

IN THE STATE OF MICHIGAN
SUPREME COURT

DONNA BRANDENBURG, as a
Michigan Gubernatorial Candidate and
individually,

Plaintiff,

v

MICHIGAN BOARD OF STATE CANVASSERS,
JOCELYN BENSON, in her official capacity as Secretary of State, AND
JONATHAN BRATER, in his official capacity as
Director of the Michigan Bureau of Elections,
Defendants.

CASE NO:
Jurisdiction: MCL 168.544 (12)

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**BRIEF IN SUPPORT OF PLAINTIFF'S VERIFIED COMPLAINT FOR MANDAMUS,
FOR DECLARATORY JUDGMENT ON CONSTITUTIONAL AND STATUTORY
ISSUES, AND REQUEST FOR INJUNCTION;**

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STATEMENT OF THE BASIS FOR JURISDICTION

The Michigan Supreme Court has jurisdiction to have a determination made by the State Board of Canvassers and to obtain mandamus or other appropriate remedy. MCL168.479; MCL 168.552(12). MCL168.479 provides: “any person who feels aggrieved by any determination made by the state board of canvassers may have the determination reviewed by mandamus, certiorari, or other appropriate remedy in the supreme court.”

STATEMENT OF QUESTIONS PRESENTED

I. Whether the Plaintiff is entitled to a writ of mandamus because the Board of Canvassers failed to count all signatures submitted in support of her nomination to the primary ballot?

Plaintiff Answers: YES

Defendants would: NO

II. Whether the Plaintiff is entitled to a writ of mandamus when the board of canvassers did not receive a sworn and written complaint?

Plaintiff Answers: YES

Defendants would: NO

III. Whether the Plaintiff was denied procedural and substantive due process in violation of Federal and Michigan law?

Plaintiff Answers: YES

Defendants would: NO

IV. Whether Donna Brandenburg is entitled to declaratory relief regarding her particular petitions are to be presumed valid ?

Plaintiff Answers: YES

Defendants would: NO

STANDARD OF REVIEW

The Court of Appeals recently summarized the requirements to issue a writ of mandamus to compel action by election officials stating:

"Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Attorney General v Bd of State Canvassers*, 318 Mich. App. 242, 248; 896 N.W.2d 485 (2016) (quotation marks and citation omitted).

"The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Id.* at 249 (quotation marks and citation omitted).

To be entitled to a writ of mandamus, a plaintiff must show that: "(1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014) (citation omitted). *Barrow v Wayne Co Bd of Canvassers*, ___NW2d___; 2022 Mich. App. LEXIS 2729, at *12-13 (Ct App, May 12, 2022).

STATEMENT OF FACTS

Republican Candidate for Governor Donna Brandenburg submitted approximately 27,500 signatures. The absence of counting of approximately 8,000-signatures was brought to attention of the state board of canvassers on May 26, 2022, which never reviewed the signatures. This is unconscionable as this is the first requirement that the Bureau of Election can accurately count all submitted signatures. The Bureau of Elections has still not addressed the missing signatures. Donna Brandenburg has suggested the Bureau of Elections merely overlooked her second submission and somehow discounted her original submission of 19,500 estimated signatures by 1800. This failure of a duty to identify the starting number correctly is a tremendous problem for the credibility of the entire *Review*.

The *Staff Report* focused on a novel process which was described in *Section III Processing Petition Sheets*. It was summarized by a member of the state board of canvassers as “unique and on the fly.” The process was simply to remove all signatures submitted by certain circulators as fraudulent and then only canvass signatures that exceeded the 15,000-signature requirement. In short, they failed to either consider signatures individually or to canvass signatures which is why mandamus is required.

In the case of Donna Brandenburg, the application of this process per their *Review* removed 11,144 collected by 19 paid circulators.

The only material issue raised as to signatures on nominating petitions submitted by Donna Brandenburg was whether any of 19 of the identified circulators obtained fraudulent or invalid signatures. No evidence was presented of a signer signing a name other than their own in violation of MCL 168.544c (8) or signing multiple names in violation of MCL 168.544c (10) In addition, no evidence was presented of a circulator making a false certification in violation of

MCL 168.544c (8). One signature was claimed as being associated with a deceased voter and another with a voter who had moved from the address. These two raised a suspicion that someone had signed the names inappropriately. No evidence was submitted of any comparisons between the signature on the nominating petitions and the signature on file in the QVF but the issue of qualified and properly registered was reported which likely came from information contained in the QVF.

All other issues, (1) facial validity or (2) qualification or (3) registration of electors, were not addressed (excluding the two voters identified in the *Review*). These issues must be deemed as waived in that a canvass was not completed timely, and the election deadline looms.

In fact, no list of challenged signatures was ever provided and there seems to be no other records that signatures were even EVALUATED by individual comparison to the QVF or for failing to meet any other standard as to Donna Brandenburg. At the hearing, it was conceded that only ‘representative signatures’ were examined referred to as ‘targeted reviews.’ To add insult to injury the Bureau of Elections Director then stated at the May 26, 2022 hearing that the total amount checked signatures against the QVF (7000 among all candidates) were determined invalid without providing evidence to support the claim that could be reviewed by the candidates. The *Staff Report* though states that there exist tally sheets which were not provided nor presented at the hearing. There was no evidence presented that any portion of the 7000 claimed comparisons were specifically to the Donna Brandenburg nominating petitions.

Of course, the opportunity for candidates to review the evidence started with a full four-day holiday weekend leaving less than a full week of notice before the primary petitions are scheduled to be certified and printed. The unfairness is the juxtaposition of two months to a few days to prepare for the resolution of the controversy.

No challenge was filed to any of the signatures on any nominating petition submitted by Donna Brandenburg. Any challenge to the signatures was made *sua sponte* by the staff of the board of elections based on their determination of fraud. There is no precedent for this action. A challenge on a doubtful signature has a legislative mandate procedure that was not followed. The challenge is to be filed with a written complaint sworn under oath before April 26, 2022, and specify the signatures which are challenged. Then an investigation or hearing to resolve the challenge is established by statute. Instead, the state board of canvassers acted like a court considering a lawsuit without a pleading being filed and without providing a fair opportunity to respond.

A single 8-hour hearing was held on May 26, 2022, to consider the nominating petitions of all candidates. No evidence was submitted related to any signature. Conclusions and general statements were made by the Director of the Bureau of Elections. The board of canvassers did not subpoena any witnesses and instead relied upon the summaries prepared by the staff and their comments. The sworn testimony was not of any witnesses to signature gathering but was instead comments made by the board, the Staff, candidates, challengers, and the public. These comments were then considered as evidence under oath.

The board deadlocked 2-2 on party lines. This deadlock was interpreted by the state board of canvassers, in deference to the Director of the Bureau of Elections, as a ruling that the petition was insufficient. This conclusion means that in effect, the Bureau of Elections made the determination. It is unclear how less than a majority supports the recommendation of staff rather than interpreting a deadlock to leave the issue to be submitted to the voters of the primary. To be clear, a 2-2 deadlock means merely that the board could not agree either that the signatures were invalid or that the candidates should be prevented from being on the primary ballot.

During the hearing, the timeline was raised both in the conduct of the hearing and in the ability to resolve the issue of who should be on the primary ballot. The state board of canvassers began working in silence on the issue in March. Assuming a start date of April they had more than six weeks to prepare for the hearing. No subpoenas were sent. There was an abundance of time to issue a public advisory or other direct notice to known candidates which could have alerted candidates to the specific problem and could have been made more than 3 weeks before the deadline of April 19, 2022. At a much earlier time the campaigns of candidate Perry and candidate James were advised of issues, but no information was presented to Donna Brandenburg.

The Bureau of Election staff then issued the *Review and Staff Report* on May 23, 2022. This was then set for a hearing on Thursday, May 26, 2022, with extremely limited time for the presentation of argument and no time for the presentation of contrary evidence had there even been sufficient time to prepare for the hearing. The State Board of Canvassers who took more than six weeks to frame the issue left limited time and notice of about two working days to prepare for a hearing. This is not even an adequate amount of time to hire counsel and review the facts.

The board of state canvassers and the staff and Director of the Bureau of Elections know that the process of printing the PRIMARY BALLOTS occurs immediately after the certification of candidates. Now that 60 days has passed the board is giving candidates very little time in which to respond and no time to conduct an investigation to refute the claims. The delay and lack of notice to prepare has prejudiced Donna Brandenburg. An injunction on the printing of ballots must be entered. This primary election process needs to be halted until after resolution of these claims. Therefore, an expedited emergency hearing is required.

ARGUMENT

PLAINTIFF IS ENTITLED TO MANDAMUS BECAUSE THE BOARD OF CANVASSERS FAILED TO COUNT ALL SIGNATURES SUBMITTED IN SUPPORT OF HER NOMINATION TO THE PRIMARY BALLOT.

Donna Brandenburg raised the issue to the board of state canvassers that the Bureau of Election staff report failed to address the estimated additional 10,000 signatures and inquired as to whether the second submission was even examined. The board of canvassers never addressed or resolved this discrepancy--which is their first duty to accurately count the signatures.

The failure to properly count the signatures is a clear breach of a statutory duty found in MCL 168.552(8).

Upon the receipt of the nominating petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the *requisite number* of qualified and registered electors.

The failure to examine the signatures means that they are presumed valid. There is no presumption of invalidity. The burden cannot be flipped to the candidate.

As to the issue of *qualified elector*, the report contains only one signature on page 233 and line 4 was unqualified as reported dead. Donna Brandenburg has no knowledge as to whether this is true or false as she lacks access to the QVF and had a statutory right to rely upon the attestation of the signer and affidavit of the circulator.

As to the issue of *registered elector*, the report contains only one signature on page 302, line 4 which reportedly moved from the address the signer reported. Donna Brandenburg has no knowledge as to whether this is true or false as she lacks access to the QVF and had a statutory right to rely upon the attestation of the signer and affidavit of the circulator.

To resolve this issue the Supreme Court should consider that the record of the canvass is incomplete. Therefore, the presumption of validity controls. The submission of 27,500 estimated signatures in which only 17,778 are identified and the Bureau of Elections cannot, will not, and/or did not answer at the hearing as to whether they considered the second submission of April 19 and the 886 additional sheets.

Even assuming there were in fact only 17,778 signatures, there is only a record of one sheet of ten (10) additional signatures being challenged as “doubtful” in the report and reliance upon a claimed ‘targeted review’ process that disqualified in entirety the 11,144 other signatures. Of which these there encompassed a mere 2-3 actual signatures were not “properly qualified or registered” from Brandenburg Petitions.

