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Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative

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ELECTION FRAUD AND THE INITIATIVE PROCESS: A STUDY OF THE 2006 MICHIGAN CIVIL RIGHTS INITIATIVE

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INTRODUCTION

As Ruthie Stevenson, President of Michigan's Macomb County chapter of the NAACP,[1] exited her neighborhood post office, an individual approached her and asked her to sign a petition about affirmative action that would "'make civil rights fairer for every-

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1. NAACP is an abbreviation for National Association for the Advancement of Colored People.

body.'"[2] The petition circulator informed her that Ruthie Stevenson supported the infamous petition.[3] Ms. Stevenson was taken aback, knowing that she opposed the petition, which sought to limit affirmative action policies in Michigan. Ms. Stevenson informed the circulator that she was Ruthie Stevenson and that she did not support the ban of affirmative action.[4] The petitioner walked away without responding to Ms. Stevenson's request that they "stop using [her] name to garner signatures."[5]

Subsequent testimony before a federal court revealed similar events occurring throughout Michigan in 2004 and 2005. In Detroit, a few miles south of Macomb County, another circulator approached Lawrence Fears and asked him to sign the same petition.[6] Mr. Fears attempted to read the petition but was unable to do so because, in his words, "the language was . . . obscured by padding and tape attached to the clipboard."[7] Mr. Fears asked the circulator what the petition concerned. The canvasser responded that she was collecting signatures to place an initiative "to keep affirmative action"[8] on the ballot in the November 2006 elections. Mr. Fears had heard about a ballot initiative that was being circulated to do away with affirmative action, an effort that Ward Connerly led and identical to efforts Connerly waged in California[9] and Washington.[10] Mr. Fears asked the circulator if the petition "had anything to do" with Connerly.[11] The circulator told him "that it did not and that she was 'not trying to do that.'"[12] Mr. Fears, still unable to

2. Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *18 (E.D. Mich. Aug. 29, 2006).

3. *Id.*; *see also* MICH. CIVIL RIGHTS COMM'N, REPORT ON THE USE OF FRAUD AND DECEPTION IN THE GATHERING OF SIGNATURES FOR THE MICHIGAN CIVIL RIGHTS INITIATIVE 7 (2006), http://www.michigan.gov/documents/PetitionFraudreport_162009_7.pdf [hereinafter MCRC REPORT].

4. MCRC REPORT, *supra* note 3, at 7. At the hearing, Ruthie Stevenson also read an affidavit from another voter who was told by a circulator that Ruthie Stevenson supported the petition. *Id.*

5. Michigan Civil Rights Commission Detroit Public Hearing, Transcript at 11 (Jan. 11, 2006), *available at* http://www.chetlyzarko.com/original-content/mcrc-hearing-01112006.html [hereinafter Detroit Transcript]; *see also Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *18.

6. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *16-17.

7. *Id.* at *16.

8. *Id.*

9. *See* Cal. Sec'y of State, Cal. Proposition 209 (1996), *available at* http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm.

10. *See* Wash. Sec'y of State, Wash. Initiative 200 (1998), *available at* http://www.secstate.wa.gov/elections/1998/i200_text.aspx.

11. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *16.

12. *Id.*

decipher the unclear language of the initiative, relied on the circulator's representation of the initiative and offered, with his signature, what he thought was his support for affirmative action.[13] Fears later found out, much to his dismay, that he had instead signed Connerly's petition supporting a ballot initiative to do away with affirmative action.[14]

During that same time period, roughly one hundred miles away in Lansing, a company hired by Connerly's campaign to support the anti-affirmative action proposal, known as the Michigan Civil Rights Initiative ("MCRI"), allegedly instructed Reverend Nathanial Smith[15] and about thirty-five other individuals to collect signatures for a "ballot proposal [that] was about keeping and maintaining civil rights."[16] Rev. Smith testified that petitioners were collectively instructed to approach registered voters and inform them that the proposal was "pro-civil rights and pro-affirmative action."[17] Rev. Smith claimed he obtained approximately five hundred signatures before a voter he approached while circulating the petition informed him that the actual language of the petition would do away with all race-based and gender-based affirmative action policies in Michigan.[18] Smith was confused by the language of the petition,[19] but then "checked into it and realized" its "true meaning."[20] Smith testified at a public hearing run by the Michigan Civil Rights Commission that, upon learning the true implications of the ballot initiative, he was "upset" to be "part of perpetrating a fraud that was perpetrated on [him] by the management company that hired [him] to get the petitions."[21] Rev. Smith

13. *Id.* at *17.

14. *Id.*

15. Smith was the pastor and founder of the In God We Trust Evangelical Outreach and Deliverance Ministries. Brief for Governor Jennifer M. Granholm as Amicus Curiae Supporting Petitioners at 2-3, Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. Aug. 14, 2006).

16. MCRC REPORT, *supra* note 3, at 9.

17. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *21. The District Court also found that the signature-gathering company that employed Smith "preferred that Black circulators devote most of their attention to the inner city of Detroit," a strategy that Smith, as an experienced circulator, felt was inefficient, because he "ordinarily solicited signatures at higher volume locations outside the city of Detroit." *Id.*

18. *Id.*; *see also* Michigan Civil Rights Commission Lansing Public Hearing, Transcript at 43-44 (May 8, 2006) [hereinafter Lansing Transcript] (on file with Fordham Urban Law Journal).

19. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *21-22.

20. Lansing Transcript, *supra* note 18, at 44.

21. *Id.*

stopped collecting signatures for the initiative and attempted to spread the word about the "true meaning" of the petition. He felt "hurt that there were hundreds . . . of people that had signed this petition . . . under false pretenses."[22]

These stories are a snapshot of the many misrepresentations that allegedly occurred for several months in 2005, during the time that Connerly's MCRI campaign worked to collect enough signatures to place its initiative on the Michigan ballot. The language of the initiative, verbose and unclear to some, asked voters to amend the Michigan Constitution to "[b]an public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes."[23] A majority of Michigan voters endorsed the proposal in November 2006.[24]

The substance of the initiative, its controversial nature, and its eventual passage are issues separate from the procedures employed to place the initiative on the ballot. It is cause for concern that any proposed amendment to the state constitution—regardless of its substance—can be placed on the ballot backed by signatures of registered voters who were told that the proposal was something different from what it was.[25] The allegations of fraud were presented to the Michigan Supreme Court, the Michigan Attorney General, and the Federal District Court for the Eastern District of Michigan. Although the federal court found that widespread fraud occurred, no government entity intervened either to address the immediate instances of fraud or to set a precedent that could ensure that future occurrences of such fraud would be impermissible.

These allegations of fraud, and the lack of any legal response, are even more problematic when considered alongside the fact that a majority of voters who claimed they were misled about the substance of the proposal were African Americans. This group of vot-

22. *Id.*

23. *See* Michigan Civil Rights Initiative, Official Ballot Language 1, http://www.michigancivilrights.org/media/Actual%20Ballot%20Language.pdf (last visited Apr. 16, 2007). Wayne State University, the employer of the author, is one of the public institutions affected by the initiative.

24. *America Votes 2006: Key Ballot Measures*, CNN.com, http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures (last visited Apr. 16, 2007).

25. It is notable that the majority of signatures for the proposal were collected from Wayne and Washtenaw Counties, two counties that eventually voted against the proposal. *See Ballot Measures, Michigan Proposition 2, County Results*, CNN.com, http://www.cnn.com/ELECTION/2006/pages/results/states/MI/I/01/county.003.html (last visited Apr. 16, 2007).

ers has historically endured barriers to political participation and is particularly affected by affirmative action policies.

This Article details and analyzes the allegations of fraud that surrounded the placement of the MCRI on the 2006 Michigan ballot, with an emphasis on the normative concerns that such a phenomenon engenders. It seeks to place the Michigan events in the broader legal and historical context of election fraud and ballot initiatives, and discusses why the events surrounding the MCRI signature-gathering process are a serious cause for concern. The Article ultimately enumerates three specific state proposals, as well as a federal proposal, for addressing the use of fraud and misrepresentation in gathering signatures to place initiatives to change laws or amend state constitutions on the ballot.

The first proposal is for state authorities charged with reviewing petition signatures to allow for an "inference" of fraud that, when met, triggers a thorough government investigation into whether registered voters signed a petition based upon a fraudulent misrepresentation.[26] Such an investigation could be as detailed as directly contacting every voter who signed the petition to verify their signature, or could simply entail a postcard mailing to all petition signatories, requesting that they return a postcard or contact the relevant authority to withdraw their name from the petition if they did not intend to sign a petition supporting the initiative. If significant evidence or patterns of fraud are revealed, funds for such investigations could be covered via fines levied on the offending campaign, even if revelations of fraud do not invalidate the rejection of the initiative petition because of lack of the signatures required.

A second proposal, which several states have pursued, involves prohibiting campaigns from paying petition circulators based upon the number of signatures they collect. Such a proposal may reduce some of the incentive for canvassers to misrepresent their petition in order to garner more signatures, thereby eliminating one of the primary motivations for circulators to commit fraud. Several federal courts of appeals have found limits on per-signature payments to be constitutionally permissible when enacted specifically in reac-

26. Acts and misrepresentations that constitute "fraud" in this scenario would ultimately be defined under state law. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

tion to actual evidence of fraud in the signature-gathering process.[27]

A final proposal concerns potential federal causes of action under the Voting Rights Act and the Fourteenth Amendment of the U.S. Constitution.[28] It concludes that a new federal statutory protection is necessary to protect voters when states decline to act in any meaningful way in response to claims of fraud. Currently, such a protection is nonexistent. Despite recent attempts,[29] there is currently no federal statute that bans such efforts to deceive voters.

This discussion is intended to be merely a starting point for a broader dialogue that seeks to develop adequate protections for registered voters who are victimized by this strain of fraud and deception. It is hoped that, in detailing the allegations of such fraud in Michigan, entities will be encouraged to enact effective safeguards to ensure this deception without a remedy does not occur again.

I. THE MICHIGAN CIVIL RIGHTS INITIATIVE: GETTING ON THE BALLOT

Michigan law allows for amendments to the state constitution to be placed on the ballot for voters to endorse with a majority vote.[30] Under article XII, section 2 of the Michigan Constitution, any state citizen may propose a ballot initiative by collecting a sufficient number of signatures of registered voters in the state in support of placing the initiative on the ballot.[31] Upon receipt of the signatures, the Secretary of State's office reviews the signatures and the State Board of Canvassers verifies their "validity and sufficiency," making an official declaration as to whether the petitioners gar-

27. *See generally, e.g.*, Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001).

28. Voting Rights Act, 42 U.S.C. § 1973(a) (1996).

29. *See* Deceptive Practices and Voter Intimidation Prevention Act, S. 1975, 109th Cong. § 2 (2005).

30. *See* MICH. COMP. LAWS §§ 168.471, 168.474 (2007).

31. The specific number of signatures needed in the 2006 election was 317,757, or ten percent of the total vote cast for all candidates for governor in 2002. MCRC REPORT, *supra* note 3, at 1. Article XII, section 2 of the Michigan Constitution states that

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected.

MICH. CONST. art. XII, § 2.

nered enough verified signatures to place the initiative on the ballot.[32]

In June 2003, the United States Supreme Court endorsed the use of affirmative action policies at the University of Michigan Law School.[33] Not long after the decision, Jennifer Gratz, a plaintiff in the case, teamed up with Ward Connerly to gather signatures for a ballot initiative that would amend the Michigan Constitution to ban the use of affirmative action "on the basis of race, sex, color, ethnicity, or national origin" in public education, employment, or contracting.[34] Gratz and Connerly named

32. MICH. CONST. art. XII, § 2.

33. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003); *see also* MCRC REPORT, *supra* note 3, at 1 ("On June 27, 2003, the United States Supreme Court upheld the use of affirmative action by the University of Michigan in *Grutter v. Bollinger*.... Shortly thereafter, the MCRI [Michigan Civil Rights Initiative] initiated a ballot petition drive in support of an initiative to nullify this landmark civil rights decision. The MCRI seeks to amend the Michigan Constitution to prohibit the use of affirmative action in public employment, public education, and public contracting on the basis of race, sex, color, ethnicity or national origin.").

34. The initiative petition proposed an amendment to article I, section 25 of the Michigan Constitution that read:

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
>
> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.
>
> (4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
>
> (5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
>
> (6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.
>
> (7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

their initiative the "Michigan Civil Rights Initiative," or the MCRI.[35]

During the summer of 2004, after some signatures had been collected to place the proposal on the ballot, confusion arose in state courts over whether the language of the petition met the requirements of Michigan election law.[36] Gratz and Connerly opted to begin collecting signatures anew in 2005, circulating new petitions, with identical language, with an eye towards placing the ballot proposal on the 2006 ballot. The language and title of the initiative, and its potential to mislead Michigan voters as to its purpose, led some voters to later allege in federal court that the petition was written "deliberately . . . in order to facilitate [the] fraud[ulent acts of the petitioners]."[37] These voters claimed that "[u]nless a prospective signer happened to notice a five-word phrase prohibiting 'preferential treatment' buried inside the small print of the 337-word amendment—*and* happened to know that 'preferential treatment' was a conservative codeword for affirmative action—the voter would have no clue that the petition had anything to do with [banning] affirmative action."[38]

A. Signature-Gathering for the Michigan Civil Rights Initiative

Between June and December 2005, hundreds of thousands of registered voters were approached and asked to sign a petition to place Gratz and Connerly's MCRI on the ballot in the November

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

Mich. Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139, 141 (Mich. Ct. App. 2005) (citing Coal. to Defend Affirmative Action & Integration, & Fight for Equality By Any Means Necessary (BAMN) v. Bd. of State Canvassers, 686 N.W.2d 287, 289-90 (Mich. Ct. App. 2004)).

