906_7-907_7-908_7-909_7-910_7-911_7-912_7-913_7-914_7-915_7-916_7-917_7-918_7-919_7-920_7-921_7-922_7-923_7-924_7-925_7-926_7-927_7-928_7-929_7-930_7-931_7-932_7-933_7-934_7-935_7-936_7-937_7-938_7-939_7-940_7-941_7-942_7-943_7-944_7-945_7-946_7-947_7-948_7-949_7-950_7-951_7-952_7-953_7-954_7-955_7-956_7-957_7-958_7-959_7-960_7-961_7-962_7-963_7-964_7-965_7-966_7-967_7-968_7-969_7-970_7-971_7-972_7-973_7-974_7-975_7-976_7-977_7-978_7-979_7-980_7-981_7-982_7-983_7-984_7-985_7-986_7-987_7-988_7-989_7-990_7-991_7-992_7-993_7-994_7-995_7-996_7-997_7-998_7-999_8000) (accessed May 28, 2021).

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, which 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. The Board then voted upon the motion, with Members Shinkle and Daunt voting in favor, and Members Matuzak and Bradshaw voting against the motion, which resulted in a 2-2 vote, meaning that the motion to certify failed. *Id.*, pp 63–64.

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 L, Malerman

Affidavit, ¶ 6.) In order to comply with these deadlines, a final determination as to the sufficiency of Petitioner’s initiative petition must be completed on or before July 29, 2022. *Id.*

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, e.g., *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, the Board deadlocked as to the sufficiency of the petition and was unable to make an official declaration.

While the Board has a legal duty to make a declaration as to the sufficiency of Unlock Michigan’s petition, see MCL 168.477, the Board was unable to do so after

it deadlocked on a motion to certify the petition as sufficient. Because the Board did not perform its duty, further instruction from this Court is necessary to guide the Board's conduct.

A. The Board is authorized to investigate certain prohibited conduct by petition circulators and signers, but it does not have a mandated duty to do so.

The Board deadlocked over a motion to investigate the signatures and signature collection processes used by Unlock Michigan, and two members later declined to certify the petition as sufficient due to their opinion that an investigation should first be conducted.

In its complaint before the Board, KMS argued that the Board should decline to certify Unlock Michigan's petition until the Board investigated the practices of various trainers and circulators of the petition. (Ex E, KMS Challenge, pp 7–12.) KMS complained of various training activities that encouraged illegal conduct, that circulators were not checking to ensure signers were registered, that petitions were left unattended, and that circulators signed other persons names. *Id.*, pp 7–10. KMS argued that the Board has authority to investigate these allegations under MCL 168.476(2). *Id.*, pp 10–11.

The Board does have limited, discretionary authority to investigate petitions under § 476(2), which provides:

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. [MCL 168.476(2) (emphasis added).]

This section has been interpreted by the Michigan Court of Appeals as permitting the Board to hold hearings upon matters within its authority under § 476(1):

[I]t is clear to us that the Legislature has only conferred upon the Board the authority to canvass the petition “to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.” MCL 168.476(1). MCL 168.476(1) clearly indicates that this authority encompasses examining the validity of the signatures and the registration status of each elector whose signature appears on the petition and investigating any doubtful signatures. Moreover, it is also clear that the Legislature, through MCL 168.476(2), only conferred upon the board the right to hold hearings, should a complaint be filed or for any purpose considered necessary “to conduct investigations of the petitions.” We cannot construe § 476(2) as a delegation of additional authority or as an expansion beyond the authority prescribed under § 476(1). [*Michigan Civil Rights Initiative*, 268 Mich App at 519.]⁵

Since that decision, the Legislature has amended the Election Law in certain relevant respects.

