STATE OF MICHIGAN

COURT OF APPEALS

PROTECT OUR JOBS,

Plaintiff,

v

BOARD OF STATE CANVASSERS and DIRECTOR OF ELECTIONS,

Defendants,

and

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION,

Intervenor,

and

GOVERNOR OF MICHIGAN and ATTORNEY GENERAL,

Amici Curiae.

UNPUBLISHED
August 27, 2012

No. 311828

Before: OWENS, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this original action, plaintiff Protect Our Jobs seeks a writ of mandamus directing defendants to place on the ballot its petition for a constitutional amendment protecting collective bargaining rights. We grant the requested relief.

Plaintiff is a ballot question committee that collected petition signatures for a constitutional amendment proposal to be placed on the November 2012 general election ballot. The proposal would add a new article 1, § 28 to the constitution to provide people with the right to organize and bargain collectively with a public or private employer to the fullest extent not preempted by federal law. The proposal would also add a new paragraph to Const 1963, art 11, § 5 protecting the rights of classified civil service employees to bargain collectively concerning

all conditions and aspects of employment except promotions. Intervenor Citizens Protecting Michigan's Constitution (CPMC), another ballot question committee, challenged the proposal on the grounds that it was a general revision of the constitution under article 12, § 3; that electors had not been informed of the statutes or constitutional provisions that might be in conflict with the proposal, and the proposal could not be summarized in a 100 word statement of purpose.

The Board of Canvassers had previously approved the form of the petition, and the Director of Elections found that there were sufficient valid signatures to qualify the proposal. However, the Board of Canvassers subsequently deadlocked on whether the petition should be placed on the ballot, with two members voting to place the proposal on the ballot and two members voting not to place the proposal on the ballot. Under the statute, the proposal therefore did not qualify for the ballot. MCL 268.22d(2).

Our Supreme Court has recently directly established that one of the proposed grounds for excluding the proposal from the ballot is inapplicable. The Supreme Court's order in *Protect MI Constitution v Secretary of State*, ___ Mich ___; ___ NW2d ___ (2012) explained that Const 1963, art 4, § 25[1] applies to amendments of laws, rather than amendments of the constitution, as is the case at bar. Our Supreme Court also held that the proposal is governed by Const 1963, art 12, § 2[2], and found that there was "no showing that there [had] been a failure to comply with [that] provision." The statutes that are potentially affected by the amendment do not have to be identified in the statement. Further, there is no basis for us to speculate in advance of any attempt to do so that the Director of Elections will not be able to properly characterize the proposal within the 100 word limit.

CPMC also argues that the proposal constitutes a general revision of Michigan's constitution. Whether a proposal is a general revision or a mere amendment depends on qualitative and quantitative considerations, including the extent to which it interferes with or modifies the operation of government and the scope of its subject matter. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 298, 305; 761 NW2d 210 (2008). The proposal at issue may have an effect on various provisions and statutes, and it may affect the relationship between Michigan's government and employees. However, it is limited to a single subject matter, and it only directly adds one section to the constitution and changes one other, as identified in the petition. In contrast, the RMGN proposal at issue in *Citizens Protecting Michigan's Const* sought to replace vast portions of the constitution and massively modify the structure and operation of Michigan's government. The initiative proposal here is far

[1] "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."

[2] Const 1963, art 12, § 2 contains a number of potentially pertinent requirements, including a requirement that a proposal republish "existing provisions of the constitution which would be altered or abrogated thereby." This requirement is also addressed by MCL 168.482(3), which we discuss *infra*.

more akin to a correction of detail than a fundamental change, when viewed in the proper context of the constitution as a whole. See *Laing v Kelly*, 259 Mich 212, 217; 242 NW 891 (1932).

Finally, CPMC and the dissent conclude that the petition does not comply with the requirement of MCL 168.482(3) that it identify and publish any existing provisions of the constitution that will be altered or abrogated by the proposal. An existing constitutional provision must be published "*only* where the proposed amendment would directly 'alter or abrogate' ('amend or replace') a specific provision or provisions of the existing Constitution." *Ferency v Secretary of State*, 409 Mich 569, 597; 297 NW2d 544 (1980) (emphasis added). Definitionally, "[a]n 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." *Id*. Significantly, the fact that a provision will be *affected* by a proposed amendment does not *ipso facto* mean it is "altered or abrogated." *Id*. at 596-597.[3] This ballot proposal will not in any way "add to, delete from, or change the existing wording" or "render wholly inoperative" any unpublished constitutional provision.