The invalidity of 1 or more signatures on a petition does not affect the validity of the remainder of the signatures on the petition. MCL 168.544c(2).

Michigan election law allows an individual who filed a nominating petition and is aggrieved by a decision of the Board of Canvassers to seek mandamus relief. MCL 168.552(12); A plaintiff has the burden of establishing entitlement to the extraordinary remedy of a writ of mandamus. The plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgment, and (4) the plaintiff has no other adequate legal or equitable remedy. Deleeuw v State Bd of Canvassers, 263 Mich App 497, 502; 688 NW2d 847 (2004).

Applying the requirements: First, the plaintiff as evidenced by exhibit 1 and 2 submitted the signatures in support of her nomination and is established a clear legal right to have the signatures counted. Second, the defendant had a clear duty by statute to count all the signatures submitted in satisfaction of the third element under MCL 168.552(8). Third, the acts are

ministerial in nature and is merely counting and reporting. Fourth, there is no other adequate legal remedy as there must be mandamus to accomplish an accurate count.

PLAINTIFF IS ENTITLED TO A WRIT OF MANDAMUS BECAUSE THE BOARD OF CANVASSERS DID NOT HAVE AUTHORITY TO CHALLENGE THE GENUINNESS OF SIGNATURES WITHOUT A SWORN AND WRITTEN COMPLAINT

Without a complaint there is no authority or requirement for the board of state canvassers to act to remove any signatures by investigation. If there is no authority to remove the signatures because a discretionary review was abandoned for failure to follow the process mandated by the statute, then there are sufficient signatures submitted by Donna Brandenburg regardless of whether the additional 10,000 signatures are counted. With sufficient signatures presumed to be valid, the Plaintiff Donna Brandenburg is entitled to mandamus or injunction.

As to the required showing for mandamus: First, the submission of more than 15,000 valid signatures entitles Donna Brandenburg to be certified and placed on the August 2, 2022, primary ballot. This is a clear legal right. Second, the defendant has a clear legal duty to certify and place Donna Brandenburg if there are 15,000 valid signatures. Third, the act of certifying and placing the candidate on the ballot is a purely ministerial duty. Fourth, the plaintiff has no other remedy except mandamus or injunction to be certified and ballot.

The board of state canvassers recognized 17,778 of the estimated 27,500 signatures submitted which is more than the 15,000 minimum requirement. If the signatures are presumed to be valid, then Donna Brandenburg is entitled to mandamus.

There is a presumption of validity of the signatures. The presumption remains until that presumption is overcome.

In *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 502; 688 NW2d 847 (2004), the Court of Appeals granted mandamus. The Court stated,

The Board of State Canvassers' sole duty with regard to qualifying petitions is to determine whether the signatures on the petition are valid, including that of the person who circulates the petition, whether they are the signatures of registered voters, and whether they are sufficient valid signatures to certify the petition. MCL 168.590f; MCL 168.552(8); *Gillis v Bd of State Canvassers*, 453 Mich 881, 554 NW2d 9 (1996). Because the challenge to the petition failed to establish that there were *not at least 30,000 valid signatures* filed in support, the board breached its clear legal duty to certify the petition. [emphasis added]

The presumption in the *Deleeuw* was applied when the board of state canvassers failed to establish that there were NOT sufficient signatures. The candidate Ralph Nader was from a minor party and had a 30,000 requirement while Donna Brandenburg as a Republican is merely required to have 15,000. However, the presumption is clear that the burden is on the board.

The *Deleeuw* Court also found:

The Board of State Canvassers comes within the definition of an 'agency' in the Administrative Procedures Act. M.C.L. § 24.203(2). 'An agency has no inherent power. Any authority it may have is vested by the Legislature, in statutes, or by the [C]onstitution.' *Belanger & Sons, Inc v Dep't of State*, 176 Mich App 59, 62-63, 438 NW2d 885 (1989); *Pharris v Secretary of State*, 117 Mich App 202, 204, 323 NW2d 652 (1982). The Board of State Canvassers' authority and duties with regard to qualifying petitions are set forth at MCL 168.552(8), which provides that the *board's sole duty with regard to qualifying petitions is to determine whether the signatures on the petitions are valid*, including those of the people who circulate the petitions, whether they are the signatures of registered voters, and whether there are sufficient valid signatures to certify the petitions. See *Gillis v Bd of State Canvassers*, 453 Mich 881, 554 NW2d 9 (1996). *There is nothing in the statute that would permit the board to look behind the signatures to determine the motives of the individual signatories or the motives or desires of the candidate.* The Secretary of State found that there were sufficient valid signatures to warrant certification of the petition to place Nader on the November ballot as an independent candidate.

Under MCL 168.552(8), challenges to the sufficiency of the petition are limited to 'questioning the registration or the genuineness of the signature of the circulator or of a person signing a ... petition filed with the secretary of state....' **The board had no authority to consider any issues other than those identified in MCL 168.552(8).** The challenge to the petition failed to establish that there were not at least thirty thousand valid signatures filed in support of Nader's candidacy, and, in fact, the board never disputed the genuineness of the signatures or the registration status of the people who signed the petitions. Rather, the challenge alleged various violations of election law, a subject that is not within the scope of the board's review. See M.C.L. § 168.31 (requiring the Secretary of State to report election fraud to the Attorney General or prosecutor) and M.C.L. § 168.943 (conferring on circuit court's jurisdiction over offenses committed

under the act). Consequently, because the challenge to the petition failed to establish that there were not at least thirty thousand valid signatures filed in support, the board breached its clear legal duty to certify the petition. **See MCL 168.552(8), which allows the board to investigate only if the board ‘receives a sworn complaint, in writing, questioning the *registration of or the genuineness of the signature of the circulator or of a person signing a [qualifying] petition....’*** (Emphasis added.)

The *Deleeuw* Court stated in footnote 4. “The board's inaction, through its deadlock, in our view constitutes an action, which is the equivalent of a determination.”

Applying this clear precedent to the case at bar there is no ability to investigate without a sworn complaint in writing under MCL 168.552(8). Any action taken is ultra vires and beyond the ministerial duties of the board. The duties of the board of canvassers have been limited to ministerial for more than 130 years as established in *McQuade v Ferguson*, 91 Mich 438 (1892).

The candidate is entitled to mandamus and declaratory relief that the board of canvassers exceeded their statutory authority and violated the substantive and procedural due process rights of Donna Brandenburg by a clear unauthorized act of malfeasance.

PLAINTIFF WAS DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS IN VIOLATION OF FEDERAL AND MICHIGAN LAW.

The fact that not all of the submitted signatures have been located or considered is an unconscionable and is a violation of substantive due process. There are two receipts attached as Exhibit 1 and 2.

The Bureau of Election claimed that the circulators provided candidates with fraudulent signature sheets.

The determination of fraud is beyond the statutory authority of MCL 168.552 which states that the board is able to identify signatures as *doubtful* signatures. There is a statutory process to determine *genuineness* which permits an investigation and hearing on genuineness. MCL 168.552 (8-13).

There is no statutory authority to declare fraud as established in Deleeuw, supra.

The Bureau of Election as an agent of the Board of State Canvassers providing staff recommendations and made an unlawful conclusion as to fraud. Their inquiry is one of genuineness and is limited by MCL 168.552. A “plain” reading of the statute states that the board of state canvassers only has the authority to verify. Any signature that the state board of canvassers is unable to verify is to remain doubtful and to be referred to the local jurisdiction to investigate or recheck. MCL 168.552 (8-13). However, the investigation is ONLY triggered by a sworn written complaint filed pursuant to MCL 168.552(8). This was confirmed in *Deleeuw, supra*.

As was raised by many of the candidates for governor, the signatures are to be considered by themselves and any invalid signature does not affect the other submitted signatures. MCL 168.544c(11).

Even assuming there was authority to investigate (there is not as to Donna Brandenburg as there was no sworn written complaint) the process used was also in violation of the procedural requirements of the statute in that the board did not consider the signatures individually and struck them en mass. MCL 168.544c(11). As was raised by many of the candidates for governor, the signatures are to be considered by themselves and any invalid signature does not affect the other submitted signatures. MCL 168.544c(11).

The Bureau of Elections created a new process. This process was made on the fly. At the hearing on May 26, 2022, a member of the public commented before the hearing from Marquette Michigan that the procedural rules were outdated.

The Bureau of Elections and the Board of Canvassers are Executive Branch Administrative agencies. The procedures are governed by the Administrative Procedures Act 306

of 1969 found at MCL 24.201 et seq. There is a process for promulgating rules which includes notice and public comment. Administrative decisions are not to be created based on new procedures created in response to the controversy. In fact, there is even a process for promulgating emergency rules, but these cannot be applied *ex post facto*.

In the present case, the *State Report on Fraudulent Nominating Petitions Section III and IV* must be deemed unconstitutional and an overreach by the Bureau of Elections. In section III, the Bureau of Elections outlined their new procedure. In Section IV the Bureau of Elections staff created a new remedy. This is a procedural due process violation on its face in that they did not follow the process of creating in section III administrative rules that are aligned with the statute and in section IV a new remedy which is both not permitted by the law and the providence of the legislature in a double whammy as a violation also of the Separation of Powers Doctrine.

The Procedural Due Process violations as to the new and novel process in Section III are:

- The new process used *limited selection and representation* when the statute expressly requires each signature to be evaluated. This was presented without identifying which of the candidates' signatures were examined and left to wonder with a report of 7000 signatures of 68,000 suspected signatures were checked by the QVF
- The process failed to create a record that a candidate or member of the public could check the work and a hearing on the 'evidence' could review the actual evidence before the conclusion was presented as an established fact.
- The process did not go thru the Administrative Procedures Act. There was no public comment
- The process varies from the statute which requires individual signature verification
- The process transferred the burden of proof from the challenger (in this case the Bureau of Elections) to the Candidate.
- The deadlocked vote was misinterpreted as to the effect by presumptively supporting the Bureau Recommendation instead of determining if there was sufficient cause to disqualify the signatures under the law.

- The process failed to reconcile the estimated submission of 27,500 signatures to the reported 17,788
- The process failed to comply with Michigan law
- There is no statutory grant of authority *sua sponte* for the Bureau to initiate a review of the genuineness of signatures.

In addition, the statutory and administrative regulatory scheme both in concept and as applied is unconstitutional and resulted in a denial of procedural and substantive due process.

