State of Michigan
Court of Claims

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

v

Case # 16-000122-MM
Hon. Stephen L. Borrello
Filed: 6-1-16

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

Ellis Boal (P10913)
Counsel for Plaintiffs
9330 Woods Road
Charlevoix, MI 49720
231-547-2626
ellisboal@voyager.net

Denise C. Barton (P41535)
Erik A. Grill (P64713)
Adam Fracassi (P79546)
Joseph Y. Ho (P77390)
Counsel for Defendants
Box 30736
Lansing,MI 48909
_____/

Plaintiffs' Opposition to Motion for Summary Disposition

I. Introduction

This suit challenges the constitutionality of the 180-day time-period for collecting ballot initiative signatures ("the 180-day statute")[1] as applied to petitions to initiate legislation.

Such initiatives are called "statutory" or "legislative" initiatives. They are distinguished from "constitutional" initiatives which seek to amend the constitution. Procedures for the two types of initiative "are not interchangeable" and the distinction

1 MCL 168.472a.

"must be respected."[2]

In the form as amended in June a week after this suit was filed,[3] the 180-day statute provides:

> 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.

The suit contends that the statute violates self-executing article 2 section 9 of the constitution, as construed in *Wolverine Golf Club v Secretary of State.*[4] (The suit does not complain on free-speech grounds.[5])

The statute's previous wording was enacted in 1973. The difference between the old and new wording is not material to this suit. That is, had the governor vetoed the new wording in June, the old wording would have been equally vulnerable under article 2 section 9.

The suit seeks a declaratory judgment under MCR 2.605 and an injunction enforcing the declaration. It does not seek mandamus. Defendants are sued only in their official capacities. No damages are sought.

Contrary to defendants, plaintiffs have standing, their claim is ripe, and they sued the right people. The court has subject-matter jurisdiction, plaintiffs have legal suing capacity, and they stated a proper claim.

---

2 *Protect Michigan Constitution v Secretary of State*, 297 Mich App 553, 569 (2012), reversed on other grounds, 492 Mich 860 (2012).

3 2016 PA 142.

4 384 Mich 641 (1971).

5 Compare *American Constitutional Law Foundation v Meyer,* 120 F3d 1092, 1099 (1997), reviewed on other grounds, 525 US 182 (1999).

II. Facts

Defendants do not dispute that well-pleaded factual allegations are accepted as true and construed in the light most favorable to plaintiffs.[6] This response relies on the facts in the complaint and certain facts in the affidavit of plaintiff LuAnne Kozma. Plaintiffs expect defendants will eventually stipulate to all the facts.

According to the complaint, plaintiff Committee to Ban Fracking in Michigan (CBFM) is a ballot question committee registered with defendants. It was formed in 2012.[7] Plaintiff Kozma directs the campaign.

CBFM is currently engaged in a statutory initiative campaign under article 2 section 9 of the state constitution. 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. According to the latest filing, which was in April,[8] it has spent $73,878.78 so far in the current election cycle. The next report is due this month.

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. Kozma has personally collected over 4000 signatures and has signed herself.

The campaign proposes a ballot question 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.

---

6 *Maiden v Rozwood*, 461 Mich 109, 119, 120 (1999).

7 Kozma affidavit ¶ 8.

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

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.

In 1986 defendant canvassers adopted a policy applying the 180-day statute to statutory initiatives.

On March 15, 2015, the canvassers posted a notice on their website which quoted the 180-day statute and asserted without qualification that it applied to any initiative petition (which would include statutory initiatives). The posting is on the stationery of defendant Johnson.[9]

On April 14, 2015, the canvassers approved the format of CBFM's statutory petition.

On May 22, 2015, CBFM began collecting signatures, aiming to get on the 2016 ballot.

Collecting signatures is hard work, particularly for a nearly-all-volunteer committee like CBFM:

> The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tiresome – so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.[10]

---

9 *http://www.michigan.gov/documents/sos/Ini_Ref_Pet_Website_339487_7.pdf*

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

Believing that 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.[11]

By November 18, 2015, the 180th day, CBFM had collected 150,000 signatures, which was less than the required 252,523. CBFM decided to research the constitutional foundations of the 180-day statute. It also decided to continue collecting.