CPMC argues that Article 4, §§ 48 and 49, allowing the Legislature to enact laws providing for resolution of disputes concerning public employees, and relative to hours and conditions of employment, will be altered by the proposal, along with Article 8, §§ 5 and 6, altering the autonomy of public universities. Under the cited provisions of Article 4, the Legislature "may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service" and "may enact laws relative to the hours and conditions of employment." CPMC argues that the proposal alters these provisions by adding language to the constitution subjugating the powers of the Legislature to the collective bargaining process.

As our dissenting colleague points out, the proposed initiative would provide that the Legislature's "power to enact laws relative to the hours and conditions of employment shall not abridge, impair or limit the right to collectively bargain for wages, hours and other terms and conditions of employment that exceed minimum levels established by the legislature." However, the proposed ballot initiative explicitly "does not compel either party to agree to a proposal or make a concession." Consequently, nothing in the proposal in any way alters or abrogates the State's power to make the final decisions as to what terms to accept. Presuming the people of the State of Michigan enact the proposed initiative, the Legislature would remain empowered to "enact laws relative to the hours and conditions of employment," and indeed, the bare fact that employees of the State would have the right to collectively bargain does not in any way force the Legislature to enact, or decline to enact, any laws whatsoever. The Legislature may find its exercise of its powers practically affected in some way, but neither the language of the constitution nor the Legislature's powers themselves are in any way changed.

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[3] See also: *Massey v Secretary of State*, 457 Mich 410, 417-418; 579 NW2d 862 (1998) and *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 402-403; 686 NW2d 287 (2004).

The cited provisions of Article 8 provide for boards to govern institutions of higher learning. While CPMC argues that the proposed ballot initiative will interfere with their autonomy, these institutions are already subject to the Public Employees Relations Act, requiring them to bargain collectively with respect to wages, hours, and terms and conditions of employment. *Central Michigan University Faculty Assn v Central Michigan University*, 404 Mich 268, 276; 273 NW2d 21 (1978). Where the Legislature can require institutions of higher learning to participate in collective bargaining without violating the autonomy of the institutions, it is difficult to see how the proposal would alter or abrogate art 8, § § 5 and 6. In any event, again, nothing in the ballot proposal alters or abrogates the boards' power to decide what final terms to accept. While it is conceivable that the operation of these provisions may be *affected* by the proposal, a mere *effect* is insufficient to trigger any republication requirement.

The signature requirement for the initiative process "was not intended to be easy to fulfill." *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 217; 378 NW2d 337 (1985). Otherwise, however, neither the courts nor the Legislature may add "undue burdens" on the people's right to change the law. *Wolverine Golf Club v Secretary of State*, 384 Mich 461,466; 185 NW2d 392 (1971). *Ferency* holds that a proposed initiative need only republish provisions of the constitution that are *altered or abrogated*, not provisions that are merely affected. CPMC has merely identified provisions that may be affected. The dissent seemingly accepts an effect as sufficient, but if an effect is held to be enough to trigger the republication requirement, the courts would be adding an undue burden to the initiative process not mandated by the constitution. The constitution, statutes, and case law control and preclude us from adding an additional hurdle, particularly a requirement never contemplated by the framers, to the people's right to amend their constitution.

The complaint for mandamus is granted, and defendants are directed to take the necessary steps to place the proposal on the ballot for the general election. This opinion is given immediate effect pursuant to MCR 7.215(F). No costs, a public question being involved.

/s/ Donald S. Owens
/s/ Amy Ronayne Krause

Court of Appeals, State of Michigan

ORDER

Protect Our Jobs v Board of State Canvassers

Docket No. 311828

Donald S. Owens
Presiding Judge

Peter D. O'Connell

Amy Ronayne Krause
Judges

The Court orders that the relief sought in the complaint for a writ of mandamus is GRANTED. *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 486, 487; 688 NW2d 528 (2004). The Board of State Canvassers' authority and duties with regard to petitions for proposed constitutional amendments is limited to determining whether the form of the petition complies with the statutory requirements and whether there are sufficient valid signatures to warrant certification of the proposal. MCL 168.476; *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980). The board breached its clear legal duty to certify the petition where it was in the proper form and had sufficient signatures. For the reasons stated in this Court's opinion, the petition meets the requirements for placement on the ballot.

The Court orders that defendants are to take all necessary measures to place the proposal on the November 2012 general election ballot.

This order is given immediate effect pursuant to MCR 7.215(F).

O'Connell, J., respectfully dissents.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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A true copy entered and certified by Larry S. Royster, Chief Clerk, on

AUG 27 2012
Date

Chief Clerk

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UNPUBLISHED
August 27, 2012

No. 311828

Before: OWENS, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

O'CONNELL, J. (*dissenting*).

