

**STATE OF MICHIGAN
IN THE SUPREME COURT**

WARREN CITY COUNCIL,

Supreme Court No. 165604

Plaintiff-Appellee,
and

COA No. 365488

RONALD J. PAPANDREA,

LC No. 23-000611-AW
(Macomb County Circuit Court)

Plaintiff,

v

SONJA BUFFA, in her official capacity as
CITY OF WARREN ELECTION
COMMISSIONER, WARREN CITY CLERK,
CITY OF WARREN ELECTION
COMMISSION, and ANTHONY FORLINI, in
his official capacity as MACOMB COUNTY
CLERK,

Defendants-Appellants.

**PLAINTIFF-APPELLEE WARREN CITY COUNCIL'S ANSWER BRIEF
OPPOSING LEAVE TO APPEAL TO MICHIGAN SUPREME COURT**

APPELLEE'S APPENDIX

WORD COUNT CERTIFICATE

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

PLUNKETT COONEY

By: MARY MASSARON (P43885)
JEFFREY M. SCHRODER (P63172)
Attorneys for Appellee
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com
jschroder@plunkettcooney.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	I
INDEX OF AUTHORITIES.....	III
COUNTER-STATEMENT IDENTIFYING JUDGMENT OR ORDER APPEALED FROM	V
COUNTER-STATEMENT OF THE QUESTIONS PRESENTED.....	VI
INTRODUCTION	1
STATEMENT OF FACTS.....	7
A. THE CITY OF WARREN’S CURRENT CHARTER PROVISIONS ESTABLISH TERM LIMITS AND ELIGIBILITY FOR OFFICE THAT APPLY TO AND LIMIT PERSONS HOLDING ALL OFFICES TO THE GREATER OF THREE TERMS OR 12 YEARS.....	7
B. THE WARREN CITY COUNCIL ADOPTED BALLOT PROPOSAL LANGUAGE TO EXPLAIN THE CHANGES TO THE VOTERS IN THAT SAME RESOLUTION.....	9
C. LITIGATION WAS NEEDED TO PLACE THE BALLOT PROPOSAL ON THE BALLOT	11
D. THE CITY OF WARREN VOTERS APPROVED THE BALLOT PROPOSAL ADOPTING THE AMENDMENT TO THE WARREN CITY CHARTER.....	12
E. AFTER THE CHARTER AMENDMENT WAS ADOPTED AND TOOK EFFECT, WARREN CITY ATTORNEY AND OTHERS ARGUED THAT IT SHOULD ONLY COUNT TERMS SERVED AFTER THE AMENDMENT BECAME EFFECTIVE AND THE CITY ELECTION COMMISSION IN IRREGULAR PROCEEDINGS CERTIFIED FOUTS’ CANDIDACY FOR MAYOR.....	12
F. THE WARREN CITY COUNCIL SUED TO VINDICATE THE VOTERS’ WILL AS EMBODIED IN THE 2020 CHARTER AMENDMENT THEY OVERWHELMINGLY VOTED TO ADOPT, LIMITING THE TERMS OF THE CITY’S MAYORS TO THE SAME TIME LIMITS THAT APPLY TO THE CITY COUNCIL AND OTHER CITY OFFICERS.....	14
G. THE CIRCUIT COURT DENIED THE WARREN CITY COUNCIL’S REQUEST FOR MANDAMUS AND GRANTED THE DEFENDANTS’ MOTION FOR SUMMARY DISPOSITION.....	16
H. THE COURT OF APPEALS ISSUED A PUBLISHED OPINION REVERSING THE CIRCUIT COURT AND DECLARING THAT THE INCUMBENT MAYOR WAS INELIGIBLE TO SEEK A FIFTH TERM AS MAYOR OF THE CITY BASED ON THE UNAMBIGUOUS LANGUAGE IN THE CHARTER.....	17
STANDARD OF REVIEW.....	21
ARGUMENT	23

THE TRIAL COURT REVERSIBLY ERRED IN HOLDING THAT THE LANGUAGE IN WARREN’S CHARTER §§ 4.3(D) AND 4.4 (D) LIMITING MAYORAL TERMS TO THE GREATER OF THREE

COMPLETE TERMS OR 12 YEARS STILL ALLOWS THE INCUMBENT MAYOR TO SEEK A FIFTH TERM IN OFFICE AS WARREN’S MAYOR EVEN THOUGH HE HAS ALREADY SERVED FOUR TERMS AND FOR ALMOST SIXTEEN YEARS, WELL OVER THE LIMIT 23

A. THE PLAIN LANGUAGE OF THE 2020 CHARTER AMENDMENT BARS MAYOR FOUTS FROM SEEKING A FIFTH TERM BECAUSE HE HAS BEEN IN OFFICE MORE THAN THREE FULL TERMS AND HAS ALREADY SERVED ALMOST SIXTEEN YEARS 24

1. *A charter provision is interpreted by looking to its plain language unless it is ambiguous.....*24

2. *The City of Warren charter amendments adopted for §§ 4.3 and 4.4 of the charter are not ambiguous and bar a person from eligibility for the office of mayor if he or she has served more than the greater of three full terms or twelve years.....*25

a. *The plain language provides for an absolute bar for a person to be eligible to run or to hold office for more than three terms or twelve years.....*25

b. *The ballot language supports the Warren City Council’s interpretation* 27

B. THE HISTORY OF AMENDMENTS TO TERM LIMITS SUPPORTS THE WARREN CITY COUNCIL’S INTERPRETATION OF THE 2020 CHARTER AMENDMENT..... 28

C. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT THE AMENDMENT WAS “NOT CLEAR” AND THEN DISMISSED THE WARREN CITY COUNCIL’S LAWSUIT..... 30

RELIEF..... 34

WORD COUNT CERTIFICATE 1

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE..... 1

INDEX OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Allison v AEW Capital Mgt, LLP,</i> 481 Mich 419; 751 NW2d 8 (2008)	21, 22
<i>Arabo v Michigan Gaming Control Bd,</i> 310 Mich App 370; 872 NW2d 223 (2015).....	21
<i>Barrow v City of Detroit Election Commission,</i> 301 Mich App 404; 836 NW2d 498 (2013).....	4, 22, 24
<i>Barrow v Detroit Election Commission, (Barrow II),</i> 305 Mich App 649; 854 NW2d 489 (2014).....	33
<i>Berdy v Buffa,</i> 504 Mich 876; 928 NW2d 204 (2019).....	9, 17, 27, 29, 32
<i>Berry v Garrett,</i> 316 Mich App 37; 890 NW2d 882 (2016)	32
<i>Bonner v City of Brighton,</i> 495 Mich 209; 848 NW2d 380 (2014).....	21
<i>City of Lansing v Lansing Township,</i> 335 Mich 641; 97 NW2d 804 (1959)	4
<i>Clearwater Township v Board of Supervisors of Kalkaska County,</i> 187 Mich 516; 153 NW 824 (1915)	31
<i>Corley v Detroit Bd of Ed,</i> 470 Mich 274; 681 NW2d 342 (2004).....	21
<i>Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan,</i> 507 Mich 498; 968 NW2d 482 (2021).....	21
<i>Felix v Milliken,</i> 463 F Supp 1360 (ED Mich 1978)	31
<i>Hackel v Macomb County Commission,</i> 298 Mich App 311; 826 NW2d 753 (2012).....	22
<i>Hughes v Judges' Retirement Board,</i> 407 Mich 75; 282 NW2d 160 (1979)	30
<i>LaFontaine Saline, Inc v Chrysler Group, LLC,</i> 496 Mich 26; 852 NW2d 78 (2014)	19
<i>League of Women Voters of Michigan v Secretary of State,</i> 506 Mich 561; 957 NW2d 731 (2020).....	15
<i>Maiden v Rozwood,</i> 461 Mich 109; 597 NW2d 817 (1999).....	22