On December 14, 2015, and March 24 and April 22, 2016, defendant Thomas stated his belief that the 180-day statute applies to statutory initiatives.

On January 8 and 21, March 24, and April 27, 2016, plaintiffs asserted to various of the defendants that the 180-day statute violated article 2 section 9.

Kozma's own signature was on February 29, 2016. Under the 180-day statute, her signature will become invalid on August 25. Most of the 4000 she collected so far were from 2015, and are already invalid under the statute.[12]

June 1 was the deadline for filing signatures for the 2016 ballot. On that date CBFM had 207,000 signatures in hand.[13] Given that over half the required number had come in within an approximate one-year period, and given that the campaign has twice more-than-doubled its initial 180-day count of 2012, CBFM expects it will be able to reach the 252,523 goal in plenty of time for the 2018 election.[14]

---

11 Kozma affidavit ¶ 12.
12 Kozma affidavit ¶¶ 22, 23.
13 Kozma affidavit ¶ 20.
14 Kozma affidavit ¶ 24; compare complaint ¶ 31.

III. Argument

A. Plaintiffs have standing

The genesis of the regulatory confusion which necessitates this suit was the supreme court's decision in *Consumers Power v Attorney General*.[15] That decision upheld the 180-day statute only "as applied to petitions to propose a constitutional amendment" under article 12 section 2.[16]

Consumers Power was prompted by a constitutional initiative of the Michigan Citizens Lobby concerning utility rates. The court's opinion accepted the plaintiff utility companies' standing without even noticing standing as an issue, though the complaint alleged only "upon information and belief" that the Citizens Lobby had announced an *intent* to file signatures *later.*[17]

In 2010 Michigan re-established its previous "prudential" standing doctrine which had been in effect until 2001:

> a litigant has standing whenever there is a legal cause of action. Further whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.[18]

---

15 426 Mich 1 (1986).

16 Exhibit 18, declaratory judgment, *Consumers Power Co v Attorney General,* Ingham County Circuit Court Case # 86-56487-CZ (7/18/86).

17 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).

18 *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349, 372 (2010), hereafter "*LSEA*."

So for cases like this one under MCR 2.605, it is only necessary to ask if the complaint reflects "a case of actual controversy."[19] "Actual controversy" is broadly termed to include any case where

> a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights.[20]

Otherwise phrased,

> what is essential to an "actual controversy" under the Declaratory Judgment rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.[21]

Contrary to defendants[22] a claim for declaratory relief "is an independent cause of action":

> Thus, the teacher-plaintiffs seeking enforcement of MCL 380.1311a(1) must meet the requirements for some other cause of action, such as … a declaratory action under MCR 2.605(A)(1).[23]

But even if a declaratory judgment were not considered an independent cause of action, plaintiffs would still have standing by demonstrating their special injury or right or substantial interest – the huge logistical effort of assembling, training, and motivating a volunteer team of hundreds of circulators – which will be detrimentally affected in a manner different from the citizenry at large.

Thus in 2007 the supreme court allowed standing to a private for-profit corporation which lost business as the result of a new election statute. The issue was

19 MCR 2.605(A)(1).
20 *Shavers v Kelley*, 402 Mich 554, 588 (1978).
21 *Shavers v Kelley*, 402 Mich at 589, cited with approval, *LSEA*, 487 Mich at 372 n 20; see also *UAW v Central Michigan University Trustees*, 295 Mich App 486, 495 (2012).
22 Defendants' brief, 6.
23 *LSEA*, 487 Mich at 377 n 26.

whether the statute enacted with a vote of less than two-thirds of the members of each house, and which provided for appropriation of public money or property for private purposes, was constitutional:

> We agree with plaintiffs that there is standing and that the issues are ripe. Plaintiff Practical Political Consulting is a political consulting firm whose business will be directly affected by the fact that, pursuant to [the challenged statute], a part of the market research for the two major political parties will be provided to the parties by the state, and, thus, this plaintiff has standing to challenge [it].[24]

In re-establishing prudential standing, *LSEA* departed from the stricter federal test in which a plaintiff had to show an injury-in-fact, causality, and redressability.[25] But even under the stricter federal test, the seventh circuit holds:

