

In the Supreme Court of the United States

AMERICANS FOR CITIZEN VOTING – MICHIGAN AND FRED SMITH, APPLICANTS

v.

MICHIGAN BOARD OF STATE CANVASSERS, SECRETARY OF STATE JOCELYN BENSON, AND
DIRECTOR OF ELECTIONS JONATHAN BRATER, RESPONDENTS

**RESPONSE IN OPPOSITION TO EMERGENCY INJUNCTION PENDING APPEAL BY
SEPTEMBER 1, 2026**

*****NEED RESOLUTION BY SEPTEMBER 4, 2026*****

**To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit**

INTRODUCTION

This is a highly unusual application. Applicants filed their original complaint for mandamus with the Michigan Supreme Court only four days before this application, and there has been no hearing, order, or opinion issued by the state court. The Applicants here are asking this Court to be the first court to review their claims, and the application provides limited and sparse citation to any law.

This application is also unusual because two of the three Respondents—the Board of State Canvassers and Director of Elections Jonathan Brater—are not well-postured to respond to it, since the four-member Board deadlocked and could not reach a decision on whether ACVM submitted a sufficient number of valid petition signatures. Without a majority position, the Board and the Director (who serves as the Board’s non-voting secretary) do not have a unified position on the merits of

ACVM's arguments. The challenger organization that opposed their petition—Promote the Vote Action (PTVA)—is not a respondent here, and since there is not yet a complete lower court record, it is not entirely clear what arguments they might raise.

Applicant Americans for Citizen Voting – Michigan (ACVM) circulated petitions in support of a voter-initiated proposal to amend Michigan's Constitution. That process is entirely a state-created right, not a right guaranteed by the First Amendment. Federal courts have previously recognized that such processes are not entitled to the same protection as the right to vote. To the contrary, many courts have held that private citizens lack a constitutional right to propose referenda or initiatives for any ballot, federal or state.

Moreover, the form of relief sought here is of a kind that is strongly disfavored in that the injunction sought will afford all the relief that could be recovered at the conclusion of any proceeding on the merits. See e.g. *Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1259 (10th Cir. 2005). Requests for such injunctions must be closely scrutinized. ACVM seeks an "emergency injunction" that would mandate that its proposal be placed on Michigan's November ballot. Such an injunction would alter the status quo, mandate actions to be taken by the Respondents, and grant the Applicants all the relief they could ever recover for their claims. But this application does little to justify such an unusual request, other than to repeat the number of signatures they gathered—without acknowledging or contending with the high number of signatures that were found to be invalid.

But Michigan Secretary of State Jocelyn Benson is also a Respondent, and as a constitutional officer and the chief election officer, Michigan Compiled Laws § 168.21, she is not subordinate to the Board with respect to its canvassing duties. She is the only Respondent free to advance a substantive position on the merits of the Application.

In these respects, ACVM's application is sorely lacking in factual bases and legal substance. Applicants have not demonstrated a likelihood of success on either their due process or their equal protection claims—both of which are, at best, novel and not supported by a clear line of federal authority entitling ACVM to the extraordinary relief they seek. This application should be denied.

JURISDICTION

28 U.S.C. 1257(a) provides that this Court has jurisdiction over, “Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”

However, in this case, there has not yet been any determination by any Michigan court. Applicants argue that the Michigan Supreme Court has not acted “in a timely fashion” so as to constructively deny relief. Time is short, but the Michigan

Supreme Court could provide relief it determines to be appropriate to Applicants. The Secretary of State must issue the call for the November 3, 2026 general election to Michigan's 83 counties **by September 4, 2026**. Mich. Comp. Laws § 168.648. The call of the election, which includes what proposals will be on the ballot, starts the clock running for counties to commence the ballot printing process. By law, absent voter ballots must be ready for delivery to overseas and military voters by September 19, 2026. Mich. Const. 1963, Art. II, § 4(1)(b). Had Applicants acted expeditiously in asserting their constitutional claims neither the parties, the Michigan Supreme Court, nor this Court would be called upon to defend and decide this matter on such an expedited and untenable basis.

STATEMENT OF THE CASE

A. Brief overview of the Respondents' duties with respect to petitions to amend the Constitution of the State of Michigan.

Article 12, § 2 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Mich. Const. art II, § 9. With respect to amendments, § 2 provides, in pertinent part:

Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an

official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

The Michigan Legislature has enacted laws to provide for the amendment process and prescribed certain duties for the Secretary, the Director, and the Board to perform.

1. Overview of the Secretary of State's duties

The Legislature has delegated the task of conducting proper elections to the Secretary of State, an elected Executive-branch officer, and the head of the Department of State. Mich. Const. art II, § 4, art 5, §§ 3, 9. Section 21 of the Michigan Election Law makes the Secretary the “chief election officer” with “supervisory control over local election officials in the performance of their duties under the provisions of this act.” Mich. Comp. Laws § 168.21.

But the Secretary of State's duties with respect to petitions are limited. See *Citizens Protecting Michigan's Constitution*, 762 N.W.2d 210, 217 (2008). The Secretary acts as the filing official to receive petitions for referendum, initiative, and constitutional amendment. Mich. Comp. Laws § 168.471. The first task attendant to the Secretary's office is to “immediately” notify the Board upon the filing of any petition. Mich. Comp. Laws § 168.475(1). Thereafter, if the Board certifies the

sufficiency of the petition and approves the statement of purpose, the Secretary certifies the statement of purpose to the counties, Michigan Compiled Laws § 168.648, and communicates the ballot wording to the media, counties, and local precincts, Michigan Compiled Laws § 168.477(2), Michigan Compiled Laws § 168.480.

2. Overview of the Director of Elections' duties

The Director of Elections is appointed by the Secretary of State and supervises the Bureau of Elections. Mich. Comp. Laws § 168.32(1), Mich. Comp. Laws § 168.34. The Director of Elections is “vested with the powers and shall perform the duties of the secretary of state under . . . her supervision, with respect to the supervision and administration of the election laws.” *Id.* As “a nonmember secretary of the state board of canvassers,” the Director of Elections supervises the Bureau as it assists the Board in canvassing petitions such as the ACVM petition. *Id.* The Director is also responsible for preparing ballot language for proposals with the approval of the Board. Mich. Comp. Laws § 168.32(2).

3. Overview of the Board of State Canvassers' duties

The Board is a bi-partisan constitutional board created by article 2, section 7 of the Michigan Constitution of 1963, and its duties and responsibilities are established by law. See Mich. Comp. Laws § 168.22, Mich. Comp. Laws § 168.841. The Legislature has empowered the Board to enforce the technical requirements set forth in the Michigan Election Law relating to the circulation and form of various petitions, including petitions to amend the constitution. With respect to petitions,

generally the Board's "duty . . . is limited to determining the sufficiency of a petition's form and content and whether there are sufficient signatures to warrant certification." *Stand Up for Democracy v. Sec'y of State*, 822 N.W.2d 159 174 (2012).

