STATE OF MICHIGAN
IN THE 15TH JUDICIAL DISTRICT COURT

STATE OF MICHIGAN,

Plaintiff,

v.

ANUJA RAJENDRA,

Defendant.

Case No. 18-0703-SM

Hon. Elizabeth Pollard Hines

DEFENDANT'S MOTION TO DISMISS CRIMINAL COMPLAINT

Brian L. Mackie (P25745)
Washtenaw County Prosecutor
Marieh Tanha (P79276)
Assistant Prosecuting Attorney
220 N. Main Street
Suite 300
Ann Arbor, MI 48104
(734) 222-6620

John A. Shea (P37634)
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
Counsel for Defendant
120 North Fourth Avenue
Ann Arbor, MI 48104-5519
(734) 995-4646
jashea@earthlink.net

David M. Blanchard (P67190)
Frances J. Hollander (P82180)
Cooperating Attorneys
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
Counsel for Defendant
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 929-4313
blanchard@bwlawonline.com
hollander@bwlawonline.com

Michael J. Steinberg (P43085)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
Counsel for Defendant
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
dkorobkin@aclumich.org

DEFENDANT'S MOTION TO DISMISS CRIMINAL COMPLAINT

Defendant Anuja Rajendra, through her counsel, asks this Court to dismiss the criminal complaint filed against her by the State of Michigan. In support of this relief, Defendant states the following:

1. Defendant Anuja Rajendra is charged under MCL 168.944, a state law that targets political speech for criminal prosecution:

> Any person who advertises or uses in any campaign material, including radio, television, newspapers, circulars, cards, or stationery, the words incumbent, re-elect, re-election, *or otherwise indicates, represents, or gives the impression* that a candidate for public office is the incumbent, when in fact the candidate is not the incumbent, is guilty of a misdemeanor punishable as provided in section 934. [MCL 168.944 (emphasis added).]

2. The First Amendment of the Constitution does not allow for a law that empowers the state to act as policemen of campaign speech and to target statements in campaign literature for criminal prosecution merely because they are false, misleading, or "give the impression" of something that is not true.

3. MCL 168.944 is void as unconstitutional.

4. Political speech, including speech about the qualifications of candidates for public office, is "at the core of our First Amendment freedoms." *Republican Party v. White*, 536 U.S. 765, 774; 122 S Ct 2528; 153 L Ed 2d 694 (2002). It "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v Phelps*, 562 US 443, 453; 131 S Ct 1207; 179 L Ed 2d 172 (2011).

5. MCL 168.944 is facially unconstitutional because it is a content-based regulation of political speech and does not survive strict scrutiny.

6. MCL 168.944 is a content-based regulation of political speech because it polices the use of language in campaign materials.

7. The First Amendment protects even allegedly misleading speech.

8. MCL 168.944 is not narrowly tailored to serve a compelling government interest.

9. Criminally prosecuting political candidates is not the least restrictive means of protecting the Public from confusing or misleading speech.

10. MCL 168.944 is not narrowly tailored because it is both overinclusive and underinclusive.

11. MCL 168.944 is not narrowly tailored because it is not limited in its timing.

12. MCL 168.944 is facially invalid because it is unconstitutionally vague.

13. MCL 168.944 is unconstitutional as applied because it is being enforced against speech that is not clearly false.

RELIEF REQUESTED

The statute under which Ms. Rajendra was charged is invalid on its face and as applied, both because it is a content-based regulation of political speech that is not narrowly tailored to further a compelling government interest, and because it prohibits speech without providing sufficient notice of what speech is actually prohibited. Accordingly, Ms. Rajendra requests that this court dismiss Count I against her with prejudice for the facts and Law stated in the accompanying brief.

Respectfully submitted,

David M. Blanchard (P67190)
Frances J. Hollander (P82180)
Cooperating Attorneys
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 929-4313

blanchard@bwlawonline.com
hollander@bwlawonline.com

John A. Shea (P37634)
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
120 North Fourth Avenue
Ann Arbor, MI 48104-5519
(734) 995-4646
jashea@earthlink.net

Michael J. Steinberg (P43085)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
dkorobkin@aclumich.org

Dated: December 4, 2018

STATE OF MICHIGAN
IN THE 15TH JUDICIAL DISTRICT COURT

STATE OF MICHIGAN,

Plaintiff,

Case No. 18-0703-SM

v.

Hon. Elizabeth Pollard Hines

ANUJA RAJENDRA,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS CRIMINAL COMPLAINT PURSUANT TO THE FIRST AMENDMENT OF THE U.S. CONSTITUTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES PRESENTED

I. **Does MCL 168.944 violate the First Amendment of the Constitution because it is a content-based restriction on political speech that is not narrowly tailored to serve a compelling government interest?**

Defendant says, "Yes"

Prosecutor says, "___"

II. **Does MCL 168.944 violate the First Amendment and Due Process because it does not give adequate notice of the conduct that it is intended to criminalize and encourages arbitrary and discriminatory enforcement?**

Defendant says, "Yes"

Prosecutor says, "___"

III. **Does MCL 168.944 violate the First Amendment of the Constitution as applied to Ms. Rajendra's conduct because it criminalized her political speech that was not false?**

Defendant says, "Yes"

Prosecutor says, "___"

INTRODUCTION

Defendant Anuja Rajendra is charged under MCL 168.944, a state law that targets political speech for criminal prosecution:

> Any person who advertises or uses in any campaign material, including radio, television, newspapers, circulars, cards, or stationery, the words incumbent, re-elect, re-election, *or otherwise indicates, represents, or gives the impression* that a candidate for public office is the incumbent, when in fact the candidate is not the incumbent, is guilty of a misdemeanor punishable as provided in section 934. [MCL 168.944 (emphasis added).]

The First Amendment of the Constitution does not allow for a law that empowers the state to act as policemen of campaign speech and to target statements in campaign literature for criminal prosecution merely because they are false, misleading, or "give the impression" of something that is not true. MCL 168.944 is void as unconstitutional because it does exactly that, calling on a prosecutor to sift through statements such as:

- "As a Michigan State Senator I pledge to cosponsor and vote for a state single payer plan."
- "As your State Senator, I am steadfast in my commitment to. . . ."
- "As your State Senator I will continue my advocacy for LGBTQ+ rights by. . . ."
- "As a mom of four and as your State Senator, I want my kids and all kids in Michigan to have the same opportunity for quality education and success."
- "As State Senator I expect to continue building strong bi-partisan coalitions. . . ."
- "I will continue protecting clean air and clean water in the State Senate by. . . ."

