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Attorney General Dana Nessel
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Re: 2018 PA 608

Dear Attorney General Nessel:

Thank you for the opportunity to present our views regarding 2018 PA 608 as you consider the Secretary of State's request for a legal opinion on the statute. As we explain below, the statute violates both the state and federal constitutions, as well as the federal Voting Rights Act.

The ACLU of Michigan has a strong interest in ensuring that the state's voters have the full access to the ballot guaranteed by the state and federal constitutions and by federal civil rights law. As one of the state's leading nonpartisan organizations dedicated to the protection of voting rights, the ACLU of Michigan has participated in many cases involving ballot access restrictions. See, e.g., *Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42; 921 NW2d 247 (2018); *Stand Up for Democracy v Sec'y of State*, 492 Mich 588; 822 NW2d 159 (2012); *Moore v Johnson*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 23, 2014 (Docket No. 14-11903), 2014 WL 4924409.

In what follows, we begin with a brief summary of the relevant provisions of 2018 PA 608. We then show that: (1) the statute's 15-percent-per-district cap on signatures impermissibly curtails the people's power of direct democracy, as reflected in the Michigan Constitution's self-executing signature thresholds; (2) numerous provisions of the statute violate the First Amendment and corresponding state constitutional provisions by imposing unjustified burdens on the signature-gathering process; and (3) the 15-percent cap violates the Voting Rights Act by disproportionately limiting the voices of black voters who wish to place a proposition on the ballot.

2018 PA 608—A Brief Summary

2018 PA 608 makes a number of changes to the law governing petitions for initiatives, referenda, and voter-initiated constitutional amendments. For purposes of our analysis, the most significant changes are as follows:

- *Geographic Distribution Requirement*: 2018 PA 608 establishes a new geographic distribution requirement for obtaining petition signatures for ballot measures. The statute

provides that "not more than 15% of the signatures to be used to determine the validity of" an initiative, referendum, or constitutional amendment petition "shall be of registered electors from any 1 congressional district." MCL 168.471. It also includes a number of provisions to enforce that primary requirement. Most significant, any signature from a congressional district after the 15-percent cap has been reached "must not be counted." *Id.* In addition, entities filing ballot-measure petitions must now sort them so that they are "categorized by congressional district, and they "must state in writing a good-faith estimate of the number of petition signatures from each congressional district." *Id.* And petitions must now be separated into different sheets for each congressional district. MCL 168.482(4).

- *Limitations on Paid Circulators*: 2018 PA 608 requires each ballot-measure petition to include "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." MCL 168.482(7). If the circulator checks the wrong box, all of the signatures on that petition will be invalidated. MCL 168.482a(4). In addition, any paid circulator must now "file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer"—and must do so "before circulating any petition." MCL 168.482a(1). Volunteer circulators face no affidavit requirement.

- *Invalidating Voters' Signatures Because of Circulators' Errors*: 2018 PA 608 provides that any signature obtained by a paid circulator who failed to submit a prior affidavit "is invalid and must not be counted." MCL 168.482a(2). In addition, if a 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 168.482a(4).

I. The 15-Percent Cap Impermissibly Curtails the Rights Granted to Voters by the Michigan Constitution.

By requiring that no more than 15 percent of petition signatures come from any one congressional district, 2018 PA 608 curtails the rights granted to voters under the Michigan Constitution. In particular, the statute imposes impermissible burdens on the state constitutional provisions that establish the people's power to engage in direct democracy. Those provisions are self-executing. Under well-settled law, the legislature is forbidden from curtailing, or imposing undue burdens on, the rights or powers granted by self-executing constitutional provisions. Indeed, the Michigan Supreme Court enforced this principle in a case involving the constitutional provision governing referendum petitions—one of the constitutional provisions implicated by 2018 PA 608. See *Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392 (1971).

A. The Signature Thresholds in the Michigan Constitution Are Self-Executing.

The Michigan Constitution reserves to the people the power of initiative and referendum, Const 1963, art 2, § 9, as well as the power to propose constitutional amendments, *id.*, art 12, § 2. These powers provide an essential tool for democracy, by providing a means for the people to bypass an unresponsive legislature. They "assure the citizenry of a gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands."

