

September 16, 2021

Submitted by email

Michigan Board of State Canvassers
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MDOS-Canvassers@Michigan.gov

**Re: Objection to Proposed Summary for “Secure MI Vote”
Initiative Petition**

Dear Chair Shinkle, Vice-Chair Matuzak, and Members of the Board of State Canvassers:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) and Attorney Janey J. Lamar write to urge you to reject the proposed summary of purpose for the “Secure MI Vote” initiative petition.¹ The proposed summary, as published on September 2, 2021 on the Board of State Canvassers’ website, is incompatible with MCL 168.482b, which states that such a summary “must consist of a true and impartial statement of the purpose of the proposed amendment or question proposed in language that does not create prejudice for or against the proposed amendment or question.”² We object to the summary’s erroneous suggestion that the measures Secure MI Vote proposes would “protect the right to vote,” “increase participation,” “increase confidence in the conduct of elections,” or “protect election integrity.”³ These claims are neither true nor impartial, and their language appears calibrated to prejudice Michigan voters. At minimum, the proposed summary should be revised, in compliance with Michigan law, by striking these misleading and deceptive phrases.

As discussed in detail below, far from “protect[ing] the right to vote” or “increas[ing] participation,” Secure MI Vote’s proposed measures would burden, abridge, and potentially deny that fundamental right for all Michiganders, and particularly for Black voters. The proposed initiative’s Voter ID measures would impose significant barriers to the franchise, especially for the disproportionately Black and low-income voters who lack access to photo identification or the underlying documents necessary to obtain such identification, forcing more

¹ See Off. of Sec’y of State Jocelyn Benson, Board of State Canvassers, *Announcement - Secure MI Vote Petition Summary 1* (Sept. 2, 2021), [https://www.michigan.gov/documents/sos/Announcement - Secure MI Pet Sum 734507 7.pdf](https://www.michigan.gov/documents/sos/Announcement_-_Secure_MI_Pet_Sum_734507_7.pdf) (including a proposed summary of the initiative petition’s purpose that claims its measures are intended “to protect the right to vote and increase confidence in the conduct of elections by requiring photo identification before casting a ballot, to increase participation by providing free photo identification to anyone needing it to vote, and to protect election integrity by prohibiting special interest funding of elections”) (Page numbers are as they appear in the document.).

² Mich. Comp. Laws § 168.482b(2)(b).

³ *Secure MI Vote Petition Summary*, *supra* note 1, at 1.

Michigan voters to cast provisional ballots that may not be counted.⁴ Its restrictions on how voters may obtain absent-voter ballot applications would impair access to the constitutional right to vote absentee, potentially violating the Michigan Constitution.⁵ And its measures blocking election funding from non-governmental sources would likely prevent local jurisdictions from accessing critical funds they need to conduct secure, fair, accessible, and transparent elections.⁶ Together, these new burdens would infringe on all eligible Michiganders' voting rights, potentially violating the U.S. Constitution, the Michigan Constitution, and Section 2 of the Voting Rights Act of 1965.

Moreover, the summary's claims of "protect[ing] election integrity" or "increas[ing] confidence in the conduct of elections" are unfounded and misleading. Elections in the United States—and particularly in Michigan—are already highly secure.⁷ Indeed, the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency described the 2020 election as "the most secure in American history."⁸ Similarly, a thorough review by the Michigan Senate Oversight Committee "found no evidence of widespread or systematic fraud in Michigan's prosecution of the 2020 election."⁹ The Committee's "clear finding" was that "citizens should be confident the results represent the true results of the ballots cast by the people of Michigan."¹⁰ The measures proposed in Secure MI Vote's initiative petition would contribute nothing to Michigan's already-secure conduct of elections. Instead, by burdening access to the franchise for eligible voters—and by blocking critical funding for

⁴ *Id.* (amending Mich. Comp. Laws § 168.523); *id.* at 2-5 (amending Mich. Comp. Laws §§ 168.759, 168.759a, 168.759b, and 168.761, and adding a new § 168.760A).

