STATE OF MICHIGAN
IN THE COURT OF APPEALS

REP. RICHARD HAMMEL; REP. KATE SEGAL; REP. MARK MEADOWS; REP. WOODROW STANLEY; REP. STEVEN LINDBERG; AND REP. JEFF IRWIN; in their individual and official capacities as members of the State House of Representatives,

Plaintiffs-Appellees

v

SPEAKER OF THE HOUSE OF REPRESENTATIVES, JAMES "JASE" BOLGER; SPEAKER PRO TEM OF THE HOUSE OF REPRESENTATIVES, JOHN WALSH; and HOUSE OF REPRESENTATIVES MAJORITY FLOOR LEADER, JIM STAMAS; in their official capacities; and THE MICHIGAN HOUSE OF REPRESENTATIVES,

Defendants-Appellants

/

Court of Appeals No. _____

Ingham Circuit Court No. 12-315-CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

Emergency relief requested by April 9, 2012.

DEFENDANT HOUSE MEMBERS' EMERGENCY APPLICATION FOR LEAVE TO APPEAL

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Heather S. Meingast (P55439)
Daniel E. Sonneveldt (P58222)
Assistant Attorneys General
Attorneys for Defendants
P.O. Box 30212, Lansing, MI 48909
(517) 373-6889

Dated: April 4, 2012

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF QUESTION PRESENTED

I. **The circuit court's enjoining of the immediate effect given Public Acts 45 and 53 of 2012 is unprecedented, and was an unreasonable and unprincipled decision barred by separation of powers principles and court precedent. Further, Plaintiffs demonstrated no likelihood of success on the merits of their claims, no irreparable harm, and the other factors weighed in favor of Defendants. Should the preliminary injunction be reversed?**

Appellants' answer: Yes.

Appellees' answer: No.

Trial court's answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, art 2, § 9, provides, in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

Const 1963, art 4, § 16, provides, in relevant part:

> Each house, except as otherwise provided in this constitution, shall choose its own officers and determine the rules of its proceedings, but shall not adopt any rule that will prevent a majority of the members elected thereto and serving therein from discharging a committee from the further consideration of any measure.

Const 1963, art 4, § 18, provides:

> Each house shall keep a journal of its proceedings, and publish the same unless the public security otherwise requires. The record of the vote and name of the members of either house voting on any question shall be entered in the journal at the request of one-fifth of the members present. Any member of either house may dissent from and protest against any act, proceeding or resolution which he deems injurious to any person or the public, and have the reason for his dissent entered in the journal.

Const 1963, art 4, § 27, provides:

> No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.

Const 1963, art 4, § 33, provides:

> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. If he does not approve, and the legislature has within that time finally adjourned the session at which the bill was passed, it shall not become law. If he disapproves, and the legislature continues the session at which the bill was passed, he shall return it within such 14-day period with his objections, to the house in which it originated. That house shall enter such objections in full in its journal and reconsider the bill. If two-thirds of the members elected to and serving in that house pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if passed by two-thirds of the members elected to and serving in that house. The vote of each house shall be entered in the journal with the votes and names of the members voting thereon. If any bill is not returned by the governor within such 14-day period, the legislature continuing in session, it shall become law as if he had signed it.

The Standing Rules of the House of Representatives include the following:

House Rule 12, provides, in relevant part:

> (1) The Presiding Officer shall pose all questions to the Members. If in doubt the Presiding Officer may order a division of the House. A division of the House may be had on the demand of ten Members. A vote taken by division is not printed in the House Journal. A roll call of the House may be demanded by one-fifth of the Members present (see Const 1963, Art 4 § 18) on any pending question and in such case the record of the votes and names of the voting Members shall be entered in the House Journal.

House Rule 31(1):

> A member may dissent from and protest against any act, proceedings or resolution which the Member deems injurious to any person or the public, and have the reason for dissent, referred to as a "no vote explanation", printed in the House Journal.

House Rule 54:

> When a motion it made, and when necessary under the rules, seconded, it shall be stated by the Presiding Officer; or, if in writing, it shall be read aloud by the Clerk before being debated.

House Rule 55:

> The Presiding Officer may require that a motion be submitted in writing. The motion shall be entered upon the House Journal, together with the name of the Member making it, unless withdrawn upon request of the Member making it and by a majority vote of those voting, if ruled out of order by the Presiding Officer.

STATEMENT OF JURISDICTION

The circuit court, in an unprecedented order, has crossed the line between the Judiciary and the Legislature by imposing rules to govern procedures in the Michigan House of Representatives. Further, the trial court improperly declared that legislation enacted into law is without immediate effect and compounded its error by offering Defendants a remedy which is constitutionally impossible. This Court must correct these errors.

Defendants-Appellants Speaker of the House James Bolger, Speaker Pro Tem of the House John Walsh, Representative Majority Floor Leader Jim Stamas, and the Michigan House of Representatives seek emergency leave to appeal under MCR 7.203(B)(1) and 7.205(E) from an Order Granting Plaintiffs' Motion for Preliminary Injunctive Relief entered by the Ingham Circuit Court on April 2, 2012. (Order, Appendix 1.)

Defendants will suffer ***substantial harm*** if required to wait for a final judgment in this matter. The circuit court violated separation of powers principles by "immediately enjoin[ing]" the "immediate effect" given Public Act 45 (House Bill 4246) and Public Act 53 (House Bill 4929) of 2012, and House Bill 5063. Public Act 45 became immediately effective on March 13, 2012. Public Act 53 became immediately effective on March 16, 2012. These acts have thus been in effect for over two weeks, and are being implemented. To the extent the circuit court suggested in its order that the House of Representatives could simply reconvene and vote again on the immediate effect of these bills, that is impossible with respect to Public Acts 45 and 53. The House of Representatives has no ability to recall a

public act for an additional vote. The acts either have immediate effect, as Defendants submit, or they do not. The public and effected entities should not have to endure any delay in resolving this significant issue.

