STATE OF MICHIGAN
IN THE SUPREME COURT

COMMITTEE TO BAN FRACKING IN MICHIGAN and LUANNE KOZMA,

Plaintiffs-Appellants,

v

DIRECTOR OF ELECTIONS, SECRETARY OF STATE, and BOARD OF STATE CANVASSERS,

Defendants-Appellees.
_____/

Court of Appeals No. 334480

Court of Claims
LC No. 16-000122-MM

APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Public Acts

Court Rules

Other Authorities

STATEMENT OF ORDER APPEALED FROM AND GROUNDS FOR APPEAL

On August 25, 2016, Plaintiffs-Appellants appealed the August 8, 2016 order of the Court of Claims granting summary disposition to Defendants-Appellants under MCR 2.116(c)(8).[1] On March 15, 2017, the Court of Appeals entered an order affirming the lower court.[2]

On April 4, 2017, Plaintiffs-Appellants timely moved for reconsideration of the Court of Appeals' decision. On April 26, 2017, the Court of Appeals denied reconsideration.[3]

In accordance with MCR 7.305(B), Plaintiffs-Appellants assert the following grounds for appeal:

1. The issue involves a substantial question about the validity of a legislative act: MCL 168.472a.

2. The issue has significant public interest and the case is against a state agency and officers of the state in their official capacities: Board of State Canvassers, Director of Elections, and Secretary of State.

3. The issue involves a legal principle of major significance to the state's jurisprudence: Whether pre-enforcement challenges to the validity of state statutes, brought under MCR 2.605, can be justiciable.

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[1] Appendix A.
[2] Appendix B.
[3] Appendix C.

4. The underlying Court of Appeals decision is clearly erroneous and will cause material injustice.

5. The underlying Court of Appeals decision conflicts with Supreme Court decisions and other decisions of the Court of Appeals: *Wolverine Golf Club v Secretary of State*[4] and *UAW v Central Michigan University Board of Trustees*,[5] among others cited in the Argument section below.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a pre-enforcement challenge to the constitutional validity of MCL 168.472a's application to statutory initiative petitions can give rise to an 'actual controversy' where Plaintiffs-Appellants have collected over 200,000 petition signatures which are subject to certain rejection by the statute's terms, and Plaintiffs will confront tremendous risk and loss if compelled to file their petition ahead of obtaining declaratory relief.

Plaintiffs-Appellants Answer: **YES**

2. Whether the Court of Appeals erroneously failed to construe MCL 168.472a as an immediately applicable regulation on the petition-circulation process.

Plaintiffs-Appellants Answer: **YES**

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4 384 Mich 461; 185 NW2d 392 (1971).

5 295 Mich App 486815 NW2d 132 (2012).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On June 1, 2016, Plaintiffs-Appellants CBFM and LuAnne Kozma ("Plaintiffs") 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 – violates Const 1963, art 2, § 9. The Court of Claims had jurisdiction under MCL 600.6419(1)(a) and MCR 2.605(A)(1).

As related in the Complaint, on the day it was filed, a bill awaited the Governor's signature to amend MCL 168.472a.[6] It was unknown at the time whether the Governor would sign it, but on June 7, 2016, he did so. MCL 168.472a now states:

> 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.[7]

The preceding version of that section stated:

> 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.[8]

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6 2016 PA 142.
7 MCL 168.472a
8 MCLA 168.472a (old version) (West 2015).

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 Court of Claims observed that the new version is the one at issue in this case.[9]

On August 8, 2016, the Court of Claims granted summary disposition to Defendants-Appellants under MCR 2.116(c)(8), holding that Plaintiffs "fail to establish an actual controversy to invoke this Court's jurisdiction to grant declaratory relief [under MCR 2.605]. … [P]laintiffs' challenge … is not ripe for consideration." On August 25, 2016, Plaintiffs appealed the Court of Claims order to the Court of Appeals, which subsequently affirmed the lower Court on March 15, 2017, holding "no actual controversy ripe for declaratory relief exists." The Court denied reconsideration on April 26, 2017.

