

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

**CITIZENS PROTECTING MICHIGAN'S
CONSTITUTION, JOSEPH SPYKE, and
JEANNE DAUNT,**

v Plaintiffs,

**SECRETARY OF STATE and MICHIGAN
BOARD OF STATE CANVASSERS,**

Defendants / Cross-Defendants,
and

**VOTERS NOT POLITICIANS BALLOT
COMMITTEE, d/b/a VOTERS NOT
POLITICIANS, COUNT MI VOTE, a Michigan
Non-Profit Corporation, d/b/a VOTERS NOT
POLITICIANS, KATHRYN A. FAHEY,
WILLIAM R. BOBIER and DAVIA C.
DOWNEY,**

Intervening Defendants / Cross-Plaintiffs

Court of Appeals
No. 343517

**INTERVENING DEFENDANTS /
CROSS-PLAINTIFFS' REPLY
BRIEF IN SUPPORT OF
CROSS-CLAIM**

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**INTERVENING DEFENDANTS / CROSS-PLAINTIFFS'
REPLY BRIEF IN SUPPORT OF CROSS-CLAIM**

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THE JURISDICTION OF THE COURT OF APPEALS

As previously discussed, this Court has jurisdiction of Plaintiffs' Complaint for Mandamus pursuant to MCL 600.4401, MCR 7.203(C)(2) and MCR 7.206(B). The Court has jurisdiction of Intervening Defendants' Cross-Claim pursuant to those provisions and MCR 2.203(D) and (E).

In their Answer and Affirmative Defenses to Intervening Defendants' Cross-Claim, the Plaintiffs have denied that the Court has jurisdiction over their Cross-Claim because their Cross-Complaint was not accompanied by a supporting brief as MCR 7.206(C)(1) requires for commencement of an original action, and that the Intervening Defendants should have filed a separate action instead of a Cross-Claim. (Answer and Affirmative Defenses, Response to Paragraph 9) The Intervening Defendants acknowledge the content of MCR 7.206(D)(1), which speaks for itself, but note that the requirements of that subrule apply to the commencement of an original action, and do not appear to apply to the filing of a Cross-Claim in an action previously commenced. Nor does the rule contain any content suggesting that the requirement of an accompanying brief is jurisdictional, or that a separate Complaint must be filed in lieu of a Cross-Claim.

The Intervening Defendants note, in this regard, that MCR 2.001 specifically provides that, "The rules of this chapter govern procedure in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." MCR 7.206(A) states that, "[e]xcept as otherwise provided in this rule, the general rules of pleading apply as nearly as practicable" and the remainder of the rule contains no content suggesting that the filing of a Cross-Claim should not

be permitted. In further response, the Intervening Defendants also note that they filed their Motion for Intervention promptly, with a request for immediate consideration of the same, in order to ensure that their status as intervenors could be established in time to file their supporting brief within the time allowed for the named Defendants to file their responses, as required by MCR 7.206(D)(2). In their Motion for Intervention, the Intervening Defendants proposed to file a supporting brief addressing their responses to Plaintiffs' Complaint for Mandamus and their Cross-Claim on or before May 22, 2018, the deadline for the Defendants to respond. The Plaintiffs did not object to Intervening Defendants' proposal to proceed in that manner, and their Cross-Claim was accepted for filing by the Court's Order of May 11, 2018.

STATEMENT OF QUESTIONS PRESENTED

Intervening Defendants / Cross-Plaintiffs continue to rely upon the statement of the issues set forth in their original supporting brief previously filed on May 22, 2018.

STATEMENT OF FACTS

Intervening Defendants / Cross-Plaintiffs continue to rely upon the discussion of the facts set forth in their original supporting brief previously filed on May 22, 2018, as supplemented by the following events that occurred after that brief was filed.

On May 22, 2018, the Bureau of Elections issued its Staff Report for VNP's proposal. That report stated that 315,654 valid signatures were required for certification, and estimated that VNP's petition was supported by 394,092 valid signatures, at a confidence level of 100%. The Staff Report also noted the agreement of the parties that the Plaintiffs' legal challenges regarding the form of VNP's petition were properly before the courts, and concluded with the recommendation that the Board of Canvassers certify the petition. (Affidavit of James R. Lancaster, ¶ 3 and Staff Report attached as Exhibit A.)¹ On the same date, VNP's General Counsel James Lancaster received notification that VNP's proposal had been placed on the agenda for the Board's meeting of May 24, 2018. (Lancaster Affidavit, ¶ 4 and notification attached as Exhibit B.