Similarly, the circuit court violated separation of powers principles by intermeddling with the established rules, practices, and procedures of the House of Representatives with regard to voting on immediate effect for bills under Const 1963, art 4, § 27, and demands for a roll call vote under art 4, § 18. The circuit court "immediately enjoined" Defendants from "ignoring" Plaintiffs' requests for a roll call vote on motions for immediate effect.

Article 4, § 16 of Michigan's Constitution delegates unfettered discretion to the Michigan House and Senate to determine the rules governing legislative proceedings. Article 3, § 2, the Constitution's separation-of-powers provision, then prohibits one branch of Michigan government from exercising powers "properly belonging to another branch." In tandem, these provisions bar judicial review of any matter involving legislative procedure, even when it is alleged that such procedure has been violated. As the Michigan Supreme Court recently recognized: "Rules of legislative procedure, adopted by the Legislature and not prescribed by the Constitution, may be suspended and action had, even if contrary thereto, *will not be reviewed by the courts*." *LeRoux v Secretary of State*, 465 Mich 594, 609; 640 NW2d 849 (2002) (emphasis added).

At the core of Plaintiffs' Complaint are two objections regarding legislative procedures in the Michigan House. The first is that the House should stop its

practice of resolving motions for immediate effect with a rising vote,[1] and should instead require a roll-call vote. The second is that the House should stop its practice of requiring motions to be made orally, specifically motions for immediate effect and a roll call vote under Article 4, § 18, and should instead accept written motions supported by signatures as well. Neither of those complaints involves a constitutional violation. And granting Plaintiffs' requested relief required the circuit court to issue an Order that directs the Michigan House how to conduct its business.

Plaintiffs try to circumvent these arguments by alleging direct violations of art 4, §§ 18 and 27. But their theories and claims are foreclosed by existing caselaw. Because binding Michigan Supreme Court precedent and the Michigan Constitution itself barred granting Plaintiffs such extraordinary relief, Defendants respectfully request that this Court grant their emergency application for leave to appeal, reverse the Order granting a preliminary injunction, and remand for entry of an order dismissing the case.[2]

---

[1] Although Plaintiffs repeatedly asserted below the votes on immediate effect are done by voice vote that is incorrect. (Randall Affidavit, Appendix 2, ¶ 7.)

[2] Concurrent with the filing of their emergency application for leave to appeal, Defendants filed a motion for a stay of the injunction order and all proceedings before the circuit court.

STATEMENT OF FACTS

Plaintiff House members filed their verified complaint for declaratory, injunctive, and mandamus relief, along with a motion for temporary restraining order and preliminary injunction on Monday, March 26, 2012. Defendants became aware of the lawsuit on Tuesday, and filed a response in opposition to the motion for injunctive relief on Friday, in advance of the show cause hearing on Monday, April 2, 2012.

Defendants do not accept many of Plaintiffs' factual allegations but in light of the short amount of time Defendants had to review the pleadings and prepare a response to the request for injunctive relief, Defendants deferred preparation of a more complete set of facts to subsequent briefing or to their Answer to the Complaint. However, additional facts relevant to this matter were presented to the circuit court through the Affidavit of Gary Randall, Clerk of the House, attached as Appendix 2.

The legislative history of Public Acts 45 and 53, and House Bill 5063, is set forth in the relevant House Journal entries for each bill (Excerpts of House Journal entries, Appendix 3),[3] and may be summarized as follows:

1. Public Act 45 of 2012 – House Bill 4246

House Bill 4246 was introduced in February 2011, and amended the Public Employment Relations Act, 1947 PA 336, to specify that collective bargaining

---

[3] The House Journals may be accessed by bill number at www.legislature.mi.gov/(S(gbyqvy55aedrsxrsfhdyi345))/mileg.aspx?page=home.

agreements under the act may be rejected, modified, or terminated pursuant to the Local Government and School District Fiscal Accountability Act, now 2011 PA 4. (House Journal No 12, 2/10/2011, p 151.) On February 23, 2011, it passed the House with a vote of 62 yeas and 47 nays. (House Journal No 17, 2/23/2011, p 215.) Defendant Stamas moved for immediate effect and the House Journal states that the "motion prevailed with 2/3 of the members voting therefor." (House Journal No 17, 2/23/2011, p 215.) Notably, the House Journal does not reveal any contemporaneous objections to the vote on immediate effect.

House Bill 4246 was then sent to the Senate where it remained in committee until March 7, 2012, when it was discharged and a substitute bill, which included a provision prohibiting graduate student research assistants from being represented by a labor organization, was approved by the Senate and given immediate effect. (Senate Journal No 23, 3/7/12, pp 326-327.) House Bill 4246 was then returned to the House along with the substitute, where the House concurred in the substitute. (House Journal No 24, 3/7/2012, p 332.) The bill was ordered enrolled. (House Journal No 24, 3/7/2012, p 332.) Plaintiff Segal then moved that the bill be given immediate effect, but was ruled out of order since the bill had been ordered enrolled, and that ruling was confirmed by a vote of the House. (House Journal No 24, 3/7/2012, p 332.)

The House Journal reveals that a number of House members, including various Plaintiffs, dissented or protested from the vote on passing the substituted version of HB 4246 because they alleged it unconstitutionally changed the purpose

of the original bill. Some also indicated that they did not vote for immediate effect even though that vote occurred over a year ago in February 2011. (House Journal No 24, 3/7/2012, p 333.)[4] The bill was ultimately signed by the Governor, filed with the Secretary of State, and became effective on March 13, 2012.