⁵ *Id.* at 2 (amending Mich. Comp. Laws § 168.759(1) to forbid election officials "from sending or providing access to an absent voter ballot application for an election to an elector unless that elector has first requested an absent voter ballot application").

⁶ *Id.* at 5 (amending Mich. Comp. Laws § 168.946(1)).

⁷ Jocelyn Benson, *SOS Jocelyn Benson: Michigan knows how to run a secure election*, Detroit Free Press (Oct. 30, 2020), <https://www.freep.com/story/opinion/contributors/2020/10/30/michigan-sos-jocelyn-benson-election-security/6067155002/> (Michigan Secretary of State Jocelyn Benson explaining that "Michigan's elections are among the most secure in the country"); *see also* Off. of Sec'y of State Jocelyn Benson, *Election Security in Michigan*, https://www.michigan.gov/sos/0,4670,7-127-1633_100423---,00.html (last visited Sept. 15, 2020) (collecting resources and information on election security in Michigan).

⁸ U.S. Dep't of Homeland Security, Cybersecurity & Infrastructure Security Agency, *Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees* (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

⁹ Mich. Senate Oversight Comm., *Report on the November 2020 Election in Michigan* 3 (June 2021), https://misenategopcdn.s3.us-east-1.amazonaws.com/99/documents/20210623/SMPO_2020ElectionReport_2.pdf.

¹⁰ *Id.* at 35; *see also id.* ("The Committee strongly recommends citizens use a critical eye and ear toward those who have pushed demonstrably false theories for their own personal gain").

election administration—they would likely reduce participation in the State’s elections and undermine election security, integrity, and confidence.

Thus, it is inaccurate and potentially prejudicial for the Secure MI Vote initiative petition’s summary to suggest that the measures therein proposed would “protect the right to vote,” “increase participation,” “increase confidence in the conduct of elections,” or “protect election integrity.” If implemented, these measures would have the opposite effects. The proposed summary should therefore be rejected and replaced with a true, impartial, and non-prejudicial description of the initiative petition’s contents, as MCL 168.482b requires.

I. The Initiative Petition’s Strict Voter ID Provisions Would Burden the Right to Vote for All Michiganders and Likely Disproportionately Harm Black Voters.

The Secure MI Vote initiative petition would rewrite Michigan’s voter identification requirements to make them far more restrictive.¹¹ It would achieve this result, first, by striking the mitigating provision in existing Michigan law that enables in-person voters to cast a regular ballot if they attest in an affidavit that they are not in possession of photo identification¹²—an option that thousands of Michiganders, including at least one state legislator, have used in past elections.¹³ Second, it would add a new and unnecessary identification requirement to the application process for absent-voter ballots.¹⁴

If these measures are implemented, the only option for voters unable to produce an approved form of photo identification will be to vote with a provisional ballot. However, in Michigan, provisional ballots are far more likely to be rejected than counted. According to the U.S. Election Assistance Commission, 71% of provisional ballots cast by Michigan voters in the 2018 general election were rejected—over three times the rate at which provisional ballots were rejected nationwide.¹⁵ In 2016, the most recent presidential election

¹¹ *Id.* at 2 (deleting the affidavit option in MCL 168.523(2);); *id.* at 2-5 (amending Mich. Comp. Laws §§ 168.759, 168.759a, 168.759b, and 168.761, and adding a new § 168.760A to require identification from absent voters).

¹² *Id.*; see Mich. Sec’y of State, *Affidavit of Voter Not in Possession of Picture Identification*, Michigan.gov (last visited May 25, 2021), https://www.michigan.gov/documents/sos/Affidavit_of_Voter_in_Possession_209344_7.pdf?20130614121635.

