**STATE OF MICHIGAN**
**IN THE MICHIGAN SUPREME COURT**

LEAGUE OF WOMEN VOTERS OF MICHIGAN, MICHIGANDERS FOR FAIR AND TRANSPARENT ELECTIONS, HENRY MAYERS, VALERIYA EPSHTEYN, and BARRY RUBIN,

Plaintiffs-Appellees,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant-Appellee.
_____/

Supreme Court No. 160907
Court of Appeals No. 350938
Court of Claims No. 19-000084-MM

**THIS APPEAL INVOLVES A RULING THAT SEVERAL PROVISIONS OF THE MICHIGAN ELECTION LAW ARE UNCONSTITUTIONAL AFFECTING SEVERAL CURRENT, PLANNED, OR POSSIBLE BALLOT PROPOSAL PETITION DRIVES SEEKING PLACEMENT ON THE 2020 BALLOT**

MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellants,

v

JOCELYN BENSON,

Defendant-Appellee.
_____/

Supreme Court No. 160908
Court of Appeals No. 351073
Court of Claims No. 19-000092-MZ

# PLAINTIFFS LEAGUE OF WOMEN VOTERS OF MICHIGAN ET AL'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL OF MICHIGAN SENATE AND HOUSE

**ORAL ARGUMENT REQUESTED IF THE COURT DETERMINES THAT ORAL ARGUMENT IS NECESSARY**

GOODMAN ACKER, P.C.
Mark Brewer (P35661)
Attorneys for League of Women Voters of Michigan, et al.
17000 W. 10 Mile Road, 2nd Floor
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

NICKELHOFF & WIDICK, PLLC
Andrew Nickelhoff (P37990)
Attorneys for League of Women Voters of Michigan, et al.
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 496-9429
anickelhoff@michlabor.legal

Mary Ellen Gurewitz (P25724)
Of Counsel, Cummings & Cummings Law Group,PLLC
Attorneys for League of Women Voters of Michigan, et al.
423 N. Main Street, Suite 200
Royal Oak, Ml 48067
(313) 204-6979
maryellen@cummingslawpllc.com

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1. Do the House and Senate have standing to enforce laws?

   The Court of Appeals said, "No."
   Plaintiffs LWVMI et al say, "No."
   Defendant Benson says, "No."
   Plaintiffs House and Senate say, "Yes."

2. Does the 15% cap on ballot proposal signatures per congressional district in PA 608 violate the express self-executing terms of Mich Const 1963 Art 2, § 9 and Art 12, § 2?

   The Court of Appeals said, "Yes."
   Plaintiffs LWVMI et al say, "Yes."
   Defendant Benson says, "Yes."
   Plaintiffs House and Senate say, "No."

3. Does the 15% cap on the ballot proposal signatures per congressional district in PA 608 violate the rights to free speech, association, and petition of Mich Const 1963 Alt 1, §§ 3 and 5?

   The Court of Appeals did not need to consider this question.
   Plaintiffs LWVMI et al say, "Yes."
   Defendant Benson says, "Yes."
   Plaintiffs House and Senate say, "No."

4. Are PA 608's new requirements targeting paid circulators unconstitutional?

   The Court of Appeals said, “Yes.”
   Plaintiffs LWVMI et al say both requirements are unconstitutional
   Defendant Benson says both requirements are unconstitutional
   Plaintiffs House and Senate say both requirements are constitutional

## COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. *The Enactment of 2018 Public Act 608.*

2018 PA 608 significantly amended the laws governing statewide petition drives and was rushed through the Legislature in two (2) weeks in December 2018 during its lame duck session.

House Bill 6595 was introduced on December 6, 2018 and referred to the House Elections and Ethics Committee, which held a short hearing on December 12, 2018. The House passed the bill with immediate effect that same day. On December 19, 2018, the Senate Committee on Elections and Government Reform held a hearing on the bill. The Senate passed a substitute bill, HB 6595 (Senate Substitute S-2), and voted for immediate passage on December 21, 2018. The House enacted the Senate substitute on the same day (after suspending the one day holdover rule). The Governor signed the bill on December 28, 2018. See http://legislature.mi.gov/doc.aspx?2018"-HB"6595

Among the changes made by PA 608 were the following:

1. *The Geographic Signature Cap.*

PA 608 introduced a new geographically-based limit on signatures that will be counted for petition qualification by amending MCL 168.471 to provide that "[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 1 congressional district." Otherwise valid petition signatures that exceed the 15% limit will not be counted: "Any signature submitted on a petition above the limit described in this section must not be counted." *Id; see also* MCL 168.477(1). While petition forms previously identified the county of the signer, *see* former MCL 168.482(4), under PA 608 petitions must be circulated based on congressional districts, MCL 168.482(4). Proponents must now file with the Secretary of State a written "good-faith estimate" of the number of signatures from each congressional district along with their petitions. MCL 168.471.

2. *New Requirements Targeting Paid Circulators.*

PA 608 also amended MCL 168.482(7) to require that each petition include a check box at the top of the page "to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer." In addition, before circulating any petitions a paid circulator must now "file

a signed affidavit with the secretary of state that indicates that he or she is a paid signature gatherer." MCL 168.482a(l). Volunteer circulators are not required to file an affidavit. These requirements are in addition to those already applicable to petition circulators, which include the following: a circulator must sign a certificate attesting that he or she is a U.S. citizen over 18 years old; that each signature on the petition was signed in his or her presence; that no one has signed more than once; and that each signature is the genuine signature of a registered voter in the city or township indicated who was qualified to sign the petition; and if the circulator is a resident of another state, he or she must check a box so indicating and agree to accept Michigan's jurisdiction for any legal proceedings concerning the petition and must fill in his or her full address and county of registration. MCL 168.482(6) (incorporating MCL 168.544c(l)).

3. *Disqualification of Petition Signatures.*

In addition, PA 608 added or amended the following provisions to require nullification of all signatures on a petition due to the circulator's failure to meet technical requirements or because of flaws in petition form, content, or formatting:

a. Newly added subsection MCL 168.482a(3) provides that if the circulator "provides or uses a false address or provides any fraudulent information" on the circulator's certificate (required under MCL 168.544c(l)), "any signature obtained by that circulator on that petition is invalid and must not be counted." The law does not define the terms "false address" or "fraudulent information."

b. Subsection MCL 168.482a(4) invalidates the signature of any voter on a petition that does not meet the formal requirements of MCL 168.482: "If 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." MCL 168.482 sets forth a number of specific formal and technical requirements for petitions, including the size of the petition, the heading of the petition, the type size and placement of required content, a summary in not more than 100 words of the purpose of the proposed amendment or question" [a new requirement added by PA 608], and a warning to voters; subsection 482 also incorporates by reference additional formal petition requirements found in MCL 168.544c(l) and (2).

c. Subsection 482(8) requires that each petition must clearly state in 12 point type 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."[1]

B. *Legal Proceedings.*

On May 22, 2019, in response to a request for an advisory opinion by the Secretary of State, the Attorney General issued an Opinion addressing various questions regarding the constitutionality of PA 608. The Opinion stated that the 15% signature cap, circulation by congressional district, the check box requirement, and the paid circulator affidavit filing requirement were unconstitutional. The Opinion found those provisions severable and stated that PA 608's other provisions were enforceable. See Attorney General Opinion No 7310. The Secretary of State and Board of Canvassers have been applying PA 608 based on that Opinion, i. e., not enforcing several provisions while enforcing others. *See* "Sponsoring a Statewide Initiative, Referendum or Constitutional Petition" (copy on Secretary of State website).

