

# MICHIGAN’S BOARD OF STATE CANVASSERS: THE USE OF IMPROPER MEANS TOWARD IMPROPER ENDS

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## I. INTRODUCTION

In June 2022, just a handful of months before the 2022 midterm elections, the Supreme Court issued its opinion in *Dobbs v. Jackson*

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*Women's Health Organization*,<sup>1</sup> overturning *Roe v. Wade*<sup>2</sup> and returning the issue of abortion to the states.<sup>3</sup> In the aftermath of the decision, state-level abortion policy solely dictated access to abortion services for the first time in 44 years.<sup>4</sup> In several states, this meant that laws or constitutional provisions that banned abortions—and were previously rendered inoperable by *Roe*—became immediately effective again, while in other states, legislators pushed to restrict abortion access via new legislation.<sup>5</sup> In six states, including Michigan, electors placed abortion policy decisions directly on their midterm election ballots, turning final resolution of the issue to voters just months after the national right to an abortion was eradicated.<sup>6</sup>

In Michigan, the *Dobbs* decision triggered the operability of a 1931 law that made it a felony to administer abortions and a misdemeanor to sell drugs producing abortion.<sup>7</sup> While a court order from Michigan Court of Claims Judge Elizabeth Gleicher prohibited the Attorney General from enforcing the 1931 law,<sup>8</sup> a citizens' group named Reproductive Freedom for All spearheaded an effort to create a more permanent, non-judicial resolution for abortion access in the state.<sup>9</sup> The group sponsored a constitutional amendment initiative petition that, if successfully placed on the ballot, would provide Michigan voters with the opportunity to

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1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

3. *Dobbs*, 142 S. Ct. at 2284 (holding that there is no Constitutional right to an abortion and overruling *Roe*, 410 U.S. 113 and *Planned Parenthood v. Casey*, 505 U.S. 833 (1982)).

4. Since 1973, states were precluded from interfering with a patient and their doctor's decision whether to terminate a pregnancy, up until a certain point. *Roe*, 410 U.S. at 163–64.

5. See generally Larissa Jimenez, *60 Days after Dobbs: State Legal Developments on Abortion*, BRENNAN CENTER FOR JUSTICE (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [https://perma.cc/2YAS-CS6N].

6. See generally Abigail Abrams, *Where Abortion Is Literally on the Ballot in 2022*, TIME (Oct. 4, 2022, 2:06 PM), <https://time.com/6219241/abortion-ballot-measures-2022/> [https://perma.cc/QXT4-3SF4].

7. MICH. COMP. LAWS § 750.14 (1931); MICH. COMP. LAWS § 750.15 (1931).

8. See generally Ed White, *Judge Strikes Down 1931 Michigan Law Criminalizing Abortion*, AP NEWS (Sept. 7, 2022), <https://apnews.com/article/abortion-michigan-constitutions-supreme-court-707465a9ec614d3c1d7599b6843c3189> [https://perma.cc/M9K8-YL5X].

9. See generally HOUSE FISCAL AGENCY, *BALLOT PROPOSAL 3 OF 2022 1* (2022), [https://www.house.mi.gov/hfa/PDF/Alpha/Ballot\\_Proposal\\_3\\_of\\_2022.pdf](https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_3_of_2022.pdf) [https://perma.cc/39TL-4YK7].

permanently enshrine the right to an abortion in Michigan's Constitution by voting in the upcoming midterm elections.<sup>10</sup>

Michigan law requires constitutional amendment initiatives to gain a certain number of petition signatures from registered voters for placement on the ballot.<sup>11</sup> Reproductive Freedom for All's ballot proposal, coined "Prop 3," garnered more than enough signatures for placement on the ballot; 753,759 voters signed the petition, making it the most-signed ballot proposal petition in Michigan's history.<sup>12</sup> Despite the petition acquiring an unprecedented number of signatures, the Board of State Canvassers, the state body tasked with certifying ballot proposals for placement on the ballot,<sup>13</sup> failed to certify the proposal.<sup>14</sup> Two members of the Board concluded there was insufficient "space between certain words of the text of the proposed amendment," and on this basis refused to certify the petition, alleging noncompliance with an election law requiring petitions to print the "full text of the amendment."<sup>15</sup> The Michigan Supreme Court disagreed, and, in *Reproductive Freedom for All v. Board of State Canvassers*,<sup>16</sup> found that despite the alleged spacing issues, the petition complied with the statutory requirements and the Board had a clear legal duty to certify the proposal for placement on the ballot.<sup>17</sup> The Board followed the Court's order, and on election day voters passed Prop 3 by a margin of 13.32%.<sup>18</sup>

In a separate opinion issued the same day, the Michigan Supreme Court ordered certification of another initiative petition that the Board failed to certify for the 2022 midterm elections.<sup>19</sup> The Board of State Canvassers had deadlocked along party lines when the two Republican Board members refused to certify Prop 2—a constitutional amendment initiative aimed at increasing election accessibility—due to an alleged

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10. *Id.*

11. *See* MICH. CONST. art. XII, § 2.

12. *Reprod. Freedom for All v. Bd. of State Canvassers*, 510 Mich. 894, 896, 978 N.W.2d 854, 855 (2022) (McCormack, C.J., concurring).

13. *See* MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

14. *Reproduc. Freedom for All*, 510 Mich. at 894–95, 978 N.W.2d at 855–56 (indicating that the Board, a body of 4, deadlocked on the certification question because two members of the Board took issue with the spacing on the initiative petition).

15. *Id.*, 978 N.W.2d at 854–55 (citing MICH. COMP. LAWS § 168.482(3) (1954) (amended 2018)).

16. *Id.* at 895, 978 N.W.2d at 855.

17. *Id.*

18. *2022 Michigan Election Results*, THE OFFICE OF SEC'Y OF STATE JOCELYN BENSON (Dec. 22, 2022, 1:30 PM), [https://mielections.us/election/results/2022GEN\\_CENR.html](https://mielections.us/election/results/2022GEN_CENR.html) [<https://perma.cc/R6J4-C8YY>].

19. *See Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 979 N.W.2d 188 (2022).

failure of the initiative petition to include everything Michigan's election law requires.<sup>20</sup> As with Prop 3, the Michigan Supreme Court disagreed and, in *Promote the Vote 2022 v. Board of State Canvassers*,<sup>21</sup> ordered certification of the proposal.<sup>22</sup> Michigan voters also passed Prop 2 on election day.<sup>23</sup>

This Note argues that in refusing to certify a ballot petition based on challenges made to the petition's substantive content, the Board of State Canvassers improperly surpasses its statutorily delegated authority—often as a means to political ends—and does so at the expense of clarity, time, and money to Michigan citizens seeking to exercise their direct democracy rights.<sup>24</sup> As this Note will demonstrate, Michigan's election law framework does not explicitly grant the Board authority to resolve content-based petition challenges.<sup>25</sup> Moreover, when the Board entertains and acts upon substantive challenges to an initiative petition, its actions contradict the longstanding notion that Board duties are “purely ministerial and clerical”<sup>26</sup> and the original purpose of direct democracy tools—to reserve power for the people.<sup>27</sup> Part II provides an overview of direct democracy tools, the initiative petition constitutional amendment process in Michigan, and the role of the Board of State Canvassers.<sup>28</sup> Part III analyzes the statutory and constitutional provisions granting the Board authority, the inherently legal nature of content-based petition challenges, and the original purpose of direct democracy tools.<sup>29</sup> Part IV concludes and emphasizes the unnecessary burden the Board of State Canvassers places on Michigan citizens seeking to exercise their constitutional rights to direct democracy when it improperly adjudicates content-based challenges.<sup>30</sup>

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20. *Id.* (citing MICH. CONST. art. XII, § 2; MICH. COMP. LAWS § 168.482 (1954) (amended 2018)). See also Cassidy Johncox, *Board Deadlocks: Voting Rights Proposal Not Certified for Michigan Ballot*, CLICK ON DETROIT (Aug. 30, 2022), <https://www.clickondetroit.com/news/local/2022/08/31/board-deadlocks-voting-rights-proposal-not-certified-for-michigan-ballot/> [<https://perma.cc/5CM4-4LVH>].

21. *Id.*

22. *Id.* See also Kathleen Floody, *Why an Obscure Michigan Board Has the Power to Reject a Ballot Initiative on Abortion Rights*, PBS (Aug. 31, 2022, 7:08 PM), <https://www.pbs.org/newshour/politics/why-an-obscure-michigan-board-has-the-power-to-reject-a-ballot-initiative-on-abortion-rights> [<https://perma.cc/2T4L-7G5M>].

23. See 2022 Michigan Election Results, *supra* note 18.

24. Floody, *supra* note 22.

25. See generally MICH. COMP. LAWS § 168.476 (1954) (amended 2005); MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

26. *McQuade v. Furgason*, 91 Mich. 438, 440, 51 N.W. 1073, 1073 (1892).