¹³ Jonathan Oosting, *GOP targets no-ID ballots to cut fraud. Only 0.2% voted that way in Michigan.*, Bridge Michigan (May 19, 2021), <https://www.bridgemi.com/michigan-government/gop-targets-no-id-ballots-cut-fraud-only-02-voted-way-michigan> (“I have voted at times by filling out an affidavit because I forgot my driver’s license,” [Sen. Ed] McBroom said in 2016. ‘And now I’m going to be told that I have got to find time when my clerk’s at the office because she’s not in the office on most days.’”).

¹⁴ *Secure MI Vote Petition Summary*, *supra* note 1, at 2-5.

¹⁵ U.S. Election Assist Comm’n, *Election Administration and Voting Survey: 2018 Comprehensive Report* 33-34 (June 2019),

for which such data is available, Michigan’s rejection rate for provisional ballots was even higher, at 82%—meaning that four provisional ballots were rejected for every one that was counted.¹⁶

Requiring all in-person or absentee voters to produce photo ID or cast a provisional ballot would needlessly, and severely, burden the right to vote. The affidavit option under Michigan’s current voter ID law for in-person voting is a particularly important safeguard for voters who lack access to any approved form of photo ID and to the underlying documents necessary to obtain such ID. In addition, voting absentee is a constitutional right for all registered Michigan voters and an increasingly important means of accessing the franchise.¹⁷ Imposing a new and unnecessary ID requirement into the process of requesting an absent-voter ballot would inappropriately impair eligible Michiganders’ constitutional right to vote absentee. Nor is there any evidence of fraud related to the affidavit option for in-person voting. A spokesperson for former Secretary of State and current Michigan Senator Ruth Johnson confirmed this point in 2016,¹⁸ and no such evidence has been presented in any more recent election.

Black voters would face particularly severe burdens under the initiative petition’s revised Voter ID procedures. In Michigan, Black voters are six times more likely than white voters to lack photo ID.¹⁹ Many low-income and homeless voters, who in Michigan are disproportionately Black, may also lack access to underlying documentation, such as a birth certificate, which substantially increases the costs and burdens of obtaining even a purportedly “free” photo ID.²⁰ In recent elections, voters in Detroit, where Black residents are 79% of the

https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf (reporting that 70.98% of provisional ballots cast in the 2018 general election in Michigan were rejected, as compared to 20.78% nationwide).

¹⁶ U.S. Election Assistance Comm’n, *The Election Administration and Voting Survey: 2016 Comprehensive Report* 27, 29 (2017), https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf (82.13% of provisional ballots cast in the 2016 general election in Michigan were rejected, as compared to 25.02% nationwide).

¹⁷ Mich. Const. art. 2, § 4; see Lauren Gibbons, *One big winner in Michigan’s 2020 election cycle: No-reason absentee voting*, MLive.com (Nov. 11, 2020), <https://www.mlive.com/politics/2020/11/one-big-winner-in-michigans-2020-election-cycle-no-reason-absentee-voting.html>.

¹⁸ Jonathan Oosting, *Strict voter ID law approved in Michigan House*, Detroit News (Dec. 7, 2016), <https://www.detroitnews.com/story/news/local/2016/12/07/strict-voter-law-approved-michigan-house/95127394/> (“We are not aware of fraud related to the affidavit’ option, said Fred Woodhams, a spokesman for Republican Secretary of State Ruth Johnson . . .”).

¹⁹ Phoebe Henninger, et al., *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws* 13 (Sept. 29, 2020), https://scholar.harvard.edu/files/morse/files/mich_voter_id.pdf.

²⁰ See Joel Kurth & Ted Roelofs, *Poor in Michigan with no ID. “I am somebody. I just can’t prove it.”*, Bridge Michigan (Sept. 26, 2017), <https://www.bridgemi.com/urban-affairs/poor-michigan-no-id-i-am-somebody-i-just-cant-prove-it>.

population,²¹ have signed a disproportionate number of affidavits attesting to a lack of photo ID.²² Thus, as one recent study found, implementing a strict voter ID law in Michigan that “requir[ed] people to have access to ID in order to vote will have a disparate racial impact.”²³ These disenfranchising effects would fall hardest on Black voters, the study shows, who “are particularly likely to lack access to ID.”²⁴

II. The Initiative Petition Would Impede Effectuation of the Michigan Constitution’s Right to Vote an Absent-Voter Ballot.