These duties are generally ministerial in nature, and in reviewing a petition the Board may not examine questions regarding the merits or substance of a proposal. See e.g. *Leininger v. Secretary of State*, 26 N.W.2d 348, 354 (Mich. 1947); see also *Gillis v. Bd of State Canvassers*, 554 N.W.2d 9 (Mich. 1996); *Automobile Club of Michigan Committee for Lower Rates Now*, 491 N.W.2d 269, 275 (Mich. 1992) ("[T]he Board of State Canvassers possesses the authority to consider questions of form."). And in performing its function, the Board generally may not look beyond the four corners of the petition. *Michigan Civil Rights Initiative v. Bd of State Canvassers*, 708 N.W.2d 139, 146 (Mich. 2005).

The Board's duties with respect to a constitutional amendment petition are two-fold. First, under Michigan Compiled Laws § 168.476(1), the Board must canvass the petition to ascertain if the petition has been signed by the requisite number of qualified and registered voters. The Board's canvassing duties are carried out by staff at the Bureau of Elections under the supervision of the Director of Elections. Mich. Comp. Laws § 168.32(1), 168.34. Second, under Michigan Compiled Laws § 168.477(1), the Board "shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted." Essentially, the Board determines whether

the petition has enough valid signatures and whether the petition is in the proper form.

In conducting this review, the Board is empowered to “hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions.” Mich. Comp. Laws § 168.476(2). But this investigatory power is generally confined to the Board’s duties of determining whether there are sufficient signatures and whether the petition is in proper form. See *Michigan Civil Rights Initiative*, 708 N.W.2d at 145–146.

B. The ACVM petition

Filing of the ACVM Petition

Petitioner Americans for Citizen Voting - Michigan (ACVM) is a registered ballot question committee. On March 4, 2026, ACVM filed its circulated petition to amend the state constitution with the Secretary of State. Mich. Comp. Laws § 168.471, Mich. Comp. Laws § 168.476.

Timing of Canvassing ACVM’s Petition

The petition was not immediately taken up for canvassing when it was filed because the Bureau of Elections was processing candidate nominating petitions and filings in March and April for the August 4, 2026, primary election. The timing of processing the ACVM petition was explained contemporaneously by Director Brater during the Board of State Canvassers’ March 20, 2026 meeting, when Board Chair Richard Houskamp asked Director Brater to provide an estimated timeline for the handling of the ACVM petition. (Exhibit A, 3/20/2026 Mtg Tr, pp. 24–27). Director Brater explained that there were three separate petition timelines that “run on very

short windows right up against each other.” *Id.* at p. 24. First, there were nominating and qualifying petitions for candidates due in mid-to-late April. *Id.* Next, there was the deadline for voter-initiated laws and referenda shortly after that. *Id.* Then there was the deadline for constitutional amendments in July. *Id.* Director Brater summarized the Bureau’s reasoning for taking things in order:

[W]e process the candidate petitions first, then the initiated law petitions, then the constitutional amendment petitions so that we can handle this very labor-intensive and time-consuming process to make sure that we are doing it carefully, that those that wish to challenge signatures can do so, that we have time to respond to that challenge, that the sponsors of the petitions can respond to those challenges as well, that we can put together the best report that we possibly can to the board so that the board then, who ultimately decides these things, can make those decisions. (Ex. A, 3/30/2026 Mtg Tr, p. 24).

Director Brater further explained that while sometimes constitutional amendment petitions can be handled early, it is not always possible to do so. (Ex. A, p. 25). As Director Brater explained in March, the ACVM petition was not filed so early that the canvass could be finished before the other petitions would need to be processed: “In this particular situation, the -- this constitutional amendment petition came in, yes, before the candidate deadline, but the normal multi-week and month process that it takes us to get through all of that would take us into the nominating petition timeline.” (Ex. A, p. 25).

Director Brater further explained that attempting the start the process sooner would likely not reach a result any sooner simply based on how the processes are performed:

I mean, one, I don’t think that would actually allow us to finish more quickly because we -- the entire process runs one after another. We scan all the petitions. We draw the sample. The sample is shared. People

can make challenges to the sample. We review the challenges, and then we present it to you. And that involves moving a lot of boxes and pieces of paper around, and the idea of starting that process and then packing everything up and then restarting again, I just don't see that actually resulting in this being processed any sooner. And I just do not think it's a good use of resources, and I don't think actually it would be to anybody's benefit to do that. (Ex. A, p. 26).

Nonetheless, at that time, Director Brater expected to start processing ACVM in June—with one reservation: “The only thing that could come in -- come at us that could've -- could push that back, not stop it, or push it later in the year would be if we got a significant number of, like, the initiative legislative petitions that we do need to process first because those have an earlier deadline.” (*Id.* at p. 27). The reason for the earlier deadline on initiative petitions is that, as provided by Article II, § 9 of the Michigan Constitution, the state legislature must be allowed 40 session days to enact or reject the petition and Michigan Compiled Laws §168.477(1) provides that Board of State Canvassers must determine the sufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted.

On May 27, 2026—the last day for filing initiative petitions—Michigan Money Out of Politics filed its initiative petition, which was then required to be canvassed before ACVM.

Processing of Petitions for Constitutional Amendments

Since 1980, the Board has used a random sampling procedure to evaluate the validity of signatures on petitions seeking an initiative, referendum, or state constitutional amendment. (Exhibit B, July 2025 Petition Manual, pp. 29–30.) In 2022, the Bureau contracted an outside firm to review the 1980 procedure, including the statistical methods and processes, which resulted in improvements to “improve

efficiency and accuracy” of the process. (*Id.*) The Board adopted the improved process in October 2023.¹ The sampling process includes drawing a sample of 1,000 signatures and taking the following steps:

To canvass a petition, BOE staff utilize a single-stage random sampling process. The selection of random signatures is completed utilizing specially designed software. As soon as it is available, BOE staff post online the randomly generated list of sheets and signatures to be sampled, and the total number of sheets and signatures submitted and in the universe. Additional documents are made available in response to requests under the Freedom of Information Act.

The sampled sheets are face reviewed to determine if a circulator error or other issue with the sheet invalidates the entire sheet of signatures. Sample signatures on invalid sheets are considered invalid signatures.

Each sampled signature on valid sheets is then examined to confirm that the signatory is a person registered to vote in Michigan, that the signature on the petition sheet matches the signature contained in the Qualified Voter File (QVF), and that the entry does not contain a fatal defect (See Appendix D: Signature Coding for a list of fatal defects.)