On the afternoon of May 23, 2018, Mr. Lancaster received notification that the Board's meeting scheduled for May 24, 2018 had been cancelled. The notice of cancellation provided no explanation of the reason for the cancellation. (Lancaster Affidavit, ¶ 5 and notice of cancellation attached as Exhibit C)

On May 23, 2018, after learning that the Board's meeting had been cancelled, Mr. Lancaster sent an e-mail message to Board Chairman Norman D. Shinkle, requesting that he provide an explanation of the reason for the cancellation and inquiring as to whether VNP's proposal would be on the agenda for the Board's next meeting on June 1, 2018. Chairman

¹ A copy of the Affidavit of James R. Lancaster is attached as Appendix "A."

Shinkle has not responded to that message. (Lancaster Affidavit, ¶ 6 and e-mail message attached as Exhibit D)

Explanations of Chairman Shinkle's reasons for cancelling the May 24, 2018 meeting have appeared in media reports. In *Gongwer News Service's* report for May 23, 2018, Secretary of State Spokesperson Fred Woodhams was quoted as saying that Chairman Shinkle had cancelled the meeting "because there were legal filings this week that make it clear the board was under no immediate deadline to take up the matter." In the *MIRS News* report for May 23, 2018, Mr. Woodhams was quoted as saying that Chairman Shinkle had opted to cancel the meeting because there were "legal filings this week that make it clear the board was under no immediate deadline to take up the matter" and further explained that Mr. Shinkle had stated that "the matter is before the courts" and he wanted resolution there before having the Board move forward. (Lancaster Affidavit, ¶ 7 and media reports attached as Exhibits E and F)

The Board of Canvassers has now issued its agenda for its meeting to be held on June 1, 2018. Consideration of VNP's proposal is not included among the items listed on that agenda. (Lancaster Affidavit, ¶ 8 and notice attached as Exhibit G)

LEGAL ARGUMENTS

I. PERFORMANCE OF DEFENDANTS' CLEAR LEGAL DUTIES SHOULD BE ENFORCED BY THIS COURT WITHOUT FURTHER DELAY.

Defendants Secretary of State and Board of Canvassers have taken no substantive positions on Plaintiffs' Complaint for Mandamus or Intervening Defendants' Cross-Claim. Rather, they have appropriately pledged to comply with this Court's orders. They have requested that this Court issue its decision in this matter promptly, so as to allow sufficient time for conclusion of any subsequent appeals to the Supreme Court before the middle of August.

However, Defendants' request overlooks the potential for delay in the further proceedings before the Board of Canvassers which could occur after completion of the Supreme Court's review – a delay which could unfairly deny the Intervening Defendants a reasonable opportunity to pursue further review, or enforcement of any decree made by this Court or the Supreme Court, if there should be an unjustified deadlock of the Board's members on the eve of the deadline.² This is why it is critical that the Court grant Intervening Defendants' request to require the Board's prompt certification of VNP's proposal for the November 2018 General Election ballot, and prompt performance of Defendants' only remaining duties for its submission to the voters in order to avoid a piecemeal resolution of questions relating to the performance of those duties. These duties are: (1) for the Board to determine whether VNP has submitted a sufficient number of valid signatures, and if it has, certify the VNP proposal, and (2) for the Director of Elections to prepare, and the Board to approve, the 100-word statement.

² The Plaintiffs are not concerned about the potential for such an injustice; indeed, it appears that they would welcome it, as their Answer has repeatedly asserted that the Board of Canvassers is not required to certify VNP's proposal for the ballot until September 6, 2018.

The Intervening Defendants contend that they are entitled to prompt performance of these statutory duties. This Court has the authority to grant that relief by means of a writ of mandamus directed to Defendants Secretary of State and Board of Canvassers. The Court also has broad authority to grant that relief pursuant to MCR 7.216(C)(7), which provides that this Court may, at any time, on terms it deems just, “enter any order or grant further or different relief as the case may require, and MCR 7.216(A)(9), which allows the Court to “direct the parties as to how to proceed in any case pending before it.” *See, Attorney General v Board of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016); *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 801; 761 NW2d 210 (2008).

