STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

HORACE SHEFFIELD III and RODRICK HARBIN,

Plaintiffs/Appellee,

v.

JANICE WINFREY, in her official capacity as Clerk for the City of Detroit, and CITY OF DETROIT ELECTION COMMISSION,

Defendants,

and

DETROIT CHARTER REVISION COMMISSION,

Intervenor-Defendant/Appellant.

Supreme Court Case No. 163084
Court of Appeals Case No. 357298
Wayne CC: 21-006043-AW

Supreme Court Case No. 163085
Court of Appeals Case No. 357299
Wayne CC: 21-006040-AW
(Consolidated)

LEGAL SCHOLARS AMICI CURIAE BRIEF IN SUPPORT OF THE INTERVENOR-DEFENDANT/APPELLANT DETROIT CHARTER REVIEW COMMISSION

John C. Philo (P52721)
Tonya Myers Phillips (P63475)
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue
Detroit, MI 48201
(313) 993-4505
jphilo@sugarlaw.org
tmphillips@sugarlaw.org
Attorneys for the Amici Curiae Legal Scholars

Mark P. Fancher (P56223)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN
2966 Woodward Ave
Detroit, MI 48201-3035
(313) 578-6800
mfancher@aclumich.org
dkorobkin@aclumich.org
Attorneys for the Amici Curiae Legal Scholars

Date: June 4, 2021

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are law professors who teach, research, and write about Michigan constitutional law, state and local government, civil rights, and urban and municipal government issues. A complete list of *amici*'s names, titles, and affiliations is set forth in the appendix to this brief.

Amici present this brief to provide analysis regarding the grave constitutional concerns raised by the government's interpretation of the statutory provision at issue in this case.

INTRODUCTION

The circuit court below faced a common question of statutory interpretation: what to do when the plain text of a statute does not speak to the problem at hand. The same statute that authorizes the Governor to review the charter commission's work is silent about what happens when the Governor fails to approve the draft charter. MCL 117.22. The two possible answers are to permit the Governor, by declining to act, to pocket-veto the local charter and prevent the people from voting on their own municipal government, or else to treat the Governor's omission as simply a political act and permit the residents of Detroit to vote on how they wish to be ruled. The Michigan Constitution tells us how to answer this question: in favor of the voters. Whenever there is constitutional or statutory silence, the default interpretation should always be the one that favors the true sovereign—the voters, not the politicians.

[1] No counsel for any party participated in the drafting this brief. No counsel or party made a monetary contribution to fund the preparation or submission of this brief.

ARGUMENT

A. The Michigan Constitution is a Populist Document

1. The Power of the Government is Derived from the People

The Michigan Constitution begins with the preamble, "We, the people of the State of Michigan, … do ordain and establish this constitution." Const 1963, art 1, Preamble. "We the people," is the language of a populist document. At a time when voter suppression against Black and urban voters is on the rise across the country, the knowledge that here in Michigan the power of government flows from the people to the government and not the other way around is paramount to understanding our entire legal framework.

Immediately following the preamble, the Michigan Constitution reads, "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. It cannot be said plainly enough that state constitutional issues must be read to empower the people. Therefore, when there is a question of whether the governance of the people of Michigan should be put to those people, the default reading of the Michigan Constitution should always answer in the affirmative. Decisions like the circuit court's in this case, which strayed from a populist understanding of the constitution, misconstrue the purpose of the state constitution because they remove power from the citizens to prioritize government actors.

State constitutions in general, and the 1963 Michigan constitution in particular, reflect deep skepticism about state officials and a savvy understanding of how even elected officials can often act against the public interest. The leading scholar of the Michigan constitution, who literally wrote the book on the subject, says, "From its first constitution in 1835, Michigan has been a state with a strong democratic impulse married to a healthy mistrust of power." *See* Fino, *The Michigan Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1996), p xxiii. State

constitutions, including ours, were ratified by the voters with a much greater array of protections for voters against overbearing government officials than the federal Constitution contains. When the Michigan constitution is read as a whole, it sets forth a plain democratic vision of state government, with the voters at the top. Interpreting the home rule provisions of this constitution and the charter-revision statutes should take account of our quintessentially Michigan populist structure of government. Legal doubts should be resolved in favor of the voters, as our constitution's framers and ratifiers so thoroughly expressed.