35. Connerly's other petitions had identical language and titles. California Proposition 209, for example, was also known as the "California Civil Rights Initiative." *See* Cal. Proposition 209, *supra* note 9.

36. *See generally Coal. to Defend Affirmative Action & Integration*, 686 N.W.2d 287 (relief in part). In particular, the controversy was over whether the "proposed language of the petition violated [Michigan Compiled Law Section] 168.482(3), which requires a petition to state whether it would alter or abrogate an existing provision of the Constitution and include the text of the constitutional provision that would be changed or eliminated by the proposal." *Mich. Civil Rights Initiative*, 708 N.W.2d at 141-42.

37. Plaintiffs' Motion for Preliminary Injunction at 8, Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323 (E.D. Mich. July 17, 2006).

38. *Id.*

2006 general election.[39] During that time period, according to the federal district court, the experiences of Michigan voters discussed above were but a handful of the fraudulent incidents that occurred throughout the state.[40] A federal court later found the incidents to be so widespread that it concluded that the MCRI campaign and their circulators engaged in a pattern of fraud that involved deceiving voters into believing that the petition supported affirmative action when, in reality, it would ban the practice.[41]

Much of the anecdotes and data regarding the acts of the MCRI petition circulators emerged from several hearings that the Michigan Civil Rights Commission conducted throughout the state in 2006.[42] Over five hundred affidavits were collected during the hearing process,[43] primarily from citizens who were either personally victims of "fraud and deceit"[44] or who "offered anecdotal or

39. Michigan state law gives petition circulators 180 days to collect signatures. MICH. COMP. LAWS §§ 168.472a (2007). The petitions were delivered to the Secretary of State's office for review in January 2005, at the end of that 180-day, or six month, period. *See generally* TERRI LYNN LAND, MICHIGAN SECRETARY OF STATE, STAFF REVIEW OF INITIATIVE PETITION (2005), *available at* http://www.michigancivilrights.org/media/SOS-MCRI-Staff-Report7132005.pdf [hereinafter SOS REVIEW].

40. *See generally* Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *35 (E.D. Mich. Aug. 29, 2006); MCRC REPORT, *supra* note 3.

41. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *33-35.

42. In Detroit, approximately 450 citizens attended the first hearing in January 2006, where twenty-eight citizens testified and over 218 individuals submitted affidavits stating they were "misled or fraudulently induced to sign the ballot petition." MCRC REPORT, *supra* note 3, at 7. At a second hearing one month later in Flint, Michigan, over 200 citizens attended to observe the Commission receive 106 affidavits and testimony from thirty-one citizens "concerned about their experience with MCRI petition circulators." *Id.* at 8; *see also id.* at 9 (noting that at the hearing, "Kathryn Blake testified about how a black female circulator at the Flint African American festival tricked a substantial number of African Americans (including Katherine Williams the CEO and curator of the Museum of African Ancestry and Research Center) to sign the petition, saying it is for affirmative action"). In May 2006, a third hearing was held in Lansing, Michigan, attended by approximately 125 individuals, at which one citizen presented thirty-one signed affidavits from voters who learned that they had signed the MCRI petition after they had been misled about its subject by petition circulators. *Id.* at 9-10. The fourth and final hearing was held a few weeks later, on May 22, 2006, in Grand Rapids. Over 300 people attended. *Id.* at 10 ("The auditorium held 250 people and the seating was at capacity, including 'standing room only.' Others not able to get into the 'packed' auditorium were watching on a monitor in the hallway outside of the auditorium.").

43. Letter from Mark Bernstein & Mohammed Abdrabboh, Michigan Civil Rights Commission, to the Michigan Supreme Court 1 (June 7, 2006), *available at* http://www.michigan.gov/documents/PetitionFraudreport_162009_7.pdf (addressing the "shameful acts of deception and misrepresentation by paid agents of the MCRI") (attaching the MCRC Report).

44. MCRC REPORT, *supra* note 3, at 6 ("These citizens signed the ballot petition under the belief that they were signing a petition in support of continuing affirmative

observational testimony about friends and/or relatives who signed the MCRI petition under the belief that they were signing a petition to support affirmative action."[45] In Detroit, one circulator informed college student Conuetta Wright that "people were trying to abolish affirmative action and that he was petitioning to keep affirmative action on the books."[46] Heidi Osgood witnessed another MCRI circulator inform a woman that the MCRI petition supported affirmative action.[47] The circulator did not respond when Osgood interrupted and accused the circulator of misleading the voter.[48] Samantha Canty claimed she was approached at a festival in Detroit and asked to sign the petition to "'keep affirmative action going.'"[49] Mark Bryant signed the petition only after the circulator assured him that it supported affirmative action.[50] Another circulator approached Andra Williams outside of a public library in a suburb of Detroit and asked her to sign a petition supporting affirmative action.[51] Williams signed the petition in reliance on that misrepresentation and only after the circulator assured her that the petition would not ban the program.[52] Judge Robert Ziolkowski of the Wayne County Circuit Court also was asked to sign a petition that purportedly supported affirmative action.[53] After he accused the circulator of misrepresenting the peti-

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action. This group also includes circulators who voluntarily testified about their role in these specific deceptive events. Some of these witnesses testified that they were prevented or not given the opportunity to read the petition before signing. Others stated that they did not take the time to read the petition because they believed the comments made by the circulator. These comments included representations that they were signing a document to support the minimum wage, a document to support affirmative action and/or a document to protect civil rights.").

45. *Id.* ("This group also consisted of citizens who were approached by circulators, but who did not personally sign the petition because they were previously aware of its true purpose or because they read the petition and understood it to be an anti-affirmative action petition."). *See Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *16-25.

46. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *17 (noting that petitioner also told Ms. Wright, who was with her son at the time, "that if affirmative action were abolished, then her son would not be able to attend the University of Michigan").

47. *Id.*

48. *Id.* at *18.

49. Plaintiffs' Motion for Preliminary Injunction, *supra* note 37, at 6.

50. Detroit Transcript, *supra* note 5, at 41-42, 45-46.

51. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *24.

52. *Id.*

53. MCRC REPORT, *supra* note 3, at 7 ("[Wayne County Circuit Court] Judge Ziolkowski stated that he was approached by a circulator to sign a pro-affirmative action petition while shopping at a pharmacy in Detroit. After signing the petition, he heard customers talking about the representations made by the circulator. Judge Zi-

tion, the circulator claimed that the signature collection agency that employed her instructed her to present the petition as a "pro-affirmative action ballot proposal."[54]

More stories of misrepresentation and fraud emerged at Michigan Civil Rights Commission hearings held in Flint, Lansing, and Grand Rapids. In Flint, registered voters testified that they felt upset that they were "deliberately lied to" and "duped into signing" the petition.[55] Fred Anthony, an African American registered voter, testified that when a circulator approached and asked him to sign a petition supporting affirmative action, he was informed that "the petition would help kids get into college and keep affirmative action in place."[56] Anthony signed the petition in reliance on those statements.[57] Former Flint Mayor Woodrow Stanley claimed he was approached on three separate occasions and at no point was told that the petition would get rid of affirmative action.[58]

Stories were no different in Grand Rapids. One registered voter recalled telling the Grand Rapids Press that she and her neighbors felt "'[b]amboozled'" and "'hoodwinked'" after being deceived into signing the petition.[59] Lupe Ramos-Montigny was approached

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olkowski confronted the circulator and verified that the circulator's representations were false. The circulator told Judge Ziolkowski that she was instructed to present the MCRI as a pro-affirmative action ballot proposal."); *see also* Plaintiffs' Motion for Preliminary Injunction, *supra* note 37, at 5 ("As Judge Ziolkowski entered a CVS store on Jefferson Avenue in Detroit, an MCRI circulator asked him to sign a petition that she said *supported* affirmative action. Judge Ziolkowski did so. Inside the store, however, other patrons told the Judge that the petition actually opposed affirmative action. Judge Ziolkowski returned to the circulator and demanded that she remove his signature.").

54. MCRC REPORT, *supra* note 3, at 7 (The circulator "told the Judge that when she was hired, the MCRI told her to say that the petition supported affirmative action.").

55. *Id.* at 8 ("Ms. Kathleen Butler stated that when she asked the circulator if this petition was for affirmative action, the circulator answered 'Yes.' She stated, 'I'm very upset that I was duped into signing this petition. I feel like I was lied to, deliberately lied to. I never, ever would sign a petition like this.'").

56. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *24-25.

57. *Id.* at *25; *see also* MCRC REPORT, *supra* note 3, at 8-9 ("Reverend Willie Hill stated that he was told by a circulator that the petition was to keep affirmative action. It was reported that petitioners also told signers that the amendment would help their children get into college, or that it would help the petitioner go to college.").

58. MCRC REPORT, *supra* note 3, at 8 ("As former Flint Mayor Woodrow Stanley stated, 'I don't remember the exact words, but I know the pitch was not, Do you want to sign a petition to get rid of affirmative action?'"). Stanley was not the only mayor who was misinformed when signing the petition. In another part of the state, Mayor of Kalamazoo Hannah McKinney testified that she signed the petition not knowing she was supporting an anti-affirmative action proposal. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *24.

59. Plaintiffs' Motion for Preliminary Injunction, *supra* note 37, at 8.

at a Martin Luther King Day festival in the city and asked to sign the petition on the representation that it "'protected'" affirmative action in Michigan.[60] Ramos-Montigny "not only signed it, but persuaded her friends to sign it based on this misrepresentation."[61] On a separate occasion, Allison Krantz was at a street festival when a circulator approached her and "asked her if she cared about civil rights."[62] When Krantz replied in the affirmative, the circulator asked her to sign a petition to "'end all discrimination.'"[63] After recognizing the petition as an initiative to ban affirmative action, Krantz asked the circulator if the petition concerned affirmative action, to which the circulator replied, "it had nothing to do with affirmative action."[64]

Similarly, a community organizer from Grand Rapids named Sarah Smith testified in federal court that a circulator approached her in a shopping center, asking her "if she supported affirmative action."[65] When she said that she did, the circulator asked her to support a petition to keep affirmative action alive by helping to put the MCRI on the ballot.[66] When Ms. Smith asked to see the back of the petition to read the text of the initiative, she was shown only a "script" that the circulator had attached to the back of his clipboard.[67] The script instructed circulators to ask registered voters: "'Do you believe in affirmative action? If so we need to work together to save it by putting it on the ballot in November. Please help keep affirmative action alive. We need you to sign now.'"[68]

Testimony also emerged in federal litigation that the registered voters were not the only individuals claiming to have been "duped"—some circulators that the petition campaign hired to collect signatures also claimed to be just as misinformed or confused as the voters. In Detroit, the MCRI campaign, through a private company, hired Joseph Reed to collect signatures for the initiative.[69] Reed "read the petition and believed that it was against affirmative action."[70] After a supervisor in the petition company told him the initiative endorsed affirmative action, Reed "told po-

60. *Id.* at 7.
61. *Id.*
62. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *22-23.
63. *Id.* at *23.
64. *Id.*
65. *Id.* at *18.
66. *Id.* at *18-19.
67. *Id.* at *19.
68. *Id.*
69. *Id.* at *23.
70. *Id.*

tential signers that the petition supported affirmative action."[71] Reed testified that many voters who "could not read well or were in a hurry" relied on his statements and signed it based on his representation.[72] LaVon Marshall, another individual hired to collect signatures, claimed that she received similar instructions from Jennifer Gratz herself.[73] Another paid circulator, Exie Chester, observed her fellow circulators "telling 'everyone that it was a petition to help blacks get into college.'"[74] Chester then adopted that appeal and received an "'enthusiastic response,'" obtaining a great deal of signatures from registered voters.[75]

Even Doyle O'Connor, a member of the State Board of Canvassers and one of the state officials charged with reviewing and certifying the collected signatures, witnessed the ruse "on several occasions" at a popular outdoor food market in Detroit.[76] According to the federal court opinion, the circulators approached O'Connor "several times and once asked him to sign a petition to help Black kids get into college."[77] After various discussions, the circulators told O'Connor they were "getting paid and that they did not care what the petition said, as long as they got paid."[78]

B. State Review of the Signatures Gathered for the MCRI

On January 6, 2005, Gratz and the MCRI campaign submitted their petition for the ballot initiative to the Secretary of State.[79] The Secretary of State's only review of the petition signatures was based on a random sampling of five hundred of the approximately 508,000 signatures filed.[80] Michigan law required at least 317,757 signatures to get the petition on the ballot.[81] Reviewing just five hundred of the over 500,000 signatures submitted, the office's report found that only fifty of the five hundred signatures were invalid because they were from non-registered voters or were otherwise facially defective.[82]

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71. *Id.* at *24.
72. *Id.*
73. Plaintiffs' Motion for Preliminary Injunction, *supra* note 37, at 10.
74. *Id.* at 9.
75. *Id.* at 10.
76. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *20.
77. *Id.*
78. *Id.*
79. SOS REVIEW, *supra* note 39, at 1.
80. *Id.*
81. *Id.*; *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *7.
82. The sample would have to reveal that the number of valid signatures was 297 or less in order to be insufficient. SOS REVIEW, *supra* note 39, at 2; *see also Operation*

Operation King's Dream ("OKD"), a 501(c)(3) organization in Michigan that collected data about alleged fraud and misrepresentation, reviewed the same random sample of five hundred signatures to determine whether the Secretary of State's analysis was accurate.[83] Upon review, OKD submitted a challenge to the State Board of Canvassers and the Michigan Secretary of State, claiming that 325 of the signatures in the sample were either facially invalid or garnered by canvassers misrepresenting the petition.[84] Volunteers with OKD contacted individuals whose names and signatures were included in the sample and asked them whether they were led to believe that the initiative was one in support of affirmative action, rather than one that would ban affirmative action.[85] Those who agreed that they had signed the petition after it was misrepresented to them signed affidavits to support their individual allegation of fraud.[86] The affidavits included claims that at the time the voters signed the petition, circulators led them to believe "that the petition was a civil rights petition for affirmative action" and that they would not have signed the petition had they been "informed that the petition's purpose was to limit or end affirmative action."[87] Among the evidence the OKD volunteers collected were eighty-one affidavit statements from individuals who claimed, either in

King's Dream, 2006 U.S. Dist. LEXIS 61323, at *7 ("Under state law, the Secretary of State was not obligated to go beyond performing these ministerial functions in approving the petition.").

83. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *7.

84. SOS REVIEW, *supra* note 39, at 2; *see Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *7 (noting that OKD defined misrepresentation as occurring when "MCRI petition circulators deceived signers by leading them to believe that the initiative was one in support of affirmative action, rather than one that would ban affirmative action"); *see also* Mich. Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139, 142 (Mich. Ct. App. 2005) (noting that the groups' challenge intended to reveal that a "significant number of the sampled signatures were procured by MCRI circulators through fraud").

85. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *22.

86. *See id.* at *17.

87. *See, e.g.*, MICH. CIVIL RIGHTS COMM'N, GRAND RAPIDS AFFIDAVITS 8 (June 22, 2006), *available at* http://www.chetlyzarko.com/MDRC-docs/MDRC_GR_Hearing_6-22-2006_Affidavits1.pdf. The standard declaration stated:

> At the time I was asked to sign this petition, the petition circulator lead [sic] me to believe that the petition was a civil rights petition for affirmative action. I was not informed that the petition's purpose was to limit or end affirmative action, including programs for admitting minority students in universities and hiring minority applicants for jobs and outreach programs for education and employment. If I had been informed that this petition aimed to eliminate those programs—had I not been deceived—I never would have signed this petition.

Id.

person or via a telephone interview, that the petition had been misrepresented to them when they signed it.[88] OKD also alleged that an additional 114 signatures were invalid "by 'implication'" since they were solicited by a circulator who allegedly deceived other voters included in eighty-one affidavits.[89]

At least 203 signatures of the 500 signature sample would need to be invalidated in order to meet the numerical threshold required to render the entire signature collection insufficient.[90] The Secretary of State's office had invalidated fifty signatures in the sample.[91] The OKD challenge would have to deem 153 additional signatures invalid to require the rejection of the petition under the Secretary of State's policy.[92] OKD submitted, and the office reviewed, 325 challenges.[93] The Secretary of State accepted only 195 as relevant to the challenge.[94]

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88. SOS REVIEW, *supra* note 39, at 2; *see also id.* at 2-3 ("[Three] signatures challenged on the basis of 'misrepresentation' which are supported by a personalized statement; 32 signatures challenged on the basis of 'misrepresentation' which are supported by a form statement executed by the signer; 10 signatures challenged on the basis of 'misrepresentation' which are supported by a statement executed by the circulator; 36 signatures challenged on the basis of 'misrepresentation' which are supported by a statement executed by a person who claims that he or she interviewed the signer by phone . . . .").

89. *Id.* at 3, 5. The review continued

> [A]t least 72 signatures challenged by implication. The signatures challenged by implication are not supported by a statement executed by either the signer or the circulator. . . . [Of those,] 38 signatures collected by circulators who *other signers* allege misrepresented the petition; and at least 34 signatures collected by circulators who are alleged to have misrepresented the petition according to persons who claim to have conducted phone interviews with *other signers* who interacted with the circulator.

Id. at 3. Notably, the Secretary's review also indicated that

> It merits observation that any determination that signatures challenged by 'implication' are invalid would necessarily be premised on three assumptions 1) that the circulator misrepresented the petition to every signer he or she encountered[;] 2) that every signer who interacted with the circulator did not understand the purpose of the petition and[;] 3) that every individual who signed the petition at the request of the circulator would wish to have their signature determined invalid.

Id.

90. *Id.* at 2 (noting that in addition to the fifty invalid signatures already confirmed by the Secretary of State as facially invalid, "[a]t least 153 of the . . . challenges would have to be accepted [as fraudulently gathered] to render the petition insufficient").

91. *Id.* at 1.

92. *Id.* at 2.

93. *Id.*

94. *Id.* at 2. Forty-two of the 325 challenged signatures were already deemed facially invalid by the Secretary of State's initial rejection of fifty signatures, and

Reviewing the challenges to those 195 signatures, the Secretary of State found thirty-five challenges to be based upon a signed affidavit of some sort from a registered voter claiming her otherwise valid signature was fraudulently garnered.[95] An additional thirty-six challenges were affidavits from OKD volunteers who interviewed signatories over the phone, alleging those signatories also claimed that their signatures were fraudulently gathered.[96] Ten signatures were challenged based upon statements from circulators claiming they themselves used fraud to induce voters to sign,[97] and 114 challenged signatures thought to be invalid by implication, based upon evidence that the circulators who had collected those signatures had misrepresented the petition to other voters.[98] The Secretary of State's staff presented this data in a staff report to the Board of Canvassers for review, but explicitly did not reach a conclusion as to "the legal authority of the Board to consider misrepresentation as a basis for finding petition signatures invalid."[99] The Secretary's staff report also concluded that the petition to place the MCRI on the ballot was supported by an adequate number of signatures.[100]

On July 19, 2005, one week after receiving the staff report from the Secretary of State, the Board of Canvassers conducted a hearing and invited witnesses from OKD and the MCRI campaign to

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eighty-eight other challenges to signatures were rejected because the challenges were without merit. *Id.*

95. *Id.* at 4 (finding three executed by personalized statement and thirty-two executed by form statement).

96. *Id.* at 5.

97. *Id.* at 4-5.

98. *Id.* at 5 ("In 114 instances, no statement was executed by the signer or the circulator. Instead, the signature was challenged because it was collected by a circulator alleged to have deceived other signers included in the sample."). The Secretary of State review also noted that, with regard to the 114 challenges "by 'implication,'" one would have to assume

> 1) that the circulator misrepresented the petition to every signer he or she encountered[;] 2) that every signer who interacted with the circulator did not understand the purpose of the petition and[;] 3) that every individual who signed the petition at the request of the circulator would wish to have their signature determined invalid.

Id. at 3.

99. *Id.* at 2.

100. *Id.* at 2; *see also* Mich. Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139, 142 (Mich. Ct. App. 2005) ("On July 13, 2005, the staff review report was issued, which examined the 500 sampled signatures, and found 450 valid signatures and 50 invalid signatures . . . . The report further concluded that the petition was sufficient under the standard procedures traditionally employed to sample petitions.").

address the allegations of fraud.[101] While reactions to the presentation were mixed, one member of the Board of Canvassers, whose experience has led him to believe that "there will always be certain circulators who are prone to using 'puffery' and exaggeration to obtain signatures," later testified that he believed there was "a pervasive pattern of deceptive conduct in support of the MCRI petition, as opposed to 'isolated excesses' by individual canvassers."[102]

After some legal confusion arose as to whether the Board of Canvassers had the authority to investigate these claims of fraud and misrepresentation, State Representative Leon Drolet, a chairman of the MCRI campaign, requested a formal opinion from the Michigan Attorney General as to whether or not the Board of Canvassers had the authority to investigate claims of fraud relating to the signature-gathering process.[103] The Attorney General responded by issuing an informal letter, which stated that the Board of Canvassers *did not* have the statutory authority under Michigan law to investigate claims of fraud.[104] Soon after the letter was issued, and at the request of the MCRI campaign, the Michigan Court of Appeals intervened to formally interpret the relevant portion of Michigan law[105] and concluded that the Board of Canvassers lacked statutory "authority to investigate and determine whether the circulators made fraudulent representations."[106] The

101. *Mich. Civil Rights Initiative*, 708 N.W.2d at 142-43; Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *9 (E.D. Mich. Aug. 29, 2006).

102. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *20-21.

103. *Id.* at *9.

104. *Id.* at *10.

105. *Mich. Civil Rights Initiative*, 708 N.W.2d at 144. The court derived information about the Board's authority and duties from Michigan Compiled Laws Section 168.476(1), which provides, in relevant part:

> Upon receiving notification of the filing of the 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 board may cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which the petitions were circulated, to determine the authenticity of the signatures or to verify the registrations . . . . MICH. COMP. LAWS § 168.476(1) (2005).

The court continued,

> [t]his Court has stated that the board's duty is limited to determining whether the form of the petition substantially complies with the statutory requirements and whether there are sufficient signatures to warrant certification of the proposal. *Mich. Civil Rights Initiative*, 708 N.W.2d at 146. .

106. *Mich. Civil Rights Initiative*, 708 N.W.2d at 146; *see also id.* (citing MICH. COMP. LAWS § 168.476(1)) ("[I]t is clear to us that the Legislature has only conferred upon the Board [of Canvassers] the authority to canvass the petition 'to ascertain if the petitions have been signed by the requisite number of qualified and registered

court then issued an order to the Secretary of State to take all necessary measures to place the initiative on the ballot.[107] The Michigan Supreme Court declined to review the decision.[108]

After the Board of Canvassers subsequently approved the signatures without further investigation, the Michigan Civil Rights Commission continued to investigate the allegations of fraudulent signature gathering. The Commission held four evidentiary hearings throughout the state to collect testimony and other statements concerning the acts of petition circulators hired by the MCRI campaign and issued a report on its findings in July 2006.[109] The Commission's report noted that the evidence of fraud revealed in its hearings was "just the tip of the iceberg" and warned that there "is substantial credible testimony that MCRI's efforts to change the Constitution of the State of Michigan rest on a foundation of fraud and misrepresentation."[110] Calling the impact of such efforts "substantial," the Commission warned that the "acts documented in the report represent a highly coordinated, systematic strategy involving many circulators and most importantly, thousands of voters."[111]

In addition:

> [T]he Commission's report confirmed that the areas in which signatures were gathered were not selected arbitrarily or haphazardly, but rather in [a] deliberate and calculated manner. African American circulators, some of whom did not understand the ballot proposal, were sent into these areas and unsuspecting African American voters were lured into signing the petition.[112]

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electors.' MCL 168.476(1) clearly indicates that this authority encompasses examining the validity of the signatures and the registration status of each elector whose signature appears on the petition and investigating any doubtful signatures . . . . Here, the challengers and interveners seek an investigation that goes beyond the four corners of the petition itself (i.e., the validity of the signatures or registration status of the electors) into the circumstances by which the signatures were obtained. Such an investigation is clearly beyond the scope of the board's authority set forth under MCL 168.476(1). Because the Legislature failed to provide the board with authority to investigate and determine whether fraudulent representations were made by the circulators of an initiative petition, we hold that the board has no statutory authority to conduct such an investigation.").

107. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *11-13.

108. *Id.* at *14-15.

109. *Id.*; *see generally* MCRC REPORT, *supra* note 3; *see also supra* notes 42-78 and accompanying text.

110. MCRC REPORT, *supra* note 3, at 12.

111. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *15.

112. MCRC REPORT, *supra* note 3, at 4.

The report found that "the conduct of the circulators was . . . a strategy that targeted African American citizens on a statewide basis," through the campaign's careful selection of "locations where it would be expected that a large number of supporters of affirmative action would congregate, such as churches and community gatherings in African American neighborhoods."[113] If the Attorney General, the Secretary of State, and the Board of Canvassers were unable to intervene to halt such acts, the Commission questioned, to where could "aggrieved citizens turn for relief?"[114] The last remaining option for intervention was the Federal District Court in the Eastern District of Michigan.