Kuhn v Dep't of Treasury, 384 Mich 378, 385 n 10; 183 NW2d 796 (1971) (internal quotation marks omitted). The "adoption of the initiative power, along with other tools of direct democracy, 'reflected the popular distrust of the Legislative branch of our state government.'" *Citizens Protecting Michigan's Constitution v Sec'y of State*, 503 Mich 42; 921 NW2d 247 (2018), quoting *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 218; 378 NW2d 337 (1985). Because of the important function these powers play in our constitutional scheme, the Michigan Supreme Court has held that "constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Kuhn*, 384 Mich at 385.

The constitution provides specific signature thresholds for the people to invoke the powers of direct democracy. "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." Const 1963, art 2, § 9. And petitions for constitutional amendments 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." *Id.*, art 12, § 2. These provisions contain no requirement of geographic distribution. All registered voters, regardless of where in the state they live, have an equal right to sign ballot-measure petitions and have their signatures count toward the constitutional thresholds.

The Michigan Supreme Court has held that the petition procedures in Const 1963, art 2, § 9, for initiatives and referenda are "self-executing." *Wolverine Golf Club*, 384 Mich at 466. The same result necessarily follows for the petition proceedings in Const 1963, art 12, § 2, for constitutional amendments.

A constitutional provision is self-executing when it can be implemented without additional legislation. In *Thompson v Vaughan*, 192 Mich 512, 520; 159 NW 65 (1916), the Court held that the referendum provision of the 1908 Constitution was self-executing, because "[t]here is nothing in its language to indicate that it was to remain in abeyance until given life by legislative enactment." Quoting Justice Cooley's treatise, the Court adopted the following principle: "'A constitutional provision may be said to be self-executing, if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.'" *Id.*, quoting Cooley & Lane, Constitutional Limitations (7th ed), p 121. Even if some additional legislation might be useful "in aid of the constitutional provision," *id.*, requirements directly imposed by that provision remain self-executing.

As the Court held in *Wolverine Golf Club*, 384 Mich at 466, the requirements imposed on initiative and referendum petitions by Const 1963, art 2, § 9 can be implemented without additional legislation and are thus self-executing. See also *Wolverine Golf Club v Hare*, 24 Mich App 711, 727; 180 NW2d 820 (1970) (opinion of Lesinski, C.J.) ("The convention comment, which may properly be considered when attempting to discover the intent of the framers, expressly states that the provisions of art. 2, § 9 are self-executing."), aff'd 384 Mich 461; 185 NW2d 392 (1971). So too can the signature requirements for constitutional amendments in Const 1963, art 12, § 2. These provisions establish specific signature thresholds, which supply a

sufficient rule for enforcing the rights they grant to voters. They do not "merely indicate[] principles, without laying down rules by means of which those principles may be given the force of law." *Thompson*, 192 Mich at 520 (internal quotation marks omitted).

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."); *id.*, art. 12, § 2 (petition for constitutional amendment "shall be in the form, and shall be signed and circulated in such manner, as prescribed by law"). But these grants of power do not undermine the conclusion that the petition requirements are self-executing. Indeed, the Michigan Supreme Court has specifically rejected such an argument. See *Wolverine Golf Club*, 384 Mich at 466 (concluding that Const 1963, art 2, § 9's "constitutional procedure is self-executing," notwithstanding the grant to the legislature of the power to implement that section). The point of a self-executing provision is not to deny the legislature the power to carry out its requirements; the point is "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.*" *Wolverine Golf Club*, 24 Mich App at 728–729 (opinion of Lesinski, C.J.) (emphasis added).

B. 2018 PA 608 Imposes Impermissible Burdens on the Signature Thresholds in the Michigan Constitution.

Because the whole point of making a provision self-executing is to limit legislative encroachment, the legislature is forbidden to "'impose additional obligations on a self-executing constitutional provision.'" *Wolverine Golf Club*, 384 Mich at 466 (quoting *Wolverine Golf Club*, 24 Mich App at 725 (opinion of Lesinski, C.J.)). See also *Soutar v St Clair Co Election Comm*, 334 Mich 258, 265; 54 NW2d 425 (1952) ("Insofar as the steps required to obtain the printing of the name of a candidate for nomination for a judicial office on the non-partisan primary ballot are concerned, the language of the Constitution is self-executing. *Obligations other than those so imposed may not be added.*") (emphasis added). Although the legislature may enact "'legislation *supplementary* to self-executing constitutional provisions,'" it may not enact laws that undermine those provisions: "'the right guaranteed shall not be curtailed or any undue burdens placed thereon.'" *Wolverine Golf Club*, 384 Mich at 466 (emphasis added), quoting *Hamilton v Deland*, 227 Mich 111, 125; 198 NW 843 (1924).

