STATE OF MICHIGAN

COURT OF CLAIMS

COMMITTEE TO BAN FRACKING IN MICHIGAN, and LUANNE KOZMA,

Plaintiffs,

v

SECRETARY OF STATE JOCELYN BENSON[1], and DIRECTOR OF ELECTIONS SALLY WILLIAMS, in their official capacity, and BOARD OF STATE CANVASSERS,

Defendants.
_____/

OPINION REGARDING DEFENDANTS' MARCH 7, 2019 MOTION FOR SUMMARY DISPOSITION AND DEFENDANTS' MARCH 26, 2019 MOTION TO STAY DISCOVERY

Case No. 18-000274-MM

Hon. Christopher M. Murray

Pending before the Court is defendants' March 7, 2019 motion for summary disposition filed pursuant to MCR 2.116(C)(10). Also pending before the Court is defendants' motion to stay discovery. For the reasons that follow the motion for summary disposition will be GRANTED. As a result, the motion to stay discovery will be DENIED as moot.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The procedural history of this case, as well as a related, separate matter previously filed in this Court, is lengthy and well-known to the parties. As a result, this opinion will recite only a few, basic facts, given the parties' and this Court's familiarity with these cases.

[1] Pursuant to MCR 2.202(C), because of her election as Secretary of State in November, 2018, Jocelyn Benson replaces Ruth Johnson as the proper defendant.

A. PLAINTIFFS' INITIATIVE PETITION CAMPAIGN

According to the allegations in plaintiffs' complaint, plaintiff Committee to Ban Fracking in Michigan (CBFM) is a committee engaged in a legislative initiative campaign, see Const 1963, art 2, § 9, that seeks to put before the electorate a ballot proposal to ban the practice of horizontal hydraulic fracturing ("fracking") in this state. On or about April 14, 2015, CBFM submitted a pre-circulation copy of its initiative petition to defendant Board of State Canvassers, which approved the form of the petition. As will be discussed in more detail below, the petition stated that the proposal would be presented to the electorate at the "November 8, 2016 General Election." CBFM began collecting signatures in an effort to obtain the requisite number—252,523—as set by art 2, § 9's requirement that an initiative petition contain "not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected . . . ." For purposes of ascertaining the required number of signatures, the "last preceding election at which a governor was elected" at that time was the November 2014 general election.

B. FIRST ROUND OF LITIGATION

As of June 1, 2016, the deadline for submitting the initiative petitions for the November 2016 ballot, see MCL 168.471, CBFM was short of the necessary signatures. Recognizing that they would be unable to place the measure on the ballot in 2016, plaintiffs continued gathering signatures, this time with the goal of placing the measure on the ballot in November 2018. One of the potential problems for CBFM in proceeding in this manner, however, was the prohibition in MCL 168.472a of counting signatures that are more than 180 days old.

Purportedly out of a desire to avoid any potential issues with MCL 168.472a, plaintiffs filed a complaint in this Court in which they challenged the constitutionality of the 180-day rule.

Plaintiffs alleged that MCL 168.472a violates art 2, § 9 because it infringes on the self-executing provisions of art 2, § 9.

In an August 8, 2016 opinion and order, this Court held that plaintiffs' constitutional challenge was not ripe for consideration because their ability to obtain the requisite amount of signatures—even with the "old" signatures—was, at most, speculative. *Committee to Ban Fracking in Michigan v Dir of Elections*, Opinion and Order of the Court of Claims, issued August 8, 2016 (Docket No. 16-000122-MM), p. 4. Because plaintiffs had not submitted their petition or collected the required number of signatures, they failed "to establish more than a hypothetical violation of their constitutional rights under Const 1963, art 2, § 9" and their claim was not ripe for adjudication. *Id.*

The Court of Appeals affirmed this Court's decision. *Committee to Bank Fracking in Michigan v Dir of Elections*, unpublished opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480). The Court agreed there was no live controversy because the former case was not one "in which plaintiffs have collected the number of required petition signatures, albeit during a time-frame outside the 180-day rule," or even one in which plaintiffs "filed those petitions at least 160 days before the election" and had the same rejected as insufficient. *Id.* at p. 4.

