

**STATE OF MICHIGAN
COURT OF APPEALS**

MICHIGAN CIVIL RIGHTS INITIATIVE,

Plaintiff/Petitioner

-vs-

BOARD OF STATE CANVASSERS,

COA No. 264204

Defendant/Respondent,

and

OPERATION KING'S DREAM, EXIE CHESTER-GRIFFIN,
ROOSEVELT J. BRISTON, LILLIAN A. CUMMINGS,
NICOLE MCCOY, ALICIA ROSE SPENCER, CHERYL
THOMPSON, LESLIE ATZMON, MONICA SMITH,
MARICRUZ LOPEZ, KATE STENVIG, LIANA
MULHOLLAND, ALISHIA STEWARD, JOSEPH
JOHNSON, JOHNATHAN CRUTCHER, TURQUOISE
WISE-KING, DENESHEA RICHEY, IVAN ADAMS,
RHIANNON CHESTER, AND CURTIS RAY,

Proposed Intervening
Defendants/Respondents.

**INTERVENING DEFENDANTS' BRIEF
IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDAMUS**

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED

I

WHETHER THE MICHIGAN BOARD OF CANVASSERS BREACHED A CLEAR LEGAL DUTY IN FAILING TO CERTIFY THE CONSTITUTIONAL AMENDMENT PROPOSED BY THE MICHIGAN CIVIL RIGHTS INITIATIVE FOR THE NOVEMBER 2006 BALLOT WHERE THERE IS SUBSTANTIAL EVIDENCE THAT THE MCRI OBTAINED ITS SIGNATURES BY RACIALLY-TARGETED FRAUD?

The intervening defendants say “No.”

Two members of the Board of Canvassers said “No.”

The petitioner says “Yes.”

II

WHETHER THE MICHIGAN BOARD OF CANVASSERS BREACHED A CLEAR LEGAL DUTY IN FAILING TO CERTIFY THE CONSTITUTIONAL AMENDMENT PROPOSED BY THE MICHIGAN CIVIL RIGHTS INITIATIVE FOR THE NOVEMBER 2006 BALLOT WHERE THE MCRI’S PETITION FAILED TO COMPLY WITH THE REQUIREMENTS OF MCL 168.482(3)?

The intervening defendants say “No.”

Two members of the Board of Canvassers said “No.”

The petitioner says “Yes.”

INTRODUCTION

Virtually every black voter who signed the MCRI petition was deceived into thinking they were signing a petition in support of affirmative action. Fully one quarter of the total signatures MCRI submitted are from communities that are overwhelmingly black.

Racially targeted fraud was employed by MCRI in majority-black cities and towns across Michigan. MCRI employed racially targeted fraud to secure the signatures of black voters on a ballot proposal whose purpose they bitterly oppose. Having done so, it now asks this Court to disregard that fraud and to order its amendment onto the ballot without the Board of Canvassers or any other body even being allowed to investigate the fraud.

To secure by deception and fraud the unwitting participation of many tens of thousands of Michigan's black voters in an historic attack on affirmative action is a provocation that shocks the popular belief as to what is reasonable, democratic and fair. It is simply unacceptable to secure the signatures of black parents in Detroit by telling them that they are signing something aimed at making college more accessible to their children when what they are actually signing is depriving their children of college opportunities.

The integrity and authority of the Michigan elections and the state agencies charged with ensuring fairness and honesty in elections is at stake in this legal proceeding.

The Constitution of our state talks in ringing terms about the necessity to "preserve the purity of elections ...[and] guard against abuses of the elective

franchise...”. It is up to this court to decide whether these words are to mean anything for Michigan’s black voters and, therefore all Michigan voters.

STATEMENT OF FACTS

The Michigan Civil Rights Initiative claims to have 455,373 signatures in support of its proposed amendment to the Constitution of the State of Michigan. But the statistical sample selected by the Bureau of Elections reveals a startling fact about those signatures.

One fourth came from communities where black people constitute 70 to 95 percent of the population.¹ Put another way, because black people are only 14 percent of the population of Michigan, the MCRI claims to have secured support from black voters at a rate twice that of the support it secured from white voters.

As is apparent, that is not because black people in Michigan actually support the amendment that the MCRI proposes. As Ward Connerly has stated, his proposed amendment aims to overturn the decision of the United States Supreme Court in *Grutter v Bollinger*, 539 US 306 (2003) and to eliminate the affirmative action plans at the University of Michigan, at other state universities, and in state employment and contracting.² As has been undisputed, that would result in an immediate two-thirds drop in the black enrollment at the University of Michigan Law School, with corresponding drops at other universities and in state employment and contracting.³

¹ One hundred twenty two of the 500 signatures in the Bureau’s sample came from cities with black majorities, including, in some instances, overwhelmingly black majorities: Detroit (74), Flint (25), Highland Park (6), Battle Creek (5), Mount Morris (2), Benton Harbor (2), Oak Park (2) and Inkster (1).

² *Washington Post*, June 25, 2003.

³ *Grutter v. Bollinger*, 288 F3d 732, 737-738 (CA 6 2002), *aff’d* 539 US 306 (2003).

In their overwhelming majority, the black and Latino/a citizens who signed the MCRI's petition bitterly oppose those objectives. They signed the MCRI's petition not because they support its aim – but because the MCRI *deliberately lied* to them about the aim of that petition.

The challengers submitted to the Board of Canvassers numerous declarations, affidavits and statements detailing the racially-targeted fraud that the MCRI had perpetrated. The MCRI asked the Board of Canvassers to ignore all of that evidence. Four days before the hearing, the MCRI received crucial support, when the office of the Attorney General, who supports the MCRI initiative, advised Representative Leon Drolet, the chief legislative supporter of that initiative, that the Board had no authority to consider that evidence.