All of the above were actual statements published by candidates in the recent Democratic primary campaign for state senate. Two are by Ms. Rajendra's campaign and allegedly give rise to the charges here, and four others are by her Democratic primary opponents — none of whom are incumbents. (See Exhibits 1-6). All of the statements fall in the category of speech entitled

to the highest level of First Amendment protection: direct public policy statements by candidates for political office, and political rhetoric typical of aspirational campaign statements.

They also illustrate the very reason why "First Amendment freedoms need breathing space to survive." *NAACP v Button*, 371 US 415, 4133; 83 S Ct 328; 9 L Ed 2d 405 (1963). Without breathing space for campaign policy statements such as these, political speech of all kinds would be predictably silenced for fear of a political prosecution. If prosecutors are allowed to parse words and verb tense to determine which campaign speech is permitted and which is a "misleading" criminal act, the natural result will be a chilling effect that discourages new voices from daring to enter the political arena. The message to non-establishment candidates such as Ms. Rajendra is unmistakable: Not only might you lose, you might also face calls to "lock her up" based on the words you use on the campaign trail. "The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States v Alvarez*, 567 US 709, 723; 132 S Ct 2537; 183 L Ed 2d 574 (2012) (plurality opinion).

Accordingly, and for the reasons explained below, Ms. Rajendra requests that this Court declare MCL 168.944 unconstitutional, either on its face or as applied, and dismiss the charge against her.

STATEMENT OF FACTS

Defendant Anuja Rajendra announced her candidacy as a new voice and a political outsider for the State Senate race in August 2017. During her campaign, Ms. Rajendra sent out mailers to her constituents in order to communicate her positions on issues, including education, healthcare, environment, diversity and inclusion, and getting the vote out. Throughout her

campaign, Ms. Rajendra made it clear that she had no previous experience in politics and that, as a woman of color, she was running for the first time to ensure that her constituents' representative reflected the diversity of Washtenaw County. Ms. Rajendra enlisted the help of experienced political consultants to craft her message and draft her campaign mailers.

Ms. Rajendra is being criminally prosecuted for language used on her education policy mailer. One side of the mailer read, "As a mom of four and as your State Senator, I want my kids and all kids in Michigan to have the same opportunity for quality education and success." (Exhibit 4). The other side read, "As your State Senator, I'm steadfast in my commitment to. . . " (*Id.*) The mailer also stated it was "Paid for by the Committee to *Elect* Anuja Rajendra." (*Id.*) (emphasis added). Ms. Rajendra referred to herself as "your next State Senator" on her healthcare mailer. (Exhibit 7). At no time did Ms. Rajendra use the terms "re-elect," "re-election," or "incumbent" in any of her policy statements.

Ms. Rajendra never intended to represent herself as an incumbent. Throughout her election, her message was one of a political outsider and a new voice. In the context of Ms. Rajendra's campaign, it is absolutely clear that Ms. Rajendra did not intend to misrepresent herself as an incumbent, but actually viewed her status as a newcomer as part of her platform and a way to distinguish herself from the other candidates. Ms. Rajendra worked closely with an experienced team of political consultants in drafting the language used in her mailers. The language that led to Ms. Rajendra's charges reflects nothing more than an aspirational desire to represent the people of Washtenaw County should she be elected. It is typical of speech used in other campaigns— even by her opponents in the same campaign.

ARGUMENT

Ms. Rajendra has been charged under MCL 168.944, a statute that criminalizes political speech as follows:

> Any person who advertises or uses in any campaign material, including radio, television, newspapers, circulars, cards, or stationery, the words incumbent, re-elect, re-election, *or otherwise indicates, represents, or gives the impression* that a candidate for public office is the incumbent, when in fact the candidate is not the incumbent, is guilty of a misdemeanor punishable as provided in section 934. [MCL 168.944 (emphasis added).]

This statute is unconstitutional on its face because it is not narrowly tailored to serve a compelling state interest. *Reed v Town of Gilbert*, 135 S Ct 2218; 192 L Ed 2d 236 (2015). The statute is also facially invalid because it is unconstitutionally vague, as it does not provide sufficient notice to a candidate of speech that is prohibited as illegal. *People v Boomer*, 250 Mich App 534; 655 NW2d 255 (2002). Finally, the statute is unconstitutional as applied because in this case it is being used to punish speech that is not clearly false. *See Briggs v Ohio Elections Comm'n*, 61 F3d 487 (CA 6 1995). Therefore, Ms. Rajendra requests that this Court declare MCL 168.944 unconstitutional and dismiss Charge I against her with prejudice.

I. POLITICAL SPEECH MERITS THE HIGHEST PROTECTION UNDER THE FIRST AMENDMENT

Political speech, including speech about the qualifications of candidates for public office, is "at the core of our First Amendment freedoms." *Republican Party v. White*, 536 U.S. 765, 774; 122 S Ct 2528; 153 L Ed 2d 694 (2002). It "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v Phelps*, 562 US 443, 453; 131 S Ct 1207; 179 L Ed 2d 172 (2011).

When political speech contains falsehoods or misleading statements, First Amendment caselaw holds that the appropriate remedy is more political speech, not restricting such speech. *See, e.g.*, *Brown v Hartlage*, 456 US 45, 61; 102 S Ct 1523; 71 L Ed 2d (1982) (quoting *Whitney*

v California, 274 US 357, 377; 47 S Ct 641; 71 L Ed 1095 (1927) (Brandeis, J., concurring) (internal citation omitted) ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force"). This principle has been reaffirmed by state and federal courts throughout the country. *See, e.g.*, *Alvarez*, 567 US at 727 ("The remedy for speech that is false is speech that is true."); *Bible Believers v Wayne County*, 805 F3d 228, 234 (CA 6 2015) ("[G]enerally, we interpret the First Amendment broadly so as to favor allowing more speech."); *Animal Legal Def Fund v Otter*, 118 F Supp 3d 1195, 1209 (D Id Aug 3, 2015) ("The remedy for misleading speech, or speech we do not like, is more speech, not enforced silence."); *Rickert v Pub Disclosure Comm'n*, 161 Wash 2d 843, 855-56; 168 P3d 826 (2007) ("In other words, the best remedy for false or unpleasant speech is more speech, not less speech."); *Susan B. Anthony List v Driehaus*, 814 F 3d 466, 476-477 (CA 6 2016) ("Indeed, courts have consistently erred on the side of permitting more political speech than less.").