Plaintiff's ballot proposal drastically abrogates, alters, and nullifies numerous existing provisions of our constitution. Unfortunately, plaintiff's petition does not inform the voters of these drastic changes. Plaintiff nonetheless demands that the proposal be placed on the November ballot. To grant plaintiff's demand would be to allow any special interest group to flout the safeguards that ensure openness and full disclosure in petitions for constitutional

amendments. Because the law entitles voters to this full disclosure, I respectfully dissent from the majority's opinion and order placing the proposal on the November ballot.[1]

This case presents a simple question: do plaintiff's proposed constitutional amendments alter or abrogate existing constitutional provisions? If so, plaintiff's petition must inform the voters of the alteration or abrogation, and the petition must reprint the existing provisions that would be altered. MCL 168.482(3). The majority concludes that plaintiff's petition essentially complies with this requirement, citing *Ferency v Secretary of State*, 409 Mich 569, 597; 297 NW2d 544 (1980). I respectfully disagree with the majority's conclusion, for three reasons. First, the majority overlooks that the proposal would add an exception to the Legislature's constitutional authority in article 4, § 49. Second, the majority's reasoning is contrary to the *Ferency* rationale. And third, the majority's application of *Ferency* is inconsistent with our Supreme Court's recent decision in *Stand Up For Democracy v Secretary of State*, ___ Mich ___; ___ NW2d ___ (Docket No. 145387, August 3, 2012).[2]

I. THE PETITION FAILS TO INFORM VOTERS THAT THE PROPOSAL ALTERS CONST 1963, ART 4, § 49

To comply with the constitutional mandate governing petitions for constitutional amendments, plaintiff's petition must be in the form prescribed by law. Const 1963, art 12, § 2. Our Legislature has prescribed the form for petitions: "If the proposal would alter or abrogate an existing provision of the constitution, the petition *shall* so state and the provisions to be altered or abrogated shall be inserted, preceded by the words: 'Provisions of existing constitution altered or abrogated by the proposal if adopted.'" MCL 168.482(3) (emphasis added).[3] In *Ferency*, 409 Mich at 597, our Supreme Court held, "[a]n existing constitutional provision is altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of a provision, or would render it totally inoperative."

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[1] I am certain that our constitutional drafters could not have foreseen the magnitude or scope of the current spate of constitutional amendment proposals, or the wheelbarrows of money that have been dumped into these proposals.

[2] Intervenor and amice point out several other flaws in plaintiff's petition, including the failure to inform voters that the proposal alters, abrogates, and nullifies more than 100 existing statutes. Our Supreme Court has directed us not to consider statutory nullification. *Protect MI Const v Secretary of State*, ___ Mich ___; ___ NW2d ___ (Docket No. 145698, August 24, 2012). Intervenor also identifies several existing constitutional provisions that the proposal would alter or abrogate. For example, paragraph 3 of the plaintiff's proposal precludes all branches of government from applying or enacting any law that would "abridge, impair or limit" collective bargaining. This portion of the proposal modifies our constitutional separation of powers framework, without informing the voters of the modification. The time limitations for resolving this case prevent this Court from considering all of the alterations and abrogations.

[3] After the *Ferency* decision, our Legislature changed the permissive word "should" to the mandatory term "shall." 1993 PA 137.

Plaintiff's petition misinforms voters about the scope of the proposal. The petition tells voters that the proposed new section would alter the constitutional declaration of rights in article 1, when it actually also alters the Legislature's authority in article 4. Plaintiff's proposal adds an exception to the Legislature's authority, as follows: "The Legislature's exercise of its power to enact laws relative to the hours and conditions of employment shall not abridge, impair or limit the right to collectively bargain for wages, hours, and other terms and conditions of employment that exceed minimum levels established by the Legislature." Initiative Petition, art 1, § 28 (3). Although plaintiff certainly has the right to propose an alteration to the Legislature's constitutional power, the law requires plaintiff to state that the proposal would alter that power. Plaintiff's petition did not identify article 4 as a provision that would be altered.

Moreover, a simple side-by-side comparison demonstrates that plaintiff's proposal would add to the existing wording of Const 1963, art 4, § 49.

Existing article 4, § 49	Plaintiff's Proposal, article 1, § 28(3)
"The legislature may enact laws *relative to the hours and conditions of employment*."	"The legislature's exercise of its power *to enact laws relative to the hours and conditions of employment* shall not abridge, impair or limit the right to collectively bargain for wages, hours and other terms and conditions of employment that exceed minimum levels established by the legislature."

[Emphases added.]

Citing *Ferency*, plaintiff contends that the proposal does not expressly alter article 4, § 49, because the proposal places the altering language in article 1. The majority apparently accepts this contention. I do not. *Ferency* does not stand for the proposition that a petitioner may engage in linguistic maneuvering to avoid complying with the form and content prescribed by law. The law requires that when a proposal will add to an existing constitutional provision, the petition must identify the existing provision. MCL 168.482(3); *Ferency*, 409 Mich at 597. The law makes no distinction for a label attached by a petitioner that attempts to disguise an addition or alteration as a new provision.