Michigan Alliance for Retired Americans v Secretary of State,
334 Mich App 238; 964 NW2d 816 (2020)..... 15

Ronald Papandrea v Warren City Election Commission,
Macomb County Circuit Court Case No 2023-000493-AW) 14

Save Our Downtown v City of Traverse City,
___ Mich App ___, ___ NW2d ___, published opinion of Michigan Court of Appeals Docket No
359536, issued October 13, 2022 25

Smith v Globe Life Ins Co,
460 Mich 446; 597 NW2d 28 (1999) 21

Tuscola Cnty Abstract Co, Inc v Tuscola Cnty Register of Deeds,
206 Mich App 508; 522 NW2d 686 (1994)..... 22

Vill of Dimondale v Grable,
240 Mich App 553; 618 NW2d 23, 30 (2000)..... 22

Warren City Council v Buffa,
333 Mich App 422; 960 NW2d 166 (2020).....4, 11

Warren City Council v Buffa,
506 Mich 889; 947 NW2d 689 (2020)..... 11

Welch Foods, Inc. v Attorney Gen.,
213 Mich App 459; 540 NW2d 693 (1995)..... 25

STATUTES

MCL 117.21..... 2

MCL 117.21(3) 17

MCL 117.22..... 10

MCL 117.5(1)(d)..... 14

RULES

MCR 2.116(G)(4) 21

MCR 7.202(6)(a)(i)..... v

MCR 7.305(B) 1

CONSTITUTIONAL PROVISIONS

MI CONST Art 4, § 40..... 31

OTHER AUTHORITIES

55 CJS, Mandamus, § 74..... 32

COUNTER-STATEMENT IDENTIFYING JUDGMENT OR ORDER APPEALED FROM

Defendants-Appellants¹ Sonja Buffa and City of Warren Election Commission seek leave to appeal from the Court of Appeals published opinion, *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, APX 0302b-0314b). The Court of Appeals issued that opinion reversing the circuit court's March 23, 2023 Order Denying Plaintiff Warren City Council's Motion for Summary Disposition and request for a writ of mandamus and granting Defendants Sonja Buffa, in her official capacity as City of Warren Election Commissioner, Warren City Clerk, City of Warren Election Commission, and Anthony Forlini, in his official capacity as Macomb County Clerk's Motion for Summary Disposition. (APX 0283b-0293b). The March 23, 2023 Order was a final order under MCR 2.602(A)(3).

The Court of Appeals reversed the circuit court because the circuit court incorrectly interpreted Warren's charter to allow the incumbent mayor to run for reelection as mayor although he is almost done with his fourth complete term and has served almost sixteen years, far longer than is allowed under the term limits.

¹ Defendants-Appellants title their application for leave to this Court as coming from Defendants-Appellees. But in the caption and body of their brief, they correctly call themselves Defendants-Appellants since they are the party seeking review in this Court.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

IS LEAVE TO APPEAL PROPERLY DENIED BECAUSE THE COURT OF APPEALS CORRECTLY HELD IN A PUBLISHED OPINION THAT THE LANGUAGE IN WARREN'S CHARTER §§ 4.3(D) AND 4.4 (D) LIMITING MAYORAL TERMS TO NO MORE THAN THE GREATER OF THREE COMPLETE TERMS OR 12 YEARS DOES NOT ALLOW THE INCUMBENT MAYOR TO SEEK A FIFTH TERM IN OFFICE AS WARREN'S MAYOR AFTER HE HAS ALREADY SERVED FOUR TERMS AND FOR ALMOST SIXTEEN YEARS?

Plaintiff-Appellee Warren City Council answers "yes."

Defendants-Appellants Sonja Buffa, in her official capacity as City of Warren Election Commissioner, Warren City Clerk, City of Warren Election Commission, and Anthony Forlini, in his official capacity as Macomb County Clerk, answer "no."

The Macomb County Circuit would presumably answer "no."

The Court of Appeals would presumably answer "yes."

INTRODUCTION

Defendants-Appellants Sonja Buffa and the City of Warren Election Commission urge this Court to grant leave to appeal and to expedite consideration of their challenge to the Court of Appeals published opinion. When seeking emergency review by this Court, Defendants-Appellants offer only a brief discussion of MCR 7.305(B)'s grounds for review. Defendants-Appellants seek review mainly because they disagree with the Court of Appeals decision. They also contend that the issue is of substantial public interest and importance. (Defendants-Appellants Sonja Buffa and City of Warren Election Commission's Application for Leave to Appeal, pp v, 1-2).

The Court of Appeals correctly held that the term limits in the Warren City Charter §§ 4.3(d) and 4.4(d) bar a candidate from office after he has served more than the greater of three complete terms or twelve years. Since Mayor Fouts has concededly served three complete terms and more than twelve years, he is ineligible to be a candidate for or hold office as mayor in Warren.

Defendants-Appellants are wrong to argue that the electors did not understand what they were voting for when they adopted the term limits. The charter language itself is clear and applies to all future candidacies and to all future terms of office for officials in the City of Warren. The explanatory language in the ballot explicitly told the voters that adoption of the term limits would mean that the mayor would be limited to no more than the greater of three complete terms or twelve years just like other Warren elected officials. The Court of Appeals correctly so held in a published opinion, which provides authoritative guidance. So further review is not needed and would be a waste of this Court's and the

parties' time and resources. It should also be noted that taxpayers are funding all parties to this lawsuit except for in pro per Plaintiff Papandrea.

Defendants-Appellants argue that decision thwarts the rights of the voters. But if the will of the people means anything, the ballot proposal passed by an overwhelming vote of the citizens of Warren in November 2020 to amend the charter, mandates that the mayor may not run for a fifth term. The ballot proposal was started by vote of the City Council (the peoples' representatives), to prohibit all elected officials (mayor included) from serving more than three terms (including any prior terms in office). The language (explanation and ballot question) was approved by the Attorney General and by the Governor, all under the laws of Michigan as an accurate reflection of the import of the actual amended charter language. *See* MCL 117.21 (requiring charter amendments to be submitted to the electors in language that consists of a "true and impartial statement of the purpose of the amendment...").

The mayor opposed the ballot proposal because it would mean he could not run for a fifth term – an obvious point not lost on him. He vetoed the ballot proposal when the Council proposed it. And his veto was overturned by Council by a unanimous vote of 7-0. The mayor, the City Council, the Attorney General, the Governor, the press, and the public understood that voting for the proposal meant that persons were not eligible to run for the office of mayor if they had served the greater of three complete terms or 12 years. Anyone who read the following language, which was on the ballot, understood that if the proposal passed, no one, including Mayor Fouts, could run for mayor or serve after having served the greater of three complete terms or 12 years:

CITY CHARTER AMENDMENT

A PROPOSAL TO REQUIRE THE OFFICE OF MAYOR TO HAVE THE SAME TERM LIMITS AS THE OTHER CITY ELECTED OFFICES.

————The proposed amendment...term limit of 3 terms or 12 years.....any terms or years served prior to this amendment are included....

PROPOSAL: Should the office of mayor have the same terms limits as the other city elected offices, which is the greater of three (3) complete terms or twelve(12) years?

(Plaintiff Warren City Council’s Motion for Summary Disposition, Exhibits 8, 9, and 10, APX 0091b-0096b, 0097b-0098b, 0099b-0100b). So to anyone who could read plain English, the ballot proposal means that no person is eligible to run for mayor if he has already served three complete terms or twelve years. The mayor already served 4 four-year terms and his YEARS SERVED PRIOR TO THIS AMENDMENT ARE INCLUDED, so he is not eligible to run again. In other words, under the amendment to the charter, the mayor would have the “same term limits as other city elected offices,” which means that he is limited to the greater of three complete terms or twelve years.