27. See *Kuhn v. Dep't of Treasury*, 384 Mich. 378, 384, 183 N.W.2d 796, 799 (1971).

28. See *infra* Part II.

29. See *infra* Part III.

30. See *infra* Part IV.

## II. BACKGROUND

### A. Direct Democracy Overview

#### 1. Forms of Direct Democracy

While the power to create and enact laws generally belongs to state and federal legislatures, many states allow citizens to participate directly in lawmaking through initiative and referenda.<sup>31</sup> Generally speaking, the initiative is a process by which citizens can place proposed laws or, in some states, constitutional amendments directly on the ballot.<sup>32</sup> Similarly, the referendum allows voters to approve or repeal an act, or proposed act, of the legislature.<sup>33</sup> These processes are unique in that they give citizens the ability to directly weigh in on the laws of their state, as opposed to indirectly doing so by voting on legislators to enact or reject laws on their behalf.<sup>34</sup>

Today, every state allows its legislature to place a measure on the ballot for approval by voters.<sup>35</sup> This process, known as the legislative referendum, was first utilized by Massachusetts to adopt its state constitution in 1778.<sup>36</sup> New Hampshire, Connecticut, Maine, and New York followed, and Congress later made the legislative referendum process mandatory for all states entering the union after 1857.<sup>37</sup> The legislative referendum stands in contrast with the popular referendum, which allows voters to approve or reject an act the legislature has already passed.<sup>38</sup> Today, twenty-three states allow for the popular referendum.<sup>39</sup>

Many states that feature the popular referendum, including Michigan, also provide voters with an initiative process.<sup>40</sup> While both the initiative

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31. See *Initiative and Referendum Overview and Resources*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2022), <https://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> [https://perma.cc/NZ7Q-J7RM].

32. *Id.*

33. *Id.*

34. *Id.*

35. *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/states.cfm> [https://perma.cc/VSE5-8UFZ].

36. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION*, 4–5 (1989).

37. *Id.*

38. *Initiative and Referendum Overview and Resources*, *supra* note 31.

39. *Initiative and Referendum Processes*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2022), <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx> [https://perma.cc/5AH2-BZTD].

40. *Initiative and Referendum Overview and Resources*, *supra* note 31.

and referenda processes grant voters the ability to directly approve or reject a proposition that may become law, the distinguishing feature of the initiative is that the process gives citizens the power to bypass the legislature altogether.<sup>41</sup> With the referenda process, there must be some sort of proposed, contemplated, or even completed action taken by the legislature for voters to approve or reject on the ballot.<sup>42</sup> Conversely, the subject matter of an initiative may have nothing to do with a decision of the legislature.<sup>43</sup> Citizens frequently utilize initiatives to pass broadly popular policies that the legislature has failed to enact.<sup>44</sup> The initiative process allows citizens to propose a statute or constitutional amendment to the electors in areas in which the legislature has not contemplated legislating.<sup>45</sup> If successful, depending on the given state, the measure may become law without ever becoming subject to the deliberations of the legislature.<sup>46</sup>

Like referenda, states maintain varying types of initiative processes.<sup>47</sup> Certain states allow initiatives for proposed statutes but not constitutional amendments.<sup>48</sup> Other states allow for initiatives for constitutional amendments only.<sup>49</sup> Fifteen states, including Michigan, currently allow for some form of initiative for both statutes and constitutional amendments.<sup>50</sup>

Initiatives can also be direct or indirect.<sup>51</sup> Indirect proposals must first be submitted to the legislature.<sup>52</sup> If the legislature adopts the proposal, it becomes law and does not appear on the ballot.<sup>53</sup> If the legislature rejects, alters, or takes no action on the proposal, the initiative question is placed on the ballot for voters to decide.<sup>54</sup> Conversely, qualifying direct initiatives are placed on the ballot for the voters to consider without going to the

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41. *Id.*

42. *Id.*

43. *Id.*

44. See, e.g., *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, MICH. BUREAU OF ELECTIONS (Jan. 2019), [https://www.michigan.gov/-/media/Project/Websites/sos/01mc Alpine/Initia\\_Ref\\_Under\\_Consti\\_1208.pdf?rev=2ab5f4a3b213442293f787202b38933d](https://www.michigan.gov/-/media/Project/Websites/sos/01mc Alpine/Initia_Ref_Under_Consti_1208.pdf?rev=2ab5f4a3b213442293f787202b38933d) [<https://perma.cc/XG8W-B9DG>].

45. *Initiative and Referendum Overview and Resources*, *supra* note 31.

46. *Id.*

47. *Id.*

48. See *Initiative and Referendum Processes*, *supra* note 39.

49. *Id.*

50. *Initiative and Referendum States*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [<https://perma.cc/F5J3-ZQDY>].

51. *Initiative and Referendum Overview and Resources*, *supra* note 31.

52. *Id.*

53. *Id.*

54. *Id.*

legislature first.<sup>55</sup> Today, twenty-four states feature some form of citizen initiative process.<sup>56</sup>

## 2. Direct Democracy in Michigan

Michigan voters first acquired the rights to initiative and referendum with the adoption of Michigan's 1908 Constitution.<sup>57</sup> The current version of the Michigan Constitution, ratified in 1963, continues to provide citizens with the ability to engage in direct democracy.<sup>58</sup> Specifically, Michigan's existing framework provides for indirect initiatives for statutes, direct initiatives for constitutional amendments, and popular referenda.<sup>59</sup> From the adoption of the 1963 Constitution through 2019, the petition process resulted in the placement of thirty-three initiatives for constitutional amendments, fourteen statutory initiatives, and ten referenda on the ballot for Michigan electors to consider.<sup>60</sup>

While each form of direct democracy is heavily utilized and important in Michigan's election law framework, this Note focuses only on the direct initiative process for constitutional amendments, as that process has been the subject of considerable controversy in recent Michigan elections.<sup>61</sup> Since 1963, seventeen constitutional amendments of the thirty-eight proposed by the citizens via petition have been approved and adopted into Michigan's Constitution.<sup>62</sup> Many of the adopted amendments reflect policy choices of profound societal importance: the elimination of sales tax on food and prescription drugs; the setting of the drinking age at twenty-one years; the implementation of term limits for congressional, state executive, and legislative offices; the creation of an independent

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55. *Id.*

56. *Id.*

57. See MICH. CONST. of 1908, art. V, § 1; *id.*, art. XVII § 2.

58. MICH. CONST. art. II, § 9; *id.*, art. XII, § 2.

59. *Id.*

60. *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, *supra* note 44.

61. See Cassidy Johncox, *Board deadlocks: Voting rights proposal not certified for Michigan Ballot*, CLICK ON DETROIT (Aug. 30, 2022), <https://www.clickondetroit.com/news/local/2022/08/31/board-deadlocks-voting-rights-proposal-not-certified-for-michigan-ballot/> [https://perma.cc/5CM4-4LVH]. See also Floody, *supra* note 22.

62. *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, *supra* note 44, at 1; *2020 Michigan Election Results*, THE OFFICE OF SEC'Y OF STATE JOCELYN BENSON (Nov. 23, 2020, 5:05 PM), [https://mielections.us/election/results/2020\\_GEN\\_CENR.html](https://mielections.us/election/results/2020_GEN_CENR.html) [https://perma.cc/G8C4-TDLQ]; *2022 Michigan Election Results*, THE OFFICE OF SEC'Y OF STATE JOCELYN BENSON (Dec. 22, 2022, 1:30 PM), [https://mielections.us/election/results/2022GEN\\_CENR.html](https://mielections.us/election/results/2022GEN_CENR.html) [https://perma.cc/R6J4-C8YY].

redistricting commission; and the allowance of election day voter registration and no-reason absentee ballot voting.<sup>63</sup> As the subject matter of these amendments indicates, the constitutional amendment initiative process is a significant and integral part of Michigan's election law framework, which citizens frequently use to implement policies of societal importance.<sup>64</sup> The Board of State Canvassers plays a substantial role in carrying out the petition process to place a proposal on the ballot.<sup>65</sup> The Board's central role, while necessary for the proper functioning of this direct democracy tool, comes with the potential for abuse.<sup>66</sup>

*B. Michigan's Framework for Constitutional Amendment by Petition and Vote of Electors*

*1. Constitutional Requirements*

Article XII, section 2 of Michigan's 1963 Constitution authorizes the proposal of constitutional amendments via petition initiative.<sup>67</sup> The Constitution itself specifies the number of registered voter signatures a given petition is required to gain in order for the proposal to be eligible for placement on the ballot.<sup>68</sup> Moreover, the Constitution specifies that, for placement on the ballot, the petition must have the requisite number of signatures and be filed with "the person authorized by law" at least 120 days before said election.<sup>69</sup> The Constitution leaves it to the legislature to define who "the person authorized by law" is, but further dictates that such person has until 60 days prior to the election to make an official determination as to the validity and sufficiency of the signatures.<sup>70</sup> If "the person authorized by law" determines that the petition meets the

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63. *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, *supra* note 44, at 2–6.