Signatures found to be invalid are reviewed a second time by another BOE staff member. Signatures challenged during the challenge period are reviewed by BOE staff.

BOE staff tally the number of valid/invalid sheets and valid/invalid signatures in the sample. [Ex. B, July 2025 Petition Manual, pp. 29–30.]

The Bureau reduces its findings as to the sufficiency of a petition to a staff report, which must be released at least two business days before the Board meets to determine the sufficiency of a petition. MCL 168.476(3). The staff report will include recommended resolutions of challenges filed against a petition. The challenge procedure is also described in the Board’s Manual. (*Id.* at pp. 28–29.)

¹ See October 20, 2023, Meeting Minutes, pp 2–3, October 20, 2023 Signed BSC Minutes (accessed September 1, 2026.)

Sampling of the ACVM Petition

The Bureau performed the sampling process and then released the sample to the public on July 24, 2026. (Exhibit C, 7/24/2026 ACVM Sample Release). As a result, challenges to the petition were due by August 7, 2026. (*Id.*)

Challenges Filed Against the ACVM Petition

On August 6, 2026, Robert LaBrant and Promote the Vote Action (PTVA) filed a challenge to ACVM's petition. (Exhibit D, PTVA Challenge).

ACVM submitted a response to that challenge on August 12, 2026. (Exhibit E, ACVM Challenge Response).

Bureau of Elections Staff Report on Sufficiency of ACVM Petition

On August 17, 2026, the Bureau of Elections issued its Staff Report publishing the results of the random sampling of 1,000 signatures out of the 709,841 signatures submitted by ACVM. (Petitioners' Exhibit C, 8/17/2026 Staff Report). In order for the random sampling to report certifying the petitions as sufficient, 629 signatures out of the 1,000 needed to be found valid. (Pets' Ex. C, p. 13). Staff review of the signatures identified 308 invalid signatures, leaving 692 valid signatures prior to the review of challenges. Of the 308 invalid signatures, 92 were either missing or did not match the voter's recorded signature in Michigan's qualified voter file (QVF), another 129 were not registered to vote, and the rest were invalid for various other reasons. (Pets' Ex. C, pp. 1–2). As a result, ACVM was only 63 signatures over the certification threshold before any challenges to its petitions were considered.

PTVA's challenge alleged that 377 of the signatures in the random sample should be rejected, for a variety of reasons. (Pets' Ex. C, p. 4). Of those 377, 217

signatures “overlapped” with signatures that Bureau staff had already determined to be invalid during their review. That left 160 challenges to signatures that remained valid following the staff’s initial review. (Pets’ Ex. C, p. 5). After reviewing the challenges, Bureau staff accepted PTVA’s challenges to 85 signatures, reducing ACVM’s total to 607—22 signatures below the certification threshold. (Pets’ Ex. C, p. 5).

ACVM’s response to the challenge asserted that 149 of the challenged signatures were valid. (Pets’ Ex. C, p. 5). For example, ACVM claimed that some signatures identified as duplicates were actually two different people. (Pets’ Ex. C, p. 6).

After considering ACVM’s response, Bureau staff concluded that ACVM had successfully rehabilitated 5 signatures. (Pets’ Ex. C, p. 6). This brought ACVM’s total to 612.

ACVM’s Demand to Review the QVF Signatures

On August 20, 2026, Attorney Edward Greim sent a letter to the Board of State Canvassers, c/o Director Brater, stating that he represented ACVM and that it was demanding access to the digitized signatures contained in Michigan’s QVF that were used to determine that 92 of ACVM’s petition signatures did not match. (Petitioners’ Exhibit D, p. 1). Mr. Greim further asked in his letter that, if this demand were denied, the Board preserve documents associated with ACVM’s petitions, “in the event ACVM is required to vindicate its rights in state and/or federal court.” (Pets’ Ex. D, p. 4).

Director Brater responded to Mr. Greim the same day and explained that the disclosure of digitized signatures was prohibited by state and federal law. (Petitioners' Exhibit E, pp. 1–2). Citing 18 U.S.C. §2721(a)(1)–(2), Mich. Comp. Laws §§257.40b, and 168.509gg(1)(f), Director Brater stated that these laws were “not permissive but rather mandate that the Bureau of Elections ‘shall not’ release the digitized signature,” even with a confidentiality agreement. *Id.* at p. 2. Director Brater suggested that ACVM may still rehabilitate signatures by obtaining affidavits from petition signers that “provid[ed] a signature that sufficiently agrees with the voter’s signature in QVF.” *Id.*

Director Brater concluded by reminding Mr. Greim that “any materials or responses to the staff report must be submitted to the Bureau of Elections no later than 48 hours before the Board meeting.” *Id.* at p. 3.

ACVM did not file a lawsuit seeking to compel disclosure of the QVF signatures prior to the August 24 Board meeting.

ACVM and Challenger Responses to the Staff Report

On August 21, 2026, ACVM submitted a 36-page response to the Bureau’s Staff Report. (Exhibit F, ACVM Response to Staff Report). Included in that response was a one-page argument that the Board should accept 17 affidavits attempting to rehabilitate signatures the staff found insufficient. (Ex. F, p. 35).

On the same day, Challenger PTVA also filed a response to the Staff Report, arguing that an additional 34 signatures should have been rejected. (Exhibit G, PTVA Response to Staff Report).

Supplemental Staff Report Addressing Challenger and ACVM Responses

On August 23, 2026—the day before the Board meeting—Bureau staff provided a supplemental report reviewing the responses from ACVM and the challenger PTVA. (Exhibit H, 8/23/26 Supplemental Report). The report reviewed ACVM's efforts to rehabilitate 45 signatures, and recommended accepting 17 out of the 45 and rejecting the remaining 28. (Ex. H, p. 1). As part of that total, staff reviewed 16 affidavits submitted by ACVM and concluded that 10 of the affidavits matched the voter's signature in the QVF. (Ex. H, p. 2). For the remaining six affidavits, five were found by staff not to match the voter's signature in the QVF and one was rejected because no affidavit was provided by ACVM. (Ex. H, p. 3).

The supplemental report also addressed ACVM's submission on Saturday, August 22, which included an additional five affidavits. (Ex. H, p. 7). Staff recommended accepting two of those as matching the QVF, but recommended rejecting the other three for defects in the notarization, illegibility, or because the signature on the petition was a duplicate (meaning the affidavit was by a person who signed the petition twice, so the affidavit did not cure the problem). (Ex. H, pp. 7–8).