This is the plain meaning of the ballot proposal and the will of the people (which all observers understood). (Plaintiff Warren City Council’s Motion for Summary Disposition, Exhibits 14, 16, APX 0110b-0125b and APX 0129b-0157b). After the ballot proposal passed and the charter was amended, the mayor could not run for a fifth term.

Indeed, the Warren City Clerk refused to certify the language to be placed on the ballot. In doing so, the Clerk did not argue that the charter language was ambiguous or that the explanation and ballot proposal did not fairly and accurately reflect its legal effect. Instead, the Clerk claimed that the Governor’s approval came too late. But the Court of Appeals rejected her argument and stated what was clear then and now – that the ballot

proposal would mean that those serving as mayor could no longer serve for five terms; they are limited to three:

At issue in this matter is a ballot proposal that, if approved by the voters at the upcoming November 3, 2020 election, would amend the Warren City Charter and REDUCE THE MAYOR'S TERM LIMIT FROM FIVE TERMS TO THREE.....

Warren City Council v Buffa, 333 Mich App 422, 426; 960 NW2d 166 (2020), *leave denied* 506 Mich 889; 947 NW2d 689 (2020) (emphasis added). There is no ambiguity or wiggle room. *Barrow v City of Detroit Election Commission*, 301 Mich App 404, 417; 836 NW2d 498 (2013) (“there is no ‘wiggle room’ when applying a clear and definite time period to an undisputed set of facts.”). The ballot proposal and explanation admit only one obvious interpretation – neither the mayor nor any other elected official who already served three terms in an office may run for that same office again. The prohibition is clear beyond peradventure.

The City Council proposed an amendment to the City Charter, which was placed on the ballot and approved by the voters. The amended charter language, consistent with the ballot proposal, makes it abundantly clear that no elected official may serve more than three terms. And Michigan law is just as clear – if the language is clear and unambiguous, the plain meaning of the ordinance (as with statutes) reflects the legislative intent and judicial construction is not permitted. *City of Lansing v Lansing Township*, 335 Mich 641, 648-649; 97 NW2d 804 (1959).

To argue as Defendants-Appellants now do (in supporting Mayor Fouts' effort to run again), that the clear language of the ordinance does not preclude a run for a fifth term, turns the entire voting procedure and common sense on its head. Despite the explanatory language of the ballot proposal (“any terms or years served prior to this amendment are

included”), Defendants-Appellants misleadingly tell this Court that no “clear statement” alerted “voters that the amendment would apply retroactively.” (Defendants-Appellants Sonja Buffa and City of Warren Election Commission’s Application for Leave to Appeal, p v). Not so. The council that voted to put the amendment to the voters explicitly told them that adoption of the proposal meant that candidates for mayor would be limited to three complete terms or 12 years, including terms already served.

This is true based on the language of the charter amendment, which does not restrict the calculation only to terms after the change. The ballot explanation and proposal made it clear to the voters that this was the meaning of the amendment and would be the result if approved by the voters. In other words, the amendment means that all elected officials who have already served in an office may not serve more than the greater of three terms or 12 years, including terms already served.

This is the stated reason for submitting the proposal to the voters and the explanation given to the voters. The voters overwhelmingly voted to so limit the terms in office. The mayor may not use pure sophistry to create any ambiguity where there is none.

Contrary to the mayor’s contrived argument, this is not a retroactive taking of rights, but a prospective amendment. The explanation for the charter proposal stated that any elected official is limited to three terms, and if that elected official has already served complete terms in the office, those terms count toward the three-term limit for running for that office once again. The language speaks to future conduct and future elections; it does not take away any rights, much less vested rights.

The trial court sadly misconstrued and misunderstood what was clear to the Council, the voters, the current mayor who opposed its adoption, and to the Court of

Appeals, which had read the Attorney General and Governor approved language to mean that the amendment would bar the mayor from running for a fifth term. As a result, the Court of Appeals reversed the circuit court, entered the requested declaratory relief, and granted a writ of mandamus to carry out the voters' will.

In its published opinion, the Court of Appeals (Cavanagh, Gleicher, O'Brien) held that "the one reasonable interpretation of the charter language is that once a person has served three terms or 12 years in that office," they are no longer eligible for office. *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023)(Opinion, p 7, APX 0308b). The Court of Appeals pointed out that "[u]nlike the 1988 amendment, which limited the number of prior terms to those after 1995, the 2020 amendment does not contain such limiting language." *Id.* Therefore, the Court of Appeals concluded, "all prior terms are to be counted." (*Id.*). The Court of Appeals rejected Defendants-Appellants argument that the charter language was just as susceptible to the meaning that prior terms are not to be included. (*Id.*). In the Court's view, "the fundamental tenet of term limits is that prior terms and considered and future terms are limited based on those prior terms." (*Id.*). The Court of Appeals also rejected Defendants-Appellants argument because "if the amendment does not apply to Mayor Fouts now, it would mean that he could be permitted to serve another three terms, for a total of seven terms." (*Id.* at p 8, APX 0309b). But that "result is not in harmony with the plain language of the charter, nor is it even consistent with the 2016 version of the charter that limited the mayor to five terms." (*Id.*). The Court of Appeals also rejected Defendants-Appellants' other arguments, providing a reasoned explanation as to why each are wrong.

Given this well-reasoned published opinion, further review is unnecessary and leave should be denied.

STATEMENT OF FACTS

A. THE CITY OF WARREN'S CURRENT CHARTER PROVISIONS ESTABLISH TERM LIMITS AND ELIGIBILITY FOR OFFICE THAT APPLY TO AND LIMIT PERSONS HOLDING ALL OFFICES TO THE GREATER OF THREE TERMS OR 12 YEARS

Warren's current charter contains two provisions, the interpretation of which are at issue in this lawsuit. These provisions were enacted as a result of voter approval of a ballot initiative during the general election in November 2020 by 67.8%. (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 10, APX 0038b-0059b).

Section 4.3 makes persons running for mayor, city council, city clerk, or city treasurer ineligible if they have served more than the greater of three complete terms or 12 years:

Sec. 4.3 - Certain persons ineligible for city office.

(d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

(Verified Complaint for a Writ of Mandamus and Declaratory Relief, Exhibit E, APX 0024b). Section 4.4 establishes the term limits for each office:

Sec. 4.4 - Terms of office.

(d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

(*Id.*, Exhibit F, APX 0026b).

The current charter provisions were enacted to change the mayor's term to the same term limits as other city elected officials. In 2020, the Warren City Council adopted a resolution to support a system of checks and balances in Warren's government by "having equal term limits for all elected city offices." (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 8 – June 30, 2020 Resolution, , APX 0091b-0096b). It did so because at that time, the mayor's term limits had been extended to five terms or 20 years, which was much longer than the terms of city council members. (*Id.*, APX 0091b-0096b). The Resolution adopted by the City Council reviewed that history to explain why the City Council was proposing this ballot initiative:

In November 1998, the electors in the City of Warren voted to establish terms limits on the office of mayor, city council, city clerk and city treasurer to three terms or 12 years.

Subsequently, in 2010, the voters approved a ballot proposal to change the size and composition of City Council from nine at-large members to two at-large members and five district members.

A City Attorney opinion on December 26, 2014 concluded that the Warren City Council is a bicameral legislature and that the term limits provisions of the charter apply separately to the councilpersons elected at-large and those elected in districts.

The City Attorney further concluded that councilpersons could serve up to 12 years as an at-large member and 12 years in a district for a total of 24 years on council.

In the 2015 municipal elections for the City of Warren, the City Clerk permitted candidates on the ballot for City Council that exceeded 12 years in that particular office in conformance with the City Attorney's December 26, 2014 opinion; the City Clerk's decision was upheld by the Macomb County Circuit Court after a challenge.

In the 2019 municipal elections for the City of Warren, a newly appointed City Clerk again permitted candidates on the ballot for City Council that exceeded 12 years in that particular office in conformance with the City Attorney's December 26, 2014 opinion; however the City Clerk's decision

was overturned by the Michigan Supreme Court in the case of *Connor Berdy v. Sonja Buffa*, Supreme Court Case No. 159725.

