State of Michigan
Court of Claims

Committee to Ban Fracking in Michigan
and LuAnne Kozma,
Plaintiffs,

v

Case #:_____
Hon: _____
Filed: _____

Christopher Thomas, Director of Elections;
Ruth Johnson, Secretary of State; and
Board of State Canvassers,
Defendants.
_____/

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Complaint for Injunctive and Declaratory Relief

Introduction

1. This action challenges the constitutionality of the time-limitation in Michigan statute MCL 168.472a ("the 180-day statute") for collecting signatures, as applied to petitions to initiate legislation. In its current form the statute provides:

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

In an amended form which has been passed by the legislature, enrolled by the Senate, and awaits action by the governor, SB 776 would provide:

> The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

Regardless which version of the 180-day statute survives the governor's pen, it violates article 2 section 9 of the 1963 Michigan constitution, under *Wolverine Golf Club v Secretary of State,*[1] regardless that a later case *Consumers Power v Attorney General*[2] upheld it as applied to petitions to amend the constitution under constitution article 12 section 2.

Jurisdiction and parties

2. The court of claims has jurisdiction to award equitable and declaratory relief against state defendants.[3]

3. Plaintiff Committee (CBFM) is a ballot question committee registered with defendants.[4] It is headquartered in Charlevoix, where plaintiff LuAnne Kozma, who directs the campaign, is registered to vote.

4. CBFM is currently engaged in a statutory initiative campaign under article 2 section 9. Like candidates for office, CBFM submits periodic financial reports which are accessible on a state website. As seen in the reports, CBFM is grass-roots-funded, with 900+ different contributors to date, none of them in mega-amounts. Though it solicits endorsements, CBFM is unaffiliated with any existing organization or entity. Volunteer circulators numbering 800+ from 60 counties have collected signatures. The

1 384 Mich 641 (1971).
2 426 Mich 1 (1986).
3 MCL 600.6419(1)(a).
4 MCL 169.201 et seq.

campaign has garnered signers from every county.

5. The campaign seeks a ballot option to ban horizontal hydraulic fracturing (commonly known as "fracking"), frack waste, and the state's longstanding statutory policy of fostering the oil-gas industry and maximizing production. The exact wording is on websites of CBFM and defendants.

6. Defendants are state officials who implement and administer the initiative statutes and regulations. The governor appoints the board of canvassers.[5] The secretary of state appoints and supervises the director of elections, who supervises the bureau of elections.[6]

Constitutional and statutory framework

7. Article 2 section 4 of the constitution requires the legislature to "enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution."[7]

8. Article 2 section 9 covers both referenda and legislative initiatives (also called statutory initiatives). Approved by con-con delegates in 1961-62 and enacted by the voters in 1963, it provides as to statutory initiatives:

> § 9 Initiative and referendum; limitations; appropriations; petitions.
>
> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative.... The power of initiative extends only to laws which the legislature may enact under this constitution. ... To invoke the initiative ..., petitions signed by a number of registered electors, not less than eight

5 MCL 168.22(3).
6 MCL 168.32(1).
7 Emphasis added.

> percent for initiative ... of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> ...
>
> Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature....
>
> If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election....
>
> Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature....
>
> The legislature shall implement the provisions of this section.[8]

Exhibit 1.

9. Implementing statutes under article 2 section 9 are found at MCL 168.471 et seq. Together they provide, in general terms, that an initiating entity asks defendant canvassers to approve the format of a petition, which must contain both a short summary and the exact wording of the proposed statute, including strikeouts of any provisions which will be eliminated. The initiator prints and distributes petitions to circulators who begin collecting signatures on a date chosen at the discretion of the initiator. The circulators get the signature, printed name, street address, voting jurisdiction, zip code, and date of signing from registered voters throughout the state who want to see the

8 Emphasis added.

measure on the ballot. In signing, a signer asserts he/she is a "qualified and registered elector" on the "actual date the signature was affixed."

