UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

PROPOSED INTERVENOR-DEFENDANTS' MOTION TO INTERVENE

ORAL ARGUMENT REQUESTED

Proposed Intervenor-Defendants Jim Pedersen, Andrea Hunter, the Michigan Alliance for Retired Americans (the "Alliance"), the Detroit Downriver Chapter of the A. Philip Randolph Institute ("DD APRI"), and Detroit Disability Power ("DDP") (together, "Proposed Intervenors") seek to intervene as defendants in the above-captioned lawsuit to safeguard their and their members' substantial and distinct legal interests, which will otherwise be inadequately represented. For the reasons discussed in the memorandum in support, filed concurrently herewith, Proposed Intervenors are entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, Proposed Intervenors request permissive intervention pursuant to Rule 24(b).

Proposed Intervenors respectfully request that the Court set a schedule regarding this motion to intervene that allows for their participation in any briefing schedules and hearings that are held. Otherwise, Proposed Intervenors' fundamental constitutional rights are at risk of being severely and irreparably harmed, as described more fully in the memorandum in support of this motion.

Pursuant to Local Rule 7.1(d) and § III(B) of this Court's Information and Guidelines for Civil Practice, counsel for Proposed Intervenors conferred with counsel for Plaintiffs and Defendants for their positions on this motion. An attempt to obtain concurrence was partially successful: Defendants, represented by the Attorney General, indicated they do not oppose intervention (but do not concur) in dialogue on October 10, 2023. Proposed Intervenors contacted Plaintiffs multiple times by phone and email on October 10, 2023, and, upon request, provided Plaintiffs' counsel with additional information to assist in Plaintiffs' evaluation of Proposed Intervenors' motion; but concurrence was not obtained.

WHEREFORE, Proposed Intervenors request that the Court grant them leave to intervene in the above-captioned matter and to file their proposed motion to dismiss (Ex. 1).[1]

[1] Proposed Intervenors also include a proposed answer (Ex. 2), out of an abundance of caution, pursuant to Federal Rule of Civil Procedure 24(c)'s requirement that a motion to intervene "be accompanied by a *pleading* that sets out the claim or defense for which intervention is sought." (emphasis added).

Dated: October 11, 2023.

Respectfully submitted,

/s/ *Sarah S. Prescott*

Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, LLC
105 East Main Street
Northville, Michigan 48167
248.679.8711
sprescott@spplawyers.com

Aria C. Branch*
Jyoti Jasrasaria
Samuel T. Ward-Packard*
Julie Zuckerbrod*
Attorneys for Plaintiffs
Elias Law Group
250 Massachusetts Ave, NW, Ste 400
Washington, DC 20001
202.968.4490
abranch@elias.law
jjasrasaria@elias.law
swardpackard@elias.law
jzuckerbrod@elias.law

Counsel for Proposed Intervenor-Defendants

*Admission pending

CERTIFICATE OF SERVICE

Sarah Prescott certifies that on the 11th day of October 2023, she served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

/s/ *Sarah S. Prescott*
Sarah S. Prescott

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Jim Pedersen, Andrea Hunter, the Michigan Alliance for Retired Americans (the "Alliance"), the Detroit Downriver Chapter of the A. Philip Randolph Institute ("DD APRI"), and Detroit Disability Power ("DDP") (together, "Proposed Intervenors") move to intervene as defendants in this lawsuit. Through this action, Plaintiffs seek extraordinary and unprecedented relief: to invalidate two amendments to the Michigan Constitution and prevent the future use of ballot initiatives to amend the state constitution in any way that implicates the times, places, and manner of federal elections. Plaintiffs' requested relief would gut Michiganders' fundamental right to vote and eliminate their right to protect and expand voting rights, all based on a bogus legal theory that the Supreme Court rejected just this summer. *See Moore v. Harper*, 600 U.S. 1, 22 (2023).

Proposed Intervenors represent a diverse group of Michigan voters who depend on the constitutional rights and procedures that Plaintiffs attack in this lawsuit. Plaintiffs' requested relief threatens to erode Proposed Intervenors' right to vote, eliminate their ability to amend the Michigan Constitution to protect voting rights or enforce the right to vote in court, frustrate their organizational missions, and force them to divert their limited organizational resources. Indeed, the Alliance and DDP have a lawsuit pending that is based upon one of the very constitutional amendments that Plaintiffs now challenge. Each of these interests is sufficient to support intervention as of right. Alternatively, Proposed Intervenors should be granted permissive intervention.

Proposed Intervenors attach a proposed motion to dismiss and brief in support (Ex. 1) and a proposed answer (Ex. 2), per Rule 24(c).

BACKGROUND

I. Michigan's Pro-Voting Ballot Initiatives

Since 2018, Michigan has fortified its democracy by implementing electoral reforms that have increased voter participation in the state. A crucial element of Michigan's ability to increase access to voting has been the use of voter-initiated ballot measures to enshrine voting rights in the Michigan Constitution.

In 2018, Michiganders overwhelmingly voted to expand voting rights and make voting more accessible. In the general election that year, 67 percent of voters approved Proposal 3 to enumerate the following voting-related rights in the Michigan Constitution: a secret ballot, timely distribution of absentee ballots to military personnel or those living overseas, straight-ticket voting, automatic voter registration, registration by mail up to 15 days before an election, in-person registration extended to election day with proof of residence, no-reason absentee voting, and the right to have statewide election results audited. Mich. Const. art. II, § 4(1)(a)-(f), (h), (l). Now enshrined in Article II, § 4(1) of the state constitution, these self-executing rights contributed to record-high voter turnout in 2020.[2] Nearly 30,000 people took advantage of the option to register and vote on election day, and absentee voting surged to about 3.2 million ballots—representing nearly 60 percent of all votes cast.[3]

In 2022, Michiganders further strengthened their voting rights with another ballot initiative. This time, Proposal 2 amended the Michigan Constitution to recognize the fundamental right to

---

[2] *See General Election Voter Registration/Turnout Statistics*, MIBOE (Feb. 2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/Election-Results-and-Statistics/General-Voter-Reg-Turnout-Stats.pdf.

[3] *See* Lauren Gibbons, *One Big Winner in Michigan's 2020 election cycle: No-reason absentee voting*, MLive (Nov. 11, 2020), https://www.mlive.com/politics/2020/11/one-big-winner-in-michigans-2020-election-cycle-no-reason-absentee-voting.html.

vote without harassing conduct, require state-funded absentee ballot drop boxes and postage for absentee applications and ballots, and require nine days of early in-person voting. Mich. Const. art. II, § 4(1)(a), (i)-(j), (m). Once again, this was an overwhelmingly popular initiative. Sixty percent of Michigan voters approved this amendment, and these rights have likewise been incorporated into Article II, § 4(1).

Voter-initiated ballot proposals have been critical not only to the preservation and expansion of voting rights, but also to these rights' enforcement. As amended by 2022 Proposal 2, Article II, § 4(1)(a) provides a right to "bring an action for declaratory, injunctive, and/or monetary relief to enforce the rights created by" Proposals 2022-2 and 2018-3 (collectively, the "Voter-Approved Amendments"), allowing Michiganders to challenge actions, laws, and policies that interfere with or unreasonably burden the right to vote. Mich. Const. art. II, § 4(1)(a). And this right of action is already being exercised: In August, Proposed Intervenors the Alliance and DDP filed a state court lawsuit challenging a law that criminalizes paying for a voter's transportation to the polls unless the voter is physically unable to walk. *Babb v. Nessel*, No. 2023-202028-CZ (Mich. Cir. Ct. Oakland Cnty.).

Plaintiffs filed this lawsuit on the heels of the Alliance's and DDP's state court case in a blatant attempt to weaken the rights that Michigan voters have fortified in recent years. Plaintiffs' requested relief would invalidate the rights that the Voter-Approved Amendments enshrined in the Michigan Constitution, including the ability to enforce those rights in court, and prevent Michigan voters from using ballot initiatives to affect federal elections in the future.

II. Proposed Intervenors

Jim Pedersen and Andrea Hunter are Michigan voters who rely on the rights initiated by the Voter-Approved Amendments to exercise their fundamental right to vote. Indeed, some of the Plaintiffs who brought this lawsuit—and seek to strip away these rights—are elected officials who

are supposed to represent these voters' interests. The Voter-Approved Amendments help ensure that voters can exercise their voting rights to express their disapproval with Plaintiffs without undue restrictions. Accordingly, with this lawsuit, Plaintiffs seek not only to eschew the will of Michigan voters at large, but also to further insulate themselves from having to answer to their own constituents.

For example, Mr. Pedersen—a constituent of Rep. Carra and Sen. Lindsey, both Plaintiffs in this lawsuit—relies on voting methods guaranteed by Article II, § 4, such as no-excuse absentee voting and early in-person voting, to exercise the franchise. As an activist, union organizer, and occasional election protection worker, Mr. Pedersen dedicates each election day to encouraging and helping voters in his community to cast their ballots. Before the Voter-Approved Amendments took effect, he could only obtain an absentee ballot if he expected to be out of town on election day. But under the Amendments, he has been able to vote by mail without providing a reason, which ensures he can timely cast his ballot. Most recently in 2020 and 2022, Mr. Pedersen was a candidate for city council and voted by mail so that he could campaign on election day. Mr. Pedersen also lives in a rural area where transportation is limited and not always available on election day. Early in-person voting gives Mr. Pedersen and his neighbors the option to vote when they can arrange transportation to the polls.

Andrea Hunter likewise relies on the right to no-excuse absentee voting. Ms. Hunter is a steelworker, often works 8-to-12-hour shifts, and does not fully control her work schedule, making her ability to vote in person on election day unpredictable. Before the Voter-Approved Amendments, she could not always obtain an absentee ballot. Therefore, if she was asked to work late on election day, she was sometimes forced to choose between being disenfranchised and losing wages. She even risked losing her job if she left to vote. Additionally, when Ms. Hunter does not

have to work on election day, she volunteers doing election protection work across the state and does not always have time to vote at her own polling location. Because of the Voter-Approved Amendments, Ms. Hunter can reliably vote an absentee ballot before election day so that she can avoid lost wages and, when she does not have to work, exercise her political rights to help others vote.

