STATE OF MICHIGAN

DANA NESSEL, ATTORNEY GENERAL

CONST 1963, ART 1, § 5:

CONST 1963, ART 2, § 9:

CONST 1963, ART 12, § 2:

US CONST, AM I:

Constitutionality of 2018 PA 608, amending Michigan Election Law.

The Legislature exceeded its constitutional authority under article 2, § 9 and article 12, § 2 of the Michigan Constitution in enacting a 15% signature distribution requirement based on congressional district, and the amendments to MCL 168.471, 168.477, and 168.482(4) are unconstitutional, but may be severed from the remainder of 2018 PA 608.

Petitions to initiate legislation or a referendum, and petitions to amend the Constitution, may be circulated on a city-township petition form under MCL 168.482(4), or a countywide form under MCL 168.544d.

Subsection 7 of MCL 168.482, and MCL 168.482c, as amended by 2018 PA 608, requiring the disclosure of the paid or voluntary status of petition circulators on the face of a petition, violate the speech clause of the Michigan Constitution and the U.S. Constitution, but may be severed from the remainder of 2018 PA 608.

Subsections 1 and 2 of MCL 168.482a, as amended by 2018 PA 608, requiring paid circulators to file an affidavit before circulating petitions, violate the speech clause of the Michigan Constitution and the U.S. Constitution and are unconstitutional, but may be severed from the remainder of 2018 PA 608.

Subsection 3 of MCL 168.482a, as amended by 2018 PA 608, requiring the invalidation of signatures on petition sheets containing false or fraudulent information supplied by the circulator, does not violate the speech clause of the Michigan Constitution or the U.S. Constitution.

Subsection 4 of MCL 168.482a, as amended by 2018 PA 608, requiring the invalidation of signatures on a petition sheet that do not comply with a mandatory form or content requirement, does not violate the speech clause of the Michigan Constitution or the U.S. Constitution.

Subsection 5 of MCL 168.482a, as amended by 2018 PA 608, requiring the invalidation of signatures that were not signed in the presence of the circulator of the petition sheet, does not violate the speech clause of the Michigan Constitution or the U.S. Constitution.

Subsection 1 of MCL 168.482b, as amended by 2018 PA 608, providing an approval process for the summary of a ballot proposal, does not violate article 2, § 9 of the Michigan Constitution.

The Director of Elections and the Board of State Canvassers are authorized to draft and approve a statement of purpose for a statewide ballot proposal that differs from the summary of the proposal previously approved by the Board under § 482b(1), as amended by 2018 PA 608.

Subsection 2 of MCL 168.479, as amended by 2018 PA 608, requiring a person to file a legal challenge regarding a determination as to the sufficiency of an initiative or referendum petition in the Michigan Supreme Court, does not violate article 6, § 4 of the Michigan Constitution.

Subsection 2 of MCL 168.479, as amended by 2018 PA 608, requiring the Michigan Supreme Court to accord highest priority to cases challenging the sufficiency of petitions, violates the separation of powers clause of the Michigan Constitution and is unconstitutional, but may be severed from the remainder of 2018 PA 608.

Opinion No. 7310 May 22, 2019

The Honorable Jocelyn Benson
Secretary of State
Richard H. Austin Building
430 W. Allegan Street
Lansing, MI 48909

You have asked six questions regarding the constitutionality of 2018 PA 608, which amended the Michigan Election Law, 1954 PA 116, MCL 168.1 *et seq.,* to impose additional requirements and limitations on persons seeking to circulate

petitions to initiate legislation, to invoke the right of referendum, and to amend the Michigan Constitution.[1]

Background

Public Act 608 was introduced as House Bill 6595 on December 6, 2018.[2] It passed the House, as substituted, on December 12, 2018, by a vote of 60 to 49, and was given immediate effect.[3] The Senate made several amendments and passed a substituted bill on December 21, 2018, by a vote of 26 to 12, and gave the bill immediate effect.[4] The bill was returned to the House the same day, where the Senate substitute was concurred in and passed on a 57 to 47 vote. Then Governor Rick Snyder signed the bill on December 28, 2018, and it became immediately effective.[5]

Legal principles

When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent. Further, when considering a claim that a statute is unconstitutional . . . the wisdom of the

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[1] This office received written comments from Samuel R. Bagenstros and Sharon Dolente on behalf of the American Civil Liberties Union Fund of Michigan, and from Patrick Anderson.

[2] See http://www.legislature.mi.gov/(S(vcpxxi2t1ljspspqg3rkmk0d))/mileg.aspx?page=getObject&objectName=2018-HB-6595 (last accessed May 20, 2019).

[3] *Id.*

[4] *Id.*

[5] *Id.*

legislation" is not part of the inquiry. *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003) (citations omitted). "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (quotation marks and citations omitted).

Because the statutes amended or added by Public Act 608 have yet to be applied or enforced as to any person or entity, this office is limited to conducting a facial review of their constitutionality.[6] Generally, a statute will fail to withstand facial review only if " 'no set of circumstances exists under which the [statute] would be valid' " and " '[t]he fact that the . . . [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient' " to render it invalid. *Council of Organizations & Others for Educ About Parochiaid, Inc v Governor*, 455 Mich 557, 568 (1997), quoting *United States v Salerno*, 481 US 739, 745 (1987). Indeed, " '[i]f any state of facts reasonably can be conceived that would sustain [a legislative act], the existence of the state of facts at the time the law was enacted must be assumed' " and the statute upheld. *Id.* But this deference is diminished with respect to facial challenges raising First Amendment issues. As the Sixth Circuit Court of Appeals has recognized, courts "rightly lighten this load in the

[6] Moreover, the opinions process is generally confined to answering questions of law, not the resolution or finding of facts. MCL 14.32; *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300–302 (1985), cert den 479 US 939 (1986).

context of free-speech challenges to the facial validity of a law." *Connection Distrib Co v. Holder*, 557 F3d 321, 335 (CA 6, 2009)(en banc).

Analysis of Questions

Question 1

In Michigan, the people have retained for themselves the power to initiate or refer legislation and to propose constitutional amendments that, if certain requirements are met, may be placed on the ballot and voted on by the people. Const 1963, art 2, § 9; art 12, § 2. Your first question relates to amendments of MCL 168.471, 168.477, and 168.482(4). These statutes, as amended by Public Act 608, impose a signature-distribution requirement regarding initiative and referendum petitions circulated under article 2, § 9 and petitions to amend the Constitution circulated under article 12, § 2.[7]

A. Signature-distribution requirement

As amended by Public Act 608, MCL 168.471 now limits the number of petition signatures that may be counted from any one congressional district:

> *Not more than 15% of the signatures to be used to determine the validity of a petition described in this section shall be of registered electors from any 1 congressional district. Any signature submitted on a petition above the limit described in this section must not be counted.*

[7] Of the 24 states that permit initiatives or referendums, 17 have some form of signature distribution requirement, most of which are provided for in that state's constitution. See Alaska Const, art 11, § 3; Ark Const, art 5, § 1; Colo Const, art 5, § 1; Fla Const, art 11, § 3; Idaho Code Ann § 34-1805, Md Const, art 16, § 3; Mass Const, art XLVIII, Part VI, General Provisions, § 2; Mo Const, art 3, §§ 50, 52a; Miss Const, art 15, § 273(3); Mont Const, art 3, § 4; Neb Const, art 11, § 2; Nev Const, art 19, § 2; NM Const, art 4, § 1; Ohio Const, art 2, § 1g; Utah Code Ann, § 20A-7-201(a)(ii); Wyo Const, art 3, § 52. Various courts have addressed the constitutionality of distribution requirements. See *Semple v Williams*, 290 F Supp 3d 1187, 1193-1194 (D Colo, 2018) (collecting cases).

> When filing a petition described in this section with the secretary of state, a person must sort the petition so that the petition signatures are categorized by congressional district. In addition, when filing a petition described in this section with the secretary of state, the person who files the petition must state in writing a good-faith estimate of the number of petition signatures from each congressional district. [Emphasis added.]

Michigan is currently divided into 14 congressional districts, all of which span multiple counties, except for District 13, which includes only Wayne County. See 2011 PA 128.

Consistent with this amendment, MCL 168.477 was amended to provide that the Board of State Canvassers[8] "may not count toward the sufficiency of a petition described in this section any valid signature of a registered elector from a congressional district submitted on that petition that is above the 15% limit described in section 471."