(*Id.*, APX 0092b-0093b).

The Resolution contained the specific charter language in effect in 2020 before the ballot proposal was adopted. It also contained the proposed language that would become part of the charter if the voters approved it during the election:

THEREFORE, IT IS RESOLVED, that it is hereby proposed, pursuant to the provision of Act No. 279 of the Public Acts of Michigan, 1909, as amended that Sections 4.3(d) and 4.4 (d) of the Charter of the City of Warren which currently read:

Sec. 4.3 - Certain persons ineligible for city office.

(d) A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

Sec. 4.4 -Terms of office.

(d) A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

(*Id.*, APX 0094b).

B. THE WARREN CITY COUNCIL ADOPTED BALLOT PROPOSAL LANGUAGE TO EXPLAIN THE CHANGES TO THE VOTERS IN THAT SAME RESOLUTION

In agreement with Michigan law, the Warren City Council prepared as part of its resolution, a ballot proposal to place the question on the ballot so that voters could consider the proposal. The Warren City Council approved the following language to seek voter approval of the change in charter language:

CITY CHARTER AMENDMENT

A PROPOSAL TO REQUIRE THE OFFICE OF MAYOR TO HAVE THE SAME TERM LIMITS AS THE OTHER CITY ELECTED OFFICES

The proposed amendment would require all city elected offices to have the same term limits of three (3) terms or twelve (12) years. Currently the office of mayor has a limit of five (5) terms or twenty (20) years and the offices of city council, clerk, and treasurer have a limit of (3) three terms or twelve (12) years. Any terms or years served prior to this amendment are included.

PROPOSAL: Should the office of mayor have the same term limits as the other city elected offices, which is the greater of three (3) complete terms or twelve (12) years?

YES _____

NO _____

(*Id.*, APX 0095b). The language was approved by the Attorney General after being submitted to the Governor as required under the Home Rule City Act, MCL 117.22. (Plaintiff Warren City Council’s Motion for Summary Disposition, Exhibit 15 – Letter from George M. Elworth, Assistant Attorney General, State Operations Division, APX 0126b-0128b).

The explanatory language on the ballot proposal told the voters that “[a]ny terms or years served prior to this amendment are included.” (Plaintiff Warren City Council’s Motion for Summary Disposition, Exhibit 9 – 2020 Ballot Proposal, APX 0097b-0098b). This is because the language to be included in the amended charter specified that persons running for the office of mayor (and other positions) would not be eligible to run for these offices for “more than the greater of three (3) complete terms or twelve (12) years in that office.” In other words, for all future elections, anyone who had served more than the greater of three complete terms or twelve years in office would be ineligible.

C. LITIGATION WAS NEEDED TO PLACE THE BALLOT PROPOSAL ON THE BALLOT

Litigation was required, though, to ensure that the ballot proposal was placed on the ballot. City Clerk Sonja Buffa refused to place the mayoral term limit question on the ballot based on when the Governor issued an approval. Buffa argued that “the Governor’s approval was required by 4:00 p.m. on August 11, 2020, and because that approval did not come until after that date, the requirement that the ballot language be certified to Buffa by 4:00 p.m. on August 11, 2020 was not satisfied.” *Warren City Council v Buffa*, 333 Mich App 422, 428; 960 NW2d 166 (2020). The circuit court agreed with her refusal to certify the proposal and refused to issue a writ of mandamus. *Id.*

But the Court of Appeals issued a published opinion issuing a writ of mandamus “compelling Buffa to certify the ballot language to the Macomb County Clerk” and giving its opinion immediate effect. *Warren City Council v Buffa*, 333 Mich App 422, 436–37; 960 NW2d 166 (2020).

The very next day, this Court denied Buffa’s application for leave to appeal. *Warren City Council v Buffa*, 506 Mich 889; 947 NW2d 689 (2020). In its opinion, the Court of Appeals recognized that the issue was a “ballot proposal that, if approved by the voters at the upcoming November 20, 2020 election, would amend the Warren City Charter and reduce the mayor’s term limit from five terms to three.” *Buffa*, 333 Mich App at 426. The Court of Appeals observed that “Mayor James R. Fouts vetoed the resolution.” *Id.* The Court of Appeals also pointed out that the Warren City Council had voted to override the veto by a 7-0 vote. *Id.*

D. THE CITY OF WARREN VOTERS APPROVED THE BALLOT PROPOSAL ADOPTING THE AMENDMENT TO THE WARREN CITY CHARTER

Voters overwhelmingly approved the ballot proposal despite massive campaigning from Mayor Fouts to defeat it. (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 17, APX 0158b-0161b). Mayor Fouts' Facebook page made clear that he interpreted the charter amendment to mean he could not run again for mayor. (*Id.*). The 2020 Charter amendment to make the mayor's term the same as that for other city offices was approved by 67.8% of the vote (41,319 votes) in the historically high-turnout November 8, 2020 general election. (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 10 – 2020 Proposal Election Result, APX 0099b-0100b). Mayor Fouts campaigned against the proposal, urging voters not to adopt the reduced term limits. (*Id.*, Exhibit 16 – News Articles, APX 0129b-0157b). But he lost.

E. AFTER THE CHARTER AMENDMENT WAS ADOPTED AND TOOK EFFECT, WARREN CITY ATTORNEY AND OTHERS ARGUED THAT IT SHOULD ONLY COUNT TERMS SERVED AFTER THE AMENDMENT BECAME EFFECTIVE AND THE CITY ELECTION COMMISSION IN IRREGULAR PROCEEDINGS CERTIFIED FOUTS' CANDIDACY FOR MAYOR

Despite the change to the charter, the clear explanation on the ballot and the massive publicity about its effect being to prevent Mayor Fouts from running again, the City Clerk Attorney, Ethan Vinson, offered an opinion that the 2020 charter amendment “does not prohibit James Fouts from appearing on the ballot in search of a fifth term for office.” (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 12 – City Attorney's Letter to City Clerk, APX 0104b-0107b). The City Attorney asserted that “[i]t is not clear that the term limit proposal may be applied to James Fouts.” (*Id.* at p 1, APX 0105b). The City Attorney argued that the “language is not a specific indication of retroactive effect.” (*Id.* at p 2, APX 0106b). The City Attorney argued that the charter did

not specify what terms or years served were included when counting the terms or years for eligibility. He contended that the voters might not have understood that a “yes” vote would bar Mayor Fouts from serving beyond 12 years or seeking a fifth term. (*Id.* at p 3, APX 0107b). He argued that the ballot proposal should have read:

“Should Mayor Fouts and all future Mayors be limited to three (3) terms in office?” or “should Warren adopt a policy that applies to the future as well as the past, holding all elected officials of city government have the same term limits of three (3) complete terms of twelve (12) years – whichever is greater?”

(*Id.*).

Meanwhile, in an unprecedented move based on the City Attorney’s October 14, 2022 opinion, the Election Commission voted to pre certify Mayor Fouts’ 2023 candidacy at its November 8, 2022 meeting. (Plaintiff Warren City Council’s Motion for Summary Disposition, Exhibit 11 – Commission Meeting Minutes, p 1, APX 0102b; *Id.*, Exhibit 12 – October 14, 2022 City Attorney Opinion, APX 0104b-0107b). The public notice stated that the meeting was “for the General Election,” but nothing in it revealed that, contrary to past practices, election issues such as certification of a candidate would be decided. (*Id.*, Exhibit 13 – Notice, APX 0108b-0109b). At that point, Mayor Fouts had not even declared his candidacy under the City Charter. Mayor Fouts did not officially file for reelection until January 30, 2023, long after this Election Commission meeting. Neither the Warren City Council nor the general public were aware of the Election Commission precertification until February – when the City Council obtained the Election Commission minutes and the City Attorney opinion. (*Id.*, Exhibit 14 – February 20, 2023 WXYZ-TV Story, APX 0110b-0125b).