10. After collecting sufficient signatures, the initiator files the petitions containing them with the defendants.

11. The initiator may file the petitions at any time but in order to get the proposal on the ballot of a particular election, the filing must be by or before a cut-off date 160 days in advance.[9] For the November 2016 election the cut-off date is June 1; for the November 2018 election the date is May 30; for the November 2020 election the date is May 27.

12. Under the 180-day statute's current version, signatures more than 180 days old on the date of filing are subjected to a rebuttable presumption against them. Under the amended version they would be rejected altogether.

13. Defendants canvass the signatures. The term "canvass" is not defined and the method is not specified in the constitution or statutes. But it is "impossible to canvass" in a timely way every one of the hundreds of thousands of signatures on a petition.[10] Accordingly the defendants typically choose a random sample of 500 or more signatures. They test the sample for validity using the "qualified voter file" (QVF).[11] The state established the QVF in 1997.[12] The QVF documents registered voters in the state. Any resident who is in the QVF is officially considered a voter registered in Michigan. For every voter, the QVF includes the date of registration, street address,

9 MCL 168.471.
10 *Taxpayers United for Assessment Cuts v Austin*, 994 F2d 291, 298 (CA6, 1993).
11 MCL 168.476(1).
12 MCL 168.509m et seq.

and other data. A document of defendant secretary, "The Michigan Qualified Voter File: A Brief Introduction," explains the nature of the QVF:

> While the QVF project was originally conceived as a response to the inefficiencies of the state's highly decentralized voter registration system ... the implementation of the National Voter Registration Act (NVRA) [52 USC 20501 et seq, a/k/a the 1993 "motor voter" law] greatly heightened the need for such an initiative. ... [T]he QVF links election officials throughout the state to a fully automated, interactive statewide voter registration database to achieve a wide variety of significant advantages....[13]

14. The testing process determines a validity rate for signatures in the sample, expressed as a percent. This rate is then multiplied by the total signatures filed by the initiator. The product is said to be the number of qualified and registered elector signatures filed. Per article 2 section 9, for both 2016 and 2018 that number will be compared to 252,523, the number which is obtained by taking 8% of the number of those who voted for governor in 2014.

15. If defendants determine the initiator submitted more than 252,523 valid signatures, they certify the measure, at which point the remaining provisions of article 2 section 9 kick in, including consideration by the legislature. The path to the ballot and a vote of the people occurs after the legislature either votes against it or takes no action.

History of the constitutional and statutory framework

16. Michigan's 1908 constitution established initiative only for constitutional amendments. A vote of the people amended it in 1913 to include statutory initiatives.

17. There was little change until 1941 when another amendment gave

13 *http://www.michigan.gov/sos/0,4670,7-127-1633_11976_12001-27157--,00.html*

defendants power to check the names appearing on petitions against the names of registered voters. The same year by PA 246 the legislature enacted the election law. In 1954 it was repealed and re-enacted as our present law by PA 116, except the 1954 act now requires defendants to prepare a 100-word statement to appear on the ballot stating the purpose of a measure which reaches that stage.[14]

18. In 1971 the supreme court decided *Wolverine Golf Club*, cited above. The case involved a statutory initiative about daylight savings time. The court affirmed a lower court which ordered canvassers to accept and canvass statutory initiative petitions, though they were filed less than "10 days before the beginning of a session of the legislature," in violation of MCL 168.472. The statute had stood on the books for 30 years. The reason: article 2 section 9 did not permit the 10-day requirement:

> We do not regard this statute as an implementation of the provision of Const.1963, art. 2, § 9. We read the stricture of that section, "the legislature shall implement the provisions of this section," as a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate. This constitutional procedure is self-executing.
>
> As pointed out by Judge Lesinski in the opinion below ... :
>
> > "It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. [citing cases]: 'The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon.'"
>
> Whether we view the ten day filing requirement in an historical context or as a question of constitutional conflict, the conclusion is the same – the requirement restricts the utilization of the initiative petition and lacks any current reason for so doing.

