STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN RE 37 DISENFRANCHISED HAMTRAMCK VOTERS (37 DISENFRANCHISED HAMTRAMCK VOTERS and MUBITH MAHMOOD),

Plaintiffs,

-v-

CITY OF HAMTRAMCK and WAYNE COUNTY BOARD OF CANVASSERS,

Defendants-Appellees;

and

ADAM ALHARBI,

Intervening Defendant-Appellee.

_____/

Supreme Court No. 169465
Court of Appeals No. 378814
Circuit Court No. 25-018688-CZ

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, PROMOTE THE VOTE FUND, AND THE LEAGUE OF WOMEN VOTERS OF MICHIGAN EDUCATION FUND

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QUESTION PRESENTED

The Wayne County Board of Canvassers refused to count 37 absentee ballots, which were found before certification but after the initial returns were reported to the Board by the Hamtramck City Clerk. This refusal occurred even though there were no allegations that the voters were unqualified to vote or the voters engaged in any kind of misconduct. Did the refusal to count these ballots violate the affected voters' fundamental right to vote, as guaranteed by Article 2, § 4 of the 1963 Constitution?

Amici answer: Yes.

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union Fund of Michigan ("ACLU") is a non-profit, nonpartisan membership organization devoted to protecting civil rights and liberties for all Michiganders. It is an affiliate of the national American Civil Liberties Union, which has approximately 1.6 million members and is among the oldest, largest, and most active civil rights organizations in the country. The ACLU regularly litigates in courts throughout Michigan in cases involving voting rights and helps coordinate voter protection efforts throughout the state to reduce obstacles to voting and encourage an engaged electorate. See, e.g., *People v Burkman*, 990 NW2d 371 (Mich, 2023); *Mothering Justice v Attorney General*, 987 NW2d 872 (Mich, 2023); *League of Women Voters of Mich v Secretary of State*, 506 Mich 561; 957 NW2d 731 (2020); *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 928 NW2d 911 (Mich, 2019); *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42; 921 NW2d 247 (2018); *Stand Up for Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012); *Socialist Workers Party v Secretary of State*, 412 Mich 571; 317 NW2d 1 (1982); *Moore v Johnson*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 23, 2014 (Docket No. 14–11903), 2014 WL 4924409.

Amicus Curiae Promote the Vote Fund ("PTVF") is a statewide nonpartisan coalition committed to removing barriers to voting and safeguarding Michigan's elections through public education, collaboration with election officials, ballot proposals, and litigation. PTVF's members

[1] Pursuant to MCR 7.212(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

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include, among others, the Arab Community Center for Economic and Social Services (ACCESS), Asian and Pacific Islander Vote Michigan (APIA Vote MI), Detroit Disability Power, Detroit Hispanic Development Corporation, League of Women Voters of Michigan, Miigwech, Inc., and the NAACP Michigan State Conference. Many of the organizations that make up the PTVF coalition have a rich history of public education and advocacy around the need for protecting voting rights, and some have also played a principal role in advocacy, education, and litigation. PTVF believes that our democracy works best when all eligible voters can make their voices heard.

In 2018, members of the PTVF coalition wrote the ballot proposal amending the Michigan Constitution to help ensure Michigan would have a voting system that works for all eligible voters, which became Proposal 3 of 2018. The PTVF coalition led a successful campaign to pass Proposal 3. Just a few years later, PTVF wrote and led the fight to pass Proposal 2 of 2022, which built on Proposal 3 of 2018 by adding more voting rights to the Michigan Constitution, including the express guarantee of the fundamental right to vote, which is a central subject of this brief. PTVF also litigates on behalf of voting rights, including by filing amicus curiae briefs. See, e.g., *Graziano v Brater*, 983 NW2d 909 (Mich, 2023) (constitutionality of 180-day limit on validity of ballot proposal signatures).

The League of Women Voters of Michigan Education Fund ("LWVMI-EF") is the 501(c)(3) wing of the League of Women Voters of Michigan ("LWVMI"), a Michigan affiliate of the national League of Women Voters, a nonpartisan, grassroots organization working to protect and expand voting rights and ensure everyone is represented in our democracy. LWVMI was formed in April 1919 after Michigan voters granted women suffrage in November 1918 and is dedicated to encouraging its members and Michiganders generally to exercise their right to vote as protected by the federal Constitution, the Michigan Constitution, and federal and state law.

