

Subject: Comment on Proposed Process for Rebutting the Presumption of Staleness in Petition Signatures
Over 180 Days Old [per announcements e-mailed out 2015-12-15]
To: Bureau of Elections <elections@michigan.gov>
CC: Valles, Lydia (MDOS) <VallesL@michigan.gov>
From: John Anthony La Pietra <jalp5dai@att.net> Date: January 8, 2016

To the Board of State Canvassers:

Courts at every level have held that political petitioning is core political speech – for circulators and for signers – and should not be unduly overburdened. Unfortunately, the new procedure proposed by the Bureau of Elections for rebutting the statutory presumption that voters' signatures "affixed" to initiative or constitutional amendment petition sheets more than 180 days before the petitions are filed does not follow this rule. Rather than taking advantage of the state's Qualified Voter File (and other technological advances since the preparation of the existing 1986 policy) to make the process clearer and easier for all parties concerned (including itself), the Bureau would require much more time, effort, expense, and paperwork for everyone than even the Board's 1986 policy does.

There is a better way – one that would still allow the Bureau and the Board to exercise proper and legal supervision to protect the purity of elections while lessening the burdens on themselves, petitioners, signers, and challengers. The QVF is the standard and the source of proof, as established by Public Act 219 of 1999 – and the QVF is in the Bureau's hands. I urge the Board to adopt a policy and process under which the Bureau would use the QVF efficiently and effectively – and would empower other concerned parties to do so as well.

* [=====] *

First, one point. The only reason to require any kind of physical separation or even separate ordering of petition sheets with any signatures whose presumed staleness is to be rebutted would be if those sheets are going to be processed differently than sheets with only non-stale signatures. And since the QVF is the standard and source of proof with or without a rebuttal claim, the Bureau does not need separate processing of those petition sheets to do its job – only an added check during the random-sample review . . . if that review is to include rebutted signatures at all.

In fact, if the Bureau insists on having presumed-stale signatures separated, then it would be fairer to circulators who go the extra mile to validate those signatures and rebut the presumption (and to the signers involved) to count all such signatures that pass the other tests (other grounds for individual challenges, e.g., sheet not disqualified for bad circulator signature) as 100% valid without sampling, and apply the sampling process and formulas only to the non-stale signatures that were not additionally validated for rebuttal. If, instead, the Bureau insists on submitting signatures already validated for rebuttal to the random-sample review process as well as non-stale signatures, then it has no need for any separation of sheets with signatures whose presumption of staleness is to be rebutted; the staleness condition can be checked against the QVF during the sample review process, just as other conditions are checked now.

The Board has the power to choose one of those two paths:

- * requiring that presumed-stale signatures be separated, with 100% acceptance for rebutted signatures (no sampling); or
- * requiring that presumed-stale signatures be included in the sampling pool, and allowing their sheets to be mixed in as well (no separating).

The Board could also allow petition sponsors to submit petition sheets separated or mixed, and authorize the Bureau to perform its review tasks in the corresponding manner. But both the Bureau and sponsors have duties to perform in a rebuttal/validation process, and the Board's adopted policy must not put all the work on either side.

* [=====] *

With the above point in mind, here is my proposed alternative procedure for validating signatures otherwise presumed stale.

(1) The Bureau must make enough QVF information available to the public, in a usable form and at no more than the actual incremental cost of reproduction (similarly to a FOIA request), that petition sponsors can actually perform the validating checks desired to rebut presumptions of staleness (and that the Bureau and challengers can actually use to double-check that work as needed). The Bureau must of course protect some parts of the data from public disclosure by law – but a subset of the QVF which omits (or even encrypts) protected data can be created to enable the rebuttal process, and it must be. To give an obvious example, if the Bureau expects sponsors to verify voter address histories both on the date of signing and within the 180-day window immediately before petition filing (though MCL 168.472a does not in fact require the latter), the histories must be included in this "QVF validation file".

Also, for the process to be practical, the QVF validation file must be a single file in a standard spreadsheet format – unlike (for example) the tangle of text files that the Bureau currently posts as the public's view of precinct-level election result data, which takes considerable time, effort, and computer expertise to put into usable form. I would recommend that at least Excel, OpenOffice, and standard comma- and tab-delimited text formats be made available. Microsoft Word or other word-processing files, including Adobe Acrobat document-type files, would not allow for convenient sorting of the information to expedite the searching necessary; database files are less familiar to non-professionals, and their programs are less broadly available.