64. *Id.*

65. *See generally* MICH. COMP. LAWS § 168.476 (1954) (amended 2005); MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

66. *See* MICH. COMP. LAWS § 168.477 (1954) (amended 2018) (directing the board to "make an official declaration of the sufficiency or insufficiency of a petition"). The Board frequently refuses to certify despite having a clear legal duty to do so. *E.g.*, *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 979 N.W.2d 188 (2022).

67. MICH. CONST. art. XII, § 2.

68. *Id.* (stating the Constitution sets the number of necessary signatures equal to "at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected.").

69. *Id.*

70. *Id.*



constitutional and statutory requirements, the proposed amendment “shall be submitted to the electors at the next general election.”<sup>71</sup>

The ballot itself is not required to contain the entire proposed amendment but must include a “true and impartial” statement—in less than 100 words—of the purpose of the proposed amendment.<sup>72</sup> Additionally, the proposed amendment, along with “any existing constitutional provisions that would be altered or abrogated thereby,” must be published in full to be placed at each polling place and distributed to news media.<sup>73</sup> If the proposed amendment garners a majority of votes, it becomes a part of the Constitution forty-five days after election day.<sup>74</sup>

Beyond implementing this general framework and dictating the minimum number of signatures a petition must obtain, the Constitution tasks the legislature with prescribing the form and circulation process of the petition and the remaining details of the ballot initiative process.<sup>75</sup>

## 2. Statutory Requirements & The Board of State Canvassers' Role

Running alongside the constitutional requirements for constitutional amendment ballot initiatives exists a detailed statutory framework that specifies the requirements a petition must meet with regard to form, content, and circulation procedures.<sup>76</sup> The statutory requirements regarding the format of the petition are particularly comprehensive and touch on everything from the size of the sheet on which the petition is printed<sup>77</sup> to the type-size and font of the words of the proposal.<sup>78</sup> The statutory framework also specifies requirements for circulation aimed at protecting the authenticity of signatures.<sup>79</sup> Moreover, the provisions further require the petition itself to carry various statements, including a

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See generally* MICH. CONST. art. XII, § 2 (“[A]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.”).

76. *See generally* MICH. COMP. LAWS § 168.471 *et seq.*

77. MICH. COMP. LAWS § 168.482(1) (1954) (amended 2018).

78. *Id.* § 168.482(3).

79. For example, any signature gained more than 180 days before the petition sponsor files the petition with the Secretary of State post-circulation will not be counted. MICH. COMP. LAWS § 168.472a (1954) (amended 2015). Additionally, it is a misdemeanor to sign a petition for another or to make a false statement on a certificate in a petition and a felony to sign a petition with multiple names. MICH. COMP. LAWS § 168.482e (1954) (amended 2018).

petition summary;<sup>80</sup> a circulator compliance statement;<sup>81</sup> a republication of any existing constitutional provision that the proposed amendment would alter or abrogate;<sup>82</sup> an identification of the petition sponsor and type;<sup>83</sup> a warning to petition signers;<sup>84</sup> and an identification of the county, city, or township of circulation.<sup>85</sup> Non-compliance with these requirements would preclude a given proposal from reaching the ballot even if the petition gained the requisite number of signatures.<sup>86</sup>

Beyond dictating what a petition must look like and what substantive information it must contain, the statutory framework also details the petition process from start to finish and empowers certain state authorities to act “as the person authorized by law” within the framework established by article XII section 2.<sup>87</sup> The statutory provisions delegate authority over the initiative petition process to two key state actors: the Secretary of State and the Board of State Canvassers.<sup>88</sup>

A petition sponsor seeking to place a proposal on an upcoming ballot must file the petition with the Secretary of State prior to circulating the petition.<sup>89</sup> After circulation, constitutional amendment initiative petitions must be filed with the Secretary of State at least 120 days before election day.<sup>90</sup> Upon receipt of the filing, the Secretary of State must immediately

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80. MICH. COMP. LAWS § 168.482(3) (1954) (amended 2018).

81. *Id.* § 168.482(8).

82. *Id.* § 168.482(3).

83. MICH. COMP. LAWS § 169.247 (1976); MICH. COMP. LAWS § 168.483(a) (1954) (amended 2012).

84. MICH. COMP. LAWS § 168.482(5) (1954) (amended 2018).

85. Op. Att’y Gen. No. 7310 (May 22, 2019).

86. *See* *Stand Up for Democracy v. Sec’y of State*, 492 Mich. 588, 594, 822 N.W.2d 159, 161 (2012) (holding that a petition must comply with all mandatory statutory provisions that pertain to a petition’s requirements regarding form).

87. Recall that article XII section 2 did not name a specific state actor responsible for receiving filed petitions or making determinations as to signature sufficiency. Instead, the language routinely refers to “the person authorized by law,” leaving the decision as to who that person is to the Legislature. MICH. CONST. art. XII, § 2.

88. *See, e.g.*, MICH. COMP. LAWS § 168.483(a) (1954) (amended 2012); MICH. COMP. LAWS § 168.476(1) (1954) (amended 2005). The Board of State Canvassers is comprised of four members “appointed by the Governor” and approved by the Senate. The four members consist of two selected from each political party receiving the greatest number of votes in the last election for Secretary of State. The members serve staggered, four-year terms, and their duties include “canvassing and certifying statewide elections,” “conducting recounts for state level offices,” “canvassing nominating petitions filed with the Secretary of State,” canvassing state level ballot proposal petitions,” assigning ballot designations, “adopting ballot language for statewide ballot proposals,” and “approving electronic voting systems for use in the state.” *Board of State Canvassers*, MICHIGAN DEP’T OF STATE, <https://www.michigan.gov/sos/elections/bsc> [<https://perma.cc/QCS2-FFFN>].

89. MICH. COMP. LAWS § 168.483(a) (1954) (amended 2012).

90. MICH. COMP. LAWS § 168.471 (1954) (amended 2018).

notify the Board of State Canvassers.<sup>91</sup> The statutory framework ultimately tasks the Board of State Canvassers with ensuring that the petitions have been signed by the requisite number of registered, qualified voters.<sup>92</sup> The Board has until two months before the election to make an official determination regarding the sufficiency or insufficiency of a petition to amend the Constitution.<sup>93</sup>

Internally, the Board of State Canvassers uses a random sampling process to determine whether a given petition gained enough valid signatures to warrant certification.<sup>94</sup> Copies of signatures selected for random sampling are made available to the public for purchase, and members of the general public can challenge a particular signature.<sup>95</sup> Additionally, challengers may allege other defects in the petition, such as failure to comply with the form specified by statute.<sup>96</sup>

The statutory framework also empowers the Board of State Canvassers to hold hearings “upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petition.”<sup>97</sup> If the Board of State Canvassers concludes that the petition is sufficient, the proposed amendment is placed on the ballot at the next statewide general election.<sup>98</sup> If approved by a majority of voters, the proposed constitutional amendment goes into effect 45 days following the date of the election at which it was approved.<sup>99</sup>

### *C. Board Refusal to Certify and the Michigan Supreme Court’s use of Mandamus*

#### *1. What is Mandamus, and When is it Used?*

Despite the statutory framework clearly specifying the requirements a petition must meet, the Board of State Canvassers often deadlocks—frequently splitting two and two along party lines—when making its final

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91. MICH. COMP. LAWS § 168.475(1) (1954) (amended 2022).

92. MICH. COMP. LAWS § 168.476(1) (1954) (amended 2005).

93. MICH. COMP. LAWS § 168.477 (1954) (amended 2005).

94. MICH. SEC’Y OF STATE, STATE DEP’T, SPONSORING A STATEWIDE INITIATIVE, REFERENDUM, OR CONSTITUTIONAL AMENDMENT PETITION (2022), [https://www.michigan.gov/-/media/Project/Websites/sos/08delrio/Initiative\\_and\\_Referendum\\_Petition\\_Instructions\\_201920\\_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca](https://www.michigan.gov/-/media/Project/Websites/sos/08delrio/Initiative_and_Referendum_Petition_Instructions_201920_061119.pdf?rev=5c7c3df8efea414a9fc366944e4e0cca) [https://perma.cc/PA3M-9QWM].