2. Public Act 53 of 2012 – House Bill 4929

House Bill 4929 was introduced in September 2011, and amended the Public Employment Relations Act to prohibit the collection of union dues by a public school employer. (House Journal No 67, 9/8/11, p 2149.) It was passed in the House by a vote of 55 yeas to 53 nays. (House Journal No 70, 9/15/11, p 2200.) Defendant Stamas moved for immediate effect and that "motion prevailed with 2/3 of the members serving voting therefor." (House Journal No 70, 9/15/11, p 2200.) The House Journal then includes 34 dissents or protests by members made separately or combined explaining their no-votes on the bill and indicating that they did not vote for immediate effect. (House Journal No 70, 9/15/11, pp 2201-2203.) The bill was sent to the Senate where a substitute passed with immediate effect, and was returned to the House. The House concurred in the Senate substitute by a vote of 56 yeas to 54 nays. (House Journal No 24, 3/7/12, p 329.)[5] Four House members

---

[4] Because House Bill 4246 was originally passed with immediate effect in February 2011, the House was not required to vote on immediate effect when it concurred in the Senate substitute in March 2012. See *Michigan Taxpayers United, Inc v Governor*, 236 Mich App 372, 376-378; 600 NW2d 401 (1999).

[5] Again, no second vote on immediate effect was required since the bill passed the House with immediate effect in September 2011. (House Journal No 70, 9/15/11, p 2200). *Michigan Taxpayers United*, 236 Mich App at 376-378.

filed dissents explaining their no votes on the substitute version, and reiterating that they had not supported the prior vote on immediate effect. (House Journal No 24, 3/7/12, pp 330-331.) The bill was ultimately signed by the Governor and filed with Secretary of State on March 20, 2012, and became effective immediately.

3. House Bill 5063

House Bill 5063 was introduced in October 2011, and would require that a petition proposing an amendment to the State Constitution or to initiate legislation by initiative and referendum be approved by the Board of State Canvassers before its circulation. (House Journal No 80, 10/12/11, p 2400.) It passed the House on March 14, 2012, by a vote of 64 yeas and 46 nays. (House Journal No 27, 3/14/12, p 391.) A number of House members submitted dissents or protests explaining their no votes, some of which included assertions that they did not vote for immediate effect. (House Journal No 27, 3/14/12, pp 391-393.) Plaintiff Segal gave notice that she would move to reconsider the vote by which House Bill 5063 passed. (House Journal No 27, 3/14/12, p 395.)

On the next day there were two points of order concerning whether Plaintiff Segal could submit a written motion for immediate effect and for a roll call vote signed by 45 other members. It was ruled by Presiding Officer Walsh that the House Rules did not allow for written motions supported by signatures for a roll call vote and that only oral motions would be considered. (House Journal No 28, 3/15/12, p 402); Verified Complaint, ¶¶ 67-73, Exhibit 6; Randall Affidavit, Appendix ¶¶ 2. Plaintiff Segal then moved to reconsider the vote on House Bill 5063, which did not

pass, and Defendant Stamas moved for immediate effect of the bill, which motion "prevailed, 2/3 of the members serving voting therefor." (House Journal No 28, 3/15/12, pp 401-402).) The bill was sent to the Senate on March 20, 2012, and remains in committee.

ARGUMENT

I. The circuit court's enjoining of the immediate effect given Public Acts 45 and 53 of 2012 is unprecedented, and was an unreasonable and unprincipled decision barred by separation of powers principles and court precedent. Further, because Plaintiffs demonstrated no likelihood of success on the merits of their claims, no irreparable harm, and where the other factors weighed in favor of Defendants, the preliminary injunction should be reversed.

A. Issue Preservation

Defendants raised the arguments set forth below in their response in opposition to the motion for injunctive relief. The issues are thus preserved for this Court's review.

B. Standard of Review

This Court reviews a trial court's decision to issue a preliminary injunction for an abuse of discretion. *Thermatool Corp v Borzym,* 227 Mich App 366, 372; 575 NW2d 334 (1998). An abuse of discretion occurs when the trial court's decision results in an outcome that is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A temporary or preliminary injunction is extraordinary relief and "should issue only in extraordinary circumstances." *Michigan State Employees Ass'n v Dep't of Mental Health,* 421 Mich 152, 157,158; 365 NW2d 93 (1984); *Michigan Coalition of State Employee Unions, et al v Civil Service Commission,* 465 Mich 212, 226, n 11; 634 NW2d 692 (2001). The Michigan Supreme Court has held that, in order to obtain a preliminary injunction, a plaintiff must prove that:

1) He is likely to prevail on the merits;

2) He will be irreparably harmed if an injunction is not issued;

3) The harm to him absent an injunction outweighs the harm that an injunction would cause the Defendants; and

4) There will be no harm to the public interest if an injunction is issued. [*Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008); *MSEA v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984).]

When seeking injunctive relief, the plaintiff has the burden of proof on each of these factors. MCR 3.310(A)(4). Plaintiffs did not meet their burden in this case and the Court's granting of a Preliminary Injunction represents an abuse of discretion.

C. Analysis

Despite precedent from this Court and the Michigan Supreme Court to the contrary, the circuit court determined that Plaintiffs are likely to succeed on the merits of their claim that Defendants violated article 4, §§ 18 and 27 of the Constitution, in giving immediate effect to various house bills, including House Bills 4246, 4929, and 5063.[6] Because the circuit court abused its discretion in making this determination, and did so with respect to the other injunction factors as well, this Court should reverse the preliminary injunction.[7]

---

[6] Plaintiffs made passing reference to other bills in their Complaint, brief in support of injunctive relief, and their supplemental brief, but did not otherwise present specific facts as to those bills.

