
In the Supreme Court of the United States

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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.

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

**APPLICANTS' (1) REPLY TO RESPONDENTS' BRIEF IN
OPPOSITION AND (2) RESPONSE TO *AMICI CURIAE***

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INTRODUCTION

Respondents are correct; this is a “highly unusual application.” Resp.1. But that’s certainly no fault of Applicants. After all, it was Respondents who took 5½ months to review only 1,000 of more than 700,000 signatures on ACVM’s petition. It was Respondents who gave Applicants nearly no time to respond when those 1,000 signatures were declared inadequate. And it was Respondents who refused to allow Applicants to proffer affidavits of identity at the Board of State Canvassers’ meeting, when there was still plenty of time to consider them. If Respondents had acted diligently and fairly, the parties would not be in this emergency posture.

Respondents are also correct that there has been no response to the request for emergency relief that Applicants filed with the Michigan Supreme Court nearly a week ago. Resp.1. (Though that Court did accept a few *amici* briefs today.) That, too, is certainly no fault of Applicants. They acted as quickly as practicable and have been stonewalled by the state judiciary. That’s why this Court should act now.

But Respondents are wrong that no federal constitutional rights are at stake. Resp.2. The Application doesn’t involve a challenge to Michigan law. It involves Respondents’ violation of Applicants’ due-process and equal-protection rights by (a) taking 5½ months to reject ACVM’s signatures, (b) refusing to give ACVM an opportunity to review the electronic voter signatures Respondents have on file, and (c) directing ACVM to obtain voter affidavits of identity but then refusing to recognize those affidavits—either because the secret-signature file prevailed or because the affidavits were submitted at the Board’s meeting, a timely presentation even under Respondents’ own rules. The U.S. Constitution requires more.

Respondents are also wrong that the injunctive relief Applicants seek is disfavored. Resp.2. Absent relief, Applicants ACVM and Smith's right to have the petition considered *at this November's election* will have been violated, and that opportunity is never coming back. Sure, the petition could be placed on the ballot in 2028, two years from now. But if Applicants persuade Michigan voters to adopt the proposal this November, then Michigan will finally ensure that non-citizens are not participating in Michigan elections (as the law already requires) in 2028 rather than in 2030. Absent relief, that opportunity, too, will be permanently lost.

The application should be granted.

CLARIFICATION OF PROCEEDINGS

Respondents complain they had a lot going on, and they processed ACVM's petition signatures as quickly as possible. Resp.8-10. What Respondents *don't* say is that they processed 1,000 signatures for another ballot initiative—Michigan Money Out of Politics—from May 27, 2026, to July 24, 2026, i.e., *in less than two months*. The difference? The proposals' substance. The so-called Money Out of Politics initiative tilts the political playing field by barring political contributions by state contractors (large and small businesses) and their executives. But it continues to allow political contributions by unions (large and small) and their officers. So Respondents had no trouble quickly approving an initiative to keep conservative donors out of politics but could not find time to process the same number of signatures for an initiative to keep non-citizens from voting illegally. Such political favoritism colors all the machinations below.

REPLY ARGUMENT

I. Applicants' Response to Respondents' Brief

Applicants have a protected liberty interest because, as this Court held in *Meyer v. Grant*, 486 U.S. 414, 422 (1988): “the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” Here, Applicants were *not* given adequate process.

Applicants do not stake their claim to relief on Respondents' refusal to give them access to the Qualified Voter File (QVF). Rather, Applicants argue that after Respondents told them the solution to the QVF-access impasse was to gather sworn affidavits—and after ACVM gathered and presented affidavits—Respondents could not arbitrarily refuse to accept them. And Respondents' refusal was indeed arbitrary.

It was arbitrary for Respondents to request affidavits, then ignore them and continue to rely on the QVF as the sole arbiter of a signer's identity. And it was arbitrary for Respondents to change their rules mid-stream and refuse to consider the identity-proving affidavits because of when they were submitted. More than 700,000 people—to include Applicant Fred Smith—exercised their First Amendment Rights, and the exercise of those rights was quashed by Respondents backtracking on their own invitation to prove signer identities with affidavits.

Moreover, Mich. Comp. Laws § 168.476—the statute empowering Respondent Board to make determinations on the sufficiency of a petition's signatures—does not make the QVF the final word on valid signatures. Indeed, that same statute directs State election officials to use alternative means to verify signatures, such as checking

with local election officials—something Respondents do not claim they ever did. State officials were thus wholly within their authority to ask ACVM to procure identity affidavits, which ACVM duly did. What violates federal law is Respondents’ later *rejection* of the very method of cure they proposed to accept.