To its credit, a bi-partisan majority of the Board refused to ignore that evidence. Two Democrats supported a motion that the Board should conduct an investigation of the manner in which the MCRI obtained its signatures. On the basis of the informal opinion by the Deputy Attorney General, a Republican member, Lyn Bankes, voted against an investigation by the Board, but later requested that the Legislature conduct an investigation (Tr 178, 181, 206-207).⁴

On the basis of the evidence of fraud that had been submitted – and that has still not been investigated – two Democrats voted against the motion to certify the MCRI's proposed amendment for the November 2006 ballot, with Member Bankes abstaining. Only one member of the Board voted in favor of the motion to certify the proposed amendment onto the ballot (Tr 200-201).

⁴ “Tr” refers to the transcript of the July 19, 2005 meeting of the Board of Canvassers.

Before this Court, the MCRI asks again that the evidence of its own racially-targeted fraud be ignored. It asks this Court to declare that the Board of Canvassers had a clear legal duty to place its proposed amendment on the ballot without any investigation to determine whether it had in fact obtained its signatures by means of systematic and racially-targeted fraud. According to the MCRI, if it has enough signatures on its petitions, the Board must certify its amendment for the ballot no matter how it obtained those signatures.

This Court should reject that argument. It should begin, as the Board of Canvassers did, by looking at the evidence of fraud that was produced in order to determine whether the Board breached a clear legal duty by refusing to place this amendment on the ballot in the absence of any investigation of whether the MCRI obtained its signatures by systematically lying to black, Latino/a and white citizens of the State.

A. The deceptive language of the MCRI's petition.

As will be set forth below, numerous MCRI circulators deliberately lied to voters in order to obtain the signatures that the MCRI submitted to the Board of Canvassers.

The MCRI now claims that the voter should have read the petition before signing it. The MCRI's circulators, however, were able to tell the lies that they told because the MCRI's petition is itself deliberately deceptive (Apx, Ex BB).

To begin with, the petition calls itself a "Civil Rights Initiative." In the summary of the proposed amendment – which is all that appears above the voters' signatures – the MCRI states that all existing remedies for discrimination will continue. But that is not

true – for the petition eliminates the chief remedy for discrimination that has been imposed – affirmative action. MCL 37.2705; 37.2210.

The proposed amendment, which is on the back of the petition, also attempts to convey the impression of continuity, stating that it bans discrimination on account of race, sex, color, ethnicity, or national origin. But neither the proposal nor the summary informs the citizens that the State Constitution and statutes already ban discrimination on those grounds. Neither therefore tells citizens that the *sole* purpose of the proposed amendment is not to ban discrimination – which is already banned – but to ban “preferences.”

The ban on “preferences” is tucked into a five words inside the proposal – and is never defined. For those who are not familiar with the MCRI’s codeword, nothing in the summary or the text of the amendment even suggests that the petition’s sole aim is the elimination of the affirmative action plan at the University of Michigan and any other affirmative action plan like it.

As set forth in signed statements submitted to the Board, Judge Robert Ziolkowski of the Third Circuit Court and Judge Archie Hayman of the Seventh Circuit Court signed the MCRI petition, even though both support affirmative action in general and at the University of Michigan in particular (Ex’s).⁵ If circuit judges can not understand what the MCRI’s petition proposes, it is obvious that ordinary citizens can not understand it.

As will be seen, the deception in the petition opens the door to the deliberate lies told by those whom the MCRI paid to circulate its petition.

⁵ “Ex” refers to the exhibits in the appendix submitted in support of this brief and motion. All exhibits were part of the record below.

B. The MCRI defrauds voters in Detroit.

Judge Ziolkowski's statement illustrates the method that the MCRI circulators used to obtain thousands of signatures in Detroit. As Judge Ziolkowski entered a CVS store on Jefferson Avenue, an MCRI circulator asked him to sign a petition that she said *supported* affirmative action. Judge Ziolkowski did so. Inside the store, however, friends told him that the petition actually opposed affirmative action. He returned to the circulator and removed his signature, with the circulator telling him that she had been told to say that the petition supported affirmative action when she was hired to circulate the petition (Apx Ex F, statement of Judge Ziolkowski).

Judge Ziolkowski's statement is simply the tip of the iceberg. An MCRI circulator told Michael Mulholland, the Secretary-Treasurer of AFSCME Local 207, that he should sign the MCRI petition because it supported affirmative action (Apx, Ex J). Heidi Osgood, a local reporter, heard another black MCRI circulator telling the same lie to numerous citizens at the Apollo Market in Detroit (Apx, Ex K).

Even more dramatically, Exie Chester, a black MCRI circulator, described how she obtained signatures on 231 petitions, including 8 that were part of the Bureau's statistical sample. As Chester stated, the MCRI officials did not tell her what the petition was about – and she assumed that the ban on preferences meant “the kind of preferences that white families have in terms of money, connections and similar things.” (Apx, Ex H, Dec of Chester, para 6). Chester therefore began collecting signatures without knowing what the petition sought to achieve.

Early in the campaign, however, Chester saw other MCRI circulators obtaining numerous signatures outside the 36th District Court by telling “everyone that it was a

petition to help blacks get into college” (Apx, Ex H, Dec of Chester, para 9). From that point forward, Chester and her friend, Emmarine Kidd, circulated the petition in front of liquor stores and at other public places in the City of Detroit and “...got an enthusiastic response and obtained many signatures based on the statement that ‘This is a petition to help blacks get into college.’” (Apx, Ex H, Dec of Chester, paras 11-12).

Much later, Chester found out what the petition was really about when Kidd’s granddaughter – a University of Michigan student – saw the petition and told her that it would result in a dramatic drop in black enrollment in colleges and universities. When Chester confronted the MCRI officials, however, they only smiled over the fraud that they had used her to commit (Apx, Ex H, Dec of Chester, paras 15-17).