C. CONTINUED EFFORTS AND PETITION REJECTED FOR FILING

In 2017 and 2018, CBFM continued circulating its petition and collecting signatures after the dismissal of the first lawsuit. Believing it had enough signatures to satisfy the 8% threshold set by the 2014 gubernatorial election, plaintiff LuAnne Kozma arrived at the office of the Bureau of Elections at approximately 4:36 p.m. on November 5, 2018, and tendered CBFM's petition and signatures for filing. The next day, i.e., November 6, was the date of the 2018

general election, and it was scheduled to be an election at which a governor was elected. Hence, the November 6, 2018 election would establish new signature requirements for initiative petitions going forward. See art 2, § 9. According to plaintiffs, filing the day before the election was "critical" for CBFM because the number of voters who cast ballots in the gubernatorial race "was projected to increase and did substantially increase" on November 6, 2018. Hence, CBFM attempted the last-minute filing in order to have the petition measured against 2014's lesser signature requirements.

The filing did not occur as anticipated by CBFM, however, because of a purported defect on the face of the petition and signature sheets. The first paragraph of the petition, which describes the legislation intended to be enacted by the petition, states that the "proposal is to be voted on *in the November 8, 2016 General Election*." (Emphasis added). Every single signature page contained the same language. In ¶ 27 of an affidavit filed in this matter, plaintiff Kozma averred that she told a receptionist at the office that, despite the articulated date on the petition and signature pages, CBFM's "new target election" was the November 2020 general election. Nevertheless, the petition was rejected. Defendant Sally Williams, the Director of Elections,[2] rejected the petition because it incorrectly stated the same was to be voted on at an election that occurred nearly two years prior to the date the petition was tendered for filing, i.e., the November 8, 2016 general election.

D. SECOND ROUND OF LITIGATION—COMPLAINT FOR MANDAMUS RELIEF

[2] Pursuant to MCL 168.32(1) the Director of Elections is appointed by the Secretary of State and is "vested with the powers and shall perform the duties of the secretary of state under his or her supervision, with respect to the supervision and administration of the election laws."

On November 6, 2018, plaintiffs filed an original action in the Court of Appeals pursuant to MCL 600.4401(1) and sought mandamus relief. Plaintiffs asked the Court of Appeals to compel the Director of Elections and the Secretary of State to accept the November 5, 2018 attempted filing and to forward the same to defendant Board of State Canvassers. See MCL 168.475(1) ("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."). Plaintiffs contended that the Director of Elections and/or the Secretary of State had no authority to refuse to accept the petition or to usurp the Board of State Canvasser's authority to make determinations regarding the sufficiency of initiative petitions. In a proposed amended complaint filed after the November 6, 2018 election passed, plaintiffs asked the Court of Appeals to declare that the November 5, 2018 action constituted a "filing" that should have required the Secretary of State and/or the Director of Elections to take possession of the petition and signatures and to immediately forward them to the Board of Canvassers.

In a one-page order, the Court of Appeals denied the complaint for mandamus relief as well as the motion to amend the complaint. *Committee to Ban Fracking in Michigan v Dir of Elections*, unpublished order of the Court of Appeals, entered November 15, 2018 (Docket No. 346280).

E. THE INSTANT COMPLAINT

On or about December 27, 2018, plaintiffs filed the instant complaint. Count I of the complaint alleges that MCL 168.472b, which prohibits the counting of petition signatures

gathered more than 180 days before the petition is filed, is unconstitutional.[3] Count II—which is labeled "Equitable Estoppel"—alleges that defendants "expressly affirmed during the proceedings of the parties' initial 2016-17 civil case that plaintiffs would be able to file their petition if and when they collect the remaining number of petition signatures needed to satisfy the constitutional threshold." Plaintiffs assert that "equity demands" defendants be estopped from relying on the incorrect date on the face of the petitions because defendants reassured plaintiffs they could file their petition after obtaining the requisite number of signatures. Count III of the petition alleges that the Director of Elections and the Secretary of State capriciously refused to accept the petition and in doing so infringed on plaintiffs' rights under art 2, § 9. Count IV—also asserted against the two defendants referenced in Count III—alleges a violation of this state's election laws. In essence, plaintiffs contend that there was no statutory authority for defendants to refuse to accept the initiative petition tendered on November 5, 2018. Finally, Count V asserts an equal protection violation. Plaintiffs allege defendants have consistently accepted petitions in spite of the presence of facial defects, and have never before refused to accept petitions tendered for filing.