Ms. Rajendra here is being prosecuted for her political speech. Criminalizing statements from Ms. Rajendra that supposedly "give[] the impression" that she is an incumbent ignores the well established case law regarding false, misleading, or unpleasant speech in the political arena: the solution to any perceived problems with Ms. Rajendra's campaign literature is to engage in *more* speech to counter hers, not to charge her with a crime. Indeed, targeting Ms. Rajendra for her political speech denies the First Amendment the "breathing space" it needs to survive. *See NAACP v Button*, 371 US 415, 433; 83 S Ct 328; 9 L Ed 2d 405 (1963). Without the proper breathing space, speech is chilled, and new political voices are silenced.

II. MCL 168.944 Is Facially Unconstitutional Because It is a Content-Based Regulation of Political Speech And Does Not Survive Strict Scrutiny

A. MCL 168.944 Is a Content-Based Regulation of Political Speech Because it Regulates the Use of Language In Campaign Materials

MCL 168.944 is a content-based restriction that regulates the language candidates can use in their political speech, and therefore must be analyzed under strict scrutiny. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S Ct at 2226. A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Content-based laws are subject to strict scrutiny. *Id.* "A speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230. Being subject to strict scrutiny, content-based laws must be struck down unless the Government can "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2231. To survive, the government must show that the law is "the least restrictive means to further the articulated interest." *Sable Communications of Cal v FCC*, 492 US 115, 126; 109 S Ct 2829; 106 L Ed 2d 93 (1989). "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v Flores*, 521 US 507, 509; 117 S Ct 2157; 138 L Ed 2d 624 (1997).

In this case, MCL 168.944 governs specific content or subject matter—statements related to a candidate's incumbency. As a content-based restriction on the exercise of political speech, it is presumptively invalid and subject to strict scrutiny. *See Reed*, 135 S Ct at 2226; *Susan B. Anthony List*, 814 F3d at 473. The burden is on the government to prove that the statute is the

least restrictive means among available, effective alternatives of furthering the asserted compelling state interest. *Brown v. Entm't Merchs. Ass'n*, 564 US 786, 799; 131 S Ct 2729; 180 L Ed 2d 708 (2011). "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v Playboy Entertainment Group, Inc*, 529 US 803, 818; 120 S Ct 1878; 146 L Ed 2d 865 (2000).

B. The First Amendment Protects Even Allegedly Misleading Speech

Even allegedly misleading political speech is protected under the First Amendment. *United States v Alvarez*, 567 US 709, 718; 132 S Ct 2537; 183 L Ed 2d 574 (2012) (plurality opinion). In *Alvarez*, the United States Supreme Court held that even patently false statements are protected under the First Amendment. "Some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Alvarez*, 567 US at 718. *Alvarez* rejected the idea that the government can selectively regulate false statements on certain topics. *Id.* at 722-723. *Alvarez* explained that the First Amendment protects the "civic duty" to engage in public debate, "with a preference for counteracting lies with more accurate information, rather than by restricting lies." *Susan B. Anthony List v Driehaus*, 814 F.3d 466, 472 (CA 6 2016) (citing *Alvarez*, 567 US at 728 (plurality opinion)). The Supreme Court reasoned that "[t]he mere potential for the exercise of [the power to decree speech to be a criminal offense] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez*, 567 US at 723.

The Ohio Court of Appeals recently struck down, as unconstitutional on its face, a statute very similar to MCL 168.944, one that likewise forbids candidates from misrepresenting themselves as incumbents. *Magda v Ohio Elections Comm'n*, 2016-Ohio-5043; 58 NE3d 1188

(Ohio App, 2016). In *Magda*, a former Ashtabula county commissioner and Ohio state representative filed a complaint with the Ohio Elections Commission against appellants Kathy Magda and the Committee to Elect Kathy Magda, claiming that the appellants had violated R.C. 3517.21(B)(1) when they published a campaign flyer and newspaper advertisement with a graphic stating "Kathy Magda" and "Ashtabula County Treasurer" directly beneath it. *Id.* at ¶ 1. R.C. 3517.21(B)(1) states that candidates shall not:

> Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term "re-elect" when the candidate has never been elected at a primary, general, or special election to the office for which he or she is a candidate. [R.C. 3517.21(B)(1).]

The Commission found a violation of the statute, but no cause to refer the matter for prosecution. The appellants filed an administrative appeal and filed a complaint for a declaratory judgment to find the statute unconstitutional. After the trial court affirmed the Commission's decision, the appellate court held:

> On its face and with particular application to the appellants' situation, R.C. 3517.21(B)(1) is overbroad and unconstitutional. R.C. 3517.21(B)(1) represents a broad-sweeping effort to control the election process beyond what is necessary to achieve election integrity. The Commission has not presented sufficient evidence that R.C. 3517.21(B)(1) is actually needed to achieve this aim or even that it does achieve this aim, beyond what counterspeech may feasibly remedy. In this instance, the statements on appellants' campaign materials *could have been debunked readily and obviously* with the counterstatement that Magda was not and has never been the Ashtabula County treasurer. [2016-Ohio-5043 at ¶ 35 (emphasis added).]

The *Magda* court relied on *Alvarez* as well as the Sixth Circuit's decision striking down as facially unconstitutional another Ohio criminal statute forbidding candidates from making false statements, *Susan B. Anthony List v Driehaus*, 814 F3d 466, 487 (CA 6 2016). In *Susan B. Anthony List*, the Sixth Circuit found that "Ohio's political false-statements laws are content-based restrictions targeting core political speech that are not narrowly tailored to serve the state's

admittedly compelling interest in conducting fair elections." *Id. Susan B. Anthony List* addressed R.C. 3517.12(B)(9)–(10). *Id.* at 469. R.C. 3517.12(B)(9)–(10) provide that candidates shall not:

> (9) Make a false statement concerning the voting record of a candidate or public official;
>
> (10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate. [R.C. 3517.12(B)(9)–(10).]

The Sixth Circuit found that these provisions were unconstitutional on their face. *Susan B. Anthony List*, 814 F3d at 476.