[7] Defendants note that some or all of the Plaintiffs may lack standing to sue under principles established by the Michigan Supreme Court in *House Speaker v State Administrative Board*, 441 Mich 547, 554; 495 NW2d 539 (1993). Because this argument would require further factual development, Defendants reserved the right

1. Plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their constitutional claims.

As argued in Defendants' brief below, Plaintiffs' substantive constitutional claims fail because they are barred by separation of powers principles as explained in *LeRoux*, *supra*, and precluded by additional precedent from this Court and the Michigan Supreme Court.

a. Plaintiffs' claims are barred by separation of powers principles.

As noted above, the Michigan Constitution delegates to each chamber of the Legislature the unfettered discretion to set its own operating procedures, and further prohibits one branch of the Michigan government from interfering with the inner workings of the other branches. See Const 1963, art 3, § 2; art 4, § 16. See also *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 329; 685 NW2d 221 (2004). Given those provisions, it should be no surprise that the Michigan Supreme Court has long held that there is no right to judicial review of an alleged violation of legislative rules or procedures.

In *LeRoux*, 465 Mich 594, the plaintiffs challenged a Michigan redistricting statute. The claim was that the statute was not validly enacted because the Secretary of the Senate changed the bill the Legislature passed before presenting the bill to the Governor for approval. The Supreme Court explained that the "courts do not review claims that actions were taken in violation of a legislative rule." *Id.*

---

to raise this argument in any subsequent motion to dismiss or for summary disposition.

at 609, citing *Anderson v Atwood*, 273 Mich 316, 319; 262 NW 922 (1935). Even legislative actions that are *contrary* to legislative procedures "will not be reviewed by the courts":

> Whether either chamber strictly observes these rules or waives or suspends them is a matter entirely within its own control or discretion, so long as it observes the mandatory requirements of the Constitution. If any of these requirements are covered by its rules, such rules must be obeyed, but *the observance or nonobservance of its remaining rules is not subject to review by the courts*. [*Id.* at 609, n 22, quoting *Carlton v Grimes*, 23 NW2d 883 (Iowa, 1946) (emphasis added).]

And it is "no impeachment of the [existing] rule[s] to say that some other way would be better, more accurate, or even more just." *United States v Ballin*, 144 US 1, 5 (1892).

That bar to judicial review is an insurmountable problem for Plaintiffs here. That is because Plaintiffs cannot demonstrate a violation of any constitutional provision. Paraphrasing the opinion in *LeRoux*, "[W]hether the action by the [Michigan House of Representatives in approving a bill with immediate effect] was authorized by [House rules] is irrelevant. The question is whether the [action] violates the constitutional provisions governing the enactment of legislation. . . . If it does not, a violation of the legislative rule is not a basis for finding [the bill] not to have been validly enacted." *LeRoux*, 465 Mich at 609-10.

Defendants acknowledge that Plaintiffs allege that a constitutional right is at stake here, but that does not help their case. In *LeRoux*, a constitutional right was at stake, the right to have legislation presented to the Governor as it was passed by the Legislature, without changes by the Secretary of the Senate. Nonetheless, the analysis of the Court was on whether the rules complained of were constitutionally

infirm. Because the rules were not in contravention of a constitutional mandate, they were within the discretion of the Legislature and not subject to court modification.

Here, Plaintiffs' case hinges on two House Rules or practices that Plaintiffs simply do not like: (1) the rule that immediate-effect motions are made orally from the floor, not in writing, and (2) the rule that such motions are decided by rising vote rather than a roll-call vote. Whether these are good rules or bad rules, and regardless of whether the Michigan Senate does it differently, the courts have no role to play in telling the Michigan House how to conduct its legislative activities. Thus, basic separation of powers principles preclude Plaintiffs' claims.

For the same reasons, Plaintiffs' claims are barred by the political question doctrine because they present political questions that separation of powers principles commit to the legislative branch. Like the separation of powers doctrine, the political question doctrine prevents the judiciary from usurping legislative prerogative. *Schwartz v City of Flint,* 426 Mich 295, 310–314; 395 NW2d 678 (1986).

Analysis of an issue under the political question doctrine involves a three-part inquiry:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations [for maintaining respect between the three branches] counsel against judicial intervention? [*House Speaker,* 443 Mich at 574 (citations omitted). See also *Wilkins v Gagliardi*, 219 Mich App 260, 265-266; 556 NW2d 171 (1996).]

All three requirements are satisfied in this case.

First, as discussed above, Plaintiffs' claims devolve into a dispute regarding the House Rules, and practices and procedures of the House of Representatives as implemented by its Presiding Officer. The Constitution expressly commits to the House the authority to "choose its own officers and determine the rules of its proceedings." Const 1963, art 4, § 16. Thus, resolving Plaintiffs' claims will involve questions committed by the text of the Constitution to the Legislature, and specifically the House of Representatives.

Second, resolving Plaintiffs' claims will require the court to move beyond traditional areas of judicial expertise. The historic practices or traditions of the House of Representatives, its rules of operation both written and unwritten, and the manner in which the House's operations are carried out on a day-to-day basis present areas outside a court's general expertise.

And third, there are prudential considerations warranting against judicial intervention. This case does not require the resolution of important constitutional questions. Rather, it is about politics and the inevitable tug-of-war between the party in power, and the party without. In fact, Plaintiff Segal followed the same process in the past, and Plaintiff Hammel acknowledged that the process has been used by both parties. (MIRS Report, Appendix 4.) It is exactly the situation the court should avoid interfering with unless it, and courts after it, are prepared to answer future calls for a referee. Under these circumstances, Plaintiffs' claims present political questions that the Court should decline to answer.

Plaintiffs try to circumvent these arguments by alleging direct violations of art 4, §§ 18 and 27. But those allegations are similarly infirm.

b. Plaintiffs' claim under Const 1963, art 4, § 27 is without merit because the Constitution does not require a roll call vote for immediate effect.