Dana Clowney, another black person hired by the MCRI to circulate petitions in Detroit, told similar lies outside the main post office on Fort Street in downtown Detroit and in front of the liquor store across the street. As set forth in his sworn statement,

I told persons that this petition was to help minority students in getting into college. I also told them that there were people who were trying to keep blacks out of college and that this initiative would stop that.

(Apx, Ex L, Dec of Clowney, para 9).

Clowney only stopped circulating after a friend told him that the MCRI’s petition was in fact against affirmative action (Apx, Ex L, Dec of Clowney, para 9).

John Henry Reed, another black citizen hired by the MCRI to circulate its petition in Detroit, told similar lies in order to obtain the signatures that the MCRI wanted. An MCRI official named “Glenda” told Reed that the petition was for affirmative action and “would help black students get into college.” Glenda also told him that there was another

petition that was attempting to end affirmative action but that this one was to “preserve it” (Apx, Ex M, Dec of Reed, para 3).

Using those lines, Reed circulated the MCRI’s petition at Northland Mall, in Troy, and in downtown Detroit and the Cass Corridor. After a few potential signers objected that the petition was against affirmative action, he raised it with MCRI supervisors “Glenda” and “Heidi,” who just laughed it off and said “some people will just be like that” (Apx, Ex M, Dec of Reed, para 8). Reed continued circulating the petitions from August through November, although he reported receiving more objections as time went on (Apx, Ex M, Dec of Reed, paras 8-10. 13). Reed obtained three of the signatures in the 500.

LaVon Marshall, another black citizen hired by the MCRI, received similar instructions from Jennifer Gratz, a top official in the MCRI campaign, along with a young white man and a black woman named Nicki, who were also officials in the MCRI campaign. Marshall circulated the petition outside Food Basics in Detroit and at downtown festivals, telling potential signers that it was for affirmative action. He obtained two of the signatures in the 500 (Apx, Ex N, Dec of Marshall, para 8-12).

Chester, Clowney, Reed and Marshall had the courage to come forward and state what they had done. The most open and systematic fraud was, however, perpetrated by those who now wish to remain silent and who could not be compelled to testify without a formal investigation. The affidavit of Heather Miller, a Detroit teacher, sets forth what such an investigation could reveal (Apx, Ex O, Aff of Miller).

On July 13, Miller visited the home of Albert Anderson, an MCRI circulator who obtained four signatures in the sample of 500. When asked whether he told potential

signers that the petition was for affirmative action, Anderson said that “Yeah, I got a dollar a signature, so I told them it was for affirmative action.” After asking for money from Miller – and being refused – he would answer no more questions (Apx, Ex O, Aff of Miller, paras 2-3).

As Miller and other investigators left his home, however, another person appeared, identifying himself as Sherman Irvin, another MCRI circulator who obtained one of the signatures in the sample of 500. Irvin told Miller that he petitioned throughout Detroit and Flint, obtaining signatures on the MCRI’s petition by telling persons that it was for affirmative action. Some potential signatories reportedly objected to what Irvin was doing but he said he told them to “fuck off,” and threatened to get a gun if they did not leave him alone. He said he “needed the money” (Apx, Ex O, Aff of Miller, paras 4-6). In fact, as Miller and the other investigators left, Irvin asked for money, cigarettes, and empty bottles (Apx, Ex O, Aff of Miller, para 7).

Numerous citizens both in and out of the sample of 500 have signed statements demonstrating the widespread and systematic nature of the fraud that the MCRI perpetrated in the black communities of this State. Samantha Canty, a resident of Southfield and one of those in the Bureau’s sample, was approached by a black man at a Taste Fest in Detroit and asked to sign the MCRI petition in order to “keep affirmative action going” (Apx, Ex P, Statement of S. Canty). Similarly, Jewell Baltimore, Rasheda Chapman, Venetta Coleman, Ervin Jackson, Dorothy Jemison, Oletric Robinson, Yolanda Sharpe and eight other persons in the Bureau’s sample signed statements that they signed the MCRI petition because they were told that it supported affirmative action (Apx, Ex Q, Aff of Wagner, paras 5-7 and attached affidavits).

In fact, the challengers sent investigators to every address in Detroit, Highland Park, Inkster, Flint, and Benton Harbor that had been listed by the persons who were included in the statistical sample of 500 selected by the Bureau. Some could not be located; others could not remember what was said; but many recalled that the MCRI circulator told him or her that the petition supported affirmative action.

Every person from those cities who was contacted signed a statement that he or she would never have signed the MCRI's petition if he or she had been told that the petition aimed to end or limit affirmative action. Despite a diligent search, the investigators were not able to find a *single* black person who signed the MCRI's petition after being told that it aimed to overturn affirmative action at the University of Michigan or anywhere else (Apx, Ex R, Aff of K. Stenvig, para 6, 13, 15; Apx, Ex S, Aff of Taylor, para 14; Apx, Ex Q, Aff of Wagner, para 13; Apx, Ex T, Aff of M. Greene, para 11).

Apart from the signatures that it obtained by lying to and deceiving the residents of Detroit, the MCRI has no support for its proposed amendment in that City of Detroit – despite the fact that 16 percent of the signatures included in the statistical sample came from Detroit.

C. The MCRI defrauds black voters in southeastern Michigan outside Detroit.

Just as Judge Ziolkowski's signature on the MCRI petition is the tip of the iceberg of the fraud in Detroit, Judge Hayman's signature on that petition is the tip of the iceberg of fraud in the rest of southeastern Michigan (Apx, Ex G).

