STATE OF MICHIGAN

IN THE COURT OF CLAIMS

MICHIGAN COMPREHENSIVE CANNABIS LAW REFORM COMMITTEE a/k/a MILEGALIZE, Plaintiff, v RUTH JOHNSON MICHIGAN SECRETARY OF STATE, CHRISTOPHER THOMAS DIRECTOR OF BUREAU OF ELECTIONS, and BOARD OF STATE CANVASSERS, Defendants.	Case No. 16- -MM Honorable **BRIEF IN SUPPORT OF MANDAMUS AND DECLARATORY AND INJUNCTIVE RELIEF**

HANK LAW, PLLC By: Jeffrey A. Hank (P71152) *Attorney Plaintiff* P.O. Box 1358 East Lansing, MI 48826 Telephone 855-426-5529	Thomas Lavigne (P58395) Matthew R. Abel (P38876) Cannabis Counsel, PLC Attorneys for Plaintiff 2930 E. Jefferson Detroit, MI 48207

ORAL ARGUMENT REQUESTED

MOTION & BRIEF IN SUPPORT FOR MANDAMUS, TEMPORARY RESTRAINING ORDER AND PRELIMINARY OR PERMANENT DECLARATORY & INJUNCTIVE RELIEF

Plaintiff, a registered ballot question committee with a petition form approved by the Board of State Canvassers (BOC) for circulation, submitted petitions to the Bureau of Elections (BOE) on June 1, 2016, to qualify for the November 2016 or next regular election ballot, and now being denied and suffering horrible constitutional deprivations of liberty and property without due process of law, and having exhausted all remedies, seeks relief from this court. Plaintiff moves for a writ of mandamus to order defendants Secretary of State (SOS), BOE and BOC to proceed with canvassing Plaintiff's petitions, and for a temporary restraining order against defendants to enjoin the enforcement of both: 1) the "rebuttable presumption" burden for any signature on an initiatory petition

older than 180 days under MCL 168.472a, and 2) the 1986 Board of Canvassers policy to utilize the rebuttable presumption; and Plaintiff argues in support of its motion for such other declaratory and injunctive relief:

STATEMENT OF FACTS

Plaintiff incorporates by reference its Complaint filed contemporaneously in this matter as if restating all factual allegations herein, and all exhibits are referenced to the complaint. Since 1908 campaigns were able to petition for the gubernatorial period. In 1963 a new Constitution was enacted and from 1963 until 1986, there was no enforcement or existence of the rebuttable presumption or the 1986 BOC policy. Campaigns historically used the Art 2, Sec 9 constitutional period between gubernatorial campaigns to petition, defined as 4 years minus 160 days, which is up to 3 years and 7 months. In 1973, MCL 168.472a was enacted. From 1973 to 1986, the BOE and BOC did not enforce the rebuttable presumption at all, because it was defendants positions that the rebuttable presumption was unconstitutional **(See Exs F, G)**.

By its very language, MCL 168.472a provides for more than 180 days to petition for a statutory initiative, because a signature's staleness can be rebutted for a signature more than 180 days old, and not be void: 168.472a Presumption as to signature on petition.

> It shall be rebuttably presumed that the signature on a petition that proposes an amendment to the constitution or is to initiate legislation, is stale and void if the signature was made more than 180 days before the petition was filed with the office of the secretary of state.

In 1986, the BOC rebuttable presumption policy was adopted during the *Consumers Power* litigation. *Consumers Power* only applied to the non-self-executing counterpart to statutory initiatives, constitutional amendments under Art 2, Sec 12 (**See generally Ex T Complaint and Order *Consumers***). Historically local clerks maintained non-

computerized Michigan voter files in a decentralized fashion. In 1997, the Qualified Voter File (QVF) was created pursuant to legislation. With the creation of the QVF, the state has a centralized computer database of qualified electors with fancy tools to track the personal history of every voter. Michigan law states that anyone in the QVF is a qualified elector, and the state is required to use the QVF to canvass petitions. With SB776, in 2016, for the first time since 1908, the Michigan Legislature has tried to restrict petition time periods for constitutional amendments and statutory initiatives in direct conflict with the People's guaranteed constitutional rights unburdened by any attempts to deny or restrict time periods or any other aspect of burdening the right to petition or to enact initiatory legislation. Timeline for visual purposes:

Petitions-No rebuttable presumption or time limit enforced			QVF		SB776 violation
			BOC policy		
1908	1963	1973	1986	1998	2016

PETITIONING IS A FUNDAMENTAL CONSTITUTIONAL RIGHT AND ANY LAW, RULE, POLICY, OR PRACTICE WHICH INFRINGES OR UNDULY BURDENS THE RIGHT IS SUBJECT TO STRICT SCRUTINY REVIEW

Controlling precedent is clear that the standard of judicial review for the questions presented by Plaintiff's case is through the lens of a strict scrutiny analysis.

The US and Michigan Constitutions elevate the right to petition to a fundamental right, therefore for that fundamental right to be infringed, the government must have a compelling interest, accomplished by the least burdensome means, and narrowly tailored to achieve that end. *US Const, Am I*. Michigan's Constitution of 1963, Article II -- § 9 -- Initiative and referendum; limitations; appropriations; petitions. Sec. 9. "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the

referendum." *See also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) "[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution." Petition signers as well as petition circulators have First Amendment rights infringed when laws restrict the petitioning process.