The supplemental staff report also addressed the August 21 response provided by the challenger PTVA seeking to disqualify another 35 signatures. (Ex. H, p. 8). Of those, the staff accepted 7 challenges (reducing the number of signatures) and rejected 28 of the challenges. (Ex. H, p. 8). Also, the supplemental report addressed challenges by PTVA attacking two additional signatures not included in its original challenge. (Ex. H, p. 12). Staff noted that they did not consider these challenges timely, but—in the event the Board considered them—the staff concluded that the

signatures were indeed duplicates, which—if accepted—would reduce ACVM’s total by two more signatures. (Ex. H, p. 12).

The supplemental report concluded by summarizing that, after reviewing the timely challenges and rehabilitation attempts, ACVM had 624 valid signatures, but needed 629 or more to be certified as sufficient. (Ex. H, p. 13).²

Board of State Canvassers Meeting and Action on ACVM Petition

The Board met on August 24, 2026 to vote on the sufficiency of ACVM’s petition. The discussion began with Director of Elections Brater presenting a summary of the process up to that point and the staff’s recommendation. (Exhibit I, BSC Mtg Tr 8/24/2026, p. 24–39). Included with Director Brater’s summary was a discussion of the ACVM’s attempt to rehabilitate petition signatures through affidavits:

[T]he board’s practice going back years is that if a -- if a sponsor thinks that that determination is wrong and the person actually did sign it, they can get an affidavit from that person. The person can sign an affidavit and say, yes, I did sign that petition on that line, and this is my signature. They sign the affidavit, it’s properly notarized, and we receive it. If the signature on that affidavit matches what’s on the qualified voter file, we will accept that as a valid signature even though what they put on the petition did not match the voter file.

So there were ten of those that we accepted. They submitted some additional ones that we did not accept either because the signature on the -- on the affidavit still did not match the qualified voter file or there were other issues like in a couple cases, there were issues with the notarization. They didn’t provide a notarized copy, or we couldn’t -- we

² As discussed above, the 624 number did not include the 2 “new” challenges raised in PTVA’s August 21 submission. If those additional challenges were accepted, the report stated that ACVM’s total would have been further reduced to 622. (Ex. H, p 12).

couldn't determine, because of the faintness of the scan, whether it was actually notarized. (Ex. I, p. 31).

Following Director Brater's introductory remarks, the Board heard a five-minute statement by Mark Brewer, counsel from the PTVA, in connection with its challenges to the petition. (Ex. I, pp. 39–43). The Board had no questions for Mr. Brewer. *Id.* Then, attorney Eric Doster presented argument on behalf of ACVM. (Ex. I, pp. 43–53). Mr. Doster's associate, Sean Dutton, read aloud the names of 22 persons for whom they claimed to have affidavits, with another 2 “on the way” that he insisted would be delivered to the Board. (Ex. I, p. 44). Mr. Doster then continued his presentation, stating, “There were 23 of those.” (Ex. I, p. 45).

Doster acknowledged that the Bureau staff recommended accepting 10 of the affidavits, but stated that “we’re going to present all 23 of them to you today.” (Ex. I, p. 45). Doster asked the Board to reject the staff recommendation and count the signatures represented by all of the affidavits, arguing that the affidavits must be accepted regardless of whether the affidavit signature matched the voter's signature in the QVF. (Ex. I, pp. 45–50).

Board Vice Chair Mary Ellen Gurewitz and Member Heather Cummings questioned Mr. Doster about the affidavits he wanted the Board to consider. (Ex. I, pp. 55–61). Member Cummings observed that the deadline for submissions to the Board was 10:00 a.m. on Saturday (August 22), and at that time the Board received 16 affidavits. (Ex. I, p. 56). Member Cummings expressed confusion as to where additional affidavits were coming from. (Ex. I, p. 56). Vice Chair Gurewitz agreed that

only 16 affidavits had been received and reviewed by the Board, and that ACVM had not provided them with 23 affidavits. (Ex. I, p. 56).

Doster stated that 16 affidavits were provided on August 21, “and then we also provided another 5 on Saturday morning,” and then asserted that “the 48 hours rule doesn’t apply to us.” (Ex. I, p. 57). Member Cummings objected to this, stating, that, “There’s absolutely no way we can keep reviewing stuff,” and “This is new. What you just came up and handed us, I don’t have time to review this right now. And we have not let Mr. Brewer file anything else after 10:00 a.m. None of us have looked at anything.” (Ex. I, p. 57). Chair Houskamp asked for clarification on when the affidavits were submitted, and Director Brater stated that the Bureau received 20 unique individual affidavits as of Saturday morning at 10:00 a.m. (Ex. I, p. 60).

Mr. Doster also argued that some of PTVA’s challenges were not properly raised in their initial challenge to ACVM’s petitions. (Ex. I, p. 70). On page 9 of the supplemental report, items #3 and 4 were signatures challenged in PTVA’s original challenge as being not registered or illegible, and in PTVA’s response to the staff report, it argued that if those persons were registered voters, then their signatures were also duplicates that should not be counted. (Ex. H, p. 9). Doster objected to PTVA’s response and argued that these were effectively “new” challenges filed after the challenge deadline. (Ex. I, p. 70–71). Vice Chair Gurewitz expressed confusion over how Doster’s argument about PTVA’s challenges in light of its request to have the Board accept new affidavits. (Ex. I, p. 72). Doster responded, “that’s not a

challenge. That's a rehabilitation, and I'm allowed to do rehabilitation to the end.” (Ex. I, p. 72–73) (cleaned up).

Mr. Brewer was then invited back to the podium to respond to Mr. Doster's arguments. (Ex. I, p. 74–81). As part of his additional time for remarks, Brewer disputed Doster's argument that “somehow petition sponsors—particularly sponsors who losing -- get an exception that they can bring new evidence here this morning. That's not the way that rule has been applied. None of the evidence that he brings here this morning (indiscernible) evidence anyway (indiscernible) be allowed.” (Ex. I, p. 75). Brewer then made arguments about specific affidavits, and how the signatures on those affidavits did not match the signatures on the petitions. (Ex. I, p. 75–76). Brewer also argued that PTVA's “new” challenges were alternative bases to reject signatures they had already challenged. (Ex. I, p. 76, 79, 80–81).

After that, the Board turned to its own discussion of the petition signatures, going through the staff report with Director Brater and attempting to reach determinations either adopting or rejecting the staff recommendations. (Ex. I, p. 81–262). The Board agreed to accept affidavits the staff recommended accepting. (Ex. I, p. 87). That left only questions about the remaining 8. (Ex. I, p. 87–88). Two had notarization issues, and six affidavits had signatures that did not match the signature in the qualified voter file. (Ex. I, p. 90).

