STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

JOCELYN BENSON, in her capacity as SECRETARY OF STATE,

Defendant.
_____/

OPINION AND ORDER

Case Nos. 19-000084-MM

Hon. Cynthia Diane Stephens

MICHIGAN SENATE, and MICHIGAN HOUSE OF REPRESENTATIVES

Plaintiffs,

v

JOCELYN BENSON, in her capacity as SECRETARY OF STATE,

Defendant.
_____/

Case Nos. 19-000092-MZ

Hon. Cynthia Diane Stephens

Pending before the Court in these consolidated cases are the parties' competing motions for summary disposition with respect to the constitutionality of various aspects of 2018 PA 608. For the reasons discussed *infra*, the Court concludes that PA 608's 15% geographic requirement articulated in MCL 168.471 and its "check-box" requirement in MCL 168.472(7) are

unconstitutional and must be stricken from PA 608, along with related provisions in MCL 168.477(1) and MCL 168.482(4). However, PA 608's affidavit requirement, see MCL 168.482a(1), and signature-invalidating requirements, see MCL 168.482a(2)-(4), pass constitutional muster on facial challenges such that declaratory relief will not issue in plaintiffs' favor as it concerns these provisions. In Docket No. 19-000092-MZ, the Court concludes that plaintiffs, Michigan Senate and Michigan House of Representatives, lack standing and that the complaint in Docket No. 19-000092-MZ must be dismissed as a result. However, the Court, exercising its inherent discretion to control its docket, see *Baynesan v Wayne State Univ*, 316 Mich App 643; 894 NW2d 102 (2016), will treat the papers submitted by the House and Senate as amicus briefs in the matter in Docket No. 19-000084-MM.

I. BACKGROUND

The people of this state have: (1) reserved for themselves the power to amend the state's constitution by initiative; (2) reserved the power to propose and enact statutes by initiative; and (3) reserved the power to reject statutes by referendum. Const 1963, art 2, § 9; Const 1963, art 12, § 2; *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59 n 18; 921 NW2d 247 (2018). At issue in this case is 2018 PA 608 and pertinent changes that the act made to this state's initiative and referendum processes.

A. 15% GEOGRAPHIC REQUIREMENT FOR SIGNATURES

The first point of contention in this case is a geographic signature requirement effectuated by PA 608 and codified in MCL 168.471. PA 608 imposed strict requirements on how many signatures could be gathered from a single congressional district. Historically there were no geographic limits. In pertinent part, the amendments effectuated by MCL 168.471 now provide that:

> *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.* 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.]

MCL 168.477(1) was amended to prohibit the Board of State Canvassers from counting signatures above the 15% limit described in MCL 168.471.

B. REQUIREMENT OF PAID CIRCULATORS TO FILE AFFIDAVITS

PA 608 also imposed new requirements on paid petition circulators. —Notably, MCL 168.482a requires paid petition circulators or "paid signature gatherers"[1] to file signed affidavits with the Secretary of State indicating that the signature gatherer has been paid to circulate a petition and to gather signatures. Volunteer circulators were not affected by this change in the law. The statute invalidates signatures collected by individuals who have not filed the requisite affidavits or who have falsified or omitted certain, pertinent details. In this respect, MCL 168.482a provides as follows:

> (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.

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

> (3) If the circulator of a petition under section 482 provides or uses a false address or provides any fraudulent information on the certificate of circulator, any signature obtained by that circulator on that petition is invalid and must not be counted.
>
> (4) 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.
>
> (5) Any signature obtained on a petition under section 482 that was not signed in the circulator's presence is invalid and must not be counted.

C. DISCLOSURE OR "CHECK-BOX" REQUIREMENTS

PA 608 additionally mandates that petition circulators check boxes on petition signature sheets indicating whether they are paid circulators or whether they are volunteer circulators. This "check box" appears on the sheet that is presented to potential signers of a petition. Any signatures gathered on a petition without compliance with the "check-box" requirements are declared invalid and are not to be counted. In this respect, MCL 168.472(7)-(8) provide:

> (7) Each petition under this section must provide at the top of the page check boxes and statements printed in 12-point type to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer.
>
> (8) Each petition under this section must clearly indicate below the statement required under subsection (7) and be printed 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.

II. 2019 OAG OPINION NO. 7310

In response to a request from defendant Secretary of State Jocelyn Benson, Attorney General Dana Nessel authored an opinion regarding the constitutionality of various aspects of PA 608. OAG No. 7310 concluded that the 15% geographic limitation imposed by MCL 168.471 was unconstitutional. OAG No. 7310 also concluded that the check-box requirement for paid petition circulators was constitutionally infirm. The opinion reached the same conclusion

with respect to affidavits required to be filed by paid petition circulators. Finally, the OAG Opinion concluded that the signature-invalidation provisions of PA 608 were constitutional.

