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Review of the Michigan Supreme Court's 2021-2022 Term and Preview of its 2022-2023 Term

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While the 2020 election brought about a change in control of the White House and U.S. Senate, it also shifted the balance of power on the Michigan Supreme Court. That year, Chief Justice Bridget Mary McCormack was re-elected to the Court and Justice Elizabeth Welch was elected, creating a 4-3 majority of Justices who had been nominated by the Democratic Party—the Court's first Democratic majority in nearly a decade. (The Court's seven Justices are officially nonpartisan, but they must be nominated by a political party to appear on a general election ballot.)

The Court's 2021-2022 term, which ran from August 1, 2021 to July 31, 2022, was its first full term after this power shift. The result was a series of closely divided decisions that recognized new rights and protections grounded primarily in the state constitution and state law, including the right to sue the State for monetary damages for violations of state constitutional rights, protections from discrimination based on sexual orientation, limits on lengthy criminal sentences for youth offenders, and protections for the right to propose laws and constitutional amendments by initiative petitions.

With the Michigan Supreme Court scheduled to begin hearing oral arguments for the 2022-2023 term on October 12, and with two seats on the Court up for election in November—one currently held by a Democratic-nominated Justice and one held by a Republican-nominated Justice—this explainer reflects on some of the significant decisions from the 2021-2022 term and previews what the Court may decide next.

Significant Decisions from the 2021-2022 Term

The Michigan Supreme Court states that it reviews an average of 2,000 applications for leave to appeal and a small number of original actions each year. Of those, the Court ends up hearing and deciding only 2-3%. For the 2021-2022 term, this amounted to 39 published opinions. (This figure does not include the numerous orders without formal opinions that the Court issues each

term; the Court primarily uses orders to address procedural matters, but it sometimes uses them to resolve the merits of a case.¹)

The Court's 39 opinions addressed a wide variety of legal issues. Broadly, 23 of the Court's opinions from the term, or 59% of them, addressed civil law matters, such as property law, tax law, torts, and public records; 15 opinions, or 38%, addressed criminal law matters, like sentencing standards, evidence requirements, and double jeopardy questions; and one opinion addressed a misconduct complaint brought against a Michigan judge.

The impact of the shift in the partisan composition of the Court is seen in the Court's more contentious decisions—those decided by 4-3 or 5-2 votes where a difference in the composition of the Court likely would have resulted in a different outcome. One third of the Court's opinions from the term fell into this category: eight decisions were decided by 4-3 votes and five decisions by 5-2 votes (though some disagreements were sharper than others). In these decisions, the four Democratic-nominated Justices usually voted together and were occasionally joined by Republican-nominated Justice Elizabeth Clement. Several of the more contentious decisions are discussed below.

Rejecting restrictions on the rights to referendum and initiative

One of the most significant decisions from the term was [*League of Women Voters of Michigan v. Secretary of State*](#), in which the Court mostly rejected legislative efforts to restrict Michiganders' rights to propose laws and constitutional amendments by initiative petition.

At issue were several changes that the Michigan Legislature made to state's initiative and referendum process in 2018. Under those 2018 provisions, no more than 15% of the signatures on a referendum or initiative petition could be obtained from a particular congressional district; paid petition circulators had to file an affidavit disclosing their non-volunteer status; and petition forms had to include a checkbox indicating whether the circulator was paid or unpaid.²

The plaintiffs challenged the 15% geographic-distribution requirement as violating state constitutional provisions that reserve to the people the ability to approve or reject legislation ("referenda"), to propose laws to the legislature and enact them if the legislature refuses ("initiated statutes"), and to propose and approve amendments to the state constitution ("initiated constitutional amendments"). With respect to referenda and initiated statutes, the Court unanimously agreed.³ The Court emphasized that, because the constitutional provision that addresses the people's power to pursue referenda and initiated statutes is "self-executing," the Legislature's authority to "implement[]" that provision is limited to filling in details like the type size, the timeline for circulating petitions, and the duties of state officials in processing the petitions.⁴ Given that the state constitution provides only for an overall minimum number of signatures needed and does not impose any geographic distribution requirement, the Court concluded that the 15% cap unduly burdened the ability of Michiganders

to exercise their referendum and initiated statute powers.⁵ As the Court explained, the requirement made it more difficult and expensive to gather the required number of signatures, and also effectively voided any signatures collected in a district after the 15% limit had been reached.