C. Federal Court Intervention

Shortly after the release of the Commission's report, OKD and several Michigan voters who had signed the petition believing that they had supported a pro-affirmative action initiative filed suit in federal court under section 2 of the Voting Rights Act of 1965, which bans any election law or procedure that results in racial discrimination in the electoral process.[115] The suit alleged that the MCRI campaign specifically directed circulators to target voters in areas with large minority populations, thereby engaging in racially-targeted fraud against African American voters, and that as a result, at least 125,000 of the 508,000 petition signatures were obtained under false pretenses and should be invalidated.[116]

In August 2006, the federal court heard testimony detailing misrepresentations made by MCRI petition circulators.[117] The court described the testimony of fraud as "overwhelming"[118] and concluded that "the conduct of the circulators went beyond mere 'puffery' and was in fact fraudulent because it objectively misrepresented the purpose of the petition."[119] The court also found the

113. *Id.* at 5-6.

114. Letter from Bernstein & Abdrabboh, *supra* note 43, at 2.

115. 42 U.S.C. § 1973(a) (1996); *see also* Complaint at 9, Operation King's Dream v. Connerly, No. 06-12773, U.S. Dist. LEXIS 61323 (E.D. Mich. June 22, 2006) ("In obtaining a place on the November 2006 general election ballot by means of systemic, widespread, and racially-targeted fraud, the defendants Connerly, Gratz and MCRI have violated Section 2 of the Voting Rights Act of 1965, 42 USC 1973.").

116. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *7.

117. *Id.* at *16.

118. *Id.* at *33.

119. *Id.* (noting that the "critical difference between puffing and fraud is that in the latter situation, the recipient of false information is in a position to reasonably rely on the assurances of the speaker"); *see also id.* at *35 (noting that some of the circulators of petitions "were themselves led to believe that they were circulating a petition sup-

testimony of Jennifer Gratz, a leader of the MCRI campaign, to be "evasive and misleading"[120] and "typical of the MCRI's approach, which is best characterized by the use of deception and connivance to confuse the issues in the hopes of getting the proposal on the ballot."[121]

Concluding that the MCRI campaign "engaged in systematic voter fraud," the federal district court held that the campaign deceived voters into believing that the petition supported affirmative action:

> The MCRI defendants were aware of and encouraged such deception by disguising their proposal as a ban on "preferences" and "discrimination," without ever fulfilling their responsibility to forthrightly clarify what these terms were supposed to mean. Jennifer Gratz's confusion at the evidentiary hearing as to the purpose of the MCRI's proposal supports the Court's conclusion that the MCRI deliberately encouraged voter fraud and did nothing to remedy such fraud once it occurred.[122]

The court accepted the proposition that the Voting Rights Act applied to the initiative petition process,[123] and that the acts of the petitioners were covered as state action under section 2 of the Voting Rights Act.[124] The opinion also explicitly admonished the

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porting affirmative action. Other circulators obviously knew that the petition opposed affirmative action and deliberately misrepresented the petition's purpose. In either situation, the signers were in a position to reasonably rely on the circulators' misrepresentations").

120. *See id.* at *30-31 ("The Court finds that Gratz's testimony in this Court was evasive and misleading . . . . Gratz's testimony in this Court was consistent with the Commission's conclusion that her assertions have been 'incorrect at best, and intentionally misleading, at worst.'").

121. *See id.* at *32-33 ("In reviewing Gratz's testimony as a whole, it is difficult to determine where the line between wilful [sic] ignorance and deliberate deception could be drawn . . . . Unfortunately, her lack of clarity and forthrightness seems typical of the MCRI's approach, which is best characterized by the use of deception and connivance to confuse the issues in the hopes of getting the proposal on the ballot.").

122. *Id.* at *35.

123. *Id.* at *44-45; *see also id.* at *43 ("In light of the section's broad language, the legislative history, and the broad construction required in light of the statute's remedial purposes, the Court concludes that [Section] 2 applies to the initiative petition process at issue in this case, which is a 'practice or procedure' imposed or applied by the state for the purposes of 42 U.S.C. § 1973(a).").

124. *Id.* at *47 ("Section 2 of the Voting Rights Act imposes an obligation upon the states to ensure that their voting practices and procedures do not result in racial discrimination. The fact that the MCRI is a private organization does not absolve the state defendants from their responsibilities under the Voting Rights Act. The Court also finds that the MCRI defendants acted as part of the state's political machinery for choosing which issues would be placed on the state's general election ballot."); *see generally* Morse v. Republican Party of Va., 517 U.S. 186 (1996) (finding that if a

Michigan state courts, the Board of Canvassers, Secretary of State, Attorney General, and Bureau of Elections for not taking the "allegations of voter fraud seriously."[125]

While the court found that the MCRI campaign engaged in "well-documented acts of [voter] fraud and deception,"[126] it also found that the campaign "targeted all Michigan voters for deception without regard to race."[127] Therefore, in the absence of a "[federal] anti-voter fraud statute," the court reasoned, the "defendants' conduct, though unprincipled, did not violate the [Voting Rights] Act."[128] The court explained that the plaintiffs "established voter fraud but have not established the inequality of access necessary to establish a violation" of the Voting Rights Act, emphasizing that "the MCRI sought to deceive and in fact deceived both minority and non-minority voters in order to obtain their signatures."[129]

II. FRAUD IN SIGNATURE-GATHERING: CAUSE FOR CONCERN?

The accusations of fraud surrounding the signature-gathering process for the 2006 Michigan Civil Rights Initiative are not a significant departure from other acts of election-related fraud occurring throughout history. Generally speaking, the presence of fraud in the electoral context is not a new phenomenon, particularly when race or political partisanship is involved.[130] Allegations of

private association's decisions affected the choices on the ballot, the Voting Rights Act prohibited racial discrimination in the conduct of the association).

125. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *5.

126. *Id.*

127. *Id.* at *2.

128. *Id.*

129. *Id.* at *51-52.

130. *See, e.g.*, Karen Blackistone, *Full and Fair Elections: Political Party Representatives and State Law*, 4 GEO. J.L. & PUB. POL'Y 213, 214 (2006) ("As far back as 1890, public scandals involving election fraud by both Democrats and Republicans abounded, and the election platforms of all three parties in 1890 included election reform proposals. Early twentieth century elections in New York and Chicago, for example, saw thousands of dead or fictitious people vote. In the presidential election of 1960, the defeated Republican candidate, Richard Nixon, alleged that massive fraud in Chicago and Texas had secured the victory for John Kennedy."); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 235-36 (1990) ("[I]n the November 1982 general election in Chicago, twenty-six people, mostly election officials, were indicted for election fraud. Their crimes included forging signatures on ballots of voters who failed to vote and marking and casting those ballots; impersonation of voters; false registration of non-residents; rendering improper 'assistance' to elderly and disabled voters; vote-buying; fraudulent dissemination and voting of absentee ballots; illegal registration of aliens; and the use of armed violence against

canvassers' use of fraud and misrepresentation in collecting signatures for ballot initiatives have haunted the process for nearly a century. For example, in 1912, a California state court reviewed 13,000 signatures in support of a ballot proposal and found that over sixty percent of those gathered were solicited by fraudulent means.[131] One year later, attempts were made in Oregon to require petitions to be signed in the presence of a county official or clerk, in the hopes of reducing fraud and ensuring that the registered voters understood the initiative they were endorsing.[132]

During the early- to mid-twentieth century, various states passed laws in an effort to curb fraudulent and deceptive behavior,[133] with most seeking to ban the payment of signature gatherers.[134] This trend was halted in 1988, when the United States Supreme Court in *Meyer v. Grant* struck down a Colorado law banning paid signature gatherers as an unconstitutional abridgement of political speech in violation of the United States Constitution's First and Fourteenth Amendments.[135] More recent federal court decisions have created exceptions to the *Meyer* principle, preserving limited bans on the

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voters and campaign workers. In one precinct, election officials staged their own private election by marking a ballot with a straight Democratic ticket and running that ballot through the tabulating machine over 200 times. The United States Attorney whose jurisdiction included Chicago estimated that ten percent of the entire vote in the city during the November 1982 election was fraudulent."); *see generally* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 11 (1978).

131. *See* Richard J. Ellis, *Direct Democracy in Oregon*, OREGON'S FUTURE, Fall 2004, at 6, *available at* http://www.willamette.edu/centers/publicpolicy/projects/oregonsfuture/PDFvol5no2/direct_democracy.pdf.

132. Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 94 (2003).

133. *See id.* at 50 ("A bill to ban paid petitioners was introduced in Oregon as early as 1909. Similar laws were introduced in legislatures across the nation, including Washington, South Dakota, and Ohio, where such bans were enacted into law between 1913 and 1914. Most states, though, declined to ban paid petitioners, although spectacular cases of fraud, or concerns about the control of special interests sporadically forced the issue onto the legislative agenda. In California, for instance, bills to ban paid petitioners were introduced and defeated in 1915, 1917, 1937, 1939, 1953, 1959, 1963, 1965, 1969, 1973, and again in 1987.").

134. P.K. Jameson & Marsha Hosack, *Citizens Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 448-49 (1995) (finding that "[m]any supervisors of elections have noted a correlation between fraudulent signatures and paid signature gathering," and noting that, in one Florida county "fifty-two percent of the signatures gathered by paid workers on the casino-gambling petitions were invalid" while "only ten percent of the signatures gathered by volunteers for the Save our Sealife petition were invalid").

135. 486 U.S. 414, 421-24 (1988). The Supreme Court was not persuaded by the argument that the ban reduced fraud because the Justices believed the potential for such fraud was "remote." *Id.* at 427.

payment of petition circulators when enacted in response to specific incidents of fraud.[136]

A. Election Fraud in the Initiative Process and Its Threat to the Health of Our Electoral System

The presence of fraud in the electoral system[137] significantly undermines the integrity of the electoral process and calls into question the health and legitimacy of our democracy.[138] Election results that do not reflect the genuine will of the entire polity challenge the basic principle that our democratic government derives

136. *See, e.g.*, Ill. *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 612 (2003) (holding that the First Amendment "does not shield fraud"); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 617-18 (8th Cir. 2001); Prete v. Bradbury, Civ. No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738, at *38 (D. Or. Feb. 18, 2004) (upholding a per-signature ban on petitioners as constitutional based on evidence that per-signature payments contributed significantly to signature fraud in Oregon); LIMIT v. Maleng, 874 F. Supp. 1138, 1141 (W.D. Wash. 1994) (noting that proof of fraud or threat to citizens' confidence in government would provide compelling justification for regulating payment of petition circulators); *see also infra* notes 216-44 and accompanying text.

137. The United States Election Assistance Commission ("EAC") defines fraud in the electoral context as "fraudulent or deceptive acts committed to influence the act of voting." U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 11 (2006) [hereinafter EAC REPORT]. The EAC definition of election fraud explicitly encapsulates such acts as using fraud or misrepresentation to induce individuals to support ballot proposal petitions. Included in its list of examples of election fraud are "[k]nowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information . . . ; [s]igning a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office . . . ; [s]igning a petition proposing an initiative or referendum when the signer is not a qualified vote"; paying someone to vote for or against a candidate, challenging a person's right to vote without probable cause; "[s]oliciting, accepting, or agreeing to accept money or other valuable thing in exchange for signing or refraining from signing a petition proposing an initiative"; and "[d]istributing or attempting to distribute election material knowing it to be fraudulent." *See id.* at 13-15.

138. *See, e.g.*, LORI MINNITE & DAVID CALLAHAN, DEMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 14 (2003), *available at* http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf ("Given that the integrity of this process is central to American democracy, there can be no compromise on the need for fair elections determined without the taint of fraud—whether on the part of voters, political parties, election administrators, or others."); Rebecca Murray, *Voteauction.net: Protected Political Speech or Treason?*, 5 J. HIGH TECH. L. 357, 357 (2005) ("Free and equal elections are a fundamental foundation of a healthy democracy. When the election system becomes tainted through fraud or undue influence, the other freedoms enjoyed in a democracy become jeopardized. It is the role of the government to ensure the election process remains free from such corruption in order to maintain the legitimacy and integrity of the system.").

its legitimacy from the consent of the people.[139] Electoral fraud in the initiative process is particularly pernicious because it (1) increases the likelihood of tainted or inaccurate electoral outcomes, (2) raises suspicions among voters as to the legitimacy of the process, and (3) threatens the role of an initiative as a direct expression of the electorate's view on a particular issue or policy. If the results of an election are inaccurate due to voter deception, the election will produce a result that fails to reflect the will of the people.[140]

An electorate that perceives fraud as an endemic presence in the electoral system—based on either their own experiences or the prevalence of allegations elsewhere—is likely to lose faith in the accuracy of an election's results, regardless of the fraud's actual effect on the outcome of the election. For example, following allegations of fraud and tainted results in the 2004 presidential election, several polls revealed that portions of the electorate questioned the legitimacy of the electoral process.[141] In one survey

139. Language supporting this ideal is found in both the Declaration of Independence and the U.S. Constitution. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); U.S. CONST. pmbl. ("We the people of the United States . . . do ordain and establish this Constitution for the United States of America."). *See also* Gardner, *supra* note 130, at 222 ("Because the people alone have the right to appoint agents in a republic, only a government consisting of individuals to whom the people have consented can be legitimate."); *id.* at 192-200 (defending the Lockean theory of democracy that defines the legitimacy of a democratic government as rooted in the accurate expression of the will of the people, concluding that "the Constitution reflects a theory of popular sovereignty in which governmental legitimacy is based on the consent of the governed").

