

STATE OF MICHIGAN
COURT OF APPEALS

PROTECT MI CONSTITUTION,
Plaintiff,

FOR PUBLICATION
August 14, 2012

v

No. 311504

SECRETARY OF STATE,
Defendant,

Advance Sheets Version

and

CITIZENS FOR MORE MICHIGAN JOBS,
Intervening Defendant,

and

ATTORNEY GENERAL,
Amicus Curiae.

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

RONAYNE KRAUSE, J. (*concurring in part and dissenting in part*)

This is another unfortunate case throwing into sharp relief two longstanding problems with the Michigan referendum process: first, poor drafting can preclude the people of this state from being able to express their will at the polls; and second, the Secretary of State needs clearer authority explicitly stating its duties, if any, to filter ballot proposals that do not conform to the requirements of our Constitution. I do not take issue with the majority's conclusion that the ballot initiative at issue in this matter does not, in fact, conform to the requirements of our Constitution for presentation to the voters. I also agree that the Secretary of State has a clear legal duty to evaluate ballot proposals for such compliance. To the extent the writ of mandamus issued by this Court directs the Secretary of State to perform her duty, I concur with it. However, because I believe that this Court lacks sufficiently clear authority granting it the power

to make the Secretary of State’s decision for her under these circumstances, I respectfully dissent to the extent that the writ of mandamus dictates the Secretary of State’s ultimate decision.¹

As the majority states in greater—and accurate—detail, this is an original mandamus action filed in this Court by Protect MI Constitution (PMI), an entity that seeks to preclude a ballot initiative from being put to the voters. The ballot initiative in question, sponsored by intervenor Citizens For More Michigan Jobs (CFMMJ), would in broad terms amend the Michigan Constitution to permit additional casinos to operate in this state. PMI asserts that the ballot initiative would not merely amend the Constitution, but would also have the effect of modifying significant portions of the Michigan Gaming Control and Revenue Act (the Gaming Act), MCL 432.201 *et seq.*, which was passed by voter initiative in 1996.² Defendant, the Secretary of State, argues that a writ of mandamus should not issue because she has no clear legal duty to examine ballot initiatives for compliance with Constitutional prerequisites.

As the majority states, a writ of mandamus “is the appropriate remedy for a party seeking to compel action by election officials,” and the Secretary of State is a state officer subject to a writ of mandamus issued by this Court. *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich App 273, 282-283; 761 NW2d 210 (2008). Indeed, it has long been established that while the Governor might be immune to mandamus, other executive officers, including department heads, are not. See *People ex rel Sutherland v Governor*, 29 Mich 320, 326-331 (1874). However, issuance of mandamus is only proper if, among other things, “the defendant has the clear legal duty to perform the act requested,” “the act is ministerial,” and “no other remedy exists that might achieve the same result.” *Citizens Protecting Michigan’s Constitution*, 280 Mich App at 284. The Secretary of State argues that evaluating a ballot proposal for constitutionality entails a great deal of discretion, and she has no legal duty to make that analysis.

I am not convinced that the act to be performed—examining an initiative proposal for compliance with constitutional prerequisites—is not ministerial. This Court has explained that an act is ministerial if it is “prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Id.* at 286, quoting *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006) (quotation marks and citations omitted). However, I do not believe that to mean that the act must be so rote or devoid of personal thought that it could literally be performed by a computer. See *Wayne Co v State Treasurer*, 105 Mich App 249, 251; 306 NW2d 468 (1981) (noting that the legal duty to act must

¹ In addition, I specifically concur in parts IV(C) and (D) of the majority’s opinion, rejecting standing and ripeness challenges to the instant appeal.

² Under the procedural posture of this case, I would decline to address whether the proposed ballot initiative actually would impermissibly alter provisions of the Gaming Act, and therefore violates the prerequisites of Const 1963, art 4, §§ 24 and 25. However, while irrelevant to the analysis in which I would engage, I note as an aside that I do agree with the majority that it does so, and so I take no issue with parts IV(F), (G), and (H) of the majority’s opinion. I merely would not reach them at this time.

usually be a specific act of a ministerial nature, although mandamus may occasionally be granted when the act to be compelled is discretionary). So long as any discretion to be exercised is in the *execution* of the act, and the act *itself* is otherwise mandated, mandamus may lie. See *Mich State Dental Society v Secretary of State*, 294 Mich 503, 516-517, 519-520; 293 NW 865 (1940) (holding that the Secretary of State's duties, which are only ministerial even though the performance thereof may entail some exercise of discretion and judgment, include the right to make a facial evaluation of obviously fake names on a petition). This Court will order mandamus when a state officer's action is so capricious and arbitrary that it evidences a total failure to exercise discretion. See *Bischoff v Wayne Co*, 320 Mich 376, 385-387; 31 NW2d 798 (1948).