Given that plaintiff's proposal adds an exception to article 4, § 49, *Ferency* directs that the petition must comply with MCL 168.482(3). 409 Mich at 597. The petition must insert article 4, § 49 and must inform voters that the proposal would alter or abrogate that provision. The petition does not comply with the form prescribed in MCL 168.482(3), because it does not identify article 4, § 49 and does not inform voters that the proposal would alter or abrogate that provision. Accordingly, the petition is not eligible to be placed on the ballot.[4]

[4] Art 1, § 28(3) of the proposal begins: "No existing or future law of the state or its political subdivisions shall abridge, impair or limit the foregoing rights . . . ." When asked at oral argument to identify the provisions that would be affected, counsel indicated that the proposal

II. THE *FERENCY* RATIONALE PRECLUDES PLACEMENT OF THIS PROPOSAL ON THE BALLOT

In *Ferency*, our Supreme Court identified two primary concerns about form and content requirements in MCL 168.482(3). The Court indicated that the Legislature should impose only "minimal burdens" on the petition process and expressed concern that "[c]orrectly interpreting the Constitution to identify all provisions affected by a proposed amendment is too onerous a burden to place upon the right of popular amendment." 409 Mich at 593, 596. The *Ferency* Court also expressed concern that if petitioners were required to identify all affected provisions, "[p]etitions will become a maze of constitutional provisions . . . . Few people will understand, without extensive explanation, how or how much a particular listed provision is being altered." *Id*. at 596.

Neither of these concerns is present in this case. Plaintiff could easily have identified the language that the proposal would add to article 4, § 49 of the existing constitution, just as plaintiff identified the language that the proposal would add to article 5, § 5 of the existing constitution. Similarly, the inclusion of article 4, § 49 in the petition would not make the petition beyond the ken of our voters. Unlike the *Ferency* Court, I have no doubt that our voters could have understood the alterations if the petition had properly apprised the voters. The failure to apprise the voters of the alterations renders the petition ineligible.

III. THE *STAND UP FOR DEMOCRACY* DECISION REQUIRES ACTUAL COMPLIANCE WITH THE LEGISLATIVELY PRESCRIBED FORM AND CONTENT FOR PETITIONS

The *Ferency* Court declared that the Legislature should not "unduly burden" the petition process, and stated, "it was not the intention of the electorate that the legislature should meddle in any way with the constitutional procedure to amend the State Constitution." 409 Mich at 591-592, quoting *Hamilton v Secretary of State*, 227 Mich 111, 130; 198 NW2d 843 (1924). The *Ferency* Court also implied that the Legislature might not have the authority to prescribe requirements for the form and content of petitions. *Id*. at 593.

Our current Supreme Court has confirmed that the Legislature has the authority to prescribe the form and content of petitions and that our courts must enforce the Legislature's prescriptions. *Stand Up For Democracy*, No. 145387, slip op pp 9-11, and passim. To properly apply the *Ferency* decision, we must reject any suggestion in *Ferency* that the Legislature overstepped its bounds by enacting a prescribed form for petitions. As Justice Mary Beth Kelly explained, the statutory prescription in corresponding MCL 168.482(2) "demonstrates a clear intent that petitions for referendums, voter initiatives, and constitutional amendments strictly

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would have to pass before we find out. This "wait and see" process does not comply with constitutional muster. If plaintiff seeks to amend the constitution, it cannot employ a process that alters or abrogates constitutional provisions without reprinting the altered provisions. Unlike other ballot proposals that inform the voters of exactly what provisions of our constitution are being altered or abrogated, the language of this ballot proposal leaves the voters guessing as to which existing laws are being nullified. One cannot amend the constitution with a nomadic statement that all existing laws are nullified without first telling the voters which laws are being nullified.

comply with the form and content requirements of the statute." *Stand Up For Democracy*, slip op p 10. Further, "[t]o certify a petition that does not strictly comply with the requirements of MCL 168.482 on the basis that it substantially complied with the statutory requirements would defeat the Legislature's intent." *Id*., slip op p 11.

The constitutional and legislative mandates governing ballot petitions ensure that our voters have the opportunity to consider whether to make drastic changes in our constitution, a constitution that has served us in various forms for more than a century. The courts are bound to apply these mandates, regardless of the advisability of the proposal or of any burden created by compliance. In my view, the majority has declined to exercise our responsibility to apply the mandates. I would deny plaintiff's request for a mandamus.[5]

/s/ Peter D. O'Connell

[5] In my opinion, including generic and all-encompassing statements such as "no existing or future laws" in a ballot proposal casts a huge net over the current constitution and leaves for another day the job of sorting through the constitution to decide which provisions to discard.