During that review, Chair Houskamp expressed his opinion on the significance of the affidavits, saying, “these are real voters who have taken an oath to tell us that they really did sign signatures that we disputed.” (Ex. I, p. 96). Chair Houskamp

continued: “These are -- these are really important things. And I think the fact that – you know, we’re talking about new evidence here. We’re talking about real voters who are coming up here and saying, we submitted this. And I think we have to look at that with [respect].” (Ex. I, pp. 96–97).

The Board examined each of the remaining affidavits. On affidavit #1 on page 3 of the supplemental report, three members of the Board agreed with Bureau’s recommendation to reject it. (Ex. H, p. 3; Ex. I, pp. 103–107). For affidavit #2 on page 3 of the supplemental report, three members of the Board agreed that it matched sufficiently and overruled the staff recommendation. (Ex. H, p. 3; Ex. I, pp. 107–110). Affidavit #3 on page 3 of the supplemental report was determined to not match the QVF. (Ex. H, p. 3; Ex. I, p. 110). Affidavit #4 was also found to not be a match. (Ex. H, p. 3; Ex. I, pp. 111–112). On affidavit #5, 2 members thought it matched and 2 other members disagreed, resulting in a tied vote. (Ex. H, p. 3; Ex. I, pp. 112–117). Under Michigan law, a tied vote meant that there were not enough votes for the Board to approve the signature. See Mich. Comp. Laws §168.22d(2) (establishing quorum of the Board as three members but requiring the vote of at least one member of each political party in order for action to be effective).

The Board then addressed five affidavits that were either not presented or not properly presented to the Board until the day of the meeting. Affidavit #2 on page 7 of the supplemental report was an affidavit for which the notary appeared on a separate page. (Ex. H, p. 7; Ex. I, pp. 132–134). ACVM offered the live testimony of the notary, which the Board heard, and then three members of the Board agreed to

accept the affidavit. (Ex. I, pp. 134–136). Affidavit #3 on page 7 of the supplemental report—the signature for Applicant Fred Smith—was provided with ACVM’s original response on Friday (August 21) electronically and the digital image was very faint. (Ex. H, p. 7; Ex. I, pp. 137–138). ACVM provided the original on the day of the Board meeting. *Id.* Three others—Schweiger, Terryah, and Borgia—were presented for the first time on the day of the meeting—at which time the Board deadlocked on whether or not to accept. (Ex. I, pp. 148–149, 150, 151–152). The Board considered affidavit #6 on page 3, which was the affidavit that was not provided by ACVM until the day of the Board meeting, and the Board similarly tied. (Ex. H, p. 3; Ex. I, p. 152).

At the conclusion of the discussion of signature affidavits, ACVM had gained two signatures to its total, leaving it with 626. (Ex. I, p. 155). Also, while not treated as one of the “five” affidavits presented on the day of the meeting, the Board also considered affidavit #1 on page 7. That affidavit did not attempt to confirm a signature but was instead intended to rehabilitate the date provided by a petition circulator. (Ex. H, p. 7). The Board also deadlocked on whether to permit rehabilitation of a circulator date through an affidavit. (Ex. I, p. 198–200).

The Board then continued to review various other challenges that are not disputed in the Application.

Lastly, the Board also discussed—with additional statements by Mr. Doster and Mr. Brewer—the two challenges raised by PTVa in its response to the staff report, and which ACVM objected to as being untimely “new” challenges. (Ex. I, pp. 208–213). The Board once again tied 2-2. (Ex. I, p. 213). The Board then considered

the other challenges timely raised by PTVA. At the conclusion of the Board's review, Director Brater summarized that ACVM could have as many as 626 valid signatures in the sample out of the required 629. (Ex. I, p. 260). However, Director Brater also noted that there were four signatures where staff recommended counting the signature and Board tied 2-2, and since it takes three votes to approve a petition, those might be considered as rejected signatures. The Attorney General's office opined that those four likely should be considered rejected, at which point Director Brater noted that the total of valid signatures would then be 622. (Ex. I, p. 252).

Following the Board's extensive discussion, Vice Chair Gurewitz moved that the Board accept the staff recommendation and find the ACVM petition insufficient, and the motion was seconded by Member Cummings. (Ex. I, p. 262). The Board voted on the motion, with Vice Chair Gurewitz and Member Cummings voting in favor, and Chair Richard Housekamp and Member Paul Cordes voting against the motion; this resulted in a 2-2 vote, meaning that the motion failed. (Ex. I, p. 262). See Mich. Comp. Laws § 168.22d(2). In order to eliminate any ambiguity, Member Paul Cordes offered an opposite motion to reject the staff recommendation and find the ACVM petition sufficient, which was seconded by Chair Houskamp. (Ex. I, p. 263). The Board then voted on the alternative motion, which again resulted in a 2-2 vote, meaning that the motion failed. (Ex. I, p. 263).

C. Procedural history

On August 27, 2026, Plaintiffs ACVM and Fred Smith filed a complaint in the Michigan Supreme Court for mandamus and declaratory relief and motion for order

to show cause, and brief in support of their complaint against Secretary of State Jocelyn Benson, Director of Elections Jonathan Brater, and the Board of State Canvassers. For relief, Plaintiffs requested that the Michigan Supreme Court grant a writ of mandamus and order Defendants to take all necessary actions to certify the petition for placement on the November 2026 general election ballot. (App., Ex. H, MSC Compl., p. 54).

On August 31, 2026, ACVM filed this application for an emergency injunction pending appeal.

ARGUMENT

I. Because the Board tied on whether or not to approve ACVM's petition, the Board, and Director Brater as the Board's secretary, do not have a position on the application.

As discussed above, Michigan Compiled Laws § 168.22d(2) provides that three members of the Board of State Canvassers constitutes a quorum,"[h]owever, an action of the board of state canvassers shall only be effective upon concurrence of at least 1 member of each major political party appointed to the board." So, any action requires a majority vote including at least member of each major party.

Because the Board deadlocked along party lines on whether to accept a number of affidavits provided by ACVM on the day of the Board meeting, on whether to accept some of PTVA's challenges, and ultimately on whether or not to find ACVM's petition sufficient, the Board does not have a unified position on those issues that has been accepted by a majority of the board. The Board, therefore, does not have an affirmative position to present on the merits. Similarly, Director Brater—in his

capacity as the non-voting secretary of the Board and head of the Bureau staff who provide support to the Board in its canvassing duties—also does not have a formal position to assert. Likewise, the Board and Director Brater do not have a position on the argument presented by the Secretary of State below.

II. Applicants are not entitled to an injunction pending appellate review where they have demonstrated none of the factors warranting the extraordinary relief they seek.