III. INSTANT LITIGATION

In Docket No. 19-000084-MM, plaintiffs League of Women Voters *et al*. raise several constitutional challenges to PA 608 and ask the Court for injunctive and declaratory relief. Count I of the complaint takes aim at the 15% geographic cap effectuated by MCL 168.471 and contends that the same is an unconstitutional restriction imposed on citizens' right of initiative and/or referendum, contrary to the dictates of art 2, § 9, and art 12, § 2. To this end, plaintiffs point out that the delegates to the Constitutional Convention rejected geographic limitations when they drafted the Constitution of 1963. See Constitutional Convention Record, Volume 2, pp. 3200-3201. Count II of the complaint takes aim at the geographic limitation by arguing that the requirement violates citizens' rights of free speech and association, as well as the right to petition. See Const 1963, art 1, §§ 3, 5.

Count III of the complaint in Docket No. 19-084 raises free speech issues about the requirements imposed on paid petition circulators, i.e., the check box requirement and the affidavit requirement. In addition, Count III alleges that invalidating signatures for what the complaint refers to as "technical circulator errors or omissions" as outlined in PA 608 violates petition signers' rights to free speech and association under Const 1963, art 1, §§ 3, 5. According to plaintiffs in Docket No. 19-084, existing law, such as criminal penalties imposed on petition circulators who make false statements, is sufficient to protect the state's interest in ensuring the accuracy of the petition/initiative process, such that additional legislation purporting to do the same is unnecessary. Count IV makes a similar claim under a due process theory.

In Docket No. 19-000092-MZ, the Michigan Senate and the Michigan House of Representatives have filed a complaint for injunctive and declaratory relief. They seek a declaration that PA 608 is constitutional in its entirety, and they ask the Court to require defendant Secretary of State to enforce the act. According to the Michigan House and Senate, their constitutional authority as this state's Legislature will be harmed if PA 608 is not enforced.

IV. THE MICHIGAN HOUSE AND SENATE LACK STANDING IN THIS MATTER

The first issue the Court will address in this case is whether the Michigan House and Senate have standing to seek injunctive and declaratory relief against the Secretary of State in Docket No. 19-092.

For the reasons stated below, this Court finds that the named plaintiffs, Michigan Senate and Michigan House of Representatives, do not have standing in this controversy but that the perspective they offer is sufficiently valuable to accord them amici status. Under the test articulated in *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), a litigant may seek declaratory relief under MCR 2.605(A)(1) in a case of actual controversy, which "exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights." *Lansing Schs Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 515; 810 NW2d 95 (2011). "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." *Lansing Schs Ed Ass'n*, 487 Mich at 372. If a member of an association or organization has standing to challenge a statute or regulation, the organization or association also has standing to challenge the same. See

Associated Builders and Contractors v Dir of Consumer & Indus Servs Director, 472 Mich 117, 127; 693 NW2d 374 (2005).[2]

Unlike the appropriations committee member in *House Speaker (Dodak) v State Administrative Bd*, 441 Mich 547; 495 NW2d 539 (1993), neither the Michigan House nor the Michigan Senate can meet "the heavy burden" imposed on legislators who seek to challenge executive action. In *Dodak*, four members of the legislature, including the Speaker of the House of Representatives, filed suit and challenged the authority of the State Administrative Board under MCL 17.3 to transfer appropriated funds from one state program to another. *Id*. at 550. The plaintiffs in that action claimed standing based on their status as legislators. *Id*. at 554. The Supreme Court opined that, "[u]nder limited circumstances, the standing of legislators to challenge allegedly unlawful executive actions has been recognized in the federal courts." *Id*. at 555. Establishing such standing was no small task, however, as the Court declared that a legislator must "overcome a heavy burden" in order to show standing existed. *Id*. To that end, it noted that, "[c]ourts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *Id*. Indeed, the Court remarked it "would be imprudent and violative of the doctrine of separation of powers to confer standing upon a legislator simply for failing in the political process." *Id*. at 556. As a result, standing will only be found to exist if legislator plaintiffs "assert more than a generalized grievance that the law is not being followed[.]" *Id*. (citation and quotation marks omitted). "Instead, they must establish that they have been deprived of a personal and legally cognizable interest peculiar to [them]."

[2] Although the Court in *Lansing Schs Ed Ass'n* overruled parts of *Associated Builders and Contractors*, it expressly declined to overrule the above-noted aspect of the case. *Lansing Schs Ed Ass'n*, 487 Mich at 372 n 20.

Id. (citation and quotation marks omitted). For instance, a legislator alleging a diminution in his or her vote amounting to a nullification of the vote, "with no recourse in the legislative process," has made the requisite allegations for standing. *Id*. at 557 (citation and quotation marks omitted).

In *Dodak*, the Supreme Court held that "at least" one of the plaintiffs, a member of the House Appropriations Committee, had standing to pursue the action. *Id*. at 550, 559-560. That member had "been denied a specific statutory right sufficient to confer standing" because he was deprived of his specific statutory right to participate in the legislative process of approving or disapproving fund transfers. *Id*. at 560. The member was not "suing to reverse the outcome of a political battle that he lost"; rather, he was "suing to maintain the effectiveness of his vote[.]" *Id*. at 561.