- The candidate was not provided adequate notice of the challenge. When a challenge is filed it is due by April 26, 2022, which is seven days after the filing deadline. No written sworn challenge complaint was ever filed hence no notice and opportunity for four weeks to respond while the Bureau of Elections *sua sponte* prepared a report issued and received late in the day on May 23, 2022
- The Bureau of Elections claimed it suspected or had reasonable suspicion of fraud but issued no subpoenas and presented no sworn testimony of facts. Only conclusions and arguments were heard on the Donna Brandenburg nominating petitions that were generalized from other candidate submissions.
- The candidate was not given adequate opportunity
 - to investigate
 - to check the investigation of the Bureau of Elections
 - to review and comment on the procedures of the Bureau of Elections
 - to present evidence at the hearing.
- The process in MCL 168.544 which provides for the ministerial function of verifying signatures for genuineness is controlling. The process in MCL 168.544

The Sanction for “Obviously Fraudulent Signatures”: What does it really mean?

There is a provision in MCL 168.544c (11) to remove *obviously fraudulent signatures* without comparing those signatures *against local registration records* which is described as a “sanction”.

MCL 168.544 (11) **If after a canvass and a hearing on a petition** under section 476 or **552** the board of state canvassers **determines** that an individual has knowingly and intentionally failed to comply with **subsection (8) or (10)**, the board of state canvassers may impose 1 or more of the following **sanctions**:

- (a) Disqualify **obviously fraudulent signatures** on a petition form on which the violation of subsection (8) or (10) occurred, **without checking the signatures** against **local registration records**.

[The relaxation sanction of the direct comparison can also be reached under MCL 168.54c(13) upon the violation of MCL 168.544c(12) which requires the same elements of finding under sections (8) and (10) plus additional evidence to support the knowledge requirement of section (12) and is therefore not discussed as it is even further out of reach to the board of canvassers]

The *relaxation sanction* does not relieve the duty to compare to the QVF—just *local registration records*. Please review the requirements of MCL 168.552(13).

(13) The qualified voter file may be used to determine the validity of petition signatures by verifying the registration of signers. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid. If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid. The qualified voter file shall be used to determine the genuineness of a signature on a petition. **Signature comparisons shall be made with the digitized signatures in the qualified voter file.** The county clerk or the board of state canvassers shall conduct the signature comparison using digitized signatures contained in the qualified voter file for their respective investigations. **If the qualified voter file does not contain a digitized signature of an elector, the city or the township clerk shall compare the petition signature to the signature contained on the master card.** [Emphasis added]

There is a mandatory requirement to compare to the QVF but there is only a contingent requirement to compare to local records. The sanction does NOT relieve the duty to compare to the QVF.

BEFORE applying the sanction and being relieved of the “direct comparison” requirement there are conditions precedent. These conditions precedent are listed in the subsection (11) which references that a finding must have occurred after a hearing pursuant to MCL 168.552 and that there is that determination of a violation of MCL 168.544c(8) or (10).

Examining the condition precedent to the relief of direct comparison and determining when a hearing pursuant to MCL 168.552 is authorized and we are back to a requirement that the hearing requires a sworn written complaint pursuant to MCL 168.552(8). There was no complaint and therefore no statutory authority for a hearing regarding the Brandenburg nominating petitions signatures.

Examining the condition precedent further, AT THE HEARING there must be a determination. There was a deadlock and so the board of state canvassers did not make any “determination” and as argued previously abdicated their authority to the director of the Bureau of Elections. There does not have to be a majority vote to overturn his personal conclusion which was the effect of the deadlock and the Board of state canvassers’ interpretation of the effect of the deadlock.

Examining the condition precedent further there must be a determination that a violation of penal statutes listed as MCL 168.544c(8) or (10). The hearing IS NOT about finding obviously fraudulent signatures. The elements of these crimes require a person to sign another person’s name or certify fraud as a circulator. These penal statutes (8) and (10) require sufficient evidence to overcome a presumption of innocence and proof beyond a reasonable doubt and a unanimous decision of a jury in a criminal trial. The hearing does not set forth a standard of evidence as reasonable suspicion, probable cause, the preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt and is therefore void for vagueness and leaves to much discretion to the board. I am certain that it any quantum of evidence is not met with a deadlocked board.

Finally, when these conditions precedent have been met, the initial determination of fraud after a hearing after a written sworn complaint then permits an EXTENSION of the removal of

signatures to signatures that are obviously fraudulent without the need for direct comparison. The hearing on the investigation also requires a direct comparison of signatures under MCL 168.552(13) for the *initial* determination and only relieves the requirement as an extension to other signatures that are obviously fraudulent.

The term “obviously fraudulent” is subjective. There is no constitutional sufficient standard that can be applied equally, and it leaves too much to the discretion of the person applying the standard. In a ministerial activity undertaken by the administrative board of state canvassers, the lack of clarity means this statute is unconstitutionally void for vagueness. The application of the standard is like “beauty in the eye of the beholder and will result in a denial of equal protection. The term invites controversy and can be applied arbitrarily and capriciously.

The standard of “Obviously Fraudulent” is promoted to justify a departure from the comparison of each signature in the consideration of the signatures submitted by Donna Brandenburg. They did not just remove local comparison but the mandatory QVF comparison.

In reviewing the disposition of claims asserted in the Court of Appeals related to other candidates, there was a deference given to discretion exercised by the board of state canvassers as to being relieved of the requirement to examine every signature. Donna Brandenburg states that in discretion exceeds the ministerial authority granted, the discretion was delegated in effect to the staff to exercise in violation of statutory conditions and was applied broader than authorized by the statute as to her signatures. The declaration of signatures which are obviously fraudulent to be discounted should be allowed—but there needs to be a standard that is not arbitrarily applied. In examination of the few examples cited to Donna Brandenburg there was no signature that was declared to be obviously fraudulent under any standard. Instead, all signatures by certain individuals were disqualified. This unconstitutional process violates substantive and

procedural due process when the conditions precedent were not satisfied. Further, it is a denial of equal protection in that it is arbitrary and capricious, it is overbroad as applied, and the term ‘obviously fraudulent’ is void for vagueness. There appears to be an improper delegation of authority and a separation of powers violation when the Bureau of Elections is granted deference to determine any issue with a deadlocked board—especially this action.

Fundamental Fairness

Donna Brandenburg stated that she had no knowledge of any fraudulently gathered signatures. The *State Report on Fraudulent Nominating Petitions* (Attached as Exhibit 4) on page 5 states that “At this point, the Bureau does not have reason to believe that any specific candidate or campaigns were aware of the activities of the fraudulent petition circulators.”

It was raised by counsel for Donna Brandenburg that the Bureau staff began canvassing the governor nominating petitions in late March per their own report on page 2 paragraph 2 of the *State Report on Fraudulent Nominating Petitions* (Attached as Exhibit 4) in *Section 2 Timeline of Detection and Response* which states “Bureau staff began to review nominating petitions at the end of March after several gubernatorial candidates had submitted nominating petitions. During this review, Staff noticed a large number of petition sheets, submitted by certain circulators, appeared fraudulent and consisted entirely of invalid signatures.”

The objection to the process was that the Bureau failed with inexcusable neglect to inform candidates prior to April 19, 2022, deadline so they would have a fair opportunity to remedy with additional signatures. In fact, this issue was dormant for almost 60 days as the Bureau continued to work until the staff report was released on May 23, 2022. A mere two days were given to respond. The initial notice to Donna Brandenburg was in the form of press

questions on May 23, 2022, and in checking her email she received notice of the 17-page report *State Report on Fraudulent Nominating Petitions*.

There was limited time to secure counsel, review the reports and present at the May 26, 2022, hearing. This opportunity was after any meaningful chance to investigate and even after the opportunity to subpoena witnesses had passed which is generally three (3) days. Further, her time to present and be heard on the issues at the hearing was severely limited by the board who claimed they had insufficient time to hear comments from all affected candidates.

The summary nature of the hearing was described properly as a goat rodeo.

The Importance of Impartiality for Due Process

The Director of the Bureau of Elections is appointed by a Democrat Secretary of State. In this case, there are many claims of partisan activity but review the facts of this case. All of the nominating petitions that are challenged are from the Republican party. There was no allegation or investigation of any Democratic candidate being affected by the challenged circulators.

The Board of Canvassers which is made up of two Republicans and Two Democrats (One Republican was even appointed by the Democratic Governor) was deadlocked on party grounds.

No *impartial judiciary* considered actual evidence, enforced any *rules of evidence*, or determined that evidence met a *standard of proof* to determine if the circulators committed fraud or the signatures are invalid.

Without these safeguards, the process is arbitrary and capricious.

DONNA BRANDENBURG IS ENTITLED TO DECLARATORY RELIEF AS TO WHETHER THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE BOARD TO DETERMINE SIGNATURES WERE FRADULENT.

The point is already made that this inquiry is beyond the authority granted to the board of state canvassers. However, was there premise supported by competent and material evidence? Or is it mere suspicion which has materially prejudiced a candidate?

The conclusion by the Bureau of Election that there was fraud is not conceded by Donna Brandenburg and requires both investigation and the presentation of evidence. There is a presumption of validity as the signatures on their face are attested to and the circulator signed an affidavit that the signatures were gathered in the presence of the circulator.

This determination of fraud will likely happen sometime after the abbreviated timeline and the primary election in the course of criminal proceedings. Fraud requires proof in the form of evidence. The Bureau may have raised reasonable suspicion of fraud but did not even investigate or present evidence at a hearing to determine whether there was fraud. The statute requires a finding of “obvious fraudulent signatures” after a determination that a crime was committed pursuant to MCL 168.544(c)

Fraud is a serious allegation. The taint of this conclusion is very damaging both to a reputation of an individual and especially to a campaign. This determination is not even within the authority of the state board of canvassers. The role of signature verification which will be examined in detail is limited to ministerial duties to determine facial validity, qualification, and registration.

There is a limited ability to resolve challenges when raised by a challenger as to the genuineness of a signature on a signature-by-signature basis. The board can only verify a signature or refer the signature to the jurisdictional election clerk per the statute. Nowhere does the failure to determine a signature as genuine or verified create the ability to make a declaration

of fraud. The maximum finding permissible was that the board considered the signatures doubtful and referred them individually—which was not done.

Instead, a declaration of fraud and declaration that candidacy was invalid was made to the public. This declaration was presented as a conclusion of fact. While it might be true it has not been established by evidence. Allegations are often exaggerated, misconstrued or even incorrect and that is what the due process and presentation of facts to an impartial factfinder require.

Candidate Donna Brandenburg is entitled to Declaratory Relief determining that there has been no competent evidence of fraudulent signatures, that the statutory process was not followed to check the validity of signatures and that the investigation of genuineness was not even permitted under the law.