The Alliance, DD APRI, and DDP are nonprofit organizations dedicated to promoting the franchise and ensuring the full constitutional rights of their members. The Alliance's mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work, with particular emphasis on safeguarding the right to vote. The Alliance has more than 200,000 members in Michigan, composed of retirees from 23 public and private sector unions, community organizations, and individual activists. Many Alliance members are elderly, disabled, and/or have mobility difficulties and thus rely on voting methods guaranteed by Article II, § 4—including no-excuse absentee voting, drop boxes, and early voting—that do not require standing in long lines or risking exposure to illnesses like COVID-19.

DD APRI is a local chapter of the national A. Philip Randolph Institute, which is the senior constituency group of the AFL-CIO. DD APRI's mission is to fight for human equality and economic justice, and to seek structural changes through the American democratic process. DD APRI has approximately 100 members in Southeast Michigan, including community activists and members of public and private sector unions. DD APRI members work to educate voters about their voting options, to encourage voters to cast their ballots, and to help members of the Detroit Downriver community vote, both in person and absentee. Because many DD APRI members face barriers to election day in-person voting, they rely on the rights enshrined in Article II, § 4 to vote in a safe and reliable manner.

DDP is a 501(c)(3) membership organization whose mission is to build the political power of the disabled community in the Detroit region. DDP has approximately 300 members—both people with disabilities and their allies—and regularly reaches another 2,000 to 3,000 supporters and constituents through its email list and events. Many DDP members have mobility difficulties or other conditions that make it difficult or impossible to get to a polling location on election day, stand in line, and/or access voting machines. DDP works to reduce these barriers by ensuring equal access to ballots for all. For example, DDP works to ensure that people with disabilities can vote early, vote by mail, access all polling locations and voting machines, and access ADA-compliant drop boxes. The rights enshrined in Article II, § 4 provide DDP's members meaningful access to voting that they would not otherwise have. The Alliance, DD APRI, and DDP seek intervention on their behalf and on behalf of their members.

ARGUMENT

I. Proposed Intervenors are entitled to intervene as of right.

The requirements for intervention under Rule 24 "should be 'broadly construed in favor of potential intervenors.'" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). This is especially true in election law cases, "and for good reason—the right to vote 'is regarded as a fundamental political right, because [it is] preservative of all rights.'" *Serv. Emps. Int'l Union Loc. 1 v. Husted*, 515 F. App'x 539, 543 (6th Cir. 2013) (per curiam) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

"Under Federal Rule of Civil Procedure 24(a)(2), district courts must permit anyone to intervene who, (1) in a timely motion, shows that (2) they have a substantial legal interest in the case, (3) their absence from the case would impair that interest, and (4) their interest is inadequately represented by the parties." *Wineries of the Old Mission Peninsula Ass'n v. Township of Peninsula*, 41 F.4th 767, 771 (6th Cir. 2022) (citation omitted).

A. The motion to intervene is timely.

This motion is timely. Courts consider the following factors when deciding whether a motion to intervene is timely:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall, 226 F.3d at 472–73 (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). "No one factor is dispositive, but rather the determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (quotation omitted).

Proposed Intervenors' motion is timely. Defendants have not yet submitted their answer, and no case schedule has been set. Indeed, Proposed Intervenors' motion comes less than two weeks after Plaintiffs filed their complaint, and before any other action in the case. *See Priorities USA v. Benson*, 448 F. Supp. 3d 755, 763 (E.D. Mich. 2020) (finding it "difficult to imagine a more timely intervention" than one filed twenty business days after the complaint). Additionally, Proposed Intervenors seek to intervene to safeguard their and their members' fundamental rights. This is unquestionably a "legitimate" purpose, such that "the motion to intervene [is] timely in light of the stated purpose for intervening." *Kirsch v. Dean,* 733 F.App'x 268, 275 (6th Cir. 2018). Nor is there any plausible risk of prejudice to other parties if intervention is granted. Proposed Intervenors are prepared to follow any briefing schedule the Court sets and participate in any future hearings or oral arguments, without delay. Finally, there are no unusual circumstances that should dissuade the Court from granting intervention.

B. Proposed Intervenors have significant protectable interests that may be impaired by this litigation.

Proposed Intervenors have significant cognizable interests that may be impaired by Plaintiffs' action. Intervenors "must have a direct and substantial interest in the litigation such that it is a real party in interest in the transaction which is the subject of the proceeding." *Reliastar Life Ins Co. v. MKP Invs.*, 565 F.App'x 369, 372 (6th Cir. 2014) (quotations and citations omitted). In the Sixth Circuit, this requirement has been described as "rather expansive," *Mich. State AFL–CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and one that courts should "construe[] liberally," *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). For example, the Sixth Circuit has explained that an intervenor need not have the same standing necessary to initiate a lawsuit and has rejected the notion that Rule 24(a)(2) requires a "specific legal or equitable interest." *Mich. State AFL–CIO*, 103 F.3d at 1245. Rather, the burden of establishing impairment of a protectable interest is "minimal," *id.* at 1247, and an intervenor need only demonstrate that impairment is *possible*, *see Purnell*, 925 F.2d at 948. Moreover, courts should resolve "close cases" "in favor of recognizing an interest under Rule 24(a)." *Michigan State AFL-CIO*, 103 F.3d at 1247.

Here, Proposed Intervenors have several legally cognizable interests that may be impaired by this lawsuit. *First*, Proposed Intervenors have an interest in preventing the nullification of their and their members' individual constitutional rights. At stake in this litigation are more than a dozen voting-related rights and the right to amend the constitution by petition. *See* Mich. Const. art. II, § 4; *id.* art. XII, § 2. The individual intervenors indisputably have a cognizable interest in preventing infringement of their constitutional rights. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (finding impairment of the right to vote is a legally cognizable injury). And the organizational intervenors have an interest in protecting their members' constitutional rights. *See Am. C.L. Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 646 (6th Cir. 2004) (finding organization had standing when

its members were "threatened with the imminent denial of their right to vote" and because the "case addresse[d] citizens' right to vote . . . which [fell] squarely withing the [organization]'s purpose"); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 726 (S.D. Ohio 2016) (finding organization "established an injury in fact" where "the challenged provisions will make it more difficult for its members and constituents to vote"), *rev'd on other grounds sub nom. Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

Second, Proposed Intervenors have a cognizable interest in maintaining the ballot-initiative process. Their interest is not merely in the enforcement of the Voter-Approved Amendments; they have a distinct interest in the *process* by which these constitutional amendments were passed. *See Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 781 (6th Cir. 2007) ("the public at large—including public interest groups—has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process" (quotation omitted)). Citizens cannot always rely on their elected officials to represent their interests. (Indeed, this very lawsuit evidences as much, where Rep. Carra and Sen. Lindsey seek to deny their constituents, including Proposed Intervenor Mr. Pedersen, of the rights in question.) This is precisely why the people reserved for themselves the power in the Michigan Constitution to reform their own laws. Proposed Intervenors have a substantial interest in maintaining that ability with respect to election-related laws.

Third, the Alliance and DDP are currently plaintiffs in an active state court case brought under Article II, § 4—the same constitutional provision Plaintiffs seek to invalidate. The Alliance and DDP brought that case to protect their members' fundamental right to vote as guaranteed by the Michigan Constitution. This lawsuit threatens to irreparably harm the very rights that the Alliance and DDP seek to protect in the pending state court case. Their interest in avoiding such

an adverse outcome, alone, is sufficient to grant intervention as of right. *See Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (finding interest requirement satisfied when intervenors "st[oo]d to gain or lose" in other pending litigation "by the direct legal operation of the . . . court's judgment"); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081–82 (8th Cir. 1999) (finding interest requirement "easily satisfie[d]" where "[t]he disposition of the lawsuit . . . may require resolution of legal and factual issues bearing on the validity of [] agreements" in which proposed intervenor had interests).

Fourth, Plaintiffs' requested relief would frustrate the missions of the Alliance, DD APRI, and DDP and require them to divert time and resources from their other activities to remedy the erosion of their members' constitutional rights. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose."). All three organizations share a common mission to erect structural changes that safeguard and promote the right to vote. Plaintiffs' requested relief is diametrically opposed to that mission; it would nullify a suite of voting-related constitutional rights and strip the organizations and their members of their right to use ballot initiatives to enact further changes related to the times, places, and manner of federal elections. Losing the right to use ballot initiatives for these purposes would, in turn, require DD APRI, the Alliance, and DDP to start new programs to influence election laws. If their members are no longer able to band together to reform their own laws, the organizations will be forced to spend time and resources lobbying the Legislature on voting and election-related issues every year. Such an expenditure would necessarily divert resources from these organizations' other activities, such as their robust public policy and issue advocacy work. In turn, the frustration to their mission and diversion of resources imposes

cognizable harm on the organizations and their members. *See, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (finding "concrete and particular" injury where plaintiffs alleged that, but for defendants' conduct, they "would be able to allocate substantial resources to other activities central to [their] mission[s]" (alterations in original) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982))); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (finding standing where law required "organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources"), *rev'd on other grounds sub nom*. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc).

C. Proposed Intervenors' interests are not adequately represented by the current parties.

Proposed Intervenors' interests are not adequately represented by Plaintiffs or Defendants. "Although a would-be intervenor is said to shoulder the burden with respect to establishing that its interest is not adequately protected by the existing parties to the action, this burden 'is minimal because it is sufficient that the movant[] prove that representation *may* be inadequate.'" *Mich. AFL-CIO*, 103 F.3d at 1247 (alteration in original) (emphasis added) (quoting *Linton by Arnold v. Comm'r of Health & Env't, State of Tenn.*, 973 F.2d 1311, 1319 (6th Cir. 1992)). "The question of adequate representation does not arise unless the applicant is somehow represented in the action. An interest that is not represented at all is surely not 'adequately represented,' and intervention in that case must be allowed." *Grubbs v. Norris*, 870 F.2d 343, 347 (6th Cir. 1989).

Where one of the original parties to the suit is a government entity whose "views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it," courts have found that "the burden [of establishing inadequacy of representation] is comparatively light." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (citing *Conservation L. Found. of New England, Inc. v.*

Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)). Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *accord Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)).

While Defendants have an interest in defending the state laws challenged in this suit, Proposed Intervenors have additional objectives: maintaining their and their members' constitutional rights, protecting their ability to further amend the Michigan Constitution by ballot initiative, safeguarding the ability to enforce their fundamental voting rights in court, and avoiding the frustration of their organizational missions and diversion of their resources. Proposed Intervenors thus have specific interests and concerns that neither Defendants nor any other party share. *See Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2042365, at *3 (D. Nev. Apr. 28, 2020) (granting intervention as of right where proposed intervenors "may present arguments about the need to safeguard [the] right to vote that are distinct from [state defendants'] arguments").