More important, Michigan’s statutes regarding affidavits say that a notarized signature establishes an individual’s identity. Application.22. That’s why Respondents accepted *some* of the identity affidavits, just not all that were necessary. There is no conflict between the affidavit statutes and Section 168.476, nor do Respondents claim one. It violated the due-process rights of the affidavit signers—including Smith—to disregard those affidavits after State officials requested them.

Applicants were denied Equal Protection of the Law

Respondents denied both Applicant Americans for Citizen Voting — Michigan and Applicant Fred Smith equal protection of the law. Start with how they treated Smith.

Respondents say that Smith is not similarly situated to other persons, so his equal-protection claim stumbles at the threshold. That misunderstands the circumstances. Smith signed ACVM’s petition. His signature was wrongly thrown out because Respondents thought it wasn’t him who signed it. Then, when Smith proved it was his signature by presenting his testimony in the form of a signed, sworn, notarized affidavit, Respondents rejected him again. So Smith was treated demonstrably worse than thousands of other similarly situated signers. Respondents cannot avoid that constitutional problem by hiding behind a never-applied 48-hour rule that even on its face does not apply to testimony in the form of an affidavit.

Respondents also say that Smith’s fundamental right to vote isn’t implicated here. Common sense says otherwise. Smith signed a petition to place ACVM’s proposed amendment on the ballot. Come November—absent injunctive relief from this Court—Smith won’t see the proposed amendment on the ballot. That is a denial of the fundamental right to vote, *simpliciter*.

Respondents cite caselaw that doesn’t control. Nearly 40 years ago, this Court decided a case that does. In *Meyer*, the Court held: “the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” 486 U.S. at 422. So signing and circulating a petition is a First Amendment protected activity.

Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291 (6th Cir. 1993), doesn’t change that rule. There, the Sixth Circuit held that voters who signed a petition were not denied the right to vote when their signatures were rejected because they did not fill out a home address, a signers’ “technical defect.” Here, Respondents rejected five signatures based solely on the theory that the voters’ signature did not match the voters’ signature on file with the State. Respondents then reviewed affidavits from the five signatories, *acknowledged the affidavits cured the alleged deficiency and proved the voters’ identity*, and *still* rejected the voters’ signatures. So this case isn’t about “technical defects”—it’s about whether Respondents can reject signatories’ repeated exercise of their First Amendment Rights.

Respondents also violated Applicant ACVM’s equal-protection rights. Notably, Respondents respond to only one of ACVM’s equal protection arguments. The Application argued ACVM was denied equal protection of the laws because: (A) the

Board considered two late-filed challenges, something the Michigan Supreme Court, the Michigan Secretary of State's guidance, and the Board's own guidance firmly state it cannot do; and, separately, (B) the Board refused to consider five signers' affidavits, even though it routinely received new evidence—not new challenges—even up to and during a meeting. Applicants even gave six recent examples in which the Board received evidence *during a meeting* and considered it. Application.31.32. And Applicants didn't bury the lead—they provided bolded headings, YouTube links, and timestamps of the Board's practice of accepting evidence even up to the middle of a meeting. *See id.* Despite its long-standing, repeatedly verified practice, the Board here treated ACVM differently than similarly situated, past petition sponsors. That's a violation of ACVM's right to equal protection of the law. Respondents don't address this argument and thus concede it.

Applicants will suffer irreparable harm, and the public interest weighs heavily in favor of placing the petition on the ballot.

Respondents also do not respond to Applicants' argument that illegally, and in violation of the Fourteenth Amendment, denying Applicants access to the ballot is an irreparable harm. Resp.37. To be sure, Respondents have a section titled "Applicants have not shown an irreparable injury." *Id.* But that section only speaks to the merits of Applicants' due-process and equal-protection claims. *See id.* Respondents leave the irreparability of Applicants harm unaddressed—and for good reason.

There is no post-election relief this Court, the Michigan Supreme Court, or anyone else can offer to repair the damage done to Applicants if its petition is wrongfully denied access to the ballot. Either voters are given an opportunity to consider the petition on November 3, 2026, or they are not. Failure to grant relief now

means the measure will not be heard this election cycle and cannot be implemented in the next. Those are opportunities that will be lost forever.