THE DEADLOCK OF THE BOARD, ALTHOUGH IT IS INACTION, IS A DETERMINATION THAT THE SIGNATURES ARE PRESUMED VALID.

The *Deleeuw* Court, *supra* stated in footnote 4. “The board's inaction, through its deadlock, in our view constitutes an action, which is the equivalent of a determination.”

The board deadlocked 2-2. Donna Brandenburg states the effect of this inaction is a final determination. What was determined? It has been interpreted by the board of state canvassers in conjunction with the advice of the Director of the Bureau of Elections that the effect is that the staff recommendations are accepted. This has the effect of delegating the duty to make all decision to the Bureau of Elections when the board deadlocks. This is absurd.

The board was unable to declare the signatures submitted by Donna Brandenburg were insufficient and therefore a deadlock means the presumption of validity prevails. There is no other interpretation when 17,778 signatures were counted and none of them were challenged facially as invalid or challenged by a sworn written complaint.

CONCLUSION

The Defendants failed the citizens of Michigan, the electors who signed the nominating petitions and the Republican Candidate Donna Brandenburg in the process described by Donna as a goat rodeo. An impromptu process was changed resulting in unnecessary damage to a campaign. Actions were taken that exceeded statutory authority, conclusions were made and publicized that were harmful to candidates that are both unsupported by the evidence and a product of assumption and conclusions.

Donna Brandenburg is entitled by law to have mandamus granted and to be certified and added to the August 2, 2022, ballot. The issue is time sensitive and so expediated relief has been requested before June 7, 2022. The relief requested is that the submission of signatures which was unchallenged be deemed sufficient by the Supreme Court by operation of the presumption of validity.

Donna also requests that in the alternative, the Supreme Court would order the Board of State Canvassers to consider all of the signatures she submitted.

Further, Donna Brandenburg requests the Supreme Court enter declaratory relief that the Board of Elections as staff for the board of state canvassers is NOT permitted to investigate signatures that are unchallenged pursuant to MCL 168.552. The Director of Elections could have filed its own timely challenge but chose not to do so.

Further, Donna Brandenburg requests the Supreme Court enter declaratory relief determining that the *ultra vires* actions were in violation of Chapter XXIV of the Michigan Election code and deprived her of her constitutional rights.

Finally, Donna Brandenburg asks the court to issue injunctive relief preventing the printing of primary ballots until the court schedules and resolves the issues present.

Please consider the three appendixes as in-depth presentations on certain statutory sections.

In Appendix 1 there is an in-depth statutory review of the processes in MCL 168.544c and MCL 168.552 with a focus on the interplay of the rules for reviewing signatures

In Appendix 2, there is a focused Review of the Evidence of Fraud that was contained in both the Staff Reports that were filed on May 23, 2022 and interpreted as to Donna Brandenburg.

In Appendix 3. There is a review of the requirements of MCL 168.544c as to facial sufficiency and the qualifications and registration requirements—even though these requirements of the canvass raised only concerns as to only 2-3 signatures.

Respectfully submitted

Dated :June 1, 2022

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APPENDIX 1: A DETAILED REVIEW AND COMMENTARY ON MCL 168.552 THE STATUTORY PROCESS FOR REVIEWING SIGNATURES

The first seven sections of MCL 168.552 describe the process that the local jurisdiction uses to determine the validity of a nominating petition. The remainder of the statute deals with the role of the state board of canvassers.

State Board of Canvassers: Determining Validity of Signatures

MCL 168.552(8) is the main provision that addresses the validity of signatures. Excerpts with all material and relevant portions of the statute are discussed herein. There is NO mention of fraud anywhere in this verification process rather the words used are verified, valid and invalid signatures.

MCL 168.552 (8) (Clause 1)

Subject to subsection (13), for the purpose of determining the validity of the signatures, the board of state canvassers may cause a doubtful signature to be checked against the qualified voter file or the registration records by the clerk of a political subdivision in which the petitions were circulated.

APPLICATION: The issues to consider are: (1) use of the permissive term “may”, (2) the provision for the board of state canvassers to “cause” a doubtful signature to be checked, (3) the use of the phrase ‘doubtful signature’ (4) the phrase “by the clerk”

First, addressing “may” mean that it is discretionary and not required. This implies that when discretion is NOT invoked that doubtful signatures may go unchecked against the QVF or registration records of the clerk of the political subdivision where the petitions were circulated.

Second, addressing “cause” which means that the state board of canvassers initiates the act of checking. It also means that they do not do the act of checking.

Third, the signature is still presumed valid before being checked and is only labeled as doubtful. There is no ability to declare a signature fraudulent under MCL 168.552 It is now under suspicion that will be resolved.

Fourth, ‘by the clerk’ of a political subdivision in which the petitions were circulated. The discretionary check is not done by the state board of canvassers rather it is caused to be done and executed by the clerk.

This discretion requires that the signature is determined to be doubtful. This is not an “investigation” but rather a check against the registration records in the QVF or clerk’s office. The clerk conducts the review. In the present case, no clerks were involved. The state board of canvassers did not follow the statute and instead, the bureau of elections (who claimed to be overwhelmed) usurped the local clerks’ authority and circumvented the intent of the legislature.

While there was reported that 7000 signatures were checked by the Bureau of Elections out of the 68,000 signatures declared improperly by them to be fraudulent, there was no identification of which of these estimated signatures related to which candidate as the signatures were part of a ‘targeted’ and selected by the Bureau of Elections. Overall, not even the tally sheets were presented for review to the candidates.

MCL 168.552 (8) (clause 2)

If the board of state canvassers receives a sworn complaint, in writing, questioning the registration of or the genuineness of the signature of the circulator or of a person signing a nominating petition filed with the secretary of state, the board of state canvassers shall commence an investigation.

Application: The word “if” is controlling. The board of state canvassers must be triggered by a sworn complaint in writing that questions the registration of or genuineness of the signature

or the circulator or person signing a nominating petition with the Secretary of State before the board commences a mandatory investigation.

Again, the complaint is in writing. It is sworn to which means that the challenge is made with knowledge under oath. It must question either the registration or the genuineness of the signature. The signature to be challenged is either the signature of the circulator or the signer.

There is no authority in MCL 168.542 (8) (clause 2) to conduct an investigation without a sworn complaint in writing. When there is a complaint filed it relates either to the registration or genuineness of a signature.

The Donna Brandenburg nominating petitions were not subject to a sworn complaint. There was no sworn complaint about registrations. There was no sworn complaint about the genuineness of signatures. There was no investigation. No investigation was required.

MCL 168.552 (8) (clause 3)

Subject to subsection (13), the board of state canvassers shall verify the registration, or the genuineness of a signature as required by subsection (13).

This is a mandatory requirement that the state board of canvassers SHALL verify registration or the genuineness of a signature (it is understood of the canvasser or elector) as required by section 13. This is after a sworn complaint is filed.

There is an inverse inference that the verification of registration or genuineness is NOT required outside of the requirement of Section 13.

The requirement is on the state board of canvassers—there is no legislative permission to cause it to be done by a jurisdiction clerk or by the director of the bureau of elections. The legislature uses the phrase “cause to be done” when there is an intention to delegate a duty.

This duty is on the state board of canvassers, and it is mandatory. What duty? To verify the registration. To verify the genuineness of a signature. When? When implicated by section 13.
MCL 168.552 (13)

(13) The qualified voter file may be used to determine the validity of petition signatures by verifying the registration of signers.

If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable presumption that the signature is invalid.

If the qualified voter file indicates that, on the date the elector signed the petition, the elector was not registered to vote in the city or township designated on the petition, there is a rebuttable presumption that the signature is invalid.

The qualified voter file shall be used to determine the genuineness of a signature on a petition.

Signature comparisons shall be made with the digitized signatures in the qualified voter file.

The county clerk or the board of state canvassers shall conduct the signature comparison using digitized signatures contained in the qualified voter file for their respective investigations.

If the qualified voter file does not contain a digitized signature of an elector, the city or the township clerk shall compare the petition signature to the signature contained on the master card.

Application: Section 13 provides the process review of registration and determination of the genuineness of a signature. Please be aware this is after the duties to determine it is facially

valid as imposed by MCL 169.544c. Section 13 defines the process of determining if a person is registered and registered in the jurisdiction indicated. When the registration is not valid on the date and jurisdiction in the QVF as signed, the presumption is that the signature becomes invalid.

The next step is to examine the genuineness of the signature. Section 13 requires comparison to the QVF. The *Staff Report in Appendix 1* did not demonstrate a single comparison of a signature from a nominating petition to the signature on file in the QVF. Yet this is what was required. The examples instead all related to the comparison of signatures on the nominating petitions against other signatures on the nominating petition.

While the comparisons in the examples are interesting and even raise concerns, this is not what the statute process for the comparison for genuineness is to follow. While there is no prohibition on these supplemental comparisons, the statutory duty was not completed by either the state board of canvassers or in the manner in which is required when a signature is being reviewed for genuineness.

The process is only required in the face of a sworn complaint

MCL 168.552 (8) (clause 4)

If the board is unable to verify the genuineness of a signature on a petition, the board shall cause the petition to be forwarded to the proper city clerk or township clerk to compare the signatures on the petition with the signatures on the registration record, or in some other manner determine whether the signatures on the petition are valid and genuine.

This process is what happens when the state board of canvassers is unable to verify the genuineness of a signature (under section 13). It does not apply to registrations. It is limited to signatures. The clear understanding is that if the board of canvassers is able to verify then the matter is concluded.

This is when the board is unable to verify under section 13.

There is the word “shall.” This means it is mandatory. The next step is not discretionary. The mandatory action is that the result regardless of who performs the forwarding the petition is FORWARDED to the proper city or township clerk to compare the signatures on the petition with the registration record or in some other manner determine whether the signatures on the petition are valid and genuine.

This is a big issue. The state board of canvassers when unsatisfied MUST send then petition to the jurisdiction clerk for final determination. The state board of canvassers does not have the ability to determine whether the signature is NOT VALID. The state board of canvassers may only verify genuineness or refer the determination to the jurisdictional clerk. The statute does not give authority to the Bureau of Elections to make a recommendation. It does not give the state board of canvassers the final authority. It requires the petitions SHALL be forwarded and the final determination made by the clerk in the jurisdiction. The clerk uses the registration record or another manner (maybe asking the elector).

There is no provision for any final determination of invalidity EXCEPT by the local clerk. Again, the Bureau of Elections and the Board of canvassers cannot determine the signature is fraudulent under MCL 168.552

MCL 168.552 (8) (clause 5)

The board of state canvassers is not required to act on a complaint respecting the validity and genuineness of signatures on a petition unless the complaint sets forth the specific signatures claimed to be invalid and the specific petition for which the complaint questions the validity and genuineness of the signature or the registration of the circulator,

and unless the complaint is received by the board of state canvassers within 7 days after the deadline for filing the nominating petitions.