In this case, the House and Senate argue that the Secretary of State deprived them of a unique right or unique interest in the diminution of their vote with respect to PA 608. Indeed, PA 608, regardless of any constitutional infirmity, was a validly enacted statute, pursuant to majority vote by the House and Senate. At the request of the Secretary of State, the Attorney General declared, in an opinion that is binding on state agencies, the statute to be unconstitutional. Immediately thereafter, plaintiff League of Women Voters et al. filed a complaint challenging the constitutionality of PA 608. Defendant Secretary of State, being represented by the Attorney General, has by and large not defended the constitutionality of the statute but instead adheres to the positions asserted in the OAG opinion. Thus, at this stage, the statute is not being enforced or applied, and the litigation surrounding the statute is being conducted without the benefit of advocacy, given the position taken by the state. The House and Senate are seeking to uphold the constitutionality of a validly enacted statute that is neither being enforced nor upheld by the executive branch. While the House and Senate act for the voters in a

representative democracy, every resident of this state has an interest in seeing validly enacted laws enforced. Under the concept of standing offered by the House and Senate, whenever an Attorney General issues an opinion invalidating a statute, both chambers would have standing to sue because the opinion "nullified" the majority vote in support of that statute. The review process itself is a part of Michigan governance. Relying on *Traverse City School District v Attorney General*, 384 Mich 390, 410 n 2; 185 NW2d 9 (1971), the Court in *Michigan Beer & Wine Wholesalers Ass'n*, affirmed that the review process was an ordinary process of governance. "The Attorney General has the duty under M.C.L. § 14.32; M.S.A. § 3.185, to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, . . .or any other state officer[.] While such opinions do not have the force of law, and are therefore not binding on courts, they have been held to be binding on state agencies and officers." *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300-301; 370 NW2d 328 (1985) (quotation marks and citations omitted). It is an ordinary part of this state's political process as defined in *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 507 NW2d 422 (1983) to include the overall operation of governance. The "heavy burden" in *Dodak* would be virtually eliminated. However, while neither the House nor the Senate have demonstrated a particularized injury, they do offer this Court a valuable perspective. Proceeding without their advocacy, this case would lack anyone supporting the legislation since both the League and the Secretary assert that it is flawed. Therefore, pursuant to the inherent authority of this Court, the papers filed by the House and Senate as amici briefs in Docket no. 19-84 are accepted. See *Baynesan v Wayne State Univ*, 316 Mich App 643, 894 NW2d 102 (2016)

V. CONSTITUTIONALITY OF PA 608'S CHALLENGED PROVISIONS

The Court begins with the presumption that the challenged statutory provisions of PA 608 are constitutional. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). As explained by the Supreme Court in *Phillips*:

> Statutes are presumed constitutional. We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict. . . . Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. [*Id*. at 422-423 (citations and quotation marks omitted).]

A. THE 15% GEOGRAPHIC REQUIREMENT IS UNCONSTITUTIONAL

The power of the initiative and referendum process is reserved to the people in art 2, § 9 of this state's Constitution. In order to invoke the initiative process, "petitions signed by a number of registered electors, not less than eight percent for initiative . . . 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." Art 2, § 9. The Legislature is charged with implementing the provisions of art 2, § 9. *Id*. Similarly, art 12, § 2 reserves to the people the right to propose constitutional amendments by petition signed by "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." While the aforementioned constitutional provisions establish requirements in terms of the number of signatures needed to invoke the respective processes, they do not contain any limits on where those signatures can be gathered.

Turning first to art 2, § 9 and initiative or referendum petitions, the Supreme Court's decision in *Wolverine Golf Club v Secretary of State*, 384 Mich 461; 185 NW2d 392 (1971), is particularly instructive with respect to the issue presently before the Court. In that case, the Legislature enacted a statute—then codified at MCL 168.472—that required the filing of

initiative or referendum petitions not less than 10 days before the start of a legislative session. *Id*. at 463-464. In weighing the issue of whether this strict time limit was constitutional, the Supreme Court explained that art 2, § 9 expressly directs the Legislature to *implement* the constitutional section on the initiative and referendum processes. *Id*. at 466. The Supreme Court explained that the implementation duty described in art 2, § 9 was "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Id*. However, the procedure for initiative or referendum was "self-executing," such that the legislative directive of "implementing" the initiative and referendum process was limited. *Id*. Indeed, the Legislature was not permitted "to impose additional obligations on a self-executing constitutional provision." *Id*. (citation and quotation marks omitted). The Court explained that, unless otherwise expressly indicated, "legislation supplementary to self-executing constitutional provisions" may not curtail or place undue burdens on the right guaranteed by the Constitution. *Id*. (citation and quotation marks omitted). With that backdrop, the Court concluded that the 10-day filing requirement "restricts the utilization of the initiative petition and lacks any current reason for doing so." *Id*. As such, the 10-day requirement was unconstitutional. *Id*. at 466-467.