F. THE WARREN CITY COUNCIL SUED TO VINDICATE THE VOTERS' WILL AS EMBODIED IN THE 2020 CHARTER AMENDMENT THEY OVERWHELMINGLY VOTED TO ADOPT, LIMITING THE TERMS OF THE CITY'S MAYORS TO THE SAME TIME LIMITS THAT APPLY TO THE CITY COUNCIL AND OTHER CITY OFFICERS

The Warren City Council sued to vindicate the voters' will. (Verified Complaint for Writ of Mandamus and Declaratory Relief, APX 0001b-0010b). The Warren City Council alleged that sections 4.3 and 4.4 of the Warren City Charter had been amended to limit the terms of office for mayor (and other city offices), making candidates ineligible to serve for "more than the greater of three (3) complete terms or twelve (12) years in that particular office." (*Id.*, Exhibits E and F, APX 0023b-0024b and APX 0025b-0026b). The Warren City Council alleged that Mayor Fouts was "serving his fourth complete term of office and is in his sixteenth year of uninterrupted service in that position." (*Id.* ¶ 25, APX 0005b). The Warren City Council alleged that the mayor was in his fourth term, and had not been elected to a fifth term. (*Id.* ¶¶ 27-30, APX 0005b). Thus, although he was entitled to complete his fourth term based on MCL 117.5(1)(d), he was not eligible to run again. (*Id.*). The Warren City Council complained that Mayor Fouts had been pre certified in an unprecedented vote on November 8, 2022, a date when the Election Commission normally did not consider new business but only opened and closed the polls. (*Id.* ¶¶ 32-42, APX 0006b-0007b). The Warren City Council's complaint included two counts, the first seeking mandamus and the second seeking declaratory relief. (*Id.*).

A second lawsuit had previously been filed by Ronald J. Papandrea, purporting to want to run for mayor and seeking a declaration that Mayor Fouts could not run again. *Ronald Papandrea v Warren City Election Commission*, Macomb County Circuit Court Case No 2023-000493-AW. Papandrea's case was consolidated with this one for all purposes.

(Stipulated Order Consolidating Cases and Setting Briefing Schedule, APX 0294b-0295b). Then the parties cross-moved for summary disposition.

City Clerk Buffa and the Warren Election Commission at first attacked the Warren City Council's complaint based on its standing. (Defendants' Sonja Buffa and Warren Election Commission's Motion for Summary Disposition, APX 0185b-0187b). In response, the Warren City Council pointed out that the only other plaintiff, Mr. Papandrea, was a supporter of Mayor Fouts. (Plaintiff Warren City Council's Response to Defendants' Sonja Buffa and Warren Election Commission's Motion for Summary Disposition, APX 0219b; Exhibit 1 to Response, Papandrea Statement, APX 230b). Pappendrea had filed suit but he failed to move for summary disposition or file any brief with his show cause motion, suggesting that he did not intend to argue that the term limits barred Mayor Fouts from running again. (*Id.*) The Warren City Council pointed out that Mr. Papandrea said in a press release that "Mayor Fouts has announced he is a candidate for re-election but I fear that he will be removed from the ballot by court action regarding term limits." (*Id.*) The Warren City Council insisted that it had standing, relying on *Michigan Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 249-250; 964 NW2d 816 (2020) and *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561, 578-580; 957 NW2d 731 (2020). The Warren City Council argued that the charter amendment it had launched and that the voters had approved meant that Mayor Fouts was not eligible to run again. (Plaintiff Warren City Council's Motion for Summary Disposition, APX 0038b-0059b).

The circuit court heard oral argument. (Transcript, APX 0245b-0282b). The circuit court focused on the language in the ballot proposal, questioning why it said what it did. (*Id.* at pp 4-10, 27-34, APX 0248b-0254b, 0271b-0278b). But despite counsel for the

Warren City Council's effort to direct his attention to the charter language, the circuit court persisted in questioning whether the ballot proposal should have been worded differently. (*Id.*). Given that the language was approved by the Attorney General and Governor and had gone on the ballot, the Warren City Council's attorney urged the court to look at the charter language as amended, which called for term limits that would make Mayor Fouts ineligible. (*Id.* at pp 15-16, APX 0259b-0260b). He also pointed out that challenges to the ballot language (proposal or explanation) should have been made at the time of the election, not after the fact when the issue is interpretation of the charter amendment. (*Id.*). Eventually, the circuit court questioned whether the language in the charter amendment was prospective or not. (*Id.* at p 21, APX 0265b). The Warren City Council's attorney pointed out that no vested rights were involved in running for future office – and that the charter refers to antecedent events, but is prospective in that it governs future eligibility for office. (*Id.* at pp 21-23, APX 0265b-0267b).

G. THE CIRCUIT COURT DENIED THE WARREN CITY COUNCIL'S REQUEST FOR MANDAMUS AND GRANTED THE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

The circuit court issued an opinion and order ruling for City Clerk Buffa and the Warren City Election Commission. (March 23, 2023 Opinion and Order, APX 0283b-0293b). The circuit court agreed that the Warren City Council had standing to defend its work on the 2020 ballot proposal. (*Id.* at p 3, APX 0285b). But the circuit court held that the Warren City Council was not entitled to mandamus. (*Id.* at pp 4-10, APX 0286b-0292b). In support of this ruling, the circuit court reviewed past ballot proposal amendments that the voters approved. (*Id.* at pp 4-6, APX 0286b-0288b). Then, after observing that the voters overwhelmingly approved this ballot proposal, the circuit court pointed out that the

explanatory statement “any terms or years served prior to this amendment are included” was not included in the proposal section on the ballot or the amended charter language. (*Id.* at p 7, APX 0289b). He then said that this caused “confusion” about whether Fouts was eligible for a fifth term. (*Id.*). The circuit court also pointed to the Warren City Attorney’s opinion asserting that “unless there is a clear indication to the contrary, legislation is generally applied prospectively only.” (*Id.* at p 8, APX 0290b, quoting Warren City Attorney’s Opinion). Despite the plain language in the ballot explanation, and the language in the charter amendment that it made the mayor’s term the same as other offices (which included prior terms in the calculation as the Supreme Court ordered in *Berdy v Buffa*, 504 Mich 876; 928 NW2d 204 (2019)), the circuit court held that the lack of “specific language in the Charter indicating that prior years served are counted towards the amended term limits” meant that “it is unclear whether the term limit proposal may be applied to Fouts.” (*Id.* at p 9, APX 0291b). The circuit court then noted that if the ballot proposal also applied to the effect of prior terms, it would violate MCL 117.21(3) by including more than one subject. (*Id.* at p 10, APX 0292b). And the circuit court therefore held that “Plaintiff has failed to establish the existence of ‘a clear legal right,’ which is need for mandamus. (*Id.*). The circuit court failed to declare the meaning of the charter language but simply granted summary disposition and dismissed the Warren City Council’s suit. (*Id.* at pp 10-11, APX 0292b-0293b).