This section limits the duty of the state board of canvassers to act. Please note the state board of canvassers are not permitted to act absent a sworn complaint in writing. They can choose to not act when the complaint is general and unspecific or if filed outside the seven-day window. The complaint must be filed in 7 days and specify the signatures and petition subject to the complaint to trigger mandatory review.

The legislature was prepared to accept signatures that are subject to a sworn complaint in writing if the challenge was not timely filed or specific to signatures. This means that the legislature is in fact presuming validity over absolute assurance. This is important if there is not sufficient time or there is a general complaint then remember there is no legislative duty to act by the state board of canvassers which would compel mandamus. However, if there is an exercised decision to act then there is a duty to act in accordance with the substantive and procedural rules.

In the present case, there is no written sworn complaint against Donna Brandenburg's petitions and no signature identified. The seven days have long since passed by April 26, 2022. The review of the genuineness of signatures is therefore without merit.

MCL 168.552 (8) (clause 6)

After receiving a request from the board of state canvassers under this subsection, the clerk of a political subdivision shall cooperate fully in determining the validity of doubtful signatures by rechecking the signatures against registration records in an expeditious and proper manner.

This imposes a duty on the clerk to fully cooperate in the determination of the validity of doubtful signatures by rechecking in an expeditious and proper manner.

This is the procedural safeguard for the candidate. The board of canvassers when they are convinced the genuineness of a signature is doubtful must still make sure that the clerk rechecks and makes the final determination. This last protection was omitted from the process in the signature verification process. In fact, the original checking of every doubtful signature was not done much less the rechecking that was required.

It is simple to understand why the legislature would require the process be returned to the local clerk when one recalls that Michigan favors decentralization of control to prevent this very partisan activity from happening.

SUMMARY OF MCL 168.542(8)

Let us review. Focus only on the genuineness of the signature of the signer. There is no issue in this contest about the signature of the circulator being genuine. There is no further discussion about the registration. Focus on the genuineness of the signature of the elector.

The law under MCL 168.542(8) provides that:

- Discretionary Process: The state board of canvassers has the ability to cause a doubtful signature to be checked against the QVF or registration record. The state board of canvassers can initiate this check only for a doubtful signature. There is specificity as to who checks the QVF or registration records and this is the clerk of the city or township. This process is NOT initiated by the Bureau of Elections. There is no sworn complaint required.
- Mandatory Process: This mandatory process only BEGINS by the sworn complaint in writing filed with the Secretary of State. This starts an investigation. The investigation does not seem limited. It can verify but it cannot conclusively determine the signature is not genuine. The investigation is then referred to the clerk who just like the discretionary process requires the same clerk to check the signature genuineness but allows the clerk to use other “manners” to investigate that are not specified. This could be by contacting the voter and it is assumed a reasonable process.
- The investigation of the state board of canvassers is controlled by section 13. But it is limited to the investigation after sworn written complaint.
- The state board of canvassers may decline a written sworn complaint that is (1) not specified as to signatures that are challenged or (2) not filed within 7 days.

- Only the clerk of the city or township can declare the signature to be unguine. The board of canvassers can raise doubt and only resolve doubt in favor of verification. This is one way. When they remain in doubt it is sent for the final recheck to the jurisdiction clerk.

***HEARINGS BEFORE THE BOARD OF CANVASSERS ON NOMINATING PETITIONS
MCL 168.552 (9)***

The board of state canvassers may hold a hearing upon a complaint filed or for a purpose considered necessary by the board of state canvassers to conduct an investigation of the petitions.

In conducting a hearing, the board of state canvassers may issue subpoenas and administer oaths.

The board of state canvassers may also adjourn periodically awaiting receipt of returns from investigations that are being made or for other necessary purposes but shall complete the canvass not less than 9 weeks before the primary election at which candidates are to be nominated.

Before making a final determination, the board of state canvassers may consider any deficiency found on the face of the petition that does not require verification against data maintained in the qualified voter file or in the voter registration files maintained by a city or township clerk.

Application. The first clause makes the ability to hold a hearing for two reasons: (1) upon a complaint being filed and (2) to conduct an investigation of the petitions. In the matter of the Donna Brandenburg nominating petitions, there was no complaint filed. There was no determination of necessity or statement of purpose to conduct an investigation of her petitions.

The hearing permits subpoenas and the administration of oaths. This contemplates a presentation of facts rather than conclusions and summaries. As to Donna Brandenburg there was

no complaint to be resolved and there was no investigation of the petitions conducted. There was merely a press conference for the Bureau of Elections to make accusations and conclusions supported by speculation. Very limited evidence as to two circulators was contained in the offerings and information related to 15 signatures.

The board is permitted to consider deficiencies related to the face of the petition. These requirements are set forth in MCL 168.544c before making a final determination.

MCL 168.552 (10)

(10) At least 2 business days before the board of state canvassers meets to make a final determination on challenges to and sufficiency of a petition, the board shall make public its staff report concerning disposition of challenges filed against the petition.

Beginning with the receipt of any document from local election officials under subsection (8), the board of state canvassers shall make that document available to candidates and challengers on a daily basis.

Application: The second clause reaffirms that a document from local election official is expected under section (8). This is required whenever there is a question of genuineness of a signature. This was not done to challenge the genuineness of the signatures submitted by Donna Brandenburg in her nominating petitions.

As there were no challenges filed against the Brandenburg nominating petitions, clause one does not apply. A Staff Report was filed but it

- Did not accurately count the submitted petitions
- Did not report any facial challenges
- Did report that between 2-12 signatures were doubtful
- There were no challenges
- There was no referral to local election officials pursuant to MCL 168.552(8)
- There was a recommendation for disqualification of signatures which is not permitted by law to signatures on the grounds they were submitted by circulators that were questioned.

MCL 168.552 (11)

(11) An official declaration of the sufficiency or insufficiency of a nominating petition shall be made by the board of state canvassers not less than 60 days before the primary election at which candidates are to be nominated.

At the time of filing a nominating petition with the secretary of state, the person filing the petition may request a notice of the approval or rejection of the petition.

The state board of canvassers deadlocked. There is a question as to whether this means there was a determination. No determination was passed. The purpose of the writ of mandamus is to require the board to make a determination as to sufficiency or insufficiency. If there is deadlock about the genuineness of signatures, then the presumption of validity would control, and the petitions of Donna Brandenburg would be declared sufficient.

If there had been evidence that the signatures were by individuals not registered electors in the jurisdiction at the time of signing, then the presumption would be that the signatures would be invalid and if sufficient in number, then the board would apply the inverse presumption and determine insufficiency. This presumption does not apply.

The Role of the Board of Canvassers is ministerial and clerical

In *McQuade v. Furgason*, 91 Mich. 438 (1892), the Michigan Supreme Court considered the role of the board of canvassers as it relates to election law and determined that their duties are ‘ministerial’ only. The issue presented was whether the board of canvassers had the authority to investigate or resolve claims of fraud. After holding that the Board of canvasser “duties are purely ministerial and clerical,” the *McQuade* court stated at 439 “Such grave charges must be investigated in the due course of the proper legal proceedings. The law furnishes ample remedy, both civil and criminal, for the correction and punishment of election frauds.” This is clear

overreach by the board of canvassers who seek to expand their role and influence into the election process.

The ministerial role of the board of canvassers is clearly defined and limited by Statute

There is a legislatively passed statute that controls all of the requirements of nominating petitions to be placed upon the primary ballot. There is no ability to create new process or remedies.

The laws which govern nominating petitions are found at MCL 168.542-548.

MCL 168.554(8) [Excerpt] Upon the receipt of the nominating petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of *qualified and registered electors*. [Emphasis added]

Duty to Count: Requisite Number of Signatures

Therefore, the board of canvassers is authorized to act in the ministerial role of counting the signatures submitted on the nominating petition to determine if the requisite number is met.

Duty to determine if signer was qualified and registered

This has been covered previously in the review of MCL 168.552. There are rules to determine if the petitions have been signed by a qualified and registered elector. These rules are clearly stated in MCL 168.552. There is no discussion of a determination of fraud anywhere in the statute. This is a finding of fact that EXCEEDS the ministerial duties of the canvass.

The Michigan Administrative Code is silent as to the issue

The Michigan Administrative Code describes in Mich Admin R 168.841-845 the procedure for the conduct of hearings. The Administrative Code is silent as to the conduct of any fraud investigation or any other actions related to determining the validity of signatures on a nominating petition.

The Doctrine of Separation of Powers-Unconstitutional Action

The separation of powers doctrine does provide for an executive board or official to make determinations of fact related to the contents of a nominating petition. Those areas are limited and restricted to the determinations enumerated in the statute by the legislature. As discussed herein. However, the legislature can not intrude on the authority of the courts in assigning duties to the executive branch--just as the executive branch cannot directly intrude on the judicial branch. It is clear under both the US and Michigan Constitutions that the resolutions of cases or controversies are properly overseen by courts that have established rules for handling evidence and procedures for ensuring due process. All administrative adjudications are reviewed by administrative law judges (not boards) and are limited generally to licensing actions within the agency. The purported decision is an unconstitutional act in violation of this doctrine.

Procedural Due Procedure limitations

Whenever an executive branch conducts an investigation *when authorized by statute* the investigation is reviewed by a court or administrative law judge who reviews the evidence. There is no process in Michigan that permits any executive board to act in such a manner. It would be a violation of procedural due process. It is also ministerial and does not require adjudication or complex fact findings. Fraud determinations are limited to the judiciary branch (or in some licensing cases an administrative law judge).

The effect of criminal behavior

There are five penal provisions in the election code related to nominating petitions. MCL 168.544c. (7), (8), (10) (12) and (15). Section (9) specifies punishment Section (16) makes the section applicable to all petitions.

(7) An individual shall not sign more nominating petitions for the same office than there are persons to be elected to the office. An individual who violates this subsection is guilty of a misdemeanor.

(8) An individual shall not do any of the following:

- (a) Sign a petition with a name other than his or her own.
- (b) Make a false statement in a certificate on a petition.
- (c) If not a circulator, sign a petition as a circulator.
- (d) Sign a name as circulator other than his or her own.

(9) Except as otherwise provided in subsection (10), an individual who violates subsection (8) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both.

(10) An individual shall not sign a petition with multiple names. An individual who violates this subsection is guilty of a felony.