When viewed through the lens of *Wolverine Golf Club*, the Court concludes that the 15% geographic limitation mandated by MCL 168.471 is unconstitutional on its face as it concerns initiative and referendum petitions described in art 2, § 9. The plain language of art 2, § 9 does not support the imposition of any geographic requirement, let alone one as stringent as the 15% requirement imposed by PA 608. Indeed, the geographic restriction in PA 608 undoubtedly limits, impairs, and hinders citizens' ability to engage in the constitutionally authorized initiative and/or referendum process by limiting circulators' ability to circulate petitions in a given

Congressional district. The effect of the 15% geographic limitation would undoubtedly drive petition circulators from the state's population hubs and would impede circulators' abilities to satisfy the Constitution's signature requirements. The Legislature lacked authority to place such a burden on the rights of the people under art 2, § 9. As explained in *Wolverine Golf Club*, 384 Mich at 466 (citation and quotation marks omitted), the Legislature is not permitted "to impose additional obligations on a self-executing constitutional provision."

The Court reaches a similar conclusion with respect to the right of the citizenry to petition for constitutional amendment under art 12, § 2. In this respect, the Supreme Court has confirmed that art 12, § 2 is also a self-executing provision. *Citizens Protecting Michigan's Constitution v Sec of State*, 503 Mich 42, 63; 921 NW2d 247 (2018). While the right to propose amendments by initiative petition must be done in accordance with constitutional restraints, that right cannot "be interfered with [ ] by the legislature, the courts, nor the officers charged with any duty in the premises." *Id*. (citation and quotation marks omitted). In the case at bar, the right of constitutional initiative has plainly been interfered with by the legislature's implementation of an arbitrary 15% rule. Furthermore, the case is distinguishable from *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), which has been cited in the instant case in support of the 15% requirements. In *Consumers Power*, a legislatively imposed requirement declared that a signature affixed to a petition more than 180 days before the petition was filed was rebuttably presumed to be stale and void. *Id*. at 7-8. In that case, the Supreme Court held that the purpose of the requirement was "to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment." *Id*. Here, in contrast to *Consumers Power*, the 15% rule is entirely divorced from any purpose or constitutional directive of art 12, § 2. Indeed, art 12, § 2 says nothing about

where signatures may be obtained. The only requirements regarding signatures are that: (1) they come from registered electors of this state; and (2) they equal at least 10% of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Hence, in contrast to the legislation that was upheld in *Consumers Power*, the 15% geographic restriction imposed by way of MCL 168.471 thwarts, rather than fulfills, a constitutional directive. See *Scott v Vaughan*, 202 Mich 629, 643; 168 NW 709 (1918) (interpreting a similar provision of this State's 1908 Constitution to conclude that the right to petition "is to be exercised in a certain way and according to certain conditions; *the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution*.") (emphasis added). Cf. *Consumers Power*, 426 Mich at 7-8. That is, while the Constitution states that petitions are to be "signed and circulated in such manner, as prescribed by law," the reference to prescription "by law" must still be read in light of the self-executing nature of art 12, § 2, and it cannot be read to permit a legislative enactment that significantly burdens the right reserved to the people under art 12, § 2. See *Citizens Protecting Michigan's Constitution*, 503 Mich at 63-64. Here, the nature of the 15% restriction is one of an "undue burden" that may not be placed on a self-executing constitutional provision. See *id*. See also *Ferency v Secretary of State*, 409 Mich 569, 591; 297 NW2d 544 (1980).

The above conclusion is consistent with the long-held notion that, when interpreting a constitutional initiative or referendum provision, courts are to adopt a liberal construction of the same in order "to facilitate, rather than hamper the exercise by the people of these reserved rights." *Newsome v Riley*, 69 Mich App 725, 729; 245 NW2d 374 (1976). See also *Kuhn v Dep't of Treasury*, 384 Mich 378, 385; 183 NW2d 796 (1971) (explaining that "under a system of government based on grants of power from the people, constitutional provisions by which the

people reserve to themselves a direct legislative voice ought to be liberally construed."). Here, the effect of PA 608's 15% geographic requirement is to hamper the initiative, petition, and referendum processes through the placement of strict geographic requirements on the citizenry's right to invoke the same.

In support of their contention that the 15% geographic requirement contained in PA 608 is constitutional, amici, the Michigan House and Senate, cite Const 1963, art 2, § 4, which provides in pertinent part that:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States, *the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.* [Emphasis added.]

Emphasizing the above-italicized section of art 2, § 4, the House and Senate contend that they have the constitutional authority to regulate elections, and that this authority extends to requirements such as the 15% geographic requirement.