The 15-percent cap curtails and places undue burdens on voters' power of direct democracy under the Michigan Constitution. That requirement does not merely supplement the Constitution's signature thresholds. It does not set forth the procedures by which the rules in the Constitution shall be enforced. Cf. *Durant v Dep't of Educ*, 186 Mich App 83, 98; 463 NW2d 461 (1990) (legislature's adoption of a statute of limitations did not "curtail or place undue burdens on a taxpayer's exercise of rights granted by the Headlee Amendment"). Nor does it otherwise ensure that the signature thresholds set forth in the Constitution are satisfied. Rather, 2018 PA 608 imposes a new substantive rule of geographic distribution. Groups of voters who seek to place a proposition on the ballot now must satisfy not just the signature thresholds in Const 1963, art 2, § 9, and art 12, § 2. They must also satisfy the separate requirement that no more than 15 percent of the required signatures may come from any congressional district.

This additional substantive requirement will impose significant burdens on initiative, referendum, and constitutional amendment campaigns. Those campaigns must now devote resources to monitoring the number of signatures they are gathering on a district-by-district basis. They must also work to overcome voters' ignorance about the congressional districts in which they live—ignorance that is exacerbated by the irregular shape of congressional district lines in Michigan's most densely-populated areas. The 15-percent cap will also burden individual voters, who will be deprived of the power to have their signature counted in support of a ballot proposition if too many other voters from their congressional district have already signed.

The burden imposed by 2018 PA 608 is at least as great as the burden the Michigan Supreme Court held to be unconstitutional in *Wolverine Golf Club*, *supra*. That case involved a statute that required petitions for voter-initiated legislation to be filed at least ten days before the start of a legislative session. Although the statute merely affected the *timing* of the exercise of the right to initiative, the Court nonetheless held the law to impose an unconstitutional burden on the self-executing guarantees of Const 1963, art 2, § 9. *Wolverine Golf Club*, 384 Mich at 466–467. Here, the statute does not merely affect the timing of the exercise of the rights to direct democracy; it imposes a new geographic signature requirement that will place significant burdens on the exercise of those rights. And it does so despite the lack of any provision in the Constitution that suggests that the power to place a proposition on the ballot may depend on where a voter lives.

To justify these burdens, the sponsors of 2018 PA 608 argued that the 15-percent cap would ensure that measures have a geographically diverse base of support before they are placed on the ballot. But if the people had wanted to include a geographic-diversity requirement for ballot-measure petitions, they would have included it in the 1963 Constitution. The burden imposed by 2018 PA 608 is necessarily "undue," because it aims at an object that the Constitution does not empower the legislature to achieve. Cf. *Durant*, 186 Mich App at 98-99 (statute of limitations for enforcing Headlee Amendment, which imposed no new substantive obligation, was constitutional because it helped to "fulfill the purpose of the amendment" by providing a structure to ensure that Headlee Amendment rights were promptly asserted).

The Michigan Constitution's imposition of specific statewide signature thresholds for direct democracy petitions contrasts sharply with its treatment of nominating petitions for statewide office. The constitution does not impose any requirements for nominating governors and senators; it simply gives the legislature the power to "enact laws to regulate the time, place and manner of all nominations and elections." Const 1963, art 2, § 4(2). Pursuant to that provision, the legislature has adopted modest geographic distribution requirements on gubernatorial and senatorial nominating petitions. See MCL 168.53 (governor) (requiring signatures of 100 registered voters from at least half of the congressional districts in the state); MCL 168.93 (senator) (same requirement). For direct democracy petitions, by contrast, the constitution specifies the signatures that are necessary to obtain access to the ballot. That express procedure does not incorporate a geographic distribution requirement. The legislature may not burden the people's constitutional power by adding such a requirement.