(2) Have any petition sponsors who separate petition sheets into those with any signatures whose presumed staleness is to be rebutted and those with only non-stale signatures put numbers or alphanumeric identification codes on petition sheets before submitting them (as may already be done by some sponsors) – to ensure that, if the types of sheets are mixed together, they can be separated again (and ordered if need be). It could also be suggested or recommended that the codes distinguish between sheets having only signatures to be rebutted and sheets with a mix of non-stale signatures and signatures to be rebutted (if any such sheets are submitted).

Any separation of sheets that is done could be done by putting petition sheets with any signatures whose presumed staleness is to be rebutted together, at the top or bottom of a pile (or in a separate pile if the petition sponsor prefers); there could also be sub-groups of sheets having only signatures to be rebutted and "mixed" sheets, as per the suggestion in the previous paragraph.

Again, there is no need to require that such sheets be separated from the rest. Signatures proved non-stale need not go through random checking, but instead could be accepted as valid unless individually challenged (since in this case petitioners are literally doing part of the Bureau's work for it). If this is allowed, the Bureau could still take its random sampling of signatures for validity by counting only the number of non-stale signatures on any petition when selecting the sample. Then the Bureau would add the sample-suggested number of valid non-stale signatures to the actual number of validated and not successfully challenged staleness-presumption-rebutted signatures, and compare that sum with the number required to place the petition's issue on the ballot when making its recommendations to the Board.

(3) Have sponsors provide with their submitted petition sheets a list (in a standard spreadsheet file format and/or as a printed hard copy) identifying the names and QVF voter-ID numbers of all signers whose presumed-stale signatures the sponsors have checked against the QVF in order to rebut the presumption of staleness and validate. If a signer's name or QVF voter-ID number is not on the list, it would be presumed that the sponsor does not seek to rebut any applicable presumption of staleness for that signer's signature – and the Bureau would not be required to check it for rebuttal validity (although it could do so at its discretion if the sheet fell within a random sample, unless the signature was struck out by the sponsor before filing, or challenged).

The Bureau would use this "rebuttal list" either to accept names so validated as 100% valid (barring other problems or successful challenges) or to facilitate its check of presumption-rebutted signatures if they appear in the random sample, depending on the Board's choice of policy and procedure mentioned above. And to help the Bureau use the rebuttal list, the sponsor would need to either provide that list in some readily visible and explained order (alphabetical by name, alphabetical by county/city or township/name, etc.) or include the QVF voter-ID number of the voter with her or his name.

It may be suggested that this "rebuttal list" could also be supplemented with further information on individual presumed-stale signatures and where in the submission of petition sheets they appear – or with a further list or table indicating how many lines on each petition are blank (or lined through), how many contain non-stale signatures, and how many contain signatures which would be presumed stale by statute unless the presumption is rebutted. That would be additional work for sponsors, to make the Bureau's sampling work (and/or the work of any challengers) more convenient. Inclusion of any or all of this supplemental information (or more) should be permitted if the petition sponsor so chooses, as long as the essential information can at need be easily found and used. However, that information is not necessary for sampling (or challenges), could easily become overly burdensome, and should not be required – especially for petitions now in process.

This is one situation in which the balance between the Bureau and petition sponsors should be tipped by consideration of individual signers – who must be presumed (especially after validation against the QVF) to have been registered voters on the dates indicated and signed the petitions in good faith with no reason at the time to doubt that their signatures would be valid and accepted. (I urge the Board to remember when it makes its decision in this matter that petition signers are deeply concerned parties – and protect their rights as signers to petition their government for redress just as it protects their rights as voters not to have private information unduly released to the public.

(4) Have sponsors also provide, at the time of filing, one comprehensive affidavit or certificate – stating that the information provided in the rebuttal list has been checked against the QVF for the purpose of rebuttal, and that all checkers have been advised of and agreed to their legal responsibility for their work and their being subject to legal process if necessary. Either this "validation commitment" or an appendix to it would give the

names and addresses of individual checkers (and/or of a company or group responsible for supervising the checkers). The sponsor could also be encouraged to voluntarily include descriptions of what information it has available to identify who performed what checks, or to be prepared to provide such information if the Bureau finds reason to ask for it.