On May 23, 2019, Plaintiffs League of Women Voters of Michigan et al (collectively "*LWVMI*")[2] filed a Verified Complaint for Declaratory and Injunctive Relief against the Secretary of State in the Court of Claims, challenging the above-described provisions of PA 608 as invalid under various provisions of the Michigan Constitution. (Ct Cl Case No 19-000084-MM) ("*LWVMI Case*") The Complaint was accompanied by a motion seeking expedited consideration based on the fact that petition proponents would soon be beginning to plan and prepare petition campaigns for the 2020 general election and needed finality as to the controlling law.

On June 5, 2019, the Michigan Senate and House of Representatives filed a Complaint for Declaratory and Injunctive Relief against the Secretary of State in the Court of Claims, seeking enforcement of all provisions of PA 608. (Ct Cl Case No 19-000092-MZ) ("*Legislature Case*")

On the same date the Michigan Senate and House of Representatives filed a Complaint for Writ of Mandamus in the Court of Appeals seeking to compel the Secretary of State to comply with PA 608 in all

[1] PA 608 made many other changes to the Election Law not at issue here.

[2] The other Plaintiffs are Michiganders for Fair and Transparent Elections, a ballot question committee, and 3 individual voters, Henry Mayers, Valeriya Epshteyn, and Barry Rubin.

respects. (Ct App No 349225) On July 2, 2019 LWVMI moved to intervene in the mandamus action and requested leave to file a motion for summary disposition on the grounds that the Legislature lacked standing and that there were no grounds for mandamus relief. On July 16, 2019, the Court of Appeals ordered the mandamus action held in abeyance pending action by the Court of Claims on dispositive motions in the two actions pending in that Court. The Court of Appeals did not rule on LWVMI's motion to intervene.

On July 3, 2019, the Court of Claims ordered the *LWVMI Case* and the *Legislature Case* consolidated by stipulation of the parties.

On September 27, 2019 following full briefing and a hearing on motions for summary disposition, the Court of Claims issued an Opinion and Order granting summary disposition to LWVMI on their claims that the 15% signature cap, congressional district circulator requirement, and the petition paid circulator checkbox were unconstitutional; the Court denied summary disposition as to the remainder of the claims. The Court also dismissed the *Legislature Case* for lack of standing but accepted the Senate and House as amici curiae in the *LWVMI Case*.

On October 7, 2019, LWVMI filed a Claim of Appeal as to those portions of the Court of Claims Opinion and Order holding the paid circulator affidavit filing requirement constitutional. (Court of Appeals No 350938) On October 14, 2019, the Senate and House filed a Claim of Appeal as to the Court of Claims dismissal of the *Legislature Case* and its holdings in the *LWVMI Case* that provisions of PA 608 were unconstitutional. (Court of Appeals No 351073)

In the Court of Appeals LWVMI requested consolidation of the two (2) appeals from the Court of Claims decision (Ct App Nos 350938 and 351073). That motion was granted. The House and Senate sought consolidation of their appeal (Ct App No 351073) with their original stayed mandamus action (Ct App No 349255). That motion was denied.

Due to the urgency of this matter LWVMI sought bypass to this Court before a Court of Appeals decision. In lieu of granting the application for bypass this Court ordered the Court of Appeals to issue a decision by January 27, 2020. The Court of Appeals did so and its decision held that all of the challenged provisions were unconstitutional and that the House and Senate lacked standing. The House and Senate

sought leave to appeal on February 3, 2020.

C. *Ballot Proposal Petition Activity.*

While the legal proceedings occurred, there are several current, planned, or possible ballot proposal petition drives seeking placement on the 2020 ballot.

For a statutory initiative these groups must collect at least 340,047 valid signatures (plus a cushion for the inevitable defective signatures) and file them by May 27, 2020. Constitutional amendments have a later deadline, July 6, 2020, but more signatures are needed - 425,059 plus a cushion. Groups seeking constitutional amendments will have to collect over half a million signatures, perhaps close to 600,000.

Time is short to collect those record-breaking numbers of signatures - requirements driven by the record-breaking 2018 gubernatorial election turnout. *See* Mich Const art 2, § 9; art 12, § 2 (basing petition signature requirements on gubernatorial turnout).

These are current, planned, or possible petition drives of which LWVMI is aware.

1. *Michigan Values Life (Right to Life)*

This proposed initiated law would ban so-called "dismemberment abortions" (medically called “dilation and evacuation”) unless necessary to save the life of the pregnant woman. On June 19, 2019 the Board of Canvassers approved the petition summary and the form of the petition. This petition does *not* conform to 2018 PA 608. It conforms to OAG No 7310 and the Court of Appeals decision. *See* http://www.michigan.gov/sos These petitions were filed on December 23, 2019 and are being reviewed by the Bureau of Elections.

2. *Michigan Heartbeat Coalition*

This proposed initiated law would require testing for a fetal heartbeat before an abortion and would prohibit performing an abortion after detection of a fetal heartbeat unless the woman has a life-threatening condition. On June 19, 2019 the Board of Canvassers approved the petition summary and the form of the petition. Petitions are circulating. This petition does *not* conform to 2018 PA 608. It conforms to OAG No 7310 and the Court of Appeals decision. See http://www.michigan.gov/sos

3. *Fair and Equal Michigan*

This ballot question committee filed a petition on January 7, 2020 seeking to amend the Elliott-Larsen Civil Rights Act. The petition does *not* confirm to 2018 PA 608. Its conforms to OAG No 7310 and the Court of Appeals decision. On January 28, 2020 the Board of Canvassers approved the petition's summary and form. Petitions are circulating.

4. *Progress Michigan*

Progress Michigan formed a ballot question committee (No 519301) to support a proposal on lobbying reform which was filed on January 23, 2020 and is being reviewed as to form by the Bureau of Elections. Its does *not* conform to 2018 PA 608. It conforms to OAG No 7310 and the Court of Appeals decision.

