STATE OF MICHIGAN
COURT OF APPEALS

Committee To Ban Fracking In Michigan and LuAnne Kozma,

Plaintiffs-Appellants,

Court of Appeals # 350161
Court of Claims # 18-000-274-MM

v

Secretary Of State Jocelyn Benson, Director Of Elections Sally Williams, in their official capacities, and Board Of State Canvassers,

Defendants-Appellees.
_____/

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Plaintiffs-Appellants' Opening Brief

Oral Argument requested

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I. Introduction and Jurisdiction[1]

The Committee to Ban Fracking in Michigan ("CBFM"), a ballot question committee, asks the Court to decide if "tendering" initiative petition signatures to the Secretary of State in November 2018 constituted "filing" them for canvassing under the election statute and common English usage, and whether an ambiguous sentence on the petition face saying CBFM's proposal is to be voted in 2016 caused the petition to die when CBFM didn't collect enough signatures in time for that election, given that the Michigan Constitution mandates that actions of the Canvassers and Legislature – not CBFM or the Secretary of State – determine the date and even the occurrence of an election, given that Defendants have a history of tolerating similar ambiguous sentences in the past, and given that Defendants in 2016-17 declared unqualifiedly and correctly in court that CBFM could file its signatures once it had collected enough.

The Court of Claims denied relief and closed the case on July 24, 2019. This Court docketed the appeal on August 12, 2019. The Court has jurisdiction under MCR 7.203(A)(1).

1 In this brief "Plaintiffs" refers to the Plaintiffs-Appellants. "Defendants" refers to the Defendants-Appellees. "The Secretary" refers to Defendants Secretary of State and her appointed Director of Elections, and their staff, collectively. "The Canvassers" refers to Defendant Board of State Canvassers. "CBFM" refers to Plaintiff Committee to Ban Fracking in Michigan.

II. Questions presented

A. Whether under Const 1963 art 2 § 9, it is deliberations of the Canvassers and Legislature after signatures are filed which determine whether there will be and election and if so on what date, regardless of what CBFM stated about an election on its petition sheets.

Plaintiffs say "yes."

B. Whether under common English usage for the word "filing," CBFM's tendering 270,962 initiative signatures to the Secretary of State constituted "filing" them under the election statute.

Plaintiffs say "yes."

C. Whether a sentence on CBFM's initiative petition sheets – "This proposal is to be voted on in the November 8, 2016, General Election" – stated a mere expectation, and whether the Secretary's reliance on it to reject tendered signatures was therefore an undue burden on the initiative process.

Plaintiffs say "yes."

D. Whether CBFM had the right to rely on assertions in court briefs of the Canvassers and Secretary of State in 2016-17, that once CBFM collected enough additional signatures on sheets which stated an expected voting date of November 2016, CBFM will and would be able to file them in 2018, given there is no claim that CBFM misled or misinformed signers.

Plaintiffs say "yes."

E. Whether the Secretary's refusal in 2018 to acknowledge filing of CBFM signature sheets which anticipated a voting date of November 2016 denied equal protection, given Defendants' different treatment in the past of similarly situated entities.

Plaintiffs say "yes."

F. Whether the Court of Claims improperly held that the expected 2016 voting date on CBFM's initiative petition sheets warranted summary disposition, when there is no claim or evidence that the error would or might have influenced signers and discovery was pending.

Plaintiffs say "yes."

III. Proceedings

Plaintiffs CBFM and CBFM Director LuAnne Kozma brought this declaratory and equitable action on December 27, 2018, to challenge both the constitutional validity of MCL 168.472a[2] as applied to statutory initiative petitions under Const 1963 art 2 § 9, and to challenge the Secretary's refusal to allow filing of CBFM's tendered signatures.

The complaint alleged five counts.

- Count I against the Secretary and Canvassers alleged that 472a violates Const 1963 art 2 § 9 under the doctrine of *Wolverine Golf Club v Secretary of State*.[3]
- Count II against the Secretary and Canvassers alleged equitable estoppel in that they reneged on assertions in the 2016-17 litigation that filing would be allowed when CBFM collected enough additional signatures.
- Count III against the Secretary alleged that her refusal of filing of CBFM's petitions violated the fourth paragraph of Const 1963 art 2 § 9.
- Count IV against the Secretary alleged that her refusal, based on an unfulfilled expectation on CBFM signature sheets, to acknowledge that tendering of petition signatures constituted "filing" them under MCL 8.3a and 168.471, violated Michigan election law.

2 "472a" or "the 180-day statute."

3 384 Mich 461 (1971).

- Count V against the Secretary alleged that because of her consistent practice of accepting filing of petitions in spite of her preliminary assumption of facial defects, her refusal in this case denied CBFM's equal protection under Const 1963 art 2 § 1 and US Const Am XIV.