Under § 482(6) and § 544c(1), initiative petitions must contain a “certificate of circulator,” which provides the following:

CERTIFICATE OF CIRCULATOR

The *undersigned circulator* of the above petition *asserts* that he or she is 18 years of age or older and a United States citizen; *that each signature on the petition was signed in his or her presence; that he or she has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more*

⁵ The question before the Court of Appeals in the *Michigan Civil Rights Initiative* case was whether the Board was authorized to investigate claims that circulators misled voters into signing petitions. The Court concluded the Board did not have the authority to do so under § 476(1) and (2). 268 Mich App at 519-520, lv den, 474 Mich 1099, recon den, 475 Mich 903 (2006).

than once; and that, to his or her best knowledge and belief, each signature is the genuine signature of the person purporting to sign the petition, the person signing the petition was at the time of signing a registered elector of the city or township listed in the heading of the petition, and the elector was qualified to sign the petition.

Circulator—Do not sign or date certificate until after circulating petition.

____ If the circulator is not a resident of Michigan, the circulator shall make a cross or check mark on the line provided, otherwise each signature on this petition sheet is invalid and the signatures will not be counted by a filing official. By making a cross or check mark on the line provided, the undersigned circulator asserts that he or she is not a resident of Michigan and agrees to accept the jurisdiction of this state for the purpose of any legal proceeding or hearing that concerns a petition sheet executed by the circulator and agrees that legal process served on the secretary of state or a designated agent of the secretary of state has the same effect as if personally served on the circulator.

(Printed Name and Signature of Circulator) (Date)

(Complete Residence Address (Street and Number or Rural Route)) Do not enter a post office box

(City or Township, State, Zip Code)

(County of Registration, if Registered to Vote, of a Circulator who is not a Resident of Michigan)

Warning-A circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor. [MCL 168.544c(1) (emphasis added).]

In 2018, the Legislature amended the Election Law to add MCL 168.482a, which provides, in part:

(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.

(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 168.482a, as amended by 2018 PA 608.]

In a subsequent Act, the Legislature also added MCL 168.482e, which provides in relevant part:

(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.

(3) An individual shall not sign a petition under section 482 with multiple names. . . .

(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 168.482e, as amended by 2018 PA 650.]

In the former section, § 482a, the Legislature described conduct by a circulator that will result in all signatures on a petition sheet being rendered invalid. In the later section, § 482e, the Legislature described prohibited conduct and provided for the invalidation of individual signatures by signers or circulators.

For the most part, the prohibited conduct described in § 482a and § 482e, is not something that would be discovered or checked by the Bureau of Elections in

canvassing petitions for the Board.⁶ This is because the prohibited conduct would not be evident from the face of the petitions, for example whether electors signed in the presence of the circulator, and § 476(1) only contemplates going beyond the face of the petition to check the registration status of signers and the genuineness of their signatures against the qualified voter file during the canvass. MCL 168.476(1).

Rather, as in this case, this type of conduct would be brought to the Board's attention via a complaint or challenge filed with the Board under § 477(2), (3). The question then becomes what is the Board's duty when presented with purported evidence of prohibited conduct.

Section 544c of the Election Law is applicable to initiative petitions "except as otherwise expressly provided." MCL 168.544c(16). Subsections 544c(8) and (11) provide that the Board may take certain actions with respect to prohibited conduct.

Similar to § 482e, subsection 544c(8) provides:

(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.

⁶ If the Bureau reviews a signature against the qualified voter file and determines it is not genuine or authentic, it is possible that the petition was signed by an individual "with a name other than his or her own." MCL 168.482e(1)(a). However, the Bureau would or already rejects such signatures as invalid under § 476(1).

Subsection 544c(11) provides that the Board of State Canvassers may take certain actions with respect to violations of these provisions:

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

(a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (8) . . . occurred, without checking the signatures against local registration records. [MCL 168.544c(11)(a).]

Section 544c(12) provides for the imposition of additional criminal and civil penalties against persons or organizations who knew of the § 544c(8) violations and did not report those violations. MCL 168.544c(12). And under § 544c(13), the Board of State Canvassers may take additional actions against those persons or organizations:

If after a canvass and a hearing on a petition under section 476 . . . 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) . . . 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) . . . occurred without checking the signatures against local registration records. . . . [MCL 168.544c(13)(a)-(d).]