Proof that the default reading of the Michigan constitution should always be one that favors the power of voters over the power of elected officials can be seen in the many ways that the Michigan Constitution favors a plurality approach to governmental powers. For example, rather than having executive officers appointed by the Governor and subject to her control, the Michigan constitution provides for the independent election of the most important officials exercising executive power, including the Secretary of State and Attorney General. Const 1963, art 5, § 21. This model for the executive is an intentional divergence by the people of Michigan from the federal model. The only federally elected executive is the President. The people of Michigan choose to *dilute* the power of the executive and to make that power more democratically accountable. Similarly, the constitution's requirement that local sheriffs and prosecutors stand for election, in contrast to the federal model where law enforcement officers and prosecutors are ultimately accountable only to the President, serves to diminish the authority of state politicians and expand the power of local voters. Const 1963, art 7, § 4. In this way the entire structure of the constitution shows that the voters should be prioritized over the Governor where the relevant statutory or constitutional text is ambiguous.

Furthermore, the people of Michigan have also diluted the legislative power. For example, the people of Michigan also decided to have legislative powers put directly into the hand of the primary state universities. Article 8, § 5 of the state constitution grants legislative power over the University of Michigan, Michigan State University, and Wayne State University in the hands of directly elected university officials. And even more notably, the constitution gives the voters direct authority to legislate, both when the legislature fails to act and when the voters wish to correct statutes the legislature did pass. Const 1963, art 2, § 9. Even judicial power, as this Court well knows, has been made subordinate to the power of the voters through judicial elections. Const 1963, art 6, §§ 2, 8, 12, 16. Ultimately, here in Michigan, the voters are in charge. All legal interpretation must take place against that background principle.

Part of how the constitution protects the power of voters and holds government officials' feet to the democratic fire is through decentralizing government functions and promoting local control. Article 7 of the Michigan Constitution, the Home Rule clauses, amply demonstrate the importance of this feature of Michigan government. The Constitutional Convention comments are clear that §§ 21 and 22, the parts of Article 7 relevant to this case, are included because the people of the state of Michigan value local control. "This is a revision of Sec. 21, Article 7, of the present [1908] constitution and reflects Michigan's successful experience with home rule. The new language is a more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this constitution and law." *Id.* There have been four version of the Michigan Constitution and the comments highlight how the importance of local autonomy resting in the hands of citizens has become a defining feature of the constitution.

In its decision to empower the Governor instead of the people, the circuit court placed a great deal of emphasis on the clause, "subject to the constitution and law" in art 7, § 22. The circuit court read this clause to mean it needed to favor the Governor over the people of the city of Detroit. By ordering a writ of mandamus removing the chance for the Detroit electorate to vote on the proposed revisions to the Detroit Charter, the circuit court was interpreting the Michigan Constitution in favor the power of the Governor over the power of the people of Detroit. However, this is not how § 22 is meant to be read. We know this because the Constitutional Convention comments are explicit, "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor." Const 1963, art 7, § 34.

The circuit court's decision indicates that it shares the Governor's concerns that the revised Charter may include some revisions that could be constitutional or statutory violations. However, that is irrelevant to whether the revised Charter is put in front of Detroit voters. If Detroit voters elect a revised charter and there are constitutional violations, then those specific revisions that are unconstitutional will not be valid. *Id*. The constitution is clear that local home rule is trumped by the constitution. However, neither the Governor nor the circuit court are the *gatekeepers* for revisions to the Detroit charter. That power is constitutionally granted to the people of Detroit. If the people vote in a revision and the constitutionality of a specific portion of the revision is challenged then the Michigan courts, and still not the Governor, will be the final word on the constitutionality of the Detroit Charter.

Allowing the Governor to veto the proposed revision because of her legal opinions would permit the Governor to exercise judicial power, something she is plainly prohibited from doing.

Const 1963, art 3, § 2.[2] If the Governor's legal objection to provisions of the proposed charter is allowed to block the voters from considering it, then no court will ever have the chance to determine whether she is correct or not on contested points of law. On the other hand, if her objections are simply political and the proposed charter does go to the voters, then courts will retain their power to adjudicate whether any aspects of the charter are unlawful and, if so, to what degree those unlawful elements are severable. Cf. *Midwest Inst of Health, PLLC v Governor of Mich (In re Certified Questions from the United States Dist Court),* 506 Mich 332; 958 NW2d 1 (2020) (affirming the strict separation of powers established in the Michigan constitution). The circuit court in its haste to protect against potential future violations to the Michigan Constitution robbed the people of Detroit of their constitutionally protected power to govern themselves.

B. MCL 117.22 Establishes Politics Forcing Procedure

1. Understanding MCL 117.22 as Politics Forcing Procedure

As both sides acknowledge, MCL 117.22 requires that both amendments and revisions to city charters be reviewed by the Governor. But the circuit court gravely misunderstood the point of this provision. The circuit court held that, "to contend that the Governor's approval is not necessary for the revision of the Charter…makes the submission of the draft to the Governor for approval an empty and useless gesture if the failure to gain approval of the revision is of no consequence." *Lewis v. Winfrey*, No. 21-006040, (Mich. 3rd Cir. Ct., May 26, 2021). But there is nothing empty or futile at all about the Governor's refusal to approve the proposed charter before its submission to the voters of Detroit. Politics matters. By giving the Governor time and the opportunity to opine on the proposed charter, MCL 117.22 creates a space for democratic debate.