There is no dispute among the parties that the legal challenges to the validity of VNP’s petition present issues that are solely within the jurisdiction of the courts, and not the Board. It is also undisputed that: 1) the Board of Canvassers established a deadline of April 26, 2018 for filing of challenges to the petition signatures; 2) no challenges to the number or validity of the petition signatures have been filed with the Board of Canvassers; 3) no challenges to the form of VNP’s petition have been filed with the Board of Canvassers other than a challenge filed by Plaintiff Citizens Protecting Michigan’s Constitution (“CPMC”), which has raised the same issues raised in Plaintiffs’ present Complaint for Mandamus; and 4) the challenge filed with the Board of Canvassers by Plaintiff CPMC did not raise any issues other than those which have been raised in this Court by Plaintiffs’ present Complaint for Mandamus.

The Board’s “sole duty” with regard to qualifying VNP’s petition is “to determine whether the signatures on the petition are valid, including that of the person who circulated the petition, whether they are the signatures of registered voters, and whether there are sufficient valid signature to certify the petition.” *Deleeuw v State Board of Canvassers*, 263 Mich App

496, 500-501; 693 NW2d 179 (2004); *Gillis v Board of State Canvassers*, 453 Mich 881; 554 NW2d 9 (1996). As this Court has held, in *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 542; 688 NW2d 538 (2004), the Board of Canvassers is obligated to certify a petition when it has approved the form of the petition, as it has in this case, and a sufficient number of signatures has been filed in support.

There is no legitimate reason to delay the Board's ministerial certification of VNP's proposal or the preparation and approval of the 100-word summary of purpose pending resolution of Plaintiffs' legal challenges. There *is*, however, a need for direction from this Court requiring the prompt certification of VNP's proposal and performance of the defendants' remaining statutory duties for a number of reasons. As previously discussed, VNP's voter-initiated petition, supported by an amply sufficient number of valid signatures, was filed with the Bureau of Elections on December 18, 2017, *more than 5 months ago*, but the Board of Canvassers has not addressed the sufficiency of the signatures or considered certification of VNP's proposal in any of its proceedings conducted to date. This continuing delay cannot be justified when there are no disputed issues for the Board to consider.

In the Plaintiffs' Answer and Affirmative Defenses to Intervening Defendants' Cross-Claim filed with this Court on May 22, 2018, Plaintiffs have denied that there is any necessity for prompt consideration of VNP's proposal by the Board, and asserted that the Board is not required to act on VNP's proposal until September 6, 2108. (See Plaintiffs' responses to Paragraphs 17, 20, 28 and 32 of the Cross-Claim on pages 11-12, 16 and 18, and Affirmative Defense No. 6 on page 19) If the Board's consideration of VNP's proposal is delayed in the manner that Plaintiffs have suggested, the delay would likely result in a piecemeal resolution of the issues related to the eligibility of VNP's proposal for the ballot and its submission to the

voters, thus denying the Intervening Defendants a reasonable opportunity to pursue further review, or enforcement of any decree made by this Court or the Supreme Court, in the event of an unjustified deadlock of the Board's members on the eve of the deadline. Although Plaintiffs might prefer that outcome, this litigation is not a game, and this Court should be loath to approve any strategy that would be implemented in the manner that a game would be played. If there is to be any unjustified refusal to certify VNP's proposal or approve the 100-word summary of purpose prepared by the Director of Elections, that action should be taken sooner rather than later, so that the Intervening Defendants may have a reasonable opportunity to present their legal challenges, and the courts will have sufficient time to consider them.

Not surprisingly, Michigan appellate decisions have manifested frustration with untimely and piecemeal challenges to ballot proposals. In *Massey v Secretary of State*, 457 Mich 410, 414-415; 579 NW2d 862 (1998), which addressed a post-election challenge to the adoption of Proposal C (term limits) in the 1992 general election based upon a claim that the Secretary of State had failed to publish all of the existing provisions that would be altered or abrogated by the proposed amendment, the Supreme Court recognized the potential for the courts to require corrective action when a challenge is more appropriately brought prior to the election, noting that, "[t]his Court has long expressed a preference that challenges such as the one brought in the present case be filed sufficiently before an election, in this case the election of 1992, for the courts to have time to resolve the dispute and, if necessary, to direct election officials to take corrective action or to enjoin submission of the proposal to the electorate." 457 Mich at 414-415, citing *Carman v Secretary of State*, 384 Mich 443, 449; 185 NW2d 1 (1971).

