STATE OF MICHIGAN
COURT OF CLAIMS

Committee To Ban Fracking In Michigan and LuAnne Kozma,

Plaintiffs,

v

Secretary Of State Ruth Johnson, Director Of Elections Sally Williams, in their official capacities, and Board Of State Canvassers,

Defendants.
_____/

No. 18-000-274-MM
Hon. Stephen L. Borrello
Filed 12-27-18

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

Matthew Erard (P81091)
Counsel for Plaintiffs
400 Bagley Street #939
Detroit, MI 48226
248-765-1605
mserard@gmail.com

Scott A. Mertens (P60069)
Assistant Attorney General
Counsel for Defendants
Box 30217
Lansing, MI 48909
517-335-7659
mertenss@michigan.gov

Heather S. Meingast (P55439)
Assistant Attorney General
Counsel for Defendants
Box 30217
Lansing, MI 48909
517-335-7659
meingasth@michigan.gov

_____/

Plaintiffs' Opposition to Defendants'
March 7, 2019, Motion for Summary Disposition
and
March 26, 2019, Motion to Stay Discovery

Table of Contents

Table of Authorities

Cases

Michigan constitution

Federal constitution

Statutes

Rules

Opinions of the attorney general

INTRODUCTION

Plaintiffs Committee to Ban Fracking in Michigan ("CBFM") and Committee Director LuAnne Kozma brought this declaratory judgment action on December 27, 2018, to challenge both the constitutional validity of MCL 168.472a, as applied to statutory initiative petitions under Const 1963 art 2 § 9, and to challenge the refusal of Defendants Secretary of State ("SOS") and Director of Elections ("director") to accept custody of Plaintiffs' tendered November 5, 2018 petition filing, and their refusal to notify the Board of State Canvassers ("canvassers" or the "canvasser board") thereof.

In lieu of a responsive pleading, Defendants have moved for summary disposition under MCR 2.116(C)(10), seeking disposition of Plaintiffs' statutory claims on the legal merits and dismissal of Plaintiffs' constitutional claims on grounds of unripeness and constitutional avoidance.

Plaintiffs have submitted interrogatories and production requests to Defendants. Defendants have moved to stay discovery till resolution of their motion for summary disposition.

STATEMENT OF FACTS

On April 14, 2015, CBFM provided Defendants with a pre-circulation copy of its statutory initiative petition as required by MCL 168.483a. That same day, by a 3-0 vote, Defendant canvassers approved the form of the petition, making note as they typically do that approval did not "extend to … the substance" of the proposal on the back or the summary on the front.[1]

On May 22, 2015, CBFM began to collect voter signatures. By June 1, 2016, CBFM had not yet collected the required 252,523 signatures. Plaintiffs sued in this Court seeking a declaratory judgment that 472a's prohibition of counting signatures older than 180 days invalidly infringes the self-executing provisions of Const 1963 art 2 § 9 under the constitutional principle pronounced by *Wolverine Golf Club v SOS*.[2] Defendants contended in response:

> If and when Plaintiffs obtain the additional signatures they require, then they would be able to file their petition. But until the minimum number of signatures has been collected, any application of MCL 168.472a to CBFM's petition is hypothetical. [Brief of Defendants-Appellees, *CBFM v Director of Elections*, Court of Appeals Case No. 334480 at 4 (October 27, 2016)].[3]

As Defendants well knew, the date they said this was less than two weeks before the 2016 election, when it would have been far too late to file signatures, get

1 Complaint exhibit 1.

2 384 Mich 461 (1971).

3 Defendants made these assertions two additional times, once to this Court and once to the Supreme Court, except that in this Court they used the words "will be able."

them canvassed, and get the CBFM initiative on that ballot. Hence, Defendants assured that Plaintiffs "would be able to file their petition" for a future election after 2016 upon collecting the remaining quantity of signatures needed to satisfy the threshold.