Based on these provisions in § 544c, the Board is authorized under § 476(2) to hold hearings to conduct investigations into violations of § 544c(8) and (12) by petition signers, circulators, and other persons or organizations. And if the Board determines that there have been knowing and intentional violations, one of the possible sanctions is the disqualification of “obviously fraudulent signatures” on the affected petition sheet(s). This authority to investigate these violations is confirmed by § 544c(14), which provides that “[i]f 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.” MCL 168.544c(14).

There is, however, a conflict between § 544c and § 482a. Subsections 544c(11) and (13) provide that the Board “may” disqualify “obviously fraudulent signatures” as a remedy for violations of § 544c(8). But § 482a expressly requires the invalidation of “any signature” on a petition sheet where the circulator provides a false address or other fraudulent information in the certificate of circulator, or where the signature was not signed in the circulator’s presence. MCL 168.482a(3), (5). Under § 482a, the signatures need not be “obviously fraudulent” to be disqualified.

Reading these statutes together, as required by principles of statutory construction, leads to a reasonable construction that the Board has authority to conduct hearings for the purpose of investigating whether a person signed someone else’s name to a petition; made “a false statement in a certificate on a petition”;

signed a petition as a circulator when the person was not the circulator; or signed someone else's name as the circulator. MCL 168.544c(8), (11); MCL 168.482e(1). But if the Board determines that a person has "knowingly and intentionally" made a "false statement in a certificate," which would include providing a "false address or other fraudulent information" in the certificate of circulator, see, e.g., *Protecting Michigan Taxpayers v Board of State Canvassers*, 324 Mich App 240, 247 (2018), the penalty must be the disqualification of all signatures on the affected petition sheets. MCL 168.544c(11); MCL 168.482a(3). A "false statement in a certificate" would also include circumstances where signers signed outside the presence of the circulator contrary to the requirements of the "certificate of circulator." MCL 168.544c(1); MCL 168.482a(5).

Based on these provisions, the Board is authorized to "investigate" certain of the allegations described by KMS in its challenge, such as circulators not being present while voters sign a petition. No provision in § 544c, § 477(2), § 482a, or § 482e, however, mandates that the Board hold hearings to investigate whether violations have occurred; the Board is simply authorized to do so. Indeed, § 476(2) expressly states that the Board "may hold hearings."

Thus, the Board can review and weigh the information and evidence put before it in a complaint, and exercise discretion as to whether to take the additional step of investigating the alleged wrongdoing through additional hearings. This grant of discretion to the Board makes sense in that the violations can also be prosecuted as criminal offenses under § 544c and § 482e, thereby targeting the

specific perpetrators instead of the initiative process preserved to the People by the Constitution. Const 1963, art 2, § 9.

Accordingly, while the Board could have held additional hearings to investigate whether signers or circulators of Unlock Michigan's petition violated § 482e(1), § 544c(8), or whether the committee or others violated § 544c(12), it was not required to do so. And while two Board members supported a motion to hold hearings and conduct such an investigation, the motion failed. After that, the Board did not have grounds to decline to certify Unlock Michigan's petition on that basis.

B. The Board does not have authority to promulgate rules for petition standards or to direct the Secretary of State to promulgate such rules.

The Board deadlocked over a motion to commence the rulemaking process to establish rules for the canvassing of petitions, and two members later declined to certify the petition as sufficient in light of their view that rulemaking should first be conducted.

KMS argued in its challenge that the Board could not canvass Unlock Michigan's petition because the "Board's petition and signature review practices were not promulgated under the" APA. (Ex E, KMS Challenge, p 12).

The Board, itself, has only limited authority to make rules. The Board has the authority granted it under § 33 of the APA, MCL 168.233, to establish rules for its organization and for procedures available to the public. The Board has established such rules. See AACS 1997, R. 168.841 *et seq.* The Board also has specific authority to make "rules and regulations" for the conducting of recounts.

MCL 168.889. The Board has established these rules as well. See AACS 1997, R. 168.901 *et seq.*

Outside § 33 and § 889, the Board does not have any independent rulemaking authority. Rather, it is the Secretary of State who is generally authorized to promulgate rules under the Michigan Election Law. See MCL 168.31(1)(a), (2); MCL 168.794c; MCL 168.797b. In the same vein, the Board does not have any express or inherent authority to direct or require the Secretary of State to engage in the rulemaking process. See, e.g., *Citizens for the Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 492 (2004) (Board is an “agency” with “no inherent power. Any authority it may have is vested . . . in statutes, or by the Constitution.”).