H. THE COURT OF APPEALS ISSUED A PUBLISHED OPINION REVERSING THE CIRCUIT COURT AND DECLARING THAT THE INCUMBENT MAYOR WAS INELIGIBLE TO SEEK A FIFTH TERM AS MAYOR OF THE CITY BASED ON THE UNAMBIGUOUS LANGUAGE IN THE CHARTER

The Warren City Council filed its claim of appeal on March 28, 2023, only five days

after the circuit court issued its opinion. After expedited proceedings, the Court of Appeals (Cavanagh, Gleicher, O'Brien) issued a published opinion holding that "the one reasonable interpretation of the charter language is that once a person has served three terms or 12 years in that office," they are no longer eligible for office. *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, p 7, APX 0308b). The Court of Appeals reasoned that term limits apply to all terms served in the past unless otherwise limited. (*Id.*) The Court "presume[d] that the Council and the citizens of Warren who voted to adopt the amendment in 2020 – limiting the mayor to three terms in line with other elected city officers – intended the results of the plain language of the amendment." (*Id.* at p 8, APX 0309b). The Court also rejected the argument that voters were confused about what they were voting for in 2020. In the Court's view, the voters could be presumed to have intended what the plain language provides:

We therefore presume that the Council and the citizens of Warren who voted to adopt the amendment in 2020—limiting the mayor to three terms, in line with other elected city officers—intended the results of the plain language of the amendment. Thus, going forward after the passage of the 2020 ballot proposal, a person shall not be eligible to hold the office of mayor, city council, city clerk, or city treasurer in Warren for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

(*Id.*) The Court of Appeals also rejected Defendants-Appellants argument because it would "mean that [Mayor Fouts] could be permitted to serve for another three terms, for a total of seven terms." (*Id.*) As the Court explained, "[t]hat result is not in harmony with the plain language of the charter, nor it is [sic] even consistent with the 2016 version of the charter that limited the mayor to five terms." (*Id.*)

The Court disagreed with Defendants-Appellants about the import of the ballot proposal language too. The Court observed that it knew of "no legal authority providing

that courts may discount ballot language that is not in the proposal question.” (*Id.* at p 9, APX 0310b). The Court of Appeals pointed out that the “circuit court’s interpretation essentially nullifies the ‘terms served prior’ language that *actually was on the ballot.*” (*Id.*). The Court rejected the argument that because that language was in the explanatory section, it should not be considered authority for interpreting the amendment. (*Id.*). The Court found that the ballot language supported the purpose of the amendment, which was to count any prior terms served in determining eligibility to hold office. (*Id.*). The Court also pointed out that the “ballot language was not challenged as unclear in 2020.” (*Id.* at p 10, APX 0311b). And a majority of voters passed it at that time. Thus, the Court held “that the charter language is clear and precluded Mayor Fouts from being eligible to run as mayor because he already has served three terms.” (*Id.*).

The Court of Appeals concluded that the charter amendments are not retroactive. (*Id.* at pp 10-11, APX 0311b-0312b). The Court pointed out that it “is undisputed that Mayor Fouts does not have a vested right to be elected as mayor in 2023.” (*Id.* at p 10). The Court disagreed with the circuit court’s assertion that counting the terms would amount to a new disability “both because there is no vested right to holding office, and because the consistent aim of the term limits in Warren is that all elected city officers be subject to the same term limits.” (*Id.*). The Court applied the factors for determining if a measure is retroactive that were set forth *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW2d 78 (2014). In the Court’s view, the City Council is seeking only prospective application of the amendment. (*Id.* at p 11, APX 0312b). That is because the Council did not seek to retroactively “disrupt Mayor Fouts’ fourth term in office after the 2019 election ... but seeks a declaration that Mayor Fouts is subject to the version of the charter in effect in

2023, on the basis of term limits amendment passed in 2020, for the election that will occur later this year.” (*Id.*).

The Court concluded that both declaratory relief and mandamus were in order to prevent Mayor Fouts from running as a candidate for mayor in the upcoming election. (*Id.* at pp 12-13, APX 0313b-0314b).

STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision on a motion for summary disposition. *Bonner v City of Brighton*, 495 Mich 209, 220; 848 NW2d 380 (2014).

Summary disposition is proper under MCR 2.116(C)(8) where “the opposing party has failed to state a claim upon which relief can be granted. A (C)(8) motion challenges the legal sufficiency of a claim based on the facts alleged. *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498, 487; 968 NW2d 482 (2021). In evaluating a (C)(8) motion, the Court must take the factual allegations as true and only consider the pleadings. *Id.* at 487–88. However, when the opposing party’s “claim is so clearly unenforceable that no factual development could possibly justify recovery,” summary disposition in favor of the moving party is warranted. *Arabo v Michigan Gaming Control Bd*, 310 Mich App 370, 488; 872 NW2d 223 (2015).

Under MCR 2.116(C)(10), summary disposition may be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. A (C)(10) motion tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Once the moving party satisfies the initial burden of supporting its claim, the burden shifts to the opposing party to go beyond the pleadings and establish a genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999); MCR 2.116(G)(4). A genuine issue of material fact only exists “if reasonable minds could differ” after viewing the issue in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10), “[a] court must consider the pleadings as well as affidavits, depositions,

admissions, and other documentary evidence in the light most favorable to the nonmoving party.” *Vill of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23, 30 (2000)

“Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists “when reasonable minds can differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison*, 481 Mich at 425.

A writ of mandamus is proper when “(1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment.” *Tuscola Cnty Abstract Co, Inc v Tuscola Cnty Register of Deeds*, 206 Mich App 508, 510-511; 522 NW2d 686 (1994). Further, there must be no other legal or equitable remedy available to achieve the same outcome sought. *Id.* at 510.

This Court reviews questions of law relative to declaratory judgment actions de novo. *Barrow v Detroit Election Commission*, 305 Mich App 649, 662; 854 NW2d 489 (2014).

The interpretation of a statute or municipal charter presents a question of law that this Court reviews de novo. *Hackel v Macomb County Commission*, 298 Mich App 311, 316; 826 NW2d 753 (2012).

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN HOLDING THAT THE LANGUAGE IN WARREN'S CHARTER §§ 4.3(D) AND 4.4 (D) LIMITING MAYORAL TERMS TO THE GREATER OF THREE COMPLETE TERMS OR 12 YEARS STILL ALLOWS THE INCUMBENT MAYOR TO SEEK A FIFTH TERM IN OFFICE AS WARREN'S MAYOR EVEN THOUGH HE HAS ALREADY SERVED FOUR TERMS AND FOR ALMOST SIXTEEN YEARS, WELL OVER THE LIMIT

The Court of Appeals correctly reversed the circuit court because it reversibly erred when it denied summary disposition in favor of the Warren City Council. A correct interpretation of the amended charter language limits terms for mayor so that they are the same as other elected officials within the city, that is, to the no “more than the greater of three (3) complete terms or twelve (12) years in office.” (Verified Complaint for Writ of Mandamus and Declaratory Relief, Exhibits E and F – Warren City Charter §§ 4.3 and 4.4, APX 0023b-0026b). The Warren City Council was therefore entitled to a declaratory judgment to that effect and a writ of mandamus barring Mayor Fouts from being registered as a candidate and placed on the ballot for the next election since he has served for far longer.

Distracted by ad hominem attacks on the City Council and confusion about the amended charter language and the language on the ballot proposal question, the circuit court wrongly ruled for Defendants-Appellants to hold that Mayor Fouts is eligible to run for the office of mayor even though he has already served four terms and almost sixteen years. But the Court of Appeals carefully reviewed the circuit court decision and reversed it. The Court summarized its holdings in favor of the Warren City Council:

We conclude that the relevant charter sections' failure to specify that time in office before the 2020 amendment will be counted does not make them ambiguous. Nor do we find dispositive the fact that the “terms served prior” language was not in the ballot proposal question itself, where the language

actually was on the ballot within the proposal section. Additionally, a prospective application of the charter is applied here, and its reliance on antecedent events does not run afoul of the general rule against retroactivity. Accordingly, for the reasons stated, we reverse the circuit court's grant of summary disposition to defendants, and grant the Council's complaint for writ of mandamus. Buffa is hereby ordered to immediately disqualify Mayor Fouts as a candidate for mayor in 2023 and not place his name on the ballot for election. A public question being involved, no costs may be taxed under MCR 7.219. This opinion shall have immediate effect pursuant to MCR 7.215(F)(2).

