STATE OF MICHIGAN

COURT OF CLAIMS

ELIZABETH CADY STANTON TRUST,

Plaintiffs,

v

DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

OPINION AND ORDER

Case No. 22-000066-MB

Hon. Douglas B. Shapiro

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(5) and (C)(8).

Plaintiff Elizabeth Cady Stanton Trust is a national 501(c)(3) nonprofit organization "whose mission and purpose" according to plaintiff "includes educating the public about and advocating for women's rights." The Trust seeks a declaratory judgment[1] that the Equal Rights Amendment (ERA) is valid and enforceable, as well as a writ of mandamus to compel defendant "to identify and repair all sex discriminatory laws, policies and programs in Michigan, to bring them into compliance with the ERA." On September 2, 2022 defendant moved for summary

[1] MCR 2.605, which governs a trial court's power to enter a declaratory judgment, provides in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). "The language in this rule is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion." *Van Buren Charter Twp v Visteon Corp,* 319 Mich App 538, 545; 904 NW2d 192 (2017).

disposition. Defendant argues that plaintiff lacks standing to bring its claims and that the request for mandamus would fail on the merits even if standing were found. For the reasons below, the Court agrees with defendant and so GRANTS the motion for summary disposition.

A. STANDING

Plaintiff seeks a declaratory judgment that the ERA was properly ratified and is the law of the land. It also seeks an order of mandamus directing the Attorney General to "identify and repair all sex discriminatory laws, policies and programs in Michigan, to bring them into compliance with the ERA." The Court concludes however that plaintiff has failed to establish standing.[2]

Michigan's standing doctrine is a "limited" and "prudential" requirement that may be met in several ways. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). First, a party has standing "whenever there is a legal cause of action." *Id.* Plaintiff has not identified any law or case providing for a cause of action on which its claim is based.

At best, plaintiff cites to MCL 14.28, as a legal basis to require the Attorney General has the responsibility and authority to bring Michigan into compliance with ERA. MCL 14.28 provides:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general,

[2] MCR 2.116(C)(5) provides for summary disposition when "[t]he party asserting the claim lacks the legal capacity to sue," and applies in cases involving alleged lack of standing, *Aichele v Hodge*, 259 Mich App 146, 165; 673 NW2d 452 (2003). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(5), this Court considers the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

> who, under his direction, shall have charge of such causes in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

Notably, this provision does not include language *requiring* the Attorney General to use her authority in the manner urged by the plaintiff, i.e. to single-handedly modify state law. MCL 14.28 does not provide a mechanism by which plaintiff or other private party could require the Attorney General to bring suit against other state officers nor nor does it provide for an express cause of action here. Further, plaintiff cannot assert standing based upon a right to seek an opinion of the Attorney General opinions pursuant to MCL 14.32 which creates a "duty of the attorney general, when required, to give his opinion upon all question of law submitted to him" because the statute goes on to make clear that this duty is only triggered by a request from certain government officials and does not permit private requests for advisory opinions.[3] There is no provision for a request for an advisory opinion from an outside private party, and the Michigan Supreme Court has indicated that the Attorney General is not required to issue advisory opinions not initiated in accordance with MCL 14.32. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 8 n 3; 740 NW2d 444 (2007).

Given that there is no "legal cause of action" providing for standing in this case, this Court must determine whether plaintiff has shown that it has a special injury or interest that will be

[3] The statute provides for requests from "by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer."

detrimentally affected in a manner different from the citizenry at large or can otherwise meet the requirements for declaratory relief pursuant to the court rule.

The Court finds that plaintiff has not established that it has a special interest or injury so as to confer standing. As noted, a litigant may have standing if the litigant can demonstrate a special injury, right, or a substantial interest that will be detrimentally affected in a manner different from the citizenry at large. *Lansing Sch Ed Ass'n*, 487 Mich at 372. When a plaintiff's interests mirror those of the general public, however, the plaintiff does not have standing. *Franklin Historic Dist Study Comm v Village of Franklin*, 241 Mich App 184, 187-188; 614 NW2d 703 (2000). See also *Detroit Fire Fighters Ass'n v City of Detroit*, 449 Mich 629, 634; 537 NW2d 436 (1995) ("It is well settled that all disgruntled citizens do not automatically have standing to sue a public body. Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large." (internal quotation omitted).) In the instant case, plaintiff has not shown, or even argued, that should the Attorney General not take the requested action plaintiff would, or might, sustain an injury that is in any matter different from the general public. Plaintiff's actual arguments are directed to inequities to which all women in Michigan have been subject. Plaintiff has not argued that it, or any of its officers or members of its organization, have suffered special injuries to their "dignity, autonomy and humanity." Even if plaintiff's argument that the ERA is now a valid amendment is correct, plaintiff presents a public wrong that would affect not only plaintiff but all women, if not the entire population. Plaintiff has not shown that it has a special interest to be vindicated and thus has not established special interest standing.

Plaintiff also lacks standing under MCR 2.605 because that rule necessitates showing an "actual controversy," and plaintiff presents only generalized speculation about the effect of the ERA on various current Michigan statutory schemes.