The following facts are taken from the Complaint and Plaintiff LuAnne Kozma's affidavit.

Plaintiff Committee to Ban Fracking in Michigan (CBFM) is a ballot question committee registered with Defendants-Appellees ("Defendants"). It was formed in 2012.[10] Plaintiff Kozma directs the campaign from its Charlevoix headquarters.

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9 Court of Claims Order at 2 n 3; see also Def's Brief in Support of Motion for Summary Disposition at 3.

10 Kozma affidavit ¶ 8

CBFM is currently engaged in a statutory initiative campaign under Const 1963, art 2, § 9. This campaign proposes a ballot question to ban horizontal hydraulic fracturing (commonly known as horizontal "fracking") and horizontal frack waste, and change the 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.[11]

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 Michigan county. CBFM is volunteer-driven. Paid circulators were hired, but they brought in only 10% of the total. Kozma has personally collected over 5000 signatures. As of its July 2016 campaign finance report, CBFM had spent $94,679.06 in the contemporaneous election cycle.[12] 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.[13]

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11 Committee to Ban Fracking in Michigan, *Ballot Language* <http://letsbanfracking.org/ballot_language> (accessed June 5, 2017)

12 Committee to Ban Fracking in Michigan, *July Quarterly CS(e)* <http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=515957> (accessed June 5, 2017)

13 Complaint ¶ 44.

"The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking."[14] And "[v]olunteer efforts are time-consuming because they often are less well-organized and more often are subject to disruptions when volunteers fail to show up."[15] 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.[16]

Prior 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

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14 *Meyer v Grant*, 486 US 414, 423; 108 S. Ct 1886; 100 L Ed 2d 425 (1988).

15 National Conference of State Legislatures, *Petition Circulation Periods* <http://ncsl.org/research/elections-and-campaigns/petition-circulation-periods.aspx> (accessed June 5, 2017).

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

period. Each time, Plaintiffs sought and obtained canvasser approval of the petition format.[17]

As to the old version of MCL 168.472a, this Court upheld its validity as applied to constitutional initiatives in 1986.[18] But that same year, Defendant Board of State Canvassers adopted a policy of additionally applying it to statutory initiatives like of that of CBFM. On several dates in 2015-16 Defendant Thomas asserted 472a was being applied to statutory initiatives. On several dates in 2016 Plaintiffs asserted to Defendants that, as to statutory initiatives, it violated Const 1963 art 2, § 9. Those disputes about the applicability of the old version to statutory initiatives receded when the new version went into law on June 7, 2016.

On April 14, 2015, the Board of State Canvassers approved the format of CBFM's statutory petition. There were changes in the language from the statutory initiative of 2013.[19] 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, in order to give time for organizing and training volunteer circulators, and to maximize opportunities for collecting during the summer and fall

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17 Kozma affidavit, ¶¶ 8-9.

18 *Consumers Power v Attorney Gen,* 426 Mich 1, 8; 392 NW2d 513 (1986).

19 Complaint ¶ 41; Kozma affidavit ¶ 12

months. Plaintiffs' intention at the time was to get on the 2016 November ballot.[20]

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

June 1, 2016 was the deadline for filing signatures for the 2016 ballot. On that date CBFM had over 207,000 signatures in hand.[21] (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.[22]

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.[23] Given that over half the required number had come in within an approximate one-year period, and that the campaign has twice more-than-doubled the initial 180-day count

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20 Kozma affidavit ¶ 12.
21 Kozma affidavit ¶ 20.
22 OAG 5528 (August 3, 1979).
23 Kozma affidavit, ¶¶ 16, 20, 25; exhibit 20.

in 2012, and given (as mentioned above) the efficient way the campaign has been run, it is highly probable that CBFM will be able to reach the 250,000 goal in time for the 2018 election.[24]

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.[25]

The Governor signed 2016 PA 142 on June 7, 2016, a few days after Plaintiffs filed this suit and announced collection would continue. The new iteration eliminated the potential, allowed by the previous iteration of 472a, for canvassers to count signatures more than 180 days old.