In keeping with these changes, the Legislature also specified the use of a different petition format for circulating these petitions. MCL 168.482(4) was amended to require that petitions be circulated on a congressional district form:

> The following statement must appear beneath the petition heading:
>
> "We, the undersigned qualified and registered electors, residents in the _____ *congressional district* in the state of Michigan, respectively petition for (amendment to constitution) (initiation of legislation) (referendum of legislation) (other appropriate description)." [Emphasis added.]

[8] The Board of State Canvassers is a constitutional board created by the Michigan Constitution, Const 1963, art 2, § 7, and its duties and responsibilities are established by law, MCL 168.22(2) and MCL 168.841. The Board is charged with performing various duties relating to the canvass of petitions filed under article 2, § 9 and article 12, § 2. See, e.g., MCL 168.475, 168.476, 168.477.

Sponsors of initiative petitions must obtain signatures from registered electors totaling 8% (now 340,047) of the total votes cast for all candidates for governor at the last preceding general election. Const 1963, art 2, § 9. Referendum sponsors must obtain signatures from 5% (now 212,530) of registered electors. *Id.* And sponsors of petitions to amend the Constitution must obtain signatures from registered electors totaling 10% (now 425,059) of the total votes cast for all candidates for governor at the last preceding general election. Const 1963, art 12, § 2.

Before the amendments, these petitions were generally circulated countywide and there was no limit on how many signatures could be collected from any one county. Depending on the size of a county,[9] a petition sponsor could theoretically collect all 340,047 signatures required for an initiative petition from one county. But under the amendments, no more than 15%—now 51,007 signatures—from any one of the 14 congressional districts may be counted in support of the petition.[10] The 15% limitation therefore has the effect of requiring a sponsor to obtain signatures from roughly half of Michigan's 14 congressional districts.[11] Proponents of the legislative amendments argued that a "maximum percentage from each congressional district would ensure that petitions destined for the ballot were

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[9] The population of Michigan's 83 counties varies widely. See http://www.senate.michigan.gov/sfa/Economics/MichiganPopulationByCounty.PDF.

[10] Fifteen percent of 340,047 is 51,007.05.

[11] Michigan election law requires candidates running for certain elected offices to obtain signatures on nominating petitions from "at least ½ of the congressional districts of the state." See MCL 168.53, 168.93.

supported by a more representative geographic cross-section of Michiganders[.]" House Fiscal Analysis, HB 6595, December 13, 2018, p 2.[12]

B. Constitutionality of amendments

You ask whether these amendments are constitutional under article 2, § 9 and article 12, § 2 of the Michigan Constitution.

Article 2, § 9, regarding initiatives and referendums, provides in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. . . . *To invoke the initiative or referendum*, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected *shall be required*.
>
> * * *
>
> The legislature shall implement the provisions of this section. [Emphasis added.]

The plain language of § 9 does not include a distribution component with respect to signatures. In other words, § 9 does not *limit* the number of signatures that can be counted from any particular geographic region or political subdivision in Michigan, nor does it *require* that petitions be signed by a certain number of registered electors in different geographic or political subdivisions. Rather, "[t]o

[12] The analysis is available at http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-6595-718A3730.pdf (last accessed May 20, 2019).

invoke the initiative or referendum" process only a specific percentage of signatures of registered electors in the State of Michigan "shall be required."

Article 12, § 2, regarding petitions to amend the Constitution, similarly does not contemplate geographic dispersion of supporting signatures:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. *Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected.* Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. *Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. . . .* [Emphasis added.]

Like article 2, § 9, article 12, § 2 does not limit the number of signatures collected from any one geographic region or political subdivision in order to obtain the required 10%. Rather, only a specific percentage of signatures of registered electors in the State of Michigan is required.

The question then is whether the Legislature was authorized to "implement" under article 2, § 9 or to "prescribe[ ]" under article 12, § 2, the 15% signature distribution limitation.

When interpreting the Constitution, the primary duty is to "ascertain . . . the general understanding and therefore the uppermost or dominant purpose of the people when they approved the provision or provisions." *Michigan Farm Bureau v Sec'y of State,* 379 Mich 387, 390–391 (1967). A constitutional provision must be

interpreted in the "sense most obvious to the common understanding." *House Speaker v Governor,* 443 Mich 560, 577 (1993). One may also consider the circumstances surrounding the adoption of the provision, which may include consideration of the constitutional convention record and reference to existing law and custom at the time of the Constitution's adoption. *Id.* at 580–581.

Moreover, there is an overriding rule of constitutional construction that requires that the referendum process "forming as it does a specific power the people themselves have expressly reserved, be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Michigan Farm Bureau,* 379 Mich at 393. Thus, "constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Kuhn v Dep't of Treasury,* 384 Mich 378, 385 (1971); *Farm Bureau Mutual Ins Co of Michigan v Comm'r of Ins,* 204 Mich App 361, 367 (1994).

In *Wolverine Golf Club v Sec'y of State*, the Michigan Supreme Court addressed whether a statute "requiring initiative petitions to be filed not less than 10 days before the start of a legislative session [was] a constitutionally permissible implementation of" article 2, § 9. 384 Mich 461, 465–467 (1971). The Court determined that the statute drew its viability from the 1908 Constitution, and that the relevant provision no longer appeared in § 9. As a result, the Court could "not regard this statute as an implementation of the provision of Const 1963, art 2, § 9." *Id*. at 466. The Court "read the stricture of that section, 'the legislature shall implement the provisions of this section,' *as a directive to the legislature to*

formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate. This constitutional procedure is self-executing." *Id.* (emphasis added). Citing other precedents, the Court continued:

> It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision.
>
> > "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon".
>
> Whether we view the ten day filing requirement in an historical context or as a question of constitutional conflict, the conclusion is the same—the requirement restricts the utilization of the initiative petition and lacks any current reason for so doing. [*Id*. (citations omitted; internal quotations omitted).]

Accordingly, the Court in *Wolverine Golf Club* held the statute unenforceable. *Id.* at 466–467.

A similar result is compelled here under article, 2, § 9. The Legislature's authority in § 9 to "implement" that section is limited to "formulat[ing] the *process* by which initiative petitioned legislation shall reach the legislature or the electorate." *Id*. at 466 (emphasis added). The Legislature cannot impose an additional obligation that does not appear in article 2, § 9 and that curtails or unduly burdens the people's right of initiative and referendum.

Here, the 15% distribution requirement goes beyond a process requirement to impose a substantive limitation on the number of voters within a congressional district whose signatures may be counted under article 2, § 9. Yet § 9 only requires

petition sponsors to obtain a specific percentage of signatures from registered electors anywhere in the State of Michigan in order to invoke the right of initiative and referendum. The plain language of article 2, § 9 cannot be interpreted to authorize the Legislature's imposition of the 15% distribution requirement added by 2018 PA 608.

Turning to article 12, § 2, this section provides that petitions to amend the Constitution "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." Const 1963, art 12, § 2. This language "clearly authorizes the Legislature to prescribe by law for the *manner* of signing and circulating petitions to propose constitutional amendments." *Consumers Power Co v Attorney General*, 426 Mich 1, 6 (1986) (emphasis added). See also *Citizens for Capital Punishment v Secretary of State,* 414 Mich 913, 914–915 (1982). Even so, in a recent challenge to a petition to amend the Constitution, the Michigan Supreme Court cautioned against allowing interference with legislative petitions under the guise of setting procedure:

> While the right to propose amendments by initiative must be done according to constitutional requirements, we have observed that "it may be said, generally, that [the right] can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises." Indeed, we have held that Article 12, § 2 is self-executing, although the Constitution explicitly allows the Legislature to prescribe by law *procedures* regulating the initiative. [*Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42, 63 (2018) (emphasis added) (footnotes omitted).]

And this understanding is supported by the 1963 Constitution's Address to the People with regards to article 12, § 2 , which states that "[d]etails as to form of

petitions, their circulation and other elections *procedures* are left to the determination of the legislature[.]" 2 Official Record, Constitutional Convention 1961, p 3407 (emphasis added). [13] See also, OAG, 1963-1964, No. 4285, p 289 (February 20, 1964).