For similar reasons, the Court also held that the 15% cap exceeded the legislature's authority to "prescribe by law" the process for initiated constitutional amendments.⁶ This portion of the Court's opinion was 5-2, with Justices Zahra and Viviano dissenting.

While the plaintiffs challenged the geographic-distribution requirement on state constitutional grounds, their challenges to the affidavit and checkbox requirements were based on the First Amendment. Relying upon U.S. Supreme Court precedent, the Court applied the "*Anderson-Burdick* test," which requires courts to weigh the character and magnitude of the burden a challenged election law imposes on speech and association against the state's interests and consider the extent to which the state's concerns justify the burden.⁷ By a 4-3, party-line vote, the Court invalidated the affidavit requirement, while a 6-1 majority (with Justice Bernstein dissenting) upheld the checkbox requirement. According to the court, the affidavit requirement did nothing to advance the state's asserted interests in informing the electorate about petition campaigns and had the potential to decrease the pool of circulators and hinder petition drives that employ paid signature gatherers.⁸ In contrast, the Court concluded that the burden imposed by the checkbox requirement was sufficiently minimal that the governmental interest in increasing information for voters served as an adequate justification.⁹

Recognizing the right to sue the state for monetary damages for violations of the state constitution

Another significant decision from the term was [*Bauserman v. Unemployment Insurance Agency*](#), in which the Court recognized for the first time that individuals can sue the state government for monetary damages when the State violates any of the rights enshrined in the Michigan Constitution's Declaration of Rights (with limited exceptions).¹⁰

In this case, the plaintiffs sought to vindicate their state constitutional right to due process: They (along with an estimated 40,000 others in Michigan) had sought unemployment compensation benefits from Michigan's Unemployment Insurance Agency, but an automated computer system erroneously found them to have committed fraud. Due to the computer system's findings, the plaintiffs were disqualified from receiving benefits and subjected to additional financial penalties. All of this occurred without notice or an opportunity for the individuals to be heard. The plaintiffs filed a class action lawsuit against the State alleging violations of their state due process rights and seeking monetary damages, and the State sought dismissal on the grounds that nothing in the state constitution or state law expressly authorizes monetary damages as a remedy for due process violations.

The Court rejected the State's argument in a party-line 4-3 opinion written by Justice Megan Cavanagh. The majority opinion reasoned that rights set forth in the state constitution must be inherently enforceable, and it is the Court's duty to enforce those rights if they are not otherwise constrained or if the legislature has not provided an adequate remedy: "If the rights guaranteed in our Constitution are to be more than words on paper, then they must be enforceable. And if the rights guaranteed in our Constitution are to be enforceable, then enforcement must fall to us, absent an explicit constitutional provision limiting our authority in this regard."¹¹

In contrast, two of the dissenting Justices (Viviano and Zahra) argued that it should be up to the state legislature, not the judiciary, to determine the remedies for violations of the state constitution.¹² The Court's opinion notes that state courts around the country that have addressed similar questions in their respective states are nearly equally divided between the competing views.¹³

Prohibiting discrimination in places of public accommodations based on sexual orientation

In another major decision, [*Rouch World, LLC v. Department of Civil Rights*](#), the Court held that the state's Elliot-Larsen Civil Rights Act (ELCRA) prohibits discrimination in places of public accommodation on the basis of sexual orientation.¹⁴ (The decision noted that the lower court had recognized the ELCRA also prohibits discrimination on the basis of gender identity, but this particular issue was not before the Court.¹⁵)

At issue was an event space's refusal to host a same-sex wedding on religious grounds. The aggrieved couple filed a complaint with the Michigan Department of Civil Rights alleging that the owners of the event space discriminated against them in violation of the ELCRA, which prohibits the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . sex."¹⁶ After the Department began an investigation, the owners of the event space filed a lawsuit contended, in part, that the ELCRA does not prohibit discrimination on the basis of sexual orientation. They argued that "sex," as used in the ELCRA, is limited strictly to gender.