Lobby Lobby Stores, Inc. v. Sebelius, this Court succinctly summarized the high threshold required for injunctions pending appeal. 568 U.S. 1401, 1403, 133 S. Ct. 641, 184 L. Ed. 2d 448 (2012). This Court reiterated that “[w]e have consistently stated, and our own Rules so require, that such power is to be used sparingly.” *Hobby Lobby*, 568 U.S. at 1403. As this Court recognized, the only source of authority for this Court to enter an injunction is the All Writs Act, 28 U.S.C. § 1651(a). *Id.* Indeed, Rule 20.1 expressly states that “[i]ssuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.” As a result, a Circuit Justice may issue an injunction “only when it is ‘[n]ecessary or appropriate in aid of our jurisdiction’ and ‘the legal rights at issue are indisputably clear.’” *Id.* This is a “demanding standard” for extraordinary relief. *Id.*

Here, ACVM and Smith (together ACVM) have not satisfied this demanding standard. Just as in *Hobby Lobby*, “whatever the ultimate merits of the applicants’ claims, their entitlement to relief is not ‘indisputably clear.’” *Id.* See also *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2004) (“Such an injunction is appropriate only if “the legal rights at issue are ‘indisputably clear.’”) ACVM’s application for an injunction has not offered any binding federal precedent clearly supporting their claims.

Further, ACVM's claims are not indisputable. They are, at best, arguable, and there are arguments opposing them. ACVM's application fails to even argue that an injunction here is necessary or appropriate to aid this Court's jurisdiction.

Further, an injunction pending appellate review can issue only where the applicant demonstrates that it is "likely to prevail, that denying . . . relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008).) ACVM cannot meet these requirements before this Court. The Application must be denied

A. ACVM is not likely to prevail on its Due Process Clause claim.

Procedural due process "imposes constraints on governmental decisions" which deprive individuals of life, liberty or property interests "within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976). "Although the amount and quality of process that [this Court's] precedents have recognized as 'due' under the Clause has changed considerably since the founding . . . it remains the case that no process is due if one is not deprived of 'life, liberty, or property[.]' " *Kerry v. Din*, 576 U.S. 86, 90, 135 S. Ct. 2128, 2132, 192 L. Ed. 2d 183 (2015) (cleaned up.). See also, *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("[T]hose who seek to invoke [the Due Process Clause's] procedural protection must establish that one of these interests [i.e., life, liberty, or property] is at stake.").

Nowhere in its application does ACVM state what liberty or property interest it alleges to have been deprived of during the Board's hearing. At best the application states that "Applicant Fred Smith expressed his First Amendment right by signing" ACVM's petition. (App., p. 24.) Assuming ACVM is implicitly asserting a liberty interest of some sort, "[p]rotected liberty interests 'may arise from two sources—the Due Process Clause itself and the laws of the States.' " *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 868–69, 74 L.Ed.2d 675 (1983)).

A party laying claim to a protected liberty interest must provide "a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 301, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)).

ACVM's fleeting references to the First Amendment do not sufficiently state the protected liberty interest at stake in relation to Michigan's state-created process for amending its Constitution, see Mich. Const. 1963, Art. XII, § 2, and its due process claim fails for that reason alone. But even assuming there is a protected liberty interest at stake, ACVM's claim still fails.

To begin, ACVM received adequate process. It is well established that "[t]he essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." *Mathews*, 424 U.S. at 348 (citation and internal quotation marks omitted). In order to comport with constitutional mandates, "[a]ll that is necessary is that the procedures be tailored, in

light of the decision to be made, to the capacities and circumstances of those who are to be heard to insure that they are given a meaningful opportunity to present their case.” *Id.* at 349 (citation and internal quotation marks omitted).

ACVM argues it was denied adequate process because it was not permitted to review the digitized signatures of the 94 petition signatures that the Bureau of Elections determined were invalid because the signature on the petition did not match the signer’s digitized signature. (App., p. 19.) As part of its canvass of a petition, the Board of State Canvassers “shall” use the QVF “to determine the validity of petition signatures by verifying . . . the genuineness of signatures on petitions when the qualified voter file contains digitized signatures.” Mich. Comp. Laws § 168.476(1). Experienced Michigan Bureau of Elections staff, under the supervision of Director Brater, perform the signature comparisons. In doing so, staff follow procedures set forth in the Board’s manual. (Defs.’ B, pp. 34, 36, July 2025 Manual.) Any signature found invalid is reviewed a second time by another Bureau staff member. (*Id.*, p. 30.) Using this process, Bureau staff initially determined that 92 signatures in the sample did not sufficiently match the QVF signature. (App., Ex. C, p. 1.) However, the Board retained discretion to independently review all these signatures against the QVF and to reject the Bureau’s determination (as it did on occasion at the hearing).

Michigan election law dictates that the Secretary of State “shall not release a copy of that portion of a registration record that contains . . . [t]he digitized signature of an elector” that is “captured and transmitted” to the QVF from a voter record or through a driver transaction. Mich. Comp. Laws § 168.509gg(1)(f). These same

digitized signatures, classified as highly restricted personal information, are also protected from public disclosure under Michigan's Vehicle Code. Mich. Comp. Laws §§ 257.40b(2), 257.208c(1), 257.307(2). *See also* 18 U.S.C. § 2721(a)(1)–(2). These laws do not permit the *in camera* review ACVM requested. (App., Ex. E.) Because copies or images of a voter's digitized signature cannot be released to the public, the Board's longstanding process has been to permit proponents like ACVM to procure affidavits from signers whose signatures are flagged as invalid. If the voter's signature on the affidavit sufficiently matches the signature in the QVF, the signature will be counted as valid. ACVM utilized this process and provided 23 affidavits to the Board—14 of which the Board accepted.

ACVM argues the affidavit process was not meaningful because of the limited time it had to collect affidavits. (App., p. 20.) It argues the canvassing of its petition was unreasonably delayed. (*Id.*) But ACVM's petition was canvassed in order of priority—candidate nominating petitions and a legislative initiative petition came first. (Defs' Ex. A, pp. 24–27.) Notably, the law only requires the Bureau of Elections to release the staff report two business days before the Board meets to determine the sufficiency of a petition. Mich. Comp. Laws § 168.476(3). But the Bureau released ACVM's staff report on Monday, August 17, seven days in advance of the August 24 Board meeting (giving ACVM three more business days than required). And while the Board's rule prohibits submissions to the Board within 48 hours of a meeting, ACVM had through 10:00 a.m. on Saturday, August 22 to submit materials, and did so. Petition challengers, PTVA, were subject to the same timeline. Mich. Admin. Code

R.168.846. The date of the staff report, which ACVM claims should have been earlier, had no effect on this timeline. ACVM's response to the staff report, including affidavits, would have been due at the exact same time (48 hours before the meeting) regardless of when the staff report and meeting was held. If the staff report was issued a month earlier, ACVM would not have had an extra month to gather affidavits (nor would challengers have an extra month to challenge signatures deemed valid).