Contrary to the House and Senate's contentions, art 2, § 4 does not support their position and it does not change the outcome in this case. Namely, art 2, § 4 does not grant the Legislature broad and unfettered authority; rather, the authority granted thereby is prefaced by the limitation, "Except as otherwise provided in this constitution . . . ." Hence, art 2, § 4 must be read in light of other constitutional provisions—such as art 2, § 9 and art 12, § 2—and cannot impose onerous requirements on initiative or referendum petitions that would otherwise not be permitted by art 2, § 9 and art 12, § 2. Furthermore, the House and Senate overstate the reach of art 2, § 4. To that end, the authorization in art 2, § 4 is with respect to "the time, place and manner of all nominations and elections." Notably absent from this provision is any discussion about the

purity of the initiative or referendum processes. And this is for good reason, given that these processes are expressly governed by other constitutional provisions.

Having determined that the 15% geographic requirement is unconstitutional, the next issue becomes whether the offending portion of the statute can be severed from the act, or whether the entirety of PA 608 must be invalidated. "When a portion of an act is invalid . . . the invalid portion may be deleted and the court may determine by rules of legislative intent whether the valid portion of the act shall be enforced." *Mich State AFL-CIO v Mich Employment Relations Comm*, 212 Mich App 472, 501; 538 NW2d 433 (1995). "The law enforced after severance must be reasonable in light of the act as originally drafted." *Id*. Here, the Court concludes that the 15% requirement can be stricken from the remaining provisions of PA 608 and that the remainder of the act—save for the remaining provisions that rely on the 15% geographic requirement—remains enforceable. That is, after striking the 15% requirement in MCL 168.471—as well as the attendant provision in MCL 168.477(1) requiring the Board of State Canvassers to reject signatures not in compliance with the 15% requirement, and as well as the change effectuated to forms in MCL 168.482(4) to provide a reference to congressional districts—the non-offending portions of the act can still be enforced.[3]

B. REQUIREMENTS IMPOSED ON PAID PETITION CIRCULATORS

The next issue before the Court concerns the requirements imposed on paid petition circulators. In this respect, PA 608: (1) mandates disclosure of a circulator's paid status on a

[3] Because the Court finds that the 15% geographic limitation is unconstitutional for the reasons stated above, it need not address the other constitutional infirmities alleged by plaintiffs in Docket No. 19-084.

signed affidavit filed with the Secretary of State, see MCL 168.482a; and (2) imposes a "check-box" requirement wherein paid signature gatherers must indicate whether they are paid signature gatherers, see MCL 168.472(7). The issue presented to the Court is whether these sections of PA 608 run afoul of the speech clauses in the state and federal constitutions.

The Supreme Court of the United States has held that "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change.' " *Buckley v American Constitutional Law Foundation, Inc*, 525 US 182, 186; 119 S Ct 636; 142 L Ed 2d 599 (1999), quoting *Meyer v Grant*, 486 US 414; 108 S Ct 1886; 100 L Ed 2d 425 (1988). Nevertheless, the state has an interest in, and is allowed to enact, regulation of petition drives in order to ensure fairness and integrity. *Id*. at 187. Hence, "[s]tates 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." *Id*. at 191.

The issues in this case concern regulations aimed at the disclosure of political speech. Regulations "directed only at *disclosure* of political speech are subject to . . . 'exacting scrutiny,' which requires the government to show that the challenged laws are substantially related to a sufficiently important governmental interest." *Nat'l Assoc for Gun Rights, Inc v Mangan*, 933 F3d 1102, 1112 (CA 9, 2019) (citation and quotation marks omitted). See also *John Doe No 1 v Reed*, 561 US 186, 196; 130 S Ct 2811; 177 L Ed 2d 493 (2010). The exacting scrutiny standard "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *John Doe No 1*, 561 US at 196 (citation and quotation marks omitted). For a statute or regulation to survive exact scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. (citation and quotation marks omitted).

1. THE CHECK-BOX REQUIREMENT IS UNCONSTITUTIONAL

MCL 168.472(7) requires paid petition circulators to disclose their paid status on the face of petition sheets circulated to potential petition signers. The Court's evaluation of this compelled disclosure is aided by reviewing the United States Supreme Court's decision in *Buckley*, 525 US 182. That case involved a Colorado statute that required petition circulators to wear an identification badge bearing the circulator's name.[4] *Id*. at 198-200. The Court held that the name-badge requirement was unconstitutional, in large part, because it "discourages participation in the petition circulation process by forcing name identification without sufficient cause." *Id*. at 200. With respect to the lack of "sufficient cause," the Court noted the state's interest in wanting to deter fraud and to keep circulators accountable to law enforcement; however, those concerns were already addressed by affidavits[5] that the circulators were required to file with the state. *Id*. at 198. And with respect to whether the name-badge requirement discouraged participation in the petition circulation process, the Court noted that concerns from petition circulators expressing significant reservations about being forced to reveal their identities at the same time they expressed their political message. *Id*. The timing of this disclosure, i.e., at the same moment the circulator's political message was revealed, was of particular importance to the Court. In this regard, the Court explained that the name-badge requirement 'forces circulators to reveal their identities at the same time they deliver their political message . . . it operates when reaction to the circulator's message is immediate and may

[4] The badge also had to indicate whether the circulator was paid or whether he or she was acting as a volunteer. The Court expressly declined to decide the constitutionality of the paid/volunteer indicator, as that issue was not before it. *Buckley*, 525 US at 200.

