

**STATE OF MICHIGAN  
COURT OF CLAIMS**

Committee to Ban Fracking in  
Michigan and LuAnne Kozma,

Plaintiffs,

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

v

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

Defendants.

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**Plaintiffs' Sur-Reply in Opposition to Defendants'  
March 7, 2019 Motion for Summary Disposition**

## I. Defendants' new constitutional defense.

In re-framing their prior contention that the four-year gubernatorial election operates to preclude Plaintiffs' initiative proposal from being voted on at the next forthcoming general election of 2020, Defendants have replaced their initial reliance on MCL 168.473b with reliance on *Hamilton v Deland*.<sup>1</sup> There, the Supreme Court held that the language of Const 1908, art 17, § 2, precluded constitutional amendatory initiative petitions from surviving an intervening gubernatorial election. *Id.*

Although the *Hamilton* rule was long assumed to extend to initiatives and referendums under Michigan's current constitution, that question was ultimately resolved to the contrary by *Bingo Coalition for Charity – Not Politics v Board of State Canvassers*.<sup>2</sup> Finding that the framers of Michigan's 1963 Constitution "did not manifest an intent to preserve the rule of *Hamilton*," the Court held that Const 1963, art 2, § 9 imposed no similar gubernatorial election cycle restriction.<sup>3</sup>

In response to the Court's *Bingo Coalition* decision, Michigan's legislature enacted MCL 168.473b, which likewise prohibits the aggregation of initiative petition signatures collected on opposite sides of a gubernatorial election. Thus, due to the judicial finding that the *Hamilton* rule was not preserved by the 1963

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1 221 Mich 541 (1923).

2 215 Mich. App. 405 (1996).

3 *Id.* at 412.

Constitution, 473b was formulated to reestablish such a rule as a creature of statute.

Even during the years prior to *Bingo Coalition*, when the *Hamilton* rule was assumed to extend to initiative petitions under Const 1963, it was always recognized that a petition sponsor can file a petition meeting the last gubernatorial election's signature requirement with the intent to have its proposal adopted or placed on the ballot during a new gubernatorial cycle, as long as that the petition is filed by the November date of the gubernatorial election intervening. Hence, as explained in the very OAG which Defendants cite:

Your specific question concerns the validity of signatures obtained prior to November 5, 1974, which was the date of the November 1974 general election, for purposes of placing the constitutional amendment on the 1976 or 1978 general election ballot.

...

[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.*<sup>4</sup>

MCL 168.473b, which correspondingly permits for valid signatures to be filed up to the date of the November gubernatorial election, applies no differently. Because Plaintiffs submitted their signatures for filing *before – not after* – the date of the November 2018 gubernatorial election, their timing fully complied with the

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4 OAG 1975, No. 4880, pp 111-12 (July 3, 1975) (emphasis added).

restriction of 473b and its *Hamilton* rule predecessor.

## **II. Defendants' new reference to Plaintiffs' online motivational video.**

At footnote 4 Defendants newly cite CBFM's February 2018 motivational video for volunteers, in an attempt to undercut Plaintiffs' assertions in complaint ¶ 58 and Kozma affidavit ¶¶ 26-27 that “after the courts' ripeness ruling CBFM changed its target election from 2018 to 2020.”

Of course the video does not undercut our papers; it does not contradict that the change of target was “after” the ripeness rulings. But even if there were a contradiction, it was improper for Defendants to venture outside the pleadings.<sup>5</sup> Save it for trial.

## **CONCLUSION AND RELIEF REQUESTED**

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

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<sup>5</sup> MCR 2.116(C)(10).

Respectfully submitted,

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