The critical problem that I perceive with the instant action is that, as I understand the law, a writ of mandamus cannot issue unless there *already* exists a clear legal duty that a defendant is shirking. Obviously, the Secretary of State would be obligated to comply with any valid court order, including a writ of mandamus issued by this Court, and the Secretary of State does not in any way contest that. However, this Court cannot *create* a clear legal duty of the sort that would support issuance of mandamus *by* issuing mandamus. Doing so is bootstrapping of the kind our jurisprudence has always frowned upon. The Secretary of State poses a Catch-22: if, indeed, she has no clear legal duty in the first place to make the instant determination on her own, I do not believe this Court can *create* that duty out of thin air by issuing a writ of mandamus.

Unfortunately, I find no case law or other authority unambiguously setting forth a clear legal duty on the Secretary of State's part to evaluate a ballot proposal for compliance with the Constitutional provisions at issue here. In *Citizens Protecting Michigan's Constitution*, this Court issued a writ of mandamus directing the Secretary of State to reject a sweeping and grossly noncompliant rewrite of the Constitution that was masquerading as a mere amendment. However, this Court did not decide that the Secretary of State had a clear legal duty to do so, but rather assumed that the Secretary did. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 286-292. Similarly, in *MUCC v Secretary of State (After Remand)*, 464 Mich 359; 630 NW2d 297 (2001), our Supreme Court issued mandamus directing the Secretary of State to reject a petition for referendum but offered no analysis whatsoever as to the existence of a duty. Almost every justice in *MUCC* wrote a separate opinion, none of which discussed mandamus in any way.

It appears to me that this Court in *Citizens Protecting Michigan's Constitution* really determined that the Secretary of State would have a clear legal duty to comply with what was effectively a declaratory judgment. I believe that to be accurate, so far as it goes: if a court were to issue a declaratory judgment that a given ballot initiative is impermissible for presentation to the voters, for example because, as here, it does not comply with the constitutional prerequisites, then it is very nearly, if not actually, axiomatic that the Secretary of State would have a clear legal duty to refuse to present that initiative to the voters. However, this Court does not, as far as I am aware, have jurisdiction to entertain original actions for declaratory judgment. MCR

7.203(C).³ This Court could grant “any judgment . . . as the case may require” pursuant to MCR 7.216(A)(7), which would impliedly include granting declaratory relief. However, that does not appear to have occurred. Mandamus and declaratory judgments are not exactly the same thing; and because this Court does not appear to have the jurisdiction to entertain an original action for declaratory relief, I would not consider one.

Our Supreme Court has, in the past, found a clear legal duty on the part of the Secretary of State, leading to writs of mandamus, to evaluate ballot proposals for facial compliance with constitutionally mandated technical requirements. In *Leininger v Secretary of State*, 316 Mich 644, 651-656; 26 NW2d 348 (1947), our Supreme Court explicitly established that the Secretary of State has a clear legal duty to determine whether petitions were in the proper constitutionally required form for transmittal to the Legislature. *Leininger* is of dubious direct validity today, however, because at the time, article V, § 1 of the 1908 Constitution, as amended by 1941 Joint Resolution 2, imposed an *explicit* duty on the Secretary to do so. *Leininger*, 316 Mich at 655. However, *Leininger* relied primarily on another case that predated 1941 JR 2, and it noted that the Constitution merely “now makes express the duty which this Court had theretofore held rested upon the Secretary of State.” *Leininger*, 316 Mich at 655.