In their request for relief, plaintiffs ask the Court to declare that their petition was filed on November 5, 2018, i.e., the date it was originally tendered, and to require the Director of Elections and the Secretary of State to provide notice of the filing to the Board of Canvassers pursuant to MCL 168.475(1). Furthermore, plaintiffs ask the Court to declare that the election-date reference on the face of the petitions was extraneous and that the same does not preclude

[3] This is in essence the same challenge asserted in the first round of litigation; the difference between the first time plaintiffs asserted the claim and the instant case is that now, at least insofar as it concerned the signature requirements set by the 2014 gubernatorial election, plaintiffs facially met the threshold signature requirement.

CBFM from satisfying the statutory conditions for filing an initiative petition. Finally, plaintiffs ask the Court to declare that MCL 168.472a is unconstitutional as applied to initiative petitions and to enjoin defendants from applying it to discount signatures gathered more than 180 days prior to the date of a petition's filing.

F. DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendants now move this Court for summary disposition pursuant to MCR 2.116(C)(10). They first argue that the November 8, 2016 date on the face of the petition was a facial defect that enabled the Director of Elections to refuse to accept the petition. In making this argument, defendants acknowledge that there is no statutory authority in MCL 168.482 or MCL 168.544c—which describe the form of petitions—expressly requiring a petition to bear the date of the election at which the petition will be submitted to the electorate. Nevertheless, defendants argue that MCL 168.471 provided the authority for the Director of Elections to reject the petition, as MCL 168.471 directs that initiative petitions should be filed at least 160 days before the election at which the proposed law is to be submitted to the voters. By setting an outermost filing date, defendants argue that § 471 contemplates that the election at which a petition circulator intends the petition to be voted on by the electorate be specified. And here, every petition sheet submitted by CBFM expressly stated that the pertinent election was the November 8, 2016 general election. The completion of that general election rendered the petition defective, argue defendants, for the reason that it was impossible for the petition to be put to the electorate at the since-completed election. Defendants acknowledge that the Secretary of State and the Director of Elections had only limited gatekeeping authority with respect to initiative petitions. Nevertheless, they argue that this limited authority permitted them to reject a petition bearing a facial defect such as the one CBFM submitted for filing.

Next, defendants argue that irrespective of the operation of the 180-day rule set forth in MCL 168.472a, the signatures contained on plaintiffs' petitions are stale and they cannot be accepted for filing. In making this argument, defendants point out that under MCL 168.473b signatures on a petition collected prior to a November general election at which a governor is elected cannot be filed after the date of that November general election. Here, plaintiffs collected their signatures prior to the November 2018 general election; hence, according to defendants, they cannot file their petition now. Defendants also ask that the Court not sanction plaintiffs' attempt to evade § 473b by way of the last-minute attempt to file on November 5, 2018. According to defendants, signatures collected under the signature requirements set by the November 2014 general election cannot be used for an initiative petition after the next gubernatorial election, which establishes a new set of requirements for petition signatures.

Defendants next argue that there is no merit to plaintiffs' equitable estoppel claim. Initially, defendants argue that plaintiffs have not even pled the existence of a representation from any of the named defendants, but instead cling to statements made in briefs filed by defendants' counsel in the prior round of litigation. Moreover, defendants argue any assertions in their briefing never amounted to representations that plaintiffs would be permitted to file their petition anytime in November 2018; the referenced statements only explained why plaintiffs were unable at that time—a time when they lacked the requisite number of signatures—to challenge the validity of the 180-day rule set forth in § 472a. And at most, defendants contend that the "representation," to the extent it can even be considered a representation, was that plaintiffs, should they meet the signature requirement, could have filed their petition by the deadline for the November 2018 general election, not for the 2020 election.