140. The problem that occurs when, as a result of fraud, the actual electoral results differ from the actual will of the voters was articulated by the Wisconsin Supreme Court in 1938. The court observed that "[n]othing is more important in a democracy than the accurate recording of the untrammeled will of the electorate," and warned that "[g]rave[ ] danger" is posed to the government when that will is not properly expressed and "electors are corrupted or are misled" by false campaign speech. State *ex. rel.* Hampel v. Mitten, 278 N.W. 431, 435 (Wis. 1938).

141. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 942 (2005) (noting that mere allegations of fraud "adversely affect[ ] Americans' views of the electoral process," citing an NBC News/Wall Street Journal poll conducted after the 2004 general election that revealed that "more than a quarter of Americans worried that the vote-count for president in 2004 was unfair" and a Rasmussen Report prior to the same election that "showed 58% of American voters believing there was 'a lot' or 'some' fraud in American elections").

following that election, a full two-thirds of African Americans questioned the fairness of the electoral process.[142]

Ballot initiatives occupy a unique, though perhaps misplaced,[143] position as a direct expression of the electorate's view on a particular issue or policy. They create an avenue for citizens to directly enact laws and amend the constitution on issues that may be politically unpalatable to the elected representative government.[144] There is, however, considerable debate over whether ballot initiatives are a beneficial tool for good public policy,[145] particularly where they seek to amend the constitution.[146] And although there is significant doubt as to whether initiatives adequately reflect the policy choices of the populace,[147] they are generally viewed as an

142. *See id.* at 942 (citing a 2004 post-election NBC News/Wall Street Journal survey that revealed nationwide, "just one-third of African-Americans call the [2004] vote 'accurate and fair'").

143. *See, e.g.*, Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1203 (2005) (noting that the "industrialization of the initiative process" has led to initiative efforts that "are too often exploited by well-financed corporate media campaigns," involve interest groups seeking to enact "pet laws without meaningful public debate," or "facilitate discrimination against minorities").

144. *See generally* David B. Magleby, *Governing by Initiative: Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 13 (1995) ("The initiative and popular referendum permit citizens to set the political agenda by placing statutes and constitutional amendments on the ballot, and by vetoing actions taken by legislative bodies at the state and local levels. Using the initiative, voters may write statutes, and in some states constitutional amendments, which will go to the ballot if sufficient valid petition signatures are gathered."). *But see id.* at 46 (suggesting that initiatives "can also be a way around legislative log jams or inaction because of organized interests" while cautioning that "many initiatives that are on topics blocked by powerful interests in the legislature run into the same phalanx of interest groups in the election campaign, and as we have seen, they are often unsuccessful in enacting legislation via initiative as well").

145. *Id.* at 46 (noting that the initiative process "is at best a supplement to representative democracy. When it works well it can orient elected officials to the will of the people and ratify fundamental structural changes. But carried to an extreme it has negative consequences for the political system and can undermine the very structure it is intended to supplement").

146. Jameson & Hosack, *supra* note 134, at 442 (providing a critique of the initiative process as it relates to amendments to the state constitution, arguing that if "it is to work properly, the constitution cannot be altered to the point that government does not function properly," and concluding that "a primary concern of the constitutional initiative process is that the constitution should contain fundamental principles of policy and be difficult to amend").

147. *See, e.g., id.* at 456 ("Direct initiative processes may not provide the degree of debate and analysis desirable for determining public policy issues. For example, Florida's direct constitutional initiative process requires only that initiative sponsors publish their balloted proposal twice prior to the election in one newspaper of general circulation in each county . . . . The electorate may adopt constitutional amendments without adequate explanation of their impact and thus cause unanticipated consequences.").

increasingly utilized mechanism[148] for ensuring that the policy wishes of the majority of voters in a given jurisdiction are expressed and, where possible, enacted.[149]

This unique role and power of the ballot initiative as a direct voice of the voters amplifies the effects of the presence of fraud or deception at any part of the process. Importantly, the ballot initiative process is not one of candidates seeking to sway voters with half-truths about what policies they will pursue if elected or nominated, nor is it one of individuals voting in the name of another person or otherwise seeking to use deception to elect or defeat a candidate.[150] It is instead a scenario by which the actual law or constitution of the state or jurisdiction is directly altered as a result of the election.[151] If voters are deceived about what policy they are supporting, rejecting, or petitioning to place on the ballot, or if they are led to believe that an initiative would bolster a particular policy when, in actuality, it would eliminate a policy, the result is that a law may be enacted or the state constitution amended based upon an illegitimate reflection of the will of the people.

The above concerns regarding the effects of fraud and misrepresentation are no less problematic when they occur in the signature-gathering phase of the initiative process. Some argue that the manner in which an initiative gets on a ballot is less important, and therefore should be subject to less scrutiny, than the manner in which voters are asked to endorse or reject an initiative already on the ballot.[152] This distinction, however, fails to recognize the vital roles that the signature-gathering process, the petitioners, and the

148. *Id.* at 441 (noting that initiatives are becoming "a more prevalent method of determining government policy in the states"); *see also* Nat'l Conference of State Legislatures, Ballot Measures Preview 2006 (Nov. 6, 2006), http://www.ncsl.org/statevote/06ballotpreview.htm.

149. There remain some limits to the range of issues that can be enacted via the initiative process. For one, they typically must not violate the U.S. Constitution, or any federal statute, and therefore are susceptible to court challenges before or after enactment, which can be costly. Proposals are also expensive, and it is often necessary that initiative committees raise hundreds of thousands of dollars before their proposed statutory or constitutional change is considered viable.

150. For other examples of election fraud, see EAC REPORT, *supra* note 137, at 13-15.

151. *See supra* notes 144, 146.

152. Ellis, *supra* note 132, at 338-39 (describing the view that "[m]any initiative proponents insist it does not really matter how an initiative gets on the ballot because ultimately it is the people who decide") To those proponents, "[w]hat matters is not so much how a measure came to be on the ballot, but whether voters approve it or not. No matter how an initiative qualifies, if it passes it has demonstrated that it represents the will of the people." *Id.*

signatories themselves play in the overall use of an initiative to amend policy or state constitutions.[153] A primary reason for requiring that an initiative or proposal receive a certain number of signatures before it is placed on the ballot is so that there is some evidence of strong and significant support for the policy change.[154] Such evidence may be misleading if several signatures are gathered from citizens deceived into thinking they are supporting a policy that the initiative seeks to eliminate. In addition, the ultimate success of the initiative once it reaches the voters often depends on how the proposal is worded and how the petitioners represent it during the signature-gathering phase. Petitioners have the unique power to frame the issue and, at all stages, are able to characterize it for the voters.[155] As the district court emphasized in *Operation King's Dream*, petitioners share that same responsibility in framing the issue during the signature-gathering phase as the initiative campaign does in the election phase.[156]

The importance of the signature-gathering phase was emphasized in the Supreme Court's opinion in *Meyer v. Grant*,[157] when the Court described the circulation of an initiative petition as in-

153. For an extensive critique of this presumption, see *id.* at 36 (arguing that the process of gathering signatures for an initiative "deserves greater scrutiny by voters, by the media, and by state elections officials as well as by scholars" and "should be treated with the same seriousness of purpose and intense publicity that is generally accorded contested nomination elections").

154. *See* Grant v. Meyer, 828 F.2d 1446, 1455 (10th Cir. 1987). The number of signatures needed is typically a percentage of the population that voted in a recent election. INITIATIVE AND REFERENDUM INSTITUTE, CONSTITUTIONAL AMENDMENTS 1 (2006), http://www.iandrinstitute.org/REPORT%202006-3%20Amendments.pdf.

155. Ellis, *supra* note 132, at 39 (critiquing the argument that the signature-gathering process is irrelevant to the eventual passage of the petition because such an argument "ignores the power bestowed upon the individuals and organizations who frame the issue"). As an example of this influence and the power of words, Ellis compares the wording of Ward Connerly's 1996 initiative to end affirmative action in California, Proposition 209, and a subsequent related effort in Texas. In California, Connerly's petition was "careful not to mention affirmative action; instead [his] initiative prohibited the state from 'discriminating against, or granting preferential treatment to, any individual or group' on the basis of race or gender." *Id.* His reason for doing so, Ellis contends, was because "[p]olls showed that overwhelming majorities supported this language, but support plummeted when respondents were asked about outlawing state affirmative action programs for women and minorities." *Id.* Concluding that the petitioners' "decision not to include the words 'affirmative action' was among the most critical ingredients in the success of Proposition 209," Ellis correspondingly notes that the "importance of question wording was underlined the following year when a proposition to 'end the use of affirmative action for women and minorities' was defeated by voters in Houston, Texas." *Id.* at 40.

156. *See* Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *33-34 (E.D. Mich. Aug. 29, 2006).

157. 486 U.S. 414 (1988).

herently involving "both the expression of a desire for political change and a discussion of the merits of the proposed change."[158] As Justice Stevens wrote in his majority opinion:

> [W]hile a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate.[159]

Though the court in *Meyer* did not find evidence of fraud in the signature-gathering process at issue in the case, and characterized the risk of fraud as "more remote at the petition stage . . . than at the time of balloting,"[160] Stevens's opinion ultimately equates the importance of the process of gathering signatures for an initiative with the action of voters deciding to support or reject the initiative, holding that both stages entail "interactive communication concerning political change that is appropriately described as 'core political speech.'"[161]

It is also worth adding a dose of context that, where present, could exacerbate the aforementioned problems. In the context of signature gathering for a ballot initiative, voters typically rely on petition circulators as campaign representatives, and expect them to be truthful about the impact and purpose of the petition.[162] Because of the voters' ultimate reliance on the petitioner for information about the initiative petition she is circulating, the government bears some responsibility in protecting voters against fraud and deception and in protecting the overall integrity of the electoral process.[163] There is an even greater need for government protection

158. *Id.* at 421.

159. *Id.*

160. *Id.* at 427.

161. *Id.* at 422; *see also* Ellis, *supra* note 132, at 75-77 (critiquing the *Meyer* Court's reliance on testimony that the signature process involves detailed conversations with registered voters on the merits of the petition and accusing the Court of "ignoring a vast body of evidence suggesting that most encounters bear little resemblance to the one described by [the testimony], particularly when . . . the circulator is pushing multiple, unrelated petitions at once").

162. Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *33 (E.D. Mich. Aug. 29, 2006) (depicting voters approached to sign initiative petitions as being "in a position to reasonably rely on the assurances of the [petition circulator]").

163. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *see also* MCRC REPORT, *supra* note 3, at 12 (emphasizing the importance of balancing "the responsi-

when the fraudulent actions of petition circulators have a disparate impact on a group of voters that has historically endured barriers to political participation.[164] Concern should also be heightened where this group stands to be uniquely impacted by the passage of the proposal.

For example, African American voters were particularly affected by the acts of the MCRI campaign in Michigan. Testimony in federal court revealed that a significant portion of the signatures alleged to be collected fraudulently came from predominantly African American areas.[165] In addition, African American citizens, who also stood to bear a great deal of the impact of the anti-affirmative action proposal, form a group of citizens who have historically and collectively experienced acts of fraud and intimidation in efforts to block their participation in the electoral process.[166] The aforementioned negative effects of fraud are thus felt even more in

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bility of voters to read and understand the content of ballot language when signing a circulator's petition" with the "responsibility of MCRI and its agents to be truthful").

164. *See also* Magleby, *supra* note 144, at 41 (describing efforts to limit the rights of racial minority groups and cautioning that the "issue of checks and balances on direct democracy is most relevant when initiatives target racial or other minority groups").

165. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *22; *see also* Plaintiffs' Motion for Preliminary Injunction, *supra* note 37, at 12 ("The statistical sample . . . [indicates that] the MCRI obtained 15 percent, or 75,000, of its signatures from Detroit—which is now over 81 percent black—and another 10 percent or 50,000 of its signatures from other communities that are from 60 to 99 percent black. The breakdown of those signatures by ZIP code shows that the overwhelming majority came from neighborhoods where white citizens have not lived for years.").

166. For a history of the attempts to use fraud and intimidation to block or otherwise harm the participation of African American voters, see, for example, Gardner, *supra* note 1130, at 234-35 ("There can be no doubt, however, that American, if not human, ingenuity at perpetrating electoral fraud reached its zenith in the post-Civil War south where whites stubbornly and persistently resisted attempts to enfranchise black citizens. The most blatant resistance to black voting was violent: blacks who attempted to vote were threatened, intimidated, harassed and beaten. The luckier ones were paid to stay away from the polls. More commonly, though, blacks were disenfranchised in less obvious or detectable ways. One technique was to cut off black participation in the political process at its inception by simply making blacks ineligible to vote, in direct defiance of the fifteenth amendment. Where blacks were legally eligible to vote, they were frequently refused registration. Election officials developed a variety of methods to avoid registering blacks, including the discriminatory administration of literacy tests and citizenship tests, and the implementation of voter identification requirements. Poll taxes also were used to keep blacks away, and if a black voter was able to pay the poll tax and sought to do so, his offer to pay would simply be refused. When blacks managed to register to vote, their names were merely purged from the lists."). *See generally* Judith Kilpatrick, *(Extra)ordinary Men: African-American Lawyers and Civil Rights in Arkansas Before 1950*, 53 ARK. L. REV. 299 (2000); Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 CHI.-KENT. L. REV 1013 (1995); *see also generally* John Graves, *Negro Disfranchisement in Arkansas*, 26 ARK. HIST. Q. 199, 209-10 (1967).

constituencies under these circumstances, making it more critical for the government to respond appropriately.