95. *Id.* Challengers must identify each challenged signature and explain the basis of their challenge. *Id.*

96. *Id.*

97. MICH. COMP. LAWS § 168.476(2) (1954) (amended 2005).

98. MICH. CONST. art. XII, § 2.

99. *Id.*

sufficiency determination.<sup>100</sup> When this happens, the proposal fails certification for placement on the ballot.<sup>101</sup> Michigan's election law framework provides citizens with an opportunity to challenge this outcome by petitioning Michigan's Supreme Court for a writ of mandamus.<sup>102</sup> In granting a writ of mandamus, the court orders the Board to certify the petition and the Secretary of State to place the proposal on the ballot.<sup>103</sup> To obtain a writ of mandamus, the petition sponsor—or any other aggrieved individual acting as the plaintiff—must show that they have a “clear legal right” to certification, that the Board has a clear legal duty to certify, that certification is ministerial in nature, and that there is “no other adequate or legal equitable remedy” available.<sup>104</sup>

## 2. Significant Instances of Mandamus Use

Instances in which plaintiffs have sought mandamus relief due to the Board's refusal to certify can be generally grouped into two major categories: challenges to the form of the petition, and challenges to the content of the petition.<sup>105</sup>

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100. Given the composition of the Board of State Canvassers—4 individuals consisting of 2 democrats and 2 republicans—it is common for the Board members to split along party lines as to certification. *E.g.*, *Reprod. Freedom for All v. Bd. of State Canvassers*, 510 Mich. 894, 978 N.W.2d 854 (2022). *See also* CITIZENS RSCH. COUNCIL OF MICH., REPORT NO. 386, REFORM OF MICHIGAN'S BALLOT QUESTION PROCESS 53 (Jan. 2014) (detailing how the Board of State Canvassers deadlocked on a Tabaco Settlement Funding constitutional initiative petition in 2003 based on alleged republication defects, and the Court's subsequent order to certify, and detailing the Board of State Canvassers deadlock along party lines as to certification of signatures on a referendum petition involving concealed weapons permits in 1999). *See also, id.* at 55 (detailing the Board of State Canvassers deadlock along party lines with regards to certification of a 2012 referendum regarding Michigan emergency manager law).

101. *E.g.*, *Reprod. Freedom for All*, 510 Mich. at 900, 978 N.W.2d at 860 (Zahra, J., dissenting).

102. MICH. COMP. LAWS § 168.479(1) (1954) (amended 2018) Specifically, MICH. COMP. LAWS § 169.479(1) allows for “any person who feels aggrieved by any determination made by the board of state canvassers” to “have the determination reviewed by mandamus or other appropriate remedy in the supreme court.” *Id.*

103. *See, e.g.*, *Reprod. Freedom for All*, 510 Mich. at 900, 978 N.W.2d at 860.

104. *Citizens for Prot. of Marriage v. Bd. of State Canvassers*, 263 Mich. App. 487, 492, 688 N.W.2d 538, 541 (2004).

105. Challenges to the form of petition generally allege a defect with regards to one of the many formatting requirements specified in MCL § 168.482. MICH. COMP. LAWS § 168.482 (1954) (amended 2018). *See, e.g.*, *Stand Up for Democracy v. Sec'y of State*, 492 Mich. 588, 593–94, 822 N.W.2d 159, 160 (2012). Challenges to the content of the petition generally allege that the content of the petition fails to include an existing constitutional provision that would be “altered or abrogated” by the proposed amendment. *See, e.g.*, *Protect Our Jobs v. Bd. of State Canvassers*, 492 Mich. 763, 777, 822 N.W.2d 534, 540 (2012).

Mandamus litigation involving challenges to the form of a given petition frequently turns on whether the petition complies with type-size or other formatting requirements.<sup>106</sup> For example, in *Stand up for Democracy v. Secretary of State*,<sup>107</sup> the Michigan Supreme Court granted a writ of mandamus for the plaintiff after determining the petition complied with the type-size requirement of MCL 168.482(2).<sup>108</sup> The intervening defendant, Citizens for Fiscal Responsibility, challenged the sufficiency of the petition.<sup>109</sup> They argued that the petition did not meet the 14-point type-size requirement because some of the individual letters measured smaller than 14-points.<sup>110</sup> The court found that the statute requires the overall “type”, and not the individual “letters”, of the petition heading to measure 14 points.<sup>111</sup> Finding that the petition met this requirement, the court ordered the Board to certify the proposal.<sup>112</sup>

In contrast to the mandamus cases based on challenges to the form of a given petition, resolution of mandamus cases resulting from content-based challenges to petitions are not as quintessentially fact-based.<sup>113</sup> For instance, republication challenges frequently result in the Board’s refusal to certify.<sup>114</sup> Those challenging under this rationale argue that the petition failed to comply with the statutory and constitutional requirement that any petition for a proposal which would alter or abrogate an existing constitutional provision republish the provision or provisions that would

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106. See, e.g., *Reprod. Freedom for All*, 510 Mich. at 894–95, 978 N.W.2d at 855 (holding that, despite the alleged lack of spacing between certain words in the proposed amendment, the petition complied with the statutory requirements of MCL 168.482(3) and that the Board had a clear legal duty to certify the petition).

107. *Stand Up for Democracy*, 492 Mich. at 593–95, 822 N.W.2d at 160–62.

108. MICH. COMP. LAWS § 168.482(2) (1954) (amended 2018); *Stand Up for Democracy*, 492 Mich. at 593–95, 822 N.W.2d at 160–62 (2012).

109. *Stand Up for Democracy*, 492 Mich. at 593–95, 822 N.W.2d at 160–62 (2012).

110. *Id.*

111. *Id.* at 611–12, 822 N.W.2d at 170. The Court dispelled with the challenger’s argument that each individual letter must meet the type-size requirement, finding instead that the statutes require only that the overall type meet the size specified. The Court based its reasoning on the fact that the statutes do not demand all required text to be in complete capital letters, and hence “necessarily contemplates that letters in the required type size may have different heights, since a lowercase ‘x’ has a different height than an uppercase ‘E.’” *Id.* As such, merely because some of the lower-case letters individually do not meet the 14-point type required, does not mean the text as a whole fails to meet the demands of the statute. *Id.*

112. *Id.* at 618–19, 822 N.W.2d at 174.

113. Content-based republication challenges typically require the Court to engage in legal analysis to determine if the content of the proposal would “alter or abrogate” an existing constitutional provision. See, e.g., *Protect Our Jobs v. Bd. of State Canvassers*, 492 Mich. 763, 778, 822 N.W.2d 534, 540 (2012).

114. E.g., *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 979 N.W.2d 188 (2022). See also *Protect Our Jobs*, 492 Mich. 763, 822 N.W.2d 534.

be affected.<sup>115</sup> The two Board members who refused to certify Promote the Vote's Prop 2 did so because of this alleged defect.<sup>116</sup>

In *Protect our Jobs v. Board of State Canvassers*,<sup>117</sup> the Michigan Supreme Court considered four cases concerning the “alter or abrogate” republication requirement.<sup>118</sup> The court reiterated that an existing constitutional provision is only altered when the amendment changes the literal phrasing of that provision by adding to it, deleting from it, or otherwise rewording it.<sup>119</sup> Moreover, the court clarified that an amendment only abrogates an existing constitutional provision “when it renders that provision wholly inoperative.”<sup>120</sup>

In *Protect our Jobs*, the court concluded that none of the proposals at issue altered an existing provision—because no amendment proposal sought to change the phrasing of an existing constitutional provision—but did find that one of the four abrogated an existing provision.<sup>121</sup> That ballot proposal sought to authorize the construction of eight new casinos and included language that required the state of Michigan to grant each casino a liquor license.<sup>122</sup> The court found that this language rendered an existing constitutional provision granting the Liquor Control Commission complete control over state “alcoholic beverage traffic”<sup>123</sup> completely inoperative.<sup>124</sup> The court denied mandamus relief to proponents of the casino proposal because the related petition failed to republish the existing constitutional provision that the proposal would abrogate, thus failing to alert voters of the proposal's impact.<sup>125</sup>

The Board of State Canvassers has also refused to certify a petition for other content-based reasons unrelated to the “alter or abrogate” requirement.<sup>126</sup> For example, in *Citizens for Protection of Marriage v. Board of State Canvassers*,<sup>127</sup> the Board refused to certify a proposal defining marriage as between one man and woman.<sup>128</sup> The Board was

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115. MICH. COMP. LAWS § 168.482(3) (1954) (amended 2018). See, e.g., *Promote the Vote 2022*, 510 Mich. 884, 979 N.W.2d 188.

116. *Id.*

117. *Protect Our Jobs*, 492 Mich. 763, 822 N.W.2d 534.

118. *Id.* at 772–73, 822 N.W.2d at 537.

119. *Id.* at 773, 822 N.W.2d at 537.

120. *Id.*

121. *Id.*, 822 N.W.2d at 537–38.

122. *Id.*, 822 N.W.2d at 538.

123. MICH. CONST. art. IV, § 40.

124. *Protect Our Jobs*, 492 Mich. at 773, 822 N.W.2d at 538.

125. *Id.* at 791, 822 N.W.2d at 547.

126. See, e.g., *Citizens for Prot. of Marriage v. Bd. of State Canvassers*, 263 Mich. App. 487, 489, 688 N.W.2d 538, 540 (2004).