Of course, in *Consumers Power Co* the Michigan Supreme Court determined that a statute could create a rebuttable presumption that petition signatures were stale after 180 days concluding that the statute was within the Legislature's authority:

> [T]he Legislature has followed the dictates of the constitution in promulgating MCL 168.472a [ ]. The statute sets forth a requirement for the signing and circulating of petitions, that is, that a signature which is affixed to a petition more than 180 days before that petition is filed with the Secretary of State is rebuttably presumed to be stale and void. The purpose of the statute is to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment. [426 Mich at 7–8.]

However, unlike the statute in *Consumers Power Co* that created a rebuttable presumption regarding the validity of signatures, the 15% distribution requirement imposes an absolute limitation, which denies many registered electors the right to have their signatures counted—a limitation without any basis in the language of article 12, § 2. As a result, the amendments imposing the 15% distribution requirement are unconstitutional under article 12, § 2.

[13] To ascertain the purpose sought to be accomplished by a constitutional provision, the "Address to the People" may be consulted. *Regents of the Univ of Michigan v State*, 395 Mich 52 (1975).

C. Severability of the amendments

Having concluded that the amendments to §§ 471, 477, and 482(4) of Public Act 608 are unconstitutional, it is necessary to determine whether the offending provisions may be severed from the remainder of Public Act 608.

Public Act 608 does not specifically address severability. Nevertheless, the Legislature has generally provided for the severability of invalid statutes in MCL 8.5, which states that "[i]f any portion of an act . . . shall be found to be invalid . . . such invalidity shall not affect the remaining portions . . . of the act which can be given effect without the invalid portion . . . provided such remaining portions are not determined . . . to be inoperable[.]" See also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 346 (2011); *People v McMurchy*, 249 Mich 147, 158 (1930) (when one part of a statute is held unconstitutional, the remainder of the statute remains valid unless all parts of the statute are so interconnected that the Legislature would likely not have passed the one part without the other).

In this case, except as noted in relation to Question 2, below, the amendments to §§ 471, 477, and 482(4) were insular and discrete additions to these statutes, and they may be struck from the Act, leaving the remaining portions operable and in effect.

It is my opinion, therefore, that the Legislature exceeded its constitutional authority under article 2, § 9 and article 12, § 2 of the Michigan Constitution in

enacting a 15% signature distribution requirement based on congressional districts, and the amendments to MCL 168.471, 168.477, and 168.482(4) are unconstitutional, but may be severed from the remainder of 2018 PA 608.[14]

Question 2

Your next question concerns amendments to MCL 168.544d. Previously, section 544d provided that "petitions for a constitutional amendment, initiation of legislation, or referendum of legislation or a local proposal may be circulated on a countywide form." In Public Act 608, however, the Legislature deleted the reference to the initiative and referendum petitions so that the section now provides:

> Nominating petitions for the offices under this act and petitions for a local proposal may be circulated on a countywide form. Petitions circulated countywide must be on a form prescribed by the secretary of state, which form must be substantially as provided in sections 482, 544a, or 544c, whichever is applicable. The secretary of state may provide for a petition form larger than 8-1/2 inches by 13 inches and shall provide for identification of the city or township in which the person signing the petition is registered. The certificate of the circulator may be on the reverse side of the petition. This section does not prohibit the circulation of petitions on another form prescribed by this act. [MCL 168.544d, as amended by 2018 PA 608.]

As a result of the amendment, § 544d no longer expressly provides for the circulation of petitions to amend the Constitution, to initiate legislation, or for a referendum, to be circulated on a countywide form. This amendment was presumably made as part of the 15% signature distribution limitation, which required these petitions to be circulated within a congressional district.

[14] Because these amendments are unconstitutional under the Michigan Constitution, it is unnecessary to address whether they violate federal law or the U.S. Constitution.

You ask whether you "retain the authority to prescribe a substantially compliant, congressional district-based form for statewide ballot proposals."

As discussed above in question one, the amendments limiting the number of signatures that may be counted from each congressional district and requiring the use of a congressional district petition form are unconstitutional. With those amendments stricken, the question becomes whether the Legislature would still have intended to preclude the use of countywide petition forms for initiating petitions to amend the Constitution, to initiate legislation, or for a referendum, as previously permitted by § 544d. In other words, it must be determined whether barring the use of countywide forms would be consistent with the "manifest intent of the Legislature." See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 346; *McMurchy*, 249 Mich at 158.

Here, the central purpose for removing the option of using countywide forms for initiatives and referendums appears to have been to effectuate the new requirement that these initiatives be circulated on a congressional district petition form. See MCL 168.482(4). With the district-level requirements no longer applicable, precluding the option of using countywide forms is no longer consistent with the Legislature's intent. Therefore the amendment to § 544d cannot be severed from the changes to §§ 471, 477, and 482(4).

As a result, the previous versions of § 482(4) and § 544(d) would continue to apply. See, e.g., *Frost v Corporation Comm*, 278 US 515, 526–528 (1929)

(unconstitutional amendment of statute was a nullity, "leaving the provisions of the existing statute unchanged"); *Campau v Detroit*, 14 Mich 276, 286 (1886); *Fillmore v Van Horn*, 129 Mich 52 (1901). Subsection 482(4) previously provided for circulation of these petitions within a city or township, i.e., on a city-township petition form. Section 544d allowed countywide forms. Since the previous language applies again, petitions to initiate or refer legislation or to amend the Constitution may be circulated on a city-township petition form, and on a countywide form under § 544d.

It is my opinion, therefore, that petitions to initiate legislation or a referendum, and petitions to amend the Constitution, may be circulated on a city-township petition form under MCL 168.482(4) or on a countywide form under MCL 168.544d.

Questions 3 and 6

In questions 3 and 6 you raise concerns relating to new requirements regarding the form of petitions and circulation requirements. 2018 PA 608, §§ 482 482a, 482c. You ask whether these provisions are constitutional.

A. Check-box requirement

The form of a petition to initiate or refer legislation or to amend the Constitution is generally provided for in MCL 168.482. Public Act 608 amended MCL 168.482 by adding subsection 7, which requires that "[e]ach petition under this section must provide at the top of the page *check boxes* and *statements* to clearly

indicate whether the circulator of the petition *is a paid signature gatherer or a volunteer signature gatherer*." (Emphasis added.)[15]

Given its nature, this statute is best analyzed under the speech clause of the Michigan Constitution and the U.S. Constitution. Const 1963, art 1, § 5; US Const, Am I.

In *Woodland v Michigan Citizens Lobby*, the Michigan Supreme Court clarified that the state's speech and association clauses, article 1, §§ 3 and 5, applied to the "individual right to solicit signatures" for petitions. 423 Mich 188, 215 (1985). The free speech rights guaranteed by article 1, § 5 have been interpreted as coterminous with those of the First Amendment, and Michigan courts have applied First Amendment jurisprudence in analyzing speech rights under the Michigan Constitution. *Id.* at 202; *Michigan Up & Out of Poverty Now Coal v State*, 210 Mich App 162, 168–69 (1995).

In the seminal case *Meyer v Grant*, the U.S. Supreme Court expressly held that "[t]he circulation of an initiative petition" is "core political speech" that "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 US 414, 421–22 (1988). See also *John Doe No. 1 v Reed*, 561 US 186, 195 (2010) ("the expression of a political view [by the signor of a petition] implicates a First Amendment right"). But the Court has also recognized

[15] Public Act 608 defined a "paid signature gatherer" in MCL 168.482d as "an individual who is compensated, directly or indirectly, through payments of money or other valuable consideration to obtain signatures on a petition."

that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v Brown,* 415 US 724, 730 (1974); see *Buckley v American Constitutional Law Found, Inc* (*ACLF*), 525 US 182, 187 (1999); *Timmons v Twin Cities Area New Party,* 520 US 351, 358 (1997); *Anderson v Celebrezze,* 460 US 780, 788 (1983). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *ACLF,* 525 US at 191. And Michigan's Constitution expressly provides that the Legislature "shall enact laws to regulate the time, place, and manner of all nominations and elections, to preserve the purity of elections," and to "guard against abuses of the elective franchise[.]" Const 1963, art 2, § 4(2).