The nature of the rebuttable presumption itself of MCL 168.472a, and even more the absurdity of the unworkable 1986 BOC policy for the rebuttable presumption, viewed through the lens of strict scrutiny, should compel the Court in this instance to hold that as applied to statutory initiatives, and as to MILegalize in this in this instance, that these burdens limit citizens rights to participate in the initiative process and are unconstitutional. The US Supreme Court and Sixth Circuit agree on the basic principles:

> The initiative process is not guaranteed by the U.S. Constitution (*Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir.1993)), but once a state confers upon its citizens the opportunity to participate in the initiative process, it may not limit that state-created right in contravention of federal fundamental law. *Meyer v. Grant*, 486 U.S. 414, 422-424, 108 S.Ct. 1886, 1892-93, 100 L.Ed.2d 425 (1988) (the right to circulate an initiative petition is "core political speech").

Brock v Thompson, 948 P2d 279, 287 fn 25; 1997 OK 127 (Okla 1997). See also *Moore et al v Johnson*, No 14-11903, slip opinion p 9 (USDC ED MI, S Div; May 23, 2014) (John Conyers case):

> "The Registration Statute is, in all material respects, indistinguishable from the statute held facially invalid by the United States Court of Appeals for the Sixth Circuit in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008). The Sixth Circuit in *Nader* held that it was "undisputable" that the plaintiff suffered a serious limitation on his First Amendment rights – a limitation triggering application of strict scrutiny – when the statute was applied so as to disqualify signatures gathered by non- registered voters and to keep the candidate off the ballot. *Id.* at 475, 478. That is exactly what happened in this case. The Registration Statute was applied so as to disqualify Mr. Conyers' signatures and keep him off the ballot. *Nader* holds that this

> amounts to a severe burden on Mr. Conyers' First Amendment rights and requires the application of strict scrutiny. *Id*. at 475, 478. The reasoning of *Nader* also compels the conclusion that application of the Registration Statute severely burdened the First Amendment rights of the Plaintiffs who gathered the signatures that were disqualified.
>
> The Registration Statute cannot survive strict scrutiny because it is not narrowly tailored to serve a compelling state interest. The State's asserted interest is detecting and preventing election fraud. (*See, e.g.,* ECF #27 at 25, where Secretary Johnson argues that "if strict scrutiny is required, the burden on Plaintiffs is justified by the State's compelling interest in preventing fraud.") Requiring circulators to register, Secretary Johnson contends, helps to combat fraud because the State knows where to find a registered voter "if questions arise regarding the validity or genuineness of signatures" (*id.*), and the State has the ability to subpoena a registered voter to provide testimony, if needed, in an investigation or prosecution of election fraud.
>
> The State's interest in combatting election fraud is compelling, but the State may protect that interest through a less restrictive means."

Similar to the Conyers case, Plaintiff's First Amendment rights, as well as the rights of both circulators and signors are being impermissibly burdened, and the state has no compelling interest. Even if the state does have a compelling interest of preventing fraud, using the QVF rather than the 1986 policy is how the state can accomplish that interest, and it can be accomplished through less burdensome and more narrowly tailored means.

The federal courts have viewed denial of ballot access with "general agreement" that these statutes "merit the closest examination" and cannot survive strict scrutiny review. *Moore Id*. citing *Libertarian Party of Virginia v Judd*, 718 F.3d 308, (4th Cir 2013) at 316-17. Since *TUAC v Austin*, the Sixth Circuit has recognized that "Nader's petition circulation activity constitutes core political speech, and any regulation of that speech is subject to exacting scrutiny. See *Buckley v American Constitutional Law Foundation, Inc*], 525 U.S. at 192 n. 12, 119 S.Ct. 636; id. at 210-11, 119 S.Ct. 636 (Thomas, J., concurring) (applying strict scrutiny because registration requirement

impacted core political speech)." *Nader v Blackwell*, 545 F3d 459, 475 (CA 6, 2008). This rule applies to the context of recalls in Michigan as well: "The circulation of recall petitions is core political speech." *Bogaert v Land I*, 572 F Supp 2d 883, 900 (USDC WD Mich 2008). In its second opinion, which came after *Nader v Blackwell* had been published, the *Bogaert v Land* court went into more detail:

> This Court held in its opinion on the motion for preliminary injunction that Plaintiff had a substantial likelihood of prevailing on the merits because recall-petition speech is core political speech, it is subject to strict scrutiny, and the district residency and registration requirements are not narrowly tailored to achieve Michigan's compelling interest in the integrity of recall petitions and the combat of election fraud. (Dkt. No. 37, Op. 30-39.) *Bogaert v Land II*, 675 F Supp 2d 742, 749 (WD Mich 2009).

In this instance, Plaintiff is being denied initiative ballot access due to a constitutionally suspect 1986 BOC policy that has never been enforced and is the epitome of not being the least burdensome means to achieve the state's interest (it is more like the most burdensome way), nor is it narrowly tailored. The consensus among experts is that the policy cannot even be reasonably be complied with. It has never been enforced. No one has even attempted to comply with it since 1986 until Plaintiff made good faith attempts in the past 7 months and found it impossible to comply, i.e. it was so unduly burdensome it made exercise of rights illusory. The 1986 BOC policy does not even achieve the state's interest in the purity of elections because signor affidavits are not a sufficient quantum or proof for qualified elector status. Plaintiff's argument of using the QVF would go farther in furthering the state's interest of preventing fraud and ensuring qualified electors are petition signors than even the defendants are attempting to do. The Bureau is directed to use the QVF to canvass petitions as it is…. so how can defendants argue that a 1986 policy that is unworkable is superior to the command of state law? It is

of course, absurd, and the 1986 BOC policy must be declared unconstitutional on its face and as applied.