As Chief Judge Lesinski explained in his opinion for the Court of Appeals in *Wolverine Golf Club*, 24 Mich App at 728, this is a context that requires especial vigilance to ensure that the

legislature is not encroaching on constitutional guarantees. The people added the rights of initiative, referendum, and voter-initiated constitutional amendment so that they could express their democratic will in the face of legislatures that were unresponsive or captured by special interests. To allow a statute to burden direct democracy by adding requirements beyond those in the Constitution would be to allow the fox to guard the henhouse—to enable the legislature to defeat the democratic safety valve that was expressly intended to put a check on the legislature itself. See *Woodland*, 423 Mich at 215 (initiative power "is a reservation of legislative authority which serves as a limitation on the powers of the Legislature" and "is constitutionally protected from government infringement once invoked"). As we have explained, 2018 PA 608's 15-percent cap imposes undue burdens on the exercise of the power of direct democracy. It is therefore unconstitutional.

II. Numerous Provisions of 2018 PA 608 Violate the First Amendment and State Constitutional Guarantees of the Rights of Speech and Petition.

The Supreme Court has held that "[t]he circulation of an initiative petition" is "core political speech," because it "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v Grant*, 486 US 414, 421–422; 108 S Ct 1886; 100 L Ed 2d 425 (1988). A voter's signature on such a petition, too, is political speech. See *Doe v Reed*, 561 US 186, 194–195; 130 S Ct 2811; 177 L Ed 2d 493 (2010). As a result, the petition-circulation process is "an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer*, 486 US at 425. Limitations on that process are "subject to exacting scrutiny." *Id.* at 420.

2018 PA 608 fails that scrutiny. Several of the statute's provisions, individually and collectively, will impose significant costs on direct democracy campaigns without a close enough connection to a strong state interest. See *Citizens for Tax Reform v Deters*, 518 F3d 375, 388 (CA 6, 2008) (burden imposed on petition circulators without sufficient justification violates the First Amendment). The geographic distribution requirement and the new requirements for paid—but not volunteer—circulators impose the most notable burdens. In addition, the statute threatens to invalidate the signatures of eligible voters because of technical errors committed by petition circulators. It thus suppresses voters' speech without a sufficient justification.

As a result of these defects, 2018 PA 608 violates the First Amendment. It also violates the equivalent provisions of the Michigan Constitution. See *Woodland*, 423 Mich at 215 ("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.'").

A. 2018 PA 608 Imposes Significant Costs on Direct Democracy Campaigns Without a Sufficient Justification.

Several of the provisions of 2018 PA 608 will impose significant new costs on ballot measure campaigns without a sufficient justification.

1. Costs Imposed by the Geographic Distribution Requirement

As discussed above, the geographic distribution requirement will impose significant burdens. In districts in which a petition exceeds the 15-percent cap, the signatures of voters will be invalidated—and their speech will therefore be squelched. See *Doe*, 561 US at 194–195. But even if direct democracy campaigns can ultimately comply with it, the cap effectively imposes a tax on their operations. Campaigns will now be forced to continuously monitor their signature gathering on a district-by-district basis to ensure that they do not exceed the cap in any district. This will necessarily increase the costs of pursuing a ballot initiative, which will limit the ability of ballot-measure campaigns to get their message out. "By making speech more costly, the State is virtually guaranteeing that there will be less of it." *Citizens for Tax Reform*, 518 F3d at 388.

The geographic distribution requirement also imposes a burden at the moment at which a petition circulator obtains a voter's signature. Under 2018 PA 608, petitions must now use separate sheets for each congressional district. See MCL 168.482(4). Before obtaining a signature, the circulator must first ascertain the congressional district in which the voter lives. Many voters cannot reliably identify the congressional district in which they live. If a circulator has a smartphone, it will take time to look up that information. Some voters will find the process too much of a bother and will walk away without signing. And the time spent looking up one voter's address is time that a circulator cannot use to speak to another voter. These effects burden protected speech, because they "limit the size of the audience of the petition" and as a result "lower the likelihood that a measure will qualify for the statewide ballot." *Citizens for Tax Reform*, 518 F3d at 383.

