

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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April 22, 2019

Clerk of the Court
Michigan Court of Claims
Hall of Justice
Lansing, Michigan 48933

Re: *Committee to Ban Fracking, et al v Johnson, et al*
Court of Claims No. 18-000274-MM

Dear Clerk:

Enclosed please find an original and a Judge's copy of Defendants' Reply Brief in Support of March 15, 2019 Motion for Summary Disposition with attached Proof of Service, for filing in the above matter.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather S. Meingast".

Heather S. Meingast
Assistant Attorney General
517.335.7659

HSM/lsa
Enclosures

cc: Ellis Boal (w/enc)
Matthew Erard (w/enc)

STATE OF MICHIGAN
COURT OF CLAIMS

COMMITTEE TO BAN FRACKING IN
MICHIGAN and LUANNE KOZMA,

Plaintiffs,

No. 18-000274-MM

v

HON. STEPHEN BORRELLO

SECRETARY OF STATE RUTH
JOHNSON, DIRECTOR OF
ELECTIONS SALLY WILLIAMS, in
their official capacities, and BOARD OF
STATE CANVASSERS,

**DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MARCH 7, 2019
MOTION FOR SUMMARY
DISPOSITION**

Defendants.

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**DEFENDANTS' REPLY BRIEF IN SUPPORT OF
MARCH 7, 2019 MOTION FOR SUMMARY DISPOSITION**

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ARGUMENT

I. Plaintiffs' statutory, equitable, and constitutional claims should be dismissed.

Plaintiffs filed their response to Defendants' motion for summary disposition on April 4, 2019. Defendants make the following points in reply.

A. Plaintiffs' petition cannot be placed on the ballot in 2020.

Although not clearly stated in the request for relief in the complaint, p 21, from their response to Defendants' motion it appears Plaintiffs want this Court to order Defendants to accept Plaintiffs' petition for filing with the intent that it be placed on the ballot in 2020. (Plfs' Resp to Mtn for SD, pp 3-4, 14, 20.) But since Plaintiffs' petition cannot be voted on in 2020, Plaintiffs' request for relief is without merit, if not moot. *Anway v Grand Rapids R Co*, 211 Mich 592, 610 (1920) (A moot case is one in which a judgment "cannot have any practical legal effect upon a then existing controversy.") (quotation marks and citation omitted).

As stated in Defendants' principal brief, article 2, § 9 of the Constitution requires that an initiative petition be "signed by a number of registered electors, not less than eight percent . . . of the total votes cast for all candidates for governor *at the last preceding general election at which a governor was elected*[" Const 1963, art 2, § 9 (Emphasis added).¹ Each gubernatorial election sets the signature requirement for petitions to initiate legislation for the immediately following four

¹ Article 12, § 2 contains similar language with respect to petitions to amend the constitution.

years. The signature requirement could go down or it could go up, depending on voter turnout.² Within those four years, there are two November General Elections at which a proposal to initiate legislation may be placed upon the ballot under the applicable signature requirement.

For example, the signature requirement for the 2014 to 2018 election cycle was determined by the total votes cast for all candidates for governor at the November 4, 2014 General Election. The general elections at which an initiative petition could have been voted upon during that cycle were the November 2016 General Election and the November 2018 General Election. Plaintiffs failed to file their petition in time for placement upon the ballot at either election. Plaintiffs want to file their petition now on the theory that it could be voted upon in 2020 but granting such relief would be unconstitutional.

Plaintiffs cannot file a petition meeting³ the last gubernatorial election cycle's signature requirement with the intent to have it placed on the ballot during a new gubernatorial election cycle. In *Hamilton v Deland*, 221 Mich 541 (1923), the Michigan Supreme Court rejected a similar argument under the 1908 version of article 12, § 2. The Court stated:

The vote for Governor every two years fixes the basis for determining the number of legal voters necessary to sign an initiatory petition and start designated official action. This primary essential to any step at all fixes distinct periods within which initiatory action may be

² The new signature requirement for initiative petitions based on the 2018 election increased from 252,523 to 340,047.

³ Defendants do not concede that Plaintiffs obtained sufficient, valid signatures, but simply assume for purposes of the argument that the petition is sufficient under the 2014-2018 signature requirement.

instituted. A petition must start out for signatures under a definite basis for determining the necessary number of signatures, and succeed or fail within the period such basis governs.

The petition in question started out in February, 1921, under the then requirement that, to be effective, it must have 105,853 signatures. An attempt was made to meet the requirement and failed. This petition lost all legal significance when the vote for Governor at the November election in 1922 fixed a new basis, and a less number of legal voters necessary to sign. The petition died with the requirement it sought but could not meet, and was not raised from the dead by the advent of a new basis designating the number necessary to sign. [*Id.* at 545.]