Further, while KMS argued that the Board should decline to certify Unlock Michigan’s petition as sufficient because the Secretary has not promulgated uniform petition standards, the question of whether she must do so and what the effect is of failing to do so, is a legal question the Board lacks authority to decide, and which is irrelevant in the context of declaring the sufficiency or insufficiency of a petition. Under § 476 and § 477, the Board’s duties are generally ministerial in nature and confined to determining whether a petition is in the proper form and contains sufficient, genuine signatures of qualified and registered electors. See, e.g., *Stand Up for Democracy*, 492 Mich at 618. No statute authorizes the Board to decline to certify a petition on the grounds that another entity, here the Secretary of State, has not promulgated rules.

- C. **To the extent the Secretary of State is required to promulgate “uniform standards” for petition signatures, the absence of such standards should not suspend the right of initiative under the Constitution or the circulation of other types of petitions.**

Before the Board, KMS essentially argued that every part of the Board’s processes for canvassing petitions was required to be promulgated as a rule under § 31(2), but it specifically noted the need for a rule on signature matching standards and the random sampling process. (Ex E, KMS Challenge, pp 12–17). But KMS’s view of what must be promulgated is over-inclusive, and it is unclear from the statute exactly what standards must be promulgated.

1. **It is unclear what “uniform standards” are required to be promulgated.**

In 1999, the Legislature amended various sections of the Michigan Election Law to provide that the qualified voter file may be used to determine the validity of signatures on petitions, whether nominating, recall, or initiatives, by verifying the registration of signers. See 1999 PA 219,⁷ 1999 PA 220.⁸

As part of those amendments, the Legislature amended § 31 to provide that the Secretary *may* promulgate rules to establish uniform standards for petition signatures:

(2) Pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the secretary of state *may* 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:

⁷ See [Michigan Legislature - House Bill 5061 \(1999\)](#) (accessed May 28, 2021).

⁸ See [Michigan Legislature - House Bill 5064 \(1999\)](#) (accessed May 28, 2020).

- (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.
- (c) Proper designation of the place of registration of a circulator or individual signing a petition. [MCL 168.31(2), as added by 1999 PA 220 (emphasis added).]

In 2005, the Legislature again amended the Michigan Election Law. Public Act 71 of 2005 amended the law to require that the qualified voter file contain the digitized signatures of electors, and to *require* the use of these digitized signatures for the purpose of determining the genuineness of signatures on petitions if the file contained a digitized signature. See 2005 PA 71.⁹ Relevant here, § 476 was amended to require the Board to use the qualified voter file with respect to signatures on initiative petitions: “The qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures.” MCL 168.476(1).

Along with this amendment, the Legislature amended § 31(2) to *require* that the Secretary of State promulgate rules to establish uniform standards for petition signatures but kept the permissive “may” for the three example standards:

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 . . . [MCL 168.31(2), as amended by 2005 PA 71 (emphasis added).]

⁹ See [Michigan Legislature - Senate Bill 0513 \(2005\)](#) (accessed May 28, 2021).

These amendments took effect January 1, 2007. See 2005 PA 71, Enacting section 3. Neither of the previous Secretaries of State, Terri Lynn Land and Ruth Johnson, promulgated rules under § 31(2), nor has Secretary Benson done so since taking office in January of 2019.

The Secretary acknowledges that § 31(2) provides that the Secretary “shall promulgate rules.” MCL 168.31(2). The statute refers to “uniform standards for state and local nominating, recall, and ballot question petition signatures.” *Id.* Because these standards are to apply to all different types of petitions at the state and local levels, their scope would be limited to procedures that could or would apply uniformly to each type of petition. And the scope of the standards is further limited to standards for “petition signatures.” The Legislature gave three examples of possible standards: (a) for determining the validity of the registration of a circulator or individual signing a petition; (b) for determining the genuineness of the signature of a circulator or individual signing a petition, including digitized signatures; and (c) for determining the proper designation of the place of registration of a circulator or individual signing a petition. MCL 168.31(2)(a)-(c).