Accepting Defendants' argument, this Court dismissed Plaintiffs' action on ripeness grounds, finding that it was speculative and hypothetical whether CBFM would be able to collect the full number of signatures required.[4] On March 14, 2017, the Court of Appeals affirmed this Court's dismissal, observing that CBFM was "*continuing to collect signatures with the same petition sheets*," but had not yet reached the ripened point of having collected and filed the threshold number of signatures required.[5] [6]

After the courts' ripeness ruling, CBFM changed its target election from 2018 to 2020, and continued collecting signatures. On November 5, 2018, Plaintiff Kozma tendered 47 boxes for filing, containing approximately 270,962 signatures (over 18,000 more than the threshold required), having done just what Defendants

---

4 *CBFM v Director of Elections*, No. 16-000122-MM (Court of Claims, August 8, 2016).

5 *CBFM v Director of Elections*, No. 334480, 2017 Mich App LEXIS 405 at *2, 8 (March 14, 2017) (emphasis added).

6 Defendants no longer maintain that plaintiffs lack standing or that they fail to state a claim against the director or canvassers, as they did in # 16-000122-MM.

and this Court said was needed to ripen CBFM's challenge to the validity of 472a. Kozma also informed Defendants of CBFM's change of target election to 2020.[7]

Spurning the assurances of the preceding litigation, the director (who reports to the SOS) and her office staff rejected the petition filing, refused to take custody of the 47 boxes, and refused to notify the canvassers that CBFM had filed. Pointing to the front-page petition's reference to the 2016 election, of which Defendants and the courts were fully cognizant[8] in the prior proceedings, they said the summary was "incorrect."[9]

However, the 2016 voting date was neither correct nor incorrect. It was and could only be an expectation, as evidenced for instance by (a) the date's absence in the full text on the back, (b) other circulated ballot petitions which canvassers have approved over the years that had a voting date in the front-page summary but never appeared on the ballot, sometimes because petitions were strategically not filed[10] and sometimes because the legislature enacted the initiative in the veto-proof manner specified by Const 1963 art 2 § 9 without a ballot vote, or (c) the tens of

---

7 Kozma affidavit, ¶ 27.

8 Kozma affidavit, exhibit 21.

9 Complaint exhibit 2.

10 For example the 2018 initiative of Clean Energy Healthy Michigan, which collected enough signatures to file, but then settled with Consumers and DTE, and did not file the signatures. See <*http://www.michiganradio.org/post/dte-consumers-strike-clean-energy-deal-ballot-initiative-organizers*>

thousands of voters who signed the CBFM petition after the election in November 2016 when it was obvious the election had passed.[11]

The example of initiatives not going to an election even though the sponsors obtained sufficient signatures is best illustrated by Right To Life Of Michigan ("RTLM"), which testified on December 12 to the House Committee on Elections and Ethics, saying they are the "premier experts" on initiating legislation in Michigan. RTLM noted it had initiated four laws since 1987, all of them through the veto-proof legislature and none by a citizen vote. Reaching the ballot is never RTLM's intent:[12]

> Right to Life of Michigan is the organization who has done the most initiated legislation of any single organization in the state. We're the premier experts on this. Four of the first six initiated laws were done by Right to Life of Michigan: Medicaid abortion funding ban in 87; Parental consent in 1990; Partial Birth Abortion ban in 2004; and Abortion Insurance Opt-Out in 2013. So we actually know very much how to do this....
>
> ...
>
> We have a 40-day clock that starts, which our legislators then get to decide whether or not they're going to vote on this. We have never once had one go to the ballot. That's never our intent. We want it initiated through our legislators, that's why we always get your signatures first. We don't intend for it to go to the ballot.

---

11 Defendants make no claim that voters who signed the petition, whether before or after 2016, were misled or misinformed.

12 Testimony of RTLM's Genevieve Marnon , *<http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=ELEC-121218.mp4>*, beginning at 1:19:02 and 1:22:48 (emphasis added).