Plaintiff is prepared to rebut signatures if MCL 168.47a is not declared constitutional, but like any rebuttable presumption, Plaintiff is entitled to rebut once confronted with something to rebut by the BOE in its sample of Plaintiff's petitions. Plaintiff deserves that due process. The first order of business is for the BOE to canvass the petitions. If the canvass actually reviews the signatures for qualified elector status as defendants are required to do, then defendants can only refuse to count those signatures if they are known to be defective, void for some other reason, or not potentially rebuttable.

Well-Settled Law regarding the Initiatory Petition Process

Under Michigan law all signatures submitted are considered presumptively valid. Signatures are not checked to the QVF for exactness and handwriting experts are not used as it has historically been acknowledged that signatures vary on petitions and on street corners when people may be in a rush, and that signatures need not match what is on file with the QVF or a clerk or on a person's driver's license. Signatures can be void due to facial defects such as not containing a circulator signature; the petition is torn or not including language or pages missing from petition; signors signed in the wrong county, entered the wrong township/city designation, wrote a birthdate instead of the date of signing, or entered a PO box instead of a physical address. Other reasons a signature or petition sheet can be void include a duplicate signature, forgery or fake name, no signature, no printed name, no date, post-dated from when the circulator signed, or the person is not a qualified elector i.e., not registered to vote.

If for any reason Plaintiff has some technical compliance issues with any lawful policy, it should not prejudice a fair canvassing of Plaintiff's petitions as Michigan has a long history of construing technical issues, deficiencies, and burdens to ballot access as immaterial and not as a sufficient basis to deny ballot access. The Michigan Court of Appeals has held that "deficiencies amounting to a wholesale exclusion of mandated disclosure information justify removal of an issue from a ballot, while mere technical noncompliance would not prevent the election from going forward." *Herp v Lansing City Clerk,* 164 Mich App 150; 416 NW2d 367 (1987), lv den 429 Mich 899 (1988). In *Meridian Twp v East Lansing,* 101 Mich App 805; 300 NW2d 703 (1980), lv den 411 Mich 962 (1981), the Court of Appeals set forth the general principle that all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements in petitions (generally, although that case involved annexation petitions) are resolved in favor of permitting the people to vote and express a choice on any proposal subject to election. In *Newsome v Bd of State Canvassers,* 69 Mich App 725, 729; 245 NW2d 374 (1976), lv den 397 Mich 833 (1976), the Court of Appeals held that "[c]onstitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of those reserved rights, *Kuhn v Dep't of Treasury,* 384 Mich 378; 183 NW2d 796 (1971). The Court In *Meridian* stated:

> Matters of concern to one inquiring as to the validity of petitions would be whether the requisite number of signatures required by the statute, in this case 20 percent of the electors of the city, are present, meaning that the signatures must be checked, as with any election petition, against those on file with the county clerk regarding eligible voters. The petitions must have been circulated only in the affected area, must bear the names and signatures of the circulators, and must be in sufficiently clear terms so that those signing the petition can be assumed to have understood to what it

> was they were appending their signatures. As a 200-year history of democracy in this country and nearly 150 years in this state have given county clerks substantial experience in such matters, ample standards exist by which clerical discretion in determining the validity of such petitions can be guided, measured, and restricted. As a general principle, all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election. *Boucher v Engstrom,* 528 P2d 456, 562 (Alas, 1974), *Cope v Toronto,* 8 Utah 2d 255; 332 P2d 977 (1958); see also, *Thompson v Secretary of State,* 192 Mich 512, 521-522; 159 NW 65 (1916), *Alexander v Mitchell,* 119 Cal App 2d 816; 260 P2d 261 (1953), *Brownlow v Wunsch,* 103 Colo 120; 83 P2d 775 (1938).

The application of the above law to this case with Plaintiff, is that any procedural defect or failure for strict compliance with any policy or law is to be resolved in favor of Plaintiff and for ballot access and that the BOE must canvass Plaintiff's petitions against the QVF to determine if the requisite number exists for qualification. The BOE is perfectly capable of doing this in a timely manner using the same sampling calculations method they currently use to canvass and has the most superior ability to confirm and access a qualified elector's history, more so than any other person.

Michigan Constitution of 1963 -- Article 2, Section 9

1923 *Hamilton v Deland* decision was about constitutional initiatives. It says:

> "The Constitution speaks on the subject, as we shall point out. The constitutional provision contains procedural rules, regulations, and limitations; it maps the course and marks the way for the accomplishment of an end; it summons no legislative aid, and will brook no elimination or restriction of its requirements; it grants rights on conditions expressed; and if its provisions are complied with and its procedure followed its mandate must be obeyed. Its provisions are prospective in operation and self-executing.
>
> The vote for Governor every two years fixes the basis for determining the number of legal voters necessary to sign an initiatory petition and start designated official action. This primary essential to any step at all fixes distinct periods within which initiatory action may be instituted. A petition must start out for signatures under a definite basis for determining

> the necessary number of signatures, and succeed or fail within the period such basis governs."