III. RESPONDING TO SIGNATURE-GATHERING FRAUD ON THE STATE LEVEL

Any analysis of the reaction of state actors to the allegations of fraud and deception surrounding the Michigan Civil Rights Initiative begins with a focus on the role of state courts and officials charged with the responsibility of responding to such allegations. States serve as the primary protector for the majority of election issues.[167] Though the additional oversight role of the federal courts is relevant and vital,[168] the negative effects of fraud in the signature-gathering process may be limited if states are vigilant about protecting voters, maintain an "elaborate system for weeding out invalid signatures," and prosecute "petitioners who knowingly pad a petition with false signatures."[169]

Any effective institutional response to fraud in the signature-gathering process should include mechanisms that serve to reduce the harmful taint such acts leave on the electorate and the democratic process.[170] That is, the state system should be one that is able to avoid tainted electoral outcomes, alleviate concerns about voters' disenchantment with the initiative system and the de-legitimization of the democratic process, and ensure that initiatives continue to serve their role as a valid direct expression of the electorate's view on a particular issue or policy.

The reaction of state entities in Michigan to allegations of fraud surrounding the 2006 MCRI, however, reveals a system that did not thoroughly and scrupulously check and weed out invalid signatures. As a result, the actions revealed a system that did little to assuage voter disenchantment with the initiative process and may have led to an electoral outcome—in this case an amendment to the state constitution—with questionable legitimacy.

167. *Voting and Democracy*, 119 HARV. L. REV. 1188, 1189 (2006) (describing the state's unique role in election oversight).

168. *See, e.g., id.* at 1200 (describing the importance of judicial intervention in the electoral process, particularly in reviewing partisan-based state administrative decisions, and recommending effective tactics for plaintiffs seeking federal judicial review of state election processes).

169. *See* Ellis, *supra* note 121, at 85.

170. *See supra* notes 137-42 and accompanying text.

A. Evaluating the Signatures: An Inference of Fraud?

The Secretary of State is the chief elections official in the state of Michigan,[171] and under state law is charged with promulgating "standards for petition signatures [which] may include . . . [d]etermining the genuineness of the signature of a circulator or individual signing a petition."[172] The Secretary of State's Election Bureau receives the petition and signatures, reviews their validity, and issues a report to the State Board of Canvassers.[173] The Board of Canvassers, which is charged with investigating and ultimately certifying signatures and placing the petition on the ballot,[174] has the authority to investigate challenged signatures by holding a hearing upon the filing of any relevant complaint.[175]

A threshold question loomed throughout the Michigan process as to whether the Board of Canvassers was required, or even permitted, to consider allegations of fraud in the signature collection phase of the initiative process. To that end, the Director of Elections for the Michigan Secretary of State testified in federal court that "there is no provision of state law addressing statements made by circulators of initiative petitioners to potential signers," and stressed that "to [his] knowledge it is not a crime under Michigan law to misrepresent the purpose of an initiative petition."[176] When the Michigan Attorney General was asked to weigh in on the matter, he issued an informal letter stating that the Board of Canvassers was not permitted under state law to investigate allegations of fraud and deception in the signature collection process.[177]

The Michigan Court of Appeals reinforced the Attorney General's informal statement with an opinion that interpreted a state statute conferring canvassing authority to the Board of Canvassers as "limited to determining whether the form of the petition substantially complies with the statutory requirements and whether

171. MICH. COMP. LAWS § 168.21 (2007) ("The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.").

172. *Id.* § 168.31(2).

173. *Id.* § 168.471.

174. *Id.* § 168.477(1) ("The board of state canvassers shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted.").

175. *Id.* § 168.476(2) ("The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions.").

176. *See* Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *25-26 (E.D. Mich. Aug. 29, 2006).

177. *Id.* at *10.

there are sufficient signatures to warrant certification of the proposal."[178] The court reasoned that the challengers alleging fraud sought an investigation that went beyond a mere examination as to the facial validity of the signatures and the registration status of the signatories. Were the Board of Canvassers to examine "the circumstances by which the signatures were obtained," the court concluded, it would be embarking on an investigation that was "clearly beyond the scope" of its statutory authority.[179] The impact of the court's decision was amplified when the state Attorney General chose not to investigate the allegations of fraud surrounding the MCRI initiative, leaving voters alleging deception without relief or remedy from the state.[180]

The solution here is simple and evident. As the Michigan Court of Appeals seems to suggest,[181] state legislatures should not only

178. Mich. Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139, 144 (Mich. Ct. App. 2005). The Court of Appeals was interpreting Michigan Compiled Laws Section 168.476, which reads:

> (1) Upon receiving notification of the filing of the 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 . . . . 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 board may cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which the petitions were circulated, to determine the authenticity of the signatures or to verify the registrations . . . .
> (2) The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions. To conduct a hearing, the board may issue subpoenas and administer oaths.

MICH. COMP. LAWS § 168.476.

179. *Mich. Civil Rights Initiative*, 708 N.W.2d at 146.

180. MCRC REPORT, *supra* note 3, at 12-13 (concluding that "[i]n the absence of intervention by the Michigan Attorney General or an Order of the Michigan Supreme Court, victims of voter fraud perpetrated by MCRI and/or agents of MCRI in the gathering of ballot signatures lack relief or remedy" while emphasizing that the "Michigan Attorney General enjoys the authority to conduct an investigation into voter fraud involving MCRI and/or agents of MCRI and should conduct such an investigation to preserve the integrity of Michigan's electoral process"); *see also* Letter from Bernstein & Abdrabboh, *supra* note 43, at 2 ("If the Secretary of State lacks jurisdiction and the Board of Canvassers has been restricted from exercising authority by the courts, then where do aggrieved citizens turn for relief?").

181. *Mich. Civil Rights Initiative*, 708 N.W.2d at 146 ("Because the Legislature failed to provide the Board with authority to investigate and determine whether fraudulent representations were made by the circulators of an initiative petition, we hold that the board has no statutory authority to conduct such an investigation.").

empower, but require, the relevant election authorities in their state (in Michigan, the Board of Canvassers) to investigate any substantial and valid voter-initiated allegation of fraud in the signature-gathering process. Such a change not only would bring Michigan in line with other states that permit the investigation of fraud,[182] but also would ensure that relevant state authorities would be able to fully investigate allegations of fraud in the signature-gathering process.

This change to the state law, however, may not be enough to fully promote and protect the integrity and legitimacy of the initiative process. This deficiency was epitomized by the MCRI campaign. Although the allegations of fraud surrounding the MCRI signature gathering process were significant, they were ultimately deemed numerically insufficient to garner meaningful reaction from the Secretary of State.

In Spring 2005, the Secretary of State's office received the challenge from Operation King's Dream,[183] alleging that 325 signatures from the office's sample of 500 (randomly selected to represent the over 508,000 signatures collected) were invalid.[184] The Secretary of State's analysis indicated that at least thirty-five signatures were challenged based on voters claiming themselves that they signed the petition believing it was in support of affirmative action,[185] with another thirty-five signatories making identical claims when an OKD volunteer contacted them over the phone.[186] The Secretary of State's office concluded that the challenge was numerically insufficient to render the petition invalid.[187]

It is important to recognize that this sampling analysis and all of the subsequent examinations were based on a mathematical extrapolation of only one tenth of one percent of the over 500,000 signatures collected by the MCRI campaign. The challenges were also collected by a small group of volunteers, who may not even have had access to the resources necessary to adequately investigate all of the five hundred signatures in the sample.[188] The Secretary of

182. *See, e.g.*, OR. CONST. art. IV, § 1b.

183. *See supra* notes 79-100 and accompanying text.

184. *See generally* SOS REVIEW, *supra* note 39.

185. *Id.* at 4.

186. *Id.* at 5.

187. As observed by Chris Thomas, Director of Elections for the Michigan Secretary of State, who later remarked on the challengers: "They just never made their case." Dawson Bell, *Is Ballot Challenge Doomed to Fail: Hearing on Affirmative Action Is Today*, DETROIT FREE PRESS, Jan. 11, 2006, at A1.

188. The criticism levied against the Operation King's Dream challenge—that the volunteers were unable to contact all 500 signatories in the sample—does not take

State's analysis, however, limited their concerns to the numbers.[189] It is of note that, while the Secretary of State's office was not required by law to go beyond this numerical analysis, the office did have the statutory authority to do so.[190]

Were the Secretary of State to decide to exercise this authority and more thoroughly investigate the claims of fraud, she could base her decision to do so on a finding that the allegations of fraud were enough to create an *inference* of fraud that would require a thorough and exacting investigation. In other words, if a group of citizens can show, through the use of affidavits or other sufficient evidence, that a small but significant percentage, perhaps ten percent, of the sample of signatures gathered were obtained by fraudulent means, an *inference of fraud* would be created that would trigger a closer investigation into the signatures. Such an inference was present in the events surrounding the MCRI campaign. The Secretary of State's 2006 review found that, of the random sample of five hundred signatures, at least seventy were gathered by potentially fraudulent means.

Once this inference of fraud is triggered, a closer investigation into allegations of fraud could then be conducted by the relevant authority—in Michigan, either the office of the Secretary of State or the Board of Canvassers. It would entail an examination of all signatures submitted and would require that all signatories be contacted in order to verify that they supported the petition. Such an examination could be conducted over the telephone, or could be as simple as sending a postcard to every valid signatory, asking for the return of the postcard or a phone call to the Secretary of State if one feels their signature was fraudulently gathered and would like it removed from the petition.[191] If *sufficient* fraud is found upon the completed investigation, enough signatures would be invali-

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into account the volunteers' reliance on allegations that for some specific canvassers, all signatures collected by them were invalid because those canvassers had misrepresented the petions (otherwise known as the invalid by implication challenges). *See* SOS REVIEW, *supra* note 39, at 3.

189. *See* Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *25-26 (E.D. Mich. Aug. 29, 2006). The Director of Elections for the Michigan Secretary of State also testified in federal court that his department's review process "does not require any review of the substantive language of the petition . . . but is limited to such issues as type size, warnings, and layout." *Id.* at *25.

190. MICH. COMP. LAWS § 168.31 (2007) ("[T]he secretary of state may promulgate rules establishing uniform standards for state and local nominating, recall, and ballot question petition signatures.").

191. If available and possible, the office could also conduct such a canvassing using the internet or email correspondence.

dated so as to require the Board of Canvassers to reject the entire petition. If *significant* fraud is found, even if it invalidates less than the number of signatures required to invalidate the petition, appropriate fines could be levied against the offending initiative campaign that would cover the costs of the elaborate investigation. Such a structure would be analogous to attorney's fees that are often levied on losing parties in lawsuits.

The ultimate result of such a detailed investigative procedure would ensure that allegations of fraud in the signature-gathering process are fully examined by relevant state authorities, increasing the legitimacy and integrity of the initiative system. By ensuring that initiative petitions accurately reflect the will of a sufficient number of the electorate, this reform would also promote electoral outcomes that justify the role of the ballot initiative as a direct expression of the electorate's view. And perhaps most important, the ultimate result would be a boost in voters' faith in the initiative system.

B. Collecting the Signatures: Reducing Fraud by Eliminating Fee-Per-Signature Policies

Apart from post-fraud remedies, such as criminalizing the act of fraud, state legislatures have primarily sought to enact legislation aimed at reducing fraud by eliminating a significant incentive for petition circulators to commit fraud: money.[192] There is some consensus among scholars, practitioners, and even some courts that the practice of paying canvassers based on the number of signatures they collect is directly linked to high levels of fraud in the signature-gathering process.[193] In 1988, the U.S. Supreme Court ruled in *Meyer* that legislation broadly banning all paid initiative canvassers is an unconstitutional infringement on the First Amendment rights of individuals seeking to change law via the initiative process,[194] in part because there was no evidence that the mere action

192. *See generally, e.g.*, Johnson v. Richards, 226 P. 559 (Okla. 1924); W.A. Schnader, *Proper Safeguards for the Initiative and Referendum Petition*, 10 AM. POL. SCI. REV. 515 (1916).

193. *See, e.g.*, Ellis, *supra* note 131, at 37 ("Gathering signatures has increasingly become a business . . . [in which] the great majority of those people behind petition tables are not idealistic volunteers but are instead interested mercenaries, bounty hunters, paid by the signature, and largely indifferent to the substance of the petition. Many would be as gratified to have you sign a petition that called for a raise in taxes as they would be to get your signature on a petition seeking a reduction in taxes. And they would be happier still if you signed both petitions, and perhaps another two or three or five while you are at it.").

