State of Michigan
Court of Appeals

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

v

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

Court of Claims Case # 16-000122-MM
Hon Stephen L. Borrello
CA Case # 334480

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Appellants' Opening Brief

Motion to be filed to dispense with all oral argument.
If denied, appellants request oral argument.

Table of Contents

Table of Authorities

I. Introduction and jurisdiction

On June 1, 2016, appellants asked the court of claims for a declaration that MCL 168.472a – which set a 180-day window for collecting and filing signatures for a statutory initiative – violated article 2 section 9 of the Michigan constitution. (Hereafter appellants refer to the statute as "472a" or "the 180-day statute.")

As related in the complaint, on the day it was filed, a bill awaited the governor's signature to amend the 180-day statute.[1] It was unknown at the time whether the governor would sign, but on June 7 he did. The 180-day statute now says:

> 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.[2]

The old version said this:

> 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.[3]

Because the complaint anticipated the possibility that the governor would sign the new version, there was no need for plaintiffs to amend or supplement. The lower court noted that the new version is the one at issue in this case.[4]

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1 2016 PA 142.

2 MCL 168.472a.

3 *http://www.legislature.mi.gov/documents/2015-2016/billengrossed/Senate/htm/2016-SEBH-0776.htm* .

4 Decision p 2, text at n 3. See also defendants' brief in support of motion for

The court of claims had jurisdiction under MCL 600.6419(1)(a) and MCR 2.605(A)(1).

The complaint also sought expedited treatment, which the court accorded. Defendants filed a motion including an attack on the ripeness of the complaint. Plaintiffs filed a response and an affidavit.

On August 8 the court granted summary disposition, holding that plaintiffs "fail to establish an actual controversy to invoke this Court's jurisdiction to grant declaratory relief [under MCR 2.605]."

This timely appeal followed on August 25, 2016. The court has jurisdiction under MCR 7.203(A)(1).

II. Questions presented

A. Whether plaintiff ballot question committee CBFM's constitutional challenge to MCL 168.472a (the "180-day statute"), as applied to signatures collected for a statutory initiative, presents an "actual controversy" thereby rendering it ripe for a declaratory judgment, where:

- defendants under the statute will refuse to count most of the 200,000 signatures which circulators collected last year and early this year, thus forcing CBFM to decide whether to (a) not file the signatures collected during that period and (because of election statutes prohibiting collecting from anyone who signed previously) exclude those signers from future collection efforts, or (b) combine all collected signatures and continue collection efforts,

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summary disposition, p 3.

- the 200,000 signatures collected in an approximate one-year period amount to about 4/5 of the needed number, there is plenty of time before 2018 within which plaintiffs can collect the remaining signatures, their second and third collection efforts in past years have each more-than-doubled the totals of the previous years, and plaintiffs have demonstrated efficient collection practices, and

- CBFM is almost entirely volunteer-driven and a ruling whether (a) it needs only 50,000 more signatures, or (b) has to decline to file most of its existing signatures and begin almost entirely anew collecting from a diminished pool, will have an enormous effect on volunteer morale and budgeting of time and resources?

Appellants say "yes." Appellees and the court of claims say "no."

B. Whether plaintiff Kozma's constitutional challenge to the 180-day statute, as applied to signatures collected for a statutory initiative, presents an "actual controversy" thereby rendering it ripe for a declaratory judgment, where:

- defendants under the statute will refuse to count her personal signature of last February when it is filed, regardless that it is "valid" as defined by MCL 168.476(1), and

- as campaign director under the statute she would advise hundreds of other circulators who would face the dilemma of collecting signatures from voters and putting those in jeopardy who (a) know they signed more than 180 days ago and know that CBFM had announced it would not file uncountable signatures, and (b) believe mistakenly that the announcement meant signing a second time is not an election violation.

Appellants say "yes." Appellees say "no." The court of claims did not rule.

III. Proceedings

All dates are in 2016 except where otherwise indicated.

On June 1, plaintiffs sued seeking a declaration and an injunction.

On June 22 defendants filed for summary disposition, including attacks on plaintiffs' standing, the ripeness of the complaint, and the sufficiency of claims against defendants other than Johnson.

On July 7 plaintiffs responded and filed an affidavit of plaintiff Kozma.

On August 8 the court granted summary disposition.

On August 25 plaintiffs appealed by right.