Plaintiffs allege that Defendants violated art 4, § 27 by passing bills with immediate effect without taking a record roll call vote. (Complaint, ¶ 110(a).) But that is not true. Article 4, § 27 states:

> No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, *but the Legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house*. [Const 1963, art 4, § 27 (emphasis added).]

It is plain that this section does *not* require a roll-call vote, when compared with sections that actually do:

> On the final passage of bills, the votes and names of the members voting thereon shall be entered in the journal. [Const 1963, art 4, § 26.]
>
> On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. [Const 1963, art 4, § 17.]
>
> All elections in either house or in joint convention . . . shall be published by the vote and name in the journal. [Const 1963, art 4, § 19.]
>
> Proposed [constitutional] amendments agreed to by two-thirds of the members elected to and serving in each house on a vote with the names and vote of those voting entered in the respective journals . . . . [Const 1963, art 12, § 1.]

The drafters of the Constitution thus knew how to require a roll-call vote, but chose not to do so in art 4, § 27. Moreover, the Constitution specifically contemplates other means of voting. Const 1963, art 4, § 18 provides that "[t]he

record of the vote and name of the members of either house voting on any question shall be entered in the journal at the request of one-fifth of the members present." The fact that members have the option of requesting a roll-call vote means that other methods of voting were contemplated. As the Attorney General observed years ago, "[t]his section clearly indicates that either house may take action by voice vote as opposed to roll-call vote." OAG, 1975-1976, No 4882, p 163 (September 30, 1975).

Because art 4, § 27 is silent with respect to how a vote for immediate effect may be made, both Houses of the Legislature have adopted their own procedures. Const 1963, art 4, § 16. The Senate, as Plaintiffs note in their pleadings, generally requires a roll-call vote for immediate effect. The House of Representatives, however, does not. The practice and procedure of the House with respect to motions and votes for immediate effect is explained in the Affidavit of Gary Randall, the Clerk of the House. (Randall Affidavit, Appendix 2.)

Under House Rules and historic practice, a motion for immediate effect is a procedural motion that is made orally from the floor of the House after being recognized by the Presiding Officer. (Randall Affidavit, Appendix 2, ¶ 5.) The question of immediate effect is put to the members by rising vote and the Presiding Officer determines whether sufficient support exists to meet Const 1963, art 4, § 27. (Randall Affidavit, Appendix 2, ¶ 7.) This method of requesting immediate effect without a record roll call vote has been the time-honored tradition and practice of

the House. (Randall Affidavit, Appendix 2, ¶ 5-7.) Again, Plaintiffs have utilized this process to their advantage in previous years. (MIRS Report, Appendix 4.)

This process is consistent with the Constitution, which does not require a roll-call vote. To the extent Plaintiffs suggest that it is incumbent upon Defendants to confirm numerically a two-thirds vote that assertion is no different than arguing that a roll-call vote is required. Plaintiffs also suggest that such a vote on immediate effect is insufficient because it is too hard to discern a two-thirds vote. But Plaintiffs provide no support for that assertion. And in any event, the same would be true for any rising or voice votes, yet both are common and not prohibited by the Constitution.

The crux of Plaintiffs' argument, however, is their assertion that House Bills 4246, 4929, and 5063 did not, in fact, receive a two-thirds vote for immediate effect. Plaintiffs' base this argument first on the theory that since neither of these bills *passed* with a two-thirds vote, they could not then have received a two-thirds vote for immediate effect. Second, Plaintiffs assert that they have proved that point since a sufficient number of House members protested the votes on immediate effect, as demonstrated in the subsequent relevant House Journal entries.

As to the first point, while there may be some correlation between votes on passage of a bill and votes for or against immediate effect, that is not necessarily the case. Members can and do change their vote from the substantive vote on a bill to the vote on immediate effect for any number of personal or political reasons. For example, HB 4799 received 72 "aye" votes on final passage (see House Journal No

26, March 16, 2011) and 70 "aye" votes on immediate effect. Accordingly, Plaintiffs' reliance on the votes cast for or against passage of bills as determinative of the votes on immediate effect is speculative at best.

Regarding the second point, Plaintiffs improperly seek to create a conflict between various House Journal entries. Const 1963, art 4, § 18 states that "[e]ach house shall keep a journal of its proceedings, and publish the same unless the public security otherwise requires." Michigan courts have long observed that "the Journals of the House and Senate are conclusive evidence of those bodies' proceedings, and when no evidence to the contrary appears in the journal, [the courts] will presume the propriety of those proceedings." *Michigan Taxpayers United, Inc v Governor*, 236 Mich App 372, 379; 600 NW2d 401 (1999), citing *Attorney General v Rice*, 64 Mich 385, 391; 31 NW 203 (1887). See also *Lansing v Michigan Power Co*, 183 Mich 400; 150 NW 250 (1914); *Fillmore v Van Horn*, 129 Mich 52; 88 NW 69 (1901); *People ex rel Hart v McElroy*, 72 Mich 446; 40 NW 750 (1888).

This principle makes sense. Allegations that the House Journal omitted something or is inaccurate as to one or more actions of the House cannot be given credence for practical reasons. Whether a member wished to be recognized, attempted to be recognized, or planned to be recognized cannot be reflected in the House Journal as there would be no end to the potential questions and issues, including whether a member's half-hearted attempt to be recognized was sufficient, whether there was too much noise on the House Floor to recognize a member, or

whether the member realized too late that he or she wished to be recognized on a particular motion. The danger of subjective determinations or *post hoc* rationalizations of what did happen or should have happened on the House Floor are vast, not the least of which being a continued question as to the validity of the reported actions. The longstanding presumption accorded the House Journal disposes of these problems.