In apparent exercise of that authority, the Michigan Legislature amended section 482, adding subsection 7, which requires that a petition form contain check boxes for the circulator to mark, designating his or her status as either a paid or voluntary circulator. 2018 PA 608, § 482(7).[16] Section 482c was also added, providing that the "circulator of a petition under section 482 who knowingly makes a false statement concerning his or her status as a paid signature gatherer or volunteer signature gatherer is guilty of a misdemeanor." 2018 PA 698, § 482c. As a result, the face of a petition circulated under § 482 now raises the issue of whether

[16] The State of Arizona has virtually the same requirement. See Az St § 19-102(B)–(D). Other states have similar requirements requiring disclosure of the circulator's paid or voluntary status. See Ca Elec Code § 101; Mo St §§ 116.080(1), 116.040; Ne St § 32-628(4); Oh St § 3519.05; Or St §§ 250.045, 250.052(1); Wy St § 22-24-310.

the circulator is paid or a volunteer, and a circulator who knowingly marks the wrong check box is guilty of a misdemeanor. [17]

The U.S. Supreme Court has decided "a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.' " *John Doe No. 1*, 561 US at 196 (citations omitted). "That standard 'requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.' " *Id*. (citations omitted). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' " *Id*. (citations omitted).

The legislative history for Public Act 608 does not reveal either the purpose for enacting the check-box requirement or the concern that the amendment was intended to address. The U.S. Supreme Court has observed that disclosure requirements can provide "the electorate with information about the sources of election-related spending" and "help citizens make informed choices in the political marketplace." *Citizens United*, 558 US at 367. See also *Buckley v Valeo,* 424 US 1, 66 (1976) (disclosure provides the electorate with information "as to where political

[17] While the statute requires that the form contain these check boxes, and further requires that the check boxes must be completed at the time the petition is submitted, there is no explicit requirement in the statute that the check boxes be completed at the time the petitions are circulated. Nevertheless, the inclusion of the new language on the form raises the issue of the circulator's volunteer or paid status when the form is presented for signature and invites inquiry if not completed at the time prior to or during the interaction between the circulator and the elector.

campaign money comes from and how it is spent," thus aiding electors in evaluating who seeks their vote) (internal quotation marks omitted).

With respect to the use of paid circulators, the U.S. Supreme Court has addressed the validity of various disclosure requirements. In *ACLF*, the Court addressed both a requirement that circulators wear badges, which included their name and status as a paid or voluntary circulator, and a requirement that circulators complete an affidavit section of the petition that included the circulator's name, address, and signature. 525 US at 197–198. Recognizing the badge requirement as different in kind from the affidavit, the Court upheld the affidavit requirement, but held that the badge requirement violated Free Speech principles because it worked to discourage political expression at the crucial moment in the petition process.

The Court's analysis addressed only the requirement that the badge include the circulator's name, and found it unconstitutional because it "force[d] circulators to reveal their identities at the same time they deliver their political message" and "expose[d] the circulator to the risk of heat of the moment harassment." *Id.* at 198–199 (internal citations and quotations omitted). "The affidavit, in contrast, does not expose the circulator to the risk of 'heat of the moment' harassment." *Id.* (citation omitted).

The Court reasoned that the moment the circulator interacts with the voter is a critical juncture and "[t]he injury to speech is heightened . . . because the badge

requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *ACLF*, 525 US at 199. The Court contrasted that result with the affidavit requirement, "which must be met only after circulators have completed their conversations with electors[.]" *Id*. (citation omitted). Accordingly, the Supreme Court held that the badge requirement "discourages participation in the petition circulation process" and violated the First Amendment. *Id.* at 200.

The *ACLF* Court contrasted disclosure requirements imposed on initiative proponents, and concluded that to the extent the statutes required the *payors* (the ballot initiative proponents) to disclose their expense information, the statutes were constitutional. In particular, the Court addressed whether statutes requiring ballot initiative proponents to file monthly reports and a final report disclosing specific information as to circulators—their names, addresses, and the amount the circulators were paid—were unconstitutional. 525 US at 201. Recognizing that disclosure provisions can further important governmental interests relating to transparency and deterring corruption in the elections process, see *Buckley*, 424 US at 66–68, the Court concluded that "[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for their initiatives, responds to that substantial state interest." *Id*. at 202–203. But with respect to disclosing the circulators' information, the "added benefit of revealing the names of paid circulators and amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." *Id.* at 203.

The Court also observed that ballot initiatives do not present the same risk of corruption as when money is spent on behalf of candidates. *Id.*, citing *Meyer*, 486 US at 427–428. And with respect to the use of paid circulators, the Court stated that "absent evidence to the contrary, 'we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.,* at 203–204, quoting *Meyer*, 486 US at 426.

Consequently, while recognizing the state's interest in disclosure of petition proponent information, the Supreme Court concluded that "[l]isting paid circulators and their income from circulation 'forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts,' " and that the requirement was only "tenuously related to the substantial interests disclosure serves." *Id*. at 204 (internal citations omitted). Thus, "Colorado's reporting requirements, to the extent that they target paid circulators, 'fai[l] exacting scrutiny.' " *Id*. at 204. The Court noted that Colorado could protect the integrity of the ballot initiative process through less problematic measures and did so through various other statutes. *Id*. at 204–205.[18] See also *Washington Initiatives Now v Rippie,* 213 F3d 1132, 1139 (CA

[18] The Supreme Court noted with approval Colorado's provision making it unlawful to forge signatures and a provision voiding petitions if a circulator violates any provision of the laws governing circulation. *ACLF*, 525 US at 204–205.

9, 2000) (striking down a state law that required only paid circulators to disclose their identities).

Like the disclosure requirement found unconstitutional in *ACLF*, the check-box requirement at issue here focuses, not on information relevant to the proponent of a petition, but rather on the circulator collecting signatures. It similarly exposes the circulator to the risk of "heat of the moment" harassment, without any apparent state interest in the circulator's personal details. Thus, under *ACLF*'s rationale, the check-box requirement fails to meet the exacting scrutiny necessary for its constitutional validity.

The Sixth Circuit Court of Appeals' recent decision in *Libertarian Party of Ohio v Husted* further supports this conclusion. In *Husted*, the court rejected a facial First Amendment challenge to an Ohio statute that required circulators of nominating petitions to disclose on petition sheets " 'the name and address of the person employing the circulator to circulate the petition, if any.' " 751 F3d 403, 406 (CA 6, 2014). The court upheld the statute where the record demonstrated a small burden on First Amendment activity coupled with an important and well-established governmental interest to which the disclosure requirement was substantially related.

In particular, after reviewing the record, the Sixth Circuit determined that the state's established interests outweighed what little evidence there was of burden: "the relevant evidence of chill—whether to paid circulators generally or to

those who circulate on behalf of minor party candidates—can best be described as scant. There is no record of any harassment or other efforts to dissuade circulators from circulating petitions." *Id.* at 416. The Court further observed that

> when we assess the chill apt to flow from Ohio's employer disclosure requirement, we note that the disclosure is not made by the circulator to the voter. Rather, the disclosure is made by the circulator when the petition is filed, after the signatures are gathered. So while the core First Amendment activity of communicating with voters is occurring, the disclosure requirement plays no part.

Id. at 417. The court emphasized that the circulator would not be inhibited in the circulator's interactions with a voter (elector) based on the disclosure requirement: "So while the core First Amendment activity of communicating with voters is occurring, the disclosure requirement *plays no part*." *Id.* at 417 (emphasis added). As a result, the "circulator does not directly lose anonymity with the voter whose signature is being solicited." *Id.*

Turning to the government's interest, the Sixth Circuit observed that the disclosure requirement had been adopted in the wake of proven fraud in the circulation of nominating petitions for a candidate for president by paid circulators. *Id.* at 417. The court noted testimony from the government that "the employer information requirement helps deter fraud and also to detect it," because "[i]t encourages employers of circulators to educate the circulators about applicable law and to hire individuals who will not reflect negatively on them. The information also helps if followup is necessary, because employers are often easier to contact than circulators." *Id.* Also, the "information enables the [Ohio] Secretary of State's Office to cross-check with campaign expenditure reports and thus contributes to

overall reporting compliance." *Id.* The Court noted additional testimony regarding fraud by paid circulators who had used names and addresses from phone books, and the absence of fraud by volunteer circulators. *Id*. at 418. "Taking all this testimony together, it appears that the employer disclosure requirement serves substantial and legitimate state interests. The governmental interest is far more than theoretical since Ohio has experienced fraud by paid circulators." *Id.*

Balancing the minimal burden imposed on circulators against the substantial governmental interest that was buttressed by proven instances of fraud, the court determined that the disclosure requirements met constitutional requirements. In doing so, the court further noted that the *ACLF* decision involved ballot initiative petitions and, there, the Supreme Court had not been presented with evidence of actual fraud. *Id*. at 419–420.