14 MCL 168.32(2).

> We hold that the petitioners were entitled to file their initiative petitions without regard to the ten day before session requirement....[15]

Exhibit 2.

19. *Woodland v Michigan Citizens Lobby*,[16] said similarly of article 2 section 9:

> [It] is a reservation of legislative authority which serves as a limitation on the powers of the Legislature. This reservation of power is constitutionally protected from government infringement once invoked; once the petition requirements have been complied with, the state may not refuse to act.[17]

20. An example of permissible "supplementary" legislation would be paper-size and type-size requirements for petitions.[18]

21. In 1973 the legislature amended the election law by adding 472a, the 180-day statute, quoted above. The statute applies to both types of initiative, statutory and constitutional. Exhibit 3.

22. In 1974 in OAG 4813, the attorney general (AG) opined the 180-day statute unconstitutional as to both types, with differing reasoning for each type. As to article 2 section 9 the AG wrote:

> This provision has been held to be self-executing [citing *Wolverine Golf Club*]. Although that provision concludes with language to the effect that the legislature should implement the provisions thereof, such language has been given a very limited construction by the Michigan Supreme Court, which held that this provision is merely:
>
> > "... a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate...." ....
>
> I am consequently of the opinion that, as applied to signatures affixed to petitions which initiate legislation … [the 180-day statute] is beyond the legislature's power to implement said section and is therefore unconstitutional and unenforceable.

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15 Emphasis added.
16 423 Mich 188, 215 (1985) (emphasis added).
17 Emphasis added.
18 MCL 168.482.

Exhibit 4.

23. In the ensuing 12 years, initiative petitions, including some with signatures gathered more than 180 days before, were filed with the election bureau, certified by the canvassers, and approved by vote of the people.

24. In 1986 in *Consumers Power*, the supreme court affirmed a judgment of the circuit court which overruled OAG 4813, but only "as applied" to constitutional initiatives under article 12 section 2. The supreme court reasoned:

> Of extreme importance to resolution of the present controversy is focus on the absence of a call for legislative action in [the 1908 constitution] and the clear presence of one in [article 12 section 2] as evidenced in the sentence:
>
> > "Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law."

Exhibit 5.

25. There is no similar call for legislative action in article 2 section 9. Accordingly the decision did not disturb the holding of OAG 4813 that the section was self-executing.

26. In briefing *Consumers Power* in the circuit court, the successful plaintiff utility companies contrasted constitutional and statutory initiatives, arguing that unlike article 12 section 2, the purpose of article 2 section 9 was to "control legislative power" and "curb legislative authority":

> Restrictions by the legislature upon the right to initiate legislation are contrary to the purpose of art 2 § 9. Both art. 2, § 8 and § 9 are direct responses to <u>suspicion of the Legislature</u>.... Article 2, §§ 8 and 9, on the other hand, are <u>antagonistic to legislative authority</u>....[19]

19 Emphasis added.

Exhibit 6, pp 11-12.

27. The plaintiff companies repeated this in oral argument:

> After [the 180-day statute] was enacted the Attorney General in 1974 … issued an opinion [OAG 4813] in response to an inquiry regarding Article 2, Section 9, and declared that Article 2, Section 9, was self-executing, and cited the provisions and the findings and teachings of both the Court of Appeals and the Supreme Court in *Wolverine v Secretary of State*…. The Attorney General was constrained to conclude that Article 2 section 9 was self-executing; and therefore, the attempt to regulate the submission of petitions to initiate legislation, which by statute had to occur 10 days prior to the beginning – or no later that 10 days prior to the beginning of a legislative sessions was unconstitutional.[20]

Exhibit 7, pages 5-6.