ARGUMENT

I. THE COURT OF APPEALS MISCONSTRUED THE DECLARATORY JUDGMENT RULE'S 'ACTUAL CONTROVERSY' STANDARD TO BAR PRE-ENFORCEMENT CHALLENGES TO THE VALIDITY OF STATE STATUTES.

In finding Plaintiffs-Appellants ("Plaintiffs") complaint unripe for judicial review, the Court of Appeals reasoned that Defendants-Appellees ("Defendants") had not directly taken any "adverse action" against their legal

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[24] Kozma affidavit ¶ 24; compare complaint ¶ 31.
[25] Kozma affidavit ¶ 25.

rights at the time of the case being filed.[26] Accordingly, notwithstanding MCL 168.472a's mandatory rejection of signatures older than 180 days, nor Defendant Thomas' acknowledged practice of enforcing the 180 day restriction,[27] the Court of Appeals concluded that Plaintiffs' challenge could only satisfy the actual controversy test upon the occurrence of having "collected the number of required petition signatures, *albeit during a time-frame outside the 180-day rule*, filed those petitions at least 160 days before the election, had those petitions rejected by defendants as insufficient, and then had their ballot proposal denied."[28]

As this Court has articulated, a litigant has standing to seek a declaratory judgment whenever he or she has satisfied the 'actual controversy' requirement of MCR 2.605 to "'plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.'"[29] Generally, such a sharpening has occurred whenever "a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights."[30] Accordingly, in light of the declaratory judgment rule's intent of being "liberally construed to provide a broad, *flexible* remedy with a view to making the courts more accessible to

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26 COA Opinion at 4.
27 Complaint ¶ 35.
28 COA Opinion at 4 (emphasis added).
29 *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 & n 20; 792 NW2d 686 (2010) (quoting *Shavers v Attorney Gen*, 402 Mich 554, 589; 267 NW2d 72 (1978)).
30 *Shavers*, *supra* at 588.

the people," this Court has "consistently held that 'a court is not precluded from reaching issues before actual injuries or losses have occurred.'"[31]

Liberal construction is particularly important in initiative cases:

> '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 sources][32]

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."[33] Granted these delegate speeches addressed a proposed change in art 12, § 2 (constitutional initiatives), not its sister art 2, § 9 (statutory initiatives). But the same grass-roots-friendly sentiment undoubtedly animated delegates alike as to both sections.

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[31] *Adair v State*, 486 Mich 468, 490; 785 NW2d 119 (2010) (quoting *Shavers*, *supra* at 589).

[32] *Kuhn v Department of Treasury*, 384 Mich 378, 385 n 10 (1971); see also *Bingo Coalition for Charity – Not Politics v Board of State Canvassers*, 215 Mich App 405, 410 (1996).

[33] Attachment B to plaintiffs' opening brief in the Court of Appeals, remarks of delegates Clyne Ward Durst Jr., Catherine Moore Cushman, George Romney, and Harold Norris, 2 Official Record Constitutional Convention 1961, pp 2460-64, reproduced from attorney general 7/15/86 brief to circuit court in *Consumers Power*.

By requiring Plaintiffs to amass 250,000 signatures "during a timeframe outside the 180-day rule," and thus wager such enormous investment on the hope of subsequent invalidation of existing state law, the Court of Appeals would not only bar "resol[ution to] questions like the one at issue before the parties change their positions or expend money futilely,"[34] but also effectively turn the declaratory judgment rule's purpose on its head. Rather than evaluating the need for a declaratory judgment to guide Plaintiffs' future conduct, let alone the hardship to Plaintiffs from withholding review, the Court of Appeals' decision construes that no actual controversy can exist until the point that there is no future conduct left to perform.

In diametrical contrast to the *ratio decidendi* of the decision below, a separate court of appeals decision recently explained that to foreclose standing to seek a declaratory judgment to pre-enforcement challenges "would be inconsistent with the purpose of a declaratory judgment, which 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*.'"[35] There, the court struck down a restriction on university employee candidacies for public office, despite no plaintiff having even sought to enter any electoral race, because the very promulgation of a regulation allegedly at odds with state law gave rise to an actual controversy.[36] Such a

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34 *Detroit v State*, 262 Mich App 542, 551; 686 NW2d 514 (2004).