127. *Id.*

128. *Id.*

concerned that the proposal description contained in the petition failed to alert electors that the amendment could potentially be interpreted by a court to prohibit recognition of domestic partnerships or bar health insurers from providing plans with benefits to unmarried couples.<sup>129</sup> The Michigan Court of Appeals concluded that the Board erred in considering the merits of the proposal and ordered the Board to certify the petition, finding it had a clear legal duty to do so.<sup>130</sup> In so concluding, the court stated that the Board's role is limited "to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient signatures," indicating that Board consideration of challenges such as this may be outside the purview of its authority.<sup>131</sup>

Today, the Board of State Canvassers continues to refuse to certify on both form and content grounds with frequency, often as a result of the Board deadlocking along party lines.<sup>132</sup> In her concurring opinion in *Reproductive Freedom for All v. Board of State Canvassers*, Chief Justice McCormack called attention to what she believed were improper motives behind the decisions of the two Board members who refused to certify.<sup>133</sup> Chief Justice McCormack noted that the Board's refusal to certify rested on alleged issues with spacing that purportedly rendered the proposal confusing, yet the individuals who initiated this challenge—with whom the two Board members that refused to certify agreed—failed to produce "a single signer" who claimed to be confused by the "limited-spacing."<sup>134</sup> This led Chief Justice McCormack to suggest that the two Board members who refused to certify did so not out of concern that voters were genuinely confused, but rather because they personally did not want the question to reach the voting population.<sup>135</sup> This observation coincides with the fact that the Board deadlocked along party lines, with the two

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129. *Id.* at 491, 688 N.W.2d at 541.

130. *Id.* at 492–93, 688 N.W.2d at 541–42.

131. *Id.* at 492, 688 N.W.2d at 541–42.

132. *See, e.g.*, *Reprod. Freedom for All v. Bd. of State Canvassers*, 510 Mich. 894, 895, 978 N.W.2d 854, 855 (2022) (ordering certification despite alleged form issues); *see also* *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 979 N.W.2d 188 (2022) (ordering certification despite alleged content issues).

133. *Reprod. Freedom for All*, 510 Mich. at 896, 978 N.W.2d at 856 (McCormack, C.J., concurring).

134. *Id.*, 978 N.W.2d at 855.

135. *Id.*, 978 N.W.2d at 856 ("They would disenfranchise millions of Michiganders not because they believe the many thousands of Michiganders who signed the proposal were confused by it, but because they think they have identified a technicality that allows them to do so, a game of gotcha gone very bad.").

Republican members constituting the block that refused to certify Prop 3.<sup>136</sup>

Further exemplifying what Chief Justice McCormack termed “evidence of the weakened state of our polity,”<sup>137</sup> the Board of State Canvassers deadlocked on another 2022 ballot proposal, also along party lines, on the very same day.<sup>138</sup> That proposal, sponsored by the citizens’ group Promote the Vote, created a constitutional amendment that, if enacted, would provide voters with increased access to absentee ballots and early voting, among other measures designed to increase election accessibility.<sup>139</sup> The Board again deadlocked, with the two Republican members alleging that the petition sponsors failed to include all the existing constitutional provisions that would be abrogated by the proposal.<sup>140</sup> The court disagreed, and ordered certification after finding the Board had a clear legal duty to certify the proposal.<sup>141</sup> This proposal, coined “Prop 2,” also soared to victory on election day, with 60% of individuals voting on the question voting in its favor.<sup>142</sup>

In her concurring opinion in *Promote the Vote 2022 v. Board of State Canvassers*, Chief Justice McCormack again called attention to potential improper motives behind the Board’s refusal to certify,<sup>143</sup> and also raised an important legal question: whether the Board of State Canvassers’ even has the authority to entertain, and subsequently resolve, the type of “alter or abrogate” challenge that led the two Board members to deny certification of Prop 2.<sup>144</sup> In a separate concurring opinion, Justice Welch raised the same question, dubbing the Board’s authority in this area

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136. See Floody, *supra* note 22.

137. *Promote the Vote 2022 Bd. of State Canvassers*, 510 Mich. 884, 885, 979 N.W.2d 188, 189 (2022) (McCormack, C.J., concurring).

138. See generally *id.*; see also Floody, *supra* note 22.

139. *Michigan Proposal 2, Voting Policies in Constitutional Amendments (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Michigan\\_Proposal\\_2\\_Voting\\_Policies\\_in\\_Constitution\\_Amendment\\_\(2022\)](https://ballotpedia.org/Michigan_Proposal_2_Voting_Policies_in_Constitution_Amendment_(2022)) [<https://perma.cc/S3TY-89N4>].

140. *Promote the Vote 2022*, 510 Mich. at 884, 979 N.W.2d at 188 (citing MICH. CONST. art. XII, § 2; MICH. COMP. LAWS § 168.482 (1954) (amended 2018)).

141. *Id.*

142. See *2022 Michigan Election Results*, *supra* note 18.

143. *Promote the Vote 2022*, 510 Mich. at 884, 979 N.W.2d at 189 (McCormack, C.J., concurring) (noting that the Board’s failure to certify the petition, given that the Board did not allege an insufficient number of signatures nor a failure to comply with unambiguous statutory requirements, “seems to be disappointing evidence of the weakened state of our polity.”).

144. *Id.* 510 Mich. 884, n.1, 979 N.W.2d 188, n.1 (McCormack, C.J., concurring) (noting that despite a statement to the contrary in *Stand up for Democracy v. Sec’y of State*, 492 Mich. 588, 618, 822 N.W.2d 159 (2012), Michigan’s election law framework does not “explicitly authorize the Board to make determinations about the ‘content’ of the petition”).



“debatable.”<sup>145</sup> As the justices point out, while certain provisions of Michigan’s Constitution and parallel statutory election framework vest the Board of State Canvassers with power to determine the sufficiency of a petition, these provisions focus on canvassing the petition for the requisite number of signatures and do not explicitly authorize the Board to make determinations about the content of a petition.<sup>146</sup>

### III. ANALYSIS

#### A. Statutory Delegation of Authority

The statutory and constitutional election framework makes clear that there are both form and content petition requirements.<sup>147</sup> Moreover, the statutory framework clearly delegates to the Board of State Canvassers substantial authority to approve or reject a petition for placement on the ballot.<sup>148</sup> Significantly, however—and despite indications by the Michigan Supreme Court to the contrary—the Board’s statutorily delegated authority does not explicitly include the ability to entertain and resolve content-based republication challenges.<sup>149</sup>

In *Stand up for Democracy v. Secretary of State*, a mandamus case resulting from a challenge regarding petition form, the court stated that the Board of State Canvassers’ duty “is limited to determining the sufficiency of a petition’s form and content and whether there are sufficient signatures to warrant certification.”<sup>150</sup> In support of this statement, Justice Kelly cited two provisions of Michigan’s election law framework that delegates authority over petitions to the Board of State Canvassers: MCL 168.476

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145. *Id.* at 888, 979 N.W.2d. at 190, n.4 (Welch, J., concurring) (“But while this Court’s authority to resolve legal disputes concerning alleged republication defects is clear, the scope of the Board’s authority to withhold certification because of an alleged republication defect is debatable”).

146. *Id.* (Welch, J., concurring) (citing MICH. CONST. art. XII, § 2; MICH. COMP. LAWS § 148.476 (1954) (amended 2018)).

147. *See* MICH. COMP. LAWS § 168.482 (1954) (amended 2018).

148. *See* MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

149. In *Stand Up for Democracy v. Secretary of State*, the lead opinion stated that “[t]he board’s duty with respect to referendum petitions is limited to determining the sufficiency of a petition’s form and content and whether there are sufficient signatures to warrant certification,” however the statutes cited in support of this proposition only address the Board’s ability to approve the “form” and “sufficiency” of the petition. *Stand Up for Democracy v. Sec’y of State*, 492 Mich. 588, 618 n.58, 822 N.W.2d 159, 174 n.58 (2012) (citing MICH. COMP. LAWS § 168.476 (1954) (amended 2018); MICH. COMP. LAWS § 168.477 (1954) (amended 2018)).

150. *Id.*

and MCL 168.477.<sup>151</sup> As other justices noted, however, the text of these statutes do not explicitly authorize the Board to consider the substance or content of a petition but rather focus on the Board's duty to ensure that the petition meets statutory requirements as to form and to canvass petitions for the requisite number of valid signatures.<sup>152</sup>

*1. MCL 168.476*

The first statute cited by Justice Kelly directs the Board, upon notice that the petition has been filed with the Secretary of State, to “canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.”<sup>153</sup> The statute also dictates in rather great detail the method the Board must use to accomplish this specific task.<sup>154</sup> Notably, subsection one of this provision only authorizes the board to investigate a petition to determine whether it has the required number of valid registered voter signatures.<sup>155</sup>

While subsection one provides the ultimate goal of the Board's investigation, subsection two grants the Board the ability to hold hearings to facilitate this process.<sup>156</sup> Subsection two does not task the Board with any additional investigative purposes, but merely allows the Board to hold hearings and collect evidence to aid it in accomplishing the goal of investigations articulated in subsection one: “to ascertain if the petitions have been signed by the requisite number of qualified and registered electors.”<sup>157</sup> Despite this clearly defined investigative purpose, Board

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151. *Id.*; MICH. COMP. LAWS § 168.476 (1954) (amended 2018); MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

152. *See* *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 885, 979 N.W.2d 188, 189 (2022) (McCormack, C.J., concurring); *Id.* at 190 (Welch, J., concurring). *See also*, *Reprod. Freedom for All v. Bd. of State Canvassers*, 510 Mich. 894, 895 n.1, 978 N.W.2d 854, 855 n.1 (2022) (McCormack, C.J., concurring).