(12) If an individual violates subsection (8) or (10) and the affected petition sheet is filed, each of the following who knew of the violation of subsection (8) or (10) before the filing of the affected petition sheet and who failed to report the violation to the secretary of state, the filing official, if different, the attorney general, a law enforcement officer, or the county prosecuting attorney is guilty of a misdemeanor, punishable by a fine of not more than \$500.00 or imprisonment for not more than 1 year, or both:

- (a) The circulator of the petition, if different than the individual who violated subsection (8) or (10).
- (b) If the petition is a nominating petition, the candidate whose nomination is sought.
- (c) If the petition is a petition for a ballot question or recall, the organization or other person sponsoring the petition drive.

(15) A person who aids or abets another in an act that is prohibited by this section is guilty of that act.

(16) The provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law.

A criminal statute has different rules associated with it including a presumption of innocence and a requirement of proof beyond a reasonable doubt. There is also a doctrine of statutory interpretation called the rule of leniency in that if the statute is unclear then the benefit goes to the person charged with violating the statute.

To summarize, it is a felony to sign multiple names on a petition (10) but a misdemeanor to sign a single false name (8a and 8d); make a false statement in the certificate by the circulator signature (8b and 8c).

There is a misdemeanor which targets the circulator, candidate or sponsor who files a petition knowing that it contains a violation of (8) or (10)

There is another misdemeanor for signing two petitions in the same contest (7)

These are provisions for fraud. All of the rest of the statute requires a crime has to be committed before there is application. Examine the provisions in (11), (13) and (14).

Section 11 applies only after a hearing under MCL 168.552(9) which requires a sworn complaint in writing before a hearing is conducted. The hearing is part of the investigation where evidence (not mere conclusion and speculations) is presented through sworn testimony and exercise of subpoena power.

MCL 168.544c (11) If after a canvass and a hearing on a petition under section 476 or 552 *the board of state canvassers determines that an individual has knowingly and intentionally failed to comply with subsection (8) or (10)*, the board of state canvassers may impose 1 or more of the following sanctions:

(a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (8) or (10) occurred, without checking the signatures *against local registration records*.

(b) Disqualify from the ballot a candidate who committed, aided, or abetted, or knowingly allowed the violation of subsection (8) or (10) on a petition to nominate that candidate.

The provision of a remedy for the state board of canvassers is at the end of a train which starts with a complaint that is sworn and in writing. It likely is particular to the signatures and timely filed before seven days which expired on April 26, 2022. To date, no complaint has been filed regarding signatures on the nominating petitions of Donna Brandenburg.

Then there is evidence of fraudulent signatures in violation of sections (8) or (10). It is important to recognize that section (7) governing duplicate signatures in a single contest does not apply here.

Then there is a determination by the state board of canvassers that the invalid signature was intentionally made, or the certification was deliberately false. There has to be a relationship to the candidate.

Then there must be obviously fraudulent signatures in addition to the fake name or fraudulent certification.

None of the parts of the train are present in the Donna Brandenburg filing—BUT that did not stop the Bureau of Elections from declaring fraud and from invoking a remedy that exceeds section (11).

There was in fact no comparison to the QVF of any signatures as contemplated in section 11(a), but which was limited only to the obviously fraudulent signatures. There was no finding that any signatures on the Donna Brandenburg petitions were obviously fraudulent.

The Bureau of Elections recommended that signatures that were neither obviously fraudulent nor were compared in the QVF be stricken because the Bureau of Elections had concluded that certain circulators had committed fraud.

There was no showing that circulators committed fraud under sections (8) or (10) at the hearing as to the petitions circulated in the Brandenburg nominating petitions.

The state board of canvassers did not take legitimate action on the recommendation of the Bureau of Election as to Donna Brandenburg because it was deadlocked. This is no action. Deadlocked means deadlocked leaving the presumption.

In MCL 168.544c (13) there are additional enumerated remedies for the state board of canvassers but there is another car added to the train. There still must be a hearing pursuant to MCL 168.552 (9) after a sworn complaint that is considered in the hearing as to specific signatures and timely filed. There must be a violation of sections (8) or (10) by the signer of the petition or as to the circulator. Finally, there must be a crime by the circulator, candidate, or organizer in violation of section (12). This is the second way in which a signature can be invalidated without comparison to the QVF.

(13) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has violated subsection (12), the board of state canvassers may impose 1 or more of the following sanctions:

(a) Impose on the organization or other person sponsoring the petition drive an administrative fine of not more than \$5,000.00.

(b) Charge the organization or other person sponsoring the petition drive for the costs of canvassing a petition form on which a violation of subsection (8) or (10) occurred.

(c) Disqualify an organization or other person described in subdivision (a) from collecting signatures on a petition for a period of not more than 4 years.

(d) Disqualify obviously fraudulent signatures on a petition form on which a violation of subsection (8) or (10) occurred without checking the signatures against local registration records.

(e) Disqualify from the ballot a candidate who committed, aided, or abetted, or knowingly allowed a violation of subsection (8) or (10) on a petition to nominate that candidate.

To be inclusive here is MCL 168.544c (14)

(14) If an individual refuses to comply with a subpoena of the board of state canvassers in an investigation of an alleged violation of subsection (8), (10), or (12), the board may hold the canvass of the petitions in abeyance until the individual complies.

The conclusion of this review of MCL 168.544c and the consequence of criminal activity is to demonstrate that there is even in the face of a crime no provision to strike all signatures gathered by a fraudulent criminal circulator. The issue of whether there is fraud under sections (8), (10) or (12) will only obviate the need to compare each signature when the signature meets the standard of obviously fraudulent and there is evidence that the signature is a product of a person signing another's name or falsely certifying the signatures.

The lack of a sworn complaint in writing before April 26, 2022, relieves the board from holding a hearing or investigating and in fact eliminates the possibility of doing so.

Recall there is absolutely no evidence that ANY candidate had knowledge of the circulator signatures concerns prior to filing. There is no knowledge of any fraud alleged to any candidate in violation of any of MCL 168.544c.

APPENDIX 2: EXAMINATION OF THE EVIDENCE OF “FRAUD”

The majority of the evidence was not specific to the nominating petitions circulated by Donna Brandenburg. In the *Staff Report: Appendix 1. Examples of Fraudulent Practices*.

Example I. On page 8-9 the Bureau of Election submitted two examples which the BOE stated supported their Example I entitled “Identical Sheets from multiple Drives. The example used two sheets from candidate Tricia Dare in the same race and two sheets from Amanda Shelton. The two sheets seem to have the same signatures and electors represented on one sheet of each and in the same order. This affects 20 signatures that were collected for two candidates in the same race nm the same day. The circulator was Niccolo Mastromatteo.

This is a violation of MCL 168.544c (7) which provides,

“An individual shall not sign more nominating petitions for the same office than there are persons to be elected to the office. An individual who violates this subsection is guilty of a misdemeanor.”

There is no remedy provided to strike the signatures. The BOE stated that the practice is to strike both signatures despite no legislative or procedural rule permitting such action.

The example was about a circuit judge race. It is possible that the signatures were obtained by both circulators working together and that ignorance of the prohibition against signing two signatures may have been a factor as easily as fraud.

These petitions do not belong to Donna Brandenburg. The circulator Niccolo Mastromatteo was among the 19 stricken in her *Review*. He is reported to have collected 43 signatures.

Example II. On page 9-11, the Bureau of Election submitted examples of signatures who have been canceled or have not lived at the petition address for years.

In order to make this determination, a staff member reviewing the signature would have to have access to the QVF. A person submitting a signature using a canceled voter or bad address may be either committing a crime by signing for another person in violation of MCL 168.544c (8) or may have just used an old address or have been improperly canceled. It would require an investigation of the signature following a determination that the signature was doubtful. No investigation of the signature cited on pages 9-11 in Example II was reported in the Staff Report or presented at the May 26, 2022, hearing. No evidence was heard on these signatures or subpoenas for witnesses who did not appear issued on the matter therefore no hearing was conducted that comported with MCLA 168.552(9). Only the summary report identifying the signatures as doubtful was presented.

15 total examples were cited with only one related to the Brandenburg submission which reported that the signature on page 233 line 4 had died in 2016. No evidence such as a death certificate or testimony was made. It appears this relies upon the QVF. If the signature represents a person that died, there is no evidence that the circulator of that petition (who is unidentified in either the *Staff Report* or *Review*) had knowledge that the individual signing the petition was in violation of MCL 168.544c (8).

Please remember that 10 candidates submitted more than 15,000 signatures for the governor race and this minimum is 150,000. This is a rate of .01% overall used to make a claim of widespread fraud. The Bureau of Elections ultimately claimed 68,000 were circulated by persons the BOE deemed fraudulent. Of these reportedly fraudulent signatures on gubernatorial nominating petitions, the evidence provided supports .02%. In the Brandenburg submission the 1 signature cited here is 1 in 27,500 estimated submitted; 1 in 17,778 of the signatures identified by the BOE and 1 in 11,144 signatures they attempt to strike based on circulators.

Example III. On page 9-11, the Bureau of Election submitted examples where the name was misspelled, an uncommon abbreviation such as an initial in place of a name. The 21 signature examples do not include any from the Brandenburg nominating petitions. None of the signatures are associated with a circulator in the report. Again 21 examples from more than 150,000 signatures submitted by the ten candidates are not a significant ratio or compelling evidence of widespread fraud.

Example IV. On pages 12-13, the Bureau of Election submitted examples where there were misspellings in other fields or mischaracterizations of jurisdictions. The example they used was that Bloomfield Hills was reported as Bloomfield on a Johnson submission. A total of four examples were from Perry Johnson petitions without identifying the circulator. None were from Donna Brandenburg nominating Petitions.

In the final part of the example, the BOE focused on the circulator Stephen Tinnin and a few repeated misspellings of “Brownstone” in place of “Brownstown “ which appeared seven times on pages 518, 160 and 342 of the Malone nominating petition submission.

The conclusion that Stephen Tinnin is a fraudulent circulator seems to be based on this evidence. There is no evidence that he signed the petition or knowingly certified the petition falsely but there is a significant reason to investigate. The BOE did not conduct an investigation. The BOE did not even subpoena the circulator to the hearing on May 26, 2022.

There is no date range for when these three pages were collected in the Staff Report. There is no correlation between these signatures which have a reason to seem doubtful and signatures collected on another day even when collected by the same circulator. There needs to be an investigation of this circulator and EACH signature gathered.