Appellants' papers below included 20 filed exhibits, numbered 1-21. (Exhibit 17 was marked but not filed in the court.) Exhibit 22 is attached hereto.[5]

IV. Facts

The following facts are taken from the complaint, LuAnne Kozma's affidavit, and plaintiffs' exhibits.

Plaintiff Committee to Ban Fracking in Michigan (CBFM) is a ballot question committee registered with defendants. It was formed in 2012.[6] Plaintiff Kozma directs the campaign from the Charlevoix headquarters.

CBFM is currently engaged in a statutory initiative campaign under article 2 section 9 of the state constitution.

This campaign proposes a ballot question to ban horizontal hydraulic fracturing (commonly known as horizontal “fracking”) and horizontal frack waste, and change the

5 Attachments A, B.
6 Kozma affidavit ¶ 8.

state's longstanding statutory policy of fostering the gas-oil industry favorably and maximizing gas-oil production. The exact language can be found on CBFM's website, and (at this writing) on that of the canvassers.

As seen in state-published financial reports, CBFM is grass-roots-funded, with over 900 different contributors to date, none of them in mega-amounts.

As of the July campaign finance filing, CBFM had spent $94,679.06 so far in the current election cycle.[7] With that money CBFM had collected 207,000 signatures as of June 1. Doing the division, that works out to $ .46 per signature. Historically in 2012-14 in the Michigan petitioning industry, the average cost per required signature ranged from $2.53 to $5.18.[8]

Comparison of the rates of the CBFM campaign and historic campaigns – the comparison is not exact because June and July are a month apart, and "signatures" of the CBFM campaign are being compared to "required signatures" of historic campaigns – suggests the CBFM operation is extremely efficient.

CBFM is unaffiliated with any existing organization or entity. Volunteer circulators numbering over 800 from 60 counties have collected signatures. The campaign has garnered signers from every county. Paid circulators were hired, but they brought in only 10% of the total.

Kozma has personally collected over 5000 signatures.

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7 *http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=515957*

8 Complaint ¶ 44.

"The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking."[9] The court may notice too the obvious fact that

> Volunteer efforts are time-consuming because they often are less well-organized and more often are subject to disruptions when volunteers fail to show up.[10]

Running a campaign involves organization: determination of the initiative language, printing and distributing petitions to dozens of counties, organizing and training hundreds of volunteers, fund-raising from hundreds of donors, choosing the launch date, filing periodic financial reports, researching the law, hiring the paid circulators, hiring a consulting firm and coordinating volunteers to verify in-hand signatures, motivating and monitoring performance of volunteers and paid collectors, and assessing volunteer morale.[11]

Previous to the current campaign, in 2012 CBFM circulated petitions for a constitutional amendment on the same subject, and collected 30,000 signatures in a 180-day period. Then in 2013, it circulated petitions for a statutory amendment on the subject, and collected 70,000 in a 180-day period. Each time, plaintiffs sought and obtained canvasser approval of the petition format.[12]

As to the old version of the 180-day statute, in 1986 the supreme court upheld its

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9 *State v Conifer Enterprises, Inc*, 82 Wash 2d 94, 104 (1973) (Rosellini dissent), quoted with approval, *Meyer v Grant*, 486 US 414, 423 (1988).

10 National Conference of State Legislatures, *http://www.ncsl.org/research/elections-and-campaigns/petition-circulation-periods.aspx* .

11 Kozma affidavit ¶¶ 5, 6, 7, 10, 12, 16, 20, 25.

12 Kozma affidavit, ¶¶ 8-9.

validity as applied to constitutional initiatives.[13] But the same year, defendant canvassers adopted a policy applying it as well to statutory initiatives like CBFM's. On several dates in 2015-16 defendant Thomas asserted that it applied to statutory initiatives. On several dates in 2016 plaintiffs asserted to defendants that as to statutory initiatives it violated article 2 section 9.

Those disputes about the applicability of the old version to statutory initiatives receded when the new version went into law on June 7.

On April 14, 2015, the canvassers approved the format of CBFM's statutory petition. There were changes in the language from the statutory initiative of 2013.[14]

Plaintiffs are satisfied with the present initiative language and have no plans to return to the canvassers for another approval.