5. *Michigan for the Commonwealth*

This ballot question committee supports a fair income tax for schools and roads. Its petition is being drafted and will *not* conform to 2018 PA 608. It will confirm to OAG No 7310 and the Court of Appeals decision.

6. *Michiganders for Fair and Transparent Elections*

Plaintiff MFTE formed a ballot question committee in 2018 (No 518715) for the purpose of a 2020 ballot proposal reforming Michigan's campaign finance laws, a proposal which is being drafted.

7. *Planned Parenthood Advocates of Michigan*

Planned Parenthood Advocates of Michigan has formed a ballot question committee (No 519249) and publicly disclosed that it is considering a ballot proposal to protect a woman's right to choose to have an abortion. *See* https://www.michiganadvance.com/2019/08/07/new-planned-parenthood-president-dismisses-reports-on-internal-strife-talks-efforts-combatting-michigan-anti-abortion-initiatives/

8. *Voters Not Politicians - Michigan Chamber of Commerce - Michigan Legislature*

These groups have announced that they are negotiating over a wide range of government reforms. At least four (4) of those reforms - extending term limits, a 2/3 vote for legislation enacted in lame duck, a 2/3 roll call vote for immediate effect, and legislative authority to withhold legislative pay - would require

a constitutional amendment. *See* MIRS Capitol Capsule, October 23, 2019, "Lame Duck Immediate Effect Among Reforms On The Table".[3]

## INTRODUCTION

In reaction to the success of direct democracy in Michigan in 2018 and to prevent the people of Michigan from repeating that success in the future the lame duck Legislature adopted 2018 PA 608.[4]

With PA 608 the longtime nemesis of direct democracy in Michigan - the Legislature - seeks to hobble its exercise beginning in 2020. The people of Michigan once again turn to the protector of their rights - the courts - to overturn the egregious unconstitutional overreach of 2018 PA 608 in time for citizens to exercise their constitutional rights to place proposals on the 2020 ballot.

The Court of Appeals in a thorough, detailed opinion vindicated the rights of citizens and leave to appeal should be denied.

## THE APPLICATION FOR LEAVE SHOULD BE DENIED.

### I. THE HOUSE AND SENATE LACK STANDING

The Court of Appeals correctly held that the House and Senate lacked standing. *See* Exhibit A to Application at 6-9.

Granting standing to the Senate and House would require overruling several decisions of this Court, ignoring a state statute, and allowing the House and Senate to disregard alternative remedies. None of that is justified.

#### A. *This Court Has Rejected Federal Standing Rules.*

The Senate and House urge this Court to adopt the federal standards for standing in legislative –

[3] There are other possible petition drives which have been publicly disclosed on which there has been no further reported activity. Only Citizens Vote is a ballot question committee (no 519239) which would amend the State constitution so that only U.S. citizens can vote in Michigan elections. *See* MIRS Capitol Capsule, June 10, 2019, "Petition Drive Would Add Citizenship As Requirement For Voting." The Libertarian Party is considering a petition drive to institute ranked choice voting. *See* Michigan Advance, February 19, 2019, "Is ranked-choice voting the next election reform for Michigan.

[4] In 2018 the voters adopted 3 proposals by margins of 56%, 61%, and 67%. *See* http://michigan.gov/sos The Legislature feared the adoption of 2 other proposals increasing the minimum wage and securing paid sick time, so it adopted them to keep them off the ballot and gutted them in lame duck.

executive disputes. Application at 20-22. This Court has already rejected those standards.

This Court articulated the requirements to establish standing in *Lansing Schools Ed Ass 'n v Lansing Bd of Education*, 487 Mich 349; 792 NW2d 686 (2010). *Lansing Schools* returned Michigan law to the "limited, prudential doctrine" in effect before the Court adopted the federal courts' standing test in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). This Court described the revived "limited, prudential" standing doctrine as follows:

> Generally, the court exercised its discretion to hear a case if the citizen had some individual interest in the subject matter of [the] complaint which is not common to all the citizens of the state....This was sometimes articulated as a special or specific injury or interest.

*Id* at 356 (quotation marks and citation omitted). Under this Court's standing analysis:

> Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

*Id* at 372. Federal standing principles do not apply here.

B. *The Senate and House Do Not Have Standing Under This Court's Decisions.*

There are no individual legislators as plaintiffs. Instead, the House and Senate assert that they have organizational standing. However, "[a]n organization has standing to advocate for the interests of its members only if the members themselves have a sufficient interest." *Lansing Schools Ed Ass'n, supra,* 487 Mich at 371 & n21. The Senate and House do not have organizational standing since their members do not have individual standing under a nearly 30 year-old precedent of this Court.

*House Speaker v State Administrative Board*, 441 Mich 547; 495 NW2d 539 (1993) in, directly addressed whether individual legislators had standing to bring a legal action. In that case, the Speaker of the House and three other legislators filed suit individually against the State Administrative Board to challenge its reallocation of funding within departments, claiming that the Legislature had previously rescinded the Board's fund transfer authority and that the transfer was unconstitutional. *Id* at 553. In response to the Board's standing challenge the legislators asserted that the Board's actions nullified the

effectiveness of their votes and interfered with their authority to approve funding transfers. *Id* at 554-55.

This Court began its analysis by noting generally that:

> Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing.

*Id* at 554. Specifically as to the standing of individual legislators to sue, this Court stated:

> Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large.

*Id.* In addition this Court specifically rejected the federal courts' standing analysis involving legislative – executive disputes:

> Under limited circumstances, the standing of legislators to challenge allegedly unlawful executive actions has been recognized in the federal courts. * * * However, to establish standing, a legislator must overcome a heavy burden. Courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government.

*Id* at 555 (federal court citations omitted). This Court concluded that:

> For these reasons, plaintiffs who sue as legislators must assert more than 'a generalized grievance that the law is not being followed . . . .' * * * Instead, they must establish that they have been deprived of a 'personal and legally cognizable interest peculiar to [them].'

*Id* (federal court citations omitted).

This Court held that legislators do not assert a special interest giving them standing to sue based solely on a claim that a defendant has failed to enforce a statute or carry out their decisions. *Id* at 557 & n 17 (*citing Killeen v Wayne Co Rd Comm*, 137 Mich App 178, 189; 357 NW2d 851 (1984)).

Applying the foregoing principles, this Court concluded in *House Speaker* that only one of the legislator plaintiffs could arguably assert individualized special standing, because he sat on the House appropriations committee and the legal status of the Board's authority would directly impact his right to approve or disapprove intradepartmental transfers as a member of that committee: "plaintiff . , . [had] been denied a specific statutory right to participate in the legislative process." *Id* at 560. Another plaintiff lawmaker who also sat on the appropriations committee was held to lack standing, since he had been able

to vote on the intradepartmental transfer at issue. *Id* at 560-61.

