STATE OF MICHIGAN
COURT OF CLAIMS

DEBORAH BABB, DETROIT DISABILITY POWER, MICHIGAN ALLIANCE FOR RETIRED AMERICANS, MICHIGAN CLERGY CONNECTS and PRIORITIES USA,

Plaintiffs,

v

DANA NESSEL, in her official capacity as Michigan Attorney General,

Defendant.
_____/

No. 23-000127-MZ

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DEFENDANT ATTORNEY GENERAL DANA NESSEL'S 9/15/23 MOTION TO DISMISS

Defendant Attorney General Dana Nessel moves under MCR 2.116(C)(7), (8) and (10) for the dismissal of Plaintiffs' complaint on the grounds that the claims fail as a matter of law, and in support of her motion states as follows:

1. Plaintiffs, an individual voter and three organizations, have brought suit against the Attorney General to enforce voting rights under article 2, §4(1)(a) of the Michigan Constitution.

2. They allege that MCL 168.931(1)(f) unconstitutionally abridges, burdens or interferes with the fundamental right to vote protected by article 2, § 4(1)(a), and they seek declaratory, injunctive and monetary relief.

3. This Court has jurisdiction under MCL 600.6419(1)(a).

4. The claims of the three organizations must be dismissed because article 2, § 4(1)(a) does not authorize suits by organizations, and thus they fail to state a claim upon which relief may be granted. MCR 2.116(C)(8).

5. Alternatively, the claims of the organizations are barred by the doctrine of collateral estoppel. MCR 2.116(C)(7).

6. The claims of the individual voter Plaintiff must also be dismissed because she fails to plead the existence of an actual controversy necessary for seeking declaratory relief. MCR 2.605. Therefore, she fails to state a claim upon which relief may be granted. MCR 2.116(C)(8).

7. In accord with Court of Claims Local Rule 2.119(A)(2), counsel for Defendant Nessel sought concurrence with her Motion for Summary Disposition on September 14, 2023, and concurrence was denied.

RELIEF REQUESTED

For these reasons and the reasons stated more fully in the accompanying brief, Defendant Attorney General Dana Nessel respectfully requests that this Honorable Court grant her motion

for summary disposition and dismiss plaintiffs' complaint in its entirety and award any other relief the Court determines appropriate under the circumstances.

Respectfully submitted,

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Dated: September 15, 2023

PROOF OF SERVICE

Heather S. Meingast certifies that on September 15, 2023, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

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DEFENDANT ATTORNEY GENERAL DANA NESSEL'S BRIEF IN SUPPORT OF HER 9/15/23 MOTION TO DISMISS

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Dated: September 15, 2023

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

Plaintiffs, an individual voter and four organizations, have sued Attorney General Dana Nessel seeking to challenge the constitutionality of a criminal election statute intended to prevent "vote hauling."[1] See MCL 168.931(1)(f). A constitutional challenge to this statute is not new. In fact, one of the organizational Plaintiffs, Priorities USA, previously sued the Attorney General in federal court to enjoin enforcement of this statute, alleging similar constitutional violations. But the organization ultimately lost on all claims. What is new, however, is the vehicle Plaintiffs are using to hale the Attorney General into court.

In 2022, the people of Michigan amended the Constitution to permit citizens to bring actions for declaratory and injunctive relief to enforce their fundamental right to vote. See Const 1963, art 2, § 4(1)(a) (as amended). Among other governmental and nongovernmental entities, the State and its officers are subject to these citizen suits. The new amendment also provides that these suits are to be brought in circuit court. Plaintiffs filed suit against the Attorney General in Oakland Circuit Court, and the Attorney General transferred the claims to this Court pursuant to the Court of Claims Act, MCL 600.6401, *et seq*.

This Court has jurisdiction to resolve the claims against the Attorney General because the amendment does not confer exclusive jurisdiction on the circuit court to hear citizen claims under § 4(1)(a) against the State. In the absence of such specific language, the Court of Claims Act continues to control where suits may be filed against the State. And Plaintiffs' claims for declaratory, injunctive, and monetary relief against the Attorney General fall squarely within this Court's jurisdiction. MCL 600.6419(1)(a).

[1] See *Priorities USA, et al v Nessel, et al*, 978 F3d 976, 983 (CA 6, 2020) ("Vote-hauling can be a classic form of bribery—paying a voter to 'haul' himself or herself (and maybe immediate or extended family) to the polls to vote.")

With jurisdiction proper in this Court, Plaintiffs' claims against the Attorney General must be dismissed for two reasons.

First, the right to bring suit under the new amendment is conferred only upon a "Michigan citizen or citizens," who may bring suit "on behalf of themselves." Const 1963, art 2, § 4(1)(a). This language precludes suits brought by organizations, even those brought on behalf of members who are Michigan citizens. Accordingly, the claims brought by the four organizational Plaintiffs must be dismissed for this reason. Alternatively, the organizations' claims are barred by collateral estoppel based on the previous federal court decisions.

