

STATE OF MICHIGAN
COURT OF APPEALS

PROTECT OUR JOBS,
Plaintiff,

UNPUBLISHED
August 27, 2012

v

No. 311828

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.

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."

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

"The legislature may enact laws *relative to the hours and conditions of employment.*"

Plaintiff's Proposal, article 1, § 28(3)

"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

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.