

Subject: Comment on Proposed Process for Rebutting the Presumption of Staleness in Petition Signatures Over 180 Days Old [per announcements e-mailed out 2015-12-15]
To: Bureau of Elections <elections@michigan.gov>
CC: Valles, Lydia (MDOS) <VallesL@michigan.gov>
From: John Anthony La Pietra <jalp5dai@att.net> Date: January 8, 2016

To the Board of State Canvassers:

Courts at every level have held that political petitioning is core political speech – for circulators and for signers – and should not be unduly overburdened. Unfortunately, the new procedure proposed by the Bureau of Elections for rebutting the statutory presumption that voters' signatures "affixed" to initiative or constitutional amendment petition sheets more than 180 days before the petitions are filed does not follow this rule. Rather than taking advantage of the state's Qualified Voter File (and other technological advances since the preparation of the existing 1986 policy) to make the process clearer and easier for all parties concerned (including itself), the Bureau would require much more time, effort, expense, and paperwork for everyone than even the Board's 1986 policy does.

There is a better way – one that would still allow the Bureau and the Board to exercise proper and legal supervision to protect the purity of elections while lessening the burdens on themselves, petitioners, signers, and challengers. The QVF is the standard and the source of proof, as established by Public Act 219 of 1999 – and the QVF is in the Bureau's hands. I urge the Board to adopt a policy and process under which the Bureau would use the QVF efficiently and effectively – and would empower other concerned parties to do so as well.

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First, one point. The only reason to require any kind of physical separation or even separate ordering of petition sheets with any signatures whose presumed staleness is to be rebutted would be if those sheets are going to be processed differently than sheets with only non-stale signatures. And since the QVF is the standard and source of proof with or without a rebuttal claim, the Bureau does not need separate processing of those petition sheets to do its job – only an added check during the random-sample review . . . if that review is to include rebutted signatures at all.

In fact, if the Bureau insists on having presumed-stale signatures separated, then it would be fairer to circulators who go the extra mile to validate those signatures and rebut the presumption (and to the signers involved) to count all such signatures that pass the other tests (other grounds for individual challenges, e.g., sheet not disqualified for bad circulator signature) as 100% valid without sampling, and apply the sampling process and formulas only to the non-stale signatures that were not additionally validated for rebuttal. If, instead, the Bureau insists on submitting signatures already validated for rebuttal to the random-sample review process as well as non-stale signatures, then it has no need for any separation of sheets with signatures whose presumption of staleness is to be rebutted; the staleness condition can be checked against the QVF during the sample review process, just as other conditions are checked now.

The Board has the power to choose one of those two paths:

- * requiring that presumed-stale signatures be separated, with 100% acceptance for rebutted signatures (no sampling); or
- * requiring that presumed-stale signatures be included in the sampling pool, and allowing their sheets to be mixed in as well (no separating).

The Board could also allow petition sponsors to submit petition sheets separated or mixed, and authorize the Bureau to perform its review tasks in the corresponding manner. But both the Bureau and sponsors have duties to perform in a rebuttal/validation process, and the Board's adopted policy must not put all the work on either side.

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With the above point in mind, here is my proposed alternative procedure for validating signatures otherwise presumed stale.

(1) The Bureau must make enough QVF information available to the public, in a usable form and at no more than the actual incremental cost of reproduction (similarly to a FOIA request), that petition sponsors can actually perform the validating checks desired to rebut presumptions of staleness (and that the Bureau and challengers can actually use to double-check that work as needed). The Bureau must of course protect some parts of the data from public disclosure by law – but a subset of the QVF which omits (or even encrypts) protected data can be created to enable the rebuttal process, and it must be. To give an obvious example, if the Bureau expects sponsors to verify voter address histories both on the date of signing and within the 180-day window immediately before petition filing (though MCL 168.472a does not in fact require the latter), the histories must be included in this "QVF validation file".

Also, for the process to be practical, the QVF validation file must be a single file in a standard spreadsheet format – unlike (for example) the tangle of text files that the Bureau currently posts as the public's view of precinct-level election result data, which takes considerable time, effort, and computer expertise to put into usable form. I would recommend that at least Excel, OpenOffice, and standard comma- and tab-delimited text formats be made available. Microsoft Word or other word-processing files, including Adobe Acrobat document-type files, would not allow for convenient sorting of the information to expedite the searching necessary; database files are less familiar to non-professionals, and their programs are less broadly available.

(2) Have any petition sponsors who separate petition sheets into those with any signatures whose presumed staleness is to be rebutted and those with only non-stale signatures put numbers or alphanumeric identification codes on petition sheets before submitting them (as may already be done by some sponsors) – to ensure that, if the types of sheets are mixed together, they can be separated again (and ordered if need be). It could also be suggested or recommended that the codes distinguish between sheets having only signatures to be rebutted and sheets with a mix of non-stale signatures and signatures to be rebutted (if any such sheets are submitted).