Second, while the individual voter Plaintiff is a citizen who may bring a claim on behalf of herself for declaratory and injunctive relief, she lacks standing to do so. The amendment uses legal terms that should be given their technical meaning in the law. Here, the amendment's use of the legal term "declaratory . . . relief" must be understood as incorporating legal principles related to requesting such relief. To maintain an action for declaratory relief, a plaintiff must first plead and prove the existence of an actual controversy between the parties. MCR 2.605. But the individual voter Plaintiff fails to do so here. She alleges no facts demonstrating she is imminently, let alone likely, to suffer a future injury as the result of any application of the challenged statute. As a result, her claims must be dismissed.

For these reasons, this Court should grant the Attorney General's motion to dismiss Plaintiffs' complaint in its entirety.

STATEMENT OF FACTS

Prior litigation – Priorities USA, et al v Attorney General Nessel

In 2019, Priorities USA and two other organizations brought suit against Attorney General Nessel in federal district court alleging that MCL 168.931(1)(f) was preempted by federal law, that it was vague and overbroad, that it violated the First Amendment by unduly

burdening the right to vote and infringing upon speech and associational rights, and that it violated equal protection principles. See *Priorities USA, et al v Nessel*, Case No. 19-cv-13341 (ED Mich, 2019). The district court preliminarily enjoined § 931(1)(f), determining that it was likely preempted by federal law. *Priorities USA, et al v Nessel*, *et al*, 487 F Supp 3d 599 (ED Mich, 2020). The U.S. Court of Appeals for the Sixth Circuit stayed the injunction pending appeal, see 978 F3d 976 (CA 6, 2020), and later reversed the injunction, see 860 Fed Appx 419 (CA 6, 2021).

The defendants, now including the Michigan Legislature, the Michigan Republican Party, and the Republican National Committee, subsequently moved for judgment on the pleadings, and the parties later filed cross motions for summary judgment after the close of discovery. *Priorities USA, et al v Nessel, et al*, 628 F Supp 3d 716, 721 (ED Mich, 2022). The district court granted the motions for judgment on the pleadings, concluding that § 931(f) was not unconstitutionally vague and did not unconstitutionally burden speech and associational rights. *Priorities USA*, 628 F Supp 3d at 733–737. Priorities USA did not appeal.

Subsequently, the Michigan Legislature introduced legislation to repeal § 931(1)(f), House Bill 4568, which remains pending.[2]

The people adopt Proposal 22-2 in November 2022

At the November 8, 2022, general election, Michigan voters adopted Proposal 22-2, sponsored by the ballot committee Promote the Vote 2022.[3] The ballot language for Proposal 2 stated:

[2] See legislative history for House Bill 4568, available at Michigan Legislature - House Bill 4568 (2023).

[3] See November 2022 general election results, available at https://mielections.us/election/results/2022GEN_CENR.html.

A proposal to amend the state constitution to add provisions regarding elections.

This proposed constitutional amendment would:

- Recognize fundamental right to vote without harassing conduct;
- Require military or overseas ballots be counted if postmarked by election day;
- Provide voter right to verify identity with photo ID or signed statement;
- Provide voter right to single application to vote absentee in all elections;
- Require state-funded absentee-ballot drop boxes, and postage for absentee applications and ballots;
- Provide that only election officials may conduct post-election audits;
- Require nine days of early in-person voting;
- Allow donations to fund elections, which must be disclosed;
- Require canvass boards certify election results based only on the official records of votes cast.

Should this proposal be adopted? [ ] Yes [ ] No [Ex A.][4]

The amendment became effective in December 2022, see Const 1963, art 12, § 2, amending §§ 4 and 7 of article 2 of the Michigan Constitution. See Const 1963, art 2, §§ 4, 7 (as amended).

Plaintiffs file suit in Oakland Circuit Court

On August 11, 2023, Deborah Babb, Detroit Disability Power, Michigan Alliance for Retired Americans, Michigan Clergy Connects and Priorities USA, filed their complaint in Oakland County Circuit Court against Attorney General Nessel and Oakland County Prosecutor Karen McDonald. Defendant Nessel was served by certified mail on August 18, 2023. On September 13, 2023, Defendant Nessel transferred the claims against her to this Court pursuant to MCL 600.6404(3) and MCR 2.228.

[4] See Board of State Canvassers, August 31, 2022, Meeting Minutes, available at Aug 31 22 BSC Meeting Minutes (michigan.gov).

STANDARD OF REVIEW

Summary disposition is proper under MCR 2.116(C)(8) if the opposing party fails to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71 (2005). "For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Ernsting v Ave Maria College*, 274 Mich App 506, 509 (2007). Nonetheless, "[t]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Kramer v Dearborn Heights*, 197 Mich App 723, 725 (1993).

Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5 (2016).

Summary disposition may be granted under MCR 2.116(7), when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law."

ARGUMENT

I. This Court has jurisdiction to resolve the claims against Attorney General Nessel.

The Court of Claims Act, MCL 600.6401 *et seq*., provides that, "[e]xcept as provided in §§ 6421 and 6440,[5] the jurisdiction of the court of claims, conferred upon it by this chapter, is

[5] MCL 600.6421(1) provides for circuit court jurisdiction over a lawsuit, or part of a lawsuit, "for which there is a right to a trial by jury as otherwise provided by law." MCL 600.6440 divests the

exclusive." MCL 600.6419(1) (emphasis added). Relevant here, the Court of Claims Act confers upon the Court of Claims "exclusive" jurisdiction to "hear and determine any claim or demand, statutory or constitutional, . . . or any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a).[6] The Court of Claims thus generally has exclusive jurisdiction over claims against Attorney General Nessel as a state officer. MCL 600.6419(1)(a), (7).

In their complaint, Plaintiffs invoke article 2, § 4(1)(a) of the Michigan Constitution as providing the jurisdictional basis for bringing suit against the Attorney General in Oakland Circuit Court. (Compl, ¶¶12–16.) That section authorizes citizens to bring suits to enforce their fundamental right to vote:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (a) The fundamental right to vote, including but not limited to the right, once registered, to vote a secret ballot in all elections. No *person* shall: (1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.
>
> Any Michigan citizen or citizens shall have standing to *bring an action for declaratory, injunctive, and/or monetary relief* to enforce the rights created by this part (a) of subsection (4)(1) on behalf of themselves. *Those actions shall be brought in the circuit court for the county in which a plaintiff resides.* [Const 1963, art 2, § 4(1)(a) (emphasis added).]

Subsection 4(1)(a) defines the word "person" to mean:

Court of Claims of jurisdiction over a claim for which the claimant "has an adequate remedy upon [that] claim in the federal courts."

[6] There are certain exceptions not appliable here. See MCL 600.6419(3), (4), (6), MCL 600.6421.

> [A]n individual, association, corporation, joint stock company, labor organization, legal representative, mutual company, partnership, unincorporated organization, the *state* or a political subdivision of the state or an *agency of the state*, or any other legal entity, and includes an *agent* of a person. [Const 1963, art 2, § 4(1)(a) (emphasis added).]

Thus, the State and its' arms are among the many "person[s]" subject to suit under § 4(1)(a). But this new provision of the Constitution does not displace the Court of Claims' exclusive jurisdiction over claims against the State, its agencies, and officers.

In *League of Women Voters of Mich v Secretary of State*, the Court explained the rules for interpreting constitutional provisions:

> In interpreting constitutional provisions, this Court applies two rules of interpretation. "First, the interpretation should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." . . . . Every constitutional provision "must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." Second, the interpretation should consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished." [333 Mich App 1, 52–58 (2020) (citations omitted).]

Here, the language of § 4(1)(a) providing that "actions shall be brought in the circuit court" does not vest that court with exclusive jurisdiction to hear claims under this provision. This interpretation is supported by the courts' construction of similar constitutional language.

Take, for example, article 9, § 32 of the Michigan Constitution—part of the 1978 Headlee Amendment—which provides that "[a]ny taxpayer of the state *shall have standing to bring suit in the Michigan State Court of Appeals* to enforce the provisions of Sections 25 through 31, inclusive, of this Article[.]" Const 1963, art 9, § 32 (emphasis added). Shortly after the amendment, the Court of Appeals analyzed the language of § 32 in *Waterford School Dist v State Board of Education*, 98 Mich App 658 (1980). The court determined the purpose of § 32 was to ease the limitations on taxpayer suits but that the amendment had "only minimal impact

on subject matter jurisdiction." *Waterford*, 98 Mich App at 663. The court concluded the amendment did not confer exclusive jurisdiction over Headlee claims in the Court of Appeals:

> While a single taxpayer is provided standing to bring suit in the Court of Appeals to enforce the provisions of Const 1963, art 9, §§ 25–31, there is no indication that this Court is to have exclusive jurisdiction over all litigation that involves the amendment. Absent a specific grant of exclusivity, we must conclude that where standing is otherwise present, the circuit courts have concurrent jurisdiction over suits based on the Headlee Amendment. [*Id*. at 663–664.]