In Mt. Clemens, Ruthie Stevenson, the President of the Macomb County branch of the NAACP was approached by an MCRI circulator outside the Mt. Clemens post office. The young white man asked her to sign the petition because it was for "civil

rights” and “affirmative action” and because the President of the Macomb County NAACP had endorsed the petition. Stevenson, however, told this MCRI circulator that she *was* the President of the Macomb County NAACP, that she had not endorsed the petition, and that it was not for civil rights or affirmative action. But two weeks later, another member of the NAACP reported to her that the same circulator had told the same lie to another black person who approached the Mt. Clemens post office (Apx, Ex U, Dec of Stevenson, paras 3-8).

In Flint, the basic story was the same. At a Halo Burger in downtown Flint, two white MCRI officials hired Elitha Marie Shumpert to circulate the MCRI petition. She petitioned in front of the Family Dollar Store in Flint. When some black citizens began telling her that the petition was against affirmative action, she asked her supervisors, who assured her that it was “...not against affirmative action at all.” She continued telling voters that it was for affirmative action until she quit for unrelated personal reasons (Apx, Ex V, Dec of Shumpert, paras 9-12).

Yvonne Moore, a black citizen of Flint, was hired by a white woman named “Patricia” who worked for the MCRI campaign. She was not told that the petition aimed to end affirmative action. She circulated the petition in Flint, Saginaw and Jackson – and she told potential signers that it was a way “to get kids into college.” She quit because the MCRI abandoned her at a polling place in Jackson, from which she had to take a midnight bus back to Flint (Apx, Ex W, Dec of Moore, paras 3-10).

Three other black residents of Flint – Christi Lynn Sanders, June Scroggins, and Lerwonia Summers – have signed sworn declarations setting forth similar misrepresentation and fraud perpetrated on them – and, unwittingly, by them on voters

whom they induced to sign the MCRI's petition. Together, they obtained three of the 500 signatures by these means (Apx, Ex's X, Y, Z, Decs of Sanders, Scroggins, and Summers).

The MCRI circulators lied to many other citizens throughout southeast Michigan. Betty Henderson, one of the 500 names selected by the Bureau, signed the MCRI petition outside Kessel's grocery store in Flint because a black MCRI circulator told her that it would save affirmative action (Apx, Ex S, Aff of Taylor, para 7). Christie Fields, another of the 500, signed the MCRI petition because a black MCRI circulator told her the same lie outside a Dollar Store in Flint (Apx, Ex S, Aff of Taylor, para 9). Willie Foyer, yet another of the 500, not only signed himself, but saw many other black people sign the petition in a strip mall in Auburn Hills because young black circulators hired by the MCRI told them that the MCRI petition supported affirmative action (Apx, Ex S, Aff of Taylor, para 13).

In sum, numerous MCRI circulators told substantially the same lie to black voters in numerous locations throughout southeastern Michigan.

D. The MCRI defrauds black voters in western Michigan.

The MCRI perpetrated the same fraud in black and Latino/a communities on the western side of the State. Lupe Ramos-Montigny was approached at a Martin Luther King Day celebration in Grand Rapids and asked to sign the MCRI's petition on the representation that it "protected" affirmative action in Michigan. She not only signed it, but persuaded her friends to sign it based on this misrepresentation (Apx, Ex AA, Dec of Ramos-Montigny).

Similarly, the challengers also previously submitted an affidavit from Sammy Williams setting forth similar fraud in Benton Harbor (Apx, Ex I, Dec of Williams).

ARGUMENT

I

THE MCRI HAS NOT SHOWN THAT THE BOARD OF CANVASSERS BREACHED A CLEAR LEGAL DUTY IN FAILING TO PLACE THE MCRI'S PROPOSED AMENDMENT ON THE NOVEMBER 2006 BALLOT IN THE ABSENCE OF ANY INVESTIGATION AS TO WHETHER THE MCRI OBTAINED THE SIGNATURES ON ITS PETITION BY MEANS OF RACIALLY-TARGETED FRAUD.

- A. The Board had no clear legal duty to place a proposed amendment on the ballot where there was substantial evidence that the MCRI had obtained its signatures by means of racially-targeted fraud.

The Michigan Constitution provides that the electors of this State may require the State election officials to submit a proposed amendment to the State Constitution to a vote of the people *if* (1) the proposed amendment is supported by a sufficient number of valid signatures and (2) is in the form and is signed and circulated in a manner that is provided by law:

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.

Const 1963, art 12, sec 2 (emphasis added).

The requirement that the petition be supported by ten percent of those who voted for Governor has a very definite purpose:

The purpose of having a particular number of signatures on a petition to call for a referendum election is to prevent trivial matters, in which there is no desire on the part of the general public to be heard, from being presented.

Stierle v Lima Township, 1996 WL 33349455 (1996), citing 82 CJS Statutes, ss 116, 123, pp 194, 217 n 21.

As this Court continued, that purpose is frustrated if the petitioner submits signatures that have been forged or that have been procured by fraudulent means:

When it comes to this purpose, there is essentially no difference between a forged signature and the signature of a person from whom the purpose of the petition has been concealed; neither signature is a manifestation of the named person's desire to see the real matter at issue voted upon by the general public. To hold otherwise would allow the petition requirement to become a sham.

Id.

As an unreported decision, *Stierle* is, of course, not binding on this Court. But its logic is compelling and its holding is based upon a decision of the Michigan Supreme Court, which is reported and which is binding. *Id.*, citing *Burton Township v Genesee County*, 369 Mich 180 (1963).