153. *Stand Up for Democracy*, 492 Mich. at 618 n.58, 822 N.W.2d at 174 n.58; MICH. COMP. LAWS § 168.476(1) (1954) (amended 2018).

154. *Id.* (directing the Board to use the “qualified voter file” to verify “the registration of signers and the genuineness of signatures on petition” and providing for a rebuttable presumption of validity or invalidity depending on whether the qualified voter file indicates the signor was registered on the date of signing. The statute permits the Board to “cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which the petitions were circulated.”).

155. *Id.*

156. MICH. COMP. LAWS § 168.476(2) (1954) (amended 2018).

157. *Id.* § 168.476 (1954) (amended 2018). This understanding is confirmed by other language in the provision relating the investigatory powers of the Board to the specific task of canvassing the petitions: “the Board may also adjourn from time to time awaiting receipt of returns from investigations . . . but shall complete the canvass at least 2 months before the election at which the proposal is to be submitted.” This language indicates that Board

refusal to certify a petition based on republication challenges flows from the Board entertaining and conducting investigations of alter or abrogate complaints.<sup>158</sup> While the Board has authority to hold hearings under MCL 168.476(2), the purpose of those hearings is to hear complaints regarding the validity of specific signatures, not to investigate the legal ramifications of the content of the proposal.<sup>159</sup>

## 2. MCL 168.477

The second statute cited by Justice Kelly directs the Board to “make an official declaration of the sufficiency or insufficiency of a petition” at least two months before the relevant election.<sup>160</sup> The provision empowers the Board to determine the “sufficiency” of a petition but does not state what factors the Board may consider in doing so.<sup>161</sup> Language from an amendment to this statute, however, sheds light on the Legislature’s understanding of the Board’s sufficiency determination.<sup>162</sup>

In 2018, the Michigan Legislature amended MCL 168.477, imposing a geographical distribution requirement under which not more than 15% of petition signatures could come from a single congressional district.<sup>163</sup> The Michigan Supreme Court ultimately found the amendment unconstitutional in *League of Women Voters of Michigan v. Secretary of State*.<sup>164</sup> Still, as enacted, the amendment barred the Board of State Canvassers from “count[ing] toward the sufficiency of a petition” any valid signature of a registered voter if the geographic distribution cap for that voter’s congressional district had already been reached.<sup>165</sup> The specific language utilized—prohibiting the Board from “count[ing]”

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investigations are for the purpose of completing the canvass, and the statute itself defines the goal of the “canvass” as determining whether “the petitions have been signed by the requisite number of qualified and registered electors.” *Id.*

158. *E.g.*, *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 979 N.W.2d 188 (2022).

159. MICH. COMP. LAWS § 168.476 (1954) (amended 2018). The Secretary of State’s initiative petition instructions, published to guide citizens through the process, also indicate a lack of Board authority to entertain content-based challenges. *See* MICH. SEC’Y OF STATE, *supra* note 94, at 12 (specifying challenge procedures for challenges to specific, individual signatures and the form of the petition, but notably not for challenges to the content of a petition).

160. *Stand Up for Democracy v. Sec’y of State*, 492 Mich. 588, 618 n.58, 822 N.W.2d 159, 174 n.58 (2012) (citing MICH. COMP. LAWS § 168.477 (1954) (amended 2018)).

161. MICH. COMP. LAWS § 168.477(1) (1954) (amended 2018).

162. *Id.*

163. *Id.*

164. *League of Women Voters of Mich. v. Sec’y of State*, 506 Mich. 561, 588, 957 N.W.2d 731, 745 (2020).

165. MICH. COMP. LAWS § 168.477(1) (1954) (amended 2018).

certain signatures “toward the sufficiency of a petition”—suggests that the legislature intended “sufficiency” to be a threshold reached by attaining a certain number of registered voters’ valid signatures.<sup>166</sup>

*3. Does the Court’s Prior Adjudication of Litigation Resulting from the Board’s “Alter or Abrogate” Determination Implicitly Recognize Board Power in This Area?*

As Chief Justice McCormack noted, neither of the statutes explicitly authorize the Board to make determinations about the “content” of the petition, despite the lead opinion in *Stand Up for Democracy* stating otherwise.<sup>167</sup> Justice Zahra, who authored a dissenting opinion in *Promote the Vote 2022*, asserted that Chief Justice McCormack was mistaken to question Board authority to entertain and resolve republication challenges.<sup>168</sup> In support of this statement, however, Justice Zahra merely cited to cases in which the Michigan Supreme Court has adjudicated “alter or abrogate” challenges.<sup>169</sup> His argument was that the court, by adjudicating mandamus cases resulting from Board resolution of an alter or abrogate challenge, implicitly recognizes the power of the Board to make those determinations.<sup>170</sup> It is true that in some cases—like with the casino license amendment, for example—the court has agreed with the alter or abrogate determination made by the Board, and this determination could be seen as recognizing the Board’s power in that area.<sup>171</sup> Yet in those cases, the question before the court was not whether the Board had the power to entertain republication challenges, but whether the Board had a clear legal duty to certify the petitions despite the alleged republication

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166. *Id. Count*, MERRIMAN-WEBSTER, <https://www.merriam-webster.com/dictionary/count> [<https://perma.cc/T2PQ-NNM5>] (indicating that “to count” means to include in a tallying or reckoning).

167. *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 884–85, 979 N.W.2d 188, 188–89 (2022) (McCormack, C.J., concurring). *See also* MICH. COMP. LAWS § 168.476 (1954) (amended 2018); MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

168. *Promote the Vote 2022*, 510 Mich. at 891 n.16, 979 N.W.2d at 194, n.16 (Zahra, J. dissenting).

169. *Id.* (citing *Citizens Protecting Michigan’s Constitution v. Secretary of State*, 503 Mich 42, 921 N.W.2d 247 (2018); *Protect Our Jobs v. Bd of State Canvassers*, 492 Mich 763, 822 N.W.2d 534 (2012); *Mich Alliance for Prosperity v. Bd of State Canvassers*, 492 Mich 763, 822 N.W.2d 534 (2012); *Citizens for More Mich Jobs v. Secretary of State*, 492 Mich 763, 822 N.W.2d 534 (2012); *The People Should Decide v. Bd of State Canvassers*, 492 Mich 763, 822 N.W.2d 534 (2012)).

170. *Id.* (“[T]he Chief Justice is mistaken and conveniently ignores additional caselaw in which the Court has considered abrogation, i.e., the content of a petition”).

171. *See, e.g., Protect Our Jobs*, 492 Mich at 763, 773–74, 822 N.W.2d 534, 537–38.

defects.<sup>172</sup> The very fact that the court ultimately made the “alter or abrogate” determination in those cases, after plaintiffs felt aggrieved by the Board’s conclusion and sought a writ of mandamus, is irrelevant to the question of whether the Board had the statutory and constitutional authority to make that determination in the first instance.<sup>173</sup>

Aside from the lone statement in *Stand Up for Democracy*—that the Board’s duty includes “determining the sufficiency of a petition’s form and content”<sup>174</sup>—there is scant textual support for Board authority to entertain and resolve republication challenges.<sup>175</sup> The very statutes cited in support of that statement do not explicitly grant the Board authority to entertain “alter or abrogate” challenges.<sup>176</sup> The fact the Board has previously entertained republication challenges does not mean they were acting within the bounds of their authority when the statutes granting the Board its power do not give it such discretion.<sup>177</sup> Even if the statutes are read as authorizing the Board to consider and investigate the content of a petition, this grant of authority is extremely difficult—if not impossible—to reconcile with the long-standing notion that the Board’s duties are “purely ministerial and clerical” in nature.<sup>178</sup>

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172. See, e.g., *id.* at 773, 822 N.W.2d at 537 (“these cases present the issue whether the petitions for each proposal satisfied the requirement under Const 1963, art 12, § 2 and MCL 168.482(3) to republish any existing provisions of the Constitution that the proposed amendment would alter or abrogate”).

173. See, e.g., *id.* In *Protect Our Jobs*, the Court embarked on rigorous legal analysis to determine whether each of the four proposed amendments at issue “altered or abrogated” an existing constitutional provision. *Id.* Each of four ballot proposals were before the Court because the Board of State Canvassers refused to certify each due to republication challenges. *Id.* at 774, 822 N.W.2d at 538. The analysis deployed to resolve the issue did not focus on the Board’s authority, but rather focused on the meaning of “alter” and “abrogate” as established by precedent and analysis of existing constitutional provisions. *Id.* at 780–92, 822 N.W.2d at 542–48.