The court observed that the circuit courts have broad jurisdiction over matters under article 6, § 13 of the Constitution and MCL 600.605, unless "exclusive jurisdiction" is conferred elsewhere by Constitution or statute. But "[s]ince there is no grant of exclusivity [in article 9, § 32], the general provisions of the Constitution and Revised Judicature Act must govern, and subject matter jurisdiction be found to lie in the circuit courts." *Waterford*, 98 Mich App at 664; see also *O'Connell v Dir of Elections*, 316 Mich App 91 (2016) (explaining that "Const 1963, art 6, § 13 grants the circuit court *original* jurisdiction to issue, hear, and determine prerogative writs, but it does not state that such original jurisdiction is *exclusive*, and thus, the Court of Claims had subject-matter jurisdiction over mandamus actions against state officers").

Subsequently, the Legislature codified this choice of courts (Court of Appeals or circuit courts) in statute. See MCL 600.308a(1). And this codification led to a later decision by the Court of Appeals concluding that the Court of Claims did not have jurisdiction to hear Headlee claims against the State, only the circuit courts or the Court of Appeals had jurisdiction. See *Riverview v Michigan*, 292 Mich App 516 (2011). More recently, and in light of the 2013 amendments expanding the jurisdiction of the Court of Claims, the Court of Appeals held that Headlee claims against the State could be brought in the Court of Claims because MCL 600.308(1) had been repealed by implication by Public 164 of 2013. *Telford v State*, 327 Mich App 195, 201 (2019).

While the language in § 4(1)(a) does not mirror article 9, § 32, it similarly lacks an indication that the circuit court's jurisdiction was intended to be exclusive, at least with respect to the State. The reference to the circuit court is understandable since, as noted in *Waterford*, it is Michigan's court of general jurisdiction. And all the entities defined as a "person" against which suit may be brought under § 4(1)(a) may be sued in the circuit court—except for the State. Article 6, § 13 of the Constitution provides that the "circuit court shall have original jurisdiction *in all matters not prohibited by law*[.]" Const 1963, art 6, § 13 (emphasis added). As discussed above, the Court of Claims Act prohibits the circuit court from exercising jurisdiction over claims against the State, its agencies, and officers "notwithstanding another law." MCL 600.6419(1)(a).

"[E]very [constitutional] provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146, 156 (2003). Here, where § 4(1)(a) does not plainly confer exclusive jurisdiction in the circuit court over the State, that provision must be construed with article 6, § 13, which authorizes the Legislature to limit circuit court jurisdiction. The Legislature has done so with respect to the State through the Court of Claims Act, consistent with article 6, § 13. Harmonizing these two constitutional provisions, § 4(1)(a) can reasonably be construed as leaving undisturbed the Legislature's exclusion of claims against the State from the circuit court's jurisdiction and the implicit grant of exclusive jurisdiction over such claims in the Court of Claims.

This construction does not conflict with the purpose and intent of the amendment. The principal purpose of § 4(1)(a) is to make voting a fundamental right and to provide citizens with a cause of action to enforce that right in court against a wide array of public and private

defendants under specific circumstances. Michigan's court of general jurisdiction, the circuit court, is the proper court to file suit against virtually all the potential defendants identified in § 4(1)(a), so it is fitting that the provision would direct that suit be filed in the circuit court. But as explained above, consistent with the reasoning in *Waterford*, the amendment did not displace existing law, and the Court of Claims continues to have "exclusive" jurisdiction over claims against the State and its officials. MCL 600.6419. This interpretation ensures that citizens can still file suits against the State to enforce their rights under § 4(1)(a). But if, as in this case, a citizen files a suit against the State or a state official in circuit court, the suit would be subject to transfer to the Court of Claims—consistent with nearly all other types of litigation filed against the State. And nothing suggests that this interpretation will be surprising or contrary to what the people expected in adopting Proposal 2.

The right to initiate litigation did not feature prominently in written materials regarding Proposal 2. The statement of purpose on the petitions circulated to voters did not reference the right to bring an action (although the petitions contained the full text of the proposal). (Ex B.)[7] And, as set forth above, the ballot language for the amendment did not include a reference to the right of citizens to bring an action, let alone where such an action may be brought. Further, Promote the Vote 2022's website did not highlight the right to bring an action—or where that action may be brought—as a key feature of Proposal 2.[8] Likewise, in published analyses of the amendment, the right to bring an action was either not mentioned or only mentioned in passing.

[7] See Board of State Canvassers, February 11, 2022, Meeting Minutes, pp 3–4, approving statement of purpose for Promote the Vote 2022, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Meeting-Minutes/Feb-11-2022-BSC-meeting-minutes.pdf?rev=80ef8d5c32d54e15b3b1763a3f27ad23&hash=EB10BA17A549C6B389A1203341018077.

[8] See Promote the Vote 2022, Frequently Asked Questions tab, available at Frequently Asked Questions – Promote The Vote 2022.