That burden is not justified by a sufficiently strong state interest. 2018 PA 608's sponsors argued that the statute was needed to ensure that ballot measures have a sufficiently strong base of support across the state before being placed on the ballot. But Michigan already has one of the highest signature thresholds in the Nation for direct democracy petitions. See Nat'l Conf of State Legislators, *Signature Requirements for Initiative Proposals* (2014), https://goo.gl/YWCjXp. In the most recent gubernatorial election, 4,250,585 votes were cast. The state constitution requires ballot-measure campaigns to submit a number of signatures equivalent to 10% of that number to qualify a constitutional amendment for the ballot, 8% to qualify an initiative, and 5% to qualify a referendum. See 1 Const 1963, art 2, § 9; *id.* art. 12, § 2. Proponents must thus gather over 425,000 signatures to qualify a constitutional amendment for the ballot, over 340,000 to qualify an initiative, and approximately 215,000 to qualify a referendum. To obtain so many signatures, proponents will, as a practical matter, be required to gather support from multiple areas of the state. Because the state has other means of achieving its interest, the geographic distribution requirement thus imposes costs without "sufficient cause." *Buckley v Am Const Law Found, Inc*, 525 US 182, 200; 119 S Ct 636; 142 L Ed 2d 599 (1999).

That is true even if the geographic distribution requirement would do a better job of achieving the state's interest. The incremental increase in the breadth of statewide support is not worth the burden on First Amendment rights. See *Citizens for Tax Reform*, 518 F3d at 387–388 (recognizing that per-signature payment to petition circulators might encourage fraud but holding that a ban on per-signature payment was unconstitutional because the state had other means of attacking fraud with less of a burden on First Amendment rights).

2. Costs Imposed by the New Requirements for Paid Circulators

2018 PA 608's new limitations on paid petition circulators inherently raise First Amendment concerns. As the Supreme Court has recognized, paid circulators are often the most effective and efficient way of gathering signatures for ballot measures, and "[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." *Meyer*, 486 US at 424. States thus are forbidden to ban paid petition circulators, see *Meyer*, 486 US at 428, or to impose undue burdens on paid circulators, see *Buckley*, 525 US at 204 (invalidating requirement that campaigns file reports containing the names of their paid circulators and the amount paid to each); *Citizens for Tax Reform*, 518 F3d at 388 (invalidating ban on per-signature method of payment for circulators).

The paid-circulator provisions of 2018 PA 608 violate the First Amendment. By requiring that petition sheets include a statement indicating whether the circulator was paid or a volunteer, MCL 168.482(7), the statute imposes new administrative costs on campaigns that use a mix of professional and volunteer signature-gatherers. Such campaigns must now incur expenses to ensure that each circulator has checked the correct box on each petition sheet. If a circulator checks the wrong box, all of the signatures on the sheet will be treated as invalid. See MCL 168.482a(4).

The requirement that paid circulators file an affidavit with the Secretary of State before collecting signatures will have even more significant effects. If the managers of a ballot-measure campaign determine, as the time approaches for turning in their petitions, that they will fall short without a major new push to gather signatures, they will want to move quickly to hire additional circulators to accomplish the task. But the requirement of a prior-filed affidavit will prevent those circulators from beginning work immediately. The campaign may thus lose precious time in reaching voters. "The timeliness of political speech is particularly important" under the First Amendment. *Elrod v Burns*, 427 US 347, 374 n 29; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (plurality opinion).

Although it is not difficult to file an affidavit with the Secretary of State, that is not enough to save the prior-filing requirement. In *Buckley*, *supra*, the Court invalidated Colorado's requirement that petition circulators be registered voters. The Court concluded that the restriction burdened First Amendment rights by "decreas[ing] the pool of potential circulators." *Buckley*, 525 US at 194. Although it may have been "'exceptionally easy to register to vote,'" *id.* at 195 (quoting the state's brief), the court found that irrelevant to the constitutional question: "The ease with which qualified voters may register to vote, however, does not lift the burden on speech at petition circulation time." *Id.* at 195. The prior-filed affidavit requirement in 2018 PA 608 raises the same First Amendment problem.