Count I is not before the Court today. As to count II, Plaintiffs reframe it as judicial estoppel, relying on the same facts which the Court of Claims adjudicated.

For relief, the complaint asked that the Court declare that the November 2016 reference on the face of the petition does not preclude its statutory compliance, declare that CBFM "filed" signatures on November 5, enjoin the Secretary to take possession of the signatures and notify the Canvassers, and declare that 472a is unconstitutional as to statutory initiatives.

Plaintiffs served Defendants on the day they sued.

The Court of Claims had jurisdiction over equitable and declaratory claims under MCL 600.6419(1)(a) and (7).

The case was assigned by lot originally to Judge O'Brien. On January 2, 2019, in accordance with court rule,[4] it was re-assigned to Judge Borello. On May 1, 2019, per an order of the Supreme Court[5] it was re-assigned to Judge Kelly. On June 13, 2019, Judge Kelly recused himself, and the case was re-assigned by lot to Judge Murray.

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4 MCR 8.111(D).

5 ADM File # 2019-01.

In lieu of a responsive pleading, Defendants moved for summary disposition under MCR 2.116(C)(10) citing MCL 168.471 ("471") and MCL 168.473b ("473b"), saying there was no genuine issue of material fact.

While that was pending Plaintiffs submitted discovery and then revised discovery to Defendants. The revised questions asked for[6]

- Documents which motivated the Secretary to change her mind about whether CBFM would be able to file after 2016.
- Documents which establish a difference between "tendering" and "filing" signatures.
- Initiative petition sheets approved or canvassed by the Canvassers from 1963 to date.
- The petition sheet and related correspondence which was the subject of OAG 5528.
- Documents regarding the reason Defendants' guidelines omit a prescription for designating an election date.
- Circumstances and reasons of the Secretary ever rejecting another sponsor's initiative signatures for filing.

Defendants moved to stay responses till resolution of summary disposition.

On May 21, 2919, Judge Kelly requested briefs whether the doctrine of *res judicata* bars this action. The parties agreed it should not.[7]

On July 24, 2019, the Court denied discovery, granted summary disposition

6 Attachment D, App 126.

7 Court of Claims opinion, p 9 n 4, App 099.

with an opinion, and closed the case.

Plaintiffs appealed electronically. The Court's docket sheet shows the appeal was considered filed on August 12, 2019.

IV. Facts

A. Canvasser approval of the petition form in 2015 and the start of circulation.

Per the Constitution, the Canvassers are a four-member Governor-appointed board of two Democrats and two Republicans.[8]

On April 9, 2015, Plaintiff Committee to Ban Fracking in Michigan filed a pre-circulation copy of the front and back of its petition sheet with the Secretary as required by law.[9] The Secretary date-stamped it.[10]

Generally, the petition language seeks to amend the state oil-gas law[11] to ban horizontal fracking and its waste in the state, eliminate the statutory pre-WWII policy requiring state environmental regulators to foster and maximize oil-gas production, and substitute a requirement that they protect climate and other environmental values.[12]

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8 Const 1963 art 2 § 7; MCL 168.22(3), 22a(1).

9 MCL 168.483a.

10 Complaint Exhibit 1, App 032-33; attachment A, App 114-15.

11 MCL 324.61501 et seq.

12 Complaint ¶ 21, App 015.

The Canvassers met and reviewed it five days later on April 14. CBFM appeared by its director, plaintiff LuAnne Kozma. She urged approval of the petition as to form, noting that over a period of days and several back-and-forths and fixes the Secretary's staff had okayed it.[13] The Chamber of Commerce appeared by two attorneys to urge the opposite. Over 24 transcript pages[14] they contended the petition's title violated the title-object rule.[15] They said it did not inform signers that the proposal would impair flow of money to the Natural Resources Trust Fund, it would gut jurisdiction of the Court of Claims, and it would amount to a taking of property. They added:

> And if you don't consider [the above issues] today, with all due respect, should these petitions ever be filed with adequate signatures, those will – those issues will be presented before the Board at that time, again.
> …
> [T]his board certainly does carry a great deal of weight and prestige, especially downstream in – in appeals matters.[16]

Even so, the Canvassers approved the form of the CBFM petition, making note as they typically do that approval did not "extend to … the substance" of the proposal on the back or the summary/synopsis on the front.

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13 Attachment F, p 27, App 153.

14 Attachment F, pp 5-29, App 147-53.

15 Const 1963 art 4 § 24.

16 Attachment F, pp 12, 16, App 149, 150.

Canvasser Norman Shinkle was present but refused to vote, stating no reason. But being the Canvassers are a Constitutional board obligated to make decisions on the matters before them, it could only have been because of an unidentified conflict. The three others were unanimous.[17]

A sentence on the CBFM sheets right after the front-page 99-word summary/synopsis stated: "This proposal is to be voted on in the November 8, 2016, General Election."