> There would be no question of his [candidate Nader's] standing to seek such relief in advance of the submission or even collection of any petitions.[26]

Similarly the tenth circuit held:

> The State argues that plaintiffs lack standing to challenge the two-county rule because, in view of their inability to gather the required signatures by June 1 of this year, they have not been injured by the requirement they challenge. … We do not believe that plaintiffs must actually gather 8,000 signatures to have standing to challenge the two-county rule because they are clearly adversely affected by the rule from the beginning of their petition drive. To comply with the rule, they must conduct a more expansive campaign over more sparsely populated areas, entailing additional expense and effort. This may in itself hinder plaintiffs' ability to obtain the required number of signatures.[27]

Numerous other circuits hold the same.[28]

---

24 *Grebner v State*, 480 Mich 939, 942 (2007).

25 *LSEA*, 487 Mich at 360 n 7, 362.

26 *Nader v Keith*, 385 F3d 729, 736 (CA 7, 2004).

27 *Blomquist v Thomson*, 739 F2d 525, 527 n 3 (CA10, 1984).

28 *Green Party of Tennessee v Hargett*, 767 F3d 533, 543-44 (CA 6, 2014); *Pérez-Guzmán v Gracia*, 346 F3d 229, 242-43 (CA 1, 2003); *Texas Independent Party v Kirk*, 84 F3d 178, 187 n 9 (CA 5, 1996); *McLain v Meier*, 851 F2d 1045, 1048 (CA 8, 1988).

Defendants argue that a declaratory judgment is not necessary to guide plaintiffs' future conduct, because defendants are not interfering with their petition circulation.[29] Defendants reason as though collection of signatures were an effortless and inexpensive process requiring no organizational forethought. As seen from Kozma's affidavit[30] and Judge Rosellini's above-quoted observation, this is not so. It involves enormous expenditure of time and resources, all of which will go to naught if article 2 section 9 is not upheld.

Again, even during the nine years when Michigan adhered to the federal rule of standing, nothing required

> a plaintiff regulated by a criminal statute to submit evidence of a threat of imminent prosecution in order to establish standing. It is sufficient to establish standing ... that the members of plaintiff business association are directly regulated by the PWA and must conform their pay and benefit practices to that of union contractors on state-funded projects under the statute. [M]embers suffer a concrete, rather than a hypothetical, injury because they either face criminal prosecution for a violation of the statute or must avoid state-funded work entirely. Such evidence establishes the existence of a legally protected interest, causation, and redressability....
>
> Moreover...:
>
> > "A declaratory action is a proper remedy to test the validity of a criminal statute where it affects one in his trade, business or occupation."
>
> To afford a businessman relief in such a situation without having first to be arrested is one of the functions of the declaratory judgment procedure.[31]

---

29 Defendants' brief, p 7.

30 Kozma affidavit ¶¶ 12, 15, 16, 20, 25.

31 *Associated Builders and Contractors v Wilbur*, 472 Mich 117, 127 (2005) [footnotes omitted]

The reference to criminal sanctions is applicable here. By statute and with the approval of defendant canvassers,[32] each CBFM petition sheet told potential signers on the front:

> A person who knowingly signs this petition more than once ... is violating the provisions of the Michigan election law.[33]

On the front of each sheet circulators certify 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....[34]

If today CBFM were to discard the 207,000 signatures and return to the voters and start a new 180-day signature collection period with the same petition sheets, as defendants say would be permissible,[35] a gigantic pool of sympathetic potential signers would have to opt out of the campaign. Those who signed in 2015 or early 2016 would refuse to sign the same sheet again for fear of election law liability. Additionally Kozma and other circulators would risk criminal liability for soliciting re-signers.[36]

In election cases, Michigan courts relax the requirements of standing further than the rule of *LSEA*. In 1987 the court of appeals held:

> "It is generally held, in the absence of a statute to the contrary, that a private person as relator may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public."[37]

---

32 Complaint ¶ 41.
33 MCL 168.482(5).
34 MCL 168.482(6), 544c(1).
35 Defendants' brief, p 5.
36 MCL 168.554c(8)(b), (9).
37 *Helmkamp v Livonia City Council*, 160 Mich App 442, 445 (1987), quoting 26 Am Jur 2d, Elections, Section 367, at 180.