The paid-circulator provisions of 2018 PA 608 thus impose significant burdens on First Amendment rights. And they lack sufficient justification. Any interest that might be served by these provisions would be just as well served by a requirement that circulators file affidavits at the time they turn in their sheets of signed petitions. See *Buckley*, 525 US at 196, 198–199 (Colorado's requirement that signature gatherer file an affidavit along with the completed

petitions is adequate to serve state interests in avoiding fraud and informing voters about the use of paid circulators). The burdens imposed by 2018 PA 608 thus violate the First Amendment.

B. 2018 PA 608 Threatens to Invalidate Voters' Signatures Because of Technical Errors by Petition Circulators.

Under 2018 PA 608, a voter's signature will be invalidated if the petition fails to "meet all of the requirements under Section 482," regardless of how technical those requirements are. MCL 168.482a(4). This provision squelches voters' speech without a sufficient justification. A voter's signature is core political speech. See *Doe*, 561 US at 194–195. To invalidate that signature because of an error committed by the signature-gatherer—one that the voter is unlikely to know about or be misled by—is disproportionate to any conceivable state interest. The invalidation provision thus violates the First Amendment.

III. The 15-Percent Cap Violates Section 2 of the Voting Rights Act.

In addition to violating the state and federal constitutions, 2018 PA 608's 15-percent cap violates the Voting Rights Act.

A. The Voting Rights Act Prohibits Laws That Interact with Social and Historical Conditions to Cause a Disparate Impact on Minority Voters' Access to the Political Process.

Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 USC 10301(a). Explaining the application of that "results test," the statute goes on to state that:

> [a] violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 USC 10301(b).

Although the language of subsection (b) refers specifically to electing "representatives," the statutory definitions make clear that the statute's protection of "participat[ion] in the political process" extends to ballot questions. The statute defines "vote" and "voting" as including:

> all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

52 USC 10310(c)(1). Signatures on a petition for a ballot measure are "prerequisite[s] to voting" on that measure. *Id.* They are therefore "action[s] necessary to make a vote effective" in an election involving "propositions for which votes are received." *Id.* See *Operation King's Dream v Connerly*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 29, 2006 (Docket No. 06-12773), 2006 WL 2514115, at *13 (VRA Section 2 applies to Michigan's "initiative petitioning process"), app dis 501 F3d 584 (CA 6, 2007).

A Section 2 violation may be established by "proof of discriminatory results alone." *Chisom v Roemer*, 501 US 380, 404; 111 S Ct 2354; 115 L Ed 2d 348 (1991). There is no requirement that the discrimination be intentional. *Id.* When minority voters allege that a law denies them equal "opportunity to 'participate in the political process,'" the Sixth Circuit refers to that claim as "a 'vote-denial' claim." *Ohio Democratic Party v Husted*, 834 F3d 620, 636–637 (CA 6, 2016). A voting practice is void under a vote-denial theory if it (1) "causally contribute[s] . . . to a disparate impact on African Americans' opportunity to participate in the political process"; and (2) does so, at least in part, because "it interacts with social and historical conditions that have produced discrimination." *Id.* at 639. The 15-percent cap will do both of those things.

B. The 15-Percent Cap Disproportionately Denies Black Voters the Opportunity to Participate in the Political Process.

By its very terms, the 15-percent cap denies certain voters an important "opportunity to participate in the political process." *Ohio Democratic Party*, 834 F3d at 639. Once the cap has been reached in any district, additional signatures from that district "*must not be counted.*" MCL 168.471 (emphasis added). It is difficult to conceive of a more overt denial of the opportunity to participate in the petition process than saying that a voter's signature does not "count."

And given Michigan's political geography, that restriction will disproportionately affect black voters. Michigan's black residents are concentrated in just two of the state's 14 congressional districts: Congressional District 13 (CD13) and Congressional District 14 (CD14). Both districts, which encompass Detroit and its inner-ring suburbs, boast a majority-black population. In none of Michigan's remaining twelve districts are black residents anywhere close to a majority. Indeed, the total black citizen voting-age population (CVAP) in CD13 and CD14 is 560,612—significantly greater than the 450,521 black CVAP in the state's other 12 districts *combined.* See United States Census Bureau, *Citizen Voting-Age Population: Michigan*, https://goo.gl/LhWMyJ.