Believing that the old version of the 180-day statute did apply to statutory initiatives, CBFM delayed the starting date for a month after canvasser approval to May 22, 2015, to give time for organizing and training volunteer circulators, and to maximize opportunities for collecting during the summer and fall months. Plaintiffs' intention at the time was to get on the 2016 ballot.[15]

By November 18, 2015, the 180th day, CBFM had collected over 150,000 signatures, which was less than the required number. The exact required number is

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13 *Consumers Power v Attorney General,* 426 Mich 1, 8 (1986).
14 Complaint ¶ 41; Kozma affidavit ¶ 12; exhibit 16.
15 Kozma affidavit ¶ 12.

252,523. (For simplicity, this brief rounds the number to 250,000.) CBFM decided to research the constitutional foundations of the 180-day statute. It also decided to continue collecting and save all signatures for eventual filing.

Kozma gave her own signature on February 29, 2016.[16] Under the 180-day statute as now worded, her signature became uncountable on August 25, even though by statute it remains a "valid" signature.[17] Most of the 5000 she collected so far were from 2015 and early 2016, and are also uncountable even though they too remain "valid."[18]

June 1 was the deadline for filing signatures for the 2016 ballot. On that date CBFM had over 207,000 signatures in hand.[19] (For simplicity this brief rounds the figure to 200,000.)

That day CBFM decided again to continue collecting with the same petition sheets, now aiming to make the 2018 ballot. An opinion of the attorney general allows this.[20]

By then CBFM had hired a consulting firm to verify in-hand signatures, and had volunteers review them to remove duplicates and invalids, to get closer to a 100% validity rate.[21]

Given that over half the required number had come in within an approximate one-

16 Exhibit 21.
17 MCL 168.476(1).
18 Kozma affidavit ¶¶ 22-23.
19 Kozma affidavit ¶ 20.
20 OAG 5528, 8/3/79.
21 Kozma affidavit, ¶¶ 16, 20, 25; exhibit 20.

year period, and given that the campaign has twice more-than-doubled the initial 180-day count in 2012, and given (as mentioned above) the efficient way the campaign has been run, it is more likely than not that CBFM will be able to reach the 250,000 goal in time for the 2018 election.[22]

Kozma's affidavit asserts:

> As director, it is my obligation to formulate strategy and allocate resources about the timing and venues for collecting signatures, and then vetting them. A declaration about the constitutionality of the 180-day statute will be a critical factor affecting leadership decisions and volunteer morale. If the statute is not ultimately struck down CBFM will have to discard signatures and expend enormous time and resources starting over again, as unfortunately CBFM did after 2013.[23]

The governor signed 2016 PA 142 on June 7, a few days after plaintiffs filed this suit and announced collection would continue.[24] The new iteration eliminated the potential, allowed by the previous iteration of 472a, for canvassers to count signatures more than 180 days old. In his signing statement the governor said the purpose of the new iteration was to:

> ensure the issues that make the ballot are the ones that matter most to Michiganders.[25]

By contrast, the purpose of the former iteration was to

> fulfill the constitutional directive … that only the registered electors of this state may propose

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22 Kozma affidavit ¶ 24; compare complaint ¶ 31.
23 Kozma affidavit ¶ 25.
24 Exhibit 20.
25 *http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-386394--,00.html*

a measure.[26]

When a court reaches the merits of the complaint, plaintiffs will contend that Michigan precedent requires invalidating the new iteration of the statute, as applied to statutory initiatives under article 2 section 9 of the constitution; and the constitutional section is self-executing so the legislature may not act to impose additional obligations on it.[27]

V. The holding of the court of claims

The court of claims noted the declaratory judgment rule "incorporates the doctrines of standing, ripeness, and mootness."[28] Under the rule there must be an "actual controversy," and an actual controversy exists if a judgment is "necessary to guide a plaintiff's future conduct in order to preserve legal rights."[29]

The court found that plaintiffs had not demonstrated an "actual controversy" because they have not collected and filed the 250,000 signatures. The court added:

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26 *Consumers Power v Attorney General,* 426 Mich 1, 8 (1986).

27 *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 721 (1970), aff'd 384 Mich 461, 465 (1971); *Kuhn v Department of Treasury*, 384 Mich 378, 385 n 10 and accompanying text (1971); *Woodland v Citizens Lobby*, 423 Mich 188, 215 (1985); *Bingo Coalition for Charity – Not Politics v Board of State Canvassers,* 215 Mich App 405, 410 (1996).

28 *UAW v Central Michigan University Trustees*, 295 Mich App 486, 495 (2012).