Lastly, defendants argue that there is no merit to plaintiffs' constitutional claims. As it concerns the alleged constitutional infirmity of § 472a, defendants argue that the matter is once again moot, for the reason that the purported facial defect contained in the petition prevents this Court from reaching the issue. Further, they contend there is no merit to the alleged constitutional violation relating to the rejection of the petition, for the reason that the petition was invalid. Finally, defendants argue that the equal protection claim is defeated by the existence of the facial defect on the petition, which provided an appropriate reason for rejecting the same.[4]

II. ANALYSIS

A. SUMMARY DISPOSITION REVIEW

Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "When entertaining a summary disposition motion under Subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence." *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014).

B. THE INITIATIVE PROCESS AND THE REJECTION OF PLAINTIFFS' PETITION

The power of the initiative process is reserved to the people in art 2, § 9 of this state's Constitution. In order to invoke the initiative process, "petitions signed by a number of

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[4]The predecessor judge *sua sponte* ordered the parties to brief the issue of whether the doctrine of res judicata bars the instant action. In response, defendants contended it was unclear whether the prior mandamus action was decided on the merits, and they asked the Court not to dismiss on the basis of res judicata. In response, plaintiffs agreed that res judicata should not bar this matter. Here, defendants have made clear that they are not asserting the doctrine and that they do not intend to carry the burden of proving its applicability. *Everson v Williams*, __ Mich App __, __; __ NW2d __ (2019) (Docket No. 340521), slip op at 6.

registered electors, not less than eight percent for initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required." Art 2, § 9. Any law proposed by the initiative process "shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature." *Id.* If the law is not enacted by the Legislature within 40 days, then it shall be submitted to the people at the next general election. *Id.* The Legislature is charged with implementing the provisions of art 2, § 9. *Id.*

In MCL 168.471 *et seq.*, the Legislature has, in accordance with its constitutional directive, implemented the provisions of art 2, § 9. In accordance with this directive, the Legislature has set forth detailed requirements regarding paper size, font size, written summaries of the proposal, and other matters concerning the form of the petition. See MCL 168.482. The Legislature has also articulated certain filing requirements for petitions. Most notably, MCL 168.471[5] provides that "Initiative petitions under section 9 of article II of the state constitution of 1963 *shall be filed with the secretary of state at least 160 days before the election at which the proposed law is to be voted upon.*"

With one exception noted in the paragraph below, the Secretary of State's role with respect to initiative petitions is limited. In general, the Secretary of State's role is limited to receiving filings and conveying information—either to the Board of Canvassers or to the general public. See, e.g., MCL 168.475(1)-(2); *Citizens Protecting Michigan's Const v Secretary of*

[5] As is the case with some of the other pertinent statutes cited herein, MCL 168.471 was amended, effective December 28, 2018, after the commencement of this action. See 2018 PA 608. Unless otherwise noted herein, all references in this opinion are to the pre-amendment version of § 471.

State, 280 Mich App 273, 286; 761 NW2d 210 (2008) ("The Secretary's duties in regard to an initiative petition are [ ] limited."). For instance, MCL 168.475(1) directs that, upon the filing of a petition, "the secretary of state shall immediately notify the board of state canvassers of the filing of the petition." "The Secretary has no further duties until after the Board deems a petition sufficient and approves the Director of Elections' statement of purpose." *Citizens Protecting Michigan's Const*, 280 Mich App at 286. The Secretary of State is not permitted to make any determinations about the validity of the proposal contained within a petition. *Id.* And upon the Board of Canvassers declaring that the petition is sufficient, the Secretary of State is charged with giving notice to the public about the petition. MCL 168.477(1); MCL 168.478.

Here, plaintiffs argue that the Secretary of State—as well as the Director of Elections, which is "vested with the powers and shall perform the duties of the secretary of state" with respect to election law, see MCL 168.32(1)—had no authority to reject CBFM's petition, due to the erroneous reference to the November 8, 2016 election or otherwise. Defendants, meanwhile, argue that § 471, which sets forth the 160-day rule, provides such authority. The Court agrees with defendants' position.