174. *Stand Up for Democracy v. Sec’y of State*, 492 Mich. 588, 618 n.58, 822 N.W.2d 159, 174 n.58 (2012).

175. See *supra* notes 138–52 and accompanying text.

176. *Id.*

177. See MICH. COMP. LAWS § 168.477 (1954) (amended 2018); see also MICH. COMP. LAWS § 168.476 (1954) (amended 2018).

178. *Reprod. Freedom for All v. Bd. of State Canvassers*, 510 Mich. 894, 895 n.1, 978 N.W.2d 854, 855 n.1 (2022) (McCormack, C.J., concurring) (citing *McQuade v. Furgason*, 91 Mich. 438, 440, 51 N.W. 1073 (1892) (describing canvassing boards’ duties as “purely ministerial and clerical”)).

*B. The State Judiciary—Not the Board of State Canvassers—Should Resolve Inherently Legal Content Challenges*

The Michigan Supreme Court has long regarded the Board of State Canvassers' duties as "purely ministerial and clerical" in nature.<sup>179</sup> Clerical work is marked by the delegation of routine tasks from an authority figure and is often repetitive in nature.<sup>180</sup> Similarly, a ministerial act is an act performed without regard to one's own discretion and judgment but rather in conformity with a prescribed manner.<sup>181</sup>

The Board's authority to canvass petitions for the requisite number of valid signatures via a specified sampling procedure is plainly consistent with the notion that the Board's duties are "purely ministerial and clerical."<sup>182</sup> Yet when the Board of State Canvassers considers content-based republication challenges—in which they attempt to determine whether the proposed constitutional amendment will "alter or abrogate" an existing constitutional provision—the Board necessarily engages in discretionary, judgment-based analysis, completely antithetical to the "ministerial" requirement.<sup>183</sup> Moreover, in exercising this discretion, the

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179. *Id.*; see also *Coll v. City Bd. of Canvassers of Election*, 83 Mich. 367, 370, 47 N.W. 227, 228 (1890); *Roemer v. Bd. of City Canvassers*, 90 Mich. 27, 29, 51 N.W. 267, 268 (1892).

180. *Clerk*, THE FREE DICTIONARY BY FAIRLEX, <https://legal-dictionary.thefreedictionary.com/clerk#:~:text=n.,case%2C%20and%20issues%20routine%20documents> [<https://perma.cc/S2NP-MQD9>]; *What Is Clerical Work?*, LEARN.ORG, [https://learn.org/articles/What\\_is\\_Clerical\\_Work.html](https://learn.org/articles/What_is_Clerical_Work.html) [<https://perma.cc/L7SU-WSUB>]; *Clerical*, DICTIONARY.COM, <https://www.dictionary.com/browse/clerk> [<https://perma.cc/ED9S-DKGW>].

181. *Ministerial Act*, LEGAL INFO. INST. (July 2020) [https://www.law.cornell.edu/wex/ministerial\\_act](https://www.law.cornell.edu/wex/ministerial_act) [<https://perma.cc/4VG6-CEVG>].

182. MICH. COMP. LAWS § 168.476 (1954) (amended 2018) (providing the Board with step-by-step instructions on using the "qualified voter file" to canvass the petition signatures. Authenticating signatories therefore follow a prescribed procedure which involves little to no discretionary thought.).

183. In *Protect Our Jobs v. Bd of State Canvassers*, 492 Mich. 763, 822 N.W.2d 534 (2012), the Michigan Supreme court held that "petition supporters must fully comply with the requirement that the petition republish any existing constitutional provision that the proposed amendment, if adopted, would alter or abrogate." *Id.* at 778, 822 N.W.2d at 540. A determination as to whether an existing provision has been "altered" merely requires determining whether the proposed amendment changes the literal text of an existing provision. *Id.* at 781–82, 822 N.W.2d at 542. Alternatively, a determination as to whether an existing provision is "abrogated" requires determining whether the proposed amendment renders another provision "wholly inoperative." *Id.* at 783, 822 N.W.2d at 543. This task requires analysis of various constitutional provisions, independent judgment regarding probable legal implications, and the ultimate formation of a discretionary conclusion. *Id.* The discretionary nature of the decision is evidenced by the fact that in this very case, Justice Marilyn Kelly's legal analysis led to a different conclusion as to whether

Board winds up adjudicating inherently legal questions properly resolved by a court.<sup>184</sup>

In her *Promote the Vote* concurrence, Justice Welch noted that resolution of an “alter or abrogate” challenge “frequently requires legal analysis and often will not be readily apparent from the face of a petition.”<sup>185</sup> Determining whether a proposed amendment would abrogate an existing constitutional provision involves considering whether it would render an existing provision “wholly inoperative.”<sup>186</sup> This entails considering whether “the proposed amendment would make the existing provision a nullity or if it would be impossible to harmonize the amendment with the existing provision.”<sup>187</sup> The harmonization analysis itself requires careful language analysis of “the provision’s discrete subparts, sentences, clauses, or even, potentially, single words.”<sup>188</sup>

In contrast to the years of legal practice and education necessary to gain a seat on Michigan’s Supreme Court, State Canvassers are not required to have had prior legal education or even limited familiarity with the law.<sup>189</sup> The only requirement for nomination to the Board of State Canvassers is that the individual is a “qualified and registered elector.”<sup>190</sup> To presume that the legislature intended for Board members—who are not required to have *any* familiarity with the substance of Michigan’s Constitution—to engage in rigorous constitutional analysis that may not even be readily apparent from the face of a petition is not only at conflict with the requirement that Board duties be “ministerial and clerical in nature,” but at odds with common sense.<sup>191</sup> As Chief Justice McCormack

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the provision had been rendered “wholly inoperative”. *Id.* at 795–96, 822 N.W.2d at 549–50 (Kelly, J. concurring in part and dissenting in part).

184. *See Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 887, 979 N.W.2d 188, 190 n.4 (2022) (Welch, J. concurring).

185. *Id.*

186. *Protect Our Jobs*, 492 Mich. at 783, 822 N.W.2d at 543.

187. *Id.*

188. *Id.*

189. *Compare* MICH. COMP. LAWS § 168.22c (1954) (amended 1995) (listing qualification for members of the Board of State Canvassers only as being a registered voter), *with* MICH. CONST. art. VI, § 19 (listing qualification for justices of the Michigan Supreme Court as licensed to practice law in the state, admitted to the practice for at least five years, and be under the age of 70 when appointed or elected).

190. MICH. COMP. LAWS § 168.22c (1954) (amended 1995). This minimal requirement is consistent with the notion that Board duties are “purely ministerial and clerical in nature”. *McQuade v. Furgason*, 91 Mich. 438, 440, 51 N.W. 1073 (1892).

191. To demonstrate the complexity of the legal analysis required, consider that even justices, with years of legal education and practice interpreting Michigan’s constitution, sometimes reach differing opinions. In *Protect Our Jobs*, the lead opinion found that the proposed casino amendment, which required the state to grant liquor licenses to the casinos, would abrogate Article 4, section 40 of Michigan’s 1963 Constitution which grants

succinctly noted in her *Promote the Vote* concurrence, “this quintessential legal question is far outside the Board’s legal role (and expertise).”<sup>192</sup>

*C. Board Consideration of Republication Challenges Interferes with Michigan Citizens’ Rights to Direct Democracy*

When the Board entertains substance-based challenges and refuses to certify a proposal on those grounds, it detracts from the original purpose of direct ballot initiatives—to reserve power for the people.<sup>193</sup> Like many other states, Michigan first enshrined the right to constitutional revision via initiative petition amid “the Populist and Progressive ferment of the early 1900s.”<sup>194</sup> Michigan’s 1963 Constitution preserved this right as well as the citizenry’s powers to indirect initiatives and popular referenda processes for legislation.<sup>195</sup> The opening language of Article II, section 9 of Michigan’s Constitution—which deals with the legislative initiative and referenda procedures—reflects how the drafters thought of the direct democracy tools as a reservation of power to the people: “the people reserve to themselves the power to propose laws and to enact and reject law.”<sup>196</sup> This language of reservation is consistent with the overarching purpose of direct democracy tools: to “assure the citizenry of a gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands.”<sup>197</sup>

With this in mind, the Michigan Supreme Court held that “constitutional provisions should be liberally construed.”<sup>198</sup> The court places emphasis on refraining from erecting additional barriers in the already difficult path a citizen must embark upon when seeking to amend

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“complete control” over liquor licenses to the Liquor Control Commission. *Protect Our Jobs*, 492 Mich. at 790, 822 N.W.2d at 547. In dissent, however, Justice Marilyn Kelly reached a different conclusion. *Id.*, at 796, 822 N.W.2d at 550 (Kelly, J., concurring in part and dissenting in part). Justice Kelly interpreted Article 4, section 40 of Michigan’s 1963 Constitution differently than the majority and concluded that the amendment would not render that provision a nullity and that harmonization was possible. *Id.* at 795, 822 N.W.2d at 549. The varied conclusions in this case demonstrate the discretionary, difficult, and legal nature of the issues content-based challenges pose.