This passage was quoted at the end of the 1974 OAG 4813, and was the basis for the AG's opinion that the term for governor determines signature-gathering time periods. *Consumers Power* overruled the 1923 decision and 1974 OAG 4813 only as to constitutional initiatives. The reason: the constitutional provision for constitutional initiatives had been changed by then. A sentence had been added, and it was no longer self-executing. That sentence was not added for statutory initiatives. For them, the *Hamilton v Deland* pronouncement that the governor's term fixes the collection period remains good law, or at least compelling reasoning that if the period for collecting signatures for an initiative is not unlimited, it is at least 4 years, not 180 days. And since Art 9, Sec 2 is self-executing and was not affected by *Consumers Power*, and extending the holding of *Wolverine Golf Club*, neither the rebuttable presumption or the 1986 BOC policy are constitutional as applied to statutory initiatives.

The 1986 BOC policy imposes undue burdens and is Unconstitutional

The 1986 policy runs afoul of the First Amendment under a strict scrutiny analysis. The policy has no compelling state interest, it is not the least burdensome means of achieving a compelling interest even if one exists, and it is not narrowly tailored. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), the Court held in determining whether an election law violates the First Amendment a court should weigh the burden of the restriction against the State's interests:

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Id. at 358, 117 S.Ct. 1364 (internal quotations and citations omitted); see also *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir.2008) ("Although a state need not present 'elaborate, empirical verification' of the weight of its purported justification when the burden is moderate, it must come forward with compelling evidence when the burden is higher") (citations omitted). *Bogaert v Land II*, 675 F Supp 2d at 749-750 is another oft quoted case. Accordingly, even under flexible analysis, the scrutiny here should be strict: the proposed regulation must be narrowly tailored to serve a compelling state interest. Furthermore, the *Bogaert v Land II* court found justification for not even bothering with the flexible approach, and rejected the distinction in petition types.

> Defendant's attempt to distinguish recall-petition circulation from other forms of petition circulation is not persuasive. Contrary to Defendant's suggestion, the proposition that the registration and residency requirements pose only a moderate burden on recall-petition circulators is not simply a matter of common sense. In fact, the existing case law and common sense tend to refute Defendant's argument for distinguishing recall petitions from initiative or candidate petitions. . . . [R]ecall-petition circulators resemble both initiative-petition circulators and candidate-petition circulators because they similarly seek ballot access.

Bogaert v Land II, 675 F Supp 2d at 750-751.

> This Court's previous determination that § 957 posed a severe burden on recall-petition circulators was based on a consistent line of federal cases that have concluded that residency or registration restrictions on petition circulators pose a severe burden on core political speech and are subject to strict scrutiny. (Dkt. No. 37, Op. 34-36.) See *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 194, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999); *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008); *Chandler v. City of Arvada*, 292 F.3d 1236, 1242 (10th Cir. 2002); *Lerman v. Bd. of Elections*, 232 F.3d 135, 149 (2d Cir. 2000); *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir.2000). Subsequent to this Court's opinion on the preliminary injunction motion, the Sixth Circuit issued its opinion in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), in which it joined the other federal circuits in extending the principles established in Buckley regarding initiative-petition circulators to candidate-petition circulators. Id. at 475-76 (applying strict scrutiny and holding that Ohio's registration and residency requirements for candidate-petition circulators violated the First Amendment). See also *Yes on Term Limits, Inc. v. Savage*, 550 F.3d

> 1023 (10th Cir. 2008) (applying strict scrutiny to analyze Oklahoma's ban on non-resident initiative-petition circulators).
>
> None of Defendant's arguments convince this Court that its previous determination that the registration and residency requirements of § 957 impose a substantial burden on Plaintiff's First Amendment rights and are not narrowly tailored to Michigan's compelling interest in the integrity of recall petitions and the combat of election fraud was erroneous. The Court stands by its previous analysis. Rather than reiterating that analysis herein, the Court reaffirms and adopts that analysis by reference and declares that the requirements in Mich. Comp. Laws § 168.957 that recall-petition circulators be registered to vote and be residents of the legislative district of the official to be recalled are unconstitutional as a violation of the First Amendment of United States Constitution, applicable to the State of Michigan through the Fourteenth Amendment. (Dkt. No. 37, Op. 33-39.)

Bogaert v Land II, 675 F Supp 2d at 752. In *Buckley*, the Supreme Court struck down a Colorado statute which required, inter alia, that initiative-petition circulators be registered voters. *Id*. The Court extended its holding in *Meyer v. Grant*, 486 U.S. at 414, in which it rejected Colorado's ban on paying ballot-initiative petition circulators. Justice Ginsburg, writing for the *Buckley* majority, discussed the fundamental constitutional rights at stake in election petition circulation:

> Petition circulation, we held, is "core political speech," because it involves "interactive communication concerning political change." First Amendment protection for such interaction, we agreed, is "at its zenith." We have also recognized, however, that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 183 (internal citations omitted.).
> In this case, as in *Meyer*, the requirement "imposes a burden on political expression that the State has failed to justify." *Id*. at 428. *Buckley*, 525 U.S. at 194-195 (some internal citations omitted).