*House Speaker* demonstrates that individual lawmakers must make a showing that a "personal and legally cognizable interest peculiar to them" is threatened, and that to establish standing they must identify a specific individualized effect of the challenged action on their ability to perform their legislative duties. A desire to see their legislation enacted, implemented, or enforced is not sufficient to confer standing on the House or Senate. Members of the Legislature (even if they had appeared as individual plaintiffs in this action) cannot assert any interest in enforcement of PA 608 that would be "different from the citizenry at large." *Lansing Schools, supra*, 487 Mich at 372.

For all of these reasons, the Senate and House as legislative bodies do not have standing to bring an action to enforce the law because their individual members lack standing.

C. *Granting Standing To the Senate and House Would Ignore A Controlling Statute.*

The House and Senate launch a jeremiad against the Attorney General's actions not only in this case but in several others and argue that her actions justify their standing. Application at 5-6, 21-22.

Even if those allegations are true, the House and Senate fail to disclose to the Court that *those actions were authorized under a longstanding statute enacted by the House and Senate.*

The House and Senate have authorized the Attorney General to exercise broad litigation powers on behalf of the State as this Court has recognized:

> The most basic purpose of her office is to litigate matters on behalf of the people of the state. Accordingly, it is widely acknowledged that Michigan's Attorney General has broad authority to bring actions that are in the interest of the state of Michigan….Specifically, MCL 14.28 provides:
>
> "The attorney general shall prosecute and defend all actions and in the supreme court, in which the state shall be interested, or a party…and..may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested."
>
> MCL 14.28 has been broadly construed to provide authority for the Attorney General to litigate on behalf of the people of the state…

*In re Certified Question from the United States District Court for the Eastern District of Michigan v Philip*

*Morris*, 465 Mich 537, 543-44; 638 NW2d 409 (2002) (citation omitted) (emphasis deleted).

This Court went on to conclude that the Attorney General's authority to litigate on behalf of the people of Michigan also included the authority to make any disposition she deems to be in the state's interest:

> It is said that the Attorney General "may control and manage all litigation in behalf of the state and *is empowered to make any disposition of the state's litigation which [the Attorney General] deems for its best interests.* 7 Am Jr 2d, Attorney General § 27, p 26.

*Id* at 546-48 (emphasis added).

Thus the Senate and House have in fact authorized the Attorney General to do exactly as she has done here and they have no basis to either complain or assert standing to sue to enforce PA 608. By the enactment of MCL 14.28 they have deprived themselves of any arguable basis for standing to enforce a law they enacted such as PA 608. Only the Attorney General has the authority to decide whether and how to enforce PA 608.

D. *The House and Senate Have Other Remedies.*

Not only do the Senate and House ask this Court to overturn *House Speaker, Lansing Schools,* and *Certified Question* as well as ignore MCL 14.28, but they have other remedies for the Attorney General's conduct which do not require this Court's involvement.

First, they can amend MCL 14.28 to grant themselves standing. This Court in *Lansing Schools* recognized that a statute could grant standing. *See* 487 Mich at 372. Nor can they be heard to complain of a gubernatorial veto because they can override any such veto. *See* Mich Const 1963 art 4, § 33.

Second, the House and Senate control the budget. *See id* §31. They can use that means to impact if not control the actions of the Attorney General.

The House and Senate do not need standing to enforce laws they enact because they have unique remedies of which they can avail themselves without recourse to the courts.

## II. THE COURT OF APPEALS DECISION ON PA 608 IS CORRECT.

A. *The 15% Cap is an Unconstitutional "Legislative Amendment" to Self-Executing Provisions of the Constitution.*

The Court of Appeals correctly unanimously held that the 15% cap on signatures per congressional district and the related requirement that petitions be circulated by congressional district are unconstitutional. *See* Exhibit A to Application at 9-15.

The Legislature exceeded its constitutional authority in PA 608 by adding to the Constitution's express and exclusive petition signature requirements. The people's jealously-guarded direct democracy rights under Const 1963 art 2, § 9 and art 12, § 2 are exercised through the process of circulating petitions to gather the constitutionally-specified required number of valid signatures to demonstrate sufficient voter support for placement of a proposal on the ballot. Article 2, § 9 provides:

> 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.

Article 12, § 2 provides that petitions for a constitutional amendment must

> 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.

These provisions set forth no geographic distribution requirements for the signatures. Under Michigan's constitutional scheme, all registered voters, regardless of where in the state they live, have an equal right to sign statewide ballot measure petitions and have their signatures counted toward the constitutional thresholds.

The Legislature is not authorized to embellish or amend the Constitution's specific petition signature thresholds for ballot qualification. The Constitution's direct democracy provisions, including the petition signature thresholds, were expressly intended and understood to be self-executing, meaning that they are to be implemented without additional legislation that limits or interferes with them. *Thompson v Vaughan*, 192 Mich 512, 520; 159 NW 65 (1916). The drafters stated this clearly in their *Address to the People* at 21:

> Matters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear,

> however, that this section is self-executing and the legislature cannot thwart the popular will by refusing to act.

*2 Official Record of the Constitutional Convention* at 3367.

This Court has made it clear that the Legislature is prohibited from thwarting the popular will by adding new requirements to those stated clearly in the Constitution. In *Wolverine Golf Club v Secretary of State*, 384 Mich 461; 185 NW2d 392 (1971), this Court affirmed a decision striking down the Legislature's attempt to impose by statute a time limit for filing initiative petitions that the 1962 Constitutional Convention had intentionally declined to continue from the prior constitution. In so holding this Court adopted Court of Appeals Judge Lesinski's conclusion that the initiative procedure in art 2, § 9 was intended to be self-executing, 24 Mich App 711, 725-28, *aff'd*, 384 Mich at 466. On that basis, the Court held that the Legislature was not empowered to establish a different or additional petition filing timetable from that stated in the Constitution:

> 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 provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon.

24 Mich App at 725, *aff'd*, 384 Mich at 466 (citations and quotation marks omitted). The same analysis and conclusion applies with respect to the specific petition signature requirements for qualification of voter-initiated proposals for constitutional amendment, legislative initiative, and referendum.

To be sure, the constitutional provisions governing direct democracy petitions specifically grant some powers to the legislature. *See* Const 1963 art 2, § 9 ("The legislature shall implement the provisions of this section."); art 12, § 2 (a petition for constitutional amendment "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law"). But these confined grants of implementing authority do not affect the established principle that the specific constitutional requirements set forth in the Constitution cannot be altered or embellished by statute. In *Wolverine Golf Club* this Court concurred, 384 Mich at 466, in Judge Lesinski's statement that:

> We view the term 'self-executing' to be more than an after-the-fact description of the operative effect of the constitutional provision. It is a

> term intended to cloak the provision with the necessary characteristics to render its express provisions free from legislative encroachment. And this is so irrespective of the implementing provision contained therein.