Proposed Intervenors know first-hand that government entities do not always share their interests when it comes to voting rights. The Alliance and DDP are in active litigation against the Attorney General to challenge a law that interferes with the fundamental right to vote. *Babb v. Nessel*, No. 2023-202028-CZ (Mich. Cir. Ct. Oakland Cnty.). And both the Alliance and DD APRI have previously sued Secretary Benson, a Defendant in this case, to challenge absentee voting restrictions. *Michigan All. for Retired Ams. v. Sec'y of State*, 964 N.W.2d 816, 820 (Mich. Ct. App.

2020).

Because Proposed Intervenors' particular interests are not shared by the present parties, they cannot rely on Defendants or anyone else to provide adequate representation. They have thus satisfied the four requirements for intervention as of right under Rule 24(a)(2), and their motion should be granted.

II. Alternatively, Proposed Intervenors should be granted permissive intervention.

Even if Proposed Intervenors were not entitled to intervene as of right, permissive intervention is warranted under Rule 24(b). "Permissive intervention has a less exacting standard than mandatory intervention and courts are given greater discretion to decide motions for permissive intervention." *Priorities USA*, 448 F. Supp. 3d at 759–60 (citing *Grubbs*, 870 F.2d at 345). "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The interest of the intervenors, for the purposes of permissive intervention, only needs to be "different" from the defendants, regardless of whether it is "substantial." *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018).

Proposed Intervenors easily meet these requirements. First, their motion is timely, and intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See supra* Argument I.A. Moreover, Proposed Intervenors' interests are distinct and not adequately represented by the existing defendants. *See supra* Argument I.C. And Proposed Intervenors will undoubtedly raise common questions of law in opposing Plaintiffs' suit, including whether Plaintiffs are entitled to the extraordinary and unprecedented relief they seek, and whether Supreme Court precedent forecloses Plaintiffs' claim. Moreover, Proposed Intervenors' interests

are constitutional in nature and extend to two of the most fundamental rights protected by the Michigan Constitution: the right to vote and the right to engage in direct democracy. Proposed Intervenors' participation in this action will contribute to the full development of the issues in this action and will aid the Court in adjudicating this matter.

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully request that this Court grant their motion to intervene.

Dated: October 11, 2023

Respectfully submitted,

/s/ *Sarah Prescott*

Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, LLC
105 East Main Street
Northville, Michigan 48167
248.679.8711
sprescott@spplawyers.com

Aria C. Branch*
Jyoti Jasrasaria
Samuel T. Ward-Packard*
Julie Zuckerbrod*
Attorneys for Plaintiffs
Elias Law Group
250 Massachusetts Ave, NW, Ste 400
Washington, DC 20001
202.968.4490
abranch@elias.law
jjasrasaria@elias.law
swardpackard@elias.law
jzuckerbrod@elias.law

Counsel for Proposed Intervenor-Defendants

*Admission pending

CERTIFICATE OF SERVICE

Sarah Prescott certifies that on the 11th day of October 2023, she served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

/s/ *Sarah S. Prescott*
Sarah S. Prescott

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

PROPOSED INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

ORAL ARGUMENT REQUESTED

Proposed Intervenor-Defendants Jim Pedersen, Andrea Hunter, the Michigan Alliance for Retired Americans, the Detroit Downriver Chapter of the A. Philip Randolph Institute, and Detroit Disability Power hereby move to dismiss Plaintiffs' complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Plaintiffs' claim is barred by the equitable doctrine of laches, Plaintiffs lack both Article III and prudential standing to bring their claim, Plaintiffs are not entitled to any of the relief they seek, and Plaintiffs' claim fails as a matter of law. The reasons to grant the motion to dismiss are set forth in more detail in the accompanying brief.

WHEREFORE, Proposed Intervenor-Defendants respectfully request that the Court dismiss this action in its entirety and award any other relief that the Court deems appropriate in the circumstances.

Dated: October 11, 2023.

Respectfully submitted,

/s/ *Sarah Prescott*

Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, LLC
105 East Main Street
Northville, Michigan 48167
248.679.8711
sprescott@spplawyers.com

Aria C. Branch*
Jyoti Jasrasaria
Samuel T. Ward-Packard*
Julie Zuckerbrod*
Attorneys for Plaintiffs
Elias Law Group
250 Massachusetts Ave, NW, Ste 400
Washington, DC 20001
202.968.4490
abranch@elias.law
jjasrasaria@elias.law
swardpackard@elias.law
jzuckerbrod@elias.law

Counsel for Proposed Intervenor-Defendants

*Admission pending

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

CONCISE STATEMENT OF REASONS

I. Plaintiffs' claim is barred by the equitable doctrine of laches.

II. Plaintiffs lack both Article III and prudential standing to bring their claim.

III. Plaintiffs are not entitled to the relief they seek.

IV. Plaintiffs' claim fails as a matter of law.

INTRODUCTION

With this lawsuit, Plaintiffs seek to use the judiciary to undermine direct democracy. They ask this Court to invalidate the right of the people of Michigan to propose certain amendments to the state constitution by petition, a right which that constitution itself has enshrined for more than a century. They likewise seek to nullify two such voter-initiated amendments that expanded voting rights in 2018 and 2022, respectively.

Because this lawsuit is barred both procedurally and on the merits, it should be dismissed. First, Plaintiffs' claims—challenging actions that took place at least a year ago—are barred by the equitable doctrine of laches. Second, Plaintiffs lack Article III standing to bring their claims, and further lack prudential standing to assert the Michigan Legislature's interests. Third, Plaintiffs' requested relief—relief which would entail extraordinary judicial interference with Michigan's democratic processes—is entirely unavailable. Half the relief Plaintiffs seek is not ripe and the other half is sweeping facial relief that is not plausible on the face of the complaint. Finally, Plaintiffs' single claim, under the Elections Clause of the U.S. Constitution, fails as a matter of law. The Supreme Court has repeatedly "rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections," including just this summer in *Moore v. Harper*, 600 U.S. 1, 26 (2023) (citing *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), *Smiley v. Holm*, 285 U.S. 355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916)). Accordingly, the central premise of Plaintiffs' entire case has been squarely rejected in binding precedent. Dismissal is required.

BACKGROUND

Michiganders have long been guaranteed the right to propose and approve constitutional amendments—a right enshrined in the Michigan Constitution. In recent years, they have exercised that right to guarantee to the people self-executing rights that provide critical access to the franchise—in 2018 and again in 2022. These amendments have worked as designed. Under the 2018 amendment, which has now been in effect for two federal election cycles, Michigan saw historic increases in voter registration and turnout. Now, nearly five years after the first set of reforms took effect, Plaintiffs ask this Court to nullify not only the expanded voting rights guaranteed by the state constitution, but also Michiganders' century-old right to further amend their constitution in any way that implicates the times, places, and manner of federal elections.

I. The Michigan Constitution

Since 1913, Michigan citizens have had the right to amend the Michigan Constitution by petition and approval by the state's registered electors. The citizen-initiated amendment process is codified in Article XII, Section 2, which provides that "Amendments may be proposed to this constitution by petition of the registered electors of this state." A petition must include the valid signatures of a number of voters equaling at least 10 percent of the total vote cast for the office of governor in the last preceding state election and be filed at least 120 days before the election at which it is to be voted on. *Id.* "If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution." *Id.*

Michigan voters have amended the constitution by petition numerous times over the past 110 years. Since the ratification of the 1963 constitution, Michigan voters have proposed 35

amendments by petition, 26 of which have been successful.[1] The subjects of the citizen-initiated amendments have ranged from taxes to collective bargaining to public education. Michiganders have recently turned their attention to the elections arena, approving two pro-democracy constitutional amendments that are the subject of Plaintiffs' challenge.

In 2018, Michiganders overwhelmingly voted to expand voting rights and make voting more accessible.[2] In the general election that year, 67 percent of voters approved 2018 Proposal 3 to protect the following voting-related rights in the Michigan Constitution: a secret ballot, timely distribution of absentee ballots to military personnel or those living overseas, straight-ticket voting, automatic voter registration, registration by mail up to 15 days before an election, in-person registration extended to election day with proof of residence, no-reason absentee voting, and the right to have statewide election results audited. Mich. Const. art. II, § 4(1)(a)–(h). These self-executing rights contributed to record-high voter turnout in 2020.[3] Nearly 30,000 people took

[1] *See* Mich. Legis. Serv. Bureau, *Proposed Amendments to the Constitution of 1963 – Summary of Adoption or Rejection*, *in* Michigan Manual 2021-2022, 101st Legislature, Michigan Legislature (2022), http://legislature.mi.gov/documents/2021-2022/michiganmanual/2021-MM-P0098-p0104.pdf; *2022 Michigan Election Results*, Mich. Sec'y of State Benson (2022), https://mielections.us/election/results/2022GEN_CENR.html.

[2] Notably, in the same election, Michiganders also overwhelmingly approved the establishment of an independent citizens redistricting commission with exclusive authority to adopt boundaries for the state's congressional and state legislative districts. Mich. Const. art. IV, § 6. Plaintiffs do not challenge the legitimacy of that amendment.

[3] *See General Election Voter Registration/Turnout Statistics*, MIBOE (Feb. 2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/Election-Results-and-Statistics/General-Voter-Reg-Turnout-Stats.pdf.

advantage of the option to register and vote on election day, and absentee voting surged to about 3.2 million ballots—representing nearly 60 percent of all votes cast in the election.[4]

In 2022, Michiganders proposed another ballot initiative to further strengthen their voting rights. 2022 Proposal 2 amended the Michigan Constitution to recognize the fundamental right to vote without harassing conduct, require state-funded absentee ballot drop boxes and postage for absentee applications and ballots, and require nine days of early in-person voting. Mich. Const. art. II § 4(1)(a), (i)–(j), (m). Once again, this was an overwhelmingly popular initiative, and 60 percent of Michigan voters approved this amendment.