RTLM's method has become the norm in this state. In 2018 only one canvassed statutory initiative went to the ballot. All three others passed in the legislature.[13]

Defendant director's staff further attributed its refusal to take custody of the petitions to lacking adequate room at its office, but acknowledged that necessary room could be made if ordered to accept such filing by the Court. Defendant director also acknowledged that the canvassers could overrule their decision.[14] Kozma departed with the boxes in a rented moving van. After negotiating with three other companies, Plaintiffs retained Kent Records Management three days later, to store them securely at its facility where they presently remain secured.

In every election cycle through the present, Defendants SOS and director have accepted election petitions for filing and review by the canvassers regardless of their own preliminary assumption of facial defects.[15] And Defendants have not

---

13 Michigan 2018 ballot measures, <*https://ballotpedia.org/Michigan_2018_ballot_measures*>.

14 Complaint ¶ 33.

15 See, e.g., *Morgan v Board of State Canvassers*, unpublished order of the Court of Appeals, issued June 8, 2018 (Docket No. 344108) (failure to include candidate address on petition heading); *Delaney v Board of State Canvassers*, Docket No. 333410, 2016 Mich App LEXIS 1170 (June 16, 2016) (same); *Tea Party v Board of State Canvassers*, unpublished order of the Court of Appeals, issued August 30, 2010 (Docket No. 299805) (petition heading failing to conform to statutory font size requirement).

promulgated any rule in compliance with the Administrative Procedures Act[16] respecting the rejection of petition filings by the SOS.

Because the day following Plaintiffs' petition filing, November 6, 2018, was the next occurring general election at which a governor was elected, any filing of CBFM's signatures after November 5 would have barred them from compliance with MCL 168.473b. Filing on November 5 was also critical for CBFM because, under Const 1963 art 2 § 9 the number of required signatures was determined by the number of voters who cast ballots for governor in the last (2014) election. That number was projected to increase and did increase substantially, on November 6.

Defendants' actions do not only prevent a citizen vote. They also prevent the legislature from acting in the veto-proof fashion which Const 1963 art 2 § 9 provides.

STANDARD OF REVIEW

Summary disposition may be granted to Defendants under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.[17] Summary disposition may also be granted to Plaintiffs under MCR 2.116(I)(2).[18]

16 MCL 24.201 et seq.

17 *City of Holland v Consumers Energy Co*, 308 Mich App 675, 681 (2015).

18 *Id* at 681-82.

ARGUMENT

I. Defendants' arguments to dismiss Plaintiffs' statutory, equitable, and constitutional claims are without merit.

A. Statutory Violations

1. Count IV: Plaintiffs' strictly compliant initiative petition bears no material defect.

As justification for refusing acceptance of CBFM's initiative petition filing, Defendants point to the petition's extraneous front-page reference to the 2016 election for which CBFM originally anticipated qualifying its initiative proposal in the absence of legislative enactment. Positing that Michigan's election law implicitly requires designating the expected election at which the proposed legislation may be submitted for a vote, Defendants contend that CBFM's petition's prior election date reference renders its petition facially defective.

The legislatively established standard governing the "form and content" of voter initiative petitions circulated on countywide forms is that of "strict" compliance with the SOS's prescribed format substantially corresponding to the directives of MCL 168.482.[19]

482(4), prescribing the requisite language for petition page-fronts, provided, in full, the following on the date of Plaintiffs' petition filing:

The following statement shall appear beneath the petition [title] heading:

19 *Stand Up for Democracy v SOS*, 492 Mich 588, 602-03 (2012); see MCL 168.544d.