> An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. Though "a court is not precluded from reaching issues before actual injuries or losses have occurred," there still must be a present legal controversy, not one that is merely hypothetical or anticipated in the future. [*League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020) (citations and footnotes omitted).][4]

Plaintiff cannot show a present legal controversy rather than a hypothetical or anticipated one. As in *League of Women Voters*, at present "[a] declaratory judgment is not *needed* to guide plaintiff's future conduct." *Id.* (Emphasis in original) Plaintiff discusses various alleged inequities in current caselaw, such as its arguments that women in the state may be subject to greater risk of sex discrimination because of the use of "intermediate scrutiny" when resolving claims of sex, rather than racial, discrimination, and that women are subject to higher rates of violence because they are not specifically listed as a protected category under a hate crime law. However, plaintiff's claim rests on hypothetical and contingent future events that may or may not occur. Plaintiff has not presented a particularized present case in which these injuries need to be redressed to resolve either the rights of plaintiff, or another specific individual, who has suffered any of the alleged injuries.

[4] See also *Id.* at 586 n 33, in which the Court cited with approval 26 CJS, Declaratory Judgment, § 28, p 66 ("[A] controversy is justiciable, such that a declaratory judgment action may be maintained, when present legal rights are affected, not when a controversy is merely anticipated.").

In summary, the Court thus agrees with defendant that plaintiff lacks standing to seek a declaratory judgment or mandamus relief.

B. REQUIREMENTS FOR MANDAMUS

For the following reasons, the Court concludes that even if it were to find standing, mandamus relief would not be proper and dismissal would be required under MCR 2.116(C)(8).[5]

"A writ of mandamus is an extraordinary remedy that will only be issued if (1) the party seeking the writ has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result." *Southfield Ed Ass'n v Bd of Ed of Southfield Pub Sch*, 320 Mich App 353, 378; 909 NW2d 1 (2017) (quotation marks and citations omitted). "The burden of proving entitlement to a writ of mandamus is on the plaintiff." *Id.*

With respect to the first element, 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." *Rental Props Owners Ass'n of Kent Co v Kent Co*

[5] Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). A motion under MCR 2.116(C)(8) may only be granted "where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (quotation marks and citation omitted).

Treasurer, 308 Mich App 498, 518-519, 866 NW2d 817 (2014) (quotation marks and citation omitted). Further, a plaintiff's clear legal right in the execution of a duty must be more than a right possessed by citizens generally. *Id.* at 519. In the instant case, as with the above discussion concerning standing, plaintiff has not shown that it has a clear legal right to relief, much less one different from the right of the public at large.

Concerning element two, a clear legal duty exists when there is a statute that plainly instructs that agency to perform a certain action. See *Berry v Garrett*, 316 Mich App 37, 43; 890 NW2d 882 (2016). In the instant case, setting aside whether plaintiff has the power or authority to request that defendant do so, plaintiff cannot show that defendant has a clear legal duty to initiate a suit against the Governor or the Legislature to force these entities to ensure compliance with the ERA. Again, plaintiff relies on MCL 14.28 in support of its argument that the Attorney General has a duty to act. The Michigan Supreme Court has recognized that "MCL 14.28 has been broadly construed to provide authority for the Attorney General to litigate on behalf of the people of the state." *In re Certified Question from US Dist Court for E Dist of Michigan*, 465 Mich 537, 544; 638 NW2d 409 (2002). However, having the power or ability to do something is not the same as having a clear legal duty to do so. The only mandatory duties contained in MCL 14.28 are to prosecute and defend actions in the Michigan Supreme Court when the state is a party or when it is "interested" in the litigation, or to represent the Governor or the Legislature in lower court proceedings when requested. Neither circumstance exists here. The Attorney General's additional powers to intervene are permissive. Plaintiff has thus failed to demonstrate that the Attorney General has a clear legal duty to prosecute an action against the Governor or the Legislature to force them to recognize the ERA as valid and alter all of Michigan's laws to comply with it. And as discussed above, while the Attorney General does have a clear legal duty, under certain

circumstances, to issue an advisory opinion that is only so when question of law is submitted to her by "the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer." Plaintiff has not established this element.

As to the third element, the Court concludes that plaintiff cannot show that any action by the Attorney General would be "ministerial." "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry*, 316 Mich App at 42, quoting *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013). In the instant case, none of the actions plaintiff seeks to impose on defendant are ministerial acts. The Attorney General has the discretion to initiate suit, but is not required to do so. MCL 14.28. In addition, although under certain circumstances the duty to issue an advisory opinion may be mandatory, the manner in which the Attorney General does so is up to her discretion. The Court agrees with defendant's argument that the actions of reviewing a statute or constitutional provision and determining whether it discriminates against women as prohibited by the ERA does not constitute a ministerial task. Rather, it would require the Attorney General to exercise her discretion and judgment in identifying suspect laws and then deciding whether such laws do, in fact, discriminate against women. Mandamus is not appropriate in such an instance.[6]

This is a final order and closes this case.

Date: April 12, 2023

Hon. Douglas B. Shapiro
Judge, Court of Claims

[6] Plaintiff has not provided an argument as to the fourth factor, i.e., whether no other legal or equitable remedy exists.