Keeping *Buckley* in mind, we examine the character and magnitude of the burden imposed by requiring both the rebuttable presumption and the 1986 BOC policy on First Amendment rights and the extent to which the law serves Michigan's interests. *Burdick v. Takushi*, 504 U.S. 428, 433-434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Laws which

are severely burdensome to constitutional freedoms must be narrowly tailored to serve compelling state interests, while less burdensome statutes receive less exacting scrutiny. *California Democratic Party v. Jones*, 120 S.Ct. at 2412.

The imposition of a rebuttable presumption requirement and the impossible to comply with 1986 BOC policy burdens the petitioners' and others' core freedoms of political expression and association. *See Buckley*, 525 U.S. at 183; *Krislov*, 226 F.3d at 858, 860-861. That is, petitioners may not associate for purposes of political expression by organizing nominating petition signature drives with whomever they wish. *See Meyer*, 486 U.S. at 424 ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). It also limits the ability of petitioner's to conduct a citizens campaign to educate Michigan voters over an extended period of time. In this case, Plaintiff MILegalize found it more effective and important to run an 11-month campaign to educate Michigan voters and encourage discussion and inquiry into the proposal than a campaign limited to 180 days. Regardless of how long Plaintiff petitioned for, the initiative would be heard at the same election and the issue and language would remain the same.

Michigan law is analogous to the federal cases, and any rebuttable presumption requirement must also be strictly construed. "[T]he right to recall public officials is an extremely important one which must be carefully guarded by the courts [. . .] statutes governing recall should be construed in favor of the right's exercise and [. . .] limitations on the right should be strictly construed[.]" *Schmidt v Genesee Co Clerk*, 127 Mich App 694, 701-702; 339 NW2d 526 (1983). Further, "it is always in the public interest to prevent a violation of a party's constitutional rights." *G&V Lounge Inc v Michigan*

Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1979) citing *Gannett Co Inc v DePasquale*, 443 US 368, 383 (1979). The state has failed to justify any reason for enforcement of both the rebuttable presumption and the 1986 BOC policy.

"Statutes must be struck down if they reduce the number of qualifying initiatives and the exchange of ideas." *Meyer*, 486 US at 421. Both MCL 168.472a and the BOC's 1986 rebuttable presumption policy that is impossible to comply with must be struck down as unconstitutional.

THE TERMS "REBUTTABLE PRESUMPTION" AND "STALE" ARE UNCONSTITUIONALLY VAGUE AND UNDEFINED

A law involving a fundamental right is unconstitutionally vague under due process standards if it does not give a person or ordinary intelligence fair notice of what is proscribed and is so vague and standardless that it allows for arbitrary and discriminatory enforcement or that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,". *Village of Hoffman Estates*, 455 US 489 (1982); *United States v. Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v Alabama*, 310 U.S. 88; *Herndon v. Lowry*, 301 U.S. 242. Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta v New Jersey*, 306 U.S. 451, 453.

What does the term Stale mean? There has been little debate in this matter about the definition of staleness— although it has been generally acknowledged that it is a vague concept and there is no definition in chapter 168 of the MCL or otherwise in state law nor has it been previously defined by the Court. The only precedential authority available comes from the pleadings of the state's top election lawyers in 1986 in the

Consumers Power case. In *Consumers* the adverse parties briefed the court in general agreement that staleness referred to a duplicate or otherwise defective signature, or a signature dated beyond the prior gubernatorial election period. Prior to the invention of the QVF and computer technology that is now used in elections management, it was difficult for the BOE to canvass a petition for duplicates, especially since the BOE uses a random sampling method. The longer a petition was in the field the likelihood of duplicates increases as people resign either out of forgetfulness or for another example because they think it is a new petition from the last one they signed.

What does the term Rebuttable Presumption mean in MCL 168.472a? It is anyone's guess. The term "presumption" has a very special meaning in law. A presumption in law is a logical inference which is made in favor of a particular fact, typically as a form of evidence. The Uniform Commercial Code (UCC) defines "presumption" and "presumed" as follows: "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence. [UCC 1-201 (31)]. Black's Law Dictionary, Sixth Edition, defines "presumption" as follows:

> A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted. ... A legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence.

Black's Law Dictionary Online, 2d Ed, defines rebuttable presumption as "A presumption which may be rebutted by evidence. Otherwise called a "disputable" presumption. A species of legal presumption which holds good until disproved." Given these definitions, in the absence of clear definition in the context, the best quantum of

proof to rebut the staleness of any signature, if so required, is to use or have access to the QVF. Defendants have the best access, and they must canvass every signature. If the canvass finds insufficient signatures and the signatures challenged include those beyond 180 days old, then Plaintiff has an opportunity to rebut the signatures just as is law and custom for Plaintiff to have the opportunity to rehabilitate any other signatures the BOE or BOC or any other person challenge. The rebuttable presumption is an after-the-fact individualized by-the-signature opportunity afforded to Plaintiff if the BOE or BOC find by using the QVF that some signatures are stale or void for the reason of not being qualified electors or otherwise void. Defendants must be ordered to canvass the petitions and if a signature is alleged stale for some articulable reason such as being defective (duplicate, wrong county, no date, etc.) or the signor is not a qualified elector, the Plaintiff has the opportunity to disprove any allegation on an individualized basis. For reasons of due process defendants cannot just lump all signatures in together and arbitrarily disqualify them. Every signature deserves equal protection, and the due process of individualized suspicion or disqualification that affords an opportunity to contest the determination.