As explained below there was no legal requirement that the front page state any election date at all. But this sentence is critical in the present dispute.

CBFM explained the reasons why the sheets carried the 2016 date, in a presentation to the Canvassers of November 15, 2018:

> At the time [2015] we hoped and expected to get enough signatures in time for the 2016 election. We also knew, as you [the Canvassers] do, that statutory ballot petition sheets historically have customarily included such language. Finally, *we were influenced by the existence of the 180-day statute* [MCL 168.472a], and had not yet researched to realize it was unconstitutional. Should the court eventually invalidate it, that would be an important factor in assessing our effort to comply with the statute, by putting a voting date in the summary.[18]

On May 22, 2015, CBFM began to collect voter signatures. At the 180-day mark in November 2015, it had over 150,000. Kozma's affidavit recounts this was

17 Attachment F, pp 30, 50, App 154, 159; complaint exhibit 1, App 029; cf complaint exhibit 3 last paragraph, App 040-41 and attachment D revised interrogatory # 7, App 130-31.

18 Complaint exhibit 3, p 3, App 039 (emphasis added).

a big improvement over previous CBFM campaigns, but still not enough to meet the threshold of 252,523 signatures, a figure determined per Const 1963 art 2 § 9 by the number of voters for governor at the previous election in 2014.

By then, as Kozma also recounts, CBFM started to question the constitutional validity of the 180-day statute, as then worded. CBFM began presenting legal argument to various officials (and to opponents in the oil-gas industry). Utilizing its 800 volunteers CBFM continued collecting and methodically vetting signatures, and hired a consulting firm to verify them. Under protocols of the Secretary, CBFM crossed out certain types of signature mistake, such as duplicates, birthdate instead of signing date, not registered on day of signing, or wrong county.

By June 1, 2016 (the 160th day before the 2016 ballot), CBFM had 207,000 signatures, still not enough, and did not file them. The CBFM petition died that day, according to Defendants now.

B. On June 1, 2016, CBFM sued to overturn the 180-day statute and continued collecting signatures using the same sheets with the disputed sentence, aiming at the time for 2018. Defendants responded saying the suit was unripe, but once CBFM collected enough additional signatures it will be able to file them. The courts agreed the suit was unripe.

That day as Kozma explains, CBFM changed its aim to the election of 2018,[19] continued collecting signatures using the same sheets, and sued the

19 Kozma affidavit ¶ 21, App 062-63.

Defendants for a declaration that 472a's prohibition of counting signatures older than 180 days unconstitutionally infringed the self-executing provisions of Const 1963 art 2 § 9 under *Wolverine Golf Club v Secretary of State.*[20]

A few days later the Governor signed the current version of 472a, making it – in Plaintiffs' view – even more unconstitutional, by making 180 days an absolute number. The new version is the one before the Court in this suit.

Rather than answering that the campaign was dead, Defendants asserted unripeness as a defense, and added in reference to the petition:

> Plaintiffs may *continue to circulate their petition without any interference*.... If and when Plaintiffs obtain the *additional* signatures they require, *they will be able to file their petition*.[21]

Defendants had known of the disputed sentence since the day the petition was filed and the Canvassers approved it in April 2015. At the time Defendants told this to the Court of Claims, a copy of the petition and the sentence were not yet in the record, but Kozma put them in the record as exhibit 21 to her affidavit. This was a month before the Court ruled on August 8, 2016.

On appeal, again without claiming the campaign was dead Defendants made the same assertion in 2016-17 – that CBFM may continue to circulate the petition – to this Court and the Supreme Court, except they changed "will be able to file" to

20 384 Mich 461 (1971).

21 Defendants' Brief on Motion for Summary Disposition, p 7, filed June 22, 2016, *Committee to Ban Fracking in Michigan v Director of Elections*, Court of Claims No. 16-000122-MM (August 8, 2016) (emphasis added).

"would be able to file."[22] Each time, the assertion was worded generally with no specific reference to CBFM's then-plan to aim for the 2018 election.

When Defendants said it to the Court of Claims and to this Court, it was after the deadline for the 2016 election. When they said it to the Supreme Court the 2016 election *itself* was long past.

In response to Defendants' motion in 2016 Kozma's affidavit noted:

> A declaration about the constitutionality of the 180-day statute will be a critical factor affecting leadership decisions and volunteer morale.[23]

The Court of Claims however upheld Defendants, and dismissed the action on ripeness grounds.[24] On March 14, 2017, this Court affirmed, saying it could not decide "hypothetical" issues, while acknowledging (without citing it, but in accord with a 1979 Opinion of the Attorney General) that CBFM was

> apparently *continuing* to collect signatures *with the same petition sheets* in an effort to have the fracking issue on the November 2018 ballot.[25]

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22 Appellate Brief of Defendants-Appellees, *Committee to Ban Fracking in Michigan v Director of Elections*, Court of Appeals Case No. 334480 at 4 (October 27, 2016); Defendants-Appellees' Brief in Opposition to Plaintiffs-Appellants' Application for Leave to Appeal, p 5, *Committee to Ban Fracking in Michigan v Director of Elections*, Supreme Court Case No. 155897, 898 NW2d 905 (July 25, 2017).