(Ex C.)[9] And news articles discussing the proposal did not highlight the right of citizens to bring an action. (Ex D.)[10]

A voter who read over materials other than the proposal itself could not have been led to believe or understand that legal actions could be brought against the State in circuit court rather than the Court of Claims since there was no discussion of such a right. See, e.g., *League of Women Voters*, 333 Mich App at 17. Further, even if the voter read the proposal itself, the text does not use language indicating that the jurisdiction of the circuit court is exclusive as to the State. Thus, it cannot be concluded that "the great mass of people" understood the amendment as granting the circuit court exclusive jurisdiction to hear claims against the State under § 4(1)(a). *Id*. at 18–19.

"[T]he framers of a provision must be presumed to have been aware of existing laws and court decisions and to have drafted accordingly." *Waterford*, 98 Mich App at 330, citing *Saginaw City Council v Saginaw Policemen & Firemen Retirement Sys Trustees*, 321 Mich 641, 647 (1948). Here, the drafters of Proposal 2 are charged with knowledge of article 6, § 13 of the Constitution and the Court of Claims Act and its grant of exclusive jurisdiction to that court over claims against the State, its agencies, and officers. *People v Thompson*, 424 Mich 118, 129 (1985) ("Those who draft a constitution are presumed to be aware of existing law and judicial

[9] See, e.g., Citizens Research Council of Michigan, Statewide Ballot Proposal 22-2: Promote the Vote 2022, September 2022, Memorandum 1171, available at memo1171_Proposal_22-2_voting_rights.pdf (crcmich.org) (no mention of the right to bring an action), and House Fiscal Analysis, Ballot Proposal 2 of 2022, October 13, 2022, p 2, available at https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_2_of_2022.pdf, (passing mention of the right to bring an action).

[10] See, e.g., The Detroit News, Proposal 2 could change how you vote in Michigan. What to know, October 19, 2022, available at Proposal 2 could change how you vote in Michigan. What to know (detroitnews.com); Detroit Free Press, Michigan Supreme Court orders certification of Promote the Vote Proposal, September 8, 2022, available at Court orders certification of voting rights proposal (freep.com).

construction and to act in light of that knowledge.") (citation omitted). In other words, they are presumed to have been aware that the Legislature had already vested the Court of Claims with "exclusive" jurisdiction over "constitutional" claims, MCL 600.6419(1)(a), pursuant to its authority under article 6, § 13. Moreover, they are also presumed to know that, absent a grant of exclusivity to the circuit court itself, the circuit court does not have jurisdiction when the constitution or a statute gives exclusive jurisdiction over the subject matter to another court, such as the Court of Claims. See *Prime Time Internat'l Distrib, Inc v Dep't of Treasury*, 322 Mich App 46, 52–53 (2017). As the *Waterford* court explained, if constitutional provisions are meant to alter existing jurisdictional arrangements established by statute, the provisions must include explicit language. Had the drafters intended to confer jurisdiction in the circuit court over claims against the State contrary to the Court of Claims Act, they would have used explicit language doing so—but they did not. As a result, this Court has exclusive jurisdiction to resolve the claims brought against the Attorney General.

II. The organizational Plaintiffs fail to state a claim upon which relief may be granted where they are not "citizens" who may bring suit under article 2, § 4(1)(a).

This Court must dismiss the claims brought by the organizational Plaintiffs because § 4(1)(a) does not confer upon organizations a right to bring suit to enforce that provision.

Detroit Disability Power, Michigan Alliance for Retired Americans, and Michigan Clergy Connects all allege that they are Michigan nonprofit organizations with Michigan citizen members that seek to bring suit on behalf of their members and on behalf of their organizations. (Compl, ¶¶ 18–30.) Priorities USA is a nonprofit advocacy and service organizations with no members. (*Id*., ¶¶ 31–33.)

Article 2, § 4(1)(a) provides that "[a]ny *Michigan citizen* or *citizens* shall have standing *to bring an action* . . . to enforce the rights created by this part . . . *on behalf of themselves*."

Const 1963, art 2, § 4(1)(a) (emphasis added.) Again, in reviewing this language, the "[w]ords should be given their common and most obvious meaning, and consideration of dictionary definitions used at the time of passage for undefined terms can be appropriate." *In re Burnett Estate*, 300 Mich App 489, 497–498 (2013). Here, the word "citizen" can best be understood to mean "a member of a state."[11] And the word "citizens" can be understood to mean more than one "member of a state." The phrase "on behalf of" means " 'in the name of, on the part of, as the agent or representative of.' " *Perkovic v Zurich Am Ins Co,* 500 Mich 44, 55 (2017), quoting *Black's Law Dictionary* (10th ed.), p. 184 (defining the word "behalf").[12] And the word "themselves" is a plural pronoun meaning "those identical ones that are they."[13]

Applying these definitions, § 4(1)(a) only authorizes Michigan citizens to bring suit on their own behalf, e.g., "on behalf of" they "themselves." The plain language of the provision does not authorize suits brought by organizations on behalf of Michigan citizens. And the language certainly does not authorize suits directly on behalf of an organization. This construction makes sense because the right that may be enforced by a citizen under § 4(1)(a) is the right to vote and to do so by a secret ballot, which are individual rights. An organization does not have the right to vote in a Michigan election, whether by secret ballot or otherwise. Further, this is the common grammatical reading of the text. See, e.g., *Morgan v Menasha Corp*, 2010 WL 2384898 at * 2–3 (Mich Ct App, June 15, 2010) (rejecting interpretation of the term "themselves" that was "contrary to common sense, and common grammatical interpretation.")