> "We, the undersigned qualified and registered electors, residents in the city township (strike 1) of ..... in the county of ....., state of Michigan, respectively petition for (amendment to constitution) (initiation of legislation) (referendum of legislation) (other appropriate description)."[20]

Accordingly, the SOS's directed format for statutory initiative petitions, as promulgated in implementation of MCL 168.544d, prescribes, in full, the following for the text on the face of the petition:

> The petition heading shall appear in 8-point type as specified below. MCL 168.482(4). The heading shall be placed at the top of the signature side of the sheet immediately beneath the presentation of the proposal.
>
> > We, the undersigned qualified and registered electors, residents in the county of _____ , State of Michigan, respectively petition for (amendment to constitution) (initiation of legislation) (referendum of legislation).[21]

Upon being forced to concede[22] that neither 482 nor 544d "expressly requires" any reference to an election date on the face of an initiative petition, Defendants attempt to rely on the supposed intimations of another statutory section bearing no relation to petition form and content specifications, MCL 168.471. Pointing to 471's directive that initiative petitions must be filed "at least 160 days

---

20 2018 PA 608, enacted December 31, 2018, has since amended MCL 168.482(4) to replace "shall" with "must" and to require the designation of a Congressional district in place of a county and city or township.

21 Attachment 1.

22 Defendants' brief in support of summary disposition, p 8.

before"[23] the proposed legislation is to be voted on, Defendants propose that the statute implicitly "contemplates" that a petition sponsor will designate "in some manner" a preferred election for the proposal to be submitted to voters.[24]

Of course this is nonsensical. There was no election at all for three of the four canvasser-sufficient statutory initiatives in 2018. And if the legislature rejects a proposal, under Const 1963 art 2 § 9 it would be the date the legislature concludes consideration, not the date of the sponsor's filing, which would determine the election date.

As their sole proffered support for such a theory, Defendants attach exhibits to show that some legislative initiative petitions approved as to form for 2017-18 included the date of an election. Yet Defendants conveniently ignore that the same does not hold true when including constitutional amendatory initiative petitions, notwithstanding that 471's terms would subject constitutional amendatory petitions to the very same "contemplated" assumption under Defendants' reading.[25]

Comparatively, the legislature rejected a 2009 Senate bill, reflecting Defendants' desire to make designating an election-date an element of the statute's

---

23 At page 8 of their brief Defendants mistakenly characterize 471 as providing that an election sets the "outermost" filing date. Actually 471 provides that an election sets the innermost filing date, that is, the date before which filing is permitted and after which it is not.

24 Defendants' brief in support of summary disposition, p 8.

25 Attachments 2-A, 2-B, the constitutional initiative of Abrogate Prohibition Michigan.

petition content criteria.[26]

In other words, CBFM would have been free, like Abrogate Prohibition Michigan, to say nothing at all about an expected voting date on the face of its petition sheets.

Defendants' strained theory for the materiality of CBFM's petition's extraneously indicated voting-date preference rests on multiple unfounded suppositions. Beginning with the terms of 471 alone, Defendants offer no support for the proposition that the 160-day filing date operates to preclude a later-filed initiative proposal from being voted on at the next following general election for which its date of filing is timely.

Thus our attorney general has, by executively-binding opinion,[27] found that 471 presents no barrier to postponing an initiative proposal's targeted election voting date if its sponsor is unable to complete and file the petition by the initially anticipated pre-election filing date.[28]

26 2009 SB 952 (proposing to amend MCL 168.482 to prescribe for initiative and referendum petitions to state, "This proposal is to be voted on at the November [date of election] General Election."), available at <*http://legislature.mi.gov/doc.aspx?2009-SB-0952*>.

27 See *Michigan Beer & Wine Wholesalers Association v Attorney General*, 142 Mich App 294, 300 (1985) (observing that, "[w]hile such opinions do not have the force of law, and are therefore not binding on courts, they have been held to be binding on state agencies and officers.") (citing *Traverse City School District v Attorney General*, 384 Mich 390, 410 n 2 (1971); *Queen Airmotive v Department of Treasury*, 105 Mich App 231, 236 (1981)).

28 OAG 1979 No. 5528. The legislative history of 1999 PA 219, the most

In addition to conflicting with the finding of the attorney general, Defendants' proposed construction of 471 would render it in conflict with Const 1963 art 2 § 9. While Defendants predicate their proposed application of 471 on section 9's directive that the "legislature shall implement the provisions of this section,"[29] *Wolverine Golf Club* narrowly construed that language to constitute only "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate," while noting that "[t]his constitutional procedure is self-executing"[30] and hence not subject to legislative alteration.