35 *UAW v Central Mich Univ Bd of Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (emphasis in original).

36 *Id.* Equally, if not even more critically, must the same reasoning apply to the type of allegedly unlawful regulation at issue here. Indeed, even if an initiative

fundamental conflict in construction over the nature of the declaratory judgment rule is one that necessitates this Court's intervention.

A. This Court has Already Countenanced the Proper Exercise of Declaratory Relief to Resolve Claims Brought in the Same Factual Context.

In accordance with the above-cited principles underlying the declaratory judgment rule, this Court's decision in *Wolverine Golf Club v Secretary of State*[37] illustrates *concretely* that Plaintiffs' complaint presented a live controversy when it was filed. In reviewing the plaintiffs' challenge to MCL 168.472 (which required statutory initiative petitions to be filed not less than ten days prior to the start of a session of the legislature), this Court observed that the plaintiffs brought their action *prior to* having submitted any petition. Why did the plaintiffs there sue before filing? Because acting "to tender any petitions would have been fruitless in light of the defendant's *stated intention* to reject them" for noncompliance with the challenged statutory requirement.[38]

Accordingly, in consideration of the plaintiffs' choice to fashion their complaint as a mandamus action, this Court observed that, "[u]nder this

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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.

[37] 384 Mich 461; 185 NW2d 392 (1971);

[38] *Id.* at 464

circumstance" of commencing their challenge prior to submitting a petition, "it might be argued that a suit for a declaratory judgment would have been a more appropriate form of action than a suit for mandamus."[39]

Here, Plaintiffs here have done exactly what this Court's *Wolverine Golf Club* decision recommended: a suit for declaratory relief prior to filing signatures.

Similarly, in *Consumers Power Co v Attorney General*,[40] the plaintiffs asserted standing to seek a declaratory judgment — as to the constitutionality of legislative curtailment of circulation-time for constitutional initiative petitions circulated under Const 1963 art 12, § 2 — upon the basis of their opposition to the Citizens Lobby's 1986 election initiative, for which no petition had been filed at the time that the case was commenced. The plaintiffs' complaint merely alleged "upon information and belief" that the Citizens Lobby had announced an *intent* to file signatures *later*.[41] Yet neither this Court nor the court below gave any consideration to whether that claim might have been unripe.

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39 *Id.*

40 426 Mich 1; 392 NW2d 513 (1986).

41 Complaint, Exhibit 19: Complaint for declaratory judgment, *Consumers Power Co v Attorney General*, Ingham County Circuit Court Case No. 86-56487-CZ, ¶¶ 18, 20, 26 (June 4, 1986).

B. The Court of Appeals' Decision Imposes a More Stringent Reviewability Standard than Applied Under Federal Jurisdiction.

In light of this Court's conclusion that Michigan's standing criteria are less restrictive than the threshold requirements derived from US Const, art III,[42] the Court of Appeals' reflection of the opposite approach demonstrates its erroneous application of the former.

In "ascertaining whether a claim is ripe for resolution," the federal courts rely on "two basic questions" — (1) Is the claim one which "arises in a concrete factual context and concerns a dispute that is likely to come to pass?" and (2) "what is the hardship to the parties of withholding court consideration?"[43] Here, however, the Court of Appeals neglected to consider either question. Indeed, despite observing Plaintiffs' contentions that "the number of signatures already collected [shows they are] likely to obtain the rest before the cut-off date,"[44] and that they will be "detrimentally affected" by the "the huge logistical effort of assembling, training, and motivating a volunteer team of hundreds of circulators,"[45] the Court of Appeals chose to wholly rely on the mechanical assumption that ripeness can only arise from

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42 See *Lansing Sch Ed Ass'n*, 487 Mich at 364, 370-71.