[11] See Merriam Webster Online Dictionary, definition of "citizen," available at Citizen Definition & Meaning - Merriam-Webster.
[12] See also Merriam Webster Online Dictionary, definition of "behalf," or "on behalf of," available at Behalf Definition & Meaning - Merriam-Webster.
[13] See Merriam Webster Online Dictionary, definition of "themselves," available at Themselves Definition & Meaning - Merriam-Webster.

In other words, it is the interpretation "most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it." *Makowski v Governor*, 495 Mich 465, 472 (2014).

This understanding is further buttressed by the existence of an adjacent broader, defined term within the very same section: "person." While the Constitution grants "citizen[s]" the rights guaranteed under Proposal 3, it prohibits all "person[s]" from violating those rights. The juxtaposition is telling. As noted above, the term "person" is broadly defined, and includes anything from an "individual" or a "corporation" to a "labor organization" or "*any other legal entity*." Const 1963, art 2, § 4(1)(a) (emphasis added). As drafted and ratified, the existence of this expansive term *within the same section* as the narrower term "citizen" only confirms the choice to limit who may bring a suit.

Further, this interpretation does not undermine or conflict with the apparent purpose of § 4(1)(a). As noted above, the purpose of the section is to establish voting as a fundamental right and to provide citizens with the ability to enforce that right in court. Filing litigation can be difficult or expensive for the ordinary citizen, thus being represented by a funded organization would be beneficial in this respect. But the drafters of Proposal 2 recognized this concern and addressed it by providing that multiple "citizens" can sue, and these citizen plaintiffs have the ability to seek "monetary relief," and even partially successful citizen plaintiffs shall be awarded "reasonable attorneys' fees, costs, and disbursements." Const 1963, art 2, § 4(1)(a). The ability to join together and seek such relief helps offset any burden on ordinary citizens to bring an action to enforce their rights under § 4(1)(a).

Finally, organizations like Plaintiffs continue to have the ability to bring other actions on behalf of themselves against the State outside of article 2, § 4(1)(a). But here, the claims of the organizational Plaintiffs must be dismissed.

III. Plaintiff Babb fails to state a claim upon which relief may be granted because she lacks standing to seek declaratory relief.

Plaintiff Babb seeks declaratory and injunctive relief against the Attorney General. Specially, she seeks a declaration that § 931(1)(f) "facially" violates article 2, § 4 of the Michigan Constitution, and she requests that the Court "[p]ermanently enjoin[ ]" Defendant Nessel and her "respective agents, officers, employees and successors, and all persons acting in concert with them, from enforcing" § 931(1)(f). (Compl, p 16.) Babb also seeks "reasonable attorneys' fees, costs, disbursements incurred in bringing this action." (*Id*.)

Presumably, Babb is invoking § 4(1)(a), clause (1) as the basis for her action. Under that subsection, "[n]o person shall: (1) . . . use any law . . . which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." Const 1963, art 2, § 4(1)(a)(1). As discussed above, a citizen like Babb "shall have *standing* to bring an action for *declaratory,* injunctive, and/or monetary *relief*," on behalf of herself, "to enforce" her right to vote where that right is denied, abridged, interfered with, or burdened. *Id*. (emphasis added). But while this provision authorizes a suit, Babb must still demonstrate the standing necessary to bring her claim for declaratory relief.

The terms "standing" and "declaratory relief" are not ones in the common vocabulary, but rather are technical, legal terms. In that case, the rule is "if a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended." *Mich Coal of State Emp Unions*

v Mich Civ Serv Comm'n, 465 Mich 212, 223 (2001). Here, nothing in the language suggests different meanings were intended as to these terms since the phrasing of the clause employs multiple legal terms to provide for a legal cause of action: "Any Michigan citizen or citizens shall have *standing* to bring an *action* for *declaratory, injunctive*, and/or monetary *relief*[.]" (Emphasis added). Accordingly, the terms "standing" and "declaratory . . . relief" can be understood as incorporating established legal principles and requirements. See, e.g, *Michigan Coal of State Emp Unions* 465 Mich at 223–224 (holding that phrase "injunctive proceedings" as used in article 11, § 5 of the Michigan Constitution is used in its technical sense and incorporates traditional requirements for obtaining preliminary injunctive relief.)