Accordingly, by seeking to transform 471 from a facilitative measure for ensuring sufficient pre-election time for a proposal to reach the legislature or electorate – into a mechanism for permanently foreclosing a petitioned proposal's consideration by either the legislature or electorate – Defendants' newly proposed

---

recent amendment of 471 prior to the events of this case, is instructive. After a substitute bill passed the House, the House Fiscal Agency wrote an analysis. Noting that the existing SOS practice was to require sponsors to file at least 120 days before an election it included this argument in favor of its passage: "Besides, if an initiative cannot go on the ballot at the upcoming election, it will be on the ballot for the one after." (emphasis added) The Senate then passed it and the bill became law. *<http://www.legislature.mi.gov/(S(hccvu5yoqmrdmhe2a1uytc4k))/mileg.aspx?page=getObject&objectName=1999-HB-5061>*

29 Defendants' brief in support of summary disposition, p 7.

30 384 Mich at 466 (1971).

construction of 471's filing date restriction would render it an obstructive curtailment of Const 1963 art 2 § 9 (which unlike Const 1963 art 12 §2's provision for constitutional-amendment "direct initiatives" has no filing deadline). It would be a curtailment far more drastic than the prior unlawful filing time restriction struck down by *Wolverine Golf Club.*

Further militating both against Defendants' construction of 471 and the attribution of any legal significance to the inclusion of extraneous petition language referencing an election voting date, is the impossibility of foreknowing whether such an invoked legislative initiative will ever become subject to an election vote under the "indirect initiative" procedure of Const 1963 art 2 § 9. Indeed, perhaps the plainest refutation of Defendants' theory as to the implicit scope of 471's contemplations is the legislature's own corrective acknowledgment, as of December 31, 2018, that the relevant provision of 471 from which Defendants attempt to divine hidden meaning was not even crafted in actual congruence with Const 1963 art 2 § 9.[31]

Even were it reasonable to infer that 471 "contemplates" that a petition

---

31 As amended by 2018 PA 608, the provision of MCL 168.471 regarding statutory initiatives now states, "Initiative petitions under section 9 of article II of the state constitution of 1963 must be filed with the secretary of state at least 160 days before the election at which the proposed law *would appear on the ballot if the legislature rejects or fails to enact the proposed law*." *Id*. (emphasis added). Notably, the amendment still omits adding any provision regarding the designation of a specific election on initiative petition sheets.

sponsor will designate "in some manner" an election date for voting on the proposed legislation, there would still be no indication of any legislative intent to materially incorporate such an assumption into the statutory standards for petition form and content.

> A court may not speculate about the probable intent of the Legislature beyond the language expressed in the statute.... The omission of a provision in one part of a statute that is included in another part of the statute should be construed as intentional, and a provision not included in one part of a statute should not be included by a court.[32]

Moreover, insofar as Defendants limit their construction of 471 to contemplate only that a sponsor will indicate a desired voting date "in some manner," Defendants propose no legal basis for disregarding the express 2020 election designation by Kozma and legal counsel verbally at the time of filing on November 5, 2018.[33] Hence, given the absence of any superior legal status to their original voting date preference indication, Defendants' objection to the validity of CBFM's petition cannot even be justified under Defendants' own statutory construction.

In light of Plaintiffs' petition's undisputed conformity to the requirements of 482 and 544d, Defendants' claim that the CBFM petition is defective is bottomed on the premise that extraneous content irregularities are tantamount to formatting

---

32 *Griswold Properties v Lexington Ins Co*, 276 Mich App 551, 564-65 (2007).

33 Kozma affidavit, ¶ 27.

noncompliance. Such an assumption, however, finds no support in the statute or prior legal decisions. See *Auto Club of Mich Comm for Lower Rates Now v SOS*,[34] (finding extraneous initiative-petition language was "not specifically prohibited by §§ 482 and 544d" and did "not render the petitions invalid as somehow being not in the 'form prescribed by the Secretary of State.' ")[35]

Because the superfluous language on Plaintiffs' petition has no legal bearing on the petition's conformity to the governing statutory requirements, Defendants are not entitled to summary disposition as to count IV of Plaintiffs' complaint.