As can be seen, the Sixth Circuit's decision in *Husted* reinforces the conclusion that the check-box requirement does not withstand constitutional scrutiny. As noted, the Michigan check-box requirement exposes the circulator to possible exchanges with an elector, which may have a chilling effect on the circulator's willingness to participate in this process and thus is unlike Ohio's disclosure requirement in *Husted*. Rather than "play[ing] no part" in the gathering of signatures, *Husted,* 751 F3d at 417, Michigan's requirement may in fact create a "heat of the moment" exchange. Moreover, the statute at issue here relates to initiative petitions, as was at issue in *ACLF*, not candidate petitions. Thus,

controlling precedent in this jurisdiction supports the conclusion that the check-box requirement does not survive exacting scrutiny.

It is true that a factually analogous case from another jurisdiction upheld the statute in question, but its analysis is not persuasive. In *Citizens in Charge v Gale*, a federal district court upheld a Nebraska statute that required ballot initiative petitions to include a statement on the face of the petition that the circulator is being paid or is a volunteer circulator, whichever was applicable, in large type and red ink. 810 F Supp 2d 916, 922 (D Neb, 2011). That court rejected the plaintiffs' argument that the required language was "pejorative" as to paid circulators and constituted compelled speech and instead appeared to be swayed by the Government's argument that the requirement helped deter circulation fraud and did not impose a significant burden on circulators. Indeed, the record showed that a majority of petition drives after enactment of the statute that had been successful in placing issues on the ballot had used paid petition circulators. *Id.* at 928. Accordingly, the Court held the statute was constitutional.

However, not only is *Gale* not binding in Michigan, but it is inconsistent with *AFLC*'s concerns about circulators experiencing "heat of the moment harassment" and with the Supreme Court's recognition that there is a more substantial governmental interest in disclosure of information about the petition proponent than disclosure of information about the circulator at the point when the circulator is interacting with the public. Further still, unlike the evidentiary backdrop in *Gale* which served to justify the disclosures, no such evidence exists here. Consequently,

Gale does not warrant a different conclusion as to Public Act 608's check-box requirement.

In sum, the check-box requirement added to MCL 168.482(7) by Public Act 608 imposes a significant burden on the free speech rights of petition circulators under the state and federal constitutions without advancing any stated or apparent state interest in contemporaneous disclosure of the circulator's paid or volunteer status. As such, it does not meet the standard of exacting scrutiny applied in *ACLF* and is therefore unconstitutional. And, because the check-box requirement itself is unconstitutional, the inextricably related provision of Section 482c (which makes it a misdemeanor for a petition circulator to knowingly make a false statement concerning his or her status as a paid or volunteer signature gatherer—a statement that would be made in the check box) is likewise unconstitutional.

B. Severability of check-box requirements

Having concluded that the addition of § 482a(7) and § 482c in Public Act 608 is unconstitutional, it is necessary to determine whether the offending provisions may be severed from the remainder of Public Act 608.

As noted previously, Public Act 608 does not specifically address severability, but the Legislature has generally provided for the severability of invalid statutes in MCL 8.5. See also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 346 (2011); *People v McMurchy*, 249 Mich 147, 158 (1930). In this case, the addition of § 482a(7) and § 482c was insular and discrete

and thus may be struck from the Act, leaving the remaining portions operable and in effect.

It is my opinion, therefore, that subsection 7 of MCL 168.482, and MCL 168.482c, as amended by 2018 PA 608, requiring the disclosure of the paid or voluntary status of petition circulators on the face of a petition, violate the speech clause of the Michigan Constitution and the U.S. Constitution, but may be severed from the remainder of 2018 PA 608.

C. Circulator affidavit requirement

Public Act 608 also added MCL 168.482a(1) and (2), which require that a "paid signature gatherer" submit a separate affidavit before circulating a petition, and further require that signatures be rejected if the circulator does not do so:

> (1) If an individual who circulates a petition under section 482 is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer.
>
> (2) Any signature obtained on a petition under section 482 by an individual who has not filed the required affidavit under subsection (1) is invalid and must not be counted.

As above, these statutes are subject to "exacting scrutiny" under the First Amendment. *John Doe No. 1*, 561 US at 196. There must be a "substantial relation" between the affidavit requirements and a "sufficiently important" governmental interest. *Id.* "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.' " *Id.* (citations omitted). In making this evaluation, other

provisions in the regulatory scheme that serve a similar purpose and how those provisions interact with the challenged law should be considered. See *ACLF*, 525 US at 204–205.

Like the check-box provision, the affidavit requirements "target paid circulators" similar to the provisions struck down in *ACLF*. Subsections 482a(1) and (2) effectively require paid circulators to register to circulate petitions—requirements that do not apply to volunteer circulators. Moreover, the failure to file the affidavit before circulating as a paid circulator will result in the rejection of those signatures that were improperly collected. Together, these requirements impose a significant burden on paid circulators that does not apply to volunteer circulators. And this burden appears only tenuously responsive to a sufficiently important governmental interest.

The purpose of the affidavit requirement appears to be to provide the State with pre-circulation notice of a paid circulator's status. As discussed above, the Supreme Court, in *ACLF,* affirmed that states have a "substantial state interest" in knowing who is sponsoring an initiative or referendum and how much is being spent to support the proposal. *ACLF*, 525 US at 202–203. And the Court concluded that Colorado's reporting statutes requiring the "[d]isclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for the initiatives, respond[ed] to that substantial state interest." *Id*. at 202–203.

But here the affidavit requirement does not substantially respond to that interest because it does not require the disclosure of any payor information. In fact, it requires nothing about the sponsor, only confirmation of a circulator's status as a paid circulator to the Secretary of State. Additionally, at the time of filing, a petition will also contain the circulator's residential address, city or township, state, and zip code, in the event it becomes necessary to contact the circulator.[19] No reason is apparent why the Secretary of State would need, or be helped by, receiving this status information of a circulator. As a result, the affidavit requirement is not substantially related to Michigan's interest in transparency and the protection against corruption in the initiative and referendum process and, to the extent it targets paid circulators, the statute fails exacting scrutiny and is unconstitutional. See *ACLF*, 525 US at 204.

D. Severability of circulator affidavit requirement

Having concluded that subsections 482a(1) and (2) of Public Act 608 are unconstitutional, it is necessary to determine whether these provisions may be severed from the remainder of Public Act 608. Like the provisions discussed above, the addition of these subsections was insular and discrete. Thus, they may be struck from the Act, leaving the remaining portions operable and in effect. MCL 8.5; *In re Request for Advisory Opinion*, 490 Mich at 346; *McMurchy*, 249 Mich at 158.

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[19] MCL 168.544c, which applies to petitions circulated under § 482, requires a circulator to sign a petition and include a residential address, along with other information, before filing the petition with the Secretary of State. See MCL 168.482(6), 168.544c(1)–(3), (5), and (15).

It is my opinion, therefore, that subsections 1 and 2 of MCL 168.482a, as amended by 2018 PA 608, requiring paid circulators to file an affidavit before circulating petitions, violate the speech clause of the Michigan Constitution and the U.S. Constitution, but may be severed from the remainder of 2018 PA 608.

E. Certificate of circulator requirements

Consideration of your question about the penalties for false statements added by Public Act 608 requires a discussion of requirements for circulator certifications found elsewhere in the act.

Petitions circulated under MCL 168.482 (i.e., those for constitutional amendment, initiation of legislation, or referendum of legislation) must contain a "certificate of circulator" as provided for in MCL 168.544c(1), which generally applies to different types of petitions. See MCL 168.482(6). Under § 544c(1) the petition form must state under the heading "certificate of circulator":

> The undersigned circulator of the above petition asserts that he or she is 18 years of age or older and a United States citizen; that each signature on the petition was signed in his or her presence; that he or she has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once; and that, to his or her best knowledge and belief, each signature is the genuine signature of the person purporting to sign the petition, the person signing the petition was at the time of signing a registered elector of the city or township listed in the heading of the petition, and the elector was qualified to sign the petition.