Warren City Council v Buffa, No 365488 (Mich Ct App April 21, 2023) (Opinion, p 13, APX 0314b). . The Court's published opinion was carefully reasoned and correct. Further review is not needed because the parties now have an authoritative decision that provides guidance for the future and that is correct under well-established principles of interpretation of the charter language.

A. THE PLAIN LANGUAGE OF THE 2020 CHARTER AMENDMENT BARS MAYOR FOUTS FROM SEEKING A FIFTH TERM BECAUSE HE HAS BEEN IN OFFICE MORE THAN THREE FULL TERMS AND HAS ALREADY SERVED ALMOST SIXTEEN YEARS

1. *A charter provision is interpreted by looking to its plain language unless it is ambiguous*

A trial court's interpretation of a municipal charter is a question of law this Court reviews de novo. *Barrow v Detroit Election Comm*, 305 Mich App 649, 663, 854 NW2d 489 (2014). When reviewing provisions of a home rule city charter, this Court applies the same rules that it applies to statutory construction. The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Courts apply unambiguous statutes as written. *Id.* Nothing may be read into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Id.* "Initiative provisions are liberally construed to effectuate their purposes and facilitate

rather than hamper the exercise of reserved rights by the people.” *Welch Foods, Inc v Attorney Gen*, 213 Mich App 459, 461; 540 NW2d 693 (1995). “The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters.” *Id.* This Court presumes that the voters intended the meaning plainly expressed in the initiative. *Id.* See also *Save Our Downtown v City of Traverse City*, No 359536 (Mich Ct App Oct 13, 2022)..

The Court of Appeals correctly employed this standard in its opinion. *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, pp 5-6, APX 0306b-0307b).

2. ***The City of Warren charter amendments adopted for §§ 4.3 and 4.4 of the charter are not ambiguous and bar a person from eligibility for the office of mayor if he or she has served more than the greater of three full terms or twelve years***
 - a. ***The plain language provides for an absolute bar for a person to be eligible to run or to hold office for more than three terms or twelve years***

Here, the language of the charter amendment itself is unambiguous and creates term limits for the position of mayor that track those that already existed for all other city offices. The language made persons ineligible for city office if they had served three complete terms or twelve years:

Sec. 4.3 - Certain persons ineligible for city office.

(d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

(Verified Complaint for Writ of Mandamus and Declaratory Relief, Exhibit E, APX 0024b).

This language eliminated the prior language, which had provided that a person would only become ineligible to hold the office of mayor after the greater of five terms or twenty years:

Sec. 4.3 - Certain persons ineligible for city office.

(d) A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that office.

(Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 8 – June 30, 2020 Resolution, APX 0094b). The language itself includes an absolute prohibition on serving more than three terms or twelve years, whichever is greater:

Sec. 4.4 - Terms of office.

(d) A person shall not be eligible to hold the office of mayor, city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

(Verified Complaint for Writ of Mandamus and Declaratory Relief, Exhibit F, APX 0026b).

This language replaced the prior provision that specified a different term limit for the mayor, allowing persons to hold the office of mayor for five terms or twenty years:

Sec. 4.4 -Terms of office.

(d) A person shall not be eligible to hold the office of mayor for more than the greater of five (5) complete terms or twenty (20) years. A person shall not be eligible to hold the position of city council, city clerk or city treasurer for more than the greater of three (3) complete terms or twelve (12) years in that particular office.

(Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 8 – June 30, 2020 Resolution, APX 00934b). Yet the circuit court held that Mayor Fouts is eligible to run for a fifth term, for a total of twenty years. In effect, the circuit court's ruling has nullified the effect of the voter-approved ballot proposal and amendment. There is no qualifying or

limiting words in this charter amendment – it applies by its terms to all prior terms or years in office as mayor.

b. The ballot language supports the Warren City Council's interpretation

The ballot language supports the Warren City Council's interpretation. The ballot proposal specifically described the proposal's purpose as "to require the office of mayor to have the same term limits as other city elected offices." (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 9, APX 0097b-0098b). Since other city office holders, including the City Clerk, City Council, and City Treasurer are ineligible to run or hold office in the same position for more than three terms or twelve years, the circuit court's interpretation is wrong. If the charter amendment ultimately allowed the mayor to run three more times and for 12 more years after it was adopted, his term would not be limited like other city officials. In fact, the circuit court's decision would allow Mayor Fouts to serve seven terms and 28 years, an absurd result and entirely inconsistent with the language on the ballot proposal that the voters overwhelmingly approved. The circuit court interpretation treats the mayor differently from all other elected officials in Warren. They are all limited to three terms or twelve years – and any terms or years that they served in the past are included in the eligibility calculation. *See generally Berdy v Buffa*, 504 Mich 876; 928 NW2d 204 (2019).

But as the Court of Appeals correctly concluded, Defendants-Appellants' interpretation turns a term limit reduction into another term limit extension for the mayor. *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, p 8, APX 0309b). Defendants-Appellants argue that a charter amendment intended to *reduce* the term limits for mayors of Warren so that they serve the same length as other Warren

officers actually increased the terms the incumbent mayor may serve from five to seven. The Court of Appeals correctly called this a construction that would lead to an absurd result, “not in harmony with the plain language of the charter.” (*Id.*).

B. THE HISTORY OF AMENDMENTS TO TERM LIMITS SUPPORTS THE WARREN CITY COUNCIL’S INTERPRETATION OF THE 2020 CHARTER AMENDMENT

The history of amendments to term limits also supports the Warren City Council’s interpretation of the 2020 charter amendment. The initial term limits were enacted in 1998. (Plaintiff Warren City Council’s Motion for Summary Disposition, Exhibit 1 – July 14, 1998 Resolution, APX 0060b-0063b). At that time, Mayor Fouts was a council member who had served for 17 years. Rather than adhering to the plain meaning of the language creating term limits, which would have meant that Fouts would be ineligible to run again for council, the amendment contained limiting language showing that it would not apply to terms before 1995. In other words, those words of limitation were added because several elected officials, including Mayor Fouts, would have been ineligible to run again for council. Explained differently, an absolute term limit (such as was later enacted) would have meant that Mayor Fouts, then a City Council member, would have been ineligible. So the amendment language and the ballot proposal language limited what would have otherwise been interpreted to apply to all past terms.

In 2010, the Charter was amended to reduce the size of the council and to provide for some to be elected by districts and others to be elected at large. The City Attorney offered an opinion that this meant that city council members could serve six terms and 24 years because the term limits would apply only to terms in the same type of district. In other words, council members could serve three terms or 12 years as an at-large council

member and then serve for three terms or 12 years as a district-elected council member. The City Attorney asserted that this change had created a bicameral legislature. (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 3, APX 0066b-0069b). Once the City Attorney issued this opinion, the then-serving City Council sought to amend the charter to allow the mayor to serve five terms and twenty years on the theory that this would make his term limits "more equal" to those of the city council. (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 4, APX 0070b-0075b). At the same time, the City Attorney inserted language repealing the phrase that "any terms or years served prior to this amendment are included." (*Id.*). At the time, this was understood to mean that all prior terms were included, not that it applied to only terms after 1995.

Three years later, this Court rejected the City Attorney's assertion that city council members could circumvent the term limits based on purportedly being part of a bicameral legislature. *Berdy v Buffa*, 504 Mich 876; 928 NW2d 204 (2019). This Court's ruling meant that four incumbent city council members, who were trying to exceed the term limits, were removed from the ballot. (Plaintiff Warren City Council's Motion for Summary Disposition, Exhibit 6, APX, 0078b-0082b). Fouts was reelected as mayor in that election and six new members of the city council were elected. (*Id.*, Exhibit 7, APX 0083b-0090b).

The newly elected City Council voted to once again place mayoral term limits on the ballot. It did so because the rationale for the extension of term limits for the mayor from three to five terms no longer existed. City council members, like other city officials, were now limited to three terms or twelve years – counting all past terms. So the mayor's terms should be also limited. And that is what the voters approved.