Pursuant to state law the QVF must be used to rebut the presumption of staleness for a signature on an initiatory petition dated more than 180 days prior to submission to the Bureau of Elections. Defendants have and do use other more narrowly-tailored tools to achieve the state's interest of ensuring only qualified electors are placing initiatives on the ballot—namely using the QVF to canvass the petitions.

The state-mandated form of petitions properly says that "knowingly" signing more than once is a violation of state law. However, without proof of a knowing violation

(cf *In re Nader*, 865 A2d 8, 73-74 (Pa Cmwlth 2004)), neither the state nor petitioner has any basis for justifying a total denial of properly qualified citizens' rights to sign petitions and be "heard" – counted. There is no fraud, so what is basis for not canvassing Plaintiff's filed signatures? Particularly when Plaintiff can already provide evidence pre-canvass that it can rebut 137,000-plus signatures? Again, there can be no more severe burden on any right than to deny it totally.

SB776 & the Unconstitutionality of Retroactive Legislation as applied to MILegalize

SB776 cannot be applied to the MILegalize campaign as it is a clear violation of procedural and substantive due process. In *Fulani v. Austin*, No. 88-cv-72331, the Eastern District of Michigan order granted the plaintiff independent candidates injunctive relief from Michigan's then-newly enacted independent-candidate petition-signature requirements because it was, for purposes of the 1988 election, "retrospective as applied without justification by any enunciated compelling state purpose." *Id*. The Sixth Circuit subsequently denied the state's request for a stay of the order on August 15, 1988 (No. 88-1627) and the state then voluntarily dismissed its appeal on November 28, 1988. In *Libertarian Party of Ohio v. Husted,* No. 2:13-cv-953, (2014) Southern District of Ohio decision granted the plaintiff minor political parties injunctive relief from Ohio's then-newly enacted party-level petitioning requirements, as applied to that year's election, because "[t]he Ohio Legislature moved the proverbial goalpost in the midst of the game." *Id*. at *17. The Sixth Circuit subsequently denied the state's motion to expedite its appeal of the injunction order on January 25, 2014 (No. 14-3030) and the state then voluntarily dismissed its appeal of that order on February 21, 2014. *Please see Hudler v. Austin*, 419

F. Supp. 1002, 1013-14 (E.D. Mich. 1976), summarily aff'd sub nom, *Allen v Austin*, 430 U.S. 924 (1977) and *Blomquist v. Thomson*, 739 F.2d 525, 526-27 (10th Cir. 1984).

In *Briscoe v. Kusper*, 435 F. 2d 1046 (7th Cir. 1970), which held that "the application of [a] new . . . rule to nullify previously acceptable signatures without prior notice was unfair and violated due process." *Id*. at 1055. That case is also discussed in some detail in *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (*see id*. at 1078), which presently remains highly influential and oft-cited in the Sixth and other U.S. Circuits. While *Briscoe* involved a candidate petition, it drew no distinction, with respect to the liberty interest at hand, between "support of independent candidates or specific policies." 435 F.2d at 1053; *see also Henry v. Connoly*, 910 F.2d 1000, 1003 (1st Cir. 1990) (distinguishing Briscoe in the context of an initiative-petition case, but basing the distinction on the latter's absence of a retroactive status change to signature validity, rather than on the differing nature of petition-types); *Pena v. Nelson*, 400 F. Supp. 493, 494 (D. Ariz. 1975) (relying on Briscoe in ruling that a state attorney general opinion retroactively invalidating an officer-recall petition "violated due process provisions of the Constitution of the United States."), but see Gibson v. Firestone, 741 F.2d 1268, 1273 (11th Cir. 1984) (appearing to exclude initiative petitions from Briscoe's applicable scope). In *Hudler v Austin,* 419 F.Supp. 1002, at 1013-1014 (1976), the last part of the opinion, Section III, is relevant to Plaintiff's case and leads to the conclusion that SB776, cannot effect the MI Legalize petitions and the November, 2016 election:

> "'"One question remains. Plaintiffs urge that even if Act 94 is otherwise constitutional, its late April, 1976, effective date comes so close to the August 3, 1976, primary as to have deprived plaintiffs of due process by giving them so little time to marshal their supporters, publicize the necessity of primary voting and depriving them of the opportunity they would have had for proselytizing while they were getting their petitions

filled earlier in the year.

It is beyond question that legislation may achieve constitutionally valid goals but infringe the Fourteenth Amendment by doing so in an unconstitutional manner. In the context of the statute challenged at bar, this principle calls for an inquiry into whether marshalling the required support in the time allotted imposed a constitutionally unreasonable obstacle to compliance.

The passage of Act 94 late in April caught plaintiffs at a particularly prejudicial and inopportune time to begin attempting to comply with the new requirements. Their petition drives were either completed or nearly completed and the form of petition which had been used, pursuant to former M.C.L.A. § 168.685, indicated to signers that their signatures constituted the only action necessary to place the party on the ballot. Further, the opportunity for soliciting petition signatures and proselytizing for primary support at the same time was rendered impossible since petition gathering had all but drawn to a close when plaintiffs were first apprised of the primary performance requirement. In tandem then, these problems presented plaintiffs with an obligation substantially more difficult to satisfy than that which new parties will face in the future under Act 94 and deprived them of due process of law.