In 2004 the court of appeals held:

> [P]etition signers possess a legally protected interest in having their signatures validated, invalidated, empowered, or disregarded according to established law.... [O]rdinary citizens have standing to enforce the law in election cases.[38]

In 2012 the court of appeals said:

> We reject CFMMJ's challenge to PMC's standing to bring this action. Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. ... The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing to seek mandamus relief.[39]

Defendants' proposed approach to standing would have prevented the US supreme court from striking down the Colorado initiative regulations in *Meyer v Grant,*[40] wherein the initiative sponsors had suspended their circulation drive.

Just as defendants were filing the present motion, the court of appeals said it again: A mere registered voter could seek mandamus to remove names of two candidates from a township primary ballot, because the affidavits of identity filed by the two did not include the precinct number in which they were registered.[41]

In a case like this one, where the constitutional right plaintiffs seek to vindicate[42] was motivated by delegates' "suspicion" of and "antagonism" toward the legislature, and was drafted to "control legislative power" and "curb legislative authority,"[43] a relaxed principle of standing is all the more prime.

---

38 *Deeleuw v State Board of Canvassers*, 263 Mich App 497, 505, 506 (2004); see also complaint ¶ 48.

39 *Protect Michigan Constitution v Secretary of State*, 297 Mich App 553, 566 (2012), reversed on other grounds, 492 Mich 860 (2012).

40 486 US 414, 417 text at n 2 (1988).

41 *Berry v Garrett*, ___ Mich App ___ (2016), docket # 333225 at *6.

42 Constitution article 2 section 9.

43 Complaint ¶¶ 26, 51.

But defendants say the plaintiffs can't challenge the 180-day statute's stifling impact until their injuries reach a maximum scale. However in no suit could such a standard be any more concretely satisfied than here. As seen above, the 180-day statute's constitutionally unresolved validity threatens to vitiate the results of CBFM's' labors and investments, and precludes efforts to mitigate the sweeping exclusion of valid signatures.

B. There is an actual controversy and the claim is ripe.

Ripeness has already been addressed above to some extent, in the quotes from *Grebner v State,*[44] *Nader v Keith*,[45] and *Blomquist v Thomson*.[46]

As seen above plaintiffs have shown an adverse interest and a need to sharpen the issues. And they need guidance for their future conduct and to preserve their rights. Thus the validity or non-validity of signatures older than 180 days will be a critical factor affecting volunteer morale, and Kozma's decision whether to keep the 207,000 signatures and keep collecting, or stop and start over as unfortunately CBFM did after 2013.[47] So there is an "actual controversy."

Defendants contend the suit isn't ripe because plaintiffs, like the Citizens Lobby in *Consumers Power*, hadn't filed signatures as of the date of the complaint.

There can be little doubt that, given the discipline and determination plaintiffs have shown resulting in 207,000 signatures in a one-year period as of June 1, that they

44 480 Mich 939, 942 (2007).
45 385 F3d 729, 736 (CA 7, 2004).
46 739 F2d 525, 527 n 3 (CA10, 1984).
47 Kozma affidavit ¶ 25.

are quite likely to be able to file 252,523 signatures well before the next cut-off date of May 30, 2018,[48] provided article 2 section 9 is upheld.

(Although Plaintiffs' petition drive is well on track to file before the 2018 election, the statute limiting collection to that end-date[49] is likely also unconstitutional under article 2 section 9, given that it suffers from the same flaw as the 180-day statute and MCL 168.472 (the timing statute struck down in *Wolverine Golf Club*.)[50])

Likewise there is little doubt that defendants will try to enforce the 180-day statute against plaintiffs when they file, given defendants are doing just that in the recreational marijuana statutory initiative case presently before this court.[51]

Plaintiffs would not disagree with defendants' reasoning if this were a mandamus case implicating the pinnacle issue of imminent ballot placement or exclusion. But the complaint here merely requests a declaratory judgment, like the one in this zoning case:

> The state also argues that the trial court did not have authority to enter declaratory relief regarding the applicability of local zoning because plans for the structures had not yet even been finalized.... But declaratory relief is designed to give litigants access to courts to preliminarily determine their rights.... Moreover, declaratory relief is designed to resolve questions like the one at issue before the parties change their positions or expend money futilely. [52]