28. Expressing no disagreement with the foregoing about article 2 section 9, AG counsel pointed in the oral argument to the practical effect of the 180-day statute, particularly on un-moneyed grass-roots groups such as the plaintiffs in the present case:

> [T]he convention comments, the delegates were concerned about limiting constitutional amendments or limiting the right of initiative to highly organized special interest groups rather than allowing access to this right by broad-based, loosely organized grass roots type organizations. If the circulation period is limited to six months, I would submit that it would effectively remove the right of the people as a broad-based group to go out and, I guess, casually, without a great deal of organization, without a great deal of money, to circulate petitions and come in with an adequate number.

Exhibit 7, page 41.

29. The plaintiffs made no response to the AG's point about grass roots groups except to argue (successfully) the point was irrelevant in an action which (unlike the present case) arises under article 12 section 2.

30. Noting the "silence" of the con-con delegates on the issue whether article 2 section 9 precludes aggregation of signatures collected before and after a gubernatorial

20 Emphasis added.

election, the court of appeals held in a referendum case, *Bingo Coalition for Charity--Not Politics v Board of State Canvassers*, it "does not."[21]

31. In 1999 the legislature enacted a new election law, MCL 168.473b, again curtailing the period within which signatures for a statutory (and constitutional) initiative could be collected:

> Signatures on a petition to propose an amendment to the state constitution of 1963 or a petition to initiate legislation collected prior to a November general election at which a governor is elected shall not be filed after the date of that November general election.

Exhibit 8.

Actions of defendants

32. On August 8, 1986, while *Consumers Power* was on appeal from circuit court but before the supreme court ruled, defendant canvassers adopted a policy for attempting to implement the 180-day statute, and applied it to both constitutional and statutory initiatives.

33. The policy stood without challenge until December 14, 2015, when defendant election director proposed an amendment to the 1986 implementation policy. Exhibit 9. If adopted the amendment would have continued application of the 180-day statute to statutory initiatives, in violation of article 2 section 9, *Wolverine Golf Club*, *Woodland v Michigan Citizens Lobby*, and *Bingo Coalition for Charity--Not Politics v Board of State Canvassers*.

34. By letters of January 8 and 21, 2016, plaintiffs reminded defendants that

21 215 Mich App 405, 408-14 (1996).

Consumers Power did not apply to statutory initiatives, and that *Wolverine Golf Club* continued to bind them as to statutory initiatives. Oil-gas industry opponents of CBFM's initiative were provided copies of the letters and the letters are posted on defendants' website. Exhibits 10 and 11.

35. Plaintiffs testified to defendants to the same effect on March 24. Again CBFM's opponents were present. On this occasion, in response to a specific query about *Wolverine Golf Club* and *Consumers Power*, defendant Thomas admitted the election bureau had been treating petitions under article 2 section 9 the same as petitions under article 12 section 2:

> MR. BOAL: So whatever else you decide, the Attorney General's opinion [OAG 4813] continues to bind you as to statutory initiatives. It was only overturned as to constitutional initiatives [by *Consumers Power*]. I've said this before. I've asked for anybody who disagrees with me to say that they disagree with me, including Chris Thomas, including John Griffin, who is back here representing the oil and gas industry, and no one has come forward with any counter argument to that. So I consider that this stands, you know, unrebutted.
>
> …
>
> MR. THOMAS: I guess I would only say I don't have a case to cite about a legislative initiative. I would say we have applied it to a legislative initiative as we've canvassed petitions ever since the 1986 case. So I guess there is a feeling that if it's good for one, it's good for the other. I don't see anything that specifically would say that if 180 days is good for getting ten percent of the vote, why wouldn't it be good for getting eight percent of the vote? So we have operated under it just so. I take your point. I don't have a case and I don't have anything else. But just so the record's clear, we have operated that way.

Exhibit 12, pages 23-25.

36. On April 22 defendant election director revised his proposal to amend the canvassers' 1986 policy. Exhibit 13. Again, if adopted the revised amendment would

have continued to violate article2 section 9 as to statutory initiatives.

37. Plaintiffs testified to the same effect to the House elections committee on April 27. Again CBFM's opponents were present. Exhibit 14.