The Court rejected the event space owners' argument in a 5-2 opinion written by Justice Clement and joined by the four Democratic-nominated Justices. Citing the U.S. Supreme Court's ruling in *Bostock v. Clayton Co.* (2020), which analyzed a similar provision in Title VII of the federal Civil Rights Act,¹⁷ the Court explained that because one's gender is necessary to the identification of one's sexual orientation, discrimination on the basis of sexual orientation necessarily requires the discriminator to treat individuals differently because of their gender.¹⁸ The dissenting Justices (Zahra and Viviano) cited the ELCRA's legislative history and

contemporary dictionaries to argue that the state legislature had not intended for the ELCRA's protections to include sexual orientation.¹⁹

Importantly, the Court did not address whether vendors like the event space owners might be able to invoke federal and state constitutional religious liberty protections to avoid liability under the ELCRA for sexual orientation or gender identity discrimination as the issue had not been decided in the lower court.²⁰ That question may well be the subject of further litigation in the near future.

Limiting lengthy criminal sentences for youth offenders

The Michigan Supreme Court also issued four decisions concerning the State's special sentencing procedures for youth offenders who are convicted of specific crimes, including first- and second-degree murder. The procedures had been adopted by the Michigan Legislature following two U.S. Supreme Court decisions: *Miller v. Alabama* (2012),²¹ which held that sentencing an individual to mandatory life without parole for a crime they committed before they were 18 violates the Eighth Amendment's ban on cruel and unusual punishments, and *Montgomery v. Louisiana* (2016),²² which held that *Miller* applied retroactively to people who had already been sentenced under mandatory life without parole laws. Although *Miller* required trial courts to consider the attributes of youth only when deciding to sentence a juvenile offender to life without parole, the Michigan Supreme Court relied upon the state constitution and state law to extend the logic of *Miller*.

In [*People v. Taylor*](#), the Court considered the proper procedure when a prosecutor seeks to sentence a juvenile offender to life without parole for first-degree murder. The Court, in a 4-3, party-line decision written by Justice Cavanagh, acknowledged that *Miller* and *Montgomery* do not impose a presumption against life without parole for juvenile offenders convicted of first-degree murder but held that the State's statutory sentencing procedures create such a presumption and that the prosecutor must rebut the presumption by clear and convincing evidence.²³

In [*People v. Parks*](#), the Court weighed the constitutionality of a mandatory sentence of life without parole for defendants convicted of first-degree murder who had reached the age of 18 at the time of their offense. The Court, in a 4-3, party-line decision written by Justice Welch, the Court held that the U.S. Supreme Court's logic in *Miller* about why children are different from adults for purposes of sentencing also applied to 18-year-olds and concluded that mandatory life sentences for 18-year-olds constitute "cruel or unusual punishment" in violation of the Michigan Constitution.²⁴ The Court explained that a judge can still sentence an 18-year-old to life without parole for first-degree murder, but that 18-year-olds must be given the same individualized sentencing procedure as afforded to "neurologically identical" juvenile offenders.²⁵

In [People v. Stovall](#), the Court weighed the constitutionality of a sentence of life *with* the possibility of parole for a defendant who committed second-degree murder while a juvenile.²⁶ The Court, in a 4-3, party-line decision written by Chief Justice McCormack, acknowledged that *Miller* and *Montgomery* allow for parolable life sentences for juvenile offenders as a matter of federal Eighth Amendment law but held that the Michigan Constitution's ban on cruel or unusual punishment prohibits such a sentence.²⁷ In reaching this conclusion, the Court relied upon its own precedent interpreting that state ban more broadly than its differently worded federal counterpart.²⁸ The Court also noted national trends in state courts towards extending *Miller* beyond the mandatory life without parole context.²⁹