Secure MI Vote’s initiative petition would also prohibit the Michigan Secretary of State, county, city, or town clerks, and “all persons employed by the State or a political subdivision” from “sending or providing an absent voter ballot application to an elector unless that elector has first requested [such an application].”²⁵ These restrictions on how a Michigan voter may receive or gain access to an absent-voter ballot application raise concerns under Article 2, § 4 of the Michigan Constitution. This provision, ratified by a supermajority of voters in 2018, guarantees to all registered Michiganders a constitutional right “to vote an absent voter ballot without giving a reason,”²⁶ and requires that the provision’s text “be liberally construed in favor of voters’ rights in order to effectuate its purposes.”²⁷ As the Michigan Court of Appeals held last year, affirmatively providing absent-voter applications to registered Michigan voters is consistent with the Secretary of State’s “constitutional obligation” to effectuate Article 2, § 4’s purposes.²⁸

By prohibiting public officials or employees from “providing access to an absent voter ballot” before a voter has requested one,” the initiative would increase the burdens involved in obtaining an absent-voter ballot for voters.

²¹ Julia Mack & Scott Levin, *See list of Michigan cities with most African American residents, and geographic shifts since 1970*, MLive.com (June 23, 2020), <https://www.mlive.com/public-interest/2020/06/see-list-of-michigan-cities-with-most-african-american-residents-and-geographic-shifts-since-1970.html>.

²² Oosting, *GOP targets no-ID ballots*, *supra* note 18 (reporting that approximately “1 in 4” of the 11,417 affidavit voters in Michigan in the November 2020 election “were signed in Detroit”); Mike Wilkinson, *Voting without an ID? Not a big problem in most of Michigan*, Bridge Michigan (Dec. 13, 2016), <https://www.bridgemi.com/michigan-government/voting-without-id-not-big-problem-most-michigan> (“By far, the voters most likely not to have ID lived in counties and cities with larger minority populations: 30 percent of all voters statewide without ID voted in Detroit; 39 percent were in Wayne County (which comprises just 17 percent of all active registered voters in the state).”).

²³ Henninger, et al., *supra* note 19, at 3.

²⁴ *Id.* at 15.

²⁵ *Secure MI Vote Petition Summary*, *supra* note 1, at 2 (amending Mich. Comp. Laws § 168.759(1)).

²⁶ Mich. Const. art. 2, § 4(1)(g); see *Davis v. Sec’y of State*, No. 354622, 2020 WL 5552822, at *3 (Mich. Ct. App. Sept. 16, 2020), *appeal denied*, 951 N.W.2d 911 (Mich. 2020).

²⁷ Mich. Const. art. 2, § 4(1).

²⁸ *Davis*, 2020 WL 5552822 at *6.

Such a result would undermine Article 2, § 4’s text and stated purposes. Thus, the initiative petition’s proposed measures appear likely to burden the exercise of Michigan voters’ constitutional rights and impede the performance of election officials’ constitutional obligations.²⁹ Further, because the initiative petition would impose an unnecessary, additional burden on the right to vote, it also raises concerns under the First and Fourteenth Amendments to the United States Constitution and Article 1, § 2 of the Michigan Constitution.³⁰ For these reasons and others, we strongly object to the summary’s misleading claim that the initiative would “protect the right to vote” or “increase participation.” Nor do the initiative’s measures have any connection to election integrity. As discussed above, Michigan’s elections are already conducted securely and with integrity.³¹ The initiative’s proposed changes would only reduce participation and undermine voter confidence.