Notably, in *Hamilton* the signature requirement decreased and the Court still opined that the petition could not be filed outside the four-year-cycle, whereas here the signature requirement increased. Clearly, Plaintiffs are not entitled to a windfall by obtaining ballot access under a lesser signature requirement than other sponsors would have to meet during the same four-year cycle. While the *Hamilton* case has been distinguished on other points, see *Consumers Power Co v Attorney General*, 426 Mich 1 (1986) and *Bingo Coalition for Charity-Not Politics v Board of State Canvassers*, 215 Mich App 405 (1996), the case still stands for the proposition that the preceding gubernatorial election sets the signature thresholds for the following four-year, election cycle. See also, OAG, 1975-1976, No. 4880, p 111 (July 3, 1975) (opining that a petition to amend the constitution that lacks sufficient signatures before the date of a November General Election at which a governor is elected dies as the signatures collected before the November General Election cannot be filed after that election).

Thus, even if Plaintiffs had sufficient signatures under the 2014-2018 election cycle, and regardless of MCL 168.472a and MCL 168.473b, the petition

cannot be placed on the November 2020 General Election ballot. Plaintiffs' window for filing a petition that met the previous signature threshold has closed. Because there would be no point to directing Defendants to accept the petition for filing and to commence a canvass of Plaintiffs' petition, Defendants' motion should be granted and the complaint dismissed with prejudice.

B. Plaintiffs' voluntary inclusion of the 2016 election date rendered the petition defective and it was properly rejected.

Defendants agree there is no constitutional or statutory provision that expressly required Plaintiffs to include the date of the election at which the proposal was to be voted upon on the face of the petition. But Plaintiffs chose to include the November 8, 2016 General Election date on the face of the petition, and when they failed to file the petition in time for that election, Plaintiffs rendered the petition defective. Plaintiffs point to no constitutional provision, statute, or case law that would have permitted Secretary Johnson to disregard the heading of their petition and interpret Plaintiffs' own reference to the November 2016 General Election as instead referring to the November 2020 General Election as Plaintiffs now request. Secretary Johnson and Director Williams properly rejected the proposed filing based on Plaintiffs' defect.

C. Defendants never represented that Plaintiffs' petition could be filed for placement on the ballot in 2020.

To the extent there was any "representation" made by the party Defendants here, at best it was a suggestion or assumption that the petition could be or would be timely filed by the deadline for placing the proposal on the 2018 General Election ballot. Plaintiffs point to absolutely nothing that suggests any of the Defendants (or

their counsel for that matter), represented that Plaintiffs could file their petition after that deadline with the intention of having their proposal placed on the 2020 General Election ballot.⁴ And there could be no such representation because, as explained above, the Constitution precludes placing Plaintiffs' petition on the ballot in 2020. Plaintiffs equitable estoppel argument is without merit.

D. Plaintiffs constitutional violations are not ripe or reviewable.

In Count I, Plaintiffs seek a declaration that the 180-day circulation requirement in MCL 168.472a is unconstitutional. But again, that statute has not caused Plaintiffs any injury because Plaintiffs' petition was rejected for other reasons. Thus, as it was in the 2016 case, Plaintiffs' claim as to section 472a is not ripe for review. *Dep't of Social Sers v Emmanuel Baptist Preschool*, 434 Mich 380, 389 (1990).⁵

⁴ Plaintiffs assert that "after the courts' [2017] ripeness ruling, CBFM changed its target election from 2018 to 2020." (Plfs' Resp to Mtn for SD, p 3). But as of February 2018, Plaintiff CBFM was collecting signatures with the goal of placing them on the ballot in 2018. Kozma, LuAnne, *Campaign update Feb 2, 2018*, YouTube (February 2, 2018), <https://www.youtube.com/watch?v=CPpua3ouv-E>, at 0:23 – 3:21 ("We've now reached 238,000 signatures ... the deadline to get our proposal before the voters in November in 2018 is at the end of May of this year ... we need you to turn in all the signatures that you have on hand ... and we also need you to continue to collect signatures throughout February March and April, into May if we have to, but these first three months are really critical and we need to send them in frequently so they continue to come in throughout the three month period.").

⁵ A claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580-581 (1985) (citation omitted); *DSS v Emmanuel Baptist Preschool*, 434 Mich 380 (1990).

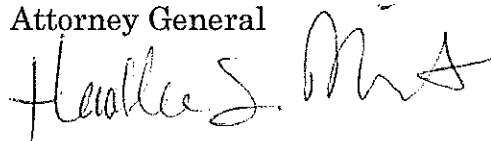
In Counts III and V, Plaintiffs allege constitutional violations based on Secretary Johnson and Director Williams' rejection of the petition due to its defects. But again, because Secretary Johnson's statutory authority provides a nonconstitutional basis for resolving these claims, this Court need not address them. *Federated Publications, Inc v Bd of Trustees of Michigan State Univ*, 460 Mich 75, 93 (1999). Moreover, these claims also appear moot because there is no practical legal relief that can be awarded to Plaintiffs since their petition can no longer be placed on the ballot. *Anway*, 211 Mich at 610.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in Defendants' principal brief, Defendants respectfully request that this Court grant summary disposition and dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,

DANA NESSEL
Attorney General

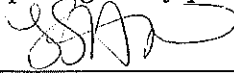


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Dated: April 22, 2019

PROOF OF SERVICE

Lisa S. Albro certifies that on the 22 day of April, 2019, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* at their last known addresses via first class mail by depositing same in a United States Post Office depository in Lansing, Michigan with first class postage fully paid.



Lisa S. Albro