Declaratory actions are governed by MCR 2.605, which provides that "[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]" (Emphasis added.) Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ* (*On Remand*), 293 Mich App 506, 515 (2011) (citation omitted). "An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Lansing Sch Educ* Ass'n, 293 Mich App at 515, citing *Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 55 (2000). "The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted).

Thus, to have standing to pursue declaratory relief, Babb must plead an actual controversy. Section 4(1)(a)'s provision that "[a]ny Michigan citizen" has "standing" to bring an action does not relieve a citizen plaintiff from demonstrating he or she has standing to seek relief. This construction is supported by interpretations of article 9, § 32, which similarly provides that "[a]ny taxpayer of the state shall have *standing* to bring suit in the Michigan State Court of Appeals to enforce the provisions of" the Headlee Amendment. (Emphasis added). In *Taxpayers for Michigan Constitutional Government v State*, the Court of Appeals observed that taxpayers bringing declaratory judgment actions under article 9, § 32 have the burden of establishing the existence of an actual controversy:

> It is a well-recognized proposition that the remedy required in an action to enforce a provision of the Headlee Amendment "comprises a resolution of the parties' prospective rights and obligations by declaratory judgment." *Wayne Cnty Chief Executive v Governor*, 230 Mich App 258, 266 [ ](1998). See also *Adair v Michigan*, 470 Mich 105, 112 [ ] (2004); *Durant v Michigan*, 456 Mich 175, 204–206 (1997); *Oakland Cnty v State of Michigan*, 456 Mich 144, 166 (1997). "[T]he plaintiff in a declaratory-judgment action bears 'the burden of establishing the existence of an actual controversy, as well as the burden of showing that ... it has actually been injured or that the threat of imminent injury exists.' " *Adair v Michigan (On Second Remand)*, 279 Mich App 507, 514 [ ] (2008), aff'd in part and rev'd in part on other grounds 486 Mich 468 [ ] (2010), quoting 22A Am Jur 2d, Declaratory Judgments, § 239, p. 788. . . . [330 Mich App 295, 302–303 (2019), aff'd in part, vacated in part, reversed in part, and remanded, 508 Mich 58 (2021).]

The same interpretation should be given to article 2, § 4(1)(a).

Here, Babb alleges that she is a 69-year-old registered voter in Oakland County who due to her age and limited mobility does not drive a car and uses a cane to walk. (Compl, ¶ 17.) She alleges that she generally goes to the polls to vote with her family, and that while she voted by absent voter ballot during the pandemic, she prefers voting in person, and had been looking forward to voting in person at the November 2022 general election. (*Id*.) But she alleges she was unable to vote in person at that election because her daughter was, at the last minute, unable

to give her a ride to her polling location, and it was too late to vote absentee. (*Id*.) Babb alleges that she is confident she would have been able to vote in person in 2022 if community organizations and political campaigns "were able to fund and offer transportation to the polls for those otherwise unable to vote." (*Id*.) She alleges that § 931(1)(f) "infringes on and unreasonably burdens" her "fundamental right to vote by preventing her from accessing such transportation." (*Id*.)

Section 931(1)(f) is a criminal statute within the Michigan Election Law that states: "A person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election." MCL 168.931(1)(f). A person who violates the provision is guilty of a misdemeanor. (*Id*.)

The federal court held § 931(1)(f) was not unconstitutionally vague because "the law's meaning is clear: [a person] cannot pay someone—whether in the form of wages or otherwise—to drive voters (except those physically unable to walk) to an election poll." *Priorities USA*, 628 F Supp 3d at 735, citing *Priorities USA*, 487 F Supp 3d at 621 ("[A] corporation is limited to providing transportation for voters who can walk through means that do not involve payment to the person doing the transporting."). The Court also concluded the statute did not unconstitutionally burden speech and associational rights. "The voter-transportation law limits only one of countless ways [persons] could bring voters to the polls. To be sure, the law bars [persons] from transporting only one class of voters (those who can walk) to the polls. It falls well short of excluding or virtually excluding those voters from accessing the polls. As a result, the law's burden is minimal." *Id*. at 736 (citations omitted). See also *id*. at 736 ("The law allows all sorts of communications that [persons] may have with voters. Again, the law proscribes only

one kind of assistance to a *precise* class of voters—paying to drive voters who can physically walk to the polls.").

Notably, voters are not the target of § 931(1)(f); rather, the person providing the transportation is subject to potential prosecution. There is no threat of prosecution or application of the statute to Babb. On the basis alone there is no controversy between Babb and the Attorney General. Nevertheless, Babb has not alleged she believes she will be unable to vote in person at a future election due to a lack of transportation or, more specifically, due to a lack of transportation not prohibited by § 931(1)(f). Rather, her allegations are backward-looking, focusing on her alleged inability to get to the polls in November 2022 because her daughter could not drive her. She does not allege what other efforts she made to obtain transportation. Here, any claim of a future harm is hypothetical. The Court will have to speculate that, at a future election, Babb will be unable to share a ride with her family, as she states she usually does, or will be unable to obtain a ride from a friend, acquaintance, or volunteer, or will be unable to ride public transportation, call a cab, or use Uber, Lyft or some other ride-share service to travel to her polling place.