2. Count IV: Defendants SOS and director had no legal authority to refuse custody of CBFM's petition filing or obstruct the canvassers' determination of the filing's sufficiency and legal compliance.

Identifying no constitutional or statutory provision empowering the SOS to refuse acceptance of initiative petition filings, nor providing any acknowledgment to the SOS's legal obligation under 475(1),[36] Defendants baldly assert that the

34 195 Mich App 613, 624 (1992).

35 See also *Coalition to Defend Affirmative Action & Integration v Board of State Canvassers*, 262 Mich App 395, 405-06 (2004). The *Coalition* court ultimately found that the "substantial compliance" standard for initiative petitions obviated the need to resolve whether the challenged petition's extraneous substantive language amounted to a defect. Although the Supreme Court's *Stand Up for Democracy* decision has since overruled that standard for deficiencies in compliance with 482, it did not address 482's applicability to extraneous petition content.

36 MCL 168.475(1) provides in full: "Upon the filing of a petition under this chapter, the secretary of state shall immediately notify the board of state canvassers of the filing of the petition. The notification shall be by first-class mail."

decision to reject CBFM's 270,962 voter signatures was in the scope of the Secretary's "gatekeeping duty."[37] Defendants then cite only the cases of *O'Connell v Director of Elections*[38] and *Graveline v Johnson*,[39] neither of which concerns initiative signatures or lends any support to their position.

O'Connell involved an affidavit of candidacy form filed by a candidate seeking automatic primary ballot placement as an incumbent judge.[40] No role for the canvassers existed in relation to such a filing.

And though the *Graveline* plaintiff's petition filing on the last day before the deadline was initially rejected for not purporting to contain sufficient signatures, that case involved no state law challenge to the SOS's authority. It ultimately resulted in an injunctive order mandating acceptance of the petition, materials, and signatures he tried to submit on the deadline date.[41]

As with determining the sufficiency of petition signatures, Michigan courts have consistently maintained that determining whether petitions conform to state election law requirements falls to the canvassers.[42] By contrast:

> [u]pon the filing of a signed petition, the Secretary must 'immediately' notify the Board by first-class mail . . . [and] has no further duties until after

37 Defendants' brief in support of summary disposition, p 9.

38 317 Mich App 82 (2016)

39 336 F Supp 3d 801 (ED Mich 2018).

40 317 Mich App at 86-87.

41 336 F Supp at 817.

the Board deems a petition sufficient and approves the Director of Elections' statement of purpose.[43]

So by refusing to notify the canvassers, SOS was saying in effect that CBFM did not "file" that day, though its brief does not press that point.[44]

Because Defendants had no legal authority to refuse acceptance of CBFM's petition and obstruct the canvassers' determination of its sufficiency and statutory compliance, they are not entitled to summary judgment as to count IV of the complaint.

3. Count IV: MCL 168.473b does not affect the validity of signatures filed prior to the date of a November gubernatorial election.

Defendants allege that the statutory restriction of 473b, which bars the filing of signatures on opposite sides of a gubernatorial election, took effect to bar the filing of signatures starting May 30 and going through the ideal[45] summer-fall warm-weather collecting days. Consequently, Defendants allege that Plaintiffs' signatures tendered for filing on November 5, 2018 were barred by 473b's

---

42 See, e.g., *Citizens Protecting Michigan's Constitution v SOS*, _ Mich App _, (June 7, 2018) (Docket No. 343517), slip op at 12, aff'd 503 Mich 42 (2018) (*Citizens II*); *Michigan Civil Rights Initiative v Board of State Canvassers*, 268 Mich App 506, 516 (2005); *Auto Club of Mich,* 195 Mich App at 624.