In 1990 our supreme court held:

> Since the state has not disavowed its intent to enforce the regulations as written, a declaratory judgment on the merits of defendants' claims regarding [the challenged rule] is appropriate in this context. ... An adjudication of the

48 Complaint ¶¶ 11, 31.
49 MCL 168.473b.
50 Compare *Bingo Coalition for Charity v Board of State Canvassers*, 215 Mich App 405 (1996).
51 *Michigan Comprehensive Cannabis Law Reform Committee a/k/a MiLegalize v Johnson*, court of claims docket # 16-131-MM.
52 *Detroit v State*, 262 Mich App 542, 550-51 (2004).

> defendants' claims will serve to prevent defendants' actual injuries or losses before they have occurred. ... The opportunity for an adjudication of constitutional rights in a judicial forum ... must remain available where there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment ... The ripeness issue we have addressed ... is prudential in nature. ... Thus, a proper ripeness analysis must balance the need for further factual development, combined with any uncertainty as to whether defendants will actually suffer future injury, with the potential hardship of denying anticipatory relief. ... First, the declaratory judgment procedure has allowed the issues to become sharpened so as to make them fit for judicial resolution.... Second, the hardship that would result from not deciding the case is a severe one.[53]

In 2010 the supreme court said:

> 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. We have also consistently held that a court is not precluded from reaching issues before actual injuries or losses have occurred."[54]

In a one-paragraph opinion in 2001 our supreme court held in a decision about a referendum (like statutory initiatives, referenda are 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.[55]

Particularly illustrative of defendants' failure to differentiate between forms of relief is their proclamation that the rule set forth in *Citizens Protecting Michigan's*

---

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

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

55 *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001).

Constitution v Secretary of State,[56] governs ripeness in "the context of ballot proposals."[57] All that *Citizens Protecting* actually provides is the basis for determining when a writ of mandamus can be sought to order the canvassers to reject an unconstitutional initiative petition prior to the its completing a sufficiency determination.[58] The court did not discuss declaratory judgments. It held a request for an immediate mandamus order was ripe because the constitutional initiative at issue amounted to a general constitutional revision.[59]

Finally, defendants fail to take into account that the possible invalidity of many or most of plaintiffs' signatures is *already* a source of immediate injury in advance of plaintiffs' petition filing. It will only be an ever greater source of injury if they are compelled to await the full completion of their petition before obtaining a declaratory judgment.

C. Plaintiffs sued the right defendants

Defendants ask that defendants Thomas and the canvasser board (but not Johnson) be dismissed, arguing that there is no indication of anything they did which would support a claim against them.[60]

The complaint notes specific acts only of the chief on-the-ground enforcers

---

56 280 Mich App 273, 282-83 (2008).
57 Defendants' brief, p 5.
58 280 Mich App at 282-91.
59 280 Mich App at 288.
60 Defendants' brief, p 8.

Thomas[61] and the governor-appointed canvasser board[62] in implementing the 180-day statute. But Johnson too is implicated by the fact she supervises Thomas.[63] They are the ones who used the 180-day statute against the recreational marijuana initiative on June 7 and 9.[64] Even had they committed no wrong acts in the past, they can be enjoined as to future conduct.

IV. Conclusion

Plaintiffs ask the court to deny the motion.

Respectfully submitted,

Ellis Boal (P10913)
Counsel for Plaintiffs
9330 Woods Road
Charlevoix, MI 49720
231-547-2626
ellisboal@voyager.net

Matthew Erard, legal assistant
mserard@gmail.com

Dated: July 7, 2016

61 Complaint ¶¶ 33, 35, 36.
62 Complaint ¶ 32.
63 Complaint ¶ 6; see also MCL 168.31(2) and 32(1).
64 *http://michigan.gov/documents/sos/Staff_Report_-_Cannabis_Law_Reform_526211_7.pdf*, *http://michigan.gov/documents/sos/060916_Mtg_Minutes_526619_7.pdf*.

Certificate of Service

Ellis Boal certifies that on the above date he served the above pleading, the affidavit of LuAnne Kozma, and exhibits 18-21, to 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* .

Ellis Boal