When "too many" voters have signed petitions in CD13 and CD14, voters in those districts—which include over half the state's black residents—will be barred from having their signatures counted. If a ballot measure reaches the cap in *both* districts, 2018 PA 608 could even prevent an *absolute majority* of black Michiganders from participating.[1] And there are no two

[1] To place a referendum on the ballot in the next election, a campaign must obtain approximately 215,000 valid signatures (5% of the total votes cast in the last gubernatorial election). Fifteen percent of that number is 32,250. If the 32,250 cap is reached in both CD 13 and CD 14, and 75% of the signatures in those districts come from black voters, a total of 48,375 of the 560,612

congressional districts in which the 15-percent cap will have anywhere close to the same effect on white voters. In a state where black residents make up just 13.6% of the citizen voting-age population, that is a grossly disproportionate impact.

More significant, 2018 PA 608 effectively removes the possibility that a question could qualify for the ballot based primarily on support from the black community. With African Americans making up 13.6% of Michigan's CVAP, a measure having overwhelming support from the black community should readily satisfy the statewide signature thresholds to qualify for the ballot (10 percent for constitutional amendments, 8 percent for initiatives, 5 percent for referenda). But the 15-percent cap, applied in the context of Michigan's political geography, will result in *cutting* the number of black residents who can participate in the petition process approximately in half. That would dramatically reduce the chances that cohesive black support could be the primary force behind putting a question on the ballot. Cf. *Thornburg v Gingles*, 478 US 30, 80; 106 S Ct 2752; 92 L Ed 2d 25 (1986) (Section 2 protects the ability of "politically cohesive groups of black voters to participate equally in the political process").

C. The 15-Percent Cap Interacts with Social and Historical Conditions That Have Produced Discrimination.

The disparate effects of the 15-percent cap directly result from its interaction "social and historical conditions that have produced discrimination." *Ohio Democratic Party*, 834 F3d at 639. The cap has a disparate racial impact because Michigan's black residents are heavily segregated in a geographic area in and around Detroit. That segregation is the result of a long legacy of institutionalized discrimination.

From the 1930s to the 1960s, the federal government maintained policies that expressly promoted housing segregation. See Wilkinson, *Michigan's Segregated Past – and Present,* Bridge Magazine (August 8, 2018); Livengood, *Duggan Confronts Detroit Racial History in Mackinac Speech,* Crain's Detroit Business (June 1, 2017). These discriminatory practices have had particularly lasting effects in the Detroit metro area. Metzger & Booza, *African Americans in the United States, Michigan and Metropolitan Detroit*, Center for Urban Studies, Working Paper Series No. 8 (February 2002). From 1910 to 1930 alone, Detroit's black population grew more than *twenty-fold. Id.* But though black residents' "geographic distribution *within* the city grew," discriminatory housing policies continued to bar black Michiganders from Detroit's suburbs. *Id.* (emphasis added). Indeed, it was "not until after the 1970s that blacks were able to gain greater access to suburban neighborhoods." *Id.* Even then, black residents were able to gain access only to so-called "inner-ring" suburbs of Detroit—communities like Southfield and Oak Park. *See* Wilkinson, *supra.*

Michigan's only majority-black districts, CD13 and CD14, are centered in those communities (Detroit and its inner-ring suburbs). The 15-percent cap achieves its discriminatory effect by interacting with the long record of housing segregation that led African-Americans to be concentrated in those communities . The cap "causally contribute[s], as it interacts with

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black voting-age citizens in those districts will have signed. That leaves 512,237 black voting-age citizens in those districts who will be barred from signing. That number is over half the number of black voting-age citizens in the entire state.

social and historical conditions that have produced discrimination, to a disparate impact on African Americans' opportunity to participate in the political process." *Ohio Democratic Party*, 834 F3d at 639. It therefore violates Section 2 of the Voting Rights Act.

Conclusion

For the foregoing reasons, 2018 PA 608 violates the state and federal constitutions, as well as the Voting Rights Act. Thank you for considering our submission as you evaluate the Secretary of State's request for a legal opinion on the statute.

Very truly yours,

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