Although *Treasurer of Committee to Elect Lostracco v Fox*, 150 Mich App 617; 389 NW2d 446 (1986) upheld the constitutionality of MCL 168.944, *Lostracco* is no longer good law given that its holding—that false speech receives no First Amendment protection—is clearly rejected by *Alvarez*. Indeed, the Ohio Court of Appeals faced a similar situation in *Magda*, where the Ohio false-incumbency-statement statute had been upheld in a previous, pre-*Alvarez* Ohio Court of Appeals decision on grounds that "false speech merits no constitutional protection." *Magda*, 2016-Ohio-5043 at ¶¶ 5, 21. But because that premise had been undermined by *Alvarez*, the pre-*Alvarez* Ohio decision was no longer good law and the Ohio false-incumbency-statement statute was struck down. *Id.* ¶ 21. Here, too, MCL 168.944 seeks to criminalize political speech for being false, and it is now clear under *Alvarez* that such speech remains protected under the First Amendment. In light of *Alvarez*, *Magda*, and *Susan B. Anthony List*, MCL 168.944 is subject to strict scrutiny and, failing that rigorous test, is unconstitutional on its face.

C. MCL 168.944 Is Not Narrowly Tailored to Serve a Compelling Government Interest

The state may argue that it has a compelling interest in "preserving the integrity of elections, protecting 'voters from confusion and undue influence,' and 'ensuring that an

individual's right to vote is not undermined by fraud in the election process.'" *See Susan B. Anthony List*, 814 F3d at 473-474 (quoting *Burson v Freeman*, 504 US 191, 199; 112 S Ct 1846; 119 L Ed 2d 5 (1992) (plurality opinion)). However, MCL 168.944 is not narrowly tailored to serve that interest.

1. *Criminally Prosecuting Political Candidates Is Not the Least Restrictive Means of Protecting the Public from Confusing or Misleading Speech*

Any supposedly offending statements from Ms. Rajendra could have easily been debunked with "more speech" from other candidates or members of the community with a counterstatement that Ms. Rajendra was not an incumbent. Indeed, Ms. Rajendra's *own* speech corrected any potential misunderstanding, as Ms. Rajendra continually referenced her status as a first-time political candidate and focused her campaign on her desire to be a new face to represent Washtenaw County. Courts' widespread admonitions that false campaign speech be met with the remedy of "more speech," *see Brown v Hartlage*, 456 US at 61, and the fact that "more speech" could have easily corrected any misunderstanding about Ms. Rajendra's incumbency status, makes it clear that MCL 168.944 is not the "least restrictive" means to serve any compelling government interest, *see Sable Communications of Cal*, 492 US at 126.

2. *MCL 168.944 Is Not Narrowly Tailored Because It Is Both Overinclusive and Underinclusive*

A law regulating speech is not narrowly tailored if it is either overinclusive or underinclusive. *See Simon & Schuster, Inc v Members of New York State Crime Victims Bd*, 502 US 105, 121–123; 112 S Ct 501; 116 L Ed 2d 476 (1991); *Reed*, 135 S Ct at 2231–2232. MCL 168.944 is both.

First, the statute is overinclusive through its prohibition on claims that "indicate[], represent[], or give[] the impression" of incumbency. The state could more narrowly further its

interests by prohibiting fraudulent lies or even false use of specific words like "incumbent" or "re-elect," but the statute reaches beyond that and prohibits language that a reasonable candidate may not even believe gives the impression that he or she is an incumbent.

> [T]here remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the government does not like.

Alvarez, 567 US at 736-737.

The statue is also underinclusive in that it regulates *only* speech that gives the false impression of incumbency without regulating *any* other false speech. Michigan does *not* have any other penal statutes regulating campaign speech, and there is no apparent reason why Michigan has a more compelling interest in prohibiting misleading speech regarding incumbency than misleading speech regarding other very important political topics. *See Reed*, 135 S Ct at 2231 ("The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.").

Instead, the fact that this statute selectively regulates false political statements of this one particular content and topic strongly suggests that its hidden purpose is to protect incumbents and deter challengers, a motive plainly in violation of the First Amendment. Courts should always be skeptical of laws enacted by incumbents to protect incumbents. When such a law brazenly criminalizes political speech, it unquestionably fails the strict scrutiny test.

3. MCL 168.944 Is Not Narrowly Tailored Because It Is Not Limited In Its Timing

The statute is not narrowly tailored for the additional reason that it does not limit the timing of when a complaint can be brought. In fact, Ms. Rajendra was not prosecuted until after

her defeat in the primary election. Prosecution after the election does not preserve the integrity of the election or protect voters because the votes have already been cast. Instead, the post-election prosecution serves to punish a citizen for running for office and deter other citizens from doing the same, without achieving the countervailing benefit of protecting the public from confusion before they cast their votes.

* * *

In sum, the state cannot meet its burden of proving that MCL 168.944 is narrowly tailored to further a compelling state interest. Accordingly, it is an unconstitutional content-based restriction on speech protected by the First Amendment.

III. MCL 168.944 Is Facially Invalid Because It Is Unconstitutionally Vague

Michigan courts have held that a penal statute is unconstitutionally vague, and thus facially invalid, when it (1) fails to provide fair notice of what conduct is prohibited; (2) encourages arbitrary and discriminatory enforcement; or (3) is overbroad and impinges on First Amendment freedoms. *People v Boomer*, 250 Mich App at 534. In *Boomer*, the Court of Appeals held a criminal statute unconstitutional when it prohibited the use of "indecent, immoral, obscene, vulgar or insulting language" in the presence of a woman or child. *Id.* at 536. The Court held it unconstitutional because it failed to provide fair notice of what language was prohibited and encouraged arbitrary and discriminatory enforcement. *Id.* at 540. The Court also held that the statute "impinge[d] on First Amendment freedoms" because it "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.* at 541-542, quoting *Reno v American Civil Liberties Union*, 521 US 844, 874; 117 S Ct 2329; 138 L Ed 2d 874 (1997)). *See also In re Chmura*, 464 Mich 58, 66; 626 NW2d 876 (2001) ("[C]ore political speech cannot be chilled by the subtle deterrent effects of vague and ambiguous limitations.")