Voter-initiated ballot proposals have been critical not only to the preservation and expansion of voting rights, but also to the enforcement of these rights. Proposal 2 provides a right to "bring an action for declaratory, injunctive, and/or monetary relief to enforce the rights created by" Proposals 2022-2 and 2018-3, allowing Michiganders to challenge actions, laws, and policies that interfere with or unreasonably burden the right to vote. *Id.* § 4(1)(a). And this right of action is already being exercised. The Michigan Alliance for Retired Americans and Detroit Disability Power, Proposed Intervenors here, filed a lawsuit in Oakland County Circuit Court in August challenging a law that criminalizes paying for a voter's transportation to the polls unless the voter is physically unable to walk. *Babb v. Nessel*, No. 2023-202028-CZ (Mich. Cir. Ct. Oakland Cnty.).

II. Plaintiffs' Complaint

Plaintiffs initiated this lawsuit on September 28, 2023—five years after Michigan voters approved Proposal 3, and nearly a year after Michigan voters approved Proposal 2. Their complaint

[4] *See* Lauren Gibbons, *One Big Winner in Michigan's 2020 election cycle: No-reason absentee voting*, MLive (Nov. 11, 2020), https://www.mlive.com/politics/2020/11/one-big-winner-in-michigans-2020-election-cycle-no-reason-absentee-voting.html.

is entirely premised on a theory that the Elections Clause of the U.S. Constitution, Article I, Section 4, Clause 1, grants state legislatures exclusive authority to regulate the times, places, and manner of federal elections, subject only to congressional enactments. *See, e.g.*, Compl. ¶ 23, ECF No. 1, PageID.6. As a result, Plaintiffs allege that Michigan's "direct democracy process" is unconstitutional "when applied to amend Michigan's constitutional provisions to regulate the times, places, and manner of federal elections," *id.* ¶ 50, PageID.9, and that Michigan's 2018 and 2022 constitutional amendments have no legal effect, *id.* ¶ 51, PageID.10. Plaintiffs' single claim is that "[t]he petition-and-state-ballot-proposal constitutional amendment ballot questions regulating times, places, and manner of federal elections violate the Elections Clause because the Michigan state legislature did not vote and approve it as required under the Elections Clause." *Id.* ¶ 58, PageID.11. They request, among other things, that the Court declare both the amendment by petition process, as applied to the regulation of federal elections, and the 2018 and 2022 constitutional amendments, to be constitutionally invalid. *Id.* ¶¶ 1, 3, PageID.2. And they seek to enjoin Defendants—the Governor, the Secretary of State, and the Director of Elections—from "any actions funding, supporting, or facilitating the use of" either "the petition-and-state-ballot-proposal process . . . to regulate times, places, and manner of federal elections," or "the 2018 and 2022 constitutional amendments to regulate times, places, and manner of federal elections." *Id.* ¶¶ 2, 4, PageID.2–3.

LEGAL STANDARD

Standing and ripeness are questions of a court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017); *Kovacs v. Chesley*, 211 F.3d 1269 (6th Cir. 2000). "[W]here subject matter jurisdiction is challenged under Rule 12(b)(1), . . . the plaintiff has the burden of proving jurisdiction in order to survive the

motion." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (emphasis omitted) (quoting *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986)).

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court presumes that all well-pleaded material allegations in the complaint are true, *see Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008), but "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (quoting Fed. R. Civ. P. 8(a)). Courts need not accept as true legal conclusions or unwarranted factual inferences. *See Total Benefits Plan. Agency*, 552 F.3d at 434.

The Sixth Circuit has held that "there is no reason not to grant a motion to dismiss where the undisputed facts conclusively establish an affirmative defense as a matter of law." *Est. of Barney v. PNC Bank, Nat. Ass'n*, 714 F.3d 920, 926 (6th Cir. 2013) (quoting *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009)); *see also id.* ("[I]f the plaintiffs' complaint contains facts which satisfy the elements of the defendant's affirmative defense, the district court may apply the affirmative defense.").

ARGUMENT

I. Plaintiffs' claim is barred by the equitable doctrine of laches.

Plaintiffs' challenge comes too late and is barred by the doctrine of laches. "In this circuit, laches is 'a negligent and unintentional failure to protect one's rights.'" *United States v. City of Loveland*, 621 F.3d 465, 473 (6th Cir. 2010) (quoting *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Id.*

(quoting *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 320 (6th Cir. 2001)). Both requirements are easily met here.

Plaintiffs themselves allege that they seek to undo constitutional amendments that were initiated in 2018 and 2022. *See* Compl. at 15, PageID.15. They provide no reason for bringing this claim now—five years after the first amendment was approved and took effect. *See Crookston v. Johnson*, 841 F.3d 396, 398–99 (6th Cir. 2016) (rejecting plaintiff's "invitation to suddenly alter Michigan's venerable voting protocols," which were "not new" and plaintiff "offer[ed] no reasonable explanation for waiting so long to file [the] action").

Plaintiffs' delay is consequential. *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 796 (M.D. Tenn. 2020) ("[T]he Sixth Circuit has made clear that the age of laws subjected to constitutional challenge is indeed relevant to the laches inquiry.") (citing *Crookston*, 841 F.3d at 398–99). Proposed Intervenors and millions of Michigan voters have relied on the fundamental voting rights that the 2018 and 2022 amendments have enshrined in the constitution. For example, Proposed Intervenors Jim Pedersen and Andrea Hunter rely on no-excuse absentee voting to exercise their right to vote. *See* Mot. to Intervene at 4–6. And Proposed Intervenors the Michigan Alliance for Retired Americans, Detroit Disability Power, and the Detroit Downriver Chapter of the A. Philip Randolph Institute—all nonprofit organizations dedicated to promoting the franchise and ensuring the full constitutional rights of their members—have members who rely on the voting methods guaranteed by the Voter-Approved Amendments. *See id.* at 6–7; *see also N.A.A.C.P. v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985) ("Laches may bar injunctive relief when the defendant has established a substantial reliance interest.") (citing *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903); *Saratoga*

Vichy Spring Co., Inc. v. Lehman, 625 F.2d 1037, 1041 (2d Cir. 1980)). This Court should therefore dismiss Plaintiffs' belated claim.

II. Plaintiffs lack standing.

This action should be dismissed because Plaintiffs lack both Article III and prudential standing to bring their claim.

The standing inquiry "involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To avoid dismissal on Article III grounds, a plaintiff must plausibly plead (1) an injury in fact, meaning "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) a causal connection between the injury and the defendant's conduct, and (3) a likelihood that the injury will be redressed by a favorable decision from the court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (internal quotation marks omitted). Additionally, prudential considerations require that "a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Int'l Union v. Dana Corp.*, 278 F.3d 548, 559 (6th Cir. 2002) (quoting *Warth*, 422 U.S. at 499).

A. Plaintiffs do not allege harms sufficient to satisfy Article III standing.

Plaintiffs lack Article III standing because they fail to allege any "concrete and particularized" injuries-in-fact. *Lujan*, 504 U.S. at 560–61. Quite to the contrary, each of their purported bases for standing are facially and woefully insufficient and foreclosed by binding precedent. Their complaint must accordingly be dismissed.

First, Plaintiffs assert—at best—only generalized grievances that do not satisfy Article III. Plaintiffs allege that they are injured because "when such a referendum violating the Elections Clause is offered, Plaintiffs' personal vote in favor or against the referendum is wasted [as] [t]here

was no authority for such a referendum in the first place." Compl. ¶ 81, PageID.14. This allegation is borderline incomprehensible. As an initial matter, the claimed injury is entirely speculative, as no "referendum" is presently due for a vote. *See Spokeo, Inc.*, 136 S. Ct. at 1547–48. But even if one were, Plaintiffs' hypothetical injury is that their votes would be "wasted" because the referendum itself would be illegal, even though their votes would be *counted*—unless, of course, Plaintiffs succeed on the merits of this litigation. Plaintiffs are aware of no case in which a court has found a sufficient Article III injury-in-fact based on such an attenuated chain, where the injury is actually effectuated by the Plaintiffs' own lawsuit.

In its simplest form, Plaintiffs appear to be simply alleging that they are injured because they may someday vote in an election that they believe violates the Elections Clause. But federal courts routinely reject such allegations as insufficient to establish standing, and for good reason: it is a classic generalized grievance about a state's alleged failure to follow the law, which could be indiscriminately claimed by literally *any* Michigan voter. *See, e.g.*, *Wesley v. Collins*, 791 F.2d 1255, 1258 (6th Cir. 1986) (holding that asserted injury to voting rights of all citizens based on alleged constitutional and statutory violations "[a]t most . . . 'amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure,' which is insufficient to support standing"). Likewise, to the extent Plaintiffs claim they have suffered harm as a result of the alleged violation of the Elections Clause, that "injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government" that does not support standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (plaintiffs lacked standing to bring Elections Clause claim). And "[i]t is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where" the Supreme Court has found standing. *Id.* (citing *Baker v.*

Carr, 369 U.S. 186, 207–08 (1962)); *see also Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 357–58 (3d Cir. 2020).

Second, Plaintiffs claim "taxpayer standing," but the Supreme Court has unequivocally held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006); *contra* Compl. ¶ 77, PageID.13–14 ("Plaintiffs also have taxpayer standing to bring this lawsuit because Defendants use state funds to support and enforce current regulations governing federal elections as a result of past amendments to the Michigan Constitution which are legally unauthorized under the Elections Clause, including the use of state funds for similar petitioning or ballot questions in the future that affect federal elections without legislator involvement."). As the Supreme Court explained, affording state taxpayers standing to press such challenges "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler Corp.*, 547 U.S. at 346 (internal quotation marks omitted) (citation omitted). Taxpayer standing is thus foreclosed.

Third, Plaintiffs bizarrely claim that they have standing based on a *Michigan* constitutional provision—that they seek to invalidate, no less—but that provision cannot support the Article III standing that Plaintiffs require to pursue their federal constitutional claim in federal court. *Contra* Compl. ¶ 80, PageID.14 ("Alternatively, the Plaintiffs also have standing as voters to bring this lawsuit under Michigan Constitution, Article 2, section 4 (a) (2022), if it were to be severed from the rest of the constitutional amendment, which waives sovereign immunity from lawsuits to enforce the rights created in the Michigan Constitution, Article 2, section 4 (a)."). It is true that Michigan's standing law is more permissive than its federal counterpart. *See Lansing Sch. Educ.*

Ass'n v. Lansing Bd. Of Educ., 792 N.W.2d 686, 694–95 (Mich. 2010) ("Michigan courts' judicial power to decide controversies [is] broader than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not."). But the fact that the Michigan Constitution includes a provision conferring standing on citizens to enforce their constitutional voting rights has no relevance when a plaintiff seeks to bring a claim under the federal constitution in federal court. *See* Compl. ¶ 80, PageID.14 (acknowledging that the standing provision Plaintiffs cite serves "to enforce the rights created in the Michigan Constitution, Article 2, section 4(a)."). Nor do Plaintiffs offer any reason that this provision alone would survive their challenge. This basis for standing accordingly must likewise be rejected.