In *Burton*, the challengers asserted that a referendum to annex land to the City of Flint was invalid because those who circulated the petitions obtained signatures by misrepresenting the nature of the proposal that they sought to place on the ballot. The Court held that the affidavits submitted in that case “fail[ed] to disclose fraudulent misrepresentation *vitiating the petition*” (emphasis added) and that, in any case, the petition itself “fairly reveal[ed] its nature and purpose.” *Id.*, 369 Mich at 186. As the emphasized words made clear, however, if the Court had found that the signatures had

been obtained by fraudulent misrepresentation, it was clear that this would “vitiating the petition,” particularly if it found that the petition itself was not clear. *Id.*

At issue here are not simply isolated misstatements of fact – or mere puffery or expressions of opinion, as might happen in any campaign. In this case, there is substantial evidence of systematic lying about the fundamental purpose of this amendment. Moreover, the lies are directed at the black population, which will lose the most if the proposed amendment were ever adopted. If believed, the evidence establishes that the MCRI is attempting to secure a vote on an amendment that will close the doors of higher education to black students on the basis of signatures obtained by lying to the parents of those students.

The Constitution requires the Legislature to enact laws to “...preserve the purity of elections ...[and] to guard against abuses of the elective franchise...” Const 1963, art 2, sec 4. Under that provision and under Article 2, Section 2, the Board of Canvassers does not, indeed cannot, have a duty to place on the ballot a proposed amendment where there is substantial evidence that the petitioners secured the signatures needed to gain access to the ballot by systematically lying to voters about the fundamental purpose of the proposed amendment.

Especially where there is substantial evidence that the petitioners targeted their lies upon blacks and other racial minorities, it would be an outrageous construction of the law to say that the Board or Canvassers should not conduct an investigation of that conduct but rather had the right, much less the duty, to ignore that evidence and place this proposed amendment on the ballot without even determining whether the MCRI had in fact obtained its signatures by means of racially-targeted fraud.

B. The Board of Canvassers has the right and the duty to investigate the allegations of racially-targeted fraud.

Article 12, Section 2 requires the state officials designated by law to determine the “validity and sufficiency” of the signatures submitted in support of a petition to amend the Constitution. By specific statute, the Legislature has designated the Board of Canvassers to discharge that responsibility. MCL 168.474. By that statute, the Legislature thus conferred upon the Board the authority to determine not simply the sufficiency of the signatures, but their validity as well.

In order for it to discharge that duty, the Legislature conferred upon the Board broad authority to “...hold hearings upon *any* complaints filed or *for any purpose considered necessary by the board to conduct investigations of the petitions:*”

(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.* To conduct a hearing, the board may issue subpoenas and administer oaths. The board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes, but shall complete the canvass at least 2 months before the election at which the proposal is to be submitted.

MCL 168.476(2)(emphasis added).

Despite that broad statutory authority, four days before the meeting that the Board had scheduled to consider the challenges to the MCRI’s petition, the Deputy Attorney General issued an informal opinion that wrongly declared that “...the Board may not consider claims of fraudulent misrepresentation or fraudulent inducement in determining the validity and sufficiency of the signatures on petitions submitted to the Board in support of a proposed constitutional amendment...” (Letter, G. Gordon to Rep Leon Drolet, July 15, 2005, at 7). As a direct result of that letter, Republican member Lyn Bankes felt compelled to vote against a Board investigation of the charges of racially-

targeted fraud – even though she believed that there was a substantial question as to the validity of the signatures that the MCRI had submitted (Tr 181, 206-207).

The Attorney General and Representative Drolet had previously announced their support for the MCRI’s initiative. While they have that right, they do not have the right to team up and block an investigation into whether the MCRI obtained its signatures by fraud.

The Deputy Attorney General’s letter to Representative Drolet reached a conclusion that is demonstrably wrong. In conferring upon the Board the duty to determine the “validity” of the signatures submitted in support of a proposed Constitutional amendment, the Constitution and the Legislature conferred upon the Board a duty that went beyond determining whether a voter had actually written his signature on the petition. If the Board determined that a circulator procured signatures by bribery, extortion, or fraud, it could determine that the signatures were not “valid” under the ordinary meaning of that term as understood by the people and by the common law – and by the Court of Appeals in *Stierle* and the Supreme Court in *Burton Township*.

Neither the informal opinion of the Attorney General nor the MCRI have provided any valid reason for the disregarding *Burton Township* and *Stierle*.

The Attorney General’s informal opinion and the MCRI’s Brief assert that the Board is limited to exercising the powers specifically set forth in MCL 168.476 (Atty Gen Op, at 4-6; MCRI Br, at 3-4). But the fact that the Board may presume that a signature is valid if the voter is in the qualified voter file and that it may compare “doubtful” signatures against the registration records does not mean that these are the only tasks that the Board must discharge in order to fulfill its Constitutional duty to

determine whether there are a sufficient number of “valid” signatures to warrant placing a proposed amendment before the electorate. Const 1963, art 12, sec 2.

If the Board were to determine that signatures had been procured by bribes, threats, or fraud, MCL 168.476 does not require it to close its eyes, holds its nose, and declare that those signatures are “valid” for securing access to the ballot.

Similarly, the fact that neither *Burton Township* nor *Stierle* considered the current Michigan election law or the current statutory authority of the Board of Canvassers is irrelevant (Atty Gen Op, at 7). There is no reason for concluding that the standards for assuring the purity of an election to amend the Constitution of the State should be less stringent than those observed for assuring the purity of an election to annex land to a city or township. In fact, if anything, the standards for amending the Constitution should be more stringent.

Likewise, the Attorney General is splitting hairs when he suggests that *Burton Township* may have held that court had the power to consider the use of fraud to secure signatures but that it did not consider whether the Board of Canvassers or some other agency had that power (Atty Gen Op, at 7). But if that is so, then this Court would have to consider the evidence of fraud – in which case there are clearly factual disputes that preclude mandamus. More fundamentally, when the Constitution conferred upon the authorities designated by law – that is, the Board of Canvassers – the power to determine whether the signatures on a petition to amend the constitution were “valid,” the plain and ordinary meaning of the term used in the Constitution confers upon the Board of Canvassers the right to determine whether signatures were invalid because they were procured by the use of bribes, threats or fraud. Const 1963, art 12, sec 2.