These examples demonstrate that the Legislature’s concerns lay with a signer’s registration status¹⁰ and the genuineness of the signer’s or circulator’s¹¹

¹⁰ Circulators no longer need to be registered to vote in order to circulate petitions, however, out-of-state circulators must include their county of registration if they are registered to vote on the petitions they circulate. See MCL 168.544c(1).

¹¹ Circulators must sign their names as well or the petition sheet will be invalid. MCL 168.544c(5), 168.482(6). But there is no specific statute requiring the Board of Canvassers to determine the genuineness of circulator signatures as part of the canvass. Section 476 only requires the Board to “canvass the petitions to ascertain

signature. Outside of those issues, it is unclear what other types of “standards” the Legislature contemplated could or should be promulgated as “uniform standards . . . for petition signatures.” MCL 168.31(2).

With respect to voter registration, the law is comprehensive. For example, regarding initiative petitions like Unlock Michigan’s, for a signature to count, the voter must be registered within the city or township the voter designates on the petition at the time of signing. MCL 168.544c(6), 168.544d, 168.476(1). See also Const 1963, art 2, §§ 1, 9. And under § 476, the qualified voter file must be used to verify the registration of petition signers:

. . . . The qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid. . . . [MCL 168.476(1) (emphasis added).]

When voters sign initiative petitions, they must include their street address or rural route, and their city or township if signing a countywide petition form. MCL 168.544c(2), (6), 168.544d, 168.482(6). If a voter fails to include his or her street address or rural route, the signature cannot be counted. MCL 168.544c(2).¹²

if the petitions have been signed *by the requisite number of qualified and registered electors.*” MCL 168.476(1) (emphasis added).

¹² The voter, however, can include a mailing address if the mailing address incorporates the political jurisdiction in which the person is registered to vote. MCL 168.552a(2). Also, if a voter fails to designate his or her city or township on the petition, that will not invalidate the signature if the city and an adjoining township have the same name. MCL 168.552a(1).

Using this information, Bureau staff will look up the signer in the qualified voter file to determine if the voter was, in fact, registered to vote “in the city or township designated on the petition” on the day of signing. MCL 168.476(1). Virtually every part of this review process is dictated by statute.

Turning to signatures, voters must include their signatures on an initiative petition to be counted. MCL 168.544c(2), MCL 168.544d, MCL 168.482(6). And a signature will not be counted if it is not, in fact, the voter’s signature. MCL 168544c(8)(a), MCL 168.482e(1)(a), (4). As with registration verification, the qualified voter file must be used to verify the genuineness of a voter’s signature unless the voter does not have a digitized signature on file:

. . . . The qualified voter file shall be used to determine the validity of petition signatures by verifying . . . the genuineness of signatures on petitions when the qualified voter file contains digitized signatures. . . . If the board is unable to verify the genuineness of a signature on a petition using the digitized signature contained in the qualified voter file, the board may cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which the petitions were circulated, to determine the authenticity of the signatures or to verify the registrations. . . . [MCL 168.476(1).]

To perform this review, Bureau staff pull up the voter in the qualified voter file and compare the voter’s digitized signature with the voter’s handwritten signature on the petition. While there is no rule or specific instructional document advising Bureau staff as to how to perform signature comparisons for the Board, the staff have long followed the same principles the Bureau has advised local clerks to use when comparing signatures on absent voter ballots. As KMS noted in its challenge, the Court of Claims held on March 9, 2021 in a different case that these signature verification standards were invalid because they had not been

promulgated under the APA pursuant to MCL 168.31(1)(a). (Ex H, *Genetski v Secretary of State et al*, COC Case No. 20-000216-MM.) The Court’s decision was premised on the fact that compliance with the standards and the terms therein was mandatory. *Id.* The Bureau has re-issued the signature verification guidance removing the mandatory element. (Ex I, Signature Verification guidance). Again, these standards reflect the Bureau’s longstanding process with respect to signature comparisons, including any signature comparisons performed with respect to the Unlock Michigan petition. *Id.*, pp 2–4.