Stephen Tinnen was a circulator attributed to 1,156 of the signatures on the Brandenburg nominating petition per the *Review*. There is again no evidence offered in the Review or the May 26, 2022, hearing that the signatures gathered for Donna Brandenburg had a similar misspelling on multiple pages or multiple times. ***The invalidity of 1 or more signatures on a petition does not affect the validity of the remainder of the signatures on the petition. MCL 168.544c(6).***

Donna Brandenburg was not made aware of the problems with circulator Stephen Tinnin prior to her submission and no similar problem was detected in her signatures he gathered. There is no evidence of whether this was before or after or that every signature was fraudulent-if any. Donna demands a canvass of her signatures or an investigation of the circulator before declaring all her signatures are invalid in defiance of law and the presumption of validity.

Example V. On pages 13-14 the Bureau of Election submitted examples of “distinctive writing characteristics.” Only one signature was from the Brandenburg Nominating Petitions and without context the example is meaningless. None of the signatures in Example V are related to circulators. While a signature identified as being on the Brandenburg Nominating Petition sheet 875 line 5 does have a circle over the letter ‘i’ twice in the name Patricia there are no comparisons on her petitions that would put her or a circulator on notice. Presumptively, the signature is unique and does not appear as the signature in the QVF. As this is not explained in the report, it may be evidence of a person who violated MCL 168.544c (8) or (10) or the signature could have an alternative explanation. There was no investigation or hearing on the signature.

As to the other candidates, one indicator of concern used to publicize widespread fraud was the circles above the “i” in the printed name. This seems nefarious until one reads the statute.

MCL 168.544c(2) does not require that the PRINTED NAME to be written on the form by the person who signs the petition. There is nothing wrong with a circulator looking at an ID and filling out the information in the petition and offering the form for signature. This is one of many reasonable explanations as to how the printed name will look similar on a petition collected by a circulator.

MCL 168.544c(2) The petition must be in a form providing a space for the circulator and each elector who signs the petition to print his or her name. The secretary of state shall prescribe the location of the space for the printed name. ***The failure*** of the circulator or ***an elector who signs the petition to print his or her name***, to print his or her name in the location prescribed by the secretary of state, or to enter a zip code or his or her correct zip code ***does not affect the validity*** of the signature of the circulator or the elector who signs the petition.

Another candidate Craig had submitted nominating petitions in which the signatures were a consistent unidentifiable scrawl that did not remotely resemble the signature in the QVF. The circulator was not identified. No examples were found submitted from the Brandenburg petitions. Again, if these signatures were doubtful then the process of an investigation should have commenced. Notice should have been given to the campaigns prior to April 19, 2022, identifying any circulator that was suspicious.

There is nothing that refutes the basic human nature that a person who cut corners on one petition may not have cut corners on every petition. This is important and codified into the law. ***The invalidity of 1 or more signatures on a petition does not affect the validity of the remainder of the signatures on the petition. MCL 168.544c(6).***

Example 6. The Bureau of Elections submitted examples on pages 14-15 of what they identified as petitions in the ‘same hand’. The examples were from three petitions from two other

campaigns. No circulator was identified. The conduct that raised the concern was not reported as being found in a review of the Brandenburg petitions. No signature expert was called and on a fair viewing of the limited three examples raises a concern but is not conclusive. The handwriting on the form in places other than the signature varies--but the signature is what is the determining factor, and some seem dissimilar. Again, no exemplars from the QVF appear. The largest issue is again the circulator is not identified and nothing is attributed as evidence as to the Brandenburg campaign.

Example 7. The Bureau of Election submitted examples that was labeled Round Tabled sheets on pages 15 and 16. The two sheets that are used as an example are from another campaign. Both are from the Craig campaign. No circulator of this example is identified. No nominating petitions from Donna Brandenburg are included or reported to have this problem.

Example 8. The Bureau of Elections submitted examples that were labeled Examples from Other Circulators. The title implies that the first examples were from the same or a limited number of circulators...but there is an insufficient record. This section has three pages from a candidate identified as Cox which the pages were unnumbered as the signatures exceeded the threshold. The candidate and office are insufficiently identified.

There is a damning admission on Page 17 of the *Staff Report*. The statement by the Bureau of Election is that there are staff tally sheets. These were not provided. These are artifacts from the analysis. Estimates were given that 7000 signatures were checked in the QVF of 68,000 and none were found to be verified. The number checked per campaign was not identified.

In general, fraud may have occurred. There may be fraud by a circulator. There is no evidence that every signature collected by a circulator was fraudulent. Time pressures may have varied. Supervision by others may have varied. While a person who fakes a signature is a

criminal, they do not have to fake every signature. In fact, it is highly unlikely that every signature is invalid. How many of the examples were from the same circulator? There is no evidence or record documenting this conclusion. Multiple examples supporting all 8 could have come from the same circulator.

At the end of reviewing all these examples in the *Staff Report Appendix 1*, there are only two Brandenburg nominating signatures that are doubtful and two circulators that would trigger a close scrutiny of a mere 1,156 signatures and 43 signatures, respectively.

REVIEW

The only other report on the signature genuineness was the *Review*.

Only one circulation sheet was submitted as an example which was submitted by Stephen Tinnen and attested to on 3/7/2022. This claimed that 10 signatures appeared to have similar handwriting. While that is not conceded these ten signatures are not sufficient and may be classified as doubtful (signatures can only be determined after full validation efforts to not be genuine) to make her submission insufficient.

An additional signature was from sheet 233 was previously discussed in the *Staff Report Example 2 and* attributed to Stephen Tinnin.

A final signature from an unknown circulator (could be Stephen Tinnin) sheet 302 as being unqualified as having moved.

In all 12 signatures were contested in the *Review* and in the combination of the review and the *Staff Report* a total of 16 signatures were discussed and contested.

The sheet 233 signature at line 4 was reported to be deceased. Donna Brandenburg has not confirmed that but reports that if a deceased voter is reported to have signed her nominating petition, then the circulator should be subpoenaed and examined as that is a crime. This is an

example of a person not qualified to sign a petition and as ID is not required then this signature assumes facts are true and confirmed by the QVF or local election officials in the precinct stricken. This is a proper inquiry for the BOE and Board of Canvassers. For purposes of the mandamus as insufficient signatures was not *qualified* the particulars of this case are not controlling. One has to contemplate if a deceased voter in the 2020 election renders the entire election invalid.

The sheet 302 at line 7 signer was reported to have moved. This is a question of a person not being validly *registered* in the jurisdiction. This is also a proper inquiry by the BOE and Board of Canvassers.

The Brandenburg campaign which lacks access to the QVF has no way to verify either QUALIFICATION or REGISTRATION after circulators present completed nominating petitions. The law puts the burden on the signer and circulator to attest under penalty of perjury with warnings on the face sheet of the nominating petition. The suggestion was made by the director of the Bureau of Elections that the burden was on the candidate or campaign. This is nonsense as there is no basis in law. The law does provide an opportunity for challengers to contest signatures and a duty for the Board of Canvassers to verify qualifications and registrations.

The canvass as to the facial validity of the signatures of nominating petitions submitted by Donna Brandenburg was never made, or if made, the record of which signatures were compared was never reported--except for the two examples from the nominating pages 233 and 302 as reported in the *Review of Nominating Petition of Donna Brandenburg*.

- There is no evidence in the *Review* of any duplicate signatures or claims asserted at the May 26, 2022, state board of canvassers hearing which would affect Brandenburg Nominating signatures.

- There is no other record of signatures being stricken for being unregistered or for being registered in another jurisdiction except the one in the *Review*.
- There is no staff recommendation as to any individual signatures or sheets of signatures disqualified for any reason other than the board of canvassers determined that the circulator committed fraud and chose a unique remedy to disallow all signatures submitted for the listed circulators.
- In all only two circulators from the Brandenburg Nominating Petitions were even identified in the *Staff Report Appendix I Examples* and the total maximum affected signatures that would be scrutinized were 1156 for circulator Stephen Tinnin and 43 for circulator Niccolo Mastromatteo. These 1199 signatures were not individually examined (excepting 15).

APPENDIX 3: A BRIEF CONTEXTUAL REVIEW OF OTHER REQUIREMENTS FOR FACIAL VALIDITY

MCL 168.542 Nominating petitions; provisions governing.

The printing of the name of any person as a candidate for nomination by any political party for any office except a city or village under the particular party heading upon the official ballots for any primary election held in this state shall be obtained by following the provisions as set forth in the chapters of this act relative to the respective offices.

NOTE: The Office of Governor requirement is inserted here as this is the reference from MCL 168.53

168.53 Office of governor; nominating petitions; signatures; form; filing.

To obtain the printing of the name of a person as a candidate for nomination by a political party for the office of governor under a particular party heading upon the official primary ballots, *there shall be filed with the secretary of state nominating petitions signed by a number of qualified and registered electors residing in this state as determined under section 544f.*

Nominating petitions shall be signed by at least 100 registered resident electors in each of at least 1/2 of the congressional districts of the state. Nominating petitions shall be in the form as prescribed in section 544c. ~~Until December 31, 2013, nominating petitions shall be received by the secretary of state for filing in accordance with this act up to 4 p.m. of the twelfth Tuesday before the August primary.~~

Beginning January 1, 2014, nominating petitions shall be received by the secretary of state for filing in accordance with this act up to 4 p.m. of the fifteenth Tuesday before the August primary.

[NOTE: The deadline in 2022 was April 19, 2022. The receipt from Donna Brandenburg for her second submission was stamped as filed as of 11:48 AM on April 19, 2022, and therefore they were filed timely. Now returning to Chapter 24 of the Election Code]

168.544c Nominating petition; type size; form; contents; circulation and signing; validity of elector's signature; agreement of circulator to accept jurisdiction; service with legal process; violations; misdemeanor; felony; sanctions; refusal of individual to comply with subpoena; applicability of section to all sections.

Sec. 544c.

[NOTE Section (1) is not reproduced because there is no issue raised related to the technical requirements of the petition.]

(2) The petition must be in a form providing a space for the circulator and each elector who signs the petition to print his or her name. The secretary of state shall prescribe the location of the space for the printed name.

The failure of the circulator or an elector who signs the petition to print his or her name, to print his or her name in the location prescribed by the secretary of state, or to enter a zip code or his or her correct zip code ***does not affect the validity*** of the signature of the circulator or the elector who signs the petition.

A printed name located in the space prescribed for printed names does not constitute the signature of the circulator or elector.

If an elector does not include his or her signature, his or her street address or rural route, or the date of signing on the petition as required under subsection (1), the elector's signature is invalid and must not be counted by a filing official.

[NOTE: there are two requirements which are zip code and name printing which are required for a valid signature; HOWEVER; the signature, the street address or rural route and the signing date are three requirements that in the ministerial review for facially valid signatures MUST be present to be counted.]