The circulator is then directed to not sign or date the certificate until after circulating the petition. *Id.* The petition must thereafter include the following language:

____ If the circulator is not a resident of Michigan, the circulator shall make a cross or check mark on the line provided, otherwise each signature on this petition sheet is invalid and the signatures will not be counted by a filing official. By making a cross or check mark on the line provided, the undersigned circulator asserts that he or she is not a resident of Michigan and agrees to accept the jurisdiction of this state for the purpose of any legal proceeding or hearing that concerns a petition sheet executed by the circulator and agrees that legal process served on the secretary of state or a designated agent of the secretary of state has the same effect as if personally served on the circulator.

_____

(Printed Name and Signature of Circulator) (Date)

_____

(Complete Residence Address (Street and Number

or Rural Route)) Do not enter a post office box

_____

(City or Township, State, Zip Code)

_____

(County of Registration, if Registered to Vote, of

a Circulator who is not a Resident of Michigan)

Warning-A circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator is guilty of a misdemeanor. [MCL 168.544c(1).]

In addition to setting forth these form requirements, § 544c also imposes certain related penalties. For example, MCL 168.544c(5) provides that a "circulator shall not obtain electors' signatures after the circulator has signed and dated the certificate of circulator." If a circulator does so, the "filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date." *Id.* MCL 168.544c(8) provides that an "individual shall not . . . make a false statement in a certificate of a petition," or "[s]ign a name as circulator other than his or her own." An individual who does so, which includes a circulator, is guilty of a misdemeanor. MCL 168.544c(9). Section 544c imposes various other possible penalties and fines related to violations of subsection 544c(8), including the disqualification of "obviously fraudulent signatures on a petition form[.]" See MCL 168.544c(9)–(12). These provisions "apply to all petitions circulated under authority of the election law" "except as otherwise expressly provided[.]" MCL 168.544c(15).

1. Subsection 482a(3)

Subsection 482a(3), as added by 2018 PA 608, invalidates *all* signatures on a particular petition sheet if the circulator "provides or uses a *false address* or provides any *fraudulent information* on the certificate of circulator." (Emphasis added.) Under this subsection, in addition to a misdemeanor penalty for providing false information in the certificate of circulator pursuant to subsection 544c(8), all the signatures on the relevant petition sheet will be discounted. A determination regarding whether a circulator used a "false address" or provided "fraudulent

information" on a petition sheet would be made by the Board of State Canvassers during the canvass of the petition under MCL 168.476(1)–(2).[20] Given the content and timing of this new penalty, it may have been added in response to a recent decision by the Michigan Court of Appeals, which held that "Michigan's election laws make no allowance for striking elector signatures in the event that a circulator records an incorrect address" in the circulator's certificate. *Protecting Michigan Taxpayers v Bd of State Canvassers*, 324 Mich App 240, 250 (2018).

You question the constitutionality of subsection 482a(3)'s discounting of elector signatures based on a circulator's provision of false or fraudulent information on the petition sheet.

This is not the first time that the Legislature has invalidated signatures based on circulator error. MCL 168.544c(5) requires the exclusion of elector signatures or entire petition sheets based on the date of the signature or if the sheet was not signed and dated by the circulator: "A filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date." MCL 168.544c(2) requires the rejection of a signature if the elector "does not include his or her signature, his or her street address or rural route, or the date of signing on the petition[.]" See also *Protecting Michigan Taxpayers*, 324 Mich App at 248–250

[20] Subsection 476(2) provides that the "board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions. To conduct a hearing, the board may issue subpoenas and administer oaths." MCL 168.476(2).

(discussing application of MCL 168.544c). Thus, a circulator's error in failing to sign and date a petition before filing, or in collecting signatures after the date the circulator has signed and dated the petition, will result in the invalidation of otherwise valid elector signatures.

Now, a circulator's inclusion of a false address or other fraudulent information in the certificate will result in the discounting of elector signatures under § 482a(3).

When deciding whether a ballot access restriction is constitutional one must weigh the "character and magnitude" of the burden the state's rule imposes on those rights against the interests the state contends justify that burden, and consider the extent to which the state's concerns make the burden necessary. *Burdick v Takushi,* 504 US 428, 434 (1992), quoting *Anderson v Celebrezze,* 460 US at 788–789. Regulations imposing severe burdens on rights must be narrowly tailored and advance a compelling state interest. But lesser burdens will trigger less taxing review, and a state's " 'important regulatory interests' " will usually be enough to justify " 'reasonable, nondiscriminatory restrictions.' " *Burdick*, 504 US at 434, quoting *Anderson,* 460 US at 788.

Subsection 482a(3)'s requirement that elector signatures be rejected based on a circulator's inclusion of false information on a petition imposes a more than minimal but less than severe burden on petition circulators and on electors who sign the petition. As discussed above, the State already rejects elector signatures

based on circulator errors, and that provision has been upheld. See, e.g., *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 298–299 (CA 6, 1993) (affirming as constitutional Michigan statute requiring rejection of petition signatures where circulator dated petition sheet incorrectly). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process[.]" *ACLF,* 525 US at 191. Michigan has a substantial interest in protecting against fraudulent practices or corruption in the initiative and referendum process. *John Doe No. 1*, 561 US at 197–198. Discounting signatures on petition sheets on which a circulator has knowingly included a false address or other fraudulent information may encourage petition sponsors to more carefully select and educate the circulators they deploy. And it may protect against the inclusion of fraudulent signatures on a petition if the circulator is required to provide a correct address at which he or she may be found if there is any question as to the validity of petition signatures. Thus, on a facial review of this statute, the substantial interest of the State in promoting the integrity of the process, on balance, outweighs the burden imposed on petition circulators and signers. But again, because this is a new statute that has yet to be applied, it is possible that the future application of the statute to a particular circulator or elector may warrant subsequent review by the courts.

It is my opinion, therefore, that subsection 3 of MCL 168.482a, as amended by 2018 PA 608, requiring the invalidation of signatures on petition sheets

containing false or fraudulent information supplied by the circulator, does not violate the speech clause of the Michigan Constitution or the U.S. Constitution.

2. MCL 168.482a(4)

Subsection 4 of § 482a provides that "[i]f a petition under section 482 is circulated and the petition does not meet all of the requirements under section 482, any signature obtained on that petition is invalid and must not be counted." 2018 PA 608 § 482a(4).[21]

Subsection 482a(4) acts as a general, catch-all penalty provision for a form or content violation of § 482 not covered by another more specific statute. See, e.g., MCL 168.544c. For example, if a petition circulated under § 482 failed to include the new summary of the proposal required by § 482(3) or the warning to electors required under § 482(5), § 482a(4) would require signatures on that petition sheet to be discounted. In *Stand Up for Democracy v Secretary of State*, the Michigan Supreme Court held that mandatory petition form and content requirements must be complied with, and that nonconforming petitions are not entitled to placement on the ballot. 492 Mich 588, 601–619 (2012). "Entitlement to be placed on the ballot requires a showing of actual compliance with the law." *Id.* at 619. Subsection 482a(4) essentially implements that holding by confirming that form and content errors will result in the invalidation of signatures. This result is mitigated to some

[21] Public Act 608 amended § 482 to require a corresponding warning statement appear on the petition "that if the petition circulator does not comply with all of the requirements of this act for petition circulators, any signature obtained by that petition circulator on that petition is invalid and will not be counted." 2018 PA 608, § 482(8).

extent by the fact that petition sponsors may seek approval as to the form of their petition *before* circulating.[22]

Because the right to initiate or refer legislation, or to amend the Michigan Constitution, "is a wholly state-created right, . . . the state may constitutionally place nondiscriminatory, content-neutral limitations on the . . . ability to initiate" these processes. *Taxpayers United for Assessment Cuts*, 994 F2d at 297. Assuming that the form or content requirement is itself valid, subsection 482a(4) is a nondiscriminatory, content-neutral limitation, and is not unconstitutional. *Id*. at 297–299 (affirming as constitutional various Michigan statutes regarding the form and content of petitions and the rejection of signatures for failing to conform to statutes).

It is my opinion, therefore, that subsection 4 of MCL 168.482a, as amended by 2018 PA 608, requiring the invalidation of signatures on a petition sheet that does not comply with a mandatory form or content requirement, does not violate the speech clause of the Michigan Constitution or the U.S. Constitution.