The validation commitment (and its appendix, if any) would be designed to provide the Bureau with the same legal recourse for service of process, etc. against petition sponsors and validation checkers (if it is ever needed) as it has implemented recently when ordered by the courts to accept the legality of out-of-state circulators of petitions. Separate affidavits from each checker are unnecessary (though they could be voluntarily provided if the sponsor prefers that method). Separate affidavits for each sheet, or worse yet each presumed-stale signature, absent specific and credible contradictory evidence, would be unduly burdensome – laughably so to anyone but the sponsors and challengers, and the Bureau, who would have to wade through that many more pages of wasted paper.

* [=====] *

This alternative proposal would make the QVF a useful tool for validation of presumed-stale signatures, not an excuse for imposing more needless cost, effort, and paperwork on petition sponsors. It would likewise make the Bureau's own work easier than it is now under the Board's 1986 policy or under the Bureau's own proposal – with less risk to the rights of petitioners, signers, or challengers. I ask the Board to please adopt it. (And I encourage the Board to allow petitioners to suggest and the Bureau to explicitly authorize any further alternatives which may be developed later and which provide equivalent safeguards for the roles and rights of all concerned parties.)

Thank you.

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NOTE: I am the Statewide Elections Co-ordinator of the Green Party of Michigan, and was GPMI's 2014 Attorney General candidate. However, this is my personal comment and is not intended to be or reflect the view of the party or anybody else.

**STATE OF MICHIGAN
DEPARTMENT OF STATE
BOARD OF CANVASSERS**

**In re Solicitation of Comments Regarding A Proposed
Change In Board Policy In Relation To The Method
For Rebutting The Statutory Presumption That A
Signature On A Constitutional Amendment Or Initiative
Petition Is Stale And Void If Made More Than 180 Days
Before The Petition Was Filed**

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**Comment Regarding a Proposed Change In Board Policy In Relation to the Method for Rebutting
The Statutory Presumption that a Signature on a Constitutional Amendment or Initiative Petition
is Stale and Void if Made more than 180 days before the Petition was Filed**

With respect to the proposed policy change for rebutting the presumption that signatures are deemed stale and void outside of the 180 day window, as set forth in MCL 168.472a, we offer the following comments for consideration by this Board:

- MCL 168.472a does not set forth what is required to rebut the presumption that a signature is stale and void and therefore any policy set forth by the Board, whether it be the existing policy or the proposed new policy, is speculative in terms of what the Legislature intended by this statutory requirement. We respectfully submit that the best course would therefore be for the Legislature to amend the statute to clarify what specifically is required in order to rebut the presumption or, alternatively, provide that signatures outside of the 180 day window are simply stale and void, thereby eliminating the rebuttable presumption altogether.
- We concur with the Bureau of Elections that technology has changed since enactment of the statute and adoption of the policy this Board to interpret that statute in 1986. The QVF is now available for purchase and committees and individuals are able to cross check signatures in order to preliminarily determine the registration status of petition signers prior to submitting to the Bureau for filing.

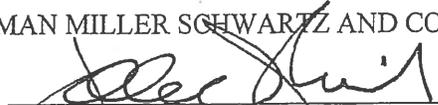
- Hence adopting a policy recognizing this change in technology at first blush appears appropriate absent legislative clarification (which is clearly the preferred approach). We note, however, our concern that the statutory provision cited by Mr. Hanks as support for using the QVF does not translate as well to persons outside of the Bureau using the QVF for this purpose. MCL 168.476 provides in pertinent part that the “qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers **and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures.**” [Emphasis supplied]. As noted in the Bureau’s memorandum to this Board, a person that purchases the QVF is not given the digitized signatures. Meaning there is no way for the proponent to verify the validity of the signature itself. MCL 168.472a is not just protecting against signatures being stale, but also void, *i.e.* not genuine. We submit that unless the proponent is able to verify the genuineness of the signature, which it can do under the current policy but could not under the proposed new policy, then the presumption has not been rebutted, because there is no way to fully verify even the registration absent confirming that the signature is genuine.
- In addition, we do not know what the Legislature intended by the term “stale.” Under the pending proposal, a signature could be three years old and still be rehabilitated as long as the person was and is registered during the applicable time frames. We submit that simply being registered does not translate to not being stale.

We therefore respectfully submit that absent a legislative amendment, the policy that has been in place for 30 years should remain. A review of the QVF by a person outside of the Bureau cannot verify the genuineness of a signature. In addition, registration alone does not cure a signature if it is “stale.” The fact that the Legislature used 180 days as the limit strongly suggests that any signature much outside that time frame is no longer valid absent proof that the signer was and is registered *and* still supports the proposal.