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Currently, LWVMI has 28 local Leagues with over 2,600 members of all political affiliations statewide. LWVMI-EF, committed to diversity and pluralism, recognizes that diverse perspectives are important and necessary for responsible and representative decision making, and subscribes to the belief that diversity and pluralism are fundamental to the values it upholds. LWVMI or LWVMI-EF has served as a plaintiff, intervenor, and amicus in numerous cases in state and federal court to protect the civil and voting rights of Michiganders.

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INTRODUCTION

In 2022, the People of Michigan added express protection of a "fundamental right to vote" to our State's Constitution. Article 2, Section 4, Subsection 1 now provides that "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have," among other more granularly defined voting rights, a comprehensive "fundamental right to vote." Const 1963, art 2, § 4(1)(a). Beyond simply declaring the existence of that right, the new constitutional provision broadly prohibits practices that might intrude on that right. It directs that "[n]o person shall: (1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." *Id.* The 2022 amendment was built on an earlier amendment adopted in 2018, which itself added new specific voting protections to Article 2, Section 4, Subsection 1, and which provided that "[t]his subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes." *Id.* § 4(1). By adding an express "fundamental right to vote" to the Michigan Constitution, and by bolstering that right with a broad prohibition of practices that might intrude on that right, the 2022 amendment marks a sharp turn away from prior case law at the federal and state levels that had approved various voting restrictions under a balancing test that too often upheld regulations that inhibited the exercise of the sacred right to vote.

But this Court need not resolve precisely how much the amendment changed the standard of review for regulations of the electoral process. For this case presents a rare *per se* violation of the fundamental right to vote. Thirty-seven Hamtramck voters cast absentee ballots, as they are entitled to do under our Constitution. See Const 1963, art 2, § 4(1)(h). No questions have been raised about the qualification of these voters, nor has anyone asserted that these voters failed to

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follow the procedures set forth in law for marking and casting their ballots. Yet the Wayne County Board of Canvassers simply refused to count these voters' ballots. The Board did not take this action because the voters did anything wrong; it did so because of errors in ballot handling within the office of the Hamtramck City Clerk. The Board of Canvassers took this extreme action of disenfranchising the 37 voters despite the availability of obvious alternatives that would preserve their fundamental right to vote—such as suggesting to the clerk that, prior to counting the ballots, she mark them as challenged or contact the voters (all of whom were identifiable to the Clerk's Office) and ask them to confidentially verify the ballots in the Clerk's custody.

It is well settled that the right to vote includes the right both to cast a ballot and to have it be counted. By refusing to count the 37 voters' ballots for reasons that were entirely the fault of the Clerk's Office, the Board of Canvassers directly "den[ied]" those voters' "fundamental right to vote," in violation of the 2022 amendment. Const 1963, art 2, § 4(1)(a). Thus, while it would be appropriate and relevant for this Court to recognize the sea change reflected by the 2022 constitutional amendments, this Court can also defer to another day the question of what precise standard of review to apply where voters challenge election regulations that impose barriers to registration or voting and might be said to have "the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." *Id.* That is because under *any* standard, this Court should grant relief for the *per se* violation of the fundamental right to vote the 37 Hamtramck voters have experienced.

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ARGUMENT

I. The 2022 Amendment Constitutionalized a Broad Right to Vote and Extended Greater Protections to Voters than Prior Case Law Did.

The language of the 2022 amendment is broad. The amendment guarantees a "fundamental right to vote." Const 1963, art 2, § 4(1)(a). As the Michigan Supreme Court has recognized, laws that impinge on a fundamental right trigger "heightened scrutiny" under the Constitution. *Andary v USAA Cas Ins Co*, 512 Mich 207, 268; 1 NW3d 186 (2023). That is certainly all the more true when, as here, the voters themselves have *expressly* clarified that they consider a right to be "fundamental." See, e.g., *Co of Wayne v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004) (recognizing that "the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified" and to accept the terms used "in the sense most obvious to the common understanding" of the voters (internal quotation marks and citations omitted)).

But the amendment does not stop with simply declaring voting to be a fundamental right. It adds multiple provisions—both general and specific—that give content and broader protection to that right. The general provisions expansively prohibit any "person" from "(1) enact[ing] or us[ing] any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engag[ing] in any harassing, threatening, or intimidating conduct; or (3) us[ing] any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." Const 1963, art 2, § 4(1)(a).