Finally, in [People v. Boykin; People v. Tate](#), the Court considered the proper way to account for a juvenile offender's youth in the special sentencing process when the prosecution seeks a sentence to a term of years (rather than life with or without parole). The Court held in a 5-2 decision written by Justice Bernstein (with Justice Clement *mostly* joining the Democratic-nominated Justices) that although the U.S. Supreme Court's decision in *Miller* pertained only to defendants who are sentenced to life without parole, Michigan's jurisprudence requires sentencing courts to consider the mitigating factors of youth in *all* sentencing hearings conducted under the special provisions.³⁰

Preview of the 2022-2023 Term

The Michigan Supreme Court's 2022-2023 term is now underway, with consequential rulings already being made and other important matters looming. In early September, the Court resolved several high-profile cases concerning proposed amendments to the Michigan Constitution that will be placed on the November 8, 2022 general election ballot. There are also several pending requests before the Court related to ongoing lawsuits challenging Michigan's 1931 abortion ban. In addition, the Court has scheduled [11 cases for oral arguments in October](#) and has another [50 cases waiting to be scheduled](#), including a challenge to the University of Michigan's prohibition of firearms on its campus. Some of these are cases are detailed below.

Proposed amendments to the Michigan Constitution (already decided)

Although the Court has not yet begun hearing oral arguments for the new term, it has already decided three expedited lawsuits concerning proposed amendments to the Michigan Constitution that will appear on voters' ballots in November.

In [Reproductive Freedom For All v. Board of State Canvassers](#), the Court ordered an initiated proposal that would enshrine abortion access in the state constitution to be placed on the ballot after the Board of State Canvassers deadlocked 2-2 on whether to certify the measure. There was no dispute about whether the petition contained a sufficient number of signatures. Instead, opponents argued that the circulated petition did not include enough space between certain

words of the text of the proposed amendment. Because the Board's tie vote would have kept the proposal off the ballot,³¹ supporters of the proposal sought expedited review in the Michigan Supreme Court. The Court, in a 5-2 order (with Justices Zahra and Viviano dissenting), rejected the opponents' spacing argument, explaining that state law does not specify a certain amount of spacing in the text and that the petition complied with all existing requirements.³²

In [*Promote the Vote 2022 v. Board of State Canvassers*](#), the Court ordered an initiated proposal concerning voting rights to be placed on the ballot after the Board of State Canvassers again deadlocked on whether to certify the measure. Opponents alleged that the petition had not properly identified every existing state constitutional provision that would be "abrogated" by the proposal if approved. Supporters of the proposal sought expedited review in the Michigan Supreme Court,³³ and the Court, in another 5-2 order (with Justices Zahra and Viviano dissenting), concluded that the "proposed amendments would not abrogate any of the constitutional provisions identified by the challenger."³⁴ Chief Justice McCormack and Justice Welch both wrote separately to question whether the Board even had the legal authority to consider the sort of abrogation claims the opponents had advanced—an issue that could come before the Court in the future.³⁵

Following the Court's decisions in *Reproductive Freedom For All* and *Promote the Vote 2022*, the Board of State Canvassers met and certified the proposed constitutional amendments for placement on the November 8, 2022 general election ballot.

In [*Anderson v. Board of State Canvassers*](#), the Court unanimously rejected a challenge to a proposal placed on the ballot by the Michigan Legislature to change the existing term limits and impose new financial disclosure requirements for state legislators.³⁶ Opponents of the measure argued that it should be removed from the ballot because it addresses multiple subjects, but the Court disagreed in a short, two-sentence order. Justice Viviano wrote separately to flag an issue for the Court—and practitioners—to consider in a future lawsuit: whether the Michigan Constitution limits initiated constitutional amendments to a single purpose. As a result of the decision, the proposal will remain on the November 8, 2022 general election ballot.

Abortion access

During the 2022-2023 term, the Michigan Supreme Court may also weigh in on abortion access more directly than it did in *Reproductive Freedom For All* as multiple lawsuits challenging the State's 1931 abortion ban are working their way through the state court system.