Here, the relevant House Journal entries for House Bills 4246, 4929, and 5063 reflect that motions for immediate effect were made and that the motions "prevailed, 2/3 of the members serving voting therefor." (Excerpts of House Journals, Appendix 3) These entries are entitled to a presumption of validity and thus it must be presumed that House Bills 4246, 4929, and 5063 were properly accorded immediate effect. *Michigan Taxpayers United*, 236 Mich App at 379. Plaintiffs attempt to rebut this presumption, pointing to the protests or dissents made by Plaintiffs and other members that they did not vote for immediate effect.

Const 1963, art 4, § 18 provides that "[a]ny member of either house may dissent from and protest against any act, proceeding or resolution which he deems injurious to any person or the public, and have the reason for his dissent entered in the journal." Under this provision, Plaintiffs and other members submitted protests to the Clerk of the House that were included in the House Journals. Plaintiffs argue that the protests demonstrate that a two-thirds vote was not achieved for these bills. But a similar argument was rejected by the Michigan Supreme Court over one hundred years ago.

In *Auditor General v Board of Supervisors*, 89 Mich 552; 51 NW 483 (1891), the auditor sought a writ of mandamus to compel the Board of Supervisors for Menominee County to levy a state tax apportioned to the county for the year 1891. The board asserted that the public act creating the county and thus subjecting it to the tax was invalid because it did not pass with a proper quorum seated in the Senate. The board supported its argument by pointing to protests made by various members and recorded in the journal that asserted a quorum was not present.[8] A majority of the Supreme Court rejected the argument that the protests, and affidavits filed in support thereof, could be used to rebut the journal entries showing that a quorum was present:

> Nor did the filing of this protest change the character or effect of the previous day's proceeding or of that day's journal. . . . This is a personal privilege merely. It has no force as legislative action, and cannot be resorted to nullify a legislative act. It has no force as a statement of fact contradicting the journal. It certainly was not intended that the protest of a member should have greater weight against legislative action than his vote would have. The senate, on the morning of the 25th, had the power to correct and to expunge such portions [of the journal] as they deemed improperly included. The minority could not, by simply filing a protest, nullify the approval of the journal. The protest was laid upon the table and printed in the journal. It is in the journal, not by virtue of any action of the legislature, but by reason of the constitutional provision extending to members that privilege. [*Auditor General*, 89 Mich at 577, lead opinion by McGrath, J. See also Morse, J., concurring, 89 Mich at 582-583, and Champlin, C.J., concurring, 89 Mich at 596][9]

---

[8] Like art 4, § 18 of the current constitution, the Constitution of 1850 provided the identical opportunity to dissent from and protest any act. See Const 1850, art 4, § 9.

[9] The concerns articulated by the Court in *Auditor General* regarding the import of dissents and protests remain valid today. For example, House members Howze,

Plaintiffs are making the same argument here—that the protests refute the House Journal entries stating that the motions for immediate effect prevailed. Notably, with respect to House Bill 4246, neither Plaintiffs nor other House members submitted any dissent or protest regarding the February 23, 2011 vote on immediate effect. (House Journal No 17, 2/23/2011, p 215.) Their argument is thus without merit in regards to House Bill 4246. Regardless, Plaintiffs and this Court are bound by the Supreme Court's decision in *Auditor General*, and thus Plaintiffs cannot use dissents or protests to impeach the House Journal entries regarding immediate effect. Accordingly, their claim that Defendants are violating art 4, § 27 is without merit.

c. Plaintiffs' claim under Const 1963, art 4, § 18 is without merit because the Constitution does not specify how requests for a record roll call vote are to be made or processed.

Plaintiffs also allege that Defendants are violating art 4, § 18 "by ignoring Plaintiffs' and others' written requests for a record roll call of the votes on immediate effect when they had over 1/5 support from the Members present." (Complaint, ¶ 110(b).) But this argument is also without merit.

Hobbs, Talabi, Lipton, Slavens, Rutledge and Bauer all filed protests with respect to the vote for immediate effect on SB 874. See House Journal No 32, March 27, 2012, pp 496-497, available at www.legislature.mi.gov/%28S%28zbatczevzb2et245mjqxyy45%29%29/documents/2011-2012/Journal/House/pdf/2012-HJ-03-29-034.pdf. But then later voted in favor of immediate effect on SB 874 after it had been returned to the House. See House Journal No 34, March 29, 2012, pp 518-519, available at www.legislature.mi.gov/%28S%28zbatczevzb2et245mjqxyy45%29%29/documents/2011-2012/Journal/House/pdf/2012-HJ-03-29-034.pdf.

Again, Const 1963, art 4, § 18 provides that "[t]he record of the vote and name of the members of either house voting on any question shall be entered in the journal at the request of one-fifth of the members present." As explained in the Randall Affidavit, the request for a roll call vote must be made by an oral motion upon recognition of the movant by the Presiding Officer. (Randall Affidavit, Appendix 2, ¶ 6.) Written motions supported by signatures are not accepted for any purpose, including a request or demand for a roll call vote under House Rules 12, 54, and 55. (Randall Affidavit, Appendix 2, ¶¶ 5-7.) This longstanding prohibition is related to concerns over proxy voting, the member not being in the chamber at the time support is requested, the member having changed their opinion on "support" after signing a document, and similar considerations. *Id.*[10] Thus, to the extent Plaintiffs complain that their written motions for roll call votes were not accepted or acted upon, it is because they did not follow the established procedures.