The public interest also weighs heavily in favor of granting relief. Respondents say that Applicants seek to enjoin the application of Michigan law. Quite the opposite. Under Michigan law and long-standing practice *by Respondents*, Applicants were entitled to offer affidavits to cure alleged issues with voters' identities. The Fourteenth Amendment guarantees Applicants due process in the application of those procedures. Instead, Respondents unlawfully denied Applicants fair process. All Applicants seek is an emergency injunction to enforce the law. And, as Applicants explained in their Emergency Application, the public interest weighs heavily in favor of seeing issues on the ballot—federal courts hardly pause for breath before so holding. *E.g., Barr v. Galvin*, 584 F. Supp. 2d 316, 321 (D. Mass. 2008) (finding public interest in favor of having nominees on the ballot); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1014 (S.D. Ohio 2008) (same) *Valenti v. Mitchell*, 790 F. Supp. 534, 548 (E.D. Pa. 1992) (“the public interest is served by ensuring that access to the government, through access to the ballot, is open to all.”); *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988 (D. Idaho 2020); *People Not Politicians Oregon v. Clarno*, 472 F. Supp. 3d 890 (D. Or. 2020).

Those holdings are for good, public-interest reasons. If a petition is kept off the ballot, then the public can never vote on it in that election cycle—even if subsequent proceedings ultimately vindicate those sponsoring the petition. Contrawise, if a petition is placed on the ballot, its merits can be litigated outside the compressed, due-process-devoid timetable of election litigation, preserving everyone's rights.

The bottom line is that all underlying disputed legal issues can be litigated and resolved in the ordinary course in the coming months. But absent an order by close of business on September 3, 2026, Applicants will lose their right forever to have their petition decided by Michigan voters at *this* November's election. The Application should be granted.

II. Response to *Amici* Promote the Vote and Robert LaBrant

First, as an initial matter, Chief Justice Roberts' in-chambers opinion in *Lux v. Rodrigues* is inapposite. That case involved a questionable constitutional challenge to a state election statute. See generally *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (challenging Virginia statute requiring nominating petition signatures to be witnessed by a resident of the corresponding congressional district). But the present case involves state election officials illegally keeping a petition off the ballot in violation of their own rules and any semblance of due process. The situation in *Lux* is not remotely comparable to the one here.

More than 700,000 Michigan citizens signed the ACVM petitions, which were turned in more than four months ahead of the statutory deadline. Application.7-11. Yet the Respondents sat on those signatures for more than 5½ months, only to review 1,000 of them at the eleventh hour (a mere 0.1% of the more than 700,000 signatures contained in the petition), *id.* at 7-8, after which they concluded that ACVM was three signatures short. *Id.* at 12-13. The kicker, though, was that the Respondent Board rejected nine affidavits from voters that signed the petition, despite the fact that Respondents told ACVM—in writing and just days prior—that ACVM could contact

the voters who signed the petition and ask them to sign an affidavit detailing the page that was signed and indicating that they were the one who signed, all for the sake of rehabilitating those voters' signatures. *Id.* at 8-10. ACVM did as requested, then Respondents denied ballot access anyway. This case is distinct from *Lux*.

Second, there's no question that the Michigan Supreme Court's refusal to act in a meaningful way despite the extreme urgency *is* a decision. See *A.A.R.P. v. Trump*, 605 U.S. 91, 94 (2025) (a lower court's "inaction in the face of extreme urgency and a high risk of 'serious, perhaps irreparable,' consequences may have the effect of refusing an injunction." (quoting 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3924.1, pp. 174, 180–181 (3d ed. 2012))). Here, the Applicants sought emergency relief from the Michigan Supreme Court on August 27, 2026. Application.5-6, 15-17. That court is required to consider cases just like this one as soon as possible. Mich. Comp. Laws § 168.479(2) ("Any legal challenge to the official declaration of the sufficiency or insufficiency of an initiative petition has the highest priority and shall be advanced on the supreme court docket so as to provide for the earliest possible disposition.").

And—at least until now—that Court regularly considers election cases on an expedited basis. Application.15. But as of this filing, the Michigan Supreme Court hasn't set a briefing schedule nor given any indication it intends to act. Applicants asked for a decision no later than September 1st, and that date has passed. So while that court has in the past expediently addressed cases like this one, it failed to do so here. The Michigan Supreme Court has constructively denied Applicants' request for a writ of mandamus, teeing this Court up to act by September 3, 2026.

A pre-election MSC ruling on the alter-or-abrogate issue would only exacerbate the violation of Applicants' due-process rights.

Applicants challenged the Board's decision to keep their petition off the ballot in the Michigan Supreme Court on August 27, seeking relief no later than September 1. On August 31—3½ days later and on the eve of Applicants' date of requested relief—PMV raised the alter-or-abrogate issue in a single sentence. PMV Affirmative Defenses at 17 ("ACVM's proposal cannot be placed on the ballot because its petition failed to list all of the Michigan Constitutional provisions altered or abrogated by the proposal."). It wasn't until the next day, on September 1 at 4:05 p.m.—55 minutes before Applicant's requested date and time for relief—that PMV finally raised a substantive alter-or-abrogate argument with the Michigan Supreme Court. PMV Brief at 4-12. The Michigan Supreme Court has yet to acknowledge Applicants' case or request briefing on any issue.