Respectfully Submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

Dated: January 8, 2016

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January 8, 2016

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P.O. Box 30197
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MICHIGAN DEPT OF STATE
2016 JAN -8 PM 3:39
ELECTIONS/GREAT SEAL

Re: Proposed Change Re Stale and Void Signatures

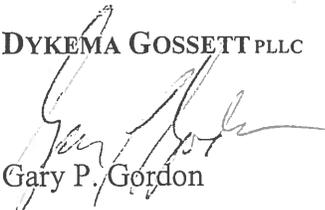
Dear Mr. Thomas:

Filed with this letter is The Michigan Chamber of Commerce Comments to a Proposed Change in Policy Regarding the Statutory Presumption that a Signature on a Petition is Stale and Void if Made More than 180 Days Before the Petition was Filed. We are enclosing four extra copies for distribution to the Board of Canvassers.

Thank-you for your consideration.

Sincerely,

DYKEMA GOSSETT PLLC



Gary P. Gordon

Attachment

STATE OF MICHIGAN
DEPARTMENT OF STATE
BOARD OF STATE CANVASSERS

**In re Solicitation of Comments Regarding A Proposed
Change In Board Policy In Relation To The Method
For Rebutting The Statutory Presumption That A
Signature On A Constitutional Amendment Or Initiative
Petition Is Stale And Void If Made More Than 180 Days
Before The Petition Was Filed**

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**THE MICHIGAN CHAMBER OF COMMERCE COMMENTS TO A PROPOSED
CHANGE IN POLICY REGARDING THE STATUTORY PRESUMPTION THAT A
SIGNATURE ON A PETITION IS STALE AND VOID IF MADE MORE THAN 180
DAYS BEFORE THE PETITON WAS FILED**

I. INTRODUCTION

The Michigan Chamber of Commerce opposes the change in policy presented for discussion purposes by the Director of Elections to the Board of State Canvassers (“Board”) regarding treatment of signatures obtained outside the 180 day time period mandated by MCL 168.472a. This section of the election law states that signatures obtained more than 180 days before the petition is filed are *rebuttably presumed to be stale and void*. The section has been operative since a 1986 Michigan Supreme Court decision overturning an Attorney General’s Opinion that had held it unconstitutional. *Consumers Power Co. v. Attorney General*, 426 Mich 1; 392 NW2d 513 (1986). Although the Board, in response to the lower Court’s decision in

Consumer's, supra, adopted the current policy providing a method to rehabilitate stale and void signatures, no attempt to actually utilize the policy to rehabilitate a signature has ever been made.

Both the proposed change and the current policy miss the mark. Both policies focus solely on whether the signatory to the petition was—at the time of signing and at the time of filing—a registered elector. If this was the only criteria of concern to the Legislature, it could have easily stated that after 180 days it is “rebuttably presumed that a signatory *is no longer a registered elector.*” But the Legislature used the terms “*stale and void.*” The most powerful rule of Legislative intent is the plain meaning of the words used. “Stale” means “having lost freshness” and void means “having no legal force of validity: null.”¹ Together, these words certainly establish a legislative intent that a signature older than 180 days—which is of no legal force, lacking validity, null and without freshness—requires more than simply demonstrating the fact of registration to rehabilitate the signature. Neither the existing policy and certainly not the proposed policy meet this test. For the following reasons, the Board should reject the proposed policy and, furthermore, the Board should defer to the Legislature to provide additional guidance.

II. THE UNDERLYING BASIS FOR REQUESTING THE CHANGE IN POLICY AND FOR REQUESTING THAT THE CHANGE BE EXPEDITED ARE FAULTY

The policy proposed for discussion by the Director of Elections was precipitated by a letter dated November 30, 2015 from the “Executive Director of the Michigan Comprehensive Cannabis Law Reform Committee.” Apparently that committee, seeking to legalize certain aspects of marijuana consumption and production, is considering filing signatures that were obtained outside of the 180 day period so the Committee’s Director has requested that the Board

¹ *The American Heritage College Dictionary*, 3rd Ed. (1993).

expedite its consideration of a change in policy. However, the change in policy proffered by the Committee's Director seeks to rewrite section 474a of the election law to say what it does not say. That is a job for the Legislature and not for this Board.