Without a cognizable injury in fact sufficient to satisfy Article III, Plaintiffs' complaint must be dismissed.

B. Plaintiffs lack prudential standing to bring their claim.

Separate and apart from their failure to allege a cognizable injury-in-fact, Plaintiffs also lack prudential standing to bring their Elections Clause claim. "Even if an injury in fact is demonstrated, the usual rule"—applicable here—"is that a party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). Plaintiffs' claim, by contrast, "rest[s] . . . on the legal rights or interests of third parties,'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499)—specifically, *the Michigan Legislature's* purported rights under the Elections Clause.

The Supreme Court has made clear that individuals, including legislators, lack standing to vindicate purported institutional injuries suffered by the state legislature as a whole. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019) ("[I]ndividual members lack standing to assert the institutional interests of a legislature."); *see also Corman v. Torres*, 287 F.

Supp. 3d 558, 567 (M.D. Pa. 2018) (per curiam) ("United States Supreme Court precedent is clear—a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature."). But that is precisely the claim that Plaintiffs—eleven individual legislators—advance. Plaintiffs assert that the ballot initiative process, when applied to the regulation of the times, places, and manner of federal elections, "usurp[s] the authority of the legislature." Compl. ¶ 62, PageID.11; *see also id.* ¶ 58, PageID.11 (alleging that the process "violate[s] the Elections Clause because the Michigan state legislature did not vote and approve it as required under the Elections Clause").

Plaintiffs, however, have no authority or standing to assert the rights of the Michigan Legislature. *See Corman*, 287 F. Supp. 3d at 573 ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly."); *cf. Karcher v. May*, 484 U.S. 72, 81–82 (1987) (explaining that presiding legislative officers were proper parties *because* state law authorized them to represent the state legislature in litigation). Plaintiffs are not the Michigan Legislature, and they do not allege that they have been authorized to represent the Michigan Legislature to represent its interests in this lawsuit. Nor have they identified any "'hindrance' to the [Legislature's] ability to protect [its] own interests." *Kowalski*, 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). "Absent a 'hindrance' to the third-party's ability to defend its own rights, this prudential limitation on standing cannot be excused." *Corman*, 287 F. Supp. 3d at 572 (quoting *Kowalski*, 543 U.S. at 130).

Thus, even if Plaintiffs could satisfy Article III's injury-in-fact requirement (and for the reasons discussed, they cannot), the complaint must nevertheless be dismissed because Plaintiffs lay claim to interests that simply are not theirs to vindicate.

III. Plaintiffs' requested relief is unavailable.

Plaintiffs' claim must also be dismissed because Plaintiffs fail to request any relief that this Court could plausibly issue. To "survive a motion to dismiss," a plaintiff must "'state a claim *to relief* that is plausible on its face.'" *Hensley Mfg.*, 579 F.3d at 609 (emphasis added) (quoting *Bell Atlantic Corp.*, 550 U.S. at 555). Plaintiffs' claimed relief is wholly implausible. First, Plaintiffs propose that the Court issue declaratory relief and a prospective, permanent injunction against the future "use of the petition-and-state-ballot-proposal process . . . for regulation of times, places, and manner of federal elections." Compl. at 15, PageID.15. But the Court lacks jurisdiction to grant relief against future amendments; the request is barred by the constitutional ripeness doctrine. Second, Plaintiffs propose that the Court facially invalidate both the 2018 and the 2022 voting rights amendments in their entirety. *Id.* But they do not even *attempt* to plead a plausible basis for invalidating those amendments insofar as they apply to *state*, rather than federal, elections. As a result, to decide this case, the Court would need either to issue an advisory opinion or to rewrite Plaintiffs' complaint for them. Neither would be a permissible exercise of Article III power. Plaintiffs' failure to plead relief that is plausibly available to them requires the case's dismissal. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (explaining that "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

A. Plaintiffs' request for relief prohibiting unspecified future ballot measures is not ripe.

This Court lacks jurisdiction over Plaintiffs' challenge to the future use of "the petition-and-state-ballot-proposal-process," Compl. at 15, PageID.15, because that challenge is not ripe. "Federal court jurisdiction is limited by the Constitution to 'cases' and 'controversies.'" *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010) (quoting U.S. Const., art III, § 2). Federal courts have

developed the constitutional ripeness doctrine "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Id.* The doctrine thus "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.*

Premature adjudication of an abstract disagreement is precisely what Plaintiffs seek here. Their case challenges the *future use* of the Article XII, Section 2, process to amend the Michigan Constitution in any manner that "regulate[s] times, places, and manner of federal elections." Compl. at 15, PageId.15. The Complaint itself makes the speculative nature of this part of Plaintiffs' case quite explicit. It alleges that "*for 2024 and future elections*, the petition-and-state-ballot-proposal processes *could be used* to amend the constitution to regulate the times, places, and manner of federal elections." *Id.* ¶ 57, PageId.10–11 (emphasis added). That could happen for the 2024 elections—or it could be 50 years before another ballot measure fitting that description passes in Michigan.

That speculative allegation conveys just one of the many steps Plaintiffs propose to skip. Consider the full sequence of events that normally would be necessary for a federal court to strike down a new Michigan constitutional amendment on Elections Clause grounds. First, the amendment's proponents would need to prepare a proper petition, *see* MCL 168.482, and secure sufficient petition signatures—10 percent of votes cast in the last election for governor—to place it on the ballot, Mich. Const., art. XII, § 2. Second, the ballot question would need to survive review by the Board of State Canvassers and, quite likely, the state courts. *See* MCL § 168.32(2); *see also* Compl. ¶¶ 41–42, PageID.8. Third, the voters would need to pass the amendment—hardly a certainty. Fourth, the Michigan Legislature would need to challenge the amendment in a federal lawsuit against an appropriate defendant. *See supra* Part II. Fifth, the court would need to conclude

that the new amendment in fact regulated *federal* elections. *See Ky. Press Ass'n v. Kentucky*, 454 F.3d 505, 510 (6th Cir. 2006) (explaining that a case was not ripe because a pivotal question of state law was unresolved). Sixth, the court would need to hold that the amendment violated the Elections Clause. And seventh, the court would need to sculpt appropriate relief and decide whether any portion of the challenged amendment was severable. *See Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 371 (6th Cir. 2006) (explaining the "normal rule" that "partial, rather than facial, invalidation is the required course").

Plaintiffs urge the Court to dispense with every one of these steps. They suggest, rather, that the Court should prospectively and permanently enjoin Defendants from in any way "funding, supporting, or facilitating the use of the petition-and-state-ballot proposal process . . . to regulate times, places, and manner of federal elections." Compl. at 15, PageID.15. Plaintiffs thus request not only that all hypothetical future Michigan constitutional amendments fitting their vague definition be prospectively invalidated, but also that Michiganders be prohibited from petitioning for or voting on them.

The constitutional ripeness doctrine does not permit such breathtakingly intrusive interference with state sovereignty. Courts consider three "key factors" when assessing ripeness: "(1) the likelihood that the harm alleged by the party will ever come to pass; (2) the hardship to the parties if judicial relief is denied at this stage in the proceedings; and (3) whether the factual record is sufficiently developed to produce a fair adjudication of the merits." *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 (6th Cir. 2008). Here, all three compel the conclusion that Plaintiffs' frontal assault on citizen-initiated constitutional amendments is improper.

First, as already shown, Plaintiffs' injuries from future amendments are wholly speculative. *See supra* Part II.A. And as detailed above, amendments would need to be, at a minimum, drafted, circulated, certified, adopted by the voters, and found to apply to federal elections before any of Plaintiffs' purported harms would arise.

Second, Plaintiffs will suffer no hardship if relief is denied at present. If a future citizen-initiated amendment to the Michigan Constitution passes and is determined to regulate federal elections, the Michigan Legislature would be free to challenge it at that juncture.

Third, the "factual record" is not "sufficiently developed" because there can be no factual record at all about future, as-yet-unwritten constitutional amendments. Plaintiffs proffer, in lieu of a record, just one factual allegation—that such amendments "could be" enacted in "2024 or future elections." Compl. ¶ 57, PageID.10-11. That lone allegation does not constitute a sufficient record for the relief sought. Consider what enforcing Plaintiffs' proposed injunction would, in practice, entail. Lacking any concrete facts about any future amendments, the Court would need to put Michigan in a sort of receivership. The Court would have to vet any and all proposed amendments before any substantial progress is made toward petition circulation—because even that step entails some "actions funding, supporting, or facilitating" the petition process by Defendants. Compl. at 15, PageID.15. The Court would, as part of its vetting, need to decide—before voters had voted a proposed amendment, and long before Michigan courts had considered its scope and effects—whether the proposed amendment "regulate[s] times, places, and manner of federal elections." *Id.* And the Court would need to continue in that oversight role on an ongoing, indefinite basis.

All three factors thus establish that Plaintiffs' challenge to the future use of the Article XII, Section 2 procedure is not ripe. The Court thus lacks Article III jurisdiction to grant the first half

of Plaintiffs' requested relief. Accordingly, the Court should—at a minimum—dismiss the action to the extent that it seeks relief against future amendments.

B. Plaintiffs do not plead plausible grounds for facially invalidating the 2018 and 2022 constitutional amendments.

The second half of Plaintiffs' case—the facial challenge to the 2018 and 2022 amendments, *see* Compl. at 15, PageID.15—also seeks unavailable relief. Plaintiffs affirmatively allege that "the 2018 and 2022 constitutional amendment [sic] are not severable," and on that basis assert that those "amendments, in their entirety, are constitutionally invalid." Compl. ¶ 83, PageID.14. And in their Prayer for Relief, Plaintiffs request a declaratory judgment that the 2018 and 2022 amendments "in their entirety, are constitutionally invalid, unenforceable, and have no legal effect." *Id.* at 15, PageID.15. Plaintiffs thereby plead themselves out of court. Their complaint does not plausibly suggest that the 2018 and 2022 amendments are invalid in all their applications, as would be required to plead a valid facial challenge. And Plaintiffs do not plead an as-applied challenge in the alternative. That leaves them with no valid challenge at all to the 2018 or 2022 amendments.