The Supreme Court already has pending a request from Governor Whitmer to authorize a county circuit court to certify to the Supreme Court the questions of whether the abortion ban violates the Due Process and Equal Protection Clauses of the Michigan Constitution, and whether the Michigan Constitution guarantees the right to abortion.³⁷

The Supreme Court also has received multiple filings in connection with a challenge to the ban brought in the State Court of Claims. In May 2022, the Court of Claims issued a preliminary injunction that temporarily blocked the Michigan Attorney General and “all ... local officials acting under the [Attorney General’s] supervision” from enforcing the ban. On appeal, the Court of Appeals ruled that the Court of Claims’ decision did not apply to county prosecutors. The plaintiffs who challenged the ban in the Court of Claims, including Planned Parenthood of Michigan, have asked the Supreme Court to reverse the Court of Appeals’ decision.³⁸ The Supreme Court also has a pending request from the same matter filed by the Michigan Catholic Conference, Right to Life Michigan, and two county prosecutors. Those parties seek to overturn a Court of Appeals order that declined to take control of the case from the Court of Claims judge.³⁹

Of course, these pending matters could all become moot if Michigan voters approve the proposed constitutional amendment on the November ballot that would expressly enshrine a right to abortion access in the Michigan Constitution.

Guns on college campuses

Among the cases waiting for oral argument to be scheduled is [*Joshua Wade v. University of Michigan*](#), which involves a claim that the University of Michigan’s prohibition of firearms on its campus violates the state and federal constitutions.

The University of Michigan adopted a policy in 2001 that banned firearms on property owned, leased, or controlled by the University with limited exceptions for military and law enforcement agents. The plaintiff, who has a concealed weapons permit, filed a challenge to the ban in 2015 alleging that it violated his rights under the Second Amendment and Article I, Section 6 of the Michigan Constitution, which provides that “[e]very person has a right to keep and bear arms for the defense of himself and the state.”

The Court of Claims ruled in favor of the University in 2015, holding that the University, as a public educational institution, constitutes a “sensitive place” where firearms may be lawfully excluded, per the U.S. Supreme Court’s decision in *District of Columbia v. Heller* (2008).⁴⁰ The Court of Appeals affirmed the Court of Claims’ decision in 2017.⁴¹

The plaintiff filed an appeal of the Court of Appeals’ decision with the Michigan Supreme Court in 2017. After holding the case in abeyance pending resolution of a few related cases in the Michigan and U.S. Supreme Courts, the Michigan Supreme Court issued an order in November 2020 stating that it would hear the appeal.⁴² Although briefing was completed in the spring of 2021, the oral argument was twice pushed back by request of the parties during the 2021-2022 term.⁴³ The oral argument has not yet been rescheduled, but given that the Court tried to hold the argument twice last term, it seems likely that the Court will again seek to do this term.

¹ Perhaps the two highest profile examples of the Court using orders to resolve the merits of cases from the 2021-2022 term were *League of Women Voters of Michigan v. Independent Citizens Redistricting Commission*, 971 N.W.2d 595 (Mich. 2022) and *Detroit Caucus v. Independent Citizens Redistricting Commission*, 969 N.W.2d 331 (Mich. 2022) in which the Court rejected legal challenges to the newly redrawn state legislative and congressional districts. In *League of Women Voters*, the Court issued a one-sentence order that rejected claims by a group of voter advocacy organizations that the state legislative maps disproportionately favored the Republican Party in violation of the Michigan Constitution; this was a 5-2 decision with two Democratic Party-nominated Justices (Welch and Bernstein) in the dissent. And in *Detroit Caucus*, the Court issued an order that rejected claims by a group of Black members of the Michigan Legislature that the state legislative and congressional maps violated the Voting Rights Act; this was a 4-3 decision with two Republican Party-nominated Justices (Zahra and Viviano) and one Democratic Party-nominated Justice (Bernstein) in the dissent.

² *League of Women Voters v. Secretary of State*, 508 Mich. 520, 975 N.W.2d 840 (2022).

³ *Id.* at 536-544.

⁴ *Id.* at 540-542.

⁵ *Id.* at 543.

⁶ *Id.* at 544-552.

⁷ *Id.* at 553-555.

⁸ *Id.* at 562-564.

⁹ *Id.* at 555-560.

¹⁰ *Bauserman v. Unemployment Insurance Agency*, __ Mich. __, __ N.W.2d __, 2022 WL 2965921 (2022).