In this respect, § 471 specifies that in order to be valid, an initiative petition "shall be filed with the secretary of state at least 160 days before the election at which the proposed law is to be voted upon." The statute does not expressly mandate which entity—the Secretary of State, the Board of Canvassers, or some other entity—is to enforce the 160-day rule. The Court agrees with defendants, however, that the most logical enforcer of this provision, as can be ascertained from the entirety of the pertinent statutory scheme, is the Secretary of State. The Secretary of State is, by analogy, a ticket-taker charged with immediately forwarding petitions, upon filing, to the Board of Canvassers. Extending that analogy, the 160-day rule in § 471 is simply a date after

which no tickets may be accepted and after which admittance may be denied. Indeed, the statutory scheme simultaneously mandates that all petitions "shall" be filed with the Secretary of State, see MCL 168.471; MCL 168.472, MCL 168.475; however, that filing must occur at least 160 days before the election at which the proposed law is to be voted on by the electorate, see § 471. Given that the filing of a petition is to occur with the Secretary of State and that the Secretary of State is the only entity with any role with respect to the "filing" of a petition, it follows that any violations of the 160-day rule for filing are also within the Secretary of State's statutory authority. This notion is further reinforced by the Secretary of State's obligation to immediately forward a "filed" petition to the Board of Canvassers. To this end, it would make little sense for the Secretary of State to "immediately" forward a late-filed petition to the Board of Canvassers for the latter to begin canvassing the late-filed (and invalid) petition to ascertain whether the petition was "signed by the requisite number of qualified and registered electors." See MCL 168.476(1).

The contextual whole of the statutory scheme imposes upon the Secretary of State an obligation to ensure that the 160-day filing requirement in § 471 has been satisfied. See *McCahan v Brennan*, 492 Mich 730, 738-739; 822 NW2d 747 (2012) (addressing statutory interpretation and the need to construe statutes as a contextual whole). For the avoidance of doubt, this opinion should not be understood as granting the Secretary of State any authority to weigh in on the merits or contents of a petition, or to reject a petition as a result of the same.

Rather, and consistent with the pertinent statutory scheme, the Secretary of State's role in this respect is only to ascertain whether the 160-day filing requirement has been met.[6]

Turning to the merits, the face of CBFM's petition was plainly in violation of § 471's 160-day requirement. As noted, each and every signature page submitted unequivocally stated that the proposal in CBFM's petition was to "be voted on in the November 8, 2016 General Election." This was an election that had long since passed when plaintiff Kozma submitted the petition to the Secretary of State. For this reason, the Secretary of State was authorized, consistent with the narrow scope of authority afforded to that office under the statutory scheme, to reject the filing of the initiative petition. This conclusion is unchanged by plaintiff Kozma's averments indicating that, in spite of the text of the petition, CBFM really intended the matter to be put to a vote in the November 2020 election. Again, the role of the Secretary of State with respect to the filing of petitions is limited. That role should not be expanded to require a searching inquiry into that which is beyond the information listed on the face of the petition itself. Stated otherwise, if the petition and signature pages submitted are plainly in violation of § 471's requirements, the Secretary of State is permitted, if not required, to reject the same. And here, those pages and all objective indicia present in CBFM's petition unequivocally showed that the petition violated the 160-day rule. When presented with that objective indicia[7] defendants were authorized under the statutory scheme to reject the filing on the basis of that objective

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[6] Although not dispositive, defendants note that there have been other instances where the Secretary of State—or the Director of Elections acting in the Secretary's stead—have rejected election petitions. See, e.g., *O'Connell v Dir of Elections*, 317 Mich App 82, 87; 894 NW2d 113 (2016).

[7] Contrary to plaintiffs' assertions, it matters little whether this reference need not have been included on the petitions. It was included, and it was erroneous. As such, the erroneous election date gave rise to the Secretary of State's limited authority to reject the petition.

information. Drawing on the Court's previous analogy, the ticket presented by CBFM simply did not permit admittance.