Facial challenges such as Plaintiffs' challenge to the 2018 and 2022 amendments "are disfavored for several reasons." *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 450 (2008). First, they "often rest on speculation," and so raise a risk of "premature interpretation . . . on the basis of factually barebones records." *Id.* (internal quotation marks omitted). Second, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (cleaned up). Third, facial challenges "threaten to short circuit the

democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

Mindful of these concerns, federal courts hold facial challenges to a demanding standard: "a plaintiff can only succeed in a facial challenge by 'establishing that no set of circumstances exists under which the Act would be valid', *i.e.*, that the law is unconstitutional in all of its applications." *Id.* (cleaned up) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). As pleaded, Plaintiffs' challenge to the 2018 and 2022 amendments does not and cannot meet that standard. Plaintiffs fail to state a plausible claim for facial relief.

Plaintiffs do not identify any plausible basis for invalidating the 2018 and 2022 amendments insofar as they apply to *state* elections. Provisions of both amendments unquestionably apply to Michigan as well as federal elections. The 2018 amendment, for instance, requires that voters have the option to vote a straight ticket in all "partisan general election[s]," whether or not a federal race is on the ballot. Mich. Const. art. II, § 4(1)I. And the 2022 amendment creates a right to vote early "in each *statewide* and federal election." *Id.* § 4(1)(m) (emphasis added). Plaintiffs' Complaint contains no allegations suggesting these provisions violate the Elections Clause vis-à-vis state elections. Nor is any such argument remotely plausible, because the Elections Cause by its own terms concerns only "[t]he times, places, and manner of holding elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Thus, Plaintiffs' facial challenge to the 2018 and 2022 amendments fails on the face of the Complaint: it does not plausibly allege that either amendment is invalid "in all of its applications."

Plaintiffs cannot salvage the Complaint by arguing that it challenges the 2018 and 2022 amendments only as they apply to federal elections. The Complaint simply does not say that. To the contrary, it boldly asserts that "the 2018 and 2022 constitutional amendment [sic] are not

severable, so the 2018 and 2022 constitutional amendments, *in their entirety*, are constitutionally invalid." Compl. ¶ 83, PageID.14 (emphasis added). And "courts may not rewrite a complaint to include claims that were never presented, nor my courts construct the plaintiff[s'] legal arguments for [them]." *Rogers v. Detroit Police Dep't*, 595 F. Supp. 2d 757, 766 (E.D. Mich. 2009).

IV. Plaintiffs fail to state a claim on which relief can be granted because they have not pleaded a viable Elections Clause claim.

Finally, Plaintiffs' claim under the Elections Clause, *see* Compl. ¶¶ 49-83, PageID.9–14, fails as a matter of law because binding Supreme Court precedent forecloses the argument that amendment by petition is unconstitutional when used to regulate federal elections.

The Elections Clause vests authority in "the Legislature" of each state to regulate the times, places, and manner of federal elections. U.S. Const. art. I, § 4, cl. 1. The Supreme Court has held, however, that this authority is not "exclusive and independent." *See, e.g.*, *Moore*, 600 U.S. at 26 (reaffirming "reject[ion of] the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections"). Rather, "when legislatures make laws, they are bound by the provisions of the very documents that give them life"—their state constitutions. *Id.* at 27. "The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power." *Id.* Accordingly, Plaintiffs cannot invoke the federal Elections Clause to invalidate provisions of the very state constitution that binds its authority.

Indeed, the Supreme Court has already weighed and rejected Plaintiffs' precise argument—that citizen-initiated state constitutional amendments in the federal elections context violate the Elections Clause. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 813 (2015), the Court considered whether, absent congressional authorization, the

Elections Clause precluded the people of Arizona from creating by ballot initiative a commission to establish congressional districts. The Court held that the Elections Clause did no such thing, because the "legislature" is "capaciously define[d]" as "the power that makes laws," and the Arizona Constitution reserved to the people the power to make law. *Id.* So too here. *See* Mich. Const. art. XII, § 2 ("Amendments may be proposed to this constitution by petition of the registered electors of this state."); *id.* art. II, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum.").

The Supreme Court's holding in *Arizona State Legislature* thus carries equal force here. The Court stated in no uncertain terms that it "resist[s] reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process. Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legis.*, 576 U.S. at 817–18. The Court further underscored "[t]he importance of direct democracy as a means to control election regulations," *id.* at 823, including to install the kinds of voting policies that Michiganders approved in 2018 and 2022, *see id.* at 822 (citing California voters' adoption of permanent voter registration, Ohio voters' banning of straight-ticket voting, and Oregon voters' extending the deadline for voter registration), and as a means of influencing the legislature itself, *id.* at 823 ("The very prospect of lawmaking by the people may influence the legislature when it considers (or fails to consider) election-related measures.").

In short, the people can regulate the times, places, and manner of federal elections pursuant to the state constitution without offending the Elections Clause. Plaintiffs' complaint thus does not plausibly allege an Elections Clause violation and so must be dismissed.

CONCLUSION

For the foregoing reasons, Proposed Intervenor-Defendants respectfully request that the Court dismiss Plaintiffs' complaint.

Dated: October 11, 2023

Respectfully submitted,

/s/ *Sarah Prescott*
Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, LLC
105 East Main Street
Northville, Michigan 48167
248.679.8711
sprescott@spplawyers.com

Aria C. Branch*
Jyoti Jasrasaria
Samuel T. Ward-Packard*
Julie Zuckerbrod*
Attorneys for Plaintiffs
Elias Law Group
250 Massachusetts Ave, NW, Ste 400
Washington, DC 20001
202.968.4490
abranch@elias.law
jjasrasaria@elias.law
swardpackard@elias.law
jzuckerbrod@elias.law

Counsel for Proposed Intervenor-Defendants

*Admission pending

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

L.R. 7.2(b)(ii) CERTIFICATE OF COMPLIANCE REGARDING PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Pursuant to W.D. L.R. 7.2(b)(ii), Plaintiff certifies that the word count to Proposed Intervenor-Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint, excepting those portions excluded under 7.3(b)(ii), equals 6,236 words, as calculated by Microsoft® Word 2019 MSO (Version 2309 Build 16.0.16827.20130) (64-bit).

Dated: October 11, 2023

Respectfully submitted,

/s/ *Sarah Prescott*
Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, LLC
105 East Main Street
Northville, Michigan 48167
248.679.8711
sprescott@spplawyers.com

Aria C. Branch*
Jyoti Jasrasaria
Samuel T. Ward-Packard*
Julie Zuckerbrod*
Attorneys for Plaintiffs
Elias Law Group
250 Massachusetts Ave, NW, Ste 400
Washington, DC 20001
202.968.4490
abranch@elias.law
jjasrasaria@elias.law
swardpackard@elias.law
jzuckerbrod@elias.law

Counsel for Proposed Intervenor-Defendants

*Admission pending

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2023, I electronically filed the foregoing document, and this *Certificate of Service* with the Clerk of the Court using the Court's ECF system, which will send notification of such filing to all counsel of record.

Dated: October 11, 2023

/s/ Sarah S. Prescott
Sarah S. Prescott

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN LINDSEY, Senator; JAMES RUNESTAD, Senator; JAMES DESANA, Representative; RACHELLE SMIT, Representative; STEVE CARRA, Representative; JOSEPH FOX, Representative; MATT MADDOCK, Representative; ANGELA RIGAS, Representative; JOSH SCHRIVER, Representative; NEIL FRISKE, Representative; and BRAD PAQUETTE, Representative,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan; JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

CIVIL ACTION

Case No. 1:23-cv-01025-JMB-PJG

Hon. Jane M. Beckering

PROPOSED ANSWER OF PROPOSED INTERVENOR-DEFENDANTS TO PLAINTIFFS' COMPLAINT

Proposed Intervenor-Defendants JIM PEDERSEN, ANDREA HUNTER, MICHIGAN ALLIANCE FOR RETIRED AMERICANS, DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE, and DETROIT DISABILITY POWER (collectively, "Proposed Intervenors"), by and through their attorneys, submit the following Proposed Answer to Plaintiffs' Complaint. Proposed Intervenors respond to the Complaint's allegations as follows:

1. Plaintiffs, all Michigan state legislators, seek a declaratory judgment under 42 U.S.C. §§ 1983, 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure, to prevent the future use of petition-and-state-ballot-proposals under Michigan Constitution, Art. XII, Sec. 2, to amend the Michigan Constitution to regulate times, places, and manner of federal elections. The acts are an unconstitutional usurpation of state legislator's rights to participate in

law-making decisions under the Elections Clause, U.S. Const., Art. 1, Sec. 4, Cl. 1. Additionally, Plaintiffs seek a declaration that the 2018 and 2022 constitutional amendments, enacted pursuant to Michigan Constitution, Art. XII, Sec. 2, have no legal effect on the state legislators enacting laws, subject to the Governor's veto power, to regulate times, places and manner of federal elections.

Response: Paragraph 1 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

2. Under the Elections Clause, the state legislature is "the entity assigned particular authority by the Federal Constitution." Moore v. Harper, 143 S.Ct 2065, 2084 (2023).

Response: *Moore v. Harper*, 143 S. Ct. 2065 (2023), speaks for itself and requires no response. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

3. The petitioning and state ballot processes to amend the Michigan Constitution under Article XII, Section 2, when used to regulate the times, places, and manner of federal elections are per se violations of legislators' federal rights under the Elections Clause because the state legislators are not involved.

Response: Paragraph 3 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

4. When state constitutional amendments, which affect the times, places, and manner of federal elections, are enacted by petition-and-state-ballot-proposals, as occurred in 2018 and

2022, the constitutional amendments and process of enactment violate the legislators' federal rights under the Elections Clause.

Response: Paragraph 4 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

5. Such petitioning or state ballot processes, when the legislators are excluded from those processes, undermines the state legislature as "the entity assigned particular authority by the Federal Constitution" to regulate the time, place, and manner of federal elections.

Response: Paragraph 5 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

6. Plaintiffs seek declaratory and injunctive relief to preserve their federal rights as state legislators under the Elections Clause to exercise their federal constitutional authority regarding all laws that regulate the times, places, and manner of federal elections subject only to Congressional enactments.