[2] Notably, the Governor's own words, in her May 24, 2021 letter to the charter commission, appear to recognize this prohibition when writing: "As to the legal effect of that decision on whether the City of Detroit Proposed 2021 Revised Charter can appear on the ballot for the August 3, 2021 election, I have not taken a position."

If the Governor approves, that endorsement would doubtless be trumpeted by the pro-charter campaigners. By refusing to approve, the Governor gives anti-charter campaigners a weighty political talking point that they are already exploiting. This healthy political give-and-take *is the point* of the Governor's review. In contrast to the vibrant, democratic, politics-enhancing role the statute provides for the Governor, the Appellees read the statute to promote the exact opposite: the Governor, alone and by omission, can veto the proposed charter and stop all democratic debate about it. Between these two diametrically opposed statutory interpretations, one elevates and confirms the power of the voters, while the other squashes political debate and places ultimate judicial review of the proposed charter in the hands of a single state executive. No part of the Michigan constitution or the conception of state government it embodies supports this latter reading.

Crucially, nowhere in this statute does it say that the Governor's refusal to approve a proposed charter prevents that charter from being place before the voters. In fact, the statute does expressly say that a charter *amendment* proposed by a local legislative body must be re-adopted by a supermajority of that body if the Governor rejects the *amendment*, but is utterly silent on charter *revisions*. As the Michigan Supreme Court has consistently recognized since as long ago as 1931, "Express mention in a statute of one thing implies the exclusion of other similar things." *City of Detroit v Redford Township*, 253 Mich 453, 456 (1931).

Here, MCL 117.22 is a politics-forcing statutory procedure. By requiring municipalities to submit amendments and revisions of their charters to the Governor, MCL 117.22 forces localities to engage politically with the state. It is rooted in the recognition that state and local governments do not operate in isolation and that the citizens of each municipality are also citizens of the state. When a Detroit voter goes to the polls and casts a vote, they do that as a Detroiter, a Michigander,

and as an American. MCL 117.22 acknowledges that multifaceted identity and nuance. It forces political interplay and communication between local government and Governor.

Through MCL 117.22 the Michigan legislature is protecting voters. The procedural requirement that revisions to city charters are submitted to and reviewed by the Governor ensures that a political exchange can occur. That political exchange allows the Governor to engage politically on a local level. The Governor is, by nature of the office, the most recognizable state actor. Therefore, her stamp of approval or her rejection of any proposed revision to a local charter has incredible political significance. It is through the political process between the local and state government that MCL 117.22 protects voters.

The lower court's decision assumes that unless the Governor's negative review can completely forestall all further democratic decision-making about the proposed charter, then it is "futile." But this disregards the importance of political procedure. Its holding treats the ability to engage politically as meaningless. However, time and opportunity to engage are significant political tools. If the Governor were to come to Detroit and hold a campaign event in support of the Charter revision that would undeniably be of consequence. Similarly, the time and opportunity to plan and execute political opposition are also of significant consequence. The holding that the submission and review process is a "empty and useless gesture" that is of "no consequence" is counter to reality. Issuing a writ of mandamus removing a chance to vote on a charter revision that the Governor disapproves of is a failure to understand the procedural point of MCL 117.22 by the circuit court. Moreover, it is a failure to account for the reality of the complex and important nature of the political process.

2. Politics Forcing Procedure is Not Uncommon

MCL 117.22 is not unique in its purpose of forcing voters and officials to engage in politics. On the contrary, the Michigan Constitution and Michigan statutes are rife with other examples of law that has the exclusive purpose to prime the political process. This illustrates that the people of the state of Michigan as well as the Michigan Legislature understand the value in "politics-forcing" procedure and that these procedures are the opposite of an "empty and useless gesture" or of "no consequence."

One example of politics-forcing procedure in the Michigan Constitution is found in Art. 4 § 24. This section of the Michigan Constitution states, "No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Const 1963, art 4, § 24. Constitutional clauses such as this are often referred to as "single subject rules." The purpose of single subject rules is to make statutory law passed by the legislature more easily understood by the public so that the electorate can engage in a political interplay with the legislature. This limitation on the legislature does not place any limit on the content of the law that the legislature can pass but creates a mechanism for politics just like MCL 117.22 does between local government and the Governor.