43 *Citizens Protecting Michigan's Constitution v SOS*, 280 Mich App 273, 286 (2008) (*Citizens I*) (citing MCL 168.475 (1)) (emphasis added).

44 Defendants' brief in support of summary disposition, p 13.

45 Kozma affidavit ¶ 29.

operation, even "disregarding the facial defect."[46]

The text of 473b provides in full:

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

Accordingly, because the plain language of 473b explicitly countenances the filing of valid petitions up to the date of the November gubernatorial election, Defendants' proposition that 473b barred Plaintiffs' pre-election filing on November 5, 2018, is in flagrant contradiction to the statute's textual operation.

Moreover, Defendants' contention that proposals voted at the same election cannot be subject to differing invocation thresholds based on their filing date is directly contradicted by the very attorney general opinion that Defendants cite as supporting authority.[47]

Because 473b has no preclusive effect on signatures filed ahead of a November gubernatorial election, Defendants are not entitled to summary disposition as count IV of Plaintiffs' complaint.

---

46 Defendants' brief in support of summary disposition, p 12.

47 OAG 1975, No. 4880, p 112 (July 3, 1975) ("[I]f the petitions with a sufficient number of signatures were submitted on or before November 4, 1974 but after July 8, 1974, the Secretary of State could have used the 1970 vote totals for Governor as a base figure although the earliest election on the issue would not be held until the 1976 general election.").

B. Count II: Equitable estoppel

"The doctrine of equitable estoppel rests on broad principles of justice."[48] As applied both to actions of law and equity, it arises where (1) a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe certain facts, (2) the other party justifiably relied on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.[49]

At every stage of proceedings during the preceding litigation, in three different courts through 2016 and into the summer of 2017, Defendants asserted, with full knowledge[50] of the contents of Plaintiffs' petition form, that when Plaintiffs obtain the "additional" signatures they require, they "will/would be able to file."[51] Such an assertion was not a passive rhetorical one, but rather the very basis for Defendants' insistence upon CBFM's continued investment in completing

---

48 *Schepke v Department of Natural Resources*, 186 Mich App 532, 534 (1990).

49 *Id* at 534-35.

50 Kozma affidavit, exhibit 21.

51 Defendants-Appellees Brief in Opposition to Plaintiffs-Appellants' Application for Leave to Appeal, *CBFM v Director of Elections*, Supreme Court Case No. 155897 (July 5, 2017); Appellate Brief of Defendants-Appellees, *CBFM v Director of Elections*, Court of Appeals Case No. 334480 at 4 (October 27, 2016); Defendants' Brief on Motion for Summary Disposition, p 7, filed June 22, 2016, *CBFM v Director of Elections*, Court of Claims No. 16-000122-MM (August 8, 2016).

the entire signature threshold in order to proceed with their legal challenge.

Defendants challenge Plaintiffs' ability to make estoppel an independent claim, and add that the above passage

> is not a representation made by a party, but rather are the words of their legal counsel in a brief,[52]

though the same legal counsel, the attorney general, appeared for Defendants both in this case and in 16-000122-MM.

Having deliberately instigated Plaintiffs to undertake the completion of such a monumental feat in direct reliance on their assurances, Defendants' cynical and capricious about-face at this stage is unconscionable. Equity cannot permit Defendants to work such a profound injustice on the hundreds of volunteer circulators, and the tens of thousands of voters who signed after the court decisions in 2016-17, all of whom relied on the integrity of Defendants' representations to Plaintiffs and the courts.

C. Counts I, III, V: Constitutional violations

Despite Plaintiffs having now collected the requisite number of signatures and submitted their petition to the SOS, Defendants now purport that Plaintiffs' request for a declaratory judgment as to the constitutionality of 472a is unripe due to the SOS's rejection of their petition filing for its alleged facial defect. Just the opposite is true: because Plaintiffs' petition contains no facial defect and would

52 Defendants' brief in support of summary disposition, pp 13-14.

immediately be subject to 472a upon Defendants' compliance 475(1), Plaintiffs' challenge to 472a is presently ripe for adjudication.