Response: Paragraph 6 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

7. Plaintiffs bring this action for these express purposes:

A. for a declaration that the constitutional ballot or petitioning proposals to enact constitutional amendments to the Michigan Constitution and the acts of Defendants in enforcing the amendments governing federal elections are unconstitutional, violate the legislators' federal rights, and violate established laws; and,

B. for injunctive relief barring the enforcement of the ballot or petitioning proposals to amend the Michigan Constitution to regulate federal elections—in violation of the Election Clause.

Response: Proposed Intervenors lack sufficient information or knowledge to form a belief as to the allegations about Plaintiffs' purposes in bringing this action, and therefore deny the same. The remaining allegations in Paragraph 7 contain mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

8. The legal question in this case is whether the process under the Michigan Constitution, Article XII, Section 2, for amendment by petition-and-state-ballot-proposal, when applied to amend Michigan's constitutional provisions to regulate the times, places, and manner of federal elections, violates the state legislators' rights by usurping their legislative power under the Elections Clause because the direct democracy process involves no involvement or approval by the state legislators.

Response: Paragraph 8 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

9. If the answer to this legal question is "yes," then the next question is whether the 2018 and 2022 constitutional amendments, enacted pursuant to Michigan Constitution, Art. XII, Sec. 2, have any legal effect on the state legislators enacting laws, subject to the Governor's veto power, to regulate times, places, and manner of federal elections.

Response: Paragraph 9 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

JURISDICTION AND VENUE

10. This action arises under the Constitution and laws of the United States.

Response: Paragraph 10 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

11. This Court has jurisdiction pursuant to Article III of the United States Constitution, 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983. Declaratory relief is authorized pursuant to 28 U.S.C. § 2201 and 2202.

Response: Paragraph 11 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

12. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. § 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Honorable Court.

Response: Paragraph 12 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

13. Venue is proper under 28 U.S.C. § 1391(b) because all events giving rise to Plaintiffs' claims occurred in the State of Michigan.

Response: Paragraph 13 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

PARTIES

14. Plaintiffs, Senator Jonathan Lindsey, Senator James Runestad, Representative James DeSana, Representative Rachelle Smit, Representative Steve Carra, Representative Joseph Fox, Representative Matt Maddock, Representative Angela Rigas, Representative Josh Schriver, Representative Neil Friske and Representative Brad Paquette are all Michigan Legislators. All Plaintiffs are elected officials who represent constituents within their respective legislative districts and each is responsible, on behalf of their constituents, for the drafting or passage of laws for enactment, including election laws affecting elections of federal officials. Plaintiffs are also voters and taxpayers in Michigan.

Response: Proposed Intervenors admit that all Plaintiffs are elected Michigan legislators who represent constituents within their legislative districts, and who are responsible, on behalf of their constituents, for the drafting or passage of laws, including laws affecting elections of federal officials. Proposed Intervenors lack sufficient information or knowledge to form a belief as to the remaining allegations in Paragraph 14, and therefore deny the same.

15. Defendant Gretchen Whitmer is the Governor of Michigan. She is the chief executive officer for the State of Michigan with the duty to execute and enforce the law.

Response: Proposed Intervenors admit that Gretchen Whitmer is the Governor of Michigan. The remaining allegations in Paragraph 15 contain mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

16. Defendant Jocelyn Benson is the Michigan Secretary of State. She is the chief election official for the State of Michigan. The secretary of state is the chief election officer of the state and has supervisory control over local election officials in the performance of their election duties (M.C.L. § 168.21).

Response: Proposed Intervenors admit that Jocelyn Benson is the Michigan Secretary of State. The remaining allegations in Paragraph 16 contain mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

17. Defendant Jonathan Brater is the Director of Elections. As such, he is vested with the powers and performs the duties of the Secretary of State under her supervision, with respect to the supervision and administration of the election laws.

Response: Proposed Intervenors admit that Jonathan Brater is the Director of the Michigan Bureau of Elections. The remaining allegations in Paragraph 17 contain mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.[1]

15. The above-named Defendants or their successors are sued in their official capacity only for prospective declaratory and injunctive relief.

Response: The second Paragraph 15 that appears in Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required. To the

[1] The allegations in Plaintiffs' Complaint are not sequentially numbered. Specifically, after Paragraph 17, regarding Defendant Director of Elections Jonathan Brater, the Complaint continues with a paragraph numbered 15 rather than 17, and uses sequential numbers thereafter. For ease of side-by-side comparison, Proposed Intervenors have numbered the paragraphs in this Answer consistent with the incorrect numbers used in the Complaint.

extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

FACTUAL ALLEGATIONS

16. The state legislature is "the entity assigned particular authority by the Federal Constitution."

Response: The second Paragraph 16 that appears in Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

17. The Elections Clause states: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., Art. 1, Sec. 4, Cl. 1.

Response: In response to the allegations made in the second Paragraph 17 of Plaintiffs' Complaint, Proposed Intervenors answer that the Elections Clause of the U.S. Constitution, Article I, Section 4, Clause 1, speaks for itself and requires no response. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

18. The Michigan Constitution Article IV, section 1, provides that legislative power is vested in the senate and house of representatives.

Response: The Michigan Constitution, article IV, section 1, speaks for itself and requires no response. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

19. The Michigan Constitution vests the legislative power in the state senate members and house of representatives members, including the right to regulate the times, places, and manner of federal elections.

Response: Paragraph 19 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

20. Therefore, under the Elections Clause and the Michigan Constitution, the Michigan state legislators, as part of two associations called the senate and house of representatives, respectively, must enact laws, subject to the Governor's veto, to regulate the times, places, and manner of federal elections subject only to Congressional enactments.

Response: Paragraph 20 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

21. Thus, Plaintiffs, as state legislators, have federal rights under the Elections Clause, U.S. Constitution, Article I, section 4, clause 1, to oversee and participate in making legislative decisions regulating the times, places, and manner of federal elections.

Response: Paragraph 21 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

22. Under the Elections Clause, Congress can enact federal laws preempting state legal provisions regulating the times, places, and manner of federal election.

Response: Paragraph 22 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

23. But, Congressional enactments are the only exception in the Elections Clause to the state legislators' federal rights to oversee and participate in making legislative decisions regulating the times, places, and manner of federal elections.

Response: Paragraph 23 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

24. The Michigan Constitution has an amendment procedure which involves petition-and-state-ballot-proposal, but does not involve state legislative approval. Mich. Const., Art. XII, Sec. 2.

Response: The Michigan Constitution, article XII, section 2, speaks for itself and requires no response. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

25. Citizen action, through the petition, can be used to amend the state constitution.

Response: Paragraph 25 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

26. In the case of proposed constitutional amendments, signatures of registered voters must equal at least 10 percent of the number of votes cast for all candidates in the last gubernatorial election in order for the matter to go before the electorate.

Response: Paragraph 26 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

27. Petitions seeking amendments to the state's constitution are filed with the Secretary of State.

Response: Paragraph 27 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

28. The petition signatures, which must be filed at least 120 days prior to the election, must conform to provisions specified in the Michigan election law.

Response: Paragraph 28 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

29. After the correct number of valid signatures and their sufficiency are ascertained, the proposed amendment to the constitution is placed on the ballot by Defendants as a ballot proposal to be considered by Michigan voters.

Response: Paragraph 29 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

30. The measure must be placed on the ballot at least 60 days prior to the election.

Response: Paragraph 30 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

31. Any proposal that is approved by a majority of voters voting on the ballot proposal becomes part of the constitution and goes into effect 45 days after the date at which it was approved.

Response: Paragraph 31 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

32. After a constitutional provision regulating federal elections goes into effect, Defendants, as Michigan's state election officials, implement the constitutional provisions regulating federal elections.

Response: Paragraph 32 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

33. 2018 Michigan Ballot Proposal 3 ("Proposal 3") was a citizen-initiated ballot initiative approved by voters in Michigan as part of the 2018 United States elections.

Response: Admit.

34. The proposal reformed Michigan elections by protecting the right to a secret ballot, ensuring access to ballots for military and overseas voters, adding straight-ticket voting, automatically registering voters, allowing any citizen to vote at any time, provided they have a proof of residency, allowing access to absentee ballots for any reason, and auditing election results.

Response: 2018 Ballot Proposal 3 speaks for itself and no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

35. The measure regulated the times, places and manner of federal elections by amending Section 4 of Article II of the Michigan Constitution. In the attached Exhibit A, the underlined text was added and the struck-through text was deleted. The constitutional provisions regulate the times, places, and manner of federal elections.

Response: Paragraph 35 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

36. The proposal was approved with 67% of the vote.

Response: Admit.

37. State legislative approval was not obtained for 2018 Proposal 3 because it was not legally required under the Michigan Constitution.

Response: Paragraph 37 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

38. In 2022, Michigan Ballot Proposal 2, the Right to Voting Policies Amendment, and also known as Promote the Vote ("Proposal 2") was a citizen-initiated proposed constitutional amendment in the state of Michigan, which was voted on as part of the 2022 Michigan elections.

Response: Admit.

39. The amendment changed voting procedures in the state with the stated goal of making it easier to vote.

Response: 2022 Ballot Proposal 2 speaks for itself and no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

40. Various voting rights advocacy groups gathered 669,972 signatures, enough for the amendment to be placed on the 2022 ballot.

Response: Admit.

41. On August 31, 2022, the Board of State Canvassers, responsible for determining whether candidates and initiatives should be placed on the ballot, deadlocked 2-2, with challengers arguing that the ballot title of the initiative was misleading.

Response: Admit.

42. On September 9, 2022, the Michigan Supreme Court ruled that the initiative should be placed on the November ballot.

Response: Proposed Intervenors admit that the Michigan Supreme Court ruled that 2022 Michigan Ballot Proposal 2 should be placed on the ballot but deny that its opinion issued on September 9, 2022.

43. The ballot measure regulated the times, places and manner of federal elections by amending Article 2, Section 4 and Section 7, of the Michigan Constitution. See attached Exhibit B. The constitutional provisions regulate the times, places, and manner of federal elections.

Response: Paragraph 43 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

44. Proposal 2 was approved with 60% of the vote.

Response: Admit.

45. State legislative approval was not obtained for 2022 Proposal 2 because it is not legally required under the Michigan Constitution.

Response: Paragraph 45 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

46. Citizen action, through the petition-and-state-ballot-proposal process without state legislative approval, used the processes to amend the Michigan Constitution that resulted in the regulation of the times, places, and manner of federal elections.