III. The Initiative Petition Would Deny Critical Election Funding for Under-Resourced and Majority-Black Jurisdictions.

Finally, the Secure MI Vote initiative petition would prohibit the use of election funding from private and federal sources, which may prevent cities and other local jurisdictions from being able to adequately fund their elections. In 2020, private citizens, foundations, and at least 49 sports franchises across the nation volunteered to donate their time, money, resources, expertise, and facilities to support election administration in counties and cities facing the extraordinary challenge of conducting a presidential election during a global pandemic.³² In Michigan, the contributions of civically minded sports teams, as well as these teams’ athletes and employees, helped local election officials avoid polling-place consolidations and provided access to absent-voter drop boxes in majority-Black cities such as Detroit and Flint.³³

²⁹ See Mich. Const. art. 2, § 4; *League of Women Voters of Michigan v. Sec’y of State*, No. 353654, 2020 WL 3980216 at *8 (Mich. Ct. App. 2020).

³⁰ See *Burdick*, 504 U.S. at 434; Mich. Const. art. 1 § 2; *In re Request for Advisory Opinion*, 740 N.W.2d at 463.

³¹ See Mich. Senate Oversight Comm., *supra* note 9, at 35 (“commend[ing] the innumerable clerks, canvassers, staff, workers, and volunteers across Michigan that make the enormous complexity of elections operate so smoothly, so often,” and describing these election workers’ dedication to a complex task as “astounding and worthy of our sincerest appreciation”).

³² See Kenneth P. Vogel, *Short of Money to Run Elections, Local Authorities Turn to Private Funds*, N.Y. Times (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/elections-private-grants-zuckerberg.html>; Nolan D. McCaskill, *Election sites at pro sports venues draw voters — but also pushback*, Politico (Nov. 2, 2020), <https://www.politico.com/news/2020/11/02/sports-venues-election-voting-sites-crowds-432522>.

³³ *Id.* (“Michigan would’ve had to consolidate polling places . . . if not for partnerships with Detroit’s sports teams”); Vince Ellis, *Why the Detroit Pistons are earning praise for voter galvanization efforts*, NBA.com (Sept. 25, 2020), <https://www.nba.com/pistons/features/why-detroit-pistons-are-earning-praise-voter-galvanization-efforts> (describing a drop box

This initiative petition, however, would prohibit local jurisdictions from accepting these commendable forms of assistance. If enacted, it would make it illegal for the State of Michigan, any state “department, agency, commission, or board,” or any “county, city, township, or village” to “accept or use any private funds, in-kind contributions, or other consideration, from any individual or entity, either directly or indirectly, to conduct or administer an election.”³⁴ The initiative’s broadly drafted language applies to “any election related activities”³⁵ and appears to ban, among other things, all volunteer activities and donations and any unremunerated use of private facilities as voting locations or training centers. If a county clerk brought coffee to the office for her colleagues, or an election inspector’s spouse drove her to work, even those benign actions would arguably violate the initiative’s proposed additions to Michigan law.

Concerningly, Secure MI Vote’s initiative petition fails to appropriate any funds to offset the likely loss of resources its implementation would cause for cities such as Detroit and Flint. Denying an essential source of election funding, without doing anything to offset that loss for local jurisdictions, would undermine the secure and transparent conduct of elections, decrease access to the fundamental right to vote, and likely reduce both participation by Michigan voters and voter confidence in election administration. These foreseeable and harmful outcomes further demonstrate the inaccuracy of the summary’s claims.

IV. Potential Violations of Michigan and Federal Law

For these reasons, Secure MI Vote’s proposed initiative will likely produce harmful results and may lead to at least three violations of the United States Constitution, the Michigan Constitution, and the Voting Rights Act of 1965.