Several aspects of this text are notable. The first is the coverage of any "person," which the amendment defines broadly to include "an individual, association, corporation, joint stock company, labor organization, legal representative, mutual company, partnership, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other

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legal entity," as well as "an agent of a person." *Id*. The amendment thus addresses impediments to the right to vote from any individual or entity, official or unofficial, public or private—a meaningful departure from the norm that constitutions typically limit only governmental action.

The text underscores the point by prohibiting not just policies or practices that impede the right to vote, but "any harassing, threatening, or intimidating conduct," as well as "*any means whatsoever*" that does so. *Id*. (emphasis added). The amendment thus addresses a wide range of impediments to the right to vote, without limiting its coverage to any particular sort of impediment. And the text makes clear that the amendment is not limited to intentional infringements, nor is it limited to the most extreme cases of vote suppression. Rather, it extends to *any* action with "the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." *Id*. The general provisions of the 2022 amendment thus erect a strong fence around the fundamental right to vote, to ensure that no practices occur that will have even the effect of impermissibly denying, abridging, interfering with, or unreasonably burdening that right in any way. And the amendment retained the constitutional text, added four years earlier, that made the relevant subsection "self-executing" and required that it "be liberally construed in favor of voters' rights in order to effectuate its purposes." *Id*.

Moreover, the specific provisions of the 2022 amendment make clear that Michigan's voters sought to impose far more voter-protective standards than what Michigan and federal courts had previously applied to voting restrictions. Prior to the 2022 amendments, the Michigan Supreme Court had adopted "the 'flexible test' articulated in *Burdick [v Takushi*, 504 US 428 (1992); 112 S Ct 2059; 119 L Ed 2d 245] when resolving an equal protection challenge to an election law under the Michigan Constitution." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 35; 740 NW2d 444 (2007). Under the *Burdick* test,

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"[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the [voting] rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id*. at 21 (quoting *Burdick*, 504 US at 434). Subsequent Michigan decisions emphasize that *Burdick* adopts a form of balancing test. See *Michigan Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 257; 964 NW2d 816 (2020) ("Our Supreme Court has described the *Burdick* test as balancing between protecting the citizens' right to vote and protecting against fraudulent voting.").

Several aspects of the 2022 amendment demonstrate that it rejects the "flexible" *Burdick* test previously applied by the Michigan courts. First, consider *Advisory Opinion Regarding Constitutionality of 2005 PA 71.* There, (over dissents from Justice CAVANAUGH and Justice KELLY), the Court applied the *Burdick* test to uphold a statutory "requirement that voters either present photo identification or sign an affidavit averring that the voter lacks photo identification before voting." 479 Mich at 7. The 2022 amendments are more voter protective, clarifying that when voters "do not have photo identification *or do not have it with them*" they can "execut[e] an affidavit verifying their identity." Const 1963, art 2, § 4(1)(g) (emphasis added). That provision clarifies an important ambiguity in the prior rule as to what happens when the voter owns a photo identification but failed to bring it with them, and also supersedes *Advisory Opinion Regarding Constitutionality of 2005 PA 71*'s reliance on the *Burdick* test in another critical way. The 2022 amendment, unlike the prior rule, *requires* that any voter identification law provide an affidavit alternative, but courts applying the *Burdick* test elsewhere have upheld voter identification laws that *lack* such an alternative. See, e.g., *Lee v Virginia State Bd of Elections*, 843 F3d 592 (CA 4,

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2016); *Common Cause/Georgia v Billups*, 554 F3d 1340 (CA 11, 2009). The guarantees the voters expressly codified in 2022 are thus in conflict with the test relied upon by the majority in *Advisory Opinion Regarding the Constitutionality of 2005 PA 71*. The new constitutional requirement of an affidavit alternative therefore highlights the 2022 amendment's rejection of *Burdick*, which had allowed "flexib[ility]" in burdening voters' fundamental right to vote so long as a regulation could survive a government-friendly balancing test.