24 Mich App at 728-29 (emphasis added). Thus, the Constitution's express statewide petition signature thresholds are not, as described in the *Address to the People*, "[m]atters of legislative detail ... left to the legislature."[5]

Nor is the absence of a geographic distribution requirement in the State Constitution an oversight calling for legislative "correction." It was a deliberate policy choice by the delegates to the Constitutional Convention. The Convention was presented with proposals to amend art 12, § 2 that were indistinguishable from PA 608's 15% cap other than in detail. For example, on May 9, 1962, delegates voted down a proposal to add to the requirement that each petition be signed by at least 10% of the total vote cast for governor in the previous gubernatorial election the following: "not more than 25 per cent of such signatures to be obtained from residents of any one county." *2 Official Record of the Constitutional Convention* at 3200-3201. The delegates had previously rejected similar proposals. *Id* at 3200. Public Act 608 adds the kind of geographic signature distribution requirement that the Convention expressly rejected.

Public Act 608 is nothing more than an unconstitutional "legislative amendment" to Michigan's foundational legal document that is exclusively the people's to amend. The sponsor and supporters of PA 608 argued in its support that, "the 1963 Constitution would benefit from an update." *See* House Fiscal Agency Legislative Analysis at 2 (December 13, 2018).[6] It is not the province of the Legislature to "update" the petition qualification requirements deliberately written into the Constitution's direct democracy

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[5] The type of "legislative detail" left to the Legislature by the 1963 Constitution is clear from a comparison of the detailed direct democracy provision of Const 1908 art 5, § 1 to the direct democracy provisions of Const 1963 art 2, § 9 and art 12, § 2. The former contained extensive detail on how signatures were to be reviewed, the required content of a petition, filing requirements, and so forth. All of that detail was deleted in the 1963 Constitution and left to the Legislature. None of the "detail" deleted from the 1908 Constitutional language and delegated to the Legislature by the 1963 Constitution imposed a geographical signature cap.

[6] At the December 12, 2018, hearing of the House Elections and Ethics Committee, Rep. James Lower, the primary sponsor of PA 608, provided the following explanation for adding the 15% cap: "We need to get more in the times. These processes haven't been updated for ages. It's time we do something on that." Video recording of December 12, 2018 House Elections and Ethics Committee hearing, available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2nd video) [last accessed on: May 13, 2019].

provisions. The 15% cap in PA 608 is unconstitutional because it is an attempt by the Legislature to amend the Constitution by statute - arrogating power that is reserved exclusively to the people and that Michigan's voters already have fully exercised in their Constitution.

B. *The 15% Cap Violates the Rights of Free Speech and Association and the Right to Petition Under Const 1963, Art I, §§ 3, 5.*

The right of Michigan's registered voters to propose legislation and constitutional amendments by circulating petitions to qualify such measures for the ballot, and their rights to express their political views by signing such petitions, are protected under the Michigan Constitution's free speech clause:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

Const 1963 art 1, § 5, The ability to circulate and sign petitions to make or change law also is protected from government interference by the freedom of association and petition clause, Const 1963 art 1, § 3, which provides:

> The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.

The Constitutional protection of these rights is well-established. "The individual right to solicit signatures to qualify an initiative petition is protected by the rights of free expression, assembly, and petition, guaranteed in sections 3 and 5 of article 1, 'The Declaration of Rights.'" *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985). Among the types of constitutionally-protected speech, political speech occupies the highest rank. *Citizens United v FEC*, 558 US 310, 339-40; 130 S Ct 876; 175 LEd2d 753 (2010). In *Meyer v Grant*, 486 US 414, 421; 108 S Ct 1886; 100 LEd2d 425 (1988), the Supreme Court recognized that the circulation of initiative petitions is "core political speech," restrictions on which are subject to "exacting scrutiny," *id* at 420. These federal constitutional decisions are applied to the interpretation and application of Michigan's Constitution.[7]

[7] The rights of speech, association, and petition under Michigan's Constitution are coextensive with those under the First Amendment to the U.S. Constitution. *Woodland v Michigan Citizens Lobby*, *supra*, 423 Mich at 208; 378 NW2d

1. Public Act 608 Will Violate the Constitutional Rights of Millions of Statewide Petition Signers By Cutting Them Out of the Direct Citizen Lawmaking Process.

As discussed earlier, the State Constitution lacks any provision that disqualifies a Michigan voter's signature on a statewide petition based on where that voter resides. This was a conscious choice by the Con-Con delegates, and certainly was understood by the voters who adopted the 1963 Constitution. Michigan's constitutional system is premised on the idea that every voter who signs a statewide petition has an equal opportunity to have his or her signature counted in the process of citizen lawmaking.

Public Act 608's 15% signature cap directly violates this basic principle. Public Act 608 will disenfranchise and silence the political expression of the hundreds of thousands of statewide petition signers who will never be counted because the petition has reached the 15% per congressional district limit. Silencing voters in this manner not only contravenes the Constitution's clear and direct wording, it also violates the core constitutional rights of Michigan citizens to participate in the electoral process. For purposes of the Constitution's rights of speech, association and petitioning, Public Act 608 is just as unconstitutional as would be a statute capping the number of votes that will be counted in elections for public office.

It is a mathematical certainty that PA 608 will completely eliminate the ability of vast numbers of Michigan voters to exercise their constitutional rights to express their views and petition for change by signing a statewide petition. The required number of signatures to place a constitutional amendment on the ballot in 2020 will be 425,059, equal to 10% of 4,250,585, the total vote cast for governor in the last election. Under PA 608, the total valid signatures counted from any one congressional district will be capped at approximately 63,759 (15% of 425,059). While the number of registered voters will not be exactly the same for each congressional district, assuming *arguendo* that there are approximately 463,964 registered voters

337 ("'[the] same liberty of speech... is secured by the Constitution of the State of Michigan' as is guaranteed by the First Amendment.") (quoting *Book Tower Garage, Inc v UAW Local No 415*; 295 Mich 580, 587; 295 NW 320 (1940)); *see also Michigan Up & Out of Poverty Now Coalition v State of Michigan*, 210 Mich App 162, 168-69; 533 NW2d 339 (1995) ("We thus review plaintiff's challenges to the new procedures in accordance with federal authority construing the First Amendment.").

in each congressional district,[8] only up to 13.7% of any district's active registered voters (63,759/463,964) would have a prospect of their signature being counted, or likely even collected. Put another way, potentially over 86% of active registered voters in Michigan who are eligible to sign a petition, about 5.6 million people, could be excluded from the process of petitioning for a constitutional amendment - either because proponents will not collect their "excess" signatures or because their signatures will be disregarded because they exceed the 15% limit for their district.