[5] There was no express challenge to the affidavits in that case; the Court's opinion simply noted the availability of the affidavits as a means of addressing the concerns purported to be addressed by the name badges. *Buckley*, 525 US at 192, 198.

be the most intense, emotional, and unreasoned[.]" *Id*. at 198-199. Thus, the name-badge stood in contrast to an affidavit that was available as a public record and which revealed the same information, because, "[u]nlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks." *Id*. at 198. This direct, "in-the-moment" delivery of information was critical to the Court's conclusion that the name-badge requirement hindered speech. *Id*. at 198-199.

The *Buckley* Court also discussed a state statute mandating that paid petition circulators disclose the names of payors as well as the names of paid circulators and amounts paid to each circulator. *Id*. at 202-203. The Court affirmed the Tenth Circuit's decision upholding disclosure requirements with respect to information about payors, noting the "importance of disclosure as a control or check on domination of the initiative process by affluent special interest groups." *Id*. at 202. "Disclosure 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. However, revealing the names of paid circulators and amounts paid to those circulators, did not add the same level of benefit. *Id*. at 203. In that case, the Court would not assume that a paid petition circulator was any more likely to accept false signatures than a volunteer circulator. *Id*. at 203-204. In short, the Court agreed with the Tenth Circuit's decision that:

> Listing paid circulators and their income from circulation "forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts, . . . no more than tenuously related to the substantial interests disclosure serves, Colorado's reporting requirements, *to the extent that they target paid circulators*, fai[l] exacting scrutiny. [*Id*. at 204 (citation and quotation marks omitted; emphasis added).]

With *Buckley* as a backdrop,[6] the Court concludes that the check-box requirement does not survive the exacting scrutiny test because it does not substantially relate to a sufficiently important governmental interest. See *John Doe I*, 561 US at 196. The check-box requirement forces petition circulators to make revelations to potential petition signers at the same time the circulator is delivering his or her political message. See *Buckley*, 525 US at 199. Similar to the name-badge requirement at issue in *Buckley*, the check-box requirement forces petition circulators to divulge this information at a time "when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned[.]" *Id*. This type of compelled disclosure discourages participation in the petition circulation process and inhibits core political speech. See *id*.

This discouragement in the petition circulation process is without sufficient reason or cause on the record before this Court to satisfy constitutional standards for such a regulation. Again, for a statute or regulation to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No 1*, 561 US at 196 (citation and quotation marks omitted). With respect to the strength of the governmental interest, none has been asserted in this matter, not even by the House and Senate. In theory, it could be argued that the check-box requirement serves the purpose of deterring fraud and regulating the petition process. See, generally, *Buckley*, 525 US at 187, 191 (discussing the general concerns a state has with respect to the petition circulation process). However, it must be noted that a circulator's paid status can be, and is, disclosed via other methods—such as the

[6] Again, *Buckley* expressly declined to decide a paid/volunteer disclosure issue somewhat similar to the issue presented in the instant case. However, drawing on *Buckley* and other pertinent authorities, the Court concludes that the check-box requirements fail constitutional scrutiny.

affidavit, discussed *infra*—that do not involve the same level of direct contact with potential voters. In addition, ballot committees are already required to make certain financial disclosures under this state's campaign finance laws. See, e.g., MCL 169.225; MCL 169.226. In other words, any regulatory purpose aimed to be served by the check-box requirement can be, and in some respects already is, served through less restrictive means. See *Buckley*, 525 US at 192 ("Our judgment is informed by other means [the state] employs to accomplish its regulatory purposes."). See also *Buckley*, 525 US at 198. The impermissible targeting of paid petition circulators under PA 608 is similar to the way paid circulators were targeted in *Buckley*. See *id.* at 204.

In support of a contrary position, amici cite a United States District Court decision from Nebraska, *Citizens in Charge v Gale*, 810 F Supp 2d 916 (D Neb, 2011), wherein a statutory disclosure regarding a petition circulator's paid or volunteer status was found to pass constitutional muster. The Court declines to find this case persuasive, however. The analysis in *Citizens in Charge* was relatively short and it did not note the same "in-the-moment" effects of disclosure that were analyzed in *Buckley*. This is significant, despite protestations from the House and Senate, because when courts "assess the chill apt to flow" from disclosure requirements, they are to consider whether the disclosure is being made directly from the circulator to the voter. *Libertarian Party of Ohio v Husted*, 751 F3d 403, 417 (CA 6, 2014). And here, the check-box requirement imposes a direct disclosure from the circulator to the voter. This is where the potential for chilling speech is most likely to occur. See *id.* Furthermore, PA 608 is distinguishable from the statute at issue in *Citizens in Charge* in the sense that the same information sought—paid circulator status—can be and is provided to the electorate in a less

confrontational fashion, as noted above, thereby achieving the same governmental objective in a way that does not restrict the political speech of petition circulators.