At this point, if that court ruled on the alter-or-abrogate argument, such a ruling would exacerbate the violation of Applicants' Fourteenth Amendment Due Process rights. "The fundamental requirement of due process is the opportunity to be heard '*at a meaningful time and in a meaningful manner*.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted, emphasis added). There is no time for the Michigan Supreme Court to adequately review PMV's alter-or-abrogate arguments or for Applicants to respond "in a *meaningful time and in a meaningful manner*" to PMV's arguments. *Id.*

This Court should not credit PMV's argument that the Michigan Supreme Court may deny relief to Applicants on ostensibly unreviewable grounds for three reasons: First, it's speculative. Second, that court has shown no sign that it intends

to issue a timely, pre-election ruling at all. Third, any alter-or-abrogate ruling would itself violate Applicants’ due-process rights. The proper resolution is to allow voters to evaluate and vote on the proposal, then litigate whether there is an underlying problem with the measure.

To be sure, PMV’s alter-or-abrogate argument is also without merit. Petitions to amend the Michigan Constitution must list “existing provisions of the constitution which would be altered or abrogated thereby.” Mich. Const. 1963, art 12, § 2. The Michigan Supreme Court narrowly construes the meaning of “altered or abrogated”—a petition only alters or abrogates “if the proposed amendment would add to, delete from, or change the existing wording of the provision *or would render it wholly inoperative.*” *Protect Our Jobs v. Bd. of State Canvassers*, 492 Mich. 763, 781 (2012) (emphasis added).

In a scattershot pleading, PMV raises nearly a dozen Michigan Constitutional provisions allegedly rendered “wholly inoperative.” Their arguments are risible. As one illustrative example, they say that Mich. Const. 1963, art 4, § 1—which gives to the Legislature the broad and general “legislative power of the State of Michigan”—is rendered “wholly inoperative” because enactment of a constitutional provision that creates new rights for Michigan voters would necessarily deny the Legislature the right to enact laws contrary to that new constitutional provision. But far from being “wholly inoperative,” the Legislature’s power would be essentially intact. And countless Michigan constitutional proposals have been placed on the ballot without mentioning that the Legislature lacks power to change those proposals on its own.

PMV's other alter-or-abrogate arguments are similarly anemic and will ultimately be rejected. But ultimately, whether PMV's arguments are meritorious is of no moment because they can be litigated later.

This Appeal Presents Legal Issues, not Factual Issues

Applicants' right to relief is not based on "fact-based disputes." *Amici* Br.4. Here, no party questions the operative facts. As Proposed *Amici*—the "challengers" in the administrative proceedings below—acknowledge before this Court, the dispute focuses on "3 petition signatures not counted and the admissibility of 5 late-filed affidavits." *Id.* And all Board Members of the Michigan State Board of Canvassers—even the two who voted to deadlock and reject these five affidavits—agreed that each affidavit contained "a valid signature" by the voter in question. Transcript of SBOC Hearing at 136:4–15. In other words, there is no dispute amongst the parties regarding "who did what, when or where, how or why," *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 394 (2018), and all that remains for this Court is to apply the law to those undisputed facts and determine whether the Board's dilatory and hindering conduct deprived Applicants of their constitutional rights.

Applicants seek only the amount of process due to them under the Fourteenth Amendment, not a *particular* process.

Respondents and *Amici* also seek to reframe Applicants' due-process claims as seeking a *particular* process, one not afforded them under Michigan law. That's an incorrect framing. Here, Applicants were denied *all* process. So it follows that they must have been denied due process.

Applicants won't rehash the undisputed facts. Respondents and *Amici* claim this Court can't consider the negligible process Applicants were afforded because

that's part of the state initiative process, which is outside the realm of a due-process claim. But federal due-process claims are regularly based on denial of state processes. As this Court held in *Zinerman v. Burch*, 494 U.S. 113 (1990), “[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; *what is unconstitutional is the deprivation of such an interest without due process of law.*” *Id.* at 125 (emphasis added). “[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.” *Id.* at 126.

Here, for all the reasons explained above and in the Emergency Application, Respondents provided effectively no process at all. Instead, it offered Applicants an opportunity to salvage their petition, then pulled the rug out from under them at the last possible second so they wouldn't have time to do anything about it. That was constitutionally inadequate. And this Court should order relief, restoring the voices of more than 700,000 Michigan voters.

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Respectfully submitted,

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