¹¹ *Id.*, 2022 WL 2965921 at *8.

¹² *Id.* at *21 (Viviano, J. dissenting)

¹³ *Id.* at *9 citing *Godfrey v. Iowa*, 898 N.W.2d 844, 856-857 (Iowa 2017).

¹⁴ *Rouch World, LLC. Department of Civil Rights*, __ Mich. __, __ N.W.2d __, 2022 WL 3007805 (2022).

¹⁵ *Id.*, 2022 WL 3007805 at *6.

¹⁶ Mich. Comp. Laws § 37.2302(a).

¹⁷ *Bostock v. Clayton Co.*, 140 S.Ct. 1731 (2020).

¹⁸ *Rouch World*, 2022 WL 3007805 at *11-12.

¹⁹ *Id.* at *20-28 (Zahra, J. dissenting), *29 (Viviano, J. dissenting).

²⁰ *Id.* at *6 n 5.

²¹ *Miller v. Alabama*, 567 U.S. 460 (2012).

²² *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

²³ *People v. Taylor*, __ Mich. __, __ N.W.2d __, 2022 WL 3008301 at *11-12 (2022).

²⁴ *People v. Parks*, __ Mich. __, __ N.W.2d __, 2022 WL 3008548 (2022).

²⁵ *Id.*, 2022 WL 3008548 at *19.

²⁶ *People v. Stovall*, __ Mich. __, __ N.W.2d __, 2022 WL 3007491 (2022).

²⁷ *Id.*, 2022 WL 3007491 at *10.

²⁸ *Id.* at *7.

²⁹ *Id.* at *9-10.

³⁰ *People v. Boykin; People v. Tate*, __ Mich. __, __ N.W.2d __, 2022 WL 3007485 *7-10 (2022).

³¹ See Beth LeBlanc, "Word spacing issue keeps abortion rights amendment from ballot; court fight expected," *The Detroit News*, Aug. 31, 2022, available at

<https://www.detroitnews.com/story/news/local/michigan/2022/08/31/voting-rights-ballot-proposal-headed-court-after-canvassers-deadlock-michigan-abortion-rights/7948041001/>.

³² *Reproductive Freedom for All v. Board of State Canvassers*, __ N.W.2d __, 2022 WL 4117489 (2022).

³³ See Clara Hendrickson, "Michigan elections panel declines to send voting rights proposal to ballot," Detroit Free Press, Aug. 31, 2022, available at

<https://www.freep.com/story/news/politics/2022/08/31/michigan-elections-panel-voting-rights-proposal/65462378007/?gnt-cfr=1>.

³⁴ *Promote the Vote 2022 v. Board of State Canvassers*, __ N.W.2d __, 2022 WL 4110880 (2022).

³⁵ *Id.*, 2022 WL 4110880 at *1 n 1 (McCormack, CJ, concurring), at *3 n 4 (Welch, J., concurring).

³⁶ *Anderson v. Board of State Canvassers*, __ N.W.2d __, 2022 WL 4098544 (2022).

³⁷ *In re Executive Message (Governor v. Prosecuting Attorneys)* (Mich. Supreme Court Docket No. 164256).

³⁸ *In re Jarzynka (Planned Parenthood v. Attorney General)* (Mich. Supreme Court Docket No. 164656).

³⁹ *In re Jarzynka (Planned Parenthood v. Attorney General)* (Mich. Supreme Court Docket No. 164753).

⁴⁰ *Wade v. University of Michigan*, No. 15000129, 2015 WL 10845344 (Mich.Ct.Cl. Nov. 13, 2015).

⁴¹ *Wade v. University of Michigan*, 320 Mich. App. 1, 905 N.W.2d 439 (2017).

⁴² *Wade v. University of Michigan*, 506 Mich. 951, 950 N.W.2d 55 (2020).

⁴³ See Aug. 23, 2021 and Dec. 28, 2021 Orders, *Wade v. University of Michigan*, Mich. Sup. Ct. Case No. 156150, available at <https://www.courts.michigan.gov/c/courts/coa/case/330555>.

