



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

January 22, 2019

Dana Nessel
Attorney General
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525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909

Dear Attorney General Nessel:

Michigan's Constitution reserves to the people, "the power to propose laws and to enact and reject laws ... and the power to approve or reject laws enacted by the legislature," through the initiative and referendum process, as well as the right to propose amendments to the Constitution. Const 1963, art 2, §9 and art 12, §2. The exercise of these fundamental rights is guided by the Michigan Election Law, 1954 PA 116, MCL 168.1 *et seq.*, which was recently amended by 2018 PA 608.

Among other changes, 2018 PA 608 establishes new grounds for rejecting otherwise valid petition signatures, including the failure to comply with the limit on the number of signatures per congressional district, the requirement to file a paid signature gatherer's affidavit prior to gathering signatures, and the circulator's obligation to check a box indicating whether he or she is a paid or volunteer signature gatherer. As the Department of State prepares to implement the changes required by the new law and provide guidance to individuals and organizations who desire to exercise these cherished petition rights, I respectfully request your formal opinion concerning the constitutionality of several of its provisions.

Establishment of a Minimum Geographic Distribution Requirement for Petition Signatures and Limitation on Number of Signatures per Congressional District that Count Toward Sufficiency

The Michigan Constitution does not require the sponsor of an initiative, referendum or constitutional amendment petition to obtain signatures from any particular region of the state, nor allow for the rejection of excess signatures gathered in any particular electoral district, yet 2018 PA 608 provides, "[n]ot 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 one congressional district." MCL 168.471, as amended by 2018 PA 608; see also MCL 168.477(1), as amended by 2018 PA 608.

As a result of this legislation, petition sponsors will be required to obtain signatures in at least seven of Michigan's fourteen congressional districts, and if the petition sponsor exceeds the 15% limitation for a congressional district, otherwise valid signatures will be rejected. Sponsors will also be required to sort petition sheets according to congressional district and provide a good

faith estimate of the number of signatures filed per congressional district. Are all of these requirements consistent with Const 1963, art 2, §9 and art 12, §2?

Elimination of the Countywide Petition Form for Statewide Proposal Petitions

Prior to the enactment of 2018 PA 608, sponsors of initiative, referendum and constitutional amendment petitions gathered signatures on a countywide petition form. MCL 168.544d, as amended by 1999 PA 218. Now, for purposes of statewide ballot proposal petitions, the option to use a countywide form is replaced with a mandate to use a congressional district form. MCL 168.482(3) and 168.544d, as amended by 2018 PA 608.

In accordance with former MCL 168.544d, the Secretary of State prescribed the format for all countywide petition forms, and the Secretary's prescribed form was required to substantially comply with the Michigan Election Law. Considering that statewide proposal petitions must now be circulated exclusively on a congressional district form, does the Secretary of State retain the authority to prescribe a substantially compliant, congressional district-based form for statewide ballot proposals?

Requirement for Paid Signature Gatherers to file an Affidavit Before Circulating Petitions

Under 2018 PA 608, an individual who is paid to circulate an initiative, referendum or constitutional amendment petition must file a signed affidavit with the Secretary of State, indicating that he or she is a "paid signature gatherer," before circulating any petition sheets. MCL 168.482a(1). Any signature obtained on a statewide proposal petition by a "paid signature gatherer" who has not filed the required affidavit is invalid and will not be counted. MCL 168.482a(2).

This requirement could present unique difficulties in the context of referendum petitions, where sponsors may have as few as 90 days¹ in which to circulate petitions. Bearing in mind that under 2018 PA 608, petition circulation cannot commence until the affidavits of a referendum petition's paid signature gatherers had been filed with the Secretary of State, is this affidavit requirement constitutional?

Option to Seek Approval of the Content of the Petition Summary

Overlooking the purely technical role previously played by the Board of State Canvassers (Board) and Director of Elections in the pre-circulation, optional approval process for determining whether a petition complies with the technical form requirements of the Michigan Election Law, 2018 PA 608 requires the Board and Director to develop and approve a 100-word summary of the purpose of the petition if the sponsor voluntarily chooses to seek approval of the content of the petition summary. MCL 168.482b(1). If the Board approves the summary, it is barred by 2018 PA 608 from considering a future challenge alleging that the summary is misleading or deceptive. Id.