In his letter, in addition to noting the modifications in the Qualified Voter File, the Committee's Director relies upon several additional points to support his request for an expedited policy change:

(1) The Committee's Director asserts that not all states allow laws or constitutional amendments to be proposed by initiative (fewer than half) but once allowed, any state imposed restriction on the right is subject to federal constitutional review. Without comment on the standard of review suggested by the Director, it must be noted that the success of ballot access is one measure of whether a state law imposed ballot safeguard requirement will pass constitutional review. Numerous groups advocating a wide range of policy proposals, while representing a diverse set of political, social and geographical interests, have successfully obtained adequate signatures to support both statutory initiatives and constitutional amendments since 1986, when the 180 day requirement began to be enforced. Valid signatures were filed to qualify at least 18 constitutional amendments and 12 initiated laws for the ballot between 1986 and 2014 without using signatures outside the 180 day limit.² In other words, if voters support a proposal, gathering adequate signatures within the mandated time period is certainly achievable.

(2) In support of his argument, the Committee's Director makes the point that "Of the 24 states with initiatory process, some provide for supplemental filing of petitions after an initial

² The initiated laws covered such diverse subjects as Abortion, Auto Insurance, Bear Hunting, Physician Assisted Suicide, School Funding and Wildlife Management. The constitutional amendments included the subjects of Term Limits, Tax Reform, School Vouchers, Employee Rights, Affirmative Action, Stem Cell Research, Same Sex Marriage, Energy Regulation, and Union Issues.

turn-in, or provide for a year or more to circulate petitions for signers.” (November 30, 2015 letter, p 4). Yet he does not disclose that some states allow signatories to remove their signatures after they sign; that California allows only 180 days for circulation and requires signatures of registered voters constituting 5% of the total vote for governor to initiate legislation (currently 365,880 signatures)—with no chance to rehabilitate signatures (Cal Const, art II, sec 8(b), Cal Elections Code, Sec 9035, 9034); that Colorado requires signatures of registered voters consisting of 5% of the total vote for governor to be obtained within 180 days, with 15 days allowed to supplement (source: Secretary of State web page); that Massachusetts allows only 64 days to obtain 3% of the total vote for governor of the signatures of registered voters to initiate legislation—with no chance to rehabilitate signatures. Thus, there are states with laws as—or more—restrictive than Michigan.

(3) Both the Director of Elections and the Committee’s Director assume that the purpose of section 472a is only to insure that the stale and void signature is that of a registered elector.³ But this ignores the clear meaning of the statute’s language. It is reasonable that the purpose is also to establish that the signatory is still in support of the proposal. Other states have recognized this by allowing the removal of the signature at the request of the signer. With the passage of time—over six months—circumstances can change as can the support for a proposal. In order to rehabilitate the signature, the requirement should be that not only should the fact of registration be proved but there should also be a demonstration that the signer still supports the proposal.

³ There is no transcript of the August 8, 1986, Board of Canvassers meeting when the current policy was adopted but there is reference to discussion from several attorneys including John Pirich, Mike Hodge and Tom Downs. August 8, 1986 Board of Canvassers Minutes, p 5.

Thus, the underlying assumptions for the suggestion that the proposal should change and that the change should be expedited are faulty.

**III. CONTRARY TO CLEAR LEGISLATIVE INTENT, BOTH THE CURRENT
POLICY AND THE THE PROPOSED POLICY IGNORE WHETHER THE
SIGNATORY TO THE PETITION STILL SUPPORTS THE PROPOSAL**

Section 472a provides only that “[i]t shall be rebuttably presumed that the signature on a petition ... *is stale and void* if the signature was made more than 180 days before the petition was filed with the office of the secretary of state.” (emphasis added).

The existing policy and the proposed policy both assume that this language only refers to the registration status of the individual signing the petition. In support of this position, it is anticipated that proponents will assert that Const 1963, art II, § 9 and art XII, § 2 only require that the signatures on the petition be that of registered electors. But both constitutional provisions also grant discretion to the Legislature to enact additional requirements. The Legislature has done so in limiting the circulation period to 180 days—and in mandating that signatures collected outside that period are rebuttably presumed to be stale and void—which has been recognized as valid by the Michigan Supreme Court. *Consumers, supra*.