29 *UAW v Central Michigan University Trustees*, 295 Mich App at 495; *In re Gerald Pollack Trust*, 309 Mich App 125, 154 (2015); *Morales v Parole Board*, 250 Mich App 29, 32 (2003).

> Plaintiffs state their intention to obtain enough signatures for a ballot initiative in the November 2018 election, but their ability to do so is, at most, speculative.

Finally the court held the constitutional challenge is "not ripe" and a court cannot adjudicate "hypothetical or contingent claims before an actual injury has been sustained," citing *Huntington Woods v Detroit.*[30]

VI. Argument

A. The standard of review.

Review of summary disposition is *de novo*.

B. Applicable rules and statutes

MCR 2.605(A)(1): "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

MCL 168.472a: "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."

MCL 168.476(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. *The qualified voter file shall be used to determine the validity of petition signatures by verifying the registration of signers and the genuineness of signatures on petitions when the qualified voter file contains digitized signatures*...."[31]

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30 279 Mich App 603, 615 (2008).

31 Emphasis added.

MCL 168.482(5) (reprinted in plaintiffs' exhibit 21): "A person who knowingly signs this petition more than once … is violating the provisions of the Michigan election law."

MCL 168.482(6): "The remainder of the petition form shall be as provided following the warning to electors signing the petition in section 544c(1)...."

MCL 168.544c(1) (reprinted in plaintiffs' exhibit 21): "The undersigned circulator of the above petition asserts … that he or she has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once.... Warning – A circulator knowingly making a false statement in the above certificate ... is guilty of a misdemeanor."

MCL 600.6419(1)(a): "[T]he court[of claims] has the following power and jurisdiction: (a) To hear and determine any claim or demand, statutory or constitutional, ... or any demand for monetary, equitable, or declaratory relief...."

C. Summary of argument

The court's cited page in *Huntington Woods* relied heavily on *National Wildlife Federation v Cleveland Cliffs Iron Co.*[32] But that case was overruled in *Lansing School Education Association v Lansing Board of Education*.[33] In any event *Huntington Woods* approved a declaratory judgment.

Second, the court's holding – that plaintiffs' "ability" to carry out a mere "intention" to obtain enough signatures is "at most speculative" – ignores the objective facts recited in the complaint and affidavit. In effect, the court considered the ripeness issue only from the point of view of the defendants, and not also from the point of view

32 471 Mich 608 (2004).
33 487 Mich 349, 352 (2010).

of the plaintiffs and their efficient practices. But the US supreme court notes:

> The [ripeness] problem is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision *and* the hardship to the parties of withholding court consideration.[34]

Finally, the court analyzed ripeness only with respect to plaintiff CBFM. It did not analyze ripeness with respect to plaintiff Kozma, both in her personal role as a signer and in her role as director of circulators who solicit voters on the street.

D. An "actual controversy" exists, which establishes standing for CBFM under MCR 2.605(A)(1).

1. In requiring a showing of a past wrong, the court of claims misconstrued the declaratory judgment rule.

The court of claims held the suit isn't ripe for a declaration under MCR 2.605(A)(1) because CBFM sued before it had collected and filed the requisite number of signatures. That is, the court said plaintiffs sued "before" an actual injury had been "sustained."

But in 1986 neither had the Citizens Lobby, the proponents of the constitutional initiative under article 12 section 2 in the leading *Consumers Power* case, filed signatures at the time that suit was filed. The *Consumers Power* complaint merely alleged "upon information and belief" that the Citizens Lobby had announced an *intent*

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34 *Abbot Laboratories v Gardner*, 387 US 136, 149 (1967) (emphasis added).

to file signatures *later.*[35] Yet the parties and the court never concerned themselves whether that claim might have been unripe.

The sixth circuit has aptly summarized several justiciability concepts:

> Although the defendants challenge only the plaintiffs' standing, other concepts of justiciability help to illustrate why the plaintiffs have suffered a cognizable injury. ... (... "[r]ipeness and mootness easily could be seen as the time dimensions of standing"). As the plaintiffs aptly argue, their alleged injury is not moot because it is "capable of repetition, yet evading review." [citing cases] Similarly, the plaintiffs' claim is not unripe, as it "arises in a concrete factual context and concerns a dispute that is likely to come to pass." [citing case] Moreover, the plaintiffs would likely suffer hardship if they must wait to adjudicate this claim. [citing case] If this court were to hold that the plaintiffs can challenge the ballot-ordering statute only after qualifying for ballot access, a court hearing the new case would likely have at most 90 days to consider it.[36]

The court of claims relied on a passage from the pre-*Lansing* 2008 declaratory decision in *Huntington Woods v Detroit.* That passage listed several considerations which in combination traditionally define "judicial power." One of the listed considerations is that there is a "plaintiff who has suffered real harm,"[37] a phrase the court below echoed in its holding here.