192. *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 885, 979 N.W.2d 188, 189 (2022) (McCormack, C.J., concurring).

193. *Kuhn v. Dep’t of Treasury*, 384 Mich. 378, 385, 183 N.W.2d 796, 799 (1971).

194. *Id.* at 385 n.10, 183 N.W.2d at 799 n.10 (citing HUGH ALVIN BONE, *THE INITIATIVE AND THE REFERENDUM 1–2* (1959)).

195. MICH. CONST. art. II, § 9; *id.* art. XII, § 2.

196. MICH. CONST. art. II, § 9.

197. *Kuhn*, 384 Mich. at 385 n.10, 183 N.W.2d at 799 n.10 (quoting John W. Lederle, *The Legislative Article*, in *THE VOTER AND THE MICHIGAN CONSTITUTION IN 1958* 37, 47 (Robert H. Pealey ed., 1984)).

198. *Kuhn*, 384 Mich. at 385, 183 N.W.2d at 799.



the Constitution.<sup>199</sup> As the state actor tasked with facilitating this direct democracy procedure, the Board of State Canvassers should also act consistently with the original purpose of the initiative petition and seek “to facilitate rather than hamper the exercise by the people of these reserved rights.”<sup>200</sup> Yet when the Board deadlocks or refuses to certify on “alter or abrogate” grounds, it runs afoul to this principal by forcing citizens—who, in most cases, have otherwise taken all of the proper steps required to lawfully place a proposal on the ballot—to mount a legal battle to vindicate their direct democracy rights.<sup>201</sup>

#### IV. CONCLUSION

Michigan’s election law framework clearly empowers the Board to make an official declaration as to the sufficiency of a petition.<sup>202</sup> Moreover, the Board is explicitly directed to “canvass the petitions to ascertain if the petitions have been signed by the requisite number” of voters.<sup>203</sup> And while Michigan’s 1963 Constitution and the related statutes certainly impose a republication requirement, no statute explicitly directs the Board to enforce that condition.<sup>204</sup> When the Board assumes that task, and considers substantive challenges to a petition, it often deadlocks, frequently along party lines, and thus fails to certify the proposal, generally resulting in the petition sponsor seeking mandamus relief from the Court.<sup>205</sup> In these instances, two Board members whose political party tends to *disagree* with the substantive policy of the proposal refuse to

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199. *See id.* *See also* *Mothering Just. v. Att’y Gen.*, No. 362271, 2023 WL 444874, at \*5 (Mich. Ct. App. Jan. 26), *appeal granted*, 511 Mich. 994, 991 N.W.2d 198 (2023) (indicating that the point of liberal construction is “to facilitate rather than hamper the exercise by the people of these reserved rights.” (quoting *Newsome v Bd of State Canvassers*, 69 Mich. App. 725, 729, 245 N.W.2d 374 (1976))).

200. *Newsome*, 69 Mich. App. at 729, 245 N.W.2d at 374.

201. *See e.g.*, *Promote the Vote 2022 v. Bd. of State Canvassers*, 510 Mich. 884, 979 N.W.2d 188 (2022) (holding that the Board had a clear legal duty to certify the proposal for placement on the ballot); *Reprod. Freedom for All v. Bd. of State Canvassers*, 510 Mich. 894, 896, 978 N.W.2d 854, 855 (2022) (holding that the Board had a clear legal duty to certify the proposal for placement on the ballot).

202. MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

203. MICH. COMP. LAWS § 168.476 (1954) (amended 2018).

204. MICH. CONST. art. XII, § 2; MICH. COMP. LAWS § 168.482(3) (1954) (amended 2018).

205. *E.g.*, *Promote the Vote 2022*, 510 Mich. 884, 979 N.W.2d 188 (holding that the Board, which had deadlocked along party lines on the certification question, had a clear legal duty to certify the proposal for placement on the ballot); *Protect Our Jobs v. Bd. of State Canvassers*, 492 Mich. 763, 774, 822 N.W.2d 534, 538 (2012) (considering four challenges to Board refusal to certify four petitions, despite each having the requisite number of registered voter signatures). *See also* Johncox, *supra* note 61.

certify, claiming a violation of the “alter or abrogate” requirement, while two Board members whose political party tends to *agree* with the substantive policy of the proposal do not share the same concern.<sup>206</sup> In many cases, the court finds that the proposed amendment would not “alter or abrogate” an existing provision and that the Board had a clear legal duty to certify the petition.<sup>207</sup> Under these circumstances, Board refusal to certify seems more evidentiary of the “weakened state of our polity,” as Chief Justice McCormack put it, and not actually indicative of authentic concerns regarding compliance with the “alter or abrogate” requirement.<sup>208</sup>

When Board members use an “alter or abrogate” challenge as a means to political ends, the Board unnecessarily makes it more difficult, costly, and time consuming for individuals to exercise their direct democracy entitlements.<sup>209</sup> When the Board refuses to certify or deadlocks on this substantive ground, purportedly based on some attempted legal analysis, it places the burden on innocent citizens—who have undertaken immense effort to present a question to the voting population—to engage in a legal dispute against the very state agency meant to “facilitate rather than hamper,”<sup>210</sup> in a “purely ministerial and clerical” way,<sup>211</sup> the exercise of their direct democracy rights. Moreover, even in the instances where a proposal actually does “alter or abrogate” an existing constitutional provision, it is hard to see any advantage to the Board of State Canvassers making this difficult constitutional determination prior to certification. State canvassers lack the legal training needed to make informed content-based decisions and “alter or abrogate” challengers have the courts as a forum to hear their objections.<sup>212</sup>

In a world where the Michigan Board of State Canvassers does not entertain and resolve republication challenges, challengers who believe a certified proposal “alters or abrogates” an existing constitutional provision can seek a writ of mandamus and have the Michigan Supreme Court—a

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206. See, e.g., Johncox, *supra*, note 61.

207. In *Promote the Vote 2022*, 510 Mich. 884, 979 N.W.2d 188, the court found that the Board had a clear legal duty to certify the petition. In *Protect Our Jobs*, 492 Mich. at 792, 822 N.W.2d at 548, the court found a clear legal duty to certify on three of the four challenges under consideration.

208. *Promote the Vote 2022*, 510 Mich. at 885, 979 N.W.2d at 189 (McCormack, C.J., concurring).

209. *Id.* By forcing petition promoters to initiate mandamus litigation in the courts when the Board had a clear legal duty to certify the petition, the Board erects unnecessary obstacles in the path of citizens’ attempting to exercise their direct democracy tools.

210. *Kuhn v. Dep’t of Treasury*, 384 Mich. 378, 385, 183 N.W.2d 796, 799 (1971).

211. *McQuade v. Furgason*, 91 Mich. 438, 440, 51 N.W. 1073 (1892).

212. *Promote the Vote 2022*, 510 Mich. at 885, 979 N.W.2d at 189 (McCormack, C.J., concurring). See also MICH. COMP. LAWS § 600.4401(1) (1961) (amended 1976).

body with the legal training and expertise necessary—perform the quintessentially legal analysis required to resolve such issues.<sup>213</sup> In this way, the Board would be prevented from unnecessarily hindering citizens seeking to exercise their rights to direct democracy by incorrectly refusing to certify an otherwise valid petition.

In sum, when the Board of State Canvassers entertains and resolves content-based republication challenges, it does so without explicit statutory authority,<sup>214</sup> in violation of the longstanding principal that Board duties are “purely ministerial and clerical in nature,”<sup>215</sup> in frustration of the overarching purpose of direct democracy tools as a reservation of power for the people,<sup>216</sup> and often as a means to a political end.<sup>217</sup> The people of Michigan simply deserve better.

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213. *Promote the Vote 2022*, 510 Mich. at 885, 979 N.W.2d at 189 (McCormack, C.J., concurring) (“The challengers have a forum in which to have this objection address: court”) (citing MICH. COMP. LAWS § 600.4401(1) (1961) (amended 1976); MICH. COURT. RULES § 7.230(C)(2) (1985)).

214. See generally MICH. COMP. LAWS § 168.476 (1954) (amended 2018); MICH. COMP. LAWS § 168.477 (1954) (amended 2018).

215. *McQuade*, 91 Mich. at 440, 51 N.W. at 1073 (describing canvassing boards’ duties as “purely ministerial and clerical”).

216. See *Kuhn v. Dep’t of Treasury*, 384 Mich. 378, 385, 183 N.W.2d 796, 799 (1971).

217. See, e.g., *Promote the Vote 2022*, 510 Mich. at 885, 979 N.W.2d at 189 (McCormack, C.J., concurring). See also Floody, *supra* note 22.