Similarly, the 2022 amendment guarantees voters the "right" to "state-funded prepaid postage" for absentee ballot applications and for absentee ballots themselves. Const 1963, art 2, § 4(1)(i). But courts applying the *Burdick* test had previously *rejected* the claim that the state's failure to pay for postage on absentee ballots impermissibly burdens the fundamental right to vote. See, e.g., *Black Voters Matter Fund v Raffensperger*, 478 F Supp 3d 1278, 1323-1324 (ND Ga, 2020), affirmed sub nom *Black Voters Matter Fund v Secretary of State for Georgia*, 11 F4th 1227 (CA 11, 2021). And the 2022 amendment guarantees voters the "[t]he right, once registered, to vote in each statewide and federal election in person at an early voting site prior to election day," which "shall be open for at least nine (9) consecutive days beginning on the second Saturday before the election and ending on the Sunday before the election." Const 1963, art 2, § 4(1)(m). But courts applying *Burdick* had previously given states broad latitude to decide whether to offer early voting at all, and certainly to decide how many days to offer. See, e.g., *Luft v Evers*, 963 F3d 665, 674 (CA 7, 2020) ("Many states (approximately 20, by the briefs' count) do not offer any early voting; it is hard to see why Wisconsin's marginal adjustment of the number of days and hours when that voting occurs could violate the Constitution."); *id*. ("Early voting is not a fundamental right in itself; it is but one aspect of a state's election system. As we have stressed, Wisconsin's system as a whole is accommodating."). In these respects as well, the 2022 amendment is

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incompatible with the "flexible" *Burdick* test the Michigan Supreme Court applied in *Request for Advisory Opinion*.

Both in its general and its specific provisions, then, the 2022 amendment constitutionalizes strong protections for the fundamental right to vote. These specific provisions are critical interpretive evidence of the pro-voter "purpose sought to be accomplished," *Southeastern Michigan Transp Auth v Secretary of State*, 104 Mich App 390, 403; 304 NW2d 846 (1981), citing *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), by the 2022 amendments. Those protections and purpose are incompatible with the more "flexible" standard of review for voting restrictions the Michigan courts applied prior to the adoption of that amendment.

II. Refusing to Count the Ballots of the 37 Hamtramck Voters is a *Per Se* Denial of the Fundamental Right to Vote.

As explained above, the 2022 amendment plainly rejected the more relaxed scrutiny the Michigan courts previously applied to voting regulations. But this Court need not decide precisely what standard of review the amendment dictates because this case presents the relatively rare situation of a *per se* denial of the fundamental right to vote. The 37 Hamtramck voters cast ballots, but the Board of Canvassers refused to count them. Well before the adoption of the 2022 amendment, courts had long settled that "the right to have one's vote counted has the same dignity as the right to put a ballot in a box." *Gray v Sanders*, 372 US 368, 380; 83 S Ct 801; 9 L Ed 2d 821 (1963) (internal quotation marks omitted). That principle reflects the obvious fact that a vote is useless unless it is counted.

If there had been a question about whether the 37 voters were qualified to vote, or if they had failed to comply with some regulation of the election process dictating how, where, or when

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to register and cast ballots, perhaps a court might have to engage in a more complex analysis.[2] It might have to decide whether the voters actually satisfied the qualification standards set forth in statute, and whether those standards or the relevant regulations of the election process had "the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." Const 1963, art 2, § 4(1)(a). That, in turn, might require the court to determine just how the 2022 amendment changed the applicable standard of review for election regulations. The pre-amendment cases applying the *Burdick* test arose in such contexts: They were challenges to regulations of the election process that might make it more difficult to register or vote, e.g., *Advisory Opinion Regarding the Constitutionality of 2005 PA 71*, *supra* (challenge to voter identification law). In those cases, the courts had to assess the state interests supporting the regulations, and they accordingly had to decide on the standard of review to use for balancing voters' interests against an asserted governmental interest in the regulation. That standard would determine how strong, and how closely tied to the regulation, the state interests would have to be to justify rules that made it harder to register or vote.

This case could not be more different. No question has been raised about whether the 37 Hamtramck voters were qualified to vote. Nor are there any allegations that these voters failed to comply with the rules governing how to register, mark, and return ballots. They cast their ballots, but Defendants refused to count them. And Defendants did so because of the Hamtramck City Clerk's own errors in handling those ballots. That has never been a proper basis to refuse to count votes. As the Michigan Supreme Court explained more than 90 years ago, "[t]he authorities all recognize that fraud upon the part of the voter vitiates his ballot, but fraud or mistake on the part

[2] However, as discussed below at page 12, the Board of Canvasser's ability to not count a ballot because of such allegations is extraordinarily limited, to the extent they can ever do so.

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of the inspectors of election should not operate to defeat the will of the voter." *Attorney General ex rel Miller v Miller*, 266 Mich 127, 132-133; 253 NW 241 (1934).