A criminal statute is void for vagueness, and violates the Due Process Clause of the Fourteenth Amendment, when it does not give adequate notice to ordinary people that their conduct might be criminal and when the legislature does not establish guidelines to govern law enforcement in enforcing the statute. *Kolender v Lawson*, 461 US 352, 357-358; 103 S Ct 1855; 75 L Ed 2d 903 (1983). In *Kolender*, the plaintiff had been charged under a statute that required people to "provide a credible and reliable identification." *Id.* at 353. The Court held that the statute was facially invalid because it was unconstitutionally vague. *Id.* at 354. The Court reasoned, "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 358. The Court held that the legislative requirement of "credible and reliable" identification did not establish guidelines to govern law enforcement when it "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute. . . ." *Id.* at 358. *See also Doe v University of Michigan*, 721 F Supp 852, 867 (ED Mich 1989) (holding that a University policy was impermissibly vague when it failed to "articulate[] any principled way to distinguish sanctionable from protected speech."); *Dambrot v Central Mich Univ*, 55 F 3d 1177, 1184 (CA 6 1995) (holding that a factor to consider in determining whether a University policy was unconstitutionally vague was whether it carried the risk of providing an "unrestricted delegation" of power to law enforcement).

Courts have repeatedly recognized that "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms." *Grayned v City of Rockford*, 408 US 104, 109; 92 S Ct 2294; 33 L Ed 2d 222 (1972). *See also Broadrick v Oklahoma*, 413 US 601, 611; 93 S Ct 2908; 37 L Ed 2d 830 (1973) ("Because First

Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *Kolender*, 461 US at 358 (quoting *Shuttlesworth v City of Birmingham*, 382 US 87, 91; 86 S Ct 211; 15 L Ed 2d 176 (1965) (stating that the Court's "concern here is based upon the 'potential for arbitrarily suppressing First Amendment liberties…").

In this case, MCL 168.944 is so vague that it is facially invalid. MCL 168.944 does not merely prohibit use of certain words—it also prohibits language that "gives the impression" of incumbency. It is undisputed that none of Ms. Rajendra's campaign mailers used the words "re-election," "re-elect," or "incumbent." Therefore, Ms. Rajendra was charged because her mailers "indicate[d], represent[ed], or g[ave] the impression" that she was the incumbent. This proscription against language that "indicates, represents, or gives the impression" provides no guidelines by which law enforcement or candidates can measure what language is sufficient to "indicate[], represent[], or give[] the impression" of incumbency. *See Kolender*, 461 US at 357-358. For example, suppose a piece of campaign literature includes a picture of a candidate in front of the Capitol Building. Or, suppose a billboard contains a picture of a candidate and the following language: "Representing You." Could those advertisements "give the impression" of incumbency? Some candidates or prosecutors might think so, and others might not. The law is so standardless, particularly with respect to its "gives the impression" language, that it fails to provide fair notice of what conduct is prohibited, encourages arbitrary and discriminatory enforcement, and is overbroad and impinges on First Amendment freedoms. The fact that other candidates in the same race made statements very similar to Ms. Rajendra's (see Exhibits 1, 3, 5-6), yet were not prosecuted, demonstrates that the statute encourages arbitrary and discriminatory enforcement. *See Boomer*, 250 Mich App at 540. This limitation on political speech

"unquestionably silences some speakers whose messages would be entitled to constitutional protection" as political speech protected by the First Amendment. *See id.* at 541-542.

IV. MCL 168.944 Is Unconstitutional As Applied Because It Is Being Enforced Against Speech That Is Not Clearly False

A statute is unconstitutional as applied when "the application of the statute in the particular context in which [a person] has acted, or in which he proposed to act, would be unconstitutional." *Women's Medical Professional Corp v Voinovich*, 130 F3d 187 (CA 6 1997) (quoting *Ada v Guam Soc'y of Obstetricians and Gynecologists*, 506 US 1011, 1012; 113 S Ct 633; 121 L Ed 2d 564 (1992) (Scalia, J., dissenting)). Under the vagueness doctrine of the due process clause, even if a statute is not facially invalid, the statute cannot be applied in a particular situation where a person does not have fair warning that his or her conduct is prohibited by that statute or where it could encourage arbitrary or discriminatory enforcement. *FCC v Fox TV Stations, Inc*, 567 US 239, 253; 132 S Ct 2307; 183 L Ed 2d 234 (2012).

Even before *Alvarez*, the Sixth Circuit held a similar Ohio statute unconstitutional as applied to a situation similar to Ms. Rajendra's, where the political speech at issue was ambiguous about incumbency. *Briggs v Ohio Elections Comm'n*, 61 F3d 487, 494 (CA 6 1995). In that case, a candidate was found guilty of violating a statute that "prohibits a candidate from using a title of an office not currently held by the candidate 'in a manner that implies that the candidate does currently hold that office.'" *Id.* at 489. The candidate paid for a billboard that said:

Lou
Briggs
State Representative
Strong New Leadership

The Sixth Circuit held that the statute, as applied to Briggs' speech, was unconstitutional because it "regulate[d] speech based upon its *implication*" and her statement was "not so much false as it [was] ambiguous." *Id.* at 494.

Likewise, MCL 168.944 is being applied here to Ms. Rajendra to punish her for speech that is not clearly false. It therefore "infringes upon her First Amendment rights." *Id.* Additionally, the statute is unconstitutionally vague as applied because it is not clear to a reasonable person that Ms. Rajendra's language indicates, represents, or gives the impression that she is an incumbent. The language used is, at worst, ambiguous. Indeed, her statements reflect an aspirational desire to represent the people of Washtenaw County should she be elected and is typical of speech used in other campaigns, and even by her opponents—demonstrating that the statute, as applied here, encourages arbitrary or discriminatory enforcement.

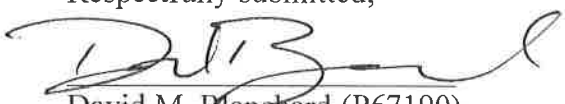
The unconstitutionality of applying MCL 168.944 under the circumstances of this case is made even clearer in the context of Ms. Rajendra's entire campaign, during which Ms. Rajendra repeatedly framed herself as a political newcomer and used other language such as "campaign to *elect*" (not to "re-elect") and referred to herself as "your next State Senator." (Exhibits 2, 4 and 7). Thus, Ms. Rajendra's statements should not subject her to criminal prosecution because Ms. Rajendra never stated that she was an incumbent and her statements did not patently indicate otherwise.