3. MCL 168.482(5)

Subsection 5 of § 482a invalidates a signature on a petition sheet if it was "not signed in the circulator's presence[.]" 2018 PA 608, § 482a(5). Similarly, as

[22] The statutes provide for the Board of State Canvassers' review of the petitions *after* the petitions have been circulated and signatures obtained. See MCL 168.475; 168.476; 168.477. But for many years, the Board has provided the service of allowing persons or organizations circulating petitions to come before the Board and obtain pre-approval as to the form of their petitions prior to being circulated.

discussed above, the "certificate of circulator" prescribed by § 544c(1) both informs generally and requires the circulator to certify specifically "that each signature on the petition was signed in his or her presence." MCL 168.544c(1). Subsection 482a(5) now requires the discounting of signatures affixed to a petition outside the presence of the circulator. The importance of requiring an elector to sign in the presence of the circulator warrants little discussion. If a petition is signed outside the presence of the circulator, the circulator has no ability to affirm that the signature is in fact that of the person who purportedly signed the petition. The rejection of signatures proven to have been obtained outside the presence of the circulator is supported by the State's substantial interest in protecting against fraudulent practices or corruption in the initiative and referendum process. *John Doe No. 1*, 561 US at 197–198. See, e.g., *Taxpayers United for Assessment Cuts*, 994 F2d at 298–299 (affirming as constitutional Michigan statute requiring rejection of petition signatures where the circulator incorrectly dated the petition sheet). Subsection 482a(5) is a nondiscriminatory, content-neutral limitation and is not unconstitutional.

It is my opinion, therefore, that subsection 5 of MCL 168.482a, as amended by 2018 PA 608, requiring the invalidation of signatures on a petition that were not signed in the presence of the circulator of the petition sheet, does not violate the speech clause of the Michigan Constitution or the U.S. Constitution.

Question 4

Your fourth question relates to § 482, which was amended by Public Act 608 to require that petition sponsors include "[a] summary in not more than 100 words of the purpose of the proposed amendment or question proposed" on the face of a petition. MCL 168.482(3).

Public Act 608 also added § 482b, which permits, but does not require, a petition sponsor to submit the summary of the purpose of a proposed amendment or question to the Board of State Canvassers for approval:

> A person who circulates a petition under section 482 *may*, before circulating any petition, submit the summary of the purpose of the proposed amendment or question proposed that is required under section 482(3) to the board of state canvassers for approval as to the content of the summary. The board of state canvassers must issue an approval or rejection of the content of the summary not more than 30 days after the summary is submitted. The board of state canvassers may not consider a challenge to the sufficiency of a submitted petition on the basis of the summary being misleading or deceptive if that summary was approved before circulation of the petition. [MCL 168.482b(1) (emphasis added).]

The apparent aim of this provision was to provide a "safe harbor" that would preclude the Board of State Canvassers from subsequently finding fault with the petition based on the content of the summary. If a petition sponsor elects to submit the summary for review, subsection 482b(2) requires that the Director of Elections prepare the summary for review and approval by the Board of State Canvassers. 2018 PA 608, § 482b(2).

A. Approval of summary process

You note that "sponsors of referendum petitions are at a unique disadvantage compared with the sponsors of other types of petitions because the process by which the petition summary is approved can last up to 30 days." You further observe that "[a]lthough the approval process is voluntary, referendum petition sponsors who forego it due to time constraints will be deprived of the statute's safe harbor against future challenges." You ask whether this result is constitutional.

Based on your question, you do not challenge the Legislature's authority to require that a petition include a summary of the proposal under subsection § 482(3). Nor do you generally challenge the enactment of the voluntary review and approval process for the summary described in subsection § 482b(1). Rather, you question the application of the voluntary review process to sponsors of referendum petitions in certain situations.

Under Const 1963, art 2, § 9, "[t]he power of referendum . . . must be invoked . . . within 90 days following the final adjournment of the legislative session at which the law was enacted."[23] This provision has been interpreted to fix the end date by which a referendum petition must be filed, but not the start date for circulating petitions. *Michigan Farm Bureau v Sec'y of State*, 379 Mich at 393–396.

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[23] Const 1963, art 4, § 13 provides that "[e]ach regular session [of the Legislature] shall adjourn without day, on a day determined by concurrent resolution, at twelve o'clock noon[.]" The Legislature now generally adjourns in late December. See, e.g, *Bishop v Montante*, 395 Mich 672, 677 (1976) (noting Legislature's "consistent late December sine die adjournments").

Referendum petitions may be circulated before the end of the legislative session. The relevant date is the date of enactment of the targeted act. *Id.* But the petitions must be filed no later than the ninetieth day after adjournment of the session. Thus, this provision could result in a shorter circulation window when compared to petitions to initiate legislation or to amend the Constitution.[24] But that result is provided for by the text of the Constitution.

What is clear from the text of § 9, however, is that referendum sponsors are generally entitled to a minimum of 90 days within which to circulate and file petitions—from the date of adjournment to the ninetieth day after adjournment. Statutes that encroach on this minimum circulation period require scrutiny to determine whether they impose an impermissible "additional obligation[ ]" or "undue burdens" on the right to propose referenda. *Wolverine Golf Club*, 384 Mich at 466.

Here, the worst-case scenario would arise when a bill is enacted on the very last day of the legislative session. In that case, a referendum sponsor would have only the minimum 90 days within which to complete the circulation and filing of a petition. And if a sponsor elects to have a petition summary approved by the Board of State Canvassers it could take the Board thirty days to approve the summary under subsection 482b(1). In that case, if the referendum sponsor submits the

[24] There is no prescribed time period for circulating ballot proposal petitions. Instead, petition sponsors are guided by the application of MCL 168.472a, which provides that signatures more than 180-days old "shall not be counted."

summary for approval by the Board on day one of the 90-day period, and it takes the Board until the thirtieth day to approve the summary, the sponsor may have only 60 days left within which to circulate the petition and collect the required 212,530 signatures. Certainly, if approval of the summary was required by § 482b(1) under these circumstances, it could well result in an unconstitutional burden. *Wolverine Golf Club*, 384 Mich at 466.

Subsection 482b(1) does not require petition sponsors to seek approval of the summary. That process is voluntary. By choosing to forego the approval process, a referendum petition sponsor will not benefit from MCL 168.482b(1)'s express instruction that the Board of State Canvassers "may not consider a challenge to the sufficiency of a submitted petition on the basis of the summary being misleading or deceptive if that summary was approved before circulation of the petition." Nevertheless, it is a choice, not a requirement.

It is my opinion, therefore, that subsection 1 of MCL 168.482b, as amended by 2018 PA 608, providing an approval process for the summary of a ballot proposal, does not violate article 2, § 9 of the Michigan Constitution.

B. Use of summary as ballot language

You also ask whether the Board of Canvassers may later approve ballot language that differs from a summary of the statement of purpose previously approved by the Board of Canvassers under § 482b(1).

MCL 168.482b(2), as added by Public Act 608, imposes requirements on petition summary language and provides that it be prepared by the Director of Elections subject to approval by the Board of State Canvassers:

> If a person submits the summary of the purpose of the proposed amendment or question proposed [to the Board of Canvassers] as provided in subsection (1), all of the following apply:
>
> (a) The summary of the purpose of the proposed amendment or question proposed must be prepared by the director of elections, with the approval of the board of state canvassers.
>
> (b) The summary is limited to not more than 100 words and must consist of a true and impartial statement of the purpose of the proposed amendment or question proposed in language that does not create prejudice for or against the proposed amendment or question proposed.
>
> (c) The summary must be worded so as to apprise the petition signers of the subject matter of the proposed amendment or question proposed, but does not need to be legally precise.
>
> (d) The summary must be clearly written using words that have a common everyday meaning to the general public.

As you note in your request, the drafting requirements for the summary of the purpose mirror the requirements for the ballot language that the Director of Elections drafts and the Board of State Canvassers approves after a petition to initiate or refer legislation or to amend the Constitution has been declared sufficient for placement on the ballot. See MCL 168.22e, 168.32, 168.477, 168.485, and 168.643a.