In a different vein, but contributing to the deprivation of due process, is the legislature's failure to take earlier action although fully apprised of the problem. Defendant director of elections Apol testified that he had advised the legislature after the 1972 election and again in the fall of 1975 that overcrowding problems were likely to arise in the next election. Apol testified before an ad hoc legislative committee involved with the proposed legislation in January or February of 1976, and the legislature was aware of the number of parties soliciting petition signatures and the potential consequences as to the 1976 election.

Depriving plaintiffs of adequate time and notice saddled them with an additional burden beyond that considered in the court's earlier assessment of the likelihood of compliance if reasonably diligent efforts are made. The short time limits, extra expense and duplicative effort required to regenerate the support of plaintiffs' constituencies falls outside *Storer's* "reasonably diligent efforts" standard and imposes an unnecessarily prejudicial burden on the plaintiff new parties seeking 1976 ballot status.

Accordingly, this court reaches the conclusion that Act 94 is a proper exercise of legislative discretion and does not offend the Constitution except as to its application to the general election for November, 1976. Insofar as the November, 1976 general election is concerned, the

> defendants are hereby directed to take such steps as are necessary to place on the November ballot all parties who would have been eligible based upon compliance with the pre-existing petition requirement."”

The Failure of the Legislature to properly enact SB776 with Immediate Effect

When a bill is enacted into law, its effective date is 90 days after the Legislature adjourns Sine Die unless both chambers of the Legislature vote to give the bill immediate effect (IE). (Article IV, Section 27 Const 1963.) Sine Die typically takes place in December. Bills without a two-thirds vote for IE typically take effect sometime in late March of the following year. If a bill has IE, it takes effect immediately upon the governor's signing the bill and filing it with the Great Seal. Currently, a bill must receive 73 votes in the House and 26 votes in the Senate to be given IE. If one chamber fails to vote for IE, the bill does not have it. The House currently determines an IE vote by allowing the Speaker Pro Tem to count rising members. Upon information and belief it is the practice of the House to allow the Speaker Pro Tem to count the rising members to determine if there are enough members voting in the affirmative to grant IE. An immediate effect vote is typically not done by a recorded roll call vote.

The problem is that SB 776 was given/granted immediate effect by the House of Representatives on May 18, 2016. The journal from May 18, 2016, simply states, "Rep. Nesbitt moved that the bill be given immediate effect. The motion prevailed, 2/3 of the members serving voting therefore." But this determination was not accurate. There were NOT 73 members voting for immediate effect. In the same journal (House Journal 48 of 2016) there are 43 House members in the dissent section of this journal saying they did NOT rise to grant immediate effect. (There are 109 members, so doing the math, there is not enough representatives voting in the affirmative to grant immediate effect.) So the

law constitutionally cannot take effect until 90 after Sine Die (sometime in March 2017).

While it may be stated that within the four corners of the House Journal is the final determinate of what happened in the House on any given day, in *Michigan Taxpayers United Foundation v. Governor*, 236 Mich.App. 372, the Court states, "the Journals of the House and Senate are conclusive evidence of those bodies' proceedings," however the Court goes on to state this only applies, "when no evidence to the contrary appears in the journal…" There is contradictory evidence in the journal in this instance, first, the sentence from the Speaker Pro Tem saying there is sufficient members voting, and second, 43 members clearly stating they did not vote for IE. Even more compelling evidence, is the video recording of the May 18, 2016 House daily session. In the video one can see Speaker Pro Tom Leonard did not tally the vote prior to the bill leaving the chamber. Additionally, the video will show there are not more than 73 members rising to vote for IE. Therefore, SB776 was not properly enacted and it cannot take effect in 2016 or be applied to MILegalize.

LEGAL STANDARDS & THE BASIS FOR INJUNCTIVE RELIEF

When a court considers a motion for a preliminary injunction, it must weigh four factors, (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Certified Restoration v. Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). Courts are generally required to balance these four factors, and none of the factors, standing alone, is a prerequisite to relief. *Golden v. Kelsey-Hayes, Co.*, 73 F.3d 648, 653 (6th Cir. 1996).

However, when "a party seeks a preliminary injunction on the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Libertarian Party of Ohio v. Husted*, – F.3d –, 2014 WL 1703856 at *8 (6th Cir. May 1, 2014), *quoting Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). "It is well-settled that loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Libertarian Party of Ohio*, 2014 WL 1703856 at *9, *citing Connection Distrib. Co.*, 154 F.3d at 288. *See also ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003) ("[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated"), *citing Elrod v. Burns*, 427 U.S. 347, 373 (1976). On the issue of harm to others, when a plaintiff demonstrates "a substantial likelihood that a challenged law is unconstitutional, no substantial harm can be said to inhere in its enjoinment." *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001), *citing Connection Distrib. Co.*, 154 F.3d at 288. "It is always in the public interest to prevent a violation of a party's constitutional rights." *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), *citing Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979). Injunctive relief is an extraordinary remedy that is ordered by a court only when justice requires, there is no adequate remedy at law, and there is real and imminent danger of irreparable injury. *See, e.g., Acer Paradise, Inc v Kalkaska County Rd Comm'n*, 262 Mich App 193, 684 NW2d 903 (2004).