CONCLUSION

The statute under which Ms. Rajendra was charged is invalid on its face and as applied, both because it is a content-based regulation of political speech that is not narrowly tailored to further a compelling government interest, and because it prohibits speech without providing

sufficient notice of what speech is actually prohibited. Accordingly, Ms. Rajendra requests that this court dismiss Count I against her with prejudice.

Respectfully submitted,



David M. Blanchard (P67190)
Frances J. Hollander (P82180)
Cooperating Attorneys
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 929-4313
blanchard@bwlawonline.com
hollander@bwlawonline.com

John A. Shea (P37634)
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
120 North Fourth Avenue
Ann Arbor, MI 48104-5519
(734) 995-4646
jashea@earthlink.net

Michael J. Steinberg (P43085)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
dkorobkin@aclumich.org

Dated: December 4, 2018

PROOF OF SERVICE

The undersigned certifies on December 4, 2018, a copy of the foregoing document was served on the attorneys of record in the above-captioned case by first-class mail to their respective address.

Natalie M. Walter, Senior Paralegal

Exhibit 1

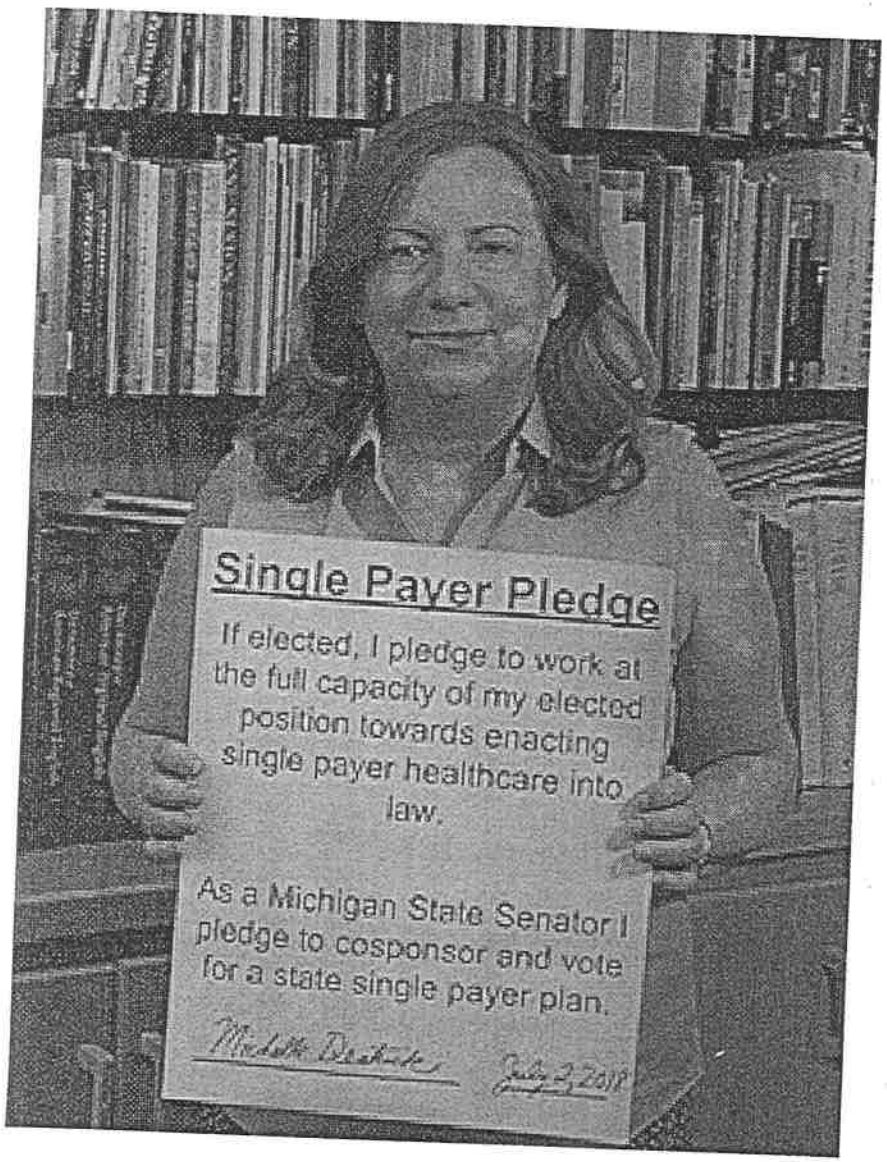

Single Payer Pledge
If elected, I pledge to work at the full capacity of my elected position towards enacting single payer healthcare into law.
As a Michigan State Senator I pledge to cosponsor and vote for a state single payer plan.

Exhibit 2

As your State Senator,
I'm steadfast in my commitment to

- Invest in universal Pre-K programs for children of all socioeconomic backgrounds and connect parents to developmental resources.
- Increase funding for K-12 public schools to ensure optimal classroom sizes, plentiful resources, and appreciated teachers.
- Promote the professional development of our teachers and integrate guidance counselors in all middle and high schools.
- Support students with special needs with the necessary resources and technology to reach their highest potential.
- Expand opportunities for high school students to earn post-secondary credits with Advanced Placement and community college classes.
- Develop skilled trades training and career pathways to retain Michigan talent and grow our workforce to compete in the 21st century economy.
- Tuition free 2-year community colleges and 4-year public universities for eligible students.