¹ Sponsors of referendum petitions may begin to circulate petitions as soon as the date of enactment, but signed petitions must be filed with the Secretary of State "within 90 days following the final adjournment of the legislative session at which the law was enacted." Const 1963, art 2, §9. As an example, if an individual or organization wished to invoke the right of referendum on 2018 PA 608, petition circulation could only occur between December 28, 2018, the date the legislation was enacted, and March 28, 2019, the 90th day following final adjournment of the 2018 legislative session.

Here again, the 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. MCL 168.482b(1). Although 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. Is this constitutional?

Additionally, the petition summary approval process under 2018 PA 608 closely mirrors the longstanding procedure governing the drafting and approval of the 100-word statement of purpose that is printed on the ballot. MCL 168.22e, 168.32, 168.477, 168.485, 168.643a. In particular, MCL 168.482b(2) imposes the same standards for true, impartial and nonprejudicial language, clearly written using words that have a common everyday meaning to the general public, and the same 100-word limit that applies to ballot wording. If the Board approves a 100-word summary of the purpose of a *petition*, may it later decide to consider or approve a different 100-word statement of purpose for the *ballot*?

Causes of Action

Until the enactment of 2018 PA 608, any person who felt aggrieved by a determination of the Board had the option to seek judicial review by mandamus, certiorari or other appropriate means. MCL 168.479. Now, an aggrieved person must file suit in the Michigan Supreme Court "within seven business days after the date of the [Board's] 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." MCL 168.479(2), as amended by 2018 PA 608. Additionally, the new law states that such proceedings "[have] the highest priority and shall be advanced on the Supreme Court docket so as to provide for the earliest possible disposition." *Id.* Do either of these requirements violate the Constitution?

Circulator Disclosure Statement and Compliance Notice, Penalties for False Statements

Public Act 608 of 2018 adds new elements to the petition form; namely, a disclosure statement which requires the petition circulator to indicate whether he or she is a "paid signature gatherer" or "volunteer signature gatherer," and a notice stating "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." MCL 168.482(7)-(8), as amended by 2018 PA 608.

Additionally, under MCL 168.482a(3)-(5) and MCL 168.482c, a circulator who provides a false address, fraudulent information, or makes a false statement regarding his or her status as a paid or volunteer signature gatherer risks the rejection of otherwise valid petition signatures and in addition, may be prosecuted for a misdemeanor offense. Do any of these penalties raise constitutional concerns?

Conclusion

As Justice Ginsburg wrote for the U.S. Supreme Court twenty years ago this month,

"Petition circulation . . . is core political speech, because it involves interactive communication concerning political change. First Amendment protection for such interaction, we agreed, is at its zenith. We have also recognized, however, 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. . . . But the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas.” *Buckley v American Constitutional Law Foundation*, 525 US 182, 186-87, 192; 119 S Ct 636; 142 L Ed 2d 599 (1999) (quotation marks and citations omitted).

For more than a century, Michiganders have exercised core First Amendment rights in the circulation of initiative, referendum and constitutional amendment petitions. In 2018 alone, the sponsors of statewide proposals submitted over 2.3 million signatures gathered in support of six different proposed initiated laws and constitutional amendments. Public Act 608 of 2018 burdens this process by adding new provisions that require the invalidation of petition signatures which, under prior law, would have been considered lawful. With the 2019-20 election cycle already underway, it is important for the Secretary of State to provide the appropriate guidance to potential petition sponsors, circulators and voters, so that all may understand how 2018 PA 608 affects their rights. Therefore, I respectfully ask for your formal opinion regarding these matters.

Sincerely,

A handwritten signature in cursive script that reads "Jocelyn Benson". The signature is written in black ink and is positioned above the printed name and title.

Jocelyn Benson
Secretary of State