In this case, Plaintiff has demonstrated a likelihood of success on the merits. Additionally, Plaintiff will suffer irreparable injury without an injunction because its

otherwise properly filed signatures will not be counted and will deny ballot access. The issuance of an injunction does not cause any harm to defendants, and the public interest in these important constitutional questions, as well as having the opportunity to vote on Plaintiff's proposal at the next regular statewide election, are manifestly worth protecting. Balancing all four factors relief for Plaintiff should be granted.

CONCLUSION & RELIEF REQUESTED

While Plaintiff presents a unique factual scenario unlikely to ever be presented again to this court, there are several important questions of fundamental constitutional law that are a first impression to this Court. The case affects the fundamental constitutional rights of all 10 million-plus Michigan voters or potential voters. Plaintiff is clearly entitled to relief, at the very minimum three immediate rulings, first for a writ of mandamus to the Bureau of Elections to proceed with canvassing and qualification of the initiative; a declaratory ruling that the 1986 policy of the Bureau of Elections does not apply to the rebuttable presumption under MCL 168.472a; and that SB776 is inapplicable as a matter of law to Plaintiff and cannot be retroactively applied. Plaintiff has both the facts and the law on its side, as well as the history and custom of petitioning in Michigan since 1908, clear rights under Art 2 Sec 9 of the 1963 Michigan Constitution, and under Michigan and federal court precedent, to have every signature it has submitted canvassed under the equal protection and due process of the law, with the opportunity, if the rebuttable presumption is found to be constitutional, for Plaintiff to rebut any presumption of staleness that the Bureau presents to it as part of its sample or canvass of Plaintiff's petitions. In light of the seriousness of this potentially being an election matter in less than five months (Plaintiff does not waive any right to be placed on the ballot at any next

regular election in Michigan if Plaintiff is deprived by any means of resolving legal issues of ballot qualification prior to the November 8, 2016 election—in other words Plaintiff seeks remedy to be placed on the ballot, which is not exclusive to the elections of 2016, 2018, 2020, etc.), the Court must act expeditiously to do justice.

WHEREFORE, Plaintiff seeks remedy and redress from the Court to issue a writ of mandamus for the reasons set forth above and in Plaintiff's brief in support, and that an order to show cause be issued as well as:

- Expedite this matter on the Court's docket;
- Declare the 1986 rebuttable presumption policy of the Board of Canvassers as unconstitutional under article 2 section 9, and unenforceable as applied to statutory initiatives;
- Declare the 1986 rebuttable presumption policy of the Board of Canvassers as unconstitutional as a violation of the First Amendment, and unenforceable as applied to statutory initiatives;
- Declare the 1986 rebuttable presumption policy of the Board of Canvassers as unconstitutional as a violation of the 5th and 14th Amendments, and unenforceable as applied to statutory initiatives;
- Declare the enforcement of the rebuttable presumption of MCL 168.472a as unconstitutional under article 2 section 9, and unenforceable as applied to statutory initiatives;
- Declare the enforcement of the rebuttable presumption of MCL 168.472a as unconstitutional as a violation of the First Amendment;
- Declare the enforcement of the rebuttable presumption of MCL 168.472a as

unconstitutional as a violation of the 5th and 14th Amendments;

- Issue a Temporary Restraining Order and enjoin Defendants from enforcement of the rebuttable presumption of MCL 168.472a; the 1986 Board of Canvassers rebuttable presumption policy; and from enforcing SB776, or any other statute or administrative rule which restricts the length of the signature collection period for statutory initiatives;
- Issue a Writ of Mandamus to the Bureau of Elections and Board of Canvassers with an Order to proceed with any canvassing and qualifications of the petitions in a normal, orderly, timely, and constitutionally compliant fashion;
- Declare all other legislative or administrative restrictions of the length of the signature collection period unconstitutional under article 2 section 9, and unenforceable as applied to statutory initiatives;
- Declare SB776 unconstitutional under article 2 section 9, and unenforceable as applied to statutory initiatives;
- Declare SB776 unconstitutional as a violation of the First Amendment;
- Declare SB776 unconstitutional as a violation of the 14th Amendment.
- Declare SB776 as unconstitutional and as a violation of the 5th Amendment as an unlawful takings as applied to Plaintiff;
- Enjoin defendants from applying SB776, or any other statute or administrative rule which restricts the length of the signature collection period for statutory initiatives;
- Award Plaintiff costs and punitive damages for the egregious nature of Defendants actions in this instance;

- Award Plaintiff's counsel reasonable attorney fees; and
- Grant such other relief as the court finds just or equitable under the circumstances.

Respectfully Submitted:

HANK LAW, PLLC

Dated: _____ By: _____

Jeffrey A. Hank (P71152)
Attorney for Plaintiff
P.O. Box 1358
East Lansing, Michigan 48826
Telephone: (855) 426-5529
Facsimile: (888) 490-7750

Thomas Lavigne (P58395)
Matthew R. Abel (P38876)
Cannabis Counsel, PLC
Attorneys for Plaintiff
2930 E. Jefferson
Detroit, MI 48207

David Cahill (P24046)
Attorney for Plaintiff
1418 Broadway
Ann Arbor, MI 48105
(734) 769-0753