Any separation of sheets that is done could be done by putting petition sheets with any signatures whose presumed staleness is to be rebutted together, at the top or bottom of a pile (or in a separate pile if the petition sponsor prefers); there could also be sub-groups of sheets having only signatures to be rebutted and "mixed" sheets, as per the suggestion in the previous paragraph.

Again, there is no need to require that such sheets be separated from the rest. Signatures proved non-stale need not go through random checking, but instead could be accepted as valid unless individually challenged (since in this case petitioners are literally doing part of the Bureau's work for it). If this is allowed, the Bureau could still take its random sampling of signatures for validity by counting only the number of non-stale signatures on any petition when selecting the sample. Then the Bureau would add the sample-suggested number of valid non-stale signatures to the actual number of validated and not successfully challenged staleness-presumption-rebutted signatures, and compare that sum with the number required to place the petition's issue on the ballot when making its recommendations to the Board.

(3) Have sponsors provide with their submitted petition sheets a list (in a standard spreadsheet file format and/or as a printed hard copy) identifying the names and QVF voter-ID numbers of all signers whose presumed-stale signatures the sponsors have checked against the QVF in order to rebut the presumption of staleness and validate. If a signer's name or QVF voter-ID number is not on the list, it would be presumed that the sponsor does not seek to rebut any applicable presumption of staleness for that signer's signature – and the Bureau would not be required to check it for rebuttal validity (although it could do so at its discretion if the sheet fell within a random sample, unless the signature was struck out by the sponsor before filing, or challenged).

The Bureau would use this "rebuttal list" either to accept names so validated as 100% valid (barring other problems or successful challenges) or to facilitate its check of presumption-rebutted signatures if they appear in the random sample, depending on the Board's choice of policy and procedure mentioned above. And to help the Bureau use the rebuttal list, the sponsor would need to either provide that list in some readily visible and explained order (alphabetical by name, alphabetical by county/city or township/name, etc.) or include the QVF voter-ID number of the voter with her or his name.

It may be suggested that this "rebuttal list" could also be supplemented with further information on individual presumed-stale signatures and where in the submission of petition sheets they appear – or with a further list or table indicating how many lines on each petition are blank (or lined through), how many contain non-stale signatures, and how many contain signatures which would be presumed stale by statute unless the presumption is rebutted. That would be additional work for sponsors, to make the Bureau's sampling work (and/or the work of any challengers) more convenient. Inclusion of any or all of this supplemental information (or more) should be permitted if the petition sponsor so chooses, as long as the essential information can at need be easily found and used. However, that information is not necessary for sampling (or challenges), could easily become overly burdensome, and should not be required – especially for petitions now in process.

This is one situation in which the balance between the Bureau and petition sponsors should be tipped by consideration of individual signers – who must be presumed (especially after validation against the QVF) to have been registered voters on the dates indicated and signed the petitions in good faith with no reason at the time to doubt that their signatures would be valid and accepted. (I urge the Board to remember when it makes its decision in this matter that petition signers are deeply concerned parties – and protect their rights as signers to petition their government for redress just as it protects their rights as voters not to have private information unduly released to the public.

(4) Have sponsors also provide, at the time of filing, one comprehensive affidavit or certificate – stating that the information provided in the rebuttal list has been checked against the QVF for the purpose of rebuttal, and that all checkers have been advised of and agreed to their legal responsibility for their work and their being subject to legal process if necessary. Either this "validation commitment" or an appendix to it would give the

names and addresses of individual checkers (and/or of a company or group responsible for supervising the checkers). The sponsor could also be encouraged to voluntarily include descriptions of what information it has available to identify who performed what checks, or to be prepared to provide such information if the Bureau finds reason to ask for it.

The validation commitment (and its appendix, if any) would be designed to provide the Bureau with the same legal recourse for service of process, etc. against petition sponsors and validation checkers (if it is ever needed) as it has implemented recently when ordered by the courts to accept the legality of out-of-state circulators of petitions. Separate affidavits from each checker are unnecessary (though they could be voluntarily provided if the sponsor prefers that method). Separate affidavits for each sheet, or worse yet each presumed-stale signature, absent specific and credible contradictory evidence, would be unduly burdensome – laughably so to anyone but the sponsors and challengers, and the Bureau, who would have to wade through that many more pages of wasted paper.

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This alternative proposal would make the QVF a useful tool for validation of presumed-stale signatures, not an excuse for imposing more needless cost, effort, and paperwork on petition sponsors. It would likewise make the Bureau's own work easier than it is now under the Board's 1986 policy or under the Bureau's own proposal – with less risk to the rights of petitioners, signers, or challengers. I ask the Board to please adopt it. (And I encourage the Board to allow petitioners to suggest and the Bureau to explicitly authorize any further alternatives which may be developed later and which provide equivalent safeguards for the roles and rights of all concerned parties.)

Thank you.

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NOTE: I am the Statewide Elections Co-ordinator of the Green Party of Michigan, and was GPMI's 2014 Attorney General candidate. However, this is my personal comment and is not intended to be or reflect the view of the party or anybody else.