Huntington Woods concerned a city's challenge to an adjacent city's proposed sale of golf course property. Defendant raised a ripeness defense. Despite inclusion of past "real harm" in the court's list, it issued a declaration even though no actual sale was

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35 Exhibit 19, complaint for declaratory judgment, *Consumers Power Co v Attorney General,* Ingham County Circuit Court Case # 86-56487-CZ, ¶¶ 18, 20, 26 (6/4/86).

36 *Green Party of Tennessee v Hargett*, 767 F3d 533, 545 n 1 (CA 6, 2014); see also *Libertarian Party of Ohio v Blackwell*, 462 F3d 579, 583-85 (CA6, 2006).

37 279 Mich App at 615 (2008).

imminent. The reason: the defendant was "actively pursuing" one. In effect, the ruling means that mere pursuit of a sale was itself "real harm."[38]

The post-*Lansing* 2012 decision in *UAW v Central Michigan University Trustees* contained a passage not noted by the court of claims. It was an election-related case, concerning a challenge to a university's policy and procedures regarding employees' candidacies for public office. No employee had actually attempted to become a candidate. Yet the court said it could decide the issue and rejected any requirement that there must be a showing of a past real harm:

> However, by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred. The essential requirement of an "actual controversy" under the rule is that the plaintiff pleads and proves facts that demonstrate an "'adverse interest necessitating the sharpening of the issues raised.'"
>
> …
>
> [T]he purpose of a declaratory judgment ... is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter *before it ripens into a violation of the law* … by affording a remedy for declaring in expedient action the rights and obligations of all litigants.
>
> …
> [T]he university employees have a special and substantial interest in ensuring that the CMU officials' policies do not violate their statutory rights under the Act, and that interest is different from any rights or interests of the public at large.[39]

As to plaintiffs' finely-sharpened interest here, they propose the following analogy: Suppose someone is building a three-story house, and has spent money

38 279 Mich App at 616-17.

39 295 Mich App 486, 495-97 (2012) (emphasis in original, footnotes omitted).

breaking ground, putting in the foundation, and erecting beams for the first and second stories. Suppose there is a zoning restriction which disallows the third story in the builder's part of town. Suppose historically there has been an appeal process whereby the builder could seek a variance to allow the third story. Suppose in the middle of construction a new zoning ordinance is enacted eliminating the variance process and limiting the plaintiff absolutely to two stories. Suppose there is a decent non-frivolous basis to claim the new zoning ordinance is invalid. Must the builder wait and finish the first and second stories and be ready to start the third, before filing suit?

The answer is "no." The court of claims acknowledged the present case is ripe if a judgment is "necessary to guide a plaintiff's future conduct in order to preserve legal rights." But by requiring the plaintiffs to collect and file 250,000 signatures before suing the court said, in effect, that a declaration is only necessary to guide future conduct when there is no future conduct left to perform.

Neither the court of claims' opinion nor defendants' brief to the court of claims cited a single initiative case or ballot access case which was dismissed on the ground of unripeness. Nor has plaintiffs' research uncovered such a precedent, in this or any other state or in the federal system.

On the other hand several such cases have rejected ripeness defenses. In the federal system these include *Nader v Keith*[40] and *Blomquist v Thomson*.[41]

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40 385 F3d 729, 736 (CA 7, 2004).

41 739 F2d 525, 527 n 3 (CA10, 1984).

See also the three-judge panel decision affirmed by the supreme court in *Williams v Rhodes.* The panel didn't question the ripeness of the Socialist Labor Party's ballot-access challenge, despite that (as concurring Justice Harlan noted) the SLP "did not even attempt to comply with the statutory command." Even so, the panel granted SLP partial relief, and the supreme court agreed.[42]

In Michigan, ballot access cases rejecting a ripeness defense include *Grebner v State*[43] and *Citizens Protecting Michigan's Constitution v Secretary of State.*[44] Also in a one-paragraph opinion in 2001 our supreme court held in a decision about a referendum (which like a statutory initiative, is enabled by article 2 section 9):

> The issue in this case is whether the referendum sought is with respect to a law [regarding appropriations or state funding, which is excepted from article 2 section 9]. This controversy is ripe for review because it is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance. All of the information necessary to resolve this controversy … is presently available.[45]

(In the *MUCC* case the petition had already been completed and the signatures filed, as a concurring opinion of the court's second review later noted.[46] But the quoted passage is not distinguishable on that basis. In rejecting the ripeness defense, the court didn't even note that signatures had been filed.)