Another clear example of politics forcing procedure found in the Michigan Constitution is the long-standing power of the Attorney General to opine on the legality of proposed legislation. *See* Const 1963, art 5, § 8; and *Cahill v. Bd. Of State Auditors*, 127 Mich. 487 (1901). Just as the Attorney General's opinion in these matters deserves attention but the Governor may proceed with her legislative agenda regardless of that opinion, so too, the Governor's opinion of the proposed charter is politically important but not the last word.

The constitution even establishes that the Governor herself is legally required to offer her opinion on public policy questions, but without that expression finally determining the legal outcome: she must give the legislature her State of the State address and her opinion on other matters of public importance. Const 1963, art 5, § 17. This provision stimulates political discussion and certainly helps to shape the legislative agenda; no observer of Michigan politics could ever call it "futile." And yet clearly, the Governor's advice to the legislature is far from the end of discussion on the issues she addresses. Similarly, the Governor's review of the proposed charter gives her a chance to express her views and advise the charter commission on how to avoid whatever pitfalls she perceives. That helpful role should never be perceived as "futile." But such advice should also never be perceived as the last word. The statute makes it the birth of discussion, not the death.

An important statutory example of politics-forcing procedure is the Administrative Procedures Act (APA). The APA governs the procedure for state agencies when they adopt and change rules and guidelines. Central to these processes governed by the APA is the opportunity for the legislature, particularly through committees, to have the opportunity for notice and comment; additionally, the APA also prioritizes public hearings for agency changes or adoptions of rules and guidelines by state agencies. See generally MCL 24.224 through MCL 24.245. The statutory mandates in the APA for legislative notice and comment as well as for public hearing are another two examples of procedure with the exclusive purpose of political exchange. Agencies with the authority to adopt or change rules and guidelines are free to promulgate rules contrary to the input they receive during this comment period. But, as with MCL 117.22, the value of the APA procedure surrounding legislative notice and comment as well as public hearings is not editorial control over content but instead the time and opportunity to engage politically.

These three examples of politics-forcing laws are far from an exhaustive list, but they do provide clear illustrative examples of how both the people of Michigan through their constitution as well as the Michigan Legislature often adopt law with the exclusive purpose of forcing politics. In its decision to issue a writ of mandamus removing the people of Detroit's ability to vote on a revision to their Charter, the circuit court misunderstood the nature of politics-forcing procedures and therefore, the purpose of MCL 117.22. The result stifles the voices of the Detroit electorate as well as the constitutionally protected political process.

CONCLUSION

The people of Detroit have faced many attempts—some successful, like the state takeovers of the city finances and city schools—to inhibit their democratic control of those who govern them. The Governor has made many attempts—some rebuffed, like the pandemic mandates[3]—to exercise power properly belonging to the voters. In this case, the Governor's failure to approve the proposed charter should be treated as the political act it clearly was intended to be, not as a democracy-blocking veto. The voters of Detroit are constitutionally and statutorily the only proper authority to decide whether to accept the proposed charter or reject it.

[3] *See In re Certified Questions—Emergency Covid Orders*, 506 Mich 332 (2020).

Respectfully Submitted,

By: /s/ John C. Philo
John C. Philo (P52721)
Tonya Myers Phillips ((P63475)
SUGAR LAW CENTER
FOR ECONOMIC & SOCIAL JUSTICE
4605 Cass Avenue, Second Floor
Detroit, Michigan 48201
(313) 993-4505/Fax: (313) 887-8470
jphilo@sugarlaw.org
tmphillips@sugarlaw.org
Attorneys for the Amici Curiae Legal Scholars

- and –

Mark P. Fancher (P56223)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Ave
Detroit, MI 48201-3035
(313) 578-6800
mfancher@aclumich.org
dkorobkin@aclumich.org
Attorneys for the Amici Curiae Legal Scholars

Date: June 4, 2021

APPENDIX

AMICI CURIAE STATE CONSITUTIONAL AND CIVIL RIGHTS LEGAL SCHOLARS

This Appendix provides *amici curiae*'s titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply any endorsement of the view expressed herein by *amici*'s institutions.

John E. Mogk
Distinguished Service Professor of Law; Chair, Levin Center at Wayne Law Faculty Committee
Wayne State University, Law School

Justin R. Long
Associate Professor of Law
Wayne State University, Law School

Khaled A. Beydoun
Associate Professor of Law; Associate Director of Civil Rights, Damon J. Keith Center for Civil Rights
Wayne State University, Law School

Peter J. Hammer
Director of the Damon J. Keith Center for Civil Rights; Professor of Law; A. Alfred Taubman Endowed Chair
Wayne State University, Law School