Once again, however, while the Court finds that this provision is unconstitutional, it declines to find that the constitutional infirmity has infected the entirety of PA 608, such that the Court is not required to invalidate the entire act. That is, the rest of PA 608 can reasonably be enforced absent the offending check-box provision. See *Mich State AFL-CIO*, 212 Mich App at 501.

2. AFFIDAVIT REQUIREMENT

The next disclosure requirement imposed on paid circulators by PA 608 is contained in MCL 168.482a, which requires paid petition circulators—but not volunteers—to file signed affidavits with the Secretary of State in which the circulator indicates that he or she has been paid to circulate a petition and to gather signatures. While the Court agrees that this requirement targets paid circulators, it declines to find that the affidavit requirement is unconstitutional *on its face,* as alleged by the Act's challengers in this case. Significant to this conclusion is the fact that the burden imposed on speech by way of the affidavit requirement is less significant than the burden imposed by requiring a paid circulator to check a box that will be presented to voters.[7] Returning to *Buckley*, 525 US at 199, the disclosure by affidavit, even if it is a matter of public record, does not carry with it the same "risk of 'heat of the moment harassment' " as the check-box requirement. This less direct, less confrontational disclosure does not pose as significant a risk to speech, nor have any of the opponents of PA 608 presented a compelling argument as to

[7] Plaintiffs' brief in Docket No. 19-084 even concedes as much.

how disclosure by affidavit will inhibit speech by paid petition circulators. It has been contended that the affidavit could make the petition process more difficult by creating more hurdles for petition organizers; however, that the overall petition process will be more difficult is not a relevant concern, particularly in this facial constitutional challenge. The appropriate test, as noted above, focuses on the burden imposed on *speech*. And that burden must be measured against the governmental interest. As noted above, the government has an interest, insofar as petition circulation is concerned, in regulating the petition process and in protecting the integrity and reliability of that process. As noted in *Libertarian Party of Ohio*, 751 F3d at 413, "[d]isclosure requirements provide the electorate with information about the sources of election-related spending and help citizens make informed choices in the political marketplace." Indeed, the Supreme Court has recognized that there is a substantial state interest in knowing about the money spent on initiative petitions. See *Buckley*, 525 US at 202-203. And here, the affidavit requirement could provide a means of ensuring that the campaign finance disclosures mandated by MCL 169.225 and MCL 169.226 are accurate, at least insofar as it provides proof of payment to circulators by a ballot committee. Furthermore, the affidavits undoubtedly provide more information to those in the political marketplace about the financiers of initiative petitions and about those seeking signatures on petitions. An affidavit provides this additional information and transparency about the petition process, but without a burdensome imposition on the petition circulator. In short, plaintiffs have not satisfied the Court that the affidavit requirement is unconstitutional on its face, i.e., that there is no set of circumstances under which the affidavit provision would be valid. See *Varran v Granneman*, 312 Mich App 591, 609; 880 NW2d 242 (2015) ("To make a successful facial challenge to the constitutionality of a statute, the challenger

must establish that no set of circumstances exists under which the [a]ct would be valid") (citation and quotation marks omitted).

C. SIGNATURE INVALIDATING PROVISIONS OF PA 608

The next issue before the Court concerns the signature-invalidating provisions contained in PA 608 by way of MCL 168.482a[8] and whether those provisions violate petition signers' rights of free speech and free association. The Court agrees with defendant Secretary of State's position that the constitutional infirmities alleged by plaintiffs in Docket No. 19-084 do not exist with respect to these sections of PA 608. As noted above, although participation in the petition process is core political speech, the Supreme Court has nevertheless held that "[s]tates 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." *Buckley*, 525 US at 191. See also *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 297 (CA 6, 1993). In *Taxpayers United*, 994 F2d 291, the United States Court of Appeals for the Sixth Circuit considered whether this state's statutes could provide for the invalidation of petition signatures for the failure to follow certain statutory procedures. The plaintiffs in that case argued that striking the signatures violated their rights to free speech and political association. *Id*. at 296-297. The Sixth Circuit rejected that argument as follows:

[8] As noted by the parties' briefing, at least some of these requirements may have arisen from the Court of Appeals' observation in *Protecting Mich Taxpayers v Board of State Canvassers*, 324 Mich App 240, 250; 919 NW2d 677 (2018), wherein the Court noted that the prior iteration of this state's election laws made "no allowance for striking elector signatures in the event that a circulator records an incorrect address, and nothing in the relevant statutes conveys any intent to disenfranchise electors who were unaware of a circulator's error or infraction."

> The Michigan procedure does nothing more than impose *nondiscriminatory, content-neutral restrictions on the plaintiffs' ability to use the initiative procedure that serve Michigan's interest in maintaining the integrity of its initiative process*. Our result would be different if . . . the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation, or if they alleged they were being treated differently than other groups seeking to initiate legislation. *But, in the instant case, we believe that it is constitutionally permissible for Michigan to condition the use of its initiative procedure on compliance with content-neutral, nondiscriminatory regulations that are, as here, reasonably related to the purpose of administering an honest and fair initiative procedure*. Accordingly, we conclude that the plaintiffs' First Amendment claim is without merit. [*Id*. at 297 (emphasis added).]