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42 393 US 23, 32, 27-28, 45-46 (1968).
43 480 Mich 939, 942 (2007).
44 280 Mich App 273, 282-83 (2008).
45 *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001).
46 *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 369 (2001).

The court of claims' requirement that plaintiffs file signatures before suing in effect improperly reduces this case to a mandamus case,[47] even though the complaint requests a mere declaration. For declaratory cases, ripeness issues are "prudential in nature" such that "[a]n adjudication of the defendants' claims will serve to prevent defendants' actual injuries or losses before they have occurred."[48] Thus in a zoning case where plans for the structures "had not yet even been finalized," the court declared relief "to resolve questions like the one at issue before the parties change their positions or expend money futilely."[49] More generally:

> An action for a declaratory judgment is typically equitable in nature and subject to different rules than other causes of action. The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people.[50]

So the court of claims applied the wrong standard, and in doing so did not act "liberally" and "prudentially" as it should have, particularly in an initiative case where

> constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed.[51]

In 1971 the supreme court explained the reasoning behind the liberal attitude toward initiative:

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47 Cf MCR 3.305(A), MCL 600.4401.

48 *Michigan Department Of Social Services V Emmanuel Baptist Preschool*, 434 Mich 380, 409-13 (1990) (footnotes and internal quote marks omitted).

49 *Detroit v State*, 262 Mich App 542, 550-51 (2004).

50 *Adair v State*, 486 Mich 468, 490 (2010) (footnotes and quotation marks omitted).

51 *Bingo Coalition for Charity – Not Politics v Board of State Canvassers,* 215 Mich App 405, 410 (1996).

> 'In the last analysis, the people are the fountainhead of law in a democracy, and therefore, it is natural that the legislative article should contain a reservation by the people of the right to make laws directly, through use of the statutory initiative and referendum. The initiative and referendum provisions assure the citizenry of a gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands.' [citing source][52]

Directly apropos to the present case, several delegates to the 1961 constitutional convention were at pains to emphasize the importance of volunteer-driven "genuine citizen" groups – groups like CBFM – which consist of "ordinary people" "who [do not] belong to ... well organized organizations" being able to participate effectively in initiative efforts. Examples of "well organized organizations" included "UAW-CIO," the "Farm Bureau," the "school groups," and "professional organizations."[53] Granted these delegate speeches addressed a proposed change in article 12 section 2 (constitutional initiatives), not its sister section article 2 section 9 (statutory initiatives). But the same grass-roots-friendly sentiment undoubtedly animated delegates alike as to both sections.

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52 *Kuhn v Department of Treasury*, 384 Mich 378, 385 n 10 (1971).

53 Attachment B, plaintiffs' exhibit 22, remarks of delegates Durst, Cushman, Romney, and Norris, 2 Official Record Constitutional Convention 1961, pp 2460-64, reproduced from attorney general 7/15/86 brief to circuit court in *Consumers Power.*

2. The court of claims improperly reduced the objective facts – which show that more likely than not plaintiffs will achieve their goal in time for 2018 – to a mere subjective intention of plaintiffs to reach their goal.

In this as in every other civil case, plaintiffs need only prove their facts by a preponderance. But without discovery or even a hearing the court of claims found as a fact that plaintiffs' "ability" to effect their "intention" to obtain enough signatures is "at most speculative."

In response it must first be said that even if an initiative campaign – unlike this one – were just starting out and had demonstrated no record of diligence and efficiency, it would still be entitled to know in advance whether it had 180 days or unlimited time within which to collect and file. To project and budget, any campaign needs to know at the start what is the time period.

But CBFM's is not just a campaign with a mere "intention" to complete the task. It has distinguished itself objectively: It mobilized 800 people to go out in the weather for tiresome time-consuming work without pay. Twice it has doubled the signature count in successive attempts. In just a year it collected 4/5 of the required 250,000 signatures and verified/vetted most of those in hand, and at this writing it is still more than 1½ years before the 2018 deadline. It allocated limited resources to maximum benefit, spending only $ .46 per signature on average, an amazing record when compared to past initiative campaigns.