Plaintiffs also allege that oral requests for record roll call votes were made but ignored by the Presiding Officer. Importantly, the same argument was made and rejected by this Court in *Michigan Taxpayers United*, 236 Mich App 372. The Court succinctly observed:

---

[10] See House Journal, Volume 1, pp 424-426 (1977) (stating that written statements demanding a record roll call on immediate effect and signed by 22 members "would not be recognized in lieu of the actual demand being made by the members at the proper time and supported by the required 1/5 of the members present as required by the Constitution, the rules and customary parliamentary procedure." The Speaker stated that to recognize such a written demand might be in effect proxy voting and it is not provided for by the rules.)

> Plaintiffs [ ] contend that the Speaker of the House allegedly ignored twenty-five House members' demand for a roll-call vote with regard to the issue of immediate effect and that the Speaker's actions were a violation of House Rule 12 and Const 1963, art 4, § 18. Although plaintiffs have provided documentation to support their claim, namely, an affidavit from the Clerk of the House, the Journal of the House makes no reference to the alleged demand for a vote. Parol evidence may not be used to show that the Legislature violated the constitution in enacting a statute. Rather, the Journals of the House and Senate are conclusive evidence of those bodies' proceedings, and when no evidence to the contrary appears in the journal, we will presume the propriety of those proceedings. [*Michigan Taxpayers United*, 236 Mich App at 379 (citations omitted)].

The Court of Appeals rejected the Plaintiffs' argument that the Court should make an exception to the parol evidence rule even though the evidence advanced was from the Clerk of the House, the person charged with keeping the journal. And in concluding, the Court observed that even if the House Journal had referenced the alleged demand for a roll call vote, "the constitution does not require the House to vote on a matter upon demand; it merely requires that when a vote is taken, the members may demand a record roll call of that vote." *Michigan Taxpayers United*, 236 Mich App at 380.

Apart from being weaker since Defendants position is supported by the Clerk, Plaintiffs' claim in this case is no different from the plaintiffs' claim in *Michigan Taxpayers United*. It matters not, of course, that the political parties's positions are now reversed. *Michigan Taxpayers United* is binding precedent, which Plaintiffs' and the circuit court improperly ignored. Accordingly, Plaintiffs' claim that Defendants have violated art 4, § 18 is without merit.

d. The House Rules and practice with respect to votes on immediate effect do not unconstitutionally interfere with the right of referendum under Const 1963, art 2, § 9.

Plaintiffs assert that the allegedly improper votes on immediate effect effectively eliminates the people's right of referendum under Const 1963, art 2, § 9 because a referendum could not be filed before the challenged legislation becomes effective.[11] This argument is a red herring.

Article 2, § 9 reserves the right of referendum to the people, and provides in part:

> The people reserve to themselves . . . the power to approve or reject laws enacted by the legislature, called the referendum. . . . The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law *within 90 days following the final adjournment of the legislative session at which the law was enacted.* [Emphasis added.]

As Plaintiffs suggest, the 90-day requirement corresponds with art 4, § 27's *sine die* language. And reading the two provisions together, a referendum must be invoked—at the very latest—on the ninetieth day following adjournment of the Legislature at which the law was enacted. *Michigan Farm Bureau v Hare*, 379 Mich 387; 151 NW2d 797 (1967) (Holding that term "within 90 days" in art 2, § 9 only fixes an end date by which a referendum must be invoked.)

---

[11] Plaintiffs did not raise this issue in their Complaint or original brief in support of injunctive relief. Rather, they filed a supplemental brief addressing this issue at the close of business on March 30, after Defendants filed their response brief with the circuit court.

The 90-day deadline applies equally to acts given regular effect and to acts given immediate effect. *Michigan Farm Bureau*, 379 Mich at 393-394. In *Michigan Farm Bureau*, the Supreme Court observed that the 90 days must be interpreted as fixing only an end date otherwise the Legislature could avoid a referral by giving an act immediate effect, later repealing the act, and then enacting it once again. *Id.* at 392-394. Thus, a referendum on an act given immediate effect may be invoked any time after its effective date but before 90 days *sine die*.

While it is true that a referendum regarding an act with immediate effect could not be invoked before the act's effective date, that result is simply a function of the Constitution's own provisions. See *Frey v Director of Dep't of Social Services*, 162 Mich App 586, 601-602; 413 NW2d 54 (1987), aff'd 429 Mich 315 (1987) ("Under article 2, § 9, referendum must be invoked within ninety days of the final adjournment of the legislative session at which the law was enacted. Whether the law was given immediate effect is irrelevant.") The drafters included no special provision with respect to referendums regarding acts given immediate effect. Moreover, it is unclear how that result "effectively eliminates" the right of referendum where referral proponents may have an expanded timeframe for signature gathering, combined with a sense of urgency given the act's immediate applicability. Therefore, Plaintiff's argument that this effectively eliminates the right of referendum is thus without merit. *Frey*, 162 Mich App at 601 ("Argument that giving the act immediate effect would impair their right to referendum is without merit.")

e. Plaintiffs' alternative request for writ of mandamus is without merit.

Plaintiffs request in the alternative that the court issue a writ of mandamus compelling Defendants to use roll-call votes for votes on immediate effect, and to honor Plaintiffs' demands under art 4, § 18. But Plaintiffs cannot establish the necessary elements for granting such relief.

A writ of mandamus is an extraordinary remedy, and will only be issued if (1) the party seeking the writ has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008). The party seeking mandamus has the burden of establishing that the official in question has a clear legal duty to perform. *Burger King Corp v City of Detroit*, 33 Mich App 382, 384; 189 NW2d 797 (1971).

As explained above, Defendants have no clear constitutional duty to employ roll call votes with respect to motions for immediate effect where the Constitution does not so require. And with respect to Plaintiffs' claims under art 4, §§ 18 and 27, these processes are not ministerial but rather involve the exercise of discretion on the part of the House's Presiding Officer. Accordingly, these are activities that cannot be compelled through a writ of mandamus.