More problematic still, Attorney General Nessel submits that § 931(1)(f) does not apply to Babb, more specifically, to a person who pays for Babb's transportation because Babb qualifies as someone who is physically unable to walk to an election. Again, she alleges she is 69 years old, has mobility issues, uses a cane to walk, and can only walk with assistance. (Compl, ¶¶ 17, 44.) While she may be able to walk, the difficulties she has with walking certainly qualify her as "physically unable to walk, to an election" for purposes of § 931(1)(f). Indeed, the statute uses the term "physically unable," not "physically disabled," "disabled," "physical disability" or "disability" as other election statutes do. See MCL 168.19, 168.29,

168.500, 168.501, 168.509t(2)(c), 168.751, 168.755a, 168.759b, 168.761(4), 168.764a(1), and 168.932(g). The difference in terminology suggests that the condition of being "physically unable" does not equate to or require actual "disability" or that a person be "disabled", although the term would include such conditions. As a result, based on the allegations contained in Plaintiffs' complaint, the Attorney General would not or could not prosecute a person for paying for the transportation of Babb or other voters with similar physical limitations. Notably, Babb does not allege any past history of enforcement of § 931(1)(f) by the Attorney General (or any other prosecutor).

Based on the facts as alleged and the plain language of § 931(1)(f), Babb has not demonstrated why she requires declaratory relief against the Attorney General to guide her future conduct in order to preserve Babb's fundamental right to vote at a future election. *Lansing Sch Educ Ass'n*, 293 Mich App at 515. Nor has she pled and proven facts that demonstrate an adverse interest between herself and the Attorney General "necessitating the sharpening of the issues raised." *UAW*, 295 Mich App at 495. "In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Leemreis v Sherman Twp*, 273 Mich App 691, 703 (2007). Because there is no actual controversy here, this Court lacks jurisdiction and must dismiss Babb's complaint.

IV. The organizational Plaintiffs' claims are barred by collateral estoppel.

Alternatively, if the Court does not agree that the organizational Plaintiffs cannot bring suit under § 4(1)(a), their claims are otherwise barred by collateral estoppel.

Where res judicata involves preclusion of a claim, collateral estoppel focuses on preclusion of a specific issue. *Mecosta Co Med Ctr v Metropolitan Group Property & Casualty Ins*, 509 Mich 276, 282-283 (2022). The three elements of collateral estoppel are: (1) a question

of fact essential to the judgment was actually litigated and determined by a valid, final judgment, (2) the parties or privies had a full and fair opportunity to litigate the issue, and (3) there must be mutuality of estoppel. *Id.* at 283 (citations omitted). Where collateral estoppel is invoked defensively, the mutual privity requirement is relaxed. See *Monat v State Farm Ins Co*, 469 Mich 679, 680-681 (2004).

Here, the federal court assessed whether § 931(1)(f) unconstitutionally interfered with the voter-advocacy activities of Priorities USA, Rise Inc, and the Detroit/Downriver Chapter of the A. Philip Randolph Institute (DAPRI) under the First and Fourteenth Amendments and concluded that it did not. *Priorities USA*, 628 F Supp 3d at 736-737. This was a final decision on the merits that Priorities USA and the other organizations had a full and fair opportunity to litigate. The decision plainly estops Priorities USA from bringing suit to challenge § 931(1)(f) based on the same or similar constitutional claims of interference with its activities. It also estops Detroit Disability Power, Michigan Alliance for Retired Americans, and Michigan Clergy Connects because they are sufficiently in privity with Priorities USA, Rise, Inc., and DAPRI for purposes of applying collateral estoppel. See *Mecosta Co Med Ctr*, 509 Mich at 283-284 ("To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.") Compare, *Priorities USA*, 487 F Supp 3d at 604-605 (describing the purpose and activities of Priorities USA, Rise, Inc, and DAPRI) and ¶¶ 18 through 33 of the instant Complaint describing the purpose and activities of Detroit Disability Power, Michigan Alliance for Retired Americans, and Michigan Clergy Connects.

Accordingly, the organizational Plaintiffs claims are also subject to dismissal based on the doctrine of collateral estoppel.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated herein, Defendant Attorney General Dana Nessel requests that this Court dismiss Plaintiffs' Complaint, in its entirety, and grant any additional relief the Court deems appropriate.

Respectfully submitted,

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Dated: September 15, 2023

PROOF OF SERVICE

Heather S. Meingast certifies that on September 15, 2023, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

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