Finally, despite the suggestions by the Attorney General and the MCRI, nothing in this Court's recent decisions requires the Board to accept without investigation signatures where there is evidence that they were procured by fraud, bribery or other unlawful means (See Atty Gen Op, at 4-5; MCRI Br, at 4-5, citing *Citizens for the Protection of Marriage v Bd of State Canvassers*, 263 Mich App 486 (2004) and *Deleeuw v Bd of State Canvassers*, 263 Mich App 497 (2004)). In both cases, the Court held that the Board had to determine whether the petitioner had sufficient "valid" or "genuine" signatures – and in neither did the Court even suggest that a signature procured by fraud, bribery or other unlawful means was a "valid" or "genuine" signature.⁶

In this case, the MCRI and the Attorney General wrongly teamed up to prevent the Board from investigating whether the MCRI had in fact obtained its signatures by means of a campaign of racially targeted fraud. Having done so, they can not now ask this Court to certify the MCRI's proposed amendment for placement on the November 2006 because there are clear questions of fact over whether the MCRI has submitted a sufficient number of "valid" signatures as required by Article 12, Section 12, and as the Board is required to determine under MCL .

The Court should deny the petition and remand this matter with instructions that the Board may investigate whether the MCRI in fact obtained its signatures by means of racially-targeted fraud.

⁶ In fact, *Citizens for the Protection of Marriage* and *Deleeuw* are completely irrelevant to this case. In *Citizens*, this Court held that the Board of Canvassers could not refuse to certify a question for the ballot "...on the basis of their conclusion that it was unlawful and unconstitutional." *Citizens for Protection of Marriage*, 263 Mich App at 489. In *Deleeuw*, this Court held that the Board could not refuse to accept signatures for Ralph Nader because they were procured by representatives of the Republican state Committee. *Deleeuw*, 263 Mich App at 499-500.

II

IN REFUSING TO CERTIFY THIS PETITION FOR THE BALLOT, THE BOARD OF CANVASSERS ACTED WITHIN THE AUTHORITY GRANTED IT BY LAW BECAUSE THE MCRI'S PETITION FAILED TO COMPLY WITH CLEAR STATUTORY REQUIREMENTS.

- A. In violation of MCL 168.482(3), the MCRI petition failed to disclose that the proposed amendment would alter or abrogate Article 1, Section 2 of the 1963 Constitution.

The Michigan Constitution requires that the voters be informed of the purpose of a Constitutional amendment by specifically requiring that the notice of election set forth in full the existing Constitutional provisions that would be altered or abrogated by the proposed amendment. Const 1963, art 2, sec 2, para 2; Const 1908, art 17, sec 3. The Legislature deemed this requirement so crucial that it specifically required that petitions seeking to obtain a vote on a proposed amendment must set forth in full the existing articles of the Constitution that would be “altered or abrogated” by the proposal. MCL 168.482(3).⁷

The evidence before the Board of Canvassers demonstrates the crucial importance of this requirement. Because the MCRI's petition did not inform voters that the proposed amendment would alter an existing article that already banned racial and other discrimination, the MCRI was able to tell circulators and voters alike that this was a “civil rights petition” designed to eliminate discrimination instead of the truth that it was

⁷ The statute reads as follows:
“If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provision to be altered or abrogated shall be inserted, preceded by the words: “Provisions of the existing constitution altered or abrogated by the proposal if adopted.”

MCL 168.482(3).

a petition that sought to drastically limit the remedies available under the existing civil rights laws.

In *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 263 Mich App 486 (2004), a panel of this Court held that the MCRI petition did not have to disclose that intent. At a time when it appeared that the dispute over the MCRI petition might be moot, the Supreme Court denied an application for leave to appeal by a vote of 4 to 3.⁸ *Coalition to Defend Affirmative Action*, 471 Mich 939(2004). The MCRI now claims that the decision of the prior panel is binding under MCR 7.215.

The prior decision is not binding, however, because that panel did not have before it the evidence demonstrating the systematic deception that the MCRI was able to perpetrate because it did not have to disclose that its petition altered the existing civil rights article in the Constitution. Moreover, even if this panel decided that the decision by the prior panel was binding, it should find that that decision was in error so that there will be an opportunity for the judges of this Court to correct that error under MCR 7.215(J)(2).

By any standard, the fundamental intent and effect of the MCRI proposal is to alter the language of the existing equal protection clause of the State Constitution. Const 1963, art 1, sec 2. Article 1, Section 2 now provides in relevant part as follows:

No person shall be denied the equal protection of the laws; nor shall any person be ... discriminated against in the exercise [of his civil or political rights] because of religion, race, color or national origin.

The MCRI's proposed amendment repeats *and then alters* this basic policy as follows:

⁸ At the time the Supreme Court considered the application for leave to appeal, the MCRI had abandoned its effort to get on the 2004 ballot--and it was not clear that it would obtain enough signatures to allow it to claim that it was entitled to a place on the 2006 ballot.

The state shall not discriminate against, *or grant preferential treatment to*, any individual or group on the basis of race, *sex*, color, *ethnicity*, or national origin *in the operation of public employment, public education, or public contracting*.

MCRI Proposal, Section 2 (emphasis added).

Insofar as action by the state is concerned, the MCRI's proposal *alters* the language of Article 1, Section 2 in three ways: (1) by adding sex and "ethnicity" to the list of prohibited discrimination, (2) by making explicit that the ban on discrimination applies to public employment, education and contracting, and (3) by limiting the existing ban on discrimination by adding the ban on "grant[ing] preferential treatment." In reality, the third objective – adding the ban on "preferences" – is the *only* aim of this petition because the courts and the Legislature have already accomplished the first and second alterations.