ACVM argues that the "Constitution does not permit decisionmakers to render determinations based on 'secret' evidence that interested parties cannot review." (App., p. 21.) But ACVM cites no precedent in support of its blanket assertion. Even so, the law makes the digitized signatures "secret" in order to protect this highly sensitive personal information. And there are checks and balances. Invalid signatures are reviewed by two nonpartisan Bureau staff members, and the four bipartisan members of the Board of Canvassers may review signatures against the QVF and accept or reject the Bureau's determinations (as they did at the hearing). That hardly constitutes a "star chamber."

In the same vein, ACVM argues that requiring the signature on the sworn affidavit to sufficiently agree with the signature in the QVF to rehabilitate the signature violates due process. (App., pp. 21–22.) But the Michigan Legislature has made the signature in the QVF dispositive. Mich. Comp. Laws § 168.476 (The qualified voter file shall be used to determine . . . the genuineness of signatures on petitions[.]") Accepting signatures that do not match the QVF would not only conflict with the law but would render it a nullity. Moreover, QVF review ensures that the

affidavits' accuracy is evaluated – not simply accepted – at a contested proceeding where the challenger has no meaningful way to contest the affidavit for example, affiants cannot be cross-examined.

Given the complex and time-sensitive issues ACVM is asking this Court to address, it is ACVM who has unreasonably delayed. ACVM had notice on August 17 of the 92 invalid signatures and knew or should have known that same day Michigan law precluded release of the digitized signatures. If it believed withholding the images violated its due process rights, ACVM should have gone straight to court. By August 20 ACVM plainly knew that the images would not be provided. (App., Ex. E.) And yet it took no action, waiting to file suit until late on August 27, days after the Board meeting, and about one week before the Secretary must issue the call of the election. Mich. Comp. Laws § 168.648. This issue could have been resolved well before now, likely in time for the Board to reasonably accommodate any court ruling.

Here, ACVM had notice and an opportunity to rebut the staff report, respond to the challenge, and provide additional information to the Board. And ACVM had a hearing at which it presented evidence and arguments, including the affidavits. See Mich. Comp. Laws § 168.476(2) (“The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions.”) Where Michigan law does not permit Defendants to disclose images of digitized signatures to members of the public, which ACVM and its counsel are, the rebuttal by affidavit process, along with the other process afforded, provided ACVM a sufficient opportunity to attempt to rehabilitate

these signatures. *Mathews*, 424 U.S. at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

Finally, although ACVM received adequate process, lack of *pre*-deprivation process is not dispositive—*post*-deprivation process may suffice. *Parratt v. Taylor*, 451 U.S. 527, 538, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds* by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). And in the procedural due process context, an adequate remedy available under state law constitutes post-deprivation process. *Zinerman v. Burch*, 494 U.S. 113, 125–26, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). As ACVM recognizes, it has a state-law remedy—filing a complaint for writ of mandamus or other relief in the Michigan Supreme Court—which it has availed itself of. Mich. Comp. Laws § 168.479(2). This is an adequate remedy. *See Schmitt v. LaRose*, 933 F.3d 628, 642 (6th Cir. 2019) (“state mandamus is a satisfactory post-deprivation remedy for the purposes of procedural due process.”) While ACVM complains that the Michigan Supreme Court has not acted expeditiously, that Court has not denied relief. Moreover, to be adequate the post-deprivation remedy does not have to guarantee a successful outcome. *Parratt*, 451 U.S. at 543–44.

B. ACVM is not likely to prevail on its Equal Protection Clause claims.

The Fourteenth Amendment’s command that no State shall “deny any person within its jurisdiction the equal protection of the laws,” U.S. Const. Amend. XIV, § 1, “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons,” *Romer*

v. *Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). This Court has “reconciled the principle of equal protection with the reality of legislative classification by holding that, ‘if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.’ “ *United States v. Skrmetti*, 605 U.S. 495, 509–10, 145 S. Ct. 1816, 1828, 222 L. Ed. 2d 136 (2025) (quoting *Romer*, 517 U.S. at 631.)

ACVM raises two equal protection arguments, neither of which have any merit.

a. *Applicant Fred Smith*³

Smith is one of the nine petition signers whose affidavit the Board rejected. He argues that the invalidation of his petition signature violated his right to equal protection in the exercise of his right to vote. (App., p. 25.) But Smith’s claim fails from the start.

“To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.” *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quotation omitted). See also *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441, 105 S.Ct. 3249, 87 L.Ed.2d 313

³ The application argues that the fundamental rights of 9 petition signers were violated. (App., p 24.) But only Mr. Smith is a party, and the application does not explain how or why ACVM or Smith have standing to raise the rights of parties not before the court.

(1985) Here, Smith, in his capacity as a petition signer, has not adequately pled that he was treated disparately as compared to a similarly situated petition signer. The affidavits that the Board accepted were those that were received under the 48-hour-rule, properly notarized, and the signature on the affidavit sufficiently matched the signature in the QVF. The Board deadlocked on Smith's affidavit because while it was submitted timely to the Board, it was largely illegible due to scanning, and the original version was not submitted to the Board until the day of the meeting, meaning it was outside the 48-hour-rule. (Ex. I, pp. 137–152.) Smith does not point to a comparator affidavit that was accepted by the Board.

But Smith's argument fails for other reasons

First, Smith's fundamental right to vote is not implicated here. While he cites two decisions in support of this argument, *Green v. City of Tuscon*, 340 F.3d 891 (9th Cir. 2003) and *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), (App., pp. 25–26), the Sixth and Fourth Circuits have held that signing an initiative petition does not implicate the fundamental right to vote.

In *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), voters whose initiative petition was denied certification for submission after a large number of signatures were disqualified by the Michigan Board of State Canvassers due to statutory deficiencies filed suit alleging that Michigan had deprived them of their First and Fourteenth Amendment rights. *Id.* at 293–94. The Sixth Circuit first addressed the plaintiffs' contention that Michigan's procedures denied them the right to vote by excluding the signatures of some registered voters

only because “technical checks” showed a failure to comply with Michigan law regarding initiatives. *Id.* at 296. The court cited as an example one signature that was disqualified because it was not accompanied by the signer’s complete home address. *Id.* at 293. The court concluded that the plaintiffs had not demonstrated a violation of the right to vote as the court found no decision by this Court or a lower federal court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote. *Id.*

The Fourth Circuit reached a similar conclusion in *Kendell v. Balcerzak*, 650 F.3d 515 (4th Cir. 2011), citing *Taxpayers United*. There, the plaintiff alleged that his equal protection rights and his fundamental right to vote were violated after a referendum petition he signed failed to gain ballot access after signatures were rejected because the signer had not signed his or her name as it appeared in the statewide voter roll. 650 F.3d at 517–520. The court rejected plaintiff’s argument that his fundamental right to vote was implicated. “As in *Taxpayers United*, in this case, [plaintiff] does not cite to us nor does our research identify any decision of the Supreme Court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote.” *Id.* at 523. *See also Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1212 (10th Cir. 2002); *Niere v. St. Louis Cnty., Missouri*, 305 F.3d 834, 838 (8th Cir. 2002) (“Signing a petition is not entitled to the same protection as exercising the right to vote.”)