A uniform standard for performing signature comparisons to verify the genuineness of petition signatures is one of the three potential standards the Legislature identified in § 31(2). But the Legislature’s use of the phrase “may include, but need not be limited to” before listing the three potential “standards” suggests that while the Secretary could promulgate these standards, she could also choose not to promulgate those standards and instead promulgate other uniform standards of her choosing.

Furthermore, as the Secretary understands § 31(2), to require promulgation under the APA any proposed standard would still have to meet the definition of a “rule.” See MCL 24.207 (“Rule’ means 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[.]”) With respect to the Bureau’s process for verifying a signer’s registration and reviewing petition sheets, the Bureau does

little more than follow the text of the relevant statutes. A rule of this type would be redundant and not necessarily required to be promulgated. And the Court's decision in *Genetski* simply confirms what the Legislature had already determined here—that a uniform standard for signature verification would be an appropriate rule—should the Secretary determine to make such a standard.

Regarding the Board's statistical random sampling process, this process does not need to be promulgated as a rule under § 31(2). Again, § 31(2) contemplates “uniform standards” that would apply to “state and local nominating, recall, and ballot question petition signatures.” MCL 168.31(2). The random sampling process is only used by the Board of State Canvassers and only in conjunction with initiatives and referendums under the Constitution. Thus, there is no “uniform standard” to be promulgated that would have application beyond the Board itself. Further, the Board and the Bureau have been utilizing this statistical sampling process since 1990. (Ex K, Malerman Affidavit, ¶ 7). See, e.g, *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 299 (CA 6, 1993) (discussing random sampling process and determining process did not violate the plaintiffs' constitutional rights). If the Legislature believed that this longstanding process should be promulgated as a “uniform standard” it could have required as much in the 1999 or 2005 legislation; however, it did not do so.

Finally, while the delayed effective date of the 2005 amendment was perhaps intended to give the then Secretary of State time to promulgate standards, § 31(2) does not contain an express date by which standards had to be promulgated.

Indeed, if the Legislature had intended a fixed deadline for making rules, it simply could have provided for that in the text of § 31(2) itself.

Moreover, it is not as if the Secretary of State has done nothing. While there are no promulgated “standards”, Secretary Benson has provided instructional guidance for circulating initiative petitions. Section 31(1) provides that the Secretary “shall . . . issue instructions” “for the conduct of elections . . . in accordance with the laws of this state,” and shall “[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections[.]” MCL 168.31(1)(a), (e). Secretary Benson has published a comprehensive instructional document entitled *Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition*.¹³ This document walks through the petition process from circulation to filing. *Id.* There are also related instructions for circulating countywide petition forms¹⁴ and city/township petition forms that apply to circulating any petition at the state or local level.¹⁵ Further, the Secretary is authorized to “advise” and “direct” local elections officials should they have questions regarding the registration status or genuineness of voter signatures on petitions filed at the local level. MCL 168.31(1)(b).

¹³ See *Sponsoring a Statewide Initiative, Referendum or Constitutional Amendment Petition*, [Initiative and Referendum Petition Instructions 2019-20 061119 658168 7.pdf \(michigan.gov\)](#) (accessed May 28, 2021).

¹⁴ See *Circulating Countywide Nominating and Qualifying Petition Forms*, [August 29, 1997 \(michigan.gov\)](#) (accessed May 28, 2021).

¹⁵ See *Circulating and Canvassing City/Township Petition Forms (April 2020)*, [August 29, 1997 \(michigan.gov\)](#) (accessed May 28, 2021).

Thus, while § 31(2) does mandate that the Secretary promulgate uniform standards for petition signatures, the lack of clarity regarding the content of the required standards and the lack of an express deadline, has stymied Secretaries from engaging in the process.

2. The absence of promulgated “uniform standards” should not require suspension of the right of initiative or the circulation of other types of petitions.