For a legislative initiative the suppression of speech and petitioning rights will be even more dramatic. In 2020 the required number of signatures to place an initiative on the ballot will be 340,047 (8% of the total vote cast for governor in the last gubernatorial election), and the total countable signatures from any congressional district will be capped at 51,007 (340,047 x .15). This will leave only about 11% of the registered voters in any district (51,007/463,964) with the ability to exercise their reserved right to sign a petition for a proposed initiative.

Inasmuch as PA 608's 15% cap on countable signatures will completely silence political expression by the vast majority of Michigan voters, it is difficult to imagine any state interest that would justify, or even explain, such an act of wholesale disenfranchisement. The asserted purpose of adding the 15% per district cap was to "ensure that petitions destined for the ballot were supported by a more representative geographic cross-section of Michiganders." House Fiscal Agency Legislative Analysis, at 2 (February 13, 2019). The primary sponsor of HB 6595, Rep. James Lower (representing the 70th House District covering portions of Gratiot and Montcalm Counties), explained the purpose of the 15% cap at the House committee hearing on December 12, 2018:

> I come from a rural area, and the plan would ensure that at least a proportion of the signatures would come from around the state and we'd get more statewide buy-in before a measure is put before the legislature for our consideration or ultimately put on the ballot for the voters' consideration.[9]

[8] 6,495,490 total active registered voters (based on Michigan Secretary of State 2019 Registered Voter Count, available at: https://www.michigan.gov/ documents/sos/2019_Registered_Voter_Count_653885_7.pdf) [last accessed on May 20, 2019], divided into 14 congressional districts.

[9] Video recording of December 12, 2018 House Elections and Ethics Committee hearing, available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2"d video) at: 6:33-7:09 [last accessed on:

Completely disregarding the petition signatures of voters in more densely populated parts of the State in order to favor signers in rural areas does not serve any compelling state interest. Getting "more statewide buy-in" may arguably be considered desirable public policy by some, but it is not a constitutionally cognizable *compelling* state interest justifying silencing millions of voters - particularly where the Con-Con delegates deliberately rejected and omitted that objective in drafting the Constitution and where the voters have never adopted it. *See 2 Official Record, supra*, at 3200-01.

In addition, the 15% cap is not the least restrictive means of achieving the stated objective. Broadening the geographic distribution of demonstrated support for ballot qualification (assuming the Constitution permits it) could have been achieved without silencing the voices of the great majority of eligible signers, such as by requiring a minimum showing of support in a wider geographic area rather than by imposing a cap on signatures that will be counted. Even if the state's asserted interest were deemed sufficiently compelling, it could have been achieved in a manner that does not silence protected political speech. *Compare, e g,* MCL 168.93 and 168.53 (establishing minimum geographic distribution petition signature requirements for petitions for US Senator and Governor).

2. Public Act 608's 15% Cap Violates the Constitutional Rights of Ballot Question Proponents By Imposing Unnecessary Burdens on Petition Circulation.

Public Act 608 unquestionably will impose a formidable roadblock to those wishing to petition for changes in the law. As stated earlier, the right to petition for voter-enacted law is expressly reserved in Const 1963, art 2, § 9 and art 12, § 2, and it is accorded additional protection as a core exercise of freedom of speech and association and of the right to petition under Const 1963, art 1, §§ 3 and 5. The 15% cap will violate those rights by dramatically increasing the difficulty and cost of mounting a campaign to circulate petitions for constitutional amendments, legislative initiatives, and/or referenda, in at least the following respects.[10]

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May 13, 2019].

[10] The factual bases for these arguments are found in LWVMI's Verified Complaint, exhibits, and affidavits filed in the Court of Claims. No party disputed their factual accuracy in the trial court or in the Court of Appeals.

a. For many decades, initiative and constitutional amendment petitions have been circulated by county; under PA 608 they will have to be circulated separately by congressional district. Where several congressional districts are concentrated within a confined geographic area (such as the Detroit metropolitan area), circulators will have more difficulty ensuring that a voter signs the correct petition.

b. While almost every qualified voter can name the county he or she lives in, many cannot identify their congressional districts. Upon information and belief, and based on surveys of voters, fewer than half of all registered voters can identify their congressional district. Michigan has had the same county lines for 120 years, while congressional districts change in number, boundaries, and population every 10 years, often significantly. During the past several decades five (5) congressional districts have completely disappeared and others have been redrawn and renumbered. For example, the 12th Congressional District once included Macomb and St. Clair Counties. Now it stretches from Dearborn to Ann Arbor, covering much of the same territory as the now-extinguished 16th District. The 1st Congressional District was once located in the City of Detroit. It now covers the Upper Peninsula and northern lower Michigan. The problem of voter confusion resulting from these changes is exacerbated by the current gerrymandered redistricting plan, which ignores county and municipal boundaries in many areas (particularly in the Detroit metropolitan area), making it more challenging for people to know in which congressional district they live. *See League of Women Voters of Michigan v Benson*, 373 FSupp 3d 867 (EDMI 2019), *vacated on jurisdictional grounds*, US S Ct No 19-220 (October 21, 2019) (detailing the partisan gerrymandering of Michigan's congressional districts).

c. Circulators will have to take more time to determine a voter's congressional district, assuming they even have that capability. Many voters will be much more likely to give up and walk away rather than waiting longer to sign the correct petition. Time spent by circulators ascertaining a voter's congressional district will be time they cannot spend communicating with voters about the proposal, diminishing constitutionality protected speech.

d. With the increased amount of time needed to collect signatures, costs for proponents using paid circulators will increase dramatically, and in some cases will be prohibitive.

e. The cap on signatures from a congressional district will increase a proponent's administrative costs, because they will be required to continuously monitor and keep a running total of the number of facially valid signatures from each congressional district in order to avoid exceeding the 15% limit and collecting unusable signatures.

f. The additional work of sorting petitions and of preparing the good faith estimate of the number of valid signatures from each congressional district will increase costs and labor for ballot question proponents, whether or not they use paid circulators.

g. Proponents will no longer be able to take advantage of the efficiency of collecting signatures in high density areas, which can make the critical difference in the ability to comply with Michigan's high signature count requirements.

h. Campaigns will find it more difficult to circulate petitions because circulators who do not have the means or the time to travel outside their local area may not be willing to travel elsewhere to collect signatures once the 15% limit is reached.

i. Compounding the foregoing obstacles is the fact that petition circulators will need more training to meet the additional requirements under PA 608, due to the possibility that a circulator's innocent error or omission could invalidate all of the signatures one or more petitions.

j. Proponents frequently can gauge and claim public support for their ballot proposals based on the number of petition signatures certified by the Board of State Canvassers. Under PA 608 the total number of valid registered voter signatures supporting a petition will no longer be tabulated or certified by the Board.

k. Currently the Board of State Canvassers certifies that the constitutionally-required number of petition signatures have been filed based on a random sample of signatures determined by the Bureau of Elections to be statistically reliable. A representative of the Bureau testified in legislative hearings that the sampling method may no longer be usable with the 15% cap in effect and each of the many thousands of

filed petitions probably would have to be examined individually, which would delay or impede the Bureau's sampling for the petition canvass.[11] This would increase the cost and amount of time needed by the Bureau to process petitions. Upon information and belief, the Legislature did not allocate additional funding to the Bureau of Elections for this purpose. Combined with a new requirement under PA 608 that the Board of Canvassers must declare the sufficiency of a petition at least 100 days before the election (MCL 168.477(1), as amended), the Bureau will have difficulty completing the canvass if there are a large number of proposals as there were in the previous general elections, and petition proponents would have to begin circulating petitions earlier in the year when it is more difficult to collect signatures.