194. Meyer v. Grant, 486 U.S. 414, 422-24 (1988).

of campaigns paying petition circulators was causally linked to those circulators fraudulently inducing registered voters to sign their petitions.[195] Recent court decisions in the Second, Eighth, and Ninth Circuits, however, have indicated some limited restrictions on the payment of signature gatherers might survive constitutional scrutiny if the restrictions are specifically tailored to reduce fraud.[196]

After *Meyer*, and in reaction to incidents of fraud similar to those surrounding the MCRI campaign, several states pursued legislation that allowed for the payment of signature gatherers but prohibited campaigns from paying them based on the number of signatures they collected.[197] A handful of district courts subsequently struck down many of these laws, arguing that they were enacted without sufficient evidence of fraud to justify the restriction.[198] The tide changed, however, in 2001 when the Court of Ap-

195. *Id.* at 427-28. The Supreme Court also held in *Meyer* that a complete ban on paid circulators restricted the expression of "core political speech" because such a ban limited the number of people who could convey a political message to only those who could volunteer. *Id.* at 422-23.

196. Person v. N.Y. State Bd. of Elections, 467 F.3d 141 (2d Cir. 2006); Prete v. Bradbury, 438 F.3d 949, 969 (9th Cir. 2006); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 618 (8th Cir. 2001).

197. Hoesly, *supra* note 143, at 1216-17 (describing Measure 26, the "Initiative Integrity Act," an initiative endorsed by Oregon voters in 2002 that prohibited petitioners from paying signature gatherers based on the number of signatures they collected); *see also id.* at 1217 ("Oregon progressives have complained that [Measure 26] will effectively end grassroots efforts by raising the cost of placing initiatives on the ballot and thus limiting access to direct democracy to corporations and unions. Further, the secretary of state has interpreted Measure 26 to ban only payment per signature, but not termination of unproductive signature gatherers, minimum signature requirements, hourly wages or salaries, or productivity bonuses. Thus, Measure 26 may have more bark than bite."); Jameson & Hosack, *supra* note 134, at 449-50 (suggesting limits on payments for signature gathering).

198. *See* Idaho Coal. United for Bears v. Cenarrusa, 234 F. Supp. 2d 1159, 1165 (D. Idaho 2001) (rejecting an Idaho law construed to prohibit the payment of petition circulators per signature based on a lack of evidence of fraud in the signature-gathering process); On Our Terms '97 PAC v. Sec'y of State of Me., 101 F. Supp. 2d 19, 26 (D. Me. 1999) (rejecting Maine's prohibition on paying petition circulators per signature, finding that the prohibition burdened the signature-gathering process, and noting that the defendants of the law provided no evidence "that fraud is more pervasive among circulators paid per signature, or even that fraud in general has been a noteworthy problem in the lengthy history of the Maine initiative and referendum process"); Term Limits Leadership Council v. Clark, 984 F. Supp. 470, 471 (S.D. Miss. 1997) (striking down a Mississippi statute that prohibited paying petition circulators per signature and finding that the "State has failed to present evidence of fraud . . . on account of the per-signature payment of petition circulators"); LIMIT v. Maleng, 874 F. Supp. 1138, 1140 (W.D. Wash. 1994) (rejecting a Washington state ban on paying circulators on a per signature basis as an unconstitutional infringement on freedom of speech under the First Amendment and arguing that defendants of the ban did not

peals for the Eighth Circuit upheld a North Dakota law banning per-signature payments to canvassers, finding the regulation justified as a basis for reducing fraud in the signature-gathering process.[199] In upholding the ban, the court compared specific, though not substantial, evidence of fraud that had occurred in a previous signature campaign,[200] with the complete lack of evidence that "payment by the hour, rather than [per-signature] would in any way burden [an initiative campaign's] ability to collect signatures."[201] The political speech limits that concerned the Supreme Court in *Meyer* were thus not as much of a threat in the narrowly tailored law enacted in North Dakota.

The *Jaeger* decision provided legal justification for voters in Oregon to pass, via ballot initiative, the Initiative Integrity Act ("IIA") the following year.[202] The IIA ended the practice in Oregon of paying petition circulators based on the number of signatures they collected and, as the Ninth Circuit later concluded, was sold to vot-

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produce any evidence to show that paying canvassers per-signature encouraged fraud).

199. *See Jaeger*, 241 F.3d at 617 (noting that unlike the statute at issue in *Meyer*, the North Dakota statute "only regulates the way in which circulators may be paid . . . [and] does not involve the complete prohibition of payment that the Supreme Court ruled unconstitutional"); *see also* Citizens for Tax Reform v. Deters, 462 F. Supp. 2d 827, 836 (S.D. Ohio 2006) (noting that in *Jaeger*, "North Dakota produced evidence concerning an incident in 1994 where 17,000 petition signatures were invalidated and 'a subsequent investigation revealed that payment per signature was an issue'").

200. *Jaeger*, 241 F.3d at 618 ("In 1987, the Legislature passed [the law banning per-signature payments to canvassers] in response to problems that occurred with an initiative that had been placed on the ballot in November 1986. State Representative Linderman stated, in regard to a 1986 signature campaign, that 'students were being paid 25 cents [per]signature. There were reported irregularities—taking names out of the phone book, etc.' The limited legislative history available shows that the legislators were aware of, and contemplated, the bill's effect on the circulation of petitions, but that they were more concerned with the testimony they had heard regarding signature fraud."). The only additional evidence of fraud cited in the opinion is that "in 1994 approximately 17,000 petition signatures were invalidated [and a] subsequent investigation revealed that payment per signature was an issue" in their invalidation. *Id.*

201. *Id.* ("While it may be argued that such assertions may establish an unacceptable burden on signature-gathering where the state cannot offer any evidence demonstrating the need to prohibit commission payments, when the state introduces evidence justifying the ban on commission payments as a necessary means to prevent fraud and abuse (as the state has in this case), initiative sponsors may not rest on bare assertions alone.").

202. *See* OR. CONST. art. IV, § 1b ("It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. Nothing herein prohibits payment for signature gathering which is not based, either directly or indirectly, on the number of signatures obtained."); *see also supra* note 200.

ers as a reform that would specifically reduce "forgery" and "fraud" in the signature-gathering process.[203] In 2005, the Court of Appeals for the Ninth Circuit followed the lead of the Eighth Circuit[204] and upheld the ban because, unlike the law at issue in *Meyer*, the Oregon law did "not completely prohibit the payment of initiative petition circulators."[205] The Ninth Circuit also noted Oregon's "important regulatory interest in preventing fraud and its appearances in the electoral processes,"[206] and cited testimony detailing "reports of interviews of various signature gatherers (paid per signature) who had forged signatures on their petitions; purchased signature sheets filled with signatures . . . ; or participated in 'signature parties' in which multiple petition circulators would gather and sign each others' petitions."[207] The court concluded that the state's interest in reducing such incidents of fraud and deception justified any minimal burden on the political speech rights of the signature gatherers.

One year later, the Court of Appeals for the Second Circuit followed suit. In *Person v. N.Y. State Board of Elections*, the court upheld a New York statute[208] that was applied to prohibit the payment of canvassers based solely on the number of signatures they collected.[209] Like the Eighth and Ninth Circuits, the Second Circuit found the limit on per-signature payments to be a constitutionally permissible method of furthering the "state's interest in preventing fraud in the gathering of signatures."[210]

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203. Prete v. Bradbury, 438 F.3d 949, 969 (9th Cir. 2006) (citing a voter pamphlet in support of Measure 26 that referred to convictions of paid petition circulators "on a variety of forgery, fraud, and identity theft counts" and stating that Measure 26 "would combat such fraud . . . by removing the 'incentive for fraud out of the system' by mandating hourly pay rather than per signature"). *But see* Bill Sizemore, *Measure 26: A Costly Failure for Oregon*, THE OREGONIAN, July 25, 2006, at B5 (alleging that Measure 26 was merely "a ploy by public employee unions to make it more difficult for conservatives to put measures on the ballot").

204. *Prete*, 438 F.3d at 970-71 ("Like *Jaeger*, [the State of Oregon] asserted an important regulatory interest in preventing fraud and forgery in the initiative process . . . [and] supported that interest with evidence that signature gatherers paid per signature actually engage in such fraud and forgery. This court's duty is not to determine whether the state's chosen method for prevention of fraud is the best imaginable.").

205. *Id.* at 962.

206. *Id.* at 969.

207. *Id.*

208. N.Y. ELEC. LAW § 17-122(1) (McKinney 1998).

209. Person v. N.Y. State Bd. of Elections, 467 F.3d 141, 143 (2d Cir. 2006) ("Although [under New York Law] remuneration to canvassers 'may not be contingent on the number of signatures obtained,' they 'may still be paid on a per diem, weekly or other time basis.'").

210. *Id.*

This recent case law suggests that states may, within the boundaries of the U.S. Constitution, enact legislation that restricts the payment of canvassers on a per-signature basis as a means of responding to evidence of fraud in the signature-gathering process. The incidents in Michigan in 2006 suggest that such evidence is indeed available to support the passage of legislation to ban the payment of petition circulators on a per-signature basis as a means of reducing fraud.[211] The canvassers in the MCRI campaign were paid based on the number of signatures they obtained,[212] and a federal district court found that many of the canvassers fraudulently induced individuals to sign their petitions.[213] Other states encountering similar events can follow suit.[214]

It is necessary to emphasize, however, that the allegations of fraud surrounding the MCRI campaign in 2006 were not based on the mere false addition of several individuals' names to petitions. The allegations instead surrounded whether circulators were approaching registered voters in predominantly African American ar-

211. In 2006, the District Court for the Eastern District of Ohio rejected an Ohio statute that banned "fee per signature" compensation, finding that the passage of such legislation was not justified by evidence of fraud. *See* Citizens for Tax Reform v. Deters, 462 F. Supp. 2d 827, 835-36 (S.D. Ohio 2006) (striking down OHIO REV. CODE ANN. § 3599.111 on the grounds that the prohibition of payment to petition circulators on a per-signature or per-volume basis was not supported by sufficient evidence that "the per-signature payment method is such an incentive to fraud that would justify the burden the Statute places on initiative proponents' core political speech rights"). This decision indicates that it is vital for states passing such legislation, particularly nearby Michigan, to support it with a detailed legislative record offering evidence that the per-signature policies provide incentive for fraudulent behavior.

212. Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *27 (E.D. Mich. Aug. 29, 2006).

213. *Id.* at *33.

214. *See generally* COLO. CONST. art. X, § 20(3)(b) ("At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1 (7.5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: "NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE. Except for district voter-approved additions, notices shall include . . . [t]wo summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments."); *In re* Initiative Petition No. 379, State Question No. 726, No. 102-999, 2006 Okla. LEXIS 95 (Okla. Dec. 12, 2006).

eas and representing the MCRI petition as supporting affirmative action, when it actually was a proposal to ban the practice. Though one could surmise that this strategy was pursued in the hopes of increasing the number of signatures gathered in a particular area, it is not clear that the campaign's fee-per-signature payment process was a significant inducement for the circulators to misrepresent the petitions. In addition, the federal court found that some of the MCRI circulators themselves may have falsely believed the petition they were circulating was for an initiative that supported affirmative action.[215] This would indicate that signature gatherers were not necessarily induced to misrepresent the petitions solely in the hopes of receiving more money as more signatures were collected. Nevertheless, in states such as Michigan that have seen fraud occur and maintain little to no regulations on the signature gathering process, eliminating the fee-per-signature practice should be considered as a significant component of any effort aimed at reducing fraud and deception in the petition process.

IV. RESPONDING TO SIGNATURE-GATHERING FRAUD ON THE FEDERAL LEVEL

Courts are uniquely positioned to "serve as a 'referee' [in regulating] state political processes."[216] Political scientist Professor David Magleby refers to the courts as "'traffic cops,'"[217] and even goes so far as to rely on them as "[t]he only institutional checks on the excesses" of the ballot initiative process.[218] Although there ex-

215. *See Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *34-35 ("In this case, some of the circulators of the MCRI petition were themselves led to believe that they were circulating a petition supporting affirmative action. Other circulators obviously knew that the petition opposed affirmative action and deliberately misrepresented the petition's purpose. In either situation, the signers were in a position to reasonably rely on the circulators' misrepresentations.").

216. *Id.* at *3 (noting that the "Court is cognizant of allegations that intervention in the political processes at issue . . . would be an unwarranted exercise of 'judicial activism,'" but calling such accusations "without merit"); *see also* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 443 (1999) (arguing that the constitutional Framers expected the federal courts to serve as "referees" to "protect minorities from the tyranny of the majority").

217. Magleby, *supra* note 143, at 46 (arguing that courts "not only balance competing rights and liberties but are the 'traffic cops' over the procedures and practices of direct legislation," and emphasizing that "[t]heir vital role and independence must be understood and reinforced").

218. *Id.* at 40 ("The proponents of the initiative and popular referendum so distrusted the traditional system of checks and balances that they largely isolated the initiative and popular referendum process from such restraints.").

ists a valid federalism debate over the role of federal courts vis-à-vis state courts in regulating election law issues,[219] there is near universal acceptance of the view that both the state and the federal judicial branches play a necessary role in regulating election-related disputes.