The Court acknowledges that the rejection of plaintiffs' petition resulted in plaintiffs missing the deadline for using signatures gathered prior to the November 2018 election. Further, the Court is mindful that any new petitions filed by plaintiffs will be subject to heightened signature requirements established by the November 2018 election. However, the Court cannot be swayed by those consequences, given that it was within the Secretary of State's legal purview to reject the filing of a petition that was plainly, on its face, in violation of § 471. As a result, defendants are entitled to summary disposition on Count IV of the complaint, which alleges a violation of this state's election laws by way of the Secretary of State and Director of Election's refusal to accept CBFM's petition for filing.[8]

The Court also concludes summary disposition is warranted on Count III of the complaint, which is plaintiffs' assertion that any rejection of the petition as occasioned by § 471 violates art 2, § 9. Plaintiffs' complaint alleges that defendants acted capriciously by refusing to

[8] Plaintiffs' citation to an attorney general opinion in support of its position, OAG, 1979 No. 5528 (August 3, 1979), is unconvincing. Attorney General opinions are not binding on courts, and it is open to debate as to whether they can even bind executive branch agencies. See *Danse Corp v Madison Hts*, 466 Mich 175, 182 n. 6; 644 NW2d 721 (2002). In any event, that opinion concerned the ability of a petition's circulator to postpone the election at which a petition could be presented to the electorate. It did not concern whether a petition could be rejected for violation of the 160-day rule. The Court also finds unconvincing caselaw cited by defendants that pertains to a petition filed after an intervening election and which concerned the interpretation of the 1908 Constitution. See *Hamilton v Deland*, 221 Mich 541; 191 NW 829 (1923). Here, the petition was never accepted for filing and thus was never "filed." Furthermore, the Court questions, but need not expressly decide, whether the holding in *Hamilton* has any precedential value with respect to the interpretation of the current iteration of art 2, § 9, particularly in light of the Court of Appeals' decision in *Bingo Coalition for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405; 546 NW2d 637 (1996), which interpreted the current iteration of art 2, § 9.

accept what plaintiffs believed was a timely filed petition. However, plaintiffs' complaint fails to both acknowledge the statutory authority permitting the rejection of the petition, and to assert that the statutory authority was unconstitutional. In any event, plaintiffs' arguments that § 471 is unconstitutional are not convincing, as the 160-day rule applied to the filing of the petition under § 471 is not an "undue burden" placed on the initiative process. Cf. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466-467; 185 NW2d 392 (1971). In arguing to the contrary, plaintiffs tacitly concede that § 471 is constitutional as a legislative implementation of art 2, § 9 insofar as it is a facilitative measure for ensuring sufficient pre-election time for a proposal to reach the Legislature and/or electorate. See art 2, § 9 ("The legislature shall implement the provisions of this section."). That is the only method, contrary to plaintiffs' assertions, in which § 471 has been applied in this case. The petition submitted by CBFM was, on the face of the ambiguous language contained on every signature page, untimely. The rejection of the petition was nothing more than an exercise of this pre-election timeframe. As a result, summary disposition will issue in defendants' favor on Count III of the complaint.

C. PLAINTIFFS' "EQUITABLE ESTOPPEL" CLAIM

Plaintiffs assert in Count II that defendants should be equitably estopped from rejecting the petitions, by virtue of a statement or statements made by defendants' counsel in various briefs filed in the previous round of litigation. Plaintiffs assert that these statements induced them to believe they would be able, upon obtaining the requisite number of signatures, to file their petition in November, 2018.

"Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to

deny the existence of those facts." *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich App 222, 240; 886 NW2d 772 (2015) (citation and quotation marks omitted). There are a number of reasons why plaintiffs' contentions are without merit and why summary disposition is warranted on this claim.