As the foregoing makes clear, PA 608's 15% cap will have a number of severe speech-suppressing effects on ballot proposal proponents, many of which will result directly from the additional time and cost needed for petition circulation. Petition campaigns will now be forced to continuously monitor their signature gathering on a district-by-district basis to ensure that they do not collect more signatures than allowable from any single district, which will multiply costs for proponents.

Public Act 608 also will suppress the constitutionally protected right to petition in another important way: by drastically increasing the obstacles facing voters from a particular locality or region who wish to put a statewide proposal on the ballot. Before PA 608, if the voters in one area with a localized problem or issue, say, unusually high auto insurance rates, wished to initiate insurance reform legislation, strong support in the affected area might be sufficient to qualify the proposal for the ballot. Once qualified for the ballot, the proponents could campaign statewide to obtain the necessary votes for enactment. Under PA 608 the proponents are much more likely to need signatures from areas that may not be affected by the proposal in order to qualify the proposal for the ballot, forcing them to undertake a statewide campaign before they even get their proposal onto the ballot.

Many of the additional burdens on petition circulation imposed by PA 608, especially those

[11] Testimony of Michael Batterbee, Michigan Secretary of State's office, at the House Elections and Ethics Committee hearing, video recording available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2nd video) at: 29:45 - 32:00 [last accessed on: May 13, 2019].

described above in a. – c., will apply at the critical moment when a petition circulator is seeking to communicate face-to-face with a potential signer about the proposal. As the Sixth Circuit Court of Appeals said in *Citizens for Tax Reform v Deters*, 518 F3d 375,383 (CA 6, 2008), *cert denied*, 555 US 1031; 129 S Ct 596; 172 LEd2d 455 (2008), striking down Ohio's ban on paying circulators on a per-signature basis:

> A circulator plays a crucial role in the petition process because the circulator both has to express the petitioner's desire for political change and has to discuss the merits of the proposed change.

The additional time that a circulator must spend looking for the correct petition sheet or determining a voter's congressional district will be time that a circulator cannot spend communicating with the voter about the proposal. And inevitably some voters will find the delay too much of a bother and will walk away without signing.

The federal courts have developed a balancing test to determine the constitutionality of petition circulation requirements under the First Amendment. In *Meyer v Grant, supra*, the Supreme Court overturned a state law banning paid petition circulators. The Court recognized the high value and importance placed on communication between petition circulators and potential signers under the First Amendment:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech.

486 US at 421-22 (quotation marks and footnote omitted). Observing that, "[t]he First Amendment protects [campaigns'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing," *id* at 424, the Court found that prohibiting the payment of petition circulators burdened protected political speech in at least two ways:

> First, it limits the number of voices who will convey [campaign's] message

> and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [campaign's] will gamer the number of signatures necessity to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

*Id* at 422-23 (footnote omitted).

The majority in *Meyer* applied a balancing test to conclude that the government's asserted justification for prohibiting paid circulators (protecting the integrity of the initiative process) did not justify the burden imposed on ballot question proponents. *Id* at 426-27. In *Buckley v American Constitutional Law Foundation*, 525 US 182; 119 S Ct 636; 142 LEd2d 599 (1999), the Court applied *Meyer* to overturn a state's requirements that petition circulators be registered voters and that they wear identification badges while circulating petitions. In doing so the Court applied the following test: did the requirement impede or reduce the effectiveness of petition circulation, and if so, was it sufficiently justified by an "impelling cause." *Id* at 197. The Court applied a similar test to strike down the identification badge requirement, finding that it "discourages participation in the petition circulation process by forcing name identification without sufficient cause." *Id* at 200.

Following the above precedent, the Sixth Circuit Court of Appeals, in *Deters, supra*, invalidated Ohio's ban on paying circulators on a per-signature basis. Applying a "sliding scale" analysis, *id* at 383, the court first looked at the burden on petition proponents, finding that the prohibition would "place[] a severe and significant burden on a core political right" by significantly increasing proponents' costs and making it more difficult to recruit trained professional circulators. *Id* at 383-87. Balanced against this burdening of core political speech, the court applied the "exacting scrutiny" standard of *Meyer* and *Buckley* to the state's assertion that the restriction would further its interest in preventing circulator fraud. *Id* at 388. The court summarized the applicable test as follows:

> By making speech more costly, the State is virtually guaranteeing that there will be less of it. Because its ban on all forms of payment to circulators except based on the amount of time worked would create a significant burden on CTR's and other petitioners' core political speech rights, the State must justify it with a compelling interest and narrowly tailored means.

*Id.*

Public Act 608's 15% signature cap fails the "exacting scrutiny" test for constitutionality for several reasons.

First, LWVMI established through the undisputed averments in the Verified Complaint and its attached affidavits that the 15% signature cap will significantly burden the ability qualify a proposal for the ballot by making it more expensive and more difficult to gather signatures.

Second, the state interest asserted to justify the 15% cap, that it would promote "more statewide buy-in before a measure is put on the ballot," is nothing more than a vague proclamation of a policy preference. It certainly does not qualify as a "compelling interest" for increasing the already considerable cost and difficulty of mounting a petition campaign.

Third, as already asserted above, the signature cap is not the least restrictive means of achieving the claimed interest. As discussed earlier, broadening the geographic distribution of demonstrated support for ballot qualification (assuming the State Constitution permitted it) could have been achieved by requiring a minimum showing of support in a wider geographic area rather than by capping the number of signatures from any particular area. Michael Batterbee of the Michigan Secretary of State's office put it this way when testifying before the House Elections and Ethics Committee on December 12, 2018:

> A minimum threshold would be a better way to get a better representation from across the state. And it goes without saying that a minimum would not disenfranchise any voters.[12]

PA 608's 15% signature cap by congressional district violates petition proponents' state constitutional rights of free speech, assembly, and petition.