43 *Warshak v United States*, 532 F3d 521, 525 (CA 6, 2008) (en banc); see *Abbot Laboratories v Gardner*, 387 US 136, 149; 87 S Ct 1507, 18 L Ed 2d 681 (1967).

44 COA Opinion at 2

45 *Id.*

the formality of having the statute applied to their particular filed signatures.

In accordance with the factors discussed above, federal courts have uniformly found ripeness and standing requirements satisfied by litigants challenging ballot access regulations, regardless of any prior official ruling applying such regulations to them specifically. See, e.g., *Green Party of Tenn v Hargett*[46] (finding the plaintiff minor parties could ripely challenge a preferential ballot-ordering statute for qualified parties despite not having undertaken any attempt to qualify for ballot access); *Nader v Keith*[47] (noting that, since "it would cost [plaintiff] more to [comply with the statute] than if the challenged provisions were invalidated," there "would be no question of his standing to seek such relief in advance of the submission or even collection of any petitions"); *Blomquist v Thomson*[48] ("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.").

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46 787 F3d 533, 545 & n. 1 (CA 6, 2014) (citing *Warshak*, *supra*); *see also Libertarian Party of Ohio v Blackwell*, 462 F3d 571, 583, 595 (CA 6, 2006) (relying on the burden imposed by mandatory primary nominations for qualified minor parties in striking down Ohio's minor party ballot access scheme, despite the plaintiff party's failure to obtain qualification).

47 385 F3d 729, 736 (CA 7, 2004) (Posner, J.).

48 739 F2d 525, 527 n 3 (CA 10, 1984)

II. THE COURT OF APPEALS ERRONEOUSLY FAILED TO CONSTRUE MCL 168.472A AS AN IMMEDIATELY APPLICABLE REGULATION ON THE PETITION CIRCULATION PROCESS.

In its 1986 *Consumers Power Co* decision, this Court directly construed the old version of MCL 168.472a as a restriction on the *pre-filing* process of petition circulation and signing. But in upholding the statute as applied to constitutional initiative petitions, *Consumers Power Co* based its holding directly on Const 1963, art 12, § 2's enabling language for that type of initiative, which "authorizes the Legislature to prescribe by law for the *manner of signing and circulating petitions* to propose constitutional amendments."[49] Whether Plaintiffs' immediate manner of circulating and signing their statutory initiative petition must conform to the prescription of MCL 168.472a is the essence of the controversy at issue here.

Far from only impacting the circulation process in the abstract, the centrally pressing uncertainty driving Plaintiffs' immediate need for declaratory judgment is how to carry their petition drive forward in relation to their 200,000+ collected signatures bearing dates more than 180 days old.

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[49] 426 Mich at 6 (emphasis added); see *id.* at 9.

Plaintiffs expect Defendants will try erroneously to rely on this ruling when a court reaches the merits here. However, the Constitution contains no similarly authorizing language for statutory initiative petitions under art 2, § 9– consistent with its distinct purpose as "a reservation of legislative authority which serves as a limitation on the powers of the Legislature." *Woodland v Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985).

Indeed, because Michigan law criminally prohibits circulators and signers from collecting or providing more than one signature from the same voter on a petition,[50] Plaintiffs cannot undertake efforts to solicit fresh signatures from those signers whose signatures have statutorily expired if they aim to challenge the 180-day restriction's validity. Moreover, because Michigan law also prohibits CBFM from supplemental filings of signatures,[51] meeting the Court of Appeals' precondition for declaratory relief entails the risk of sacrificing all of their recent signatures collected within the statutory time frame in order to file them conjointly with signatures over 180 days old.

Without the crucial ability to know whether they are investing such tremendous labors in vain, Plaintiffs are faced with the grossly unfair obligation to maximize their risks and losses —with inevitably drastic resulting effect on volunteer morale. No meaningful prudential or equitable interest can be served by conditioning declaratory relief on such a detrimental course.

REQUEST FOR RELIEF

Wherefore, Plaintiffs ask this Court to reverse the Court of Appeals and remand for further proceedings.

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50 MCL 168.544c(1), (15).

51 MCL 168.475(2).

Respectfully submitted,

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