As an initial matter, equitable estoppel is not an independent cause of action, contrary to the manner in which plaintiffs have pled it. See *Casey v Auto Owners Ins Co*, 273 Mich App 388, 399; 729 NW2d 277 (2006) ("It is well established under Michigan law that equitable estoppel is not a cause of action unto itself; it is available only as a defense."). Furthermore, equitable estoppel applies to factual representations, see *NL Ventures*, 314 Mich App at 240, and plaintiffs are trying to extend the doctrine to assertions about the law, as made in arguments presented in briefs filed in the 2016 action. Moreover, even assuming any representations were made or could have been made in the briefs, the representations did not amount to assertions that plaintiffs could file their signatures at any time, nor do they suggest plaintiffs could succeed in placing the petition on the ballot at any election of plaintiffs' choosing without regard to the applicable law. None of the statements suggests plaintiffs could file a petition on the eve of the November 2018 election in the hopes of having the same voted on at a future election, or that defendants would overlook any statutory violations. At most, the asserted statements indicate that if plaintiffs achieved the requisite number of signatures, they could attempt to file the petition for purposes of having the petition voted on at then-upcoming (2018) election and that issues concerning the constitutionality of the 180-day rule articulated in MCL 168.472a (regarding stale signatures) could be litigated at that time. As a result, summary disposition under MCR 2.116(C)(10) is warranted on the equitable estoppel claim.

D. THE EQUAL PROTECTION CLAIM

At the outset, it is unclear whether plaintiffs are still pursuing their equal protection claim, for the reason that they have not specifically addressed defendants' argument as to why summary disposition should issue on this count (Count V). In any event, the Court agrees with defendants that summary disposition is warranted. "The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

> The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. The general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally related to a legitimate state interest. Under this deferential standard, "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute[.] [*Id.* at 318-319 (citations and quotation marks omitted).]

The documentary evidence presented does not reveal that CBFM's petition was treated differently from petitions filed by any similarly situated entities. "To be considered similarly situated, the challenger and his comparators must be *prima facie* identical in all relevant respects or directly comparable . . . in all material respects." *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013) (citation and quotation marks omitted). Plaintiffs contend, and cite instances of when, other petitions have been accepted for filing despite the presence of defects on the face of the petitions. However, it is apparent that none of the other petitions contained the 160-day defect present in this case. See *Morgan v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered June 8, 2018 (Docket No. 344108); *Delaney v Bd of State Canvassers*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2016 (Docket No. 333410); *The Tea Party v Bd of State Canvassers*, unpublished order of the Court of

Appeals, entered August 30, 2010 (Docket No. 299805). Here, by contrast, the defect in the petition concerned the 160-day rule, which is a matter the Secretary of State is charged with enforcing and is the limited type of error that enabled the Secretary of State to reject a petition. An attempt to draw a comparison between petitions that were accepted for filing but which contained defects *outside* of the Secretary of State's authority to review does not establish that plaintiffs and those other entities are prima facie identical in every respect. See *Lima Twp*, 302 Mich App at 503. Accordingly, summary disposition is warranted on Count V of the complaint.

E. REMAINING ISSUES

Because the petition was never "filed" the Court need not address the effect, or lack thereof, of MCL 168.473b. That statute provides "[s]ignatures on 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." Here, the petition was simply not "filed" before the November 2018 election, so there is no reason for the Court to address whether this statutory scheme would warrant summary disposition in defendants' favor. As a result, any discussion regarding plaintiffs' attempt to, at the last hour, avoid what was anticipated to be increased signature requirements for a 2020 ballot proposal by utilizing signature requirements established six years prior would be purely academic and need not be addressed in this opinion. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (describing a moot case or moot issue as one presenting "nothing but abstract questions of law which do not rest upon existing facts or rights") (citation and quotation marks omitted).

Furthermore, Count I of plaintiffs' complaint, which again asks the Court to declare that the 180-day rule established in MCL 168.472a runs afoul of art 2, § 9, is moot. Indeed, there are no signatures which have been discounted by virtue of the statute, such that any argument

premised on § 472a is moot for the reason that the same does not rest upon existing facts or rights. See *TM*, 501 Mich at 317.

III. CONCLUSION

For the foregoing reasons, defendants' motion for summary disposition will be GRANTED pursuant to MCR 2.116(C)(10). The motion pertaining to discovery will be DENIED as moot.

DATE: July 24, 2019

Christopher M. Murray
Judge, Court of Claims