The prior case is *Scott v Secretary of State*, 202 Mich 629; 168 NW 709 (1918). Although *Scott* predates 1941 JR 2, it was decided after the 1908 Constitution was amended to provide for a referendum process by 1913 Concurrent Resolution 4.⁴ The 1913 to 1941 version of Const 1908, art V, § 1 did not provide the explicit directive to the Secretary to “determine[] that the petition is legal and in proper form and has been signed by the required number of qualified and registered electors,” as it did after 1941 JR 2, as noted in *Leininger*. Rather, it specified only that “[u]pon receipt of any initiative petition, the Secretary of State shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors” and transmit it to the Legislature if so. 1913 CR 4. *Scott* observed that the same constitutional provision required all petitions to contain “the full text of the amendment so proposed,” and on that basis, it held that “such petition” had to be defined as one “conforming to the constitutional mandate.” *Scott*, 202 Mich at 644. If a petition did not satisfy the constitutional requirements, it was therefore the duty of the Secretary to reject it. *Scott*, 202 Mich at 643-646; see also, *Hamilton v Secretary of State*, 212 Mich 31, 38-40; 179 NW 553 (1920) (discussing *Scott*).

I would find that, while Michigan has a new Constitution, the principles discussed in *Scott* and expounded upon in *Leininger* are still valid and binding. I would therefore explicitly hold that the Secretary of State has a clear, unambiguous, affirmative legal duty to evaluate

³ Obviously, it would be possible to establish that this Court may entertain an original action for declaratory relief in the specific context of determining whether ballot initiatives are permissible, pursuant to MCR 7.203(C)(5). To the best of my knowledge, this has not occurred.

⁴ The original, “as ratified” version of Const 1908, art V, § 1 stated only that “[t]he legislative power is vested in a senate and house of representatives,” and this original version of that section is now found at Const 1963, art 4, § 1.

ballot initiatives for facial compliance with the technical formalities dictated by the Constitution. However, I find authority only supporting the bare obligation by the Secretary to make that evaluation. Should the Secretary find that the ballot proposal is or is not compliant, and thereby decide whether to place it on the ballot, the Secretary's decision will then be reviewable by an appeal to the courts. See *Leininger*, 316 Mich at 652, citing *Hamilton*, 212 Mich at 38 and *Thompson v Secretary of State*, 192 Mich 512, 523-524; 159 NW 65 (1916). Alternatively, one or more of the parties should have commenced an action seeking declaratory relief.

I recognize that there are time constraints on the subject matter of this case. However, I do not believe that those time constraints change the law. I note that at oral argument, the Solicitor General agreed on the record that the Secretary is obligated to make this decision, but asked this Court to make that decision *for* the Secretary because of those time constraints. I do not believe that in the absence of any clear authority to the contrary, such as that from our Legislature or from our Supreme Court, this Court may do so until such time as the Secretary has made a decision.⁵ Indeed, at oral argument, the possibility of clarifying legislation was discussed, and I would very much like to have such clear authority on which to rely.⁶ However, in the absence thereof, I can only surmise the courts could address the issue through a complaint for declaratory judgment.

Where the majority and I part ways is that I would issue a writ of mandamus directing the Secretary of State to make this decision; the majority would relieve the Secretary of her duty and issue a writ of mandamus making this decision for her. I believe that the Secretary of State has a clear legal duty, independent of any decision or judgment from this Court, to evaluate ballot initiatives for facial compliance with the procedural requirements specified by the Constitution, and we can therefore issue a writ of mandamus requiring the Secretary of State to carry out that duty. If a court, such as this Court, issues a declaratory judgment that a ballot initiative is or is not constitutionally infirm, *then* the Secretary of State has a clear legal duty to take a particular action to accept or reject the initiative and present it to the voters. But I believe the majority's approach conflates the matter and impermissibly treats this case as not only an original action for mandamus, but also an original action for declaratory judgment. I appreciate the majority's concern, given the nature of the ballot initiative at issue, but in the absence of a clearer articulation of this Court's authority and the Secretary of State's duty from our Supreme Court or

⁵ Furthermore, I am not persuaded that the time constraints are as dire as suggested. The courts may conclude that legislation is impermissible *after* voting has occurred, and the people may well vote against this particular initiative. In any event, PMI candidly points out, and I agree, that no matter what this Court does, at least one party *will* seek leave to appeal to our Supreme Court. It is my hope and my respectful request that if our Supreme Court chooses to review this matter, that it take the opportunity to benefit the bench, the bar, the Secretary of State, and the people of this state by clarifying the concerns I have raised.

⁶ As noted earlier, I agree with the majority's analysis of the ballot initiative's constitutional infirmities, but I am unsure that this Court may properly reach that analysis under the instant procedural posture of this case.

from the Legislature, I would only direct that the Secretary of State engage in the analysis that she was obligated to engage in from the outset.

/s/ Amy Ronayne Krause