"Nothing will be read into a statute that is not within the manifest intention of the Legislature as gathered from the act itself." *In re Schnell*, 214 Mich App 304, 309 (1995). Moreover, "there is a presumption against implied repeals." *Int'l*

Business Machines Corp v Dep't of Treasury, 496 Mich 642, 660 (2014), citing *Jackson v Michigan Corrections Comm*, 313 Mich 352, 356 (1946). In enacting Public Act 608, the Legislature left untouched the statutes providing for the drafting, review, and approval of the ballot language by the Director of Elections and the Board. And the Legislature did not expressly provide that, if a summary is approved, it must also be used as the ballot language.

Because the drafting standards are the same for both the summary and ballot language, the summary *could* later be approved by the Board of State Canvassers as ballot language—but the Board is not *required* to use the previously approved summary. Rather, the Director of Elections and the Board remain authorized to draft and approve ballot language that differs from the petition summary. See MCL 168.22e, 168.32, 168.477, 168.485, and 168.643a. Notably, if the Director and the Board intend to use the previously approved summary as ballot language, the language must still be approved in conformity with MCL 168.22e, which requires the approval of ballot language for initiative and referendum petitions take place at a public meeting of the Board noticed three days in advance of the meeting date. Various individuals have a right to notice of, and to speak at, the public meeting regarding proposed ballot language. MCL 168.22e(1)–(2).

It is my opinion, therefore, that the Director of Elections and the Board of State Canvassers are authorized to draft and approve a statement of purpose for a

statewide ballot proposal that differs from the summary of the proposal previously approved by the Board under MCL 168.482b(1), as amended by 2018 PA 608.

Question 5

Finally, you ask whether MCL 168.479, as amended by Public Act 608, violates any part of article 6 of the Michigan Constitution relating to the judiciary, or Michigan's separation of powers clause, as set forth in article 3, § 2 of the Constitution.

A. Filing in the Michigan Supreme Court

Public Act 608 added subsection 2 to MCL 168.479, which provides that a person aggrieved by a decision of the Board of State Canvassers concerning the sufficiency of a petition must file a claim in the Michigan Supreme Court within seven days:

> (1) Notwithstanding any other law to the contrary and subject to subsection (2), any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.
>
> (2) If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, *the person must file a legal challenge to the board's determination in the supreme court within 7 business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first.* [Emphasis added.]

Under subsection 2, aggrieved persons appear limited to filing legal challenges regarding the sufficiency of an initiative petition in the Supreme Court.

Previously, given the discretionary "may" in subsection 1, such claims were typically brought first in the Michigan Court of Appeals, and then appealed to the Michigan Supreme Court as necessary, consistent with MCL 600.4401(1)

Article 6, § 4 of the Constitution sets forth the Supreme Court's jurisdiction: "[T]he supreme court shall have general superintending control over all courts; power to issue, hear and determine *prerogative and remedial writs*; and appellate jurisdiction as provided by rules of the supreme court." (Emphasis added.) "Mandamus is properly categorized as both an 'extraordinary' and a 'prerogative' writ." *O'Connell v Director of Elections*, 316 Mich App 91, 100 (2016). Thus, the Supreme Court has jurisdiction to hear and determine complaints for writs of mandamus, although that jurisdiction is not exclusive to the Supreme Court. *Id*. at 106 (discussing jurisdiction of courts over requests for mandamus). Notably, "[t]he legislative department cannot grant or withhold such jurisdiction." *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 69 (1940).

As a general matter, the Supreme Court retains complete discretion to consider which cases it will hear. See MCR 7.303(B); MCR 7.306. Supreme Court review is mandatory only in cases involving "a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension." MCR 7.303(A). In enacting § 479(2), the Legislature neither granted the Supreme Court jurisdiction nor withheld jurisdiction. *In re Mfr's Freight Forwarding Co*, 294 Mich at 69. Subsection 479(2) simply requires that an aggrieved person file a legal challenge to the sufficiency of an initiative petition in the Supreme Court. Nothing in § 479(2)

requires the Supreme Court to exercise its jurisdiction; instead, it merely directs persons where to file legal challenges.

Even though the Legislature may direct litigants to make their initial filings in the Supreme Court, there is, of course, no guarantee that the Supreme Court will actually take jurisdiction of that legal challenge. The Court retains its authority to direct or remand a complaint for writ of mandamus to the Michigan Court of Appeals for an initial decision, and the Court may well direct a legal challenge filed under section § 479(2) to be refiled in the Court of Appeals. MCR 7.300(B). Accordingly, the first sentence of § 479(2) does not violate article 6, § 4.

It is my opinion, therefore, that the provision in MCL 168.479(2), as amended by 2018 PA 608, requiring an aggrieved person to file a legal challenge regarding a determination as to the sufficiency of an initiative petition in the Michigan Supreme Court is not unconstitutional under article 6, § 4 of the Michigan Constitution.

B. According "highest priority" to sufficiency challenges

Subsection 479(2) was further amended to provide that the Michigan Supreme Court must accord challenges to the sufficiency of a petition "highest priority":

> Any legal challenge to the official declaration of the sufficiency or insufficiency of an initiative petition has the *highest priority* and *shall be advanced on the supreme court docket* so as to provide for the earliest possible disposition. [2018 P 608, § 479(2) (emphasis added).]

Determining whether this statute is constitutional requires consideration of the separation of powers clause and the constitutional powers of the Supreme

Court. The Michigan Constitution provides for the separation of powers of the three branches of government. Specifically, article 3, § 2 states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

The Constitution grants the Supreme Court exclusive authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5; *McDougall v Schanz*, 461 Mich 15, 26 (1999) ("It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court.") Indeed, the Supreme Court has held that "[t]he function of enacting and amending judicial rules of practice and procedure has been committed exclusively to this Court . . . ; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will." *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541 (1964). For this reason, to the extent that § 479(2) seeks to control the Supreme Court's established practices and procedures, it is unconstitutional.

In dictating that a legal challenge to the sufficiency of an initiative petition has the highest priority and must be advanced on the Supreme Court docket, the Legislature has interfered with the Supreme Court's authority to determine rules of practice and procedure. In fact, the Supreme Court has already provided for a general procedure by which proceedings in the Supreme Court may be expedited. MCR 7.311(E) provides:

> A party may move . . . to expedite any proceeding before the Court. The motion or an accompanying affidavit must identify the manner of service of the motion on the other parties and explain why . . . expedited scheduling of the proceeding is necessary. If the motion is granted, the Court will schedule an earlier hearing or render an earlier decision on the matter.

There is no Michigan Court Rule providing expedited Supreme Court consideration of petition disputes.[25] That is not to say that the Supreme Court has not considered the matter. With respect to such disputes in the Court of Appeals, MCR 7.213(C)(4) provides:

> The priority of cases on the [Court of Appeals'] session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:
>
> * * *
>
> (4) appeals from all cases involving election issues, including, but not limited to, recall elections and petition disputes.

In sum, under our Constitution, it is the Supreme Court's role to establish the rules of practice and procedure in the courts of this state. And the Court has done so with respect to whether and in which court, i.e., the Court of Appeals, petition disputes should be mandatorily expedited.

Under these circumstances, MCL 168.479(2)'s second requirement, which purports to establish a procedural rule that is within the exclusive control of the Supreme Court, is unconstitutional.

[25] There are also no administrative orders requiring the expedited consideration of election cases.

C. Severability of the amendment

Having concluded that § 479(2)'s "priority" requirement is unconstitutional, it is necessary to determine whether this provision may be severed from the "place of initial filing" requirement and from the rest of Public Act 608. The primary issue is whether the portion of § 479(2) remaining after its last sentence has been severed is capable of functioning alone. See, e.g., *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 345 (2011) (noting that it has long been established that "[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand").

As discussed above, § 479(2) consists of two sentences. The first dictates where and when *an aggrieved person* must file a legal challenge regarding the sufficiency of an initiative petition. The second, which is unconstitutional, dictates that the *Supreme Court* must treat that legal challenge as the highest priority and advance it on the Supreme Court's docket. Given the different subjects of the two sentences, the first sentence is capable of functioning without the second sentence. In fact, in the second sentence's absence, the Michigan Court Rules will govern. Therefore, while the "priority" requirement is unconstitutional, the "place of initial filing" requirement may remain in full force and effect.

It is my opinion, therefore, that subsection 2 of MCL 168.479, as amended by 2018 PA 608, requiring the Michigan Supreme Court to accord highest priority to cases challenging the sufficiency of petitions, violates the separation of powers clause of the Michigan Constitution, but may be severed from the remainder of 2018 PA 608.

DANA NESSEL
Attorney General