In *Citizens for Protection of Marriage, supra*, this Court granted the requested writ of mandamus to require certification of the proposal for amendment of the Constitution at issue in

an Opinion and Order issued on September 3, 2004. But because it appeared likely that the Board of Canvassers would remain deadlocked, the Court declined to order a remand to the Board for approval of the 100-word summary proposed by the Director of Elections during the pendency of the Court's review, but instead directed the Secretary of State to take all necessary measures to place the proposal on the November ballot using the 100-word summary previously submitted. 263 Mich App at 493-495.

The harm threatened in this case is similar to the deadlock that threatened to defeat the will of the people in *Citizens for Protection of Marriage*, as it is obvious that consideration of VNP's proposal is being delayed without legitimate cause, and it seems probable that this unjustified delay will continue until after the issues raised in Plaintiffs' Complaint are finally adjudicated if this Court does not intervene to direct timely compliance. To prevent that harm, this Court should now take swift action, similar to its action in *Citizens for Protection of Marriage*, to assure that all issues related to the eligibility of VNP's proposal for the ballot and its proper submission to the voters are settled by judicial decree well in advance of the statutory deadline.

In this case, there is no justification or necessity for delaying the certification of VNP's proposal or the completion of the related duties required for submission of its proposal on the ballot until final adjudication of Plaintiffs' legal challenges by the Supreme Court. This Court's decision on Intervening Defendants' Cross-Claim, and all actions taken by the Secretary of State and the Board of Canvassers in compliance with this Court's Orders, would of course be subject to modification by any subsequent Order of the Supreme Court. Thus, there would be no prejudice of any kind, to any party, if VNP's proposal is certified and prepared for submission on the ballot pending disposition of Plaintiffs' legal challenges.

For all of these reasons, the Intervening Defendants contend that the interests of justice would be best served by requiring the prompt performance of the Defendants' clear legal duties regarding the ministerial certification of VNP's proposal, the preparation and approval of the constitutionally-required 100-word summary of purpose, and the preparation of their proposal for submission on the General Election ballot, without further delay. The Intervening Defendants have requested this relief because they have no other legal or equitable remedy which can sufficiently assure the timely performance of Defendants' clear legal duties in light of the impending deadline for certification of VNP's proposal for the ballot which could eliminate or unfairly limit the opportunity to pursue enforcement action to require the performance of those duties if the certification of the proposal for the ballot or the preparation and approval of the required 100-word summary are delayed until final adjudication of Plaintiffs' claims by the Supreme Court has been completed.

RELIEF REQUESTED

WHEREFORE, the Intervening Defendants / Cross-Plaintiffs respectfully request that this Honorable Court:


- A. Deny Plaintiffs' Complaint for Mandamus;
- B. Enter its Order granting a writ of mandamus against Defendants Secretary of State and Board of State Canvassers, or an Order providing binding direction to those Defendants pursuant to MCR 7.216(A)(7) and (9), requiring them to promptly comply with all of their constitutional and statutory duties regarding certification, approval and placement of the ballot proposal at issue on the 2018 General Election ballot, without delay. Specifically,

the Intervening Defendants / Cross-Plaintiffs request that the Defendants be required to perform their clear legal duties as follows:

1. That the Board of State Canvassers be directed to perform its ministerial duty of certifying VNP's ballot proposal for inclusion on the 2018 General Election ballot, or alternatively, to consider and vote upon certification of VNP's ballot proposal, at a meeting convened within 14 days after entry of the Court's Judgment, or another time deemed appropriate by the Court;
 2. That the Director of Elections be directed to prepare the constitutionally-required 100-word summary of purpose, and that the Board of State Canvassers be directed to consider and approve or vote upon the Director of Elections' proposed summary at a meeting convened within 30 days after entry of the Court's Judgment, or another time deemed appropriate by the Court; and
 3. That the Secretary of State be directed to promptly comply with all of its other constitutional and statutory duties regarding placement of VNP's proposal on the ballot.
- C. Require timely and complete reporting of actions taken for the required performance of the aforementioned duties pursuant to MCR 7.216(A)(7).
 - D. Grant immediate effect of the Court's Judgment pursuant to MCR 7.215(F)(2).
 - E. Retain jurisdiction of this matter to permit further proceedings to secure prompt enforcement of the Court's Judgment.

Respectfully submitted,

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