Response: Paragraph 46 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

47. In both 2018 and 2022, the petition-and-state-ballot-proposal processes was used to amend the constitution to regulate the times, places, and manner of federal elections.

Response: Paragraph 47 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

48. Similarly, in the future, those same petition-and-state-ballot-proposal processes could be used to amend the Michigan Constitution to regulate the times, places, and manner of federal elections.

Response: Paragraph 48 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

COUNT I

49. Plaintiffs hereby incorporate by reference paragraphs 1 through 48 as if fully restated herein.

Response: Proposed Intervenors incorporate by reference their responses in the preceding and following paragraphs as if fully set forth herein.

50. The process under the Michigan Constitution, Article XII, Section 2, for amendment by petition-and-state-ballot-proposal, when applied to amend Michigan's constitutional provisions to regulate the times, places, and manner of federal elections, violates the legislators' rights by usurping legislative power under the Elections Clause because the direct democracy process involves no involvement or approval by the state legislators.

Response: Paragraph 50 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

51. Consequently, the 2018 and 2022 constitutional amendments, enacted pursuant to Michigan Constitution, Art. XII, Sec. 2, have no legal effect on the state legislators enacting laws, subject to the Governor's veto power, to regulate times, places, and manner of federal elections.

Response: Paragraph 51 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

52. The Michigan Constitution provides that the legislative power is vested in the senate and house of representatives (Mich. Const., Art. IV, sec. 1).

Response: The Michigan Constitution, article IV, section 1, speaks for itself and requires no response. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

53. The Michigan Constitution vests the legislative power in the state senate and house of representatives to regulate the times, places, and manner of federal elections.

Response: Paragraph 53 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

54. Therefore, under the Elections Clause and the Michigan Constitution, the Michigan state legislature, defined as senate and house of representatives, has the exclusive authority to enact laws, subject to the Governor's veto, to regulate the times, places, and manner of federal elections subject only to Congressional enactments.

Response: Paragraph 54 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

55. However, the Michigan Constitution has an amendment procedure for petition-and-state-ballot-proposals without state legislative approval (Mich. Const., Art. XII, Sec. 2).

Response: The Michigan Constitution, article XII, section 2, speaks for itself and requires no response. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

56. Citizen action, through the petition-and-state-ballot-proposal processes without state legislative actions to adopt those proposals through the legislative process, has been used to amend the constitution to regulate the times, places, and manner of federal elections.

Response: Paragraph 56 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

57. Similarly, for 2024 and future elections, the petition-and-state-ballot-proposal processes could be used to amend the constitution to regulate the times, places, and manner of federal elections.

Response: Admit.

58. The petition-and-state-ballot-proposal constitutional amendment ballot questions regulating times, places, and manner of federal elections violate the Elections Clause because the Michigan state legislature did not vote and approve it as required under the Elections Clause.

Response: Paragraph 58 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

59. Accordingly, the 2018 and 2022 constitutional amendments, enacted pursuant to Michigan Constitution, Art. XII, Sec. 2, have no legal effect on the state legislature enacting laws, subject to the Governor's veto power, regarding the regulation of the times, places, and manner of federal elections.

Response: Paragraph 59 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

60. Plaintiffs have standing under applicable federal statutes and rules of civil procedure to seek a declaratory judgment and related injunctive relief.

Response: Paragraph 60 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

61. Defendants have supervisory control over local election officials for all elections and for the performance of their election duties for state-level ballot proposals such as the 2018 and 2022 state-level ballot proposal (MCL 168.21).

Response: Paragraph 61 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

62. Defendants are also responsible for enforcement of laws governing all elections, including federal elections. When petitioning or ballot proposal processes are enacted that circumvent or usurp the authority of the legislature and acts of Plaintiff legislators, Defendants support and enforce laws that violate the Elections Clause.

Response: Proposed Intervenors admit that Defendants are responsible for the enforcement of laws governing elections. Paragraph 62 otherwise contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

63. Plaintiffs, as legislators, taxpayers, and voters are injured by Defendants when they support or enforce election laws that circumvent or usurp the authority of the legislature.

Response: Paragraph 63 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

64. Defendants support and enforce laws that violate the Elections Clause because such enacted amendments are legally null-and-void under the Elections Clause when they directly or indirectly regulate federal elections.

Response: Paragraph 64 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

65. Plaintiffs have individual legislator standing to challenge usurpation of state legislative powers.

Response: Paragraph 65 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

66. The process under the Michigan Constitution (Article XII, Section 2) for amendment by petition-and-state-ballot-proposal, when applied to amend Michigan state constitutional provisions to regulate the times, places, and manner of federal elections, usurps the state legislators' powers under the Elections Clause.

Response: Paragraph 66 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

67. Plaintiffs, as state legislators have federal rights under the Elections Clause U.S. Const., Art. 1, Sec. 4, Cl. 1, to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

Response: Paragraph 67 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

68. Under the Elections Clause, Congress can enact federal laws preempting state legal provisions regulating the times, places and manner of federal election.

Response: Paragraph 68 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required and the allegations misstate the law, Proposed Intervenors deny the allegations.

69. But, Congressional enactments are the only exception in the Elections Clause to the state legislators' federal rights to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections.

Response: Paragraph 69 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

70. State constitutional processes to amend state constitutions affecting the times, places, and manner of federal elections, without legislative participation, including the debate and acts or actions of state legislators, is not an exception contemplated under the Elections Clause.

Response: Paragraph 70 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

71. The process under the Michigan Constitution (Article XII, Section 2) for amendment by petition-and-state-ballot-proposal, when applied to amend Michigan state constitutional provisions to regulate the times, places, and manner of federal elections, violates the legislators' federal rights under the Elections Clause.

Response: Paragraph 71 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

72. Defendants caused injury to Plaintiffs when they supported and enforced laws and when they support and enforce constitutional provisions enacted through the petitioning and ballot question processes that usurp the state legislature's powers and violate the state legislator's federal rights under the Elections Clause.

Response: Paragraph 72 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

73. Plaintiffs who draft, author, and support bills for passage in the state legislature are injured because the 2018 and 2022 constitutional amendments appear to be facially valid regulations, but are constitutionally invalid under the Elections Clause.

Response: Paragraph 73 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

74. The 2018 and 2022 constitutional amendments were not constitutionally enacted under the Elections Clause because state legislative approval and state legislator participation were not involved.

Response: Paragraph 74 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

75. The legal obstacle caused by the 2018 and 2022 constitutional amendments injures Plaintiffs when they draft, author, or support the enactment of laws to regulate federal elections.

Response: Paragraph 75 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

76. A controversy exists between Plaintiffs and Defendants on the issue of whether the 2018 and 2022 constitutional amendments are legally valid regulations of federal elections. Moreover, similar petitioning or ballot question initiatives can occur again in the future, hence, the controversy is continuing.

Response: Paragraph 76 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

77. Plaintiffs also have taxpayer standing to bring this lawsuit because Defendants use state funds to support and enforce current regulations governing federal elections as a result of past amendments to the Michigan Constitution which are legally unauthorized under the Elections Clause, including the use of state funds for similar petitioning or ballot questions in the future that affect federal elections without legislator involvement.

Response: Paragraph 77 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

78. Defendants cause injury to Plaintiffs when they supervise, fund, or otherwise support statewide referenda on such legally invalid ballot questions.

Response: Paragraph 78 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

79. Plaintiffs as state legislators are uniquely injured by such illegal disbursement or illegal use of taxpayers funds because, if the referendum passes, there is a violation of the state legislators' federal rights under the Elections Clause.

Response: Paragraph 79 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

80. Alternatively, the Plaintiffs also have standing as voters to bring this lawsuit under Michigan Constitution, Article 2, section 4 (a) (2022), if it were to be severed from the rest of the constitutional amendment, which waives sovereign immunity from lawsuits to enforce the rights created in the Michigan Constitution, Article 2, section 4 (a).

Response: Paragraph 80 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

81. Plaintiffs are injured because, when such a referendum violating the Elections Clause is offered, Plaintiffs' personal vote in favor or against the referendum is wasted. There was no authority for such a referendum in the first place.

Response: Paragraph 81 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

82. Defendants cause injury by unnecessarily burdening Plaintiffs' voting rights when they supervise, fund, or otherwise support statewide referenda on such legally invalid ballot questions.

Response: Paragraph 82 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

83. Additionally, as to remedy, if the Plaintiffs prevail on their claim, Plaintiffs allege that the 2018 and 2022 constitutional amendment are not severable, so the 2018 and 2022 constitutional amendments, in their entirety, are constitutionally invalid.

Response: Paragraph 83 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Proposed Intervenors deny the allegations.

AFFIRMATIVE DEFENSES

Proposed Intervenors set forth their affirmative defenses without assuming the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiffs. Moreover, nothing stated here is intended or shall be construed as an admission that any particular issue or subject matter is relevant to the allegations in the Complaint. Proposed Intervenors reserve the right to amend or supplement their affirmative defenses as additional facts concerning defenses become known.

As separate and distinct affirmative defenses, Proposed Intervenors allege as follows:

Plaintiffs' claim is barred by the doctrine of laches;

This Court lacks subject-matter jurisdiction to adjudicate Plaintiffs' claim;

Plaintiffs lack standing to assert their claim;

This Court lacks jurisdiction to grant Plaintiffs the relief they seek; and

Plaintiffs fail to state a claim on which relief can be granted.

PRAYER FOR RELIEF

WHEREFORE, Proposed Intervenors respectfully that this Court:

A. Deny Plaintiffs any relief;

B. Dismiss the complaint in its entirety, with prejudice; and

C. Grant such other and further relief as the Court may deem just and proper.

Dated: October 11, 2023

Respectfully submitted,

/s/ *Sarah Prescott*

Sarah S. Prescott (P70510)
Salvatore Prescott Porter & Porter, LLC
105 East Main Street
Northville, Michigan 48167
248.679.8711
sprescott@spplawyers.com

Aria C. Branch*
Jyoti Jasrasaria
Samuel T. Ward-Packard*
Julie Zuckerbrod*
Attorneys for Plaintiffs
Elias Law Group
250 Massachusetts Ave, NW, Ste 400
Washington, DC 20001
202.968.4490
abranch@elias.law
jjasrasaria@elias.law
swardpackard@elias.law
jzuckerbrod@elias.law

Counsel for Proposed Intervenor-Defendants

*Admission pending