The hallmark of statutory construction is to give effect to the Legislature’s intent. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). The most powerful indicator of that intent is a statute’s plain and unambiguous language. As noted above, the words “stale and void” have recognized and common dictionary meanings. “Stale” means “having lost freshness” and void means “having no legal force of validity: null.” The Legislature is deemed to have knowledge of the meaning of these words. Thus, signatures that are 6 months old when the

petitions are filed are null and void and lack freshness. To assert that they can be rehabilitated by simply demonstrating the fact of registration ignores the plain meaning of these words.

The words “stale and void” are a recognition by the Legislature that over time—6 months time—if a petition has not been filed, then circumstances may change that may cause the person signing the petition to change his/her mind. Other intervening legislation may lessen the need for legislation posed by the petition. Other intervening circumstances on the national political or local political scene may have changed. There are a myriad of issues or factual circumstances that may have changed to have caused the support for a proposal to be modified.⁴ Therefore, after 6 months—or more—the signature is considered to be stale and void and the proponent of the petition should bear the burden of demonstrating that it is not. And that burden should be more than simply demonstrating the fact of registration.

IV. THE BOARD SHOULD DEFER TO THE LEGISLATURE

Const 1963, art II, § 9 establishing the right to initiate laws by petition provides that, “[t]he legislature shall implement the provisions of this section.” Similar language appears in Const 1963, art XII, § 2 providing for amendment of the constitution by petition. The legislature has responded to these mandates—in part—by enactment of section 472a. However, the legislature did not enact a procedure for determining how the rebuttable presumption should be

⁴ In the most recent example, a group circulating petitions proposing an increase in the Corporate Income Tax announced on January 7, 2016, that it was abandoning its efforts because of changed circumstances. The purpose of the proposal—to raise money for transportation was met by intervening legislation. “‘Once they [the legislature] passed the road package...we didn’t feel that it made sense to continue,’ said Lisa Canada, spokesperson for the ballot committee....” *Union-Backed Group Pushing CIT Hike is No More*, MIRS, January 7, 2016.

overcome. One reason may be that prior to application of this section to a petition, the Attorney General issued his Opinion finding it unconstitutional.⁵

As noted, in response to the lower court decision reversing the Attorney General's opinion and prior to the Supreme Court decision in *Consumers*, the Board immediately adopted a policy to rehabilitate signatures that were collected outside the 180 day time limit. However, two questions remain as to that policy: whether the Board had the Constitutional authority to adopt such a policy; and, if so, what standards should be applied. Neither issue has been considered by the Courts:

We express no opinion in this action as to the validity of the procedures adopted by the Board of State Canvassers for rebutting the presumption of staleness and voidness. This aspect of the matter was not presented to or ruled on by the trial court or ruled on by the Court of Appeals.

Consumers, Id. at 8, fn 1.

Neither the existing policy nor the proposed policy recognize the legislative intent encompassed by the words "stale and void." The Committee's Director asks that this Board rewrite the law but that is the Legislature's job—not that of the Board. The issues presented can be resolved by the Board deferring to the Legislature. Therefore, the Chamber respectfully suggests that the Board ask the Legislature to enact legislation to establish procedures and standards to determine the method to overcome the presumption that signatures obtained outside the 180 day time period are presumed to be stale and void.

⁵ 472a of the election law was enacted by 1973 PA 112. It would not have been effective until 1974. However, prior to the general election and presumably prior to the canvass of any petitions subject to the 180 day limitation, on August 13, 1974, the Attorney General issued his opinion finding the statute unconstitutional. (OAG 1973-1974, No 4813, p 171).

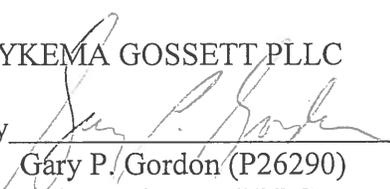
V. CONCLUSION

The Michigan Chamber of Commerce appreciates the opportunity to present its position and to point out some issues that deserve more extensive consideration regarding determination of the acceptance of signatures that are presumed to be “stale and void” by the Legislature. This issue is too important to be dealt with on a precipitous track and the Legislature should be given an opportunity to provide input. Lacking legislation addressing the issue, the Board should recognize that the words “stale and void” mean more than simply whether the signatory of a petition was registered and must mean whether or not the individual still supports the issue after a period of 6 months or more has passed. Therefore, the burden must be on the proponent, who has let the time expire to determine whether there is still support for the proposal.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By



Gary P. Gordon (P26290)