### C. *Public Act 608's New Requirements Targeting Paid Petition Circulators Are Unconstitutional.*

PA 608 added new requirements that apply only to paid petition circulators but not to volunteer circulators, compelling paid circulators to publicly disclose their paid status in two (2) ways. First, under

[12] Video recording of testimony available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2nd video) at: 29:45 -32:00 [last accessed on: May 13, 2019].

MCL 168.482(7), added by PA 608, each petition must include a check box at the top of the page "to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer." In addition, before he or she may circulate any petitions a paid circulator must now "file a signed affidavit with the secretary of state that indicates that he or she is a paid signature gatherer." MCL l68.482a(l). Volunteer circulators are not required to file an affidavit.[13]

The Court of Appeals struck down both the check box and affidavit requirements, *see* Exhibit at A to Application 15-20. That decision was correct for several reasons.

First, these requirements both violate well-established Supreme Court precedent:

> forc[ing] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts .. fail[s] exacting scrutiny."

*Buckley, supra*, 525 US at 204. In *Buckley*, the Court considered whether a Colorado statute requiring the disclosure of the names of paid circulators in campaign finance reports violated the Constitution. *Id* at 201-04. The Court found that disclosure by the proponents of a proposal that they were paying for signatures satisfied the state's interest, *id* at 202-03, but that disclosure of the *actual names of paid circulators* served no legitimate state interest and therefore "fail[ed] exacting scrutiny," *id* at 204.

The same is true here. The stated goal of these requirements in PA 608 was to target and end the anonymity of paid circulators, an anonymity which is constitutionally protected under *Buckley*:

> [The bill] makes sure that people circulating these petitions can't. . .conceal the fact they they're paid by out-of-state billionaires and special interest groups. If that is something that they're going to do, that should be transparent and that should be in front of people and they should know that when they are deciding whether or not to sign a petition.[14]

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[13] These requirements are in addition to those already applicable to petition circulators, which include the following: a circulator must sign a certificate attesting that he or she is a U.S. citizen over 18 years old; each signature on the petition was signed in his or her presence; that no one has signed more than once; and that each signature is the genuine signature of a registered voter in the city or township indicated who was qualified to sign the petition; and if the circulator is a resident of another state, he or she must check a box so indicating and agree to accept Michigan's jurisdiction for any legal proceedings concerning the petition and must fill in his or her full address and county of registration. MCL 168.482(6) (incorporating MCL 168.544c(l)).

[14] Statement of bill sponsor Rep. Lower, video recording of December 12, 2018 House Elections and Ethics Committee hearing, available at: http://www.house.mi.gov/MHRPublic/videoarchive.aspx (Dec. 12, 2018, 2nd video) at: 7:15-7:35. ) [last accessed on May 13, 2019].

(emphasis added). At the hearing of the Senate Committee on Elections and Government Reform the bill sponsor stated:

> It also requires people pushing these types of initiatives to make it very clear whether they are volunteers or they're being paid for by out-of-state millionaires and billionaires and special interest groups. I think voters deserve a right to know that prior to signing a petition.[15]

(emphasis added). As in *Buckley*, the state's interest in disclosing the sources of financial support for a proposal is fully satisfied by the ballot question committee reporting requirements imposed on petition sponsors by the Michigan Campaign Finance Act, MCL 169.201 et seq. Committees are required to report the names, addresses, and amounts contributed by their financial supporters on an ongoing basis, and the information is publicly available. *See, e g,* MCL 169.225, 169.226(1)(e)-(j), 169.232. The MCFA also already requires petition proponents to report whether they are hiring firms which employ paid circulators. *See, e g*, MCL 169.206 (defining reportable expenditures). Under *Buckley*, the state has no legitimate interest in the disclosure of paid circulator identities through the petition check box or the pre-filing affidavit.

The State may assert that these provisions compelling disclosure of the names of paid circulators serve its interest in preventing fraudulent petition signatures. While the State has a legitimate interest in deterring fraudulent petition signatures, *Deters, supra*, 518 F3d at 387, the Court in *Meyer* categorically rejected the argument that paid circulators are more prone to fraud than volunteer circulators:

> No evidence has been offered to support that speculation, however, and 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 integri1y -- 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.

486 US at 426; *see also Buckley, supra*, at 203-04 (quoting *Meyer*). In fact, the opposite is typically the case. As the Court observed, professional vendors using paid circulators compete based on their reputations

[15] Recording of Senate Committee on Elections and Government Reform hearing, December 20, 2018; available at: https://drive.google.com/open?id=luM69UMXmOZWZglBXi2EN7gYlERqUMvnr (at: J 1:0H3:29) [last accessed on May 13, 2019].

and their results based on the quality of valid signatures collected; they have a business incentive to be scrupulous and supervise their circulators closely. *Id.*

Thus, the petition check box and the paid circulator affidavit pre-filing requirement in sub-section 482a(l) not only violate *Buckley*, but serve no compelling state interest. They only create more paperwork and, in the case of the affidavit, delays the deployment of circulators.[16]

All of the information the state needs and is constitutionally entitled to know about each circulator, volunteer or paid, is already included in the circulator's certificate on the face of each petition. *See* MCL 168.544c(l)-(3), (5), and (15), incorporated by reference in MCL 168.482(6), The paid circulator check box and the paid circulator pre-filing affidavit requirement selectively impose additional administrative burdens only on petition proponents that employ paid circulators, without any countervailing benefit or justification. They are unconstitutional under *Buckley* and *Meyer*.

## CONCLUSION AND RELIEF SOUGHT

For the reasons stated LWVMI asks that the Court deny the Application for Leave to Appeal.

Respectfully submitted,

/s/ Mark Brewer
Mark Brewer
Goodman Acker, P.C.
Attorneys for Plaintiff-Appellant
Progress Michigan
17000 W. 10 Mile Road, 2nd Floor
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

NICKELHOFF & WIDICK, PLLC
Andrew Nickelhoff (P37990)
Attorneys for League of Women Voters of Michigan, et al.
333 W. Fort Street, Ste. 1400

[16] If it is the sworn oath the State seeks through the affidavit requirement - and it clearly isn't - that can be accomplished in a less burdensome way by requiring filed petitions be notarized as some cities do, *see, e g*, City of Detroit Charter §12-102, and as did the 1908 Constitution, *see* Const 1908 art 5, § 1,16.

Detroit, MI 48226
(313) 496-9429
anickelhoff@michlabor.legal

Mary Ellen Gurewitz (P25724)
Of Counsel, Cummings & Cummings Law Group, PLLC
Attorneys for League of Women Voters of Michigan, et al.
423 N. Main Street, Ste. 200
Royal Oak, MI 48067
(313) 204-6979
maryellen@cummingslawpllc.com

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