KMS argued in its complaint before the Board that the Board could not consider or continue to canvass Unlock Michigan’s petition until “uniform standards” were promulgated. (Ex E, KMS Challenge, p 17.) But even if the Secretary is required to promulgate standards under § 31(2), petition canvassing should not grind to halt because of it.

The Board and the Bureau have been utilizing the same canvassing procedures for decades, barring legislative changes over the years, and no committee or person has argued that the Board’s canvassing procedures must be promulgated by rule in order to apply to a petition.

Furthermore, halting canvassing while rulemaking is pursued would prejudice the Secretary of State and her Bureau of Elections. Under this scenario, the Bureau would have to re-canvass the Unlock Michigan petition all over again at some point in the future. Moreover, the Bureau is currently canvassing an initiative petition filed by Fair and Equal Michigan.¹⁶ If the Board were required to

¹⁶ The Bureau just released the signature sample and announced the challenge deadline for Fair and Equal Michigan’s petition on May 19, 2021. See [Announcement - Fair and Equal MI Challenge Deadline 051921 725985 7.pdf \(michigan.gov\)](#) (accessed May 28, 2021).

halt canvassing on Unlock Michigan's petition, the Bureau would presumably also have to halt canvassing of Fair and Equal Michigan's petition. This result would unquestionably prejudice the Secretary and the Bureau. It would require the Bureau to incur the time and expense of recanvassing both petitions at or about the same time, and since there would be no certainty as to when that would occur given that rulemaking can take up to a year, (Ex J, Rulemaking Manual, p 30), it is unclear what other Bureau functions recanvassing would interfere with, i.e., conducting elections, reviewing other petitions.

But not only does the requested relief prejudice the Secretary, it would prejudice Petitioners and other ballot proposal committees who have or will seek to circulate petitions with the intent to place proposals on the 2022 ballot. It would be patently unfair to require the Secretary to promulgate administrative rules and retroactively apply them to petitions that have already been filed, where the sponsors have no opportunity to strike noncompliant signatures or take whatever other steps are necessary to comply with the new rules. And it would be unfair to delay future petition circulation by ballot proposal committees seeking to access the November 2022 ballot until uniform standards are promulgated.¹⁷

¹⁷ In addition, if § 31(2) is interpreted to require the suspension of statewide ballot proposals, because it requires uniform standards for state and local nominating and recall petitions, presumably the same argument would apply to these petitions as well. Meaning candidates and recall proponents could not circulate petitions or have those petitions canvassed by the requisite filing official until the Secretary of State promulgates standards under § 31(2).

It must be recalled that the right to initiate or refer legislation, and the right to seek amendment of the Constitution, is reserved to the People of Michigan by the Constitution. See Const 1963, art 2, § 9, art 12, § 2. While these provisions are self-executing, the Legislature can supplement them so long as the legislation does not unduly burden or curtail the rights secured by the Constitution. See, e.g., *Wolverine Golf Club v Hare*, 384 Mich 461, 466 (1971); *Durant v Dep't of Educ*, 186 Mich App 83, 98 (1990), citing *Hamilton v Sec of State*, 227 Mich 111, 125 (1924).

In this case, interpreting § 31(2) as requiring the halting or suspension of petition canvassing and circulation while the Secretary pursues rulemaking (assuming she must), would unduly burden or curtail the rights of the People.¹⁸ This is especially so where the Board and the Bureau have had the same or similar procedures in place for canvassing statewide ballot proposals for decades, and where the relevant statutes leave very little discretion to the Board or the Bureau in performing their canvassing duties.

Accordingly, even if this Court were to conclude that the Secretary must pursue rulemaking to establish uniform petition signature standards, it should permit all current and future petitions to proceed under the Board's existing procedures until rules can be promulgated under the APA.

¹⁸ Because this is so, it is unnecessary to address Petitioners' arguments that their speech, equal protection, and due process rights have been violated.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Respondents Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater agree that Respondent Board of State Canvassers has a duty to determine the sufficiency of Petitioner's petition, and that an order of mandamus should issue directing Respondent Board to meet and determine the sufficiency of Petitioners' petition consistent with the arguments set forth above.

Respectfully submitted,

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