The Court of Appeals correctly held that this supports the City Council's interpretation because reading a charter amendment intended to reduce the mayor's term limits from five to three is not "consistent with the 2016 version of the charter that limited the mayor to five terms." *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, p 8, APX 0309b). And the Court of Appeals correctly pointed out that this would read the amendment to make the mayor's term limits the same as that of other Warren officers. (*Id.*).

C. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT THE AMENDMENT WAS "NOT CLEAR" AND THEN DISMISSED THE WARREN CITY COUNCIL'S LAWSUIT

The circuit court did not undertake a careful examination of the plain meaning of the charter language. Nor did it look to the language (ballot explanatory language and proposal language) to determine whether Mayor Fouts is barred from seeking a fifth term. Instead, the circuit court accepted Defendants' arguments that the language was "unclear." (March 23, 2023 Opinion and Order, pp 9-10, APX 0291b-0292b). Not so. The language itself is clear and limits eligibility and terms to three terms or twelve years. No qualifying words appear in the proposal suggesting that it only applied to future terms. And if there was any doubt, the purpose of the proposal was to make the mayor's term limits the same as all the other office holders, a purpose which the circuit court's ruling thwarts.

The circuit court tried to buttress its mistaken ruling by suggesting that if the amendment is applied to past terms, that means that it is retroactive. Again, not so. The Court of Appeals correctly held that a statute's relationship to antecedent events does not mean that it is operating retroactively. *Hughes v Judges' Retirement Board*, 407 Mich 75, 85; 282 NW2d 160 (1979). The charter amendment at issue did not deprive Mayor Fouts of

any vested right. *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, pp 10-11, APX 0311b-0312b). . As the Supreme Court held, “[m]erely because some of the requisites for its application are drawn from a time antedating its passage does not constitute a law retrospective.” *Hughes*, 407 Mich at 86, citing *Clearwater Township v Board of Supervisors of Kalkaska County*, 187 Mich 516; 153 NW 824 (1915). As here, those decisions concluded that calculating eligibility for retirement benefits could provide benefits to “judges who fulfilled their service requirements prior to the effective date of the amendment” and would not be considered retroactive. Similarly, calculating eligibility for running for or holding the office of mayor in the future does not become retroactive just because the eligibility requirements look to past service in office.

This point can be further illustrated by way of reference to the Michigan legal drinking age. As explained in *Felix v Milliken*, 463 F Supp 1360 (ED Mich 1978), in 1933, the legal drinking age in Michigan for consumption of alcoholic beverages (except for beer) was 21. *Id.* at 1364. In 1937, the minimum age was raised to 21, and then lowered back down again to 18 in 1972. *Id.* A few years later in 1978, and in line with the current state of the law, the drinking age in Michigan was raised back up to 21 by voter initiative Constitutional Amendment Proposal D. (see current MI CONST Art 4, § 40). When the drinking age was last moved up to 21 from 18, certainly it did not apply retroactively to make 18, 19, and 20 year-olds who formerly drank legally under the lower drinking age violators of the newly-instituted 21-year old age limit based on their past conduct. But at the same time, the passage of the higher drinking age required an analysis of the totality of an individual’s age (i.e. years from birth to present age) to determine if the individual was

currently eligible to drink. Calculating eligibility to drink did not become retroactive just because the eligibility analysis looked to past years lived.

The Warren City Council sought declaratory relief and mandamus. The circuit court reversibly erred in refusing mandamus when the charter language bars Mayor Fouts from eligibility to run for a fifth term. *Berdy*, 928 NW2d at 205 , held that “plaintiff’s ability to show a clear legal right or a clear legal duty for purposes of mandamus does not depend upon the difficulty of the legal question presented.” *See Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016) (“In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.”) (emphasis added and citation omitted). *See also* 55 CJS, Mandamus, § 74, p 107 (“[T]he requirement that a duty be clearly defined to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt. As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie.”). The circuit court relied on “confusion” to claim the Warren City Council did not meet the “clear legal right” element of mandamus. But just because the controlling statute’s interpretation is in doubt does not warrant a denial of mandamus. The circuit court was wrong to refuse mandamus because of “the difficulty of the legal question to be decided.” *Berry*, 316 Mich App at 41.

The Court of Appeals correctly held that a declaratory judgment is appropriate to “definitively declare the parties’ rights and duties, to guide their future conduct and relations, and to preserve their legal rights.” *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, pp 11-12, APX 0312b-0313b) , quoting *Barrow v Detroit*

Election Commission, (Barrow II), 305 Mich App 649, 662; 854 NW2d 489 (2014). Since the Council cited legal authority in support of its position, it was entitled to declaratory judgment. *Warren City Council v Buffa*, No 365488 (Mich Ct App April 21, 2023) (Opinion, p 12, APX 0313b) . The Council was also entitled to mandamus because “[a]s the legislative body for the City of Warren, the Council has a clear legal right to the proper application of charter provisions.” (*Id.*). Further, the Council would have a clear legal right to have a person not qualified to be a candidate to be removed from the ballot. (*Id.*). The Court elaborated that “Defendants have the clear legal duty to comply with the charter and, given Mayor Fouts’ prior terms of service, defendants have a clear legal duty *not* to certify him as a candidate.” (*Id.*) (emphasis in original). Based on this, the Court of Appeals ordered Buffa to “disqualify Mayor Fouts as a candidate for mayor in 2023 and not place his name on the ballot for election.” (*Id.* at p 13, APX 0314b).

RELIEF

WHEREFORE, Plaintiff-Appellee Warren City Council asks this Court to deny leave to appeal or peremptorily affirm the Court of Appeals judgment declaring that Mayor Fouts is ineligible for office and mandating that his candidacy be rejected by the Election Commission, as is consistent with the voters' will as embodied in the charter amendment, and to grant it such other relief as is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Mary Massaron
MARY MASSARON (P43885)
JEFFREY M. SCHRODER (P63172)
Attorneys for Plaintiff-Appellee
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com
jschroder@plunkettcooney.com

Dated: May 3, 2023

WORD COUNT CERTIFICATE

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached answer brief opposing leave to appeal;
2. The brief prepared by her office complies with the print type requirements;
3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 12 font; and
4. The word processing system counts the number of words in the brief as 10,057.

/s/Mary Massaron
MARY MASSARON

**STATE OF MICHIGAN
IN THE SUPREME COURT**

WARREN CITY COUNCIL,

Supreme Court No. 165604

Plaintiff-Appellee,
and

COA No. 365488

RONALD J. PAPANDREA,

LC No. 23-000611-AW
(Macomb County Circuit Court)

Plaintiff,
v

SONJA BUFFA, in her official capacity as
CITY OF WARREN ELECTION
COMMISSIONER, WARREN CITY CLERK,
CITY OF WARREN ELECTION
COMMISSION, and ANTHONY FORLINI, in
his official capacity as MACOMB COUNTY
CLERK,

Defendants-Appellants.

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

MONIQUE M. VANDERHOFF, states that on May 3, 2023, a copy of the Plaintiff-Appellee Warren City Council’s Answer Brief Opposing Leave to Appeal to Michigan Supreme Court, Appellee Appendix, Word Count Certificate, and this Proof of Service/Statement Regarding E-Service, were served as follows:

Lawrence T. Garcia (P54890) Miller, Canfield, Paddock & Stone, PLC Attorney for Buffa and Election Comm’n garcia@millercanfield.com	Counsel was e-served via MiFile
Frank Krycia (P35383) Assistant Corporation Counsel	Counsel was e-served via MiFile

Attorney for Clerk Forlini frank.krycia@macombgov.org	
RONALD J. PAPANDREA (P26581) Plaintiff, <i>In Propria Persona</i> ronpapandrea@gmail.com	Counsel was e-served via MiFile

/s/Monique M. Vanderhoff
Monique M. Vanderhoff

Open.28127.31067.30827417-2