Dykema Gossett PLLC

Attorneys for Michigan Chamber of
Commerce

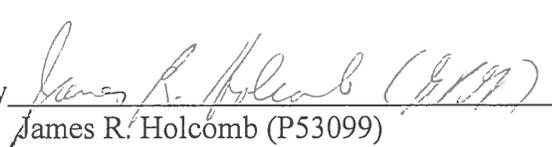
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Dated: January 8, 2016

Malerman, Melissa (MDOS)

From: SOS, Elections
Sent: Friday, January 08, 2016 3:20 PM
To: Malerman, Melissa (MDOS)
Subject: FW: Memo: Michigan Bureau of Elections Procedures for Validating Petition Signatures
Attachments: Memo Michigan Bureau of Elections Procedures for Validating Petition Signatures.pdf

From: Mark Grebner (via Google Docs) [<mailto:mark.grebner@gmail.com>]
Sent: Friday, January 08, 2016 3:10 PM
To: SOS, Elections
Subject: Memo: Michigan Bureau of Elections Procedures for Validating Petition Signatures

Mark Grebner has attached the following document:



Memo: Michigan Bureau of Elections Procedures for Validating Petition Signatures



Alan Fox & I work together, but our responses should be read independently, as they reflect our divergent (if generally consistent) viewpoints.

Suggested Changes to Michigan Bureau of Elections Procedures for Validating Petition Signatures

Submitted by Mark Grebner
January 8, 2016

This is written in response to the Bureau's invitation to comment on a proposed revision to the procedures for evaluating signatures on initiative petitions which are more than 180 days old at the time the petitions are submitted. Rather than addressing that limited question, I suggest the Bureau take the opportunity to look more deeply into its procedures, in order to simplify and streamline the entire process, and to bring it into harmony with the technical changes of the past thirty years, including the creation of the QVF.

Bureaucracies are inherently conservative. They tend to persist in policies which have been proven workable, modifying them only when forced by strong pressure. Even then, the modification selected is generally whichever is smallest and least disruptive to established ways. The long-range result of such conservatism is the continuation and elaboration of procedures and rules whose original meaning has been lost. The focus on small-scale fixes leaves the larger structure increasingly grotesque and indefensible, viewed at larger scales.

When such a tangled structure is evaluated, it is natural for its defenders to assume and believe that for each obscure twist there is a corresponding benefit to someone, and that any change is apt to be detrimental to some public interest. To everyone unaware of the detailed history of its creation, it is assumed that the law would not have been written in such a way unless there were a good reason at the time. And - since the reason can no longer be discerned - who can say that it doesn't persist? Perhaps at a larger level, this presumption against change is the very definition and soul of conservatism. But at the smaller scale of bureaucratic procedure, the presumption is a prescription for increasing inefficiency and ineffectiveness.

I am writing to urge the bureau to seize this opportunity to rethink and rationalize its procedures for evaluating petition signatures. My suggestions touch upon statistical assumptions which the bureau will need to confirm with its consultant. But I believe my suggestions are so straightforward but I am NOT concerned whether they will be found valid.

My first suggestion is to move away from the idea of sampling individual signatures, and toward sampling entire sheets. This shift in focus may seem to be a drastic break with the past, but that is only because the existing procedure has become accepted as the only proper way.

Second, I suggest greatly reducing the amount of preliminary scrutiny of submitted petitions, in favor of relying on sampling. Instead of determining exactly how many facially valid signatures have been submitted - a laborious task - I propose to deal with questions of facial validity in exactly the same way non-registration is presently evaluated. In part, this shift would be

justified by reduction in labor costs, but it is also urged for the value of simplifying and making the entire process more transparent. Under present procedures, it's difficult to contest the Bureau's ruling that a particular has been ruled "facially invalid" because such a signature is excluded from the universe from which the sample is drawn. To resurrect such a signature requires in effective that the sampled universe should be considered to be enlarged, and such arguments must be made against ALL "facially invalid" signatures, not just the small number which might have fallen into the sample. If the Board of Canvassers disagreed with the staff concerning the status of a substantial number of sheets, the entire sampling process could be derailed.