(3) ***If the circulator of a petition*** under section 482, a qualifying petition for an office named in section 590b(4), or a petition to form a new political party under section 685 ***is not a resident of this state***, the circulator shall indicate where provided on the certificate of circulator that he or she agrees to accept the jurisdiction of this state for the purpose of any legal

proceeding or hearing initiated under section 476, 552, 590f(2), or 685 that concerns a petition sheet executed by the circulator and agrees that legal process served on the secretary of state or a designated agent of the secretary of state has the same effect as if personally served on the circulator.

[NOTE: This issue was not raised]

(4) If the secretary of state or a designated agent of the secretary of state is served with legal process as described in subsection (3), the secretary of state shall promptly notify the circulator by personal service or certified mail at the circulator's residential address as indicated in the certificate of circulator.

(5) The circulator of a petition shall sign and date the certificate of circulator before the petition is filed. A circulator shall not obtain electors' signatures after the circulator has signed and dated the certificate of circulator. A filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date.

[Note: This provides rules related to disqualifying an entire petition (sheet as referred to by the chairman of the state board of canvassers) and is when the circulator fails to sign and date. Signatures after the certificate are also facially invalid.]

(6) Except as provided in section 544d, a ***petition sheet must not be circulated in more than 1 city or township*** and ***each signer of a petition sheet must be a registered elector of the city or township indicated*** in the heading of the petition sheet. ***The invalidity of 1 or more signatures on a petition does not affect the validity of the remainder of the signatures on the petition.***

[Note: This provides a requirement that a petition sheet is limited to one political subdivision of a city or township. Obviously, this makes it easy for when the election clerk in that jurisdiction is required to verify genuineness and is likely the legislative intent behind the requirement. The requirement that the signer be a registered elector in the township or precinct indicated in the heading is the requirement that a person be qualified and registered to be facially valid. THE NEXT RULE that states that invalidity of 1 or more signatures does not affect the invalidity of the remainder of the signatures on the petition CAN NOT BE OVERSTATED as its importance

to this dispute. Each signature is judged on its own comparison. A sample cannot be used. One elector who died or moved was used as the only two examples in the disqualification of 11,144 other signatures by extrapolation.

(7) An individual shall not sign more nominating petitions for the same office than there are persons to be elected to the office. An individual who violates this subsection is guilty of a misdemeanor.

[Note: the duty is on the individual signing more than one petition. This is a misdemeanor. There is no provision to strike the duplicate signature. While this was not an issue in the nominating petitions submitted by Donna Brandenburg, an oblique reference was made during the lead-up to the agenda items during the State Board of Canvasser hearing on May 26, 2022.

(8) An individual shall not do any of the following:

- (a) Sign a petition with a name other than his or her own.
- (b) Make a false statement in a certificate on a petition.
- (c) If not a circulator, sign a petition as a circulator.
- (d) Sign a name as circulator other than his or her own.

[Note: the duty is again on the individual signing that they own their name and that there is no false statement in the certificate. Section (9) states this is a misdemeanor unless section (10) applies when the person signs multiple names. These are penal statutes as they impose a criminal penalty even though they are outside the penal code. This is observed only because a statute such as section 7-10 has different rules of statutory interpretation]

(9) Except as otherwise provided in subsection (10), an individual who violates subsection (8) is guilty of a misdemeanor punishable by a fine of not more than \$500.00 or imprisonment for not more than 93 days, or both.

(10) An individual shall not sign a petition with multiple names. An individual who violates this subsection is guilty of a felony.

(11) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has knowingly and intentionally failed to comply with subsection (8) or (10), the board of state canvassers *may* impose 1 or more of the following sanctions:

(a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (8) or (10) occurred, without checking the signatures against local registration records.

(b) Disqualify from the ballot a candidate who committed, aided, or abetted, or knowingly allowed the violation of subsection (8) or (10) on a petition to nominate that candidate.

[Note: This provision only applies after a hearing on a nominating petition (MCL 168.552) and the administrative code rules. There is a procedure and a remedy in the statute. First, there is the ability of the board of canvassers to (MAY) which is not required to take an action. It would be assumed that a majority of the board would be required to act and that a deadlock would prevent discretionary action from happening.

- (a) The board MAY disqualify obviously fraudulent signatures on a petition form which is the subject of a violation of (8) or (10) without checking the signatures against local registration records. This again is discretionary action triggered by a condition precedent. The condition is a violation of section 8 or 10. This is the commission of a crime. The crime in section 8 is specified as a person signing a name other than their own or a false certification. The crime in section 10 is specified as one person signing multiple names.
- (b) The board May disqualify a candidate if they are also culpable in the crime. This is NOT alleged and is therefore not discussed except to note that the board essentially disqualified the candidate Donna Brandenburg even after finding there was no evidence linking her to the alleged fraudulent signatures.

Question Presented is what constitutes “obviously fraudulent signatures on a petition form on which the violation of subsection (8) or (10) occurred”?

The statute is probable overbroad if it is applied as there is no defined standard that can be objectively viewed. An executive branch administrative board must have specific guidance or there will be an unequal application that is arbitrary and capricious.

However, the language is limited in this application because it does not apply on its face. The finding by the state board of elections was not determined when deadlocked 2-2 to establish any finding of fact. Moreover, the board did not specifically find that the “signatures” were “obviously fraudulent.” To be clear, without there being a finding on the record that there were ‘obviously fraudulent signatures there is no application of the overbroad language without standards sufficient to meet the constitutional requirement for administrative action. Without

application then the statute is just overbroad on its face rather than as applied. Again, there is no determination by a majority of the board that there was any signature that was ‘obviously fraudulent.’”

There is a limitation beyond the determination of “obvious fraud” which is that there must be a violation of section 8 or 10. An allegation was made that the certification was false. This was based upon a belief that there is evidence that a person signed more than one name in violation of section (10). This would be a felony for the person who signed IF established. A person who certified those signatures is only guilty of a misdemeanor in violation of section (8). A person who signed once a name other than their own is also guilty of a misdemeanor under section (8).

These are part of a penal statute. There is a presumption of innocence and a requirement of proof beyond a reasonable doubt to establish these acts occurred. This is pending. No witness was supplied under oath. No witness was subpoenaed. No affidavit was filed with an admission of guilt. There is a certificate and some suspicion that could be reasonable. There may be probable cause. There is not yet a finding. The Donna Brandenburg campaign has not conducted an investigation and left the Bureau of Elections to its proof at the hearing and was prepared to examine any witness. No witness was produced except a report filled with conjecture, innuendo, and speculations about what may have happened. New reports which vary also added to the confusion acting as though it was an indisputably proven fact. Donna Brandenburg is still waiting to view additional evidence and has not conceded that there is obvious fraud or that there was a false certification of a person signed a petition other than their name.

Note that signing more than one governor nominating petition is a misdemeanor under section (7) but does NOT trigger the remedy.

Finally, there is the question of a discretionary remedy. There is no requirement to strike the signatures without comparison even if there had been a finding.

In conclusion, the remedy of striking signatures is at the discretion of the state board of canvassers but only after there is a finding that a person either (1) actually signed a name other than their own; (2) actually signed more than one name or (3) made a false certification. The burden of proof to establish the fraud in a penal code when not set by the statute is beyond a reasonable doubt with a presumption of innocence to a standard that the signatures must meet the nebulous standard of obvious fraudulent signatures—not all of the pages collected by a circulator. The state board of canvassers failed to satisfy the statutory requirements and appears to have accepted the bureau of elections recommendation despite being deadlocked to strike all signatures rather than the obviously fraudulent ones thereby creating a novel remedy.

(12) If an individual violates subsection (8) or (10) and the affected petition sheet is filed, each of the following who *knew* of the violation of subsection (8) or (10) *before* the filing of the affected petition sheet and who failed to report the violation to the secretary of state, the filing official, if different, the attorney general, a law enforcement officer, or the county prosecuting attorney is guilty of a misdemeanor, punishable by a fine of not more than \$500.00 or imprisonment for not more than 1 year, or both:

- (a) The circulator of the petition, if different than the individual who violated subsection (8) or (10).
- (b) If the petition is a nominating petition, the candidate whose nomination is sought.
- (c) If the petition is a petition for a ballot question or recall, the organization or other person sponsoring the petition drive.

[Note: there is scienter or *mens rea* requirement that requires actual knowledge. There is a timing of the knowledge being BEFORE the filing of the affected petition sheet and a failure to report (the actus reus). This is also a penal statute and provides a punishment as a misdemeanor. It applies to the circulator and the candidate who has committed the crime by failing to report with knowledge. This crime was not alleged during the hearing to any candidate and while it was alleged to a company and by inference circulators, it has relevance only as it defines section 13.

(13) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has violated subsection (12), the board of state canvassers may impose 1 or more of the following sanctions:

- (a) Impose on the organization or other person sponsoring the petition drive an administrative fine of not more than \$5,000.00.
- (b) Charge the organization or other person sponsoring the petition drive for the costs of canvassing a petition form on which a violation of subsection (8) or (10) occurred.
- (c) Disqualify an organization or other person described in subdivision (a) from collecting signatures on a petition for a period of not more than 4 years.
- (d) Disqualify obviously fraudulent signatures on a petition form on which a violation of subsection (8) or (10) occurred without checking the signatures against local registration records.
- (e) Disqualify from the ballot a candidate who committed, aided, or abetted, or knowingly allowed a violation of subsection (8) or (10) on a petition to nominate that candidate.

[Note: the state board of canvassers did not really conduct a hearing pursuant to section 552 as will be discussed below. The state board of canvassers clearly did not make the finding that there was a violation of subsection 12. The state board of canvassers did not propose a remedy under section 13. The indirect effect of selecting a remedy to disqualify all signatures submitted by a circulator and to disqualify 11,144 signatures from 19 circulators for Donna Brandenburg had the effect of disqualifying the candidate which is the most extreme sanction reserved for when the candidate committed a crime by direct participation, by aiding and abetting or knowingly allowing a violation of law in subsection 12. There was no allegation or finding so this entire remedy is not applicable under section 13. Likewise, the references in section 8 to paragraph 13 are dependent upon a finding after hearing of a violation of section 12 and are hence unavailable.

(14) If an individual refuses to comply with a subpoena of the board of state canvassers in an investigation of an alleged violation of subsection (8), (10), or (12), the board may hold the canvass of the petitions in abeyance until the individual complies.

(15) A person who aids or abets another in an act that is prohibited by this section is guilty of that act.

(16) The provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law.