Everywhere but on his petition, Connerly has made that intent clear. Two days after the United States Supreme Court held in *Grutter* that the University of Michigan had not violated the Equal Protection Clause by considering the race of those applying for admission to its Law School, Connerly announced that he would launch a petition campaign to amend the Constitution of the State of Michigan in order to overrule that decision. *Washington Post*, June 25, 2003. As the State equal protection had long been held to provide protections that were identical with those of the federal Constitution,⁹ the MCRI knew that it had to alter the language of the state equal protection clause in order to achieve that objective.

In December 2003, the MCRI made that clear when it revealed that the text of its proposed amendment was a word-for-word copy of California's Proposition 209.

⁹ *Moore v. Spangler*, 401 Mich. 360, 370 (1977).

(Compare Proposed Amend, Ex 2, with Const CA, Art 1, sec 31). In California, Connerly himself had made clear that the fundamental purpose and effect of that Proposition was to amend the equal protection clause of that State's Constitution. As the California Court of Appeals held in a case that bears his name:

Under equal protection analysis, all state actions that rely on suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny.

Connerly v State Personnel Board, 92 Cal App 4th 16, 42 (2001). Accord. *Hi-Voltage Wire Works, Inc. v City of San Jose*, 24 Cal 4th 537 (2000).¹⁰

The question is not whether the MCRI seeks to alter Article 1, Section 2 – the question is whether MCL 168.482(3) requires the MCRI to inform the voters of that intent so that they can intelligently decide whether they want to sign its petition.

In defining when a proposed amendment must disclose the existing articles that it will alter or abrogate, the Michigan Supreme Court has held as follows:

We hold that it is only where the proposed amendment would directly “alter or abrogate” (“amend” or “replace”) a specific provision or provisions of the Constitution that the provision or provisions must be noted on the petitions. An existing constitutional provision is altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or would render it wholly inoperative.

Ferency v Secretary of State, 409 Mich 569, 597 (1980).

¹⁰ The Supreme Court of Florida also recognized that the proposals that Connerly has supported had as their fundamental aim the alteration of the equal protection clause in that state's Constitution. *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So 2d 888, 894 (Sup Ct Fla 2001).

In a subsequent decision, the Court declared that the phrase “existing wording” in the *Ferency* standard should be “taken literally.” *Massey v Secretary of State*, 457 Mich 410, 418 (1998).

In *Coalition to Defend Affirmative Action*, a panel of this Court held that language quoted above was purportedly “dispositive of plaintiff’s arguments.” *Id.*, 262 Mich at 402. But that is only so if the phrase “taken literally” means that the proposed amendment must literally state that it intends to alter or abrogate an existing article. Under that construction, however, the *requirement* that a petitioner disclose the provisions that would be altered or abrogated becomes not a requirement but an *option* for the proponents of the proposed amendment. If the proponents want to disclose the intent to amend the existing article, they phrase the amendment as an alteration of an existing article. If not, however, they phrase it as a new article that in practice overwrites the terms of the old article.

For public relations reasons, the MCRI has decided that it is best to pose as a defender of civil rights and thus not to disclose that its proposed amendment has as its fundamental and indeed only aim the alteration of the existing civil rights article in the Constitution.¹¹

Neither *Massey* nor *Ferency*, however, intended to convert the requirement of disclosure of articles that will be altered or abrogated into a drafting or public relations option for the proponents of the proposed amendment. In those cases, the Supreme Court

¹¹ As the Texas Court of Appeals found in considering another petition with identical language to that proposed by the MCRI, Connerly’s supporters have consciously attempted to force votes on proposals banning so-called “preferences” because they believe that they can win more votes on such proposals than on attempts to ban “affirmative action” or, still less, attempts to amend the civil rights act. See *Brown v Blum*, 9 SW 2d 840, 848-852 (1999).

based its decision not on whether the proponents of the amendment chose words that explicitly acknowledged an intent to amend the language of an existing provision, but on an analysis of whether the proposed amendment in fact altered or abrogated the language of an existing provision. Thus, in *Massey*, the Court held that the term-limit amendment did not need to disclose the existing article setting forth the age and residence requirements for legislators not because of the phrasing of the term-limit amendment itself, but because that amendment would not *in fact* alter or abrogate the language setting forth the age and residence requirements for Representatives and Senators, which would continue on in full force even if the proposed amendment were adopted. *Massey, supra*, 457 Mich at 416-418.

The same method of analysis compels the exact opposite conclusion here. If the MCRI's proposed amendment were passed, the courts would have to consider whether particular state actions discriminated against *or* granted preferences on account of race, gender or other prohibited factors. The language in Article 1, Section 2 banning discrimination *would forever be joined to and altered by the language banning "preferences."*

Even though this was obviously so, the prior panel refused to require disclosure of the evident intent of the proposal because the amendment had a different word order and some different words that were different than the existing article:

...[T]he only words that the proposed amendment and Article 1, Section 2 have in common is some form of the word "discriminate" and the words "race," "color," and "national origin." The fact that the proposed amendment uses some of the same terms found in Article 1, Section 2 does not compel the conclusion that the proposal alters, amends or abrogates the existing wording of that provision.

Coalition to Defend Affirmative Action, 262 Mich App at 402.

But this ignores the evident fact that the *sole* objective of the MCRI’s proposed amendment is to alter the language of Article 1, Section 2’s ban on discrimination by including a ban on what the MCRI calls “racial preferences.” Moreover, it amounts to saying that so long as the MCRI disguises its intent by substituting a “new” article with slightly different words in slightly different orders, it need not disclose the fundamental alteration in the language of Article 1, Section 2 that it hopes to achieve.