38. Though called on publicly on March 24 and April 27, no representative of the defendants or of CBFM's opponents has responded to or attempted to refute plaintiffs' point that *Wolverine Golf Club* continues to bind defendants as to statutory initiatives.

SB 776

39. On March 10 and May 18, 2016, the Senate and then the House passed SB 776, quoted above, and gave it immediate effect. On May 24 the Senate enrolled it and sent it to the governor on May 31. Exhibit 15.

40. As of this date the governor has neither signed nor vetoed the amended version. If he takes no action it will become law.

The CBFM campaign

41. On April 14, 2015, by a 3-0 vote (with member Norman Shinkle abstaining) defendant canvassers approved the format of CBFM's statutory petition. Per their practice, the approval did not extend to the substance of the proposal on the back of the petition, the substance of the summary on the front, or the manner in which the language was affixed. Exhibit 16.

42. On May 22, CBFM began collecting signatures, at first using only

volunteers including plaintiff Kozma, who has herself signed.

43. The 180th day after CBFM's start date was November 18, 2015. As of then it had collected approximately 150,000 signatures. The sum was less than the required 252,523.

44. As of November 18, about 90% of the signatures collected had been brought in by volunteers. About 10% came in through paid circulators, who received $1 a signature (sometimes with a small override for circulator organizers). This was a low rate in the petitioning industry necessitated by CBFM's grassroots finances. The average cost per required signature in 2012 was $5.18; in 2014 it was $2.53.[22]

45. CBFM continued collecting through the winter. As of today it has over 200,000 signatures. Of these, plaintiff Kozma collected 4000+ signatures. The top collectors, Carol Gilchrist and Robert Allen, got 8000+ and 7000+ respectively. The sum is still insufficient and CBFM has not yet filed.

Right to relief

46. Given that over half the required number of signatures are in hand after an approximate one-year period, plaintiffs expect that they will be able to reach the 252,523 goal soon, provided defendants comply with article 2 section 9, *Wolverine Golf Club*, *Woodland v Michigan Citizens Lobby*, and *Bingo Coalition for Charity--Not Politics v Board of State Canvassers*.

22 *https://ballotpedia.org/2012_ballot_measure_petition_signature_costs#Michigan*, *https://ballotpedia.org/2014_ballot_measure_petition_signature_costs#Michigan*.

47. CBFM will be devoting substantial time and resources, including countless volunteer hours, all of which will have been wasted if the rule of article 2 section 9, *Wolverine Golf Club*, *Woodland v Michigan Citizens Lobby*, and *Bingo Coalition for Charity--Not Politics v Board of State Canvassers* is not upheld.

48. Plaintiffs have standing because "petition signers possess a legally protected interest in having their signatures validated, invalidated, empowered, or disregarded according to established law...."[23]

49. The legislature already has a constitutional role in the indirect statutory initiative process, constrained to the following: implementing procedures which do not curtail the people's right to initiative, voting on the proposal in 40 session days adopting or rejecting it; and after a measure passes it can amend the law by a ¾ vote in house and senate.

50. But by "curtailing" the signature collection period both versions of the 180-day statute "restrict the utilization of the initiative petition and lack any current reason for so doing."

51. There is no reason to think that citizen "suspicion" of the legislature, "antagonism" to it, and desire to "control" its power and "curb" its authority have diminished in recent years.

23 *Deeleuw v State Board of Canvassers*, 263 Mich App 497, 505 (2004).

Relief requested

52. Wherefore, plaintiffs ask the court to:

- expedite this matter on the court's docket,
- declare the 180-day statute unconstitutional under article 2 section 9, and unenforceable as applied to statutory initiatives,
- declare all other legislative or administrative restrictions of the length of the signature collection period unconstitutional under article 2 section 9, and unenforceable as applied to statutory initiatives,
- enjoin defendants from applying the 180-day statute or any other statute or administrative rule which restricts the length of the signature collection period for statutory initiatives, and
- grant such other relief as the court thinks just.

Respectfully submitted,

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