The Court applied that principle in *Abbott v Bd of Canvassers of Montcalm Co*, 172 Mich 416, 418-419; 137 NW 961 (1912), which held that ballots should not be thrown out simply because the clerk failed to put ballot numbers next to the voters' names on the voting rolls as required by law. The Court reasoned that "[t]he failure of the clerk of the board of election inspectors to properly place the numbers opposite the names of the voters was not the fault of the voters," and so they accordingly "should not be disfranchised." *Id*. at 418. "Any other conclusion," the Court explained, "would enable a corrupt inspector to disfranchise the electors when they were not parties to the fraud." *Id*. at 418-419.

This principle holds even more strongly after adoption of the 2022 amendment, which guarantees the "fundamental right to vote" against "any means whatsoever" that "has the intent or effect of denying" that right—and which requires that the fundamental right "be liberally construed in favor of voters' rights." Const 1963, art 2, § 4(1). Refusing to count a ballot because of a clerk's error plainly has the effect of denying the right to vote. And holding a voter responsible for a clerk's error is flatly inconsistent with "liberally constru[ing]" the law "in favor of voters' rights." *Id*.

Even if Defendants were concerned that the 37 voters' ballots had been tampered with at some point while they sat in the custody of the Clerk's office, they had ample tools to address the concern without simply refusing to count the votes. Most directly, they could have suggested that the clerk either contact the 37 voters and have them confidentially verify their ballots or mark the 37 ballots as challenged, allowing for them to be identified in any future claim that might be brought by either candidate. As Plaintiffs note (Pl Br, p 16), the disputed ballots "remain in their

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return envelopes." That means that the 37 voters can readily be identified and contacted. Taking any one of these routes would avoid disenfranchising them.

The Circuit Court concluded that the Board of Canvassers had "discretion under MCL 168.823" to decline to count the 37 voters' ballots. App to Pl-App Br, p 4. That conclusion reflects a misreading of the statute—and one that would draw the statute into conflict with the disenfranchised voters' constitutionally guaranteed fundamental right to vote. By its plain terms, MCL 168.823(3) requires the Board of Canvassers to identify "any ballots that the election inspectors failed to count" and to ensure that they are counted. The statute gives the Board two options for accomplishing that result: Either the Board may "summon the election inspectors before them, and require them to count any ballots that the election inspectors failed to count, to make correct returns," or, "[i]n the alternative to summoning the election inspectors before them, the board of county canvassers may designate staff members from the county clerk's office to count any ballots that the election inspectors failed to count, to make correct returns . . . ." *Id*. Either way, the statute requires the Board to "canvass the votes from the corrected returns"—not the initial, "incorrect or incomplete," count. *Id*. And the statute gives the Board time to undertake this process: Where returns "are missing, incomplete, or incorrect," the Board has "power to adjourn from day to day until the returns shall have been procured or corrected." MCL 168.823(1).

Because the returns reported to the Board of Canvassers were missing 37 ballots that were known to have been cast, they were on their face "missing, incomplete, or incorrect." *Id*. The statute thus gave the Board a duty to seek to count those missing ballots. Doing so would not have required the Board to engage in a "judicial function," *Attorney General v Bd of Supervisors of Genesee Co*, 166 Mich 61, 64; 131 NW 163 (1911), such as "determining frauds in the election," *McQuade v Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892). Rather, it would entail the

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"ministerial and clerical" functions, *id*., of marking the ballots as challenged in case needed for further proceedings or causing the 37 voters to be contacted and having them validate their existing ballots, and then tabulating the validated ballots to ensure a complete count—and, more pointedly for constitutional purposes, to ensure that those voters retained the fundamental right guaranteed by the 2022 amendment. Nothing in that process would require the Board to conduct any investigation, find any facts, or resolve any disputed issues.

But the Board did not ask the 37 voters to validate their existing ballots or mark the ballots as challenged. It simply refused to count the ballots the voters had cast. And it did so because of an error made by the Clerk's office rather than because of any failure of the voters themselves to follow proper procedures. In these circumstances, refusing to count their ballots straightforwardly "den[ied]" the 37 voters their fundamental right to vote. Const 1963, art 2, § 4(1). That is, in and of itself, a violation of the 2022 amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

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WORD COUNT STATEMENT AND ATTESTATION REGARDING AMICI'S TAX-EXEMPT STATUS

This brief contains 3,552 words in the sections covered by MCR 7.212(C)(6)-(8). This amicus brief is also filed on behalf of tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code. MCR 7.212(H)(2)(f).

Respectfully submitted,

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