Defendants further contend that the Court should apply the doctrine of constitutional avoidance to abstain from addressing Plaintiffs' complaint counts III and V, which charge that the SOS's unlawful and capricious "gatekeeping" decision at the office door infringes the right of initiative under Const 1963 art 2 § 9 and the federal 14th amendment and state equal protection clauses, respectively. Because Defendants never identify what "statutory authority" would provide a non-constitutional basis for resolving the gatekeeping claims, Defendants fail to provide any basis for the Court's abstention from adjudicating them.

II. Defendants should answer discovery

Acknowledging that summary disposition is generally premature before discovery is complete, Defendants nevertheless argue it should be stayed because "there is no reasonable chance that discovery will uncover factual support" for CBFM's position.[53]

On the same day as the motion to stay, CBFM filed revised questions and withdrew the original ones. The revised questions repeated the 7 questions of the original and added one more. The 8 revised questions were served on May 27, and accordingly the new return date is April 24, not April 18.

53 Defendants' brief in support of expedited motion requesting stay of discovery, p 3, filed March 26, 2019.

Defendants do not analyze the discovery questions singly. In sum, they questions inquire for:

- Non-confidential documents regarding Defendants' change of heart from 2016-17 to today whether CBFM would be able file petitions in 2018, though Defendants and all three levels of courts knew in 2016-17 the sheet faces referenced the 2016 election date.

- Non-confidential documents regarding the difference between CBFM "tendering" signatures (which Defendants acknowledge) and CBFM "filing" them (which Defendants will not acknowledge).

- In light of the canvassers 2017 approval of the Abrogate Prohibition Michigan petition which did not designate an election date – thus contradicting Defendants' assertion that petition sponsors "ordinarily" include an election date – copies of the faces of all initiative petition sheets approved or canvassed by the canvassers, from 1963 to date.

- Correspondence concerning the particular petition sheet which was the subject of OAG 5528 (holding that if there were insufficient signers on a petition for the 1980 election the same petition forms may circulated for filing for the 1982 election).

- The 2009 legislature having rejected a bill which would have required that petition sheets bear an election date on the front, all non-confidential documents regarding the desirability or necessity for initiative sponsors to designate an election date on the sheets, and the reason Defendants' guidelines omit a prescription for designating an election date.

- The circumstances and reasons of SOS ever rejecting any other sponsor's initiative signature sheets for filing.

- The authority for the canvassers to join the motion, given the canvassers have never met to discuss this suit – not even in a closed session – to decide whether to fight or settle it.[54]

- Correspondence between Defendants and Abrogate Prohibition Michigan, whose petition the canvassers approved though it did not designate an election date.

Answers to these questions will help the Court decide whether an unmandated extraneous sentence on the face of CBFM's petition sheets – a sentence which stated CBFM's expectations for a 2016 or 2018 election which had gone unfulfilled and which CBFM on November 5 verbally corrected to a 2020 election – justified the SOS's refusal to take custody of the petitions and notify the canvassers.

54 Compare the canvassers' action on June 20, 2018, where the minutes show they went into closed session with the attorney general to discuss "trial or settlement strategy" for three different suits in which the canvasser board was a defendant. *<https://www.michigan.gov/documents/sos/06-20-18_Approved_Mtg_Minutes_635775_7.pdf>*

CONCLUSION AND RELIEF REQUESTED

Wherefore, Plaintiffs respectfully request that the Court deny Defendants' motion for summary disposition and compel them to answer discovery.

Respectfully submitted,

/s/ Ellis Boal
Ellis Boal (P10913)
Counsel for Plaintiffs
9330 Woods Road
Charlevoix, MI 49720
231.547.2626
ellisboal@voyager.net

/s/ Matthew Erard
Matthew Erard (P81091)
Counsel for Plaintiffs
400 Bagley St #939
Detroit, MI 48226
248.765.1605
mserard@gmail.com

Dated: April 4, 2019