ANUJA RAJENDRA

Democrat for Michigan State Senate

Moving Forward Together | Vote on Aug 7th

PRSRT STD
U.S. POSTAGE PAID
Detroit, MI
Permit No. 1026

HAMIDAH AMINAH KAUFMAN
Or Current Resident
PO BOX 130081
ANN ARBOR MI 48113-0081

Exhibit 3

IRWIN

DEMOCRAT FOR STATE SENATE

LGBTQ+ RIGHTS

I am a fighter for equality. From helping to **create domestic partner benefits (http://www.ewashtenaw.org/government/clerk_register/Minutes/rop/year_2000/2000-11-30rop.pdf)** for Washtenaw County employees in 2000 to leading the charge for **second parent adoption (http://www.pridesource.com/article.html?article=70072)** in Lansing, I have been a loud and proud supporter of treating every person with dignity and respect. As your State Senator, I will continue my advocacy for LGBTQ+ rights by:

1. Amending the Elliot Larson Civil Rights Act to expressly **include protections for LGBT citizens (https://mihousedemsblog.com/2014/09/10/legislation-introduced-to-update-michigans-civil-rights-law/)**
2. **Fix the second-parent-adoption loophole (http://www.pridesource.com/article.html?article=50263)** that treats LGBTQ+ parents differently
3. Require the Secretary of State to issue identification that matches the gender expression of the resident
4. Change medicaid policies to support treatment for transgender people

PAID FOR BY JEFF IRWIN FOR STATE SENATE | 2542 BELLWOOD AVE | ANN ARBOR, MI 48104

CONTRIBUTE (HTTPS://WWW.IRWINFORSENATE.COM/CONTRIBUTE/)

Exhibit 4

ANUJA
RAJENDRA

DEMOCRAT FOR MICHIGAN STATE SENATE

A WORLD CLASS EDUCATION

Like millions of Michigan families, education has been critical to my success, especially as a first generation American. It was my public school education that provided me with the foundation to earn two degrees at the University of Michigan and to start two socially conscious businesses. ***As a mom of four and as your State Senator, I want my kids and all kids in Michigan to have the same opportunity for quality education and success. A high-quality public education is the right of every child, not a privilege.***

-Anuja

Stay Connected With the Campaign!
www.anujaforsenate.com

PAID FOR BY THE COMMITTEE TO ELECT ANUJA RAJENDRA

Exhibit 5

IRWIN

DEMOCRAT FOR STATE SENATE

EDUCATION

I believe that providing a quality, free public education is the most important priority in Michigan government. I also believe that the goal of education is to foster happy and healthy people who know how to learn and like doing it. I want to improve education from early childhood through higher education by increasing funding, respecting educators, and building in support for children facing obstacles from trauma to disability. Current education policies discriminate heavily against low income students and students of color, dragging them down in a system that is supposed to be "The Great Equalizer." In the state house, I proposed legislation and **fought for increased investment** (https://www.youtube.com/watch?v=tB_f_FHmkVs&t=25s) in education from early childhood, through k-12 and higher education, and that is something I will continue to fight for in the State Senate.

EARLY CHILDHOOD

While I served in Washtenaw County Government, I helped to expand early childhood education. This expansion included the creation of the Eastern Washtenaw Head Start program. While I served in state government, I helped to increase funding for early childhood education. As State Senator, I expect

to continue building strong bi-partisan coalitions to continue increasing the number slots. I would also continue building our early childhood system by:

1. Universal pre-K---Head Start and GSRP---funding should be augmented to allow every child to attend
2. Support for wraparound services for children experiencing trauma
3. Increased compensation for educators, giving experienced educators an incentive to stay
4. Enacting family friendly employment policies that support maternity and paternity leave

K-12 SCHOOLS

1. Better and more equitable funding for K-12 schools---Michigan should be a top-ten state for per-pupil funding
2. Require charter schools to follow the same rules as community-governed schools, especially transparency with public funds
3. Reverse the trend toward high-stakes testing for the evaluation of schools and educators, which do a better job of predicting the income and race of a student's family than their performance in school.
4. Help school districts with **more revenue tools (http://www.legislature.mi.gov/(S(f3tizdtb4v4521mrbgrpzwpr))/mileg.aspx?page=getobject&objectname=2016-HB-6015&query=on)**
5. Provide support for tutoring, mentoring, and other social services for children facing poverty and trauma

HIGHER EDUCATION

1. More state support for higher education
2. Increase need-based financial aid---Michigan is in the bottom quartile, and we can do better
3. Restore state-based funding for the Indian Tuition Waiver program so that colleges are encouraged rather than discouraged to enroll tribal members

MICHIGAN EDUCATORS ARE PROUD TO ENDORSE JEFF IRWIN FOR STATE SENATE

MEA

Michigan Education Association

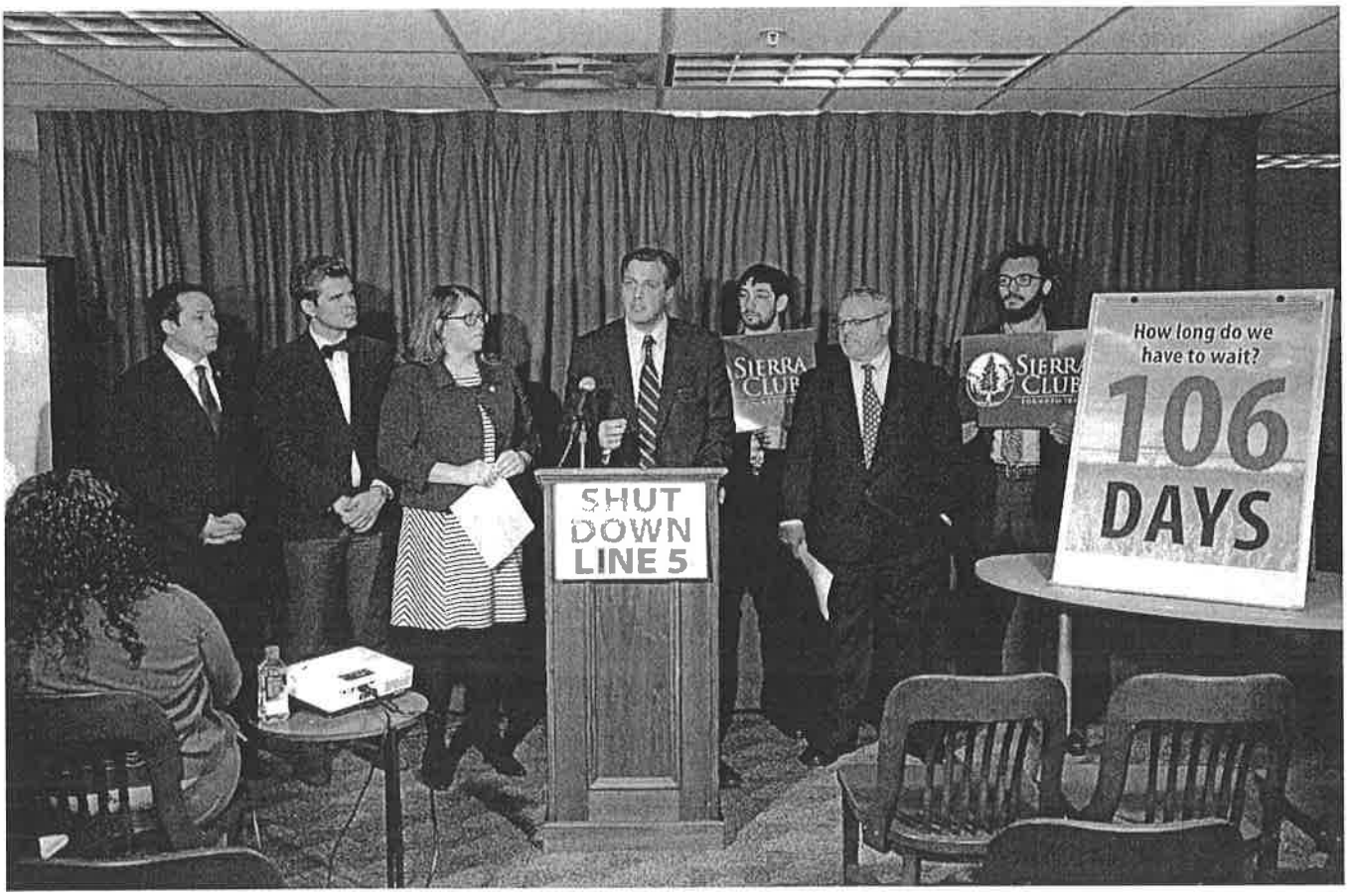
PAID FOR BY JEFF IRWIN FOR STATE SENATE | 2542 BELLWOOD AVE | ANN ARBOR, MI 48104