As I envision the revised process, it would go something like this:

1. When a petition is received by the Bureau, staff would simply number all the pages received, with the only checking done being to remove any sheets which clearly contain no remotely plausible valid signatures. Such removed sheets might be entirely blank, or might be a petition from a different drive accidentally admixed. But any sheet which might possibly be argued to contain even one valid signature would be left in the set. In other words, during the initial review, staff would not be called upon to exercise refined judgment. Whether a sheet which contained no valid signatures was included or excluded from the set of petitions numbered would make no difference to the expected result of the sampling process.

Note that no effort is made has been made to determine at this stage whether each sheet is facially valid or whether its circulator is qualified. Leaving those determinations to later consideration greatly reduces the amount of staff effort required focusing more intense attention upon far fewer pages. The only processing required before the sample is drawn would be to number the pages while removing detritus. I imagine the petitions being numbered exactly as they are submitted to the Bureau, without any effort to reorder them.

2. After the petitions are numbered, the bureau would announce the number of sheets submitted, but will not attempt to state the number of signatures submitted.

3. A sample will be drawn over the entire set of petitions, using procedures drawn up by the Bureau's statistical consultant. For example, perhaps 200 sheets would be drawn uniformly, without replacement, which might eventually be found to contain 1400 signatures. No effort need be made to segment the sample according to the number of signatures present on each page, or according to the range of dates present on each page.

Sampling of the entire sheets, rather than individual signatures, requires slightly more sophisticated statistical technique, but is well within the boundaries of established sampling theory. In effect, about four times as many signatures would need to be examined in order to achieve a given level of statistical precision, but the larger number of signatures checked would be offset by the reduction in steps, and the fact the signatures would be located on fewer

sheets. The ultimate question is how best to achieve a given level of statistical precision at the lowest possible staff costs, and cluster sampling is well adapted to that purpose.

[3b. As the Bureau's statistical consultant will already be considering by the time he has finished reading the paragraph above, there is an alternative. If the submitted petition were divided into 'tranches' based on the number of apparent signatures, and then sampling were conducted within those tranches, the required number of signatures sampled to reach a given level of statistical accuracy would be reduced by approximately 75% - but at the cost of considerably more upfront handling of the petitions. Whether this approach would be superior, I leave to others.]

4. Once the sample is drawn, it can be released to the public, and Bureau staff can begin the process of evaluating the signatures. All signatures on each sampled sheet would be scrutinized for individual validity, and also for the validity of the sheet on which they are located. Challenges may be made to individual signatures and also to entire sheets.

In effect, the sampling process is estimating both the rate of validity of submitted signatures and also the average number of signatures submitted / petition sheet. Although determining the number of submitted signatures by sampling will have the effect of reducing the statistical power of a given sample size, the cost of checking the larger sample will be compensated by the savings of staff time from not having to individually count, examine each sheet for facial validity, and handle a separate sheet for every signature in the sample.

5. Challenges, by staff or public, might apply to an entire sheet, based on the identity of the circulator, or on failure to fill out header or circulator information correctly.

6. Rather than generating random sheet numbers sufficient only for drawing the initial sample, the Bureau should draw and securely store sheet numbers sufficient for as many additional samples as might be necessary to process a petition which turns out to be at the very cusp of sufficiency. These additional sheet numbers should not be disclosed, because the parties to a challenge should not be motivated by looking ahead to find that the next increment of sample appears to be randomly favorable or unfavorable to their cause.

7. Finally we are coming close to the question the bureau originally posed: what to do about signatures more than 180 days old at the time of submission? I propose an answer which should be simple to implement under the framework I have laid out above. A signature which is less than 180 days old at the time petitions are submitted to the Bureau should be deemed valid if it is less than 180 days old and the signer appeared in the QVF at the time of signing.

If a signature is more than 180 days old at the time of submission, it should be deemed invalid unless the voter's name appears in the QVF at the time of submission. As a practical matter, because the publicly released QVF is only updated monthly, the Bureau will have to adopt and

operational definition such as: "appears in the final QVF released to the public before the date of petition submission".

It should be kept in mind that many sheets will contain a mixture of "stale" signatures (more than 180 days old) and non-stale signatures, and any sampling regimen will need to deal smoothly with such combinations. I think it would be a mistake to create separate processes for making and considering challenges which would depend on the age of the signature, because doing so would increase the complexity of the process and create additional ambiguities for the parties to dispute and force the Bureau to referee. Under the approach I have laid out, older signatures would simply have to meet one additional hurdle, based on the idea that voters who have died or moved away no longer have a valid interest in the subject of the petition. Further, this approach seems entirely consistent with the statute's language.