First, by abolishing the affidavit option for voters who lack photo identification, Secure MI Vote’s proposed initiative would call into question the constitutionality of Michigan’s voter ID law as a whole. In 2007, the Michigan Supreme Court relied on the existence of “the affidavit alternative” to uphold the statute from challenge under the Michigan and U.S. Constitutions as a

location and voter-education volunteering efforts made possible by the Detroit Pistons); *“True community champions”: Mayor Neeley thanks Kyle Kuzma Foundation and the NBPA Foundation for their generous donation to make every vote count*, City of Flint (Oct. 27, 2020), <https://www.cityofflint.com/2020/10/27/true-community-champions-mayor-neeley-thanks-kyle-kuzma-foundation-and-the-nbpa-foundation-for-their-generous-donation-to-make-every-vote-count-in-flint/> (announcing a donation of \$10,000 from Flint native and NBA Laker Kyle Kuzma and the National Basketball Players Association “to help install and secure additional absentee voter drop boxes throughout the [C]ity” of Flint).

³⁴ *Secure MI Vote Petition Summary*, *supra* note 1, at 5.

³⁵ *Id.*

severe burden on the right to vote or an impermissible poll tax.³⁶ If the affidavit option is removed, Michigan’s voter ID law will likely be subject to renewed challenge on similar grounds—and significant elements of the Court’s 2007 analysis will not apply.

Second, because the initiative petition’s measures may prevent a disproportionate number of Black voters from participating in elections or cause a disproportionate number of Black voters to cast provisional ballots—which are likely to remain uncounted³⁷—the petition may violate the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965,³⁸ which prohibit discriminatory denial or abridgment of the right to vote, a right that “includes the right to have the ballot counted.”³⁹

Third, by burdening all Michiganders’ voting rights and imposing this burden without serving a legitimate state interest, the Secure MI Vote initiative petition may violate the First and Fourteenth Amendments to the United States Constitution and Article 1, § 2 of the Michigan Constitution.⁴⁰

Plainly, proposed changes to the Michigan Election Law that may violate federal and state voting-rights protections and will severely burden access to the franchise, particularly for Black Michiganders, cannot truly or impartially be described as “protect[ing] the right to vote” or “protect[ing] election integrity.”

³⁶ *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 456–57 (Mich. 2007) (holding that Michigan’s voter ID law does not impose a severe burden because “the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being ‘allowed to vote’”); *id.* at 464–65 (holding that the law “is not an unconstitutional poll tax” because “[a] voter who does not otherwise possess adequate photo identification is not required to incur the costs of obtaining photo identification as a condition of voting” and may instead “simply sign an affidavit in the presence of an election inspector”).

³⁷ *See, e.g.*, U.S. Election Assistance Comm’n, *supra* note 15, at 33-34 (reporting that 70.98% of provisional ballots cast by Michigan voters in the 2018 general election were rejected).

³⁸ *See* U.S. Const. amends. XIV, XV; 52 U.S.C. § 10301.

³⁹ *Reynolds v. Sims*, 377 U.S. 533, 555 n. 29 (1964). Under the Voting Rights Act, voting is specifically defined to include: “all action necessary to make a vote effective in any . . . election, including, but not limited to . . . having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.” 52 U.S.C. § 10310(c)(1).

⁴⁰ *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate’ against ‘the precise interest put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); Mich. Const. art. 1 § 2; *In re Request for Advisory Opinion*, 740 N.W.2d at 463 (adopting the *Anderson-Burdick* test for equal-protection challenges to voting laws under Article 1, § 2 of the Michigan Constitution).

* * *

For the foregoing reasons, we urge the Board of Canvassers to reject the proposed summary of purpose for the initiative petition sponsored by Secure MI Vote, and to ensure that any future summary is accurate, impartial, and non-prejudicial, as MCL 168.482b demands. Please feel free to contact Steven Lance at (347) 947-0522 or by email at slance@naacpldf.org with any questions or to discuss these concerns in more detail.

Sincerely,

/s/ Steven Lance

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NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. LDF has been fully separate from the National Association for the Advancement of Colored People (“NAACP”) since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.