In short, CBFM has a determined and efficient character, with the "ability" to

finish the job. As in *Huntington Woods*, CBFM is "actively pursuing" the goal. Applying the preponderance standard to these facts, it is more likely than not that plaintiffs will complete the task in the 1½ years before 2018.

At the same time, a draining effect is at work which affects volunteer morale. That consists of the existence of the 180-day statute itself, and volunteers' dispiriting knowledge that the state apparatus intends to use it to deflect the campaign just when – after years of building – the initiative finally has a chance of success.

If plaintiffs are correct that the 180-day statute is invalid, they should not have to labor under it while they prove the point. They should be allowed to come to court and try to prove it now. That way if they lose on the merits, they can minimize their losses and regroup.

Otherwise stated, the possible uncountability of many or most of plaintiffs' valid signatures is *already* a source of injury in advance of plaintiffs' petition filing.

As Kozma explains, the countability or uncountability of signatures older than 180 days will be a critical factor affecting volunteer morale and her decision as director of what to do. Planning and budgeting mean that decision needs to be made very soon. CBFM has two choices for its "future conduct": (a) keep the 200,000 signatures already in-hand and keep collecting on the chance that the merits of this suit will go in plaintiffs' favor, or (b) not file the collected signatures and intensify collection[54] within a now-

54 Cf *Blomquist v Thomson*, 739 F 2d 525, 527 n 3.

diminished pool on the chance that the merits will go against them.[55]

Defendants invite plaintiffs to pursue option (b) in the diminished pool:

> Alternatively, it is also possible that Plaintiffs may suddenly benefit from a wave of popular support and quickly collect all of the necessary signatures within a six month span of time. That would render the *earlier and outdated* signatures unnecessary to a determination of whether the proposal reaches the ballot.[56]

The reason the pool would be diminished is that, though the "earlier and outdated" signatures would not be used, they would still exist and it would be a violation for the early signers to knowingly sign again.[57] Thus a gigantic reservoir of sympathetic voters – most of the 200,000 – would be disenfranchised, and their voices not heard though their signatures are perfectly "valid" according to statute.[58]

E. An "actual controversy" exists, which establishes standing for Kozma under MCR 2.605(A)(1).

LuAnne Kozma too is a plaintiff. She signed the petition herself on February 29, and collected thousands of signatures of others. But at this writing her signature is now over 180 days old. Though still perfectly "valid," it will not be "counted" under the new 180-day statute if the statute is upheld. Her claim contesting that is actionable today.

Additionally she would face a dilemma if she announced 180-day-old signatures would not be filed due to being uncountable, and directed circulators to return to the

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55 Kozma affidavit ¶ 25.
56 Defendants' brief, p 5 (emphasis added).
57 MCL 168.544c(1) (reprinted in plaintiffs' exhibit 21).
58 MCL 168.476(1).

streets to solicit voters in a new 180-day window with the proviso that a repeat signature is not to be solicited – even if the previous signature were over 180 days old.

Inevitably circulators would encounter voters who signed longer ago than 180 days. Likely some volunteers would garble the instruction, and because of the announcement that old signatures would not be filed, would not realize it is still a violation to knowingly take such voters' repeat signatures.

Even if all 800 circulators did get the message not to take repeat signatures, in most cases they would not know whether a particular prospective signer had signed over 180 days previously. But likely some of the prospective signers would know that they signed the ban-fracking petition previously. Not being active informed volunteers, they could well sign knowingly, believing mistakenly that CBFM's announcement made it legal to sign again.

Though not filed, the previous signatures would still exist. Election violations would ensue over the knowing repeat violations. Circulators and signers could well be looking at Kozma as the cause of it all. She would have reason to fear being drawn individually into separate legal proceedings.

For this additional reason her claim against the 180-day statute is ripe today.

VII. Conclusion

Wherefore appellants ask the court to reverse the court of claims and remand for further proceedings.

Respectfully submitted,

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Dated: September 22, 2016

Certificate of Service

Ellis Boal certifies that on the above date he served the above pleading on the above counsel at the above address, and emailed it to them at *bartond@michigan.gov* , *grille@michigan.gov* , *fracassia@michigan.gov* , and *hoj@michigan.gov* .

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