CONTRIBUTE (HTTPS://WWW.IRWINFORSENATE.COM/CONTRIBUTE/)

Exhibit 6

IRWIN

DEMOCRAT FOR STATE SENATE



ENVIRONMENT

I believe that we have a responsibility to create a cleaner, more sustainable community. I will fight for more stringent standards to prevent pollution and ensure complete cleanups. I will also push to align transportation, energy, and economic development funding with sustainability goals because I believe that Michigan can lead in green innovation and create jobs transitioning our energy and infrastructure while doing our part to fight climate change. We've seen in in places like Flint and Detroit how a reckless attitude toward the environment can be disastrous for our most disadvantaged communities, and we need to implement just policies for permitting to both protect our environment and ensure that people of color are not facing the brunt of the consequences of climate change.

In county government and as a State Representative, I have been an outspoken leader on environmental protection. From preventing irresponsible oil and gas development to promoting community solar and improved net metering, I will do everything I can to protect the Great Lakes, prevent pollution, and promote clean energy. I was the first house member to propose **legislation (http://www.legislature.mi.gov/(S(zfxk3omruodgv3ps0uf4iaoo))/mileg.aspx?page=GetObject&objectname=2015-HCR-0015)** to shut down "Line 5," and will continue to advocate for stopping use of this dangerous pipeline. I won awards for leadership from the **Sierra Club** (/s/janeelderaward.jpg), **Clean Water Action** (/s/CleanWaterAward.jpg), and the **Great Lakes Renewable Energy Association** (/s/GLREAaward-2.jpg) for this work, and I will continue protecting clean air and clean water in the State Senate by:

1. Promoting clean energy development
2. Holding polluters accountable
3. Standing up for public access and public land
4. Implementing environmental justice policies for permitting to stop the disproportionate effects of climate change on communities of color

Take a look at the action plan I proposed for the Flint Water Crisis here. (/s/Irwin_An-Action-Plan-for-FlintRevised.pdf)

PROUDLY ENDORSED BY THE MICHIGAN SIERRA CLUB

Protecting

CLEAN WATER ACTION

Michigan Water

MICHIGAN LEAGUE OF CONSERVATION VOTERS

SIERRA CLUB S C ENDORSED

PAID FOR BY JEFF IRWIN FOR STATE SENATE | 2542 BELLWOOD AVE | ANN ARBOR, MI 48104

CONTRIBUTE
(HTTPS://WWW.IRWINFORSENATE.COM/CONTRIBUTE/)

Exhibit 7

As your next State Senator, I'm committed to...

Single-payer System: We need a non-profit, state-sponsored comprehensive health care plan. As a first step, I will introduce a bill to evaluate alternatives, costs and benefits of a single-payer system in Michigan

Mental health and substance abuse treatment: Toxic stress is permeating our society. We must destigmatize mental health struggles, invest more in counseling and treatment, and connect people to resources.

Protect Medicaid: Michigan's Medicaid expansion, known as Healthy Michigan, has been a lifesaver for thousands of people. I will adamantly oppose any cuts to Medicaid.

Preventative Care and Wellness: Investing in preventative care is key to saving money in the long-term and helps people live longer, healthier lives.

Birth Control and Reproductive Health: I am pro-choice and will sponsor legislation to overturn the "rape insurance" legislation which bans coverage of abortions as standard care.

Prescription Drug Coverage: Families shouldn't have to choose between paying for medication or their basic needs. I will demand transparency and accountability from the big pharmaceutical companies.

ANUJA RAJENDRA

Democrat for Michigan State Senate

Stay Connected With the Campaign!
www.anujaforsenate.com

Submit you absentee ballot today or **VOTE ON AUG 7TH**

PRSRT STD
U.S. POSTAGE PAID
Detroit, MI
Permit No. 1026

HAMIDAH AMINAH KAUFMAN
Or Current Resident
PO BOX 130081
ANN ARBOR MI 48113-0081

STATE OF MICHIGAN
IN THE 15TH JUDICIAL DISTRICT COURT

STATE OF MICHIGAN,

Plaintiff,

Case No. 18-0703-SM

v.

Hon. Elizabeth Pollard Hines

ANUJA RAJENDRA,

Defendant.

NOTICE OF HEARING

To: Clerk of the Court

Please take notice that Defendant's Motion to Dismiss will be brought on for hearing before the Honorable Elizabeth Pollard Hines on **Thursday, January 10, 2019 at 9:00 am**, or as soon thereafter as counsel may be heard.

Respectfully submitted,

David M. Blanchard (P67190)
Frances J. Hollander (P82180)
Cooperating Attorneys
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Counsel for Defendant
221 N. Main Street, Suite 300
Ann Arbor, MI 48104
(734) 929-4313
blanchard@bwlawonline.com
hollander@bwlawonline.com

Dated: December 4, 2018