The United States Court of Appeals for the Fourth Circuit reached a similar decision in a case where signatures were invalidated under state law for lack of compliance with certain statutory provisions. See *Kendall v Balcerzak*, 650 F3d 515, 526 (CA 4, 2011).

Returning to the instant case, the signature-invalidating components of PA 608, while harsh, are content-neutral and nondiscriminatory. In fact, no party has made a serious allegation to the contrary. Courts generally decline to invalidate a state's decision to impose "nondiscriminatory, content-neutral restrictions" on the ability to use the initiative process. *Buckley*, 525 US at 191. Guided by *Buckley*, the Court refuses to find the signature-invalidating provisions of PA 608 as being unconstitutional on their face. Unlike the check-box requirement discussed above, invalidating signatures does not affect a petition circulator's ability to communicate his or her political message. See *Taxpayers United*, 994 F2d at 297; *Kendall*, 650 F3d at 526. Cf. *Buckley*, 525 US at 200-202. Rather, it is merely a check imposed by the state on the integrity of the process. In addition, this state's Supreme Court has held that substantial compliance with technical aspects of petition laws does not suffice, and that strict compliance is required. *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 619-620; 822 NW2d 159 (2012) (Opinion by MARY BETH KELLY, J).

The Court notes that, as it concerns MCL 168.482a(3)—which invalidates signatures associated with a "false address" or "fraudulent information"—plaintiffs in Docket No. 19-084 briefly contend that pertinent terms in the statute are void for vagueness and that they should not be enforced. Plaintiffs' failure to adequately brief this issue or provide any meaningful discussion does not put the matter before the Court and will result in the Court treating the contention as being abandoned. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

As a final matter, the Court rejects plaintiffs' due process claim in Docket No. 19-084. The Board of State Canvassers is not required to provide petition signers with notice and the opportunity to respond before their signatures are rejected. See *Kendall*, 650 F3d at 529. As explained by the Seventh Circuit in *Protect Marriage Ill v Orr*, 463 F3d 604, 608 (CA 7, 2006), and as adopted by the *Kendall* Court:

> what is required in the name of due process depends, as the Supreme Court made clear in *Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976), on the costs as well as the benefits of process. See also *Wilkinson v. Austin*, 545 US 209, 125 S Ct 2384, 2395, 162 L Ed 2d 174 (2005); *Holly v. Woolfolk*, 415 F 3d 678, 680–81 (7th Cir 2005) (and cases cited there). The cost of allowing tens of thousands of people to demand a hearing on the validity of their signatures would be disproportionate to the benefits, which would be slight because the state allows the organization orchestrating a campaign to put an advisory question on the ballot, in this case Protect Marriage Illinois, to challenge the disqualification of any petitions.

Applying the reasoning of *Kendall* and *Protect Marriage Ill* to the case at bar, the costs of allowing potentially untold numbers of signers to demand a hearing on the validity of their signatures is disproportionate to the benefits of the same. The current procedures for review by the Board of State Canvassers outlined in MCL 168.476 are sufficient, and the type of pre-invalidation notice-and-hearing requested by plaintiffs is not warranted. The Court will grant

summary disposition to defendant Secretary of State as the non-moving party on this matter—Count IV of the complaint—pursuant to MCR 2.116(I)(2).

VI. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs in Docket No. 19-084 are entitled to summary disposition with respect to their requests for declaratory relief that: (1) the 15% geographic requirement in MCL 168.471 is unconstitutional—as are the sections of PA 608 related to the 15% requirement and/or Congressional districts, see MCL 168.477(1), and MCL 168.482(4); and (2) the check-box requirement in MCL 168.472(7) is unconstitutional.

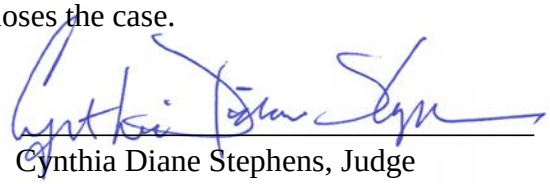
IT IS HEREBY FURTHER ORDERED that declaratory relief will not issue in plaintiffs' favor with respect to whether the affidavit requirement in MCL 168.482a(1) is unconstitutional on its face.

IT IS HEREBY FURTHER ORDERED that summary disposition is GRANTED in favor of defendant Secretary of State, as the nonmoving party, with respect whether the signature-invalidation requirements contained in MCL 168.482a are unconstitutional—either under a free speech theory or under a due process theory.

IT IS HEREBY FURTHER ORDERED that the complaint in Docket No. 19-092 is DISMISSED because plaintiffs Michigan House and Senate lack standing.

This order resolves the last pending claim and closes the case.

Dated: September 27, 2019



Cynthia Diane Stephens, Judge
Court of Claims