By *any* reasonable standard, the MCRI’s proposal alters or amends Article 1, Section 2.¹² Indeed, if the proposal ever passed, the MCRI would, as Connerly was in California, be the first in line to argue that it had altered or abrogated Article 1, Section 2. The question is not whether the MCRI’s proposed amendment alters Article 1, Section 2—the question is whether the MCRI can gain a place on the ballot after withholding that vital information from the electorate at large and in particular from those black citizens whom the MCRI has so blatantly deceived in obtaining its signatures.

The challengers ask this panel to decide that the MCRI can not obtain a place on the ballot by concealing from the voters the fundamental intent of its proposed amendment in direct violation of MCL 168.482(3) and in direct violation of its obligation to tell the truth to the voters whose signatures it solicits.

¹² In the prior case, the Attorney General urged that the Board of Canvassers needed a bright-line test and should not be required to determine whether a proposed amendment actually alters the language of an existing provision. But it takes nothing more than putting the language of Article 1, Section 2 next to the language of the MCRI’s proposed amendment to see that this amendment alters the language of an existing section. Moreover, the Supreme Court has long held that the Board of Canvassers has the competence and the duty to “appreciate the meaning and effect of what appears on the face of a petition” so that it “can determine whether, upon its face, it imports one thing or another.” *Scott v Vaughn*, 202 Mich 629, 644 (1918).

- B. In further violation of MCL 168.482(3), the MCRI's petition places a misleading summary on the first page of the petition, where the text of the amendment is required to be.

As the Attorney General has opined, the Michigan Constitution has been amended to provide different requirements for statutes that are proposed by initiative and amendments to the Constitution that are proposed by initiative. In the former, the notice of the election need not set forth the full text of the laws to be altered or abrogated; in the latter that is a constitutional necessity. 1997 Op Atty Gen No. 1997

Consistent with that difference, in MCL 168.482 (3), the Legislature prescribed a requirement that applied *solely* to those petitions that sought to amend the Constitution. In that subsection alone, the Legislature clearly required that: “The full text of the amendment so proposed *shall follow* [the heading prescribed by statute] and be printed in 8-point type.” MCL 168.482(3)(emphasis added). As the Attorney General has noted,

In a later statute, the Legislature authorized the Secretary of State to relax some of the requirements of form specified in other sections—but it pointedly did not allow the Secretary to authorize the placement of a Constitutional amendment on the back of the petition, with a summary placed on the front. MCL 168.544d.

Despite the clear requirements of the statute, the MCRI petition deliberately failed to place the proposed amendment on the front of the petition. Even after challengers objected to this failure at the December 2003 meeting of the Board of Canvassers, the MCRI persisted in these violations of the statute. Indeed, even after the Board of Canvassers motion pointedly did not approve “the summary of the proposal which appears on the signature side of the petition or...the manner in which the proposal is

affixed on the petition,” the MCRI failed to correct the violations of the statute.

Coalition to Defend Affirmative Action, 262 Mich App at 400.

For a year-and-a-half, the MCRI persisted in circulating petitions that buried the text of the amendment on the back of the petition – even though the statute required the reverse and even though the Board of Canvassers had pointedly refused to approve the placement of the proposal in that location.

Even though the Board of Canvassers had not even ruled on the issues, the prior panel of this Court held that “Neither 168.482 nor MCL 168.544d require that the text of the proposed amendment appear on the front of the petition.” *Coalition to Defend Affirmative Action*, 262 Mich App at 405. But MCL 168.482(3) specifically requires that the text of the proposed amendment shall follow the heading prescribed by law. As the Supreme Court has repeatedly held, the courts must follow the clear words of the statute as written. *State Farm Fire and Casualty Company v Old Republic Insurance Company*, 466 Mich 142 (2002). In failing to do so here, the prior panel erred by allowing the MCRI to bury the text of the proposed amendment on the back of the petition when the statute explicitly requires that it be immediately under the heading on the front of the petition.¹³

Finally, although it the prior panel “discouraged prospective drafters from including extraneous language in future petitions,” *Id.*, 262 Mich App at 406, it held that

¹³ In *Coalition to Defend Affirmative Action*, the prior panel also took note of a letter issued by the Secretary of State that allowed an amendment to be placed on the back if there was insufficient room on the front of the petition for that text. *Id.*, 262 Mich App at 405. Even assuming that the Secretary could authorize a violation of the clear words of the statute, the prior panel did not even address the fact that the letter was not applicable to this petition because there was sufficient room on the front. The MCRI’s summary contained 252 words; the text of the proposed amendment was only 337 words; and no one can claim that there was no room for the proposal on the front of the petition.

even if there were defects in the MCRI's petition, it had "substantially complied" with the statutory requirements and that this was all that was required in order to secure access to the ballot. *Id.*, 262 Mich App at 405-406.

But however salutary those principles may be for inadvertent or negligible errors, they are inapplicable where the petitioner engaged in a year-and-a-half of continuing violations after the defects were called to its attention. Instead of revising the format of its petitions, the MCRI deliberately circulated petitions that did not comply with the clear words of the statute. The challengers submit that the MCRI did this so that it could continue using a summary that said that existing remedies would continue – even though the proposal would eliminate the most important remedy of all – affirmative action.

But whatever its reason was, the two members of the Board of Canvassers who dissented on the grounds of the MCRI's failure to comply with the clear requirements of the law acted well-within the discretion given to them to approve the form of petitions – and this Court should not set their decision aside by ordering them to approve a petition that has deliberately failed to comply with the law.

CONCLUSION AND RELIEF REQUESTED

The intervening respondents request that this Court deny the petition for a writ of mandamus on the grounds that there are disputed issues of fact and there is no clear legal duty to certify the MCRI's proposed amendment for placement on the November 2006 ballot where there is substantial evidence of racially targeted fraud in obtaining the signatures in support of that petition and where the petition itself failed to comply with the clear requirements of the statute that are designed to minimize the possibility of deceiving those who are asked to sign the petition.

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