2. Plaintiffs failed to demonstrate irreparable harm if an injunction is not issued.

The Michigan Supreme Court has held that, in order for a preliminary injunction to be granted, plaintiffs must make a "particularized showing of irreparable harm that will occur before the merits of the claim are considered." *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007). This is an "indispensable requirement to obtain a preliminary injunction. The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376 v City of Pontiac,* 482 Mich 1, 9; 753 NW2d 595 (2008).

The circuit court found that the purported diminution of Plaintiffs' voting power resulted in irreparable harm, and that Defendants' voting procedures for immediate effect effectively eliminates the public's right of referendum resulting in obvious irreparable harm. (Transcript, Appendix 5, pp 42-43.)

As discussed above, the argument that Defendants' voting on immediate effect interferes with the right of referendum is without merit. As a result it does not support any finding of irreparable harm. Turning to the diminished voting power theory, Plaintiffs asserted that they would suffer irreparable harm because they "have an interest in maintaining the effectiveness of their votes as Members of the House of Representatives," and cited *Dodak v State Administrative Board*, 441 Mich 547; 495 NW2d 539 (1993). (Plaintiffs' Brief in Support of Temporary

Restraining Order/Preliminary Injunctive Relief, p 16.) But the *Dodak* case does not stand for such a broad proposition.

In *Dodak*, the Supreme Court first had to decide whether any of the four legislator-plaintiffs had standing to sue. The Court ultimately concluded that only Senator Jacobetti had standing in his capacity "as a member of the House Appropriations Committee, [who had] been denied a specific statutory right" to vote on an intradepartmental transfer. *Dodak*, 441 Mich at 560. This narrow articulation by the Court for standing purposes does not support a finding of irreparable harm based on a vague theory of diminished voting power. Moreover, as discussed above, Plaintiffs' substantive claims regarding art 4, §§ 18 and 27 are precluded by the Constitution and precedent. And Plaintiffs' claims, in essence, are not that they have been denied an opportunity to utilize or participate in votes under §§ 18 and 27, but rather that they have not been successful in doing so. No court has recognized such a right. Under these circumstances, Plaintiffs failed to demonstrate irreparable harm and the court's injunction should be reversed.

3. The harm to Defendants if an injunction issued outweighed the harm to Plaintiffs if it was denied, and the public interest weighed in favor of denying the request for injunctive relief.

While less than clear, it appears the circuit court concluded that the balance of harms and public interest weighed in favor of granting an injunction because the public has an interest in knowing how their representatives voted, and because the immediate effect votes interfere with art 2, § 9's referendum right. (Transcript,

Appendix 5, pp 40-43.) But these factors plainly weighed in favor of denying the request for an injunction.

Defendants are harmed by the court's enjoining the immediate effect of Public Acts 45 and 53 because they have no ability to "reconvene and vote on the immediate application of these bills" as the circuit court suggested. (Order, Appendix 1.) Once a bill given immediate effect is presented to the Governor and he signs and files it with the Secretary of State, it becomes law. Const 1963, art 4, § 33; OAG, 1983-1984, No 6201, p 230 (January 30, 1984). Neither house of the Legislature has any ability to recall a public act in order to perfect a supposed imperfect vote on immediate effect. Nor could the House engage in some other procedure, like passing a resolution to do so, see, e.g. *United Ins Co v Attorney General*, 300 Mich 200; 1 NW2d 510 (1942) (Concurrent resolutions attempting to give immediate to public acts adopted 5 months prior), or by passing another act for that purpose. See OAG, 1941-1942, No 21087, p 369 (October 9, 1941) (Where Legislature passed a number of acts without giving them immediate effect, it could not subsequently by a new act that specifically designated the prior acts by number, give them immediate effect.) Short of repealing Public Act 45 and reenacting it with immediate effect, which the House cannot do on its own, there is no remedy.

And while the court's injunction only invalidates the immediate effect of the two public acts, meaning they would instead become effective 90 days sine die, that result is not in the public's interest. These acts became effective over two weeks ago, and while that's not a long time, it is long enough to assume that wheels have

been put in motion. Moreover, the public, like Defendants, have an interest in maintaining the Constitution's separation of powers principles.

The Legislature is the branch of government tasked with creating laws, and is specifically empowered to determine the rules and procedures for doing so. An injunction imposing different rules or practices on the House that are not constitutionally required would constitute an unprecedented judicial interference with this branch of government. But that is just what the circuit court did in this case by immediately enjoining Defendants from "ignoring" Plaintiffs' oral and written requests for roll call votes on votes for immediate effect.

The harm to the public interest is not outweighed by the equities in Plaintiffs' parliamentary challenges raised in their Complaint. These types of challenges should be left to the House to consider and resolve—not the courts. Const 1963, art 4, § 16; *LeRoux, supra*. The public is entitled to the constitutional protections afforded to their elected Legislature and the separation of powers constitutionally prescribed. The harm to the public interest by court intervention outweighs the harm alleged to the parochial interests of the Plaintiffs. *Michigan Coalition of State Employee Unions, et al v Civil Service Comm'n,* 465 Mich at 226. Because these factors weighed in favor of denying Plaintiffs' request for injunctive relief, the circuit court's injunction should be reversed.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendants Speaker of the House James Bolger, Speaker Pro Tem of the House John Walsh, Representative Majority Floor Leader Jim Stamas, and the House of Representatives request that this Court grant their emergency application for leave to appeal, reverse the circuit court's grant of preliminary injunctive relief, and remand for entry of an order dismissing Plaintiffs' Complaint.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Heather S. Meingast

Heather Meingast (55439)
Daniel E. Sonneveldt (P58222)
Assistant Attorneys General
Attorneys for Defendants
P.O. Box 30212
Lansing, MI 48909
(517) 373-6889

Dated: April 4, 2012