In 2006, Michigan citizens victimized by the alleged misrepresentations of the MCRI campaign were unable to find an adequate remedy from state authorities. It was a failure that the federal district court emphasized when voters subsequently turned to the federal government with their allegations.[220] Lamenting "the indifference exhibited by the state agencies who could have investigated and addressed MCRI's actions but failed to do so,"[221] the federal court declared that, "[w]ith the exception of the Michigan Civil Rights Commission," Michigan "has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud" brought before the state courts, Attorney General, Secretary of State, and the Board of Canvassers.[222]

When state courts and other entities do not intervene to address election fraud against the voter, what protections are federal courts able to provide? Not much, according to the federal court in the Eastern District of Michigan. In presenting their case to the fed-

219. *See, e.g.*, Michelle L. Robertson, *Election Fraud—Winning at All Costs: Election Fraud in the Third Circuit*, 40 VILL. L. REV. 869, 880 (1995) (describing the fragile relationship between state and federal courts in evaluating election disputes and the federal court's power to abstain from some state election disputes). Robertson also addressed the difficulties inherent in seeking federal jurisdiction over these claims:

> Allegations of state election fraud present several difficult issues which a federal court must overcome to properly decide the case. First, the federal court must confront the abstention doctrine. This doctrine requires that federal courts refrain from examining cases that state courts should review. State and local laws prescribe how to conduct their elections and the procedures for challenging those elections. Accordingly, local and state governments should monitor the potential violations of these laws. Second, if the federal court hurdles abstention, the court must find a federal cause of action that provides the plaintiff standing. If a federal cause of action exists, the plaintiff must then prove the election fraud. Finally, if the plaintiff proves election fraud under a federal cause of action, the federal court must select an appropriate remedy. Such remedies range from money damages to a new election.

Id. at 873-74.

220. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *5.

221. *Id.*

222. *Id.* (The district court continued: "If the institutions established by the People of Michigan, including the Michigan Courts, Board of State Canvassers, Secretary of State, Attorney General, and Bureau of Elections, had taken the allegations of voter fraud seriously, then it is quite possible that this case would not have come to federal court.").

eral district court, plaintiffs alleged that the MCRI campaign had violated section 2 of the Voting Rights Act by intentionally misrepresenting the petition to a group of voters who were predominantly African American.[223] The federal district court agreed with the plaintiffs that the MCRI campaign had engaged in documented acts of fraud and deception,[224] but concluded that the fraud affected all Michigan voters, regardless of race.[225]

The district court's application of section 2 was, however, potentially flawed and inadequate.[226] The court found that section 2 of the Voting Rights Act applied to the acts of the petitioners, because the signature-gathering and initiative petition process "is a 'process leading to nomination or election' within the plain language of Section 2."[227] MCRI petition circulators were also covered as state actors, because they "acted as part of the state's political machinery for choosing which issues would be placed on the state's general election ballot."[228] The district court did not, however, apply the totality of the circumstances test typically employed to evaluate claims under section 2, which calls on courts to consider a variety of factors in evaluating whether a neutral election law or procedure violates the provision.[229] Ignoring case law

223. *Id.* at *2.

224. *Id.* at *5.

225. *Id.* at *2. *See generally supra* notes 115-29 and accompanying text.

226. An appeal to the district court decision is pending in the Sixth Circuit Court of Appeals.

227. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *41.

228. *Id.* at *47 (viewing this analysis as consistent with Morse v. Republican Party of Va., 517 U.S. 186 (1996), Terry v. Adams, 345 U.S. 461 (1953), Smith v. Allwright, 321 U.S. 649 (1944), and Grovey v. Townsend, 295 U.S. 45 (1935)).

229. S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Judiciary Committee lists several factors courts should consider in evaluating the effect of neutral election laws or procedures, including:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

directing it to apply the totality of the circumstances test,[230] the court instead relied on an opinion from a separate circuit, the Court of Appeals for the Fifth Circuit. In *Welch v. McKenzie*, the Fifth Circuit found numerous "irregularities, errors, and fraud in the distribution and counting of absentee ballots" that "were racially motivated or had the effect of diluting the votes of black voters,"[231] but concluded there was insufficient evidence that the violations affected only African American voters.[232] Because, as in *Welch*, white voters were also affected by the potentially illegal acts, the court in *Operation King's Dream* concluded that there was no section 2 violation.[233]

The district court was correct, however, in emphasizing that the Voting Rights Act, the most significant piece of federal legislation protecting the voting rights of U.S. citizens,[234] is "not a general anti-fraud statute."[235] Without evidence that fraudulent acts were intentionally targeting or had a disparate impact on members of one racial group, it is difficult to successfully challenge widespread election fraud or voter deception in federal court with the Voting Rights Act.[236]

Id. For an application of the totality of circumstances analysis, see Thornburg v. Gingles, 478 U.S. 30 (1986); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).

230. *See generally* Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2005); *Wesley*, 791 F.2d 1255.

231. Welch v. McKenzie, 765 F.2d 1311, 1312 (5th Cir. 1985).

232. *Id.*; *see also* Robertson, *supra* note 219, at 893 (noting that the court in *Welch* "found no violation of the Voting Rights Act even though the state favored a white candidate over a black candidate. The court, focusing on the voters, held that the plaintiffs did not prove 'racial motivation or state-created impairment of black votes'").

233. Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *51 (E.D. Mich. Aug. 29, 2006) ("The Court finds that in this case, as in *Welch*, Plaintiffs have established voter fraud but have not established the inequality of access necessary to establish a violation of the Voting Rights Act.").

234. Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 194-95 (2001) ("Sections 1971 and 1973 are the primary statutes specifically adopted to regulate the election process, a process which has been traditionally left to the states to administer.").

235. *Operation King's Dream*, 2006 U.S. Dist. LEXIS 61323, at *52; *see id.* at *52-53 ("The Act requires a finding of unequal *access*, which in this case required Plaintiffs to show that minority voters could not participate in the electoral process on the same terms and to the same extent as non-minority voters. The evidence in this case shows that minority and non-minority voters participated in the initiative petition process on the same terms. The fact that the terms were fraudulent does not establish a *Section 2* violation.").

236. *See* Lee, *supra* note 234, at 194 (arguing that section 2 of the Voting Rights Act "merely prohibits anyone acting under color of state authority from discriminating against individuals on the basis of race, color or previous condition of servitude. It

In the absence of federal legislation providing a cause of action to directly challenge fraudulent acts in the electoral process, litigants may be able to turn to the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution for a potential cause of action. Under the clause, no state may "deprive any person of life, liberty, or property, without due process of law."[237] As such, a substantive due process claim is available where a state imposes an unfair burden on a citizen's fundamental right to vote or engage in the electoral process, or fails to properly protect voters against attempts to limit the power of their vote, which the state arguably does in failing to provide effective avenues for protecting voters against incidents of fraud in the signature-gathering process.

Such an argument was explicitly articulated by the Court of Appeals for the First Circuit in its 1978 opinion in *Griffin v. Burns*.[238] In evaluating claims that the state improperly instructed voters to cast absentee ballots that the state later invalidated, the court found the state had violated the voters' due process rights and ordered that the state conduct an entirely new election.[239] The First Circuit reasoned that when a state fails to adequately protect its voters, "the election process itself reaches the point of patent and fundamental unfairness, [and] a violation of the due process clause may be indicated."[240] In *Griffin,* as in the case of election fraud in the signature-gathering process, the federal court was "not asked to count and validate ballots and enter into the details of the administration of the election," but rather was "confronted with an officially-sponsored election procedure which, in its basic aspect,

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does not address fraud . . . [and] is a limited remedy, in that it protects against discrimination in the area of qualifying voters on the basis of race only").

237. U.S. CONST. amend. XIV, § 1. *See, e.g.*, Robertson, *supra* note 219, at 888-90 (discussing a potential cause of action under the Due Process Clause for election fraud).

238. 570 F.2d 1065, 1076 (1st Cir. 1978) ("[W]e do not see how an election conducted under these circumstances can be said to be fair. When a group of voters are handed ballots by election officials that, unsuspected by all, are invalid, state law may forbid counting the ballots, but the election itself becomes a flawed process. Given the closeness of the election here, and the fact that the 'right of suffrage is a fundamental matter,' . . . we are unwilling to reject [plaintiff's] claim merely on the fiction that the voters had a duty, at their peril, somehow to foresee the ruling of the [State] Supreme Court invalidating their ballots.").

239. *Id.* at 1078-80.

240. *Id.* at 1077 ("Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.").

was flawed."[241] Such flaws, the First Circuit held, implicated due process because in such a circumstance "the entire election process including . . . the state's administrative and judicial corrective process fails on its face to afford fundamental fairness."[242]

Neither of these above constitutional claims—of equal protection or due process—should be taken as an indication that further federal protections are unnecessary. To create a more significant and consistent federal safeguard, Congress should enact a statute that, for example, prohibits any individual from knowingly deceiving any other person with regards to their ability to vote or the implication of their participation in any part of the electoral process.[243] The additional creation of a private cause of action in such a provision would ensure that voters unable to find protection from election fraud via state processes, as occurred in Michigan in 2006, could seek such protection in federal court. Congressional authority to enact such legislation would be based upon its authority to regulate the electoral process to further the government interest in reducing fraud or the appearance of fraud under Article I, Section 4 of the U.S. Constitution.[244]

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241. *Id.* at 1078.

242. *Id.* Additional remedies for either the due process or the equal protection claim are available under section 1983 of the Civil Rights Act, which states that no person "under color of any statute, ordinance, regulation, custom, or usage, of any State" may deprive another citizen of any constitutional rights. 42 U.S.C. § 1983 (1996). *See also* Lee, *supra* note 233, at 197 (describing the application of section 1983 to election violations and cautioning that "Section 1983 does not provide a substantive right. Instead, it provides a vehicle for the enforcement of a constitutional right, privilege or immunity . . . . The courts, however, have expressed great reluctance to intercede in election contests and have done so only in the case of pervasive fraud").

243. Various attempts to create anti-fraud statutory protections have been made, but have languished, in the recent past. In 2005, Senator Barack Obama (D-IL) introduced the "Deceptive Practices and Voter Intimidation Prevention Act of 2005," which sought to make it unlawful, among other things, for any individual to "knowingly deceive another person regarding the time, place, or manner" of a federal election, or the "qualifications for or restrictions on voter eligibility for any [federal] election." The bill was re-introduced in 2006, and again in 2007 to a democratically-controlled U.S. Senate. *See* Deceptive Practices and Voter Intimidation Prevention Act, S. 1975, 109th Cong. § 2 (2005).

244. *See* U.S. CONST. art. I, § 4; *see, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003); Buckley v. Valeo, 424 U.S. 1 (1976); Jonathan E. Davis, Comment, *The National Voter Registration Act of 1993: Debunking States' Rights Resistance and the Pretense of Voter Fraud*, 6 TEMP. POL. & CIV. RTS. L. REV. 117, 123-24 (1997) (describing various Supreme Court cases that support congressional authority to legislate anti-fraud legislation in the area of election fraud); Lee, *supra* note 234, at 195 (citing 91 C.J.S. *United States* § 46 (2000)) (arguing "there is no question that Congress has authority to pass legislation to protect elections").

CONCLUSION

What happened in Michigan in 2006—a high profile and controversial initiative to amend the state constitution earning a spot on the state ballot despite findings of fraud and misrepresentation—is a cloud in a larger storm in the world of direct democracy. For one, just a month after voters in Michigan voted to pass his MCRI and amend the state constitution to end affirmative action, Ward Connerly announced that his organization had already selected nine other states as their next potential targets: Arizona, Colorado, Missouri, Nebraska, Nevada, Oregon, South Dakota, Utah, and Wyoming.[245] Voters in those states should be alert to the potential that the campaign will implement tactics similar to those found to have occurred in Michigan, which could result in an amendment to the state constitution that is "stained by well-documented acts of fraud and deception."[246]

But it also goes without saying that Connerly's MCRI campaign was not the first, and it will not be the last, to be accused of engaging in fraud and deception to induce unsuspecting registered voters into endorsing petitions to place their initiatives on the ballot. In the absence of strong state and federal protections for voters victimized by such acts, these methods may continue unabated, causing further damage to the integrity of the direct democracy process. If government officials, state election authorities, clerks, courts, voters, scholars, and other election experts intensify their scrutiny of the signature-gathering process, actively endorsing procedures and regulations that protect voters from trickery and fraud, the trend can be stymied. When that occurs, our country's system of direct democracy, celebrated through the initiative process, will be brought closer to the ideal of being both direct and democratic.

245. Peter Schmidt, *Ward Connerly Names States that May Be His Next Targets for Bans on Affirmative-Action Preferences*, CHRON. HIGHER EDUC., Dec. 14, 2006, *available at* http://chronicle.com/daily/2006/12/2006121401n.htm ("The nine states where [Connerly's organization] has set up exploratory committees to look at putting preference bans on the ballot are Arizona, Colorado, Missouri, Nebraska, Nevada, Oregon, South Dakota, Utah, and Wyoming.").

246. Operation King's Dream v. Connerly, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *5 (E.D. Mich. Aug. 29, 2006).