Second, because no fundamental right is implicated, rational basis review applies. “Under rational-basis review, a law will survive constitutional scrutiny so

long as the existence of a rational connection to its aim ‘is at least debatable.’ “ *Tiwari v. Friedlander*, 26 F.4th 355, 369 (6th Cir. 2022) (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648, 674 (1981)). Here, all the statutes or Board policies at issue survive rational basis review. The State has a legitimate interest in protecting against fraud or unscrupulous circulation practices by having the Board compare petition signatures to the QVF to help ensure the signers are who they purport to be. Likewise, with respect to rehabilitating an invalid signature the Board has legitimate interest in a process that hews closely to the law by still requiring that a signature sufficiently agree with the signature contained in the QVF. Finally, the Board has a legitimate interest in setting deadlines for submitting materials to the Board for consideration at a meeting so that the Board has time to prepare and run an efficient meeting to carry out its often time-sensitive duties. Smith’s equal protection claim thus fails.

b. Applicant ACVM

ACVM argues that its equal protection right were violated by “subjecting it to different application of the rules than other petitions to amend the Michigan Constitution.” (App., p. 29.) At bottom, ACVM alleges that the Board treated it differently when the Board considered, but deadlocked, on two challenges ACVM alleges were untimely. (App., pp. 29–30.) And this deadlock resulted in the challenged signatures being invalid. (*Id.*, p. 30.)

But ACVM misstates the facts. The Board deadlocked because there was a dispute over whether these two challenges were untimely. PTVA had originally timely challenged these two signatures as being not registered or illegible, which

challenges the Bureau rejected, so in response to the staff report PTVA asserted they were both otherwise invalid as duplicates. (Ex. H, p. 9.) ACVM argued these should be considered new, untimely challenges and rejected, (Ex. I, pp. 70–71), but Vice Chair Gurewitz disagreed, (*id.*, p. 72), and later the Board deadlocked on that issue, (*id.*, p. 213.) The issue was whether the original, timely challenge to these two signatures, which the Bureau rejected, preserved PTVA’s ability to challenge them on alternative grounds in its response to the staff report, which PTVA timely submitted under the 48-hour-rule, or, whether the challenges were new and thus untimely under the 10-day challenge deadline. (Ex. I, p. 32, pp. 208–213, Ex. H, p. 9.) This was not an issue that had come up before this Board, and the Board evenly disagreed.

ACVM purports to provide some comparators in its application but none are sufficiently similar to the present circumstances. (App., pp. 31–32.) So, ACVM’s claim fails where it has not adequately pled that it was treated disparately as compared to a similarly situated petition sponsor under similar circumstances. Moreover, ACVM was treated consistently throughout the meeting. The Board discussed, i.e., considered, all ACVM’s submissions that came in after the 48-hour-rule. But ultimately, like the “late” challenges, took no action on them as the Board deadlocked. If the Board had created and applied new rules to accept all ACVM’s affidavits, even those with nonmatching signatures and those filed late, it would be at minimum accused of violating the rights of challengers, who would have no meaningful

opportunity to contest the accuracy of the affidavits. ACVM's equal protection claim fails.

C. Applicants have not shown an irreparable injury.

Generally, “a finding that there is simply no likelihood of success on the merits is usually fatal” to a request for injunctive relief. *Gonzales v. Nat’l Bd of Med Exam’rs*, 225 F.3d 620, 625 (6th Cir. 2000). As already argued, Applicants have no likelihood of prevailing on their due process and equal protection claims, so the application should be denied.

Even so, ACVM has no federally protected constitutional right to ballot access for its initiative. See, e.g., *Taxpayers United*, 994 F.2d at 295; *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996); *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 937 (7th Cir. 2018) (collecting cases). Applicants seek a mandatory injunction asking this Court to order their proposal onto the November general election ballot. But as laid out in detail above, there has been no determination that ACVM has sufficient valid signatures to support placement on the ballot as required by Michigan’s Constitution. Mich. Const. 1963, Art. XII, § 2. Where it remains unclear whether ACVM has even satisfied the requirements for obtaining ballot access, ACVM has not shown irreparable harm.

D. The public interest and balance of harms weigh in favor of denying relief.

The remaining factors, “harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party.” *Nken v. Holder*, 556 US 418, 435 (2009). “[A]ny time a State is enjoined by a court from effectuating

statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3, 183 L.Ed.2d 667 (2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers)). So “[u]nless the statute is unconstitutional, enjoining a ‘State from conducting [its] elections pursuant to a statute enacted by the Legislature ... would seriously and irreparably harm [the State].’ “ *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (quoting *Abbott v. Perez*, 585 U.S. 579, 602, 138 S. Ct. 2305, 2324, 201 L.Ed.2d 714 (2018)).

While Applicants do not seek to enjoin any laws per se, that is the effect here where they ask this Court to order their proposal directly onto the ballot. Applicants assert there will be no harm to the State if the Court does so. But again, no determination has been made that ACVM even has sufficient valid signatures to warrant placement on the ballot. The State and its people are harmed when its laws are not properly complied with, especially here where ACVM seeks to amend Michigan’s Constitution.

It is also noteworthy that ACVM asks the Court to hastily review and reverse nine Board determinations – and only those nine – while ignoring the rest of the petition. ACVM asks the Court, in the name of equal protection and due process, to review and reverse only nine specific determinations that went against them and reverse those, but leave in place without review all determinations adjudicated in their favor. But cherry-picking only nine determinations to reverse would distort the result. Simply put, ACVM wants to keep all its gains while disputing only its losses,

but such a one-sided analysis is inconsistent with the principles of due process and equal Protection ACVM seeks to invoke.

The Court should decline to put its thumb on the scale in this manner, particularly in the case of a state administrative proceeding where a state court can provide more fulsome and comprehensive review. These factors plainly weigh in favor denying relief.

CONCLUSION

For all these reasons, the application should be denied.

Respectfully submitted,

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Dated: SEPTEMBER 2026