23 Kozma affidavit ¶ 25, App 063-64.

24 *Committee to Ban Fracking in Michigan v Director of Elections*, No. 16-000122-MM (Court of Claims, August 8, 2016).

25 *Committee to Ban Fracking in Michigan v Director of Elections*, No. 334480, 2017 Mich App LEXIS 405 at *2, 8 (March 14, 2017) (emphasis added).

The 1979 OAG had held:

> It is my opinion therefore that in the event circulators of an initiative petition have insufficient signatures to file the petition for the 1980 general election ballot, they may continue to circulate the *same petition forms* for filing for the 1982 general election ballot.[26]

The Supreme Court denied review.

C. CBFM changed the target election again, to 2020, and continued collecting.

In May 2018 CBFM again changed its target election, from 2018 to 2020, and continued collecting additional signatures with the same sheets. The aim at this point became to file the signatures for 2020 before election day in 2018, which was November 6. Under Const 1963 art 2 § 9 the number of required signatures is determined by the number of voters who cast ballots for governor in the previous election. Until November 6, 2018, that previous election was in 2014. The Court of Claims acknowledged that as expected the required number increased substantially on November 6 from the 2014 number.[27]

Changing of target elections had been a practice permitted by the Attorney General for the 40 years since the 1979 OAG. On January 20, 2000, an analyst for the House Fiscal Agency recognized the practice, in summarizing arguments for that year's amendment to 471. This was the last time 471 was amended prior to

26 Attachment G, OAG 5528 (1979), App 171 (emphasis added)

27 Court of Claims opinion, p 14, App 104.

this case. After a substitute bill passed the House, and before the Senate passed it and it became law as 1999 PA 219,[28] the analyst wrote:

> The 160-day deadline takes this into account. (It adds 40 days to the 120-day deadline for constitutional amendment petitions.) *Besides, if an initiative cannot go on the ballot at the upcoming election, it will be on the ballot for the one after.*[29]

Before that, this was even the Secretary's view, in arguing unsuccessfully for the constitutionality of MCL 168.472 to this Court in *Wolverine Golf Club:*

> filing after the statutory deadline results in submission of the issue to *the following legislative session*.[30]

Nothing in 471 prevents a committee from filing signatures during the 160-period before a governor election, if the aim is to have a vote in the following election, should the Legislature not enact the proposal itself.

In their reply to the Court of Claims,[31] Defendants quoted from a February 2, 2018, online CBFM video update for volunteers. In the 15-minute presentation director Kozma stated CBFM so far had 238,000 signatures, and was still aiming

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28 Legislative history, 1999 PA 219 <*http://www.legislature.mi.gov/(S(hccvu5yoqmrdmhe2a1uytc4k))/mileg.aspx?page=getObject&objectName=1999-HB-5061*>

29 Michigan House Fiscal Agency Analysis, 1-20-00 <*http://www.legislature.mi.gov/documents/1999-2000/billanalysis/House/htm/1999-HLA-5054-A.htm*> [emphasis added].

30 *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 736 (1970) (emphasis added).

31 Defendants' reply brief, p 5 n 4.

for the November 2018 election. Kozma walked through the legal issue about 472a, and the courts' refusal to hear CBFM's challenge until enough signatures were filed and CBFM could file a new suit. She explained CBFM's tedious and costly vetting process, and gave tips of venues and times for collecting.[32]

In a sur-reply Plaintiffs objected to Defendants citing this video.[33] The Court did not rule on the objection, and the citation is still in the record. Accordingly it is fair for this Court to notice Kozma's follow-up 5-minute online video of May 30, 2018.[34] There she announced the change of CBFM's target election, saying the number of in-hand signatures was a bit below 260,000, and the new filing deadline would be right before that year's election. A caption below the video added:

> With just 40,000 more signatures to go, the Committee will collect through the summer to reach its goal and submit signatures by November of 2018, *to qualify for the 2020 election*.[35]

32 CBFM campaign update, 2-2-18 <*https://www.youtube.com/watch?v=CPpua3ouv-E* >

33 Plaintiffs' sur-reply, p 4.

34 CBFM campaign update, 5-30-18 <*https://www.youtube.com/watch?v=Wsu4yyovTbs* >

35 Emphasis added.

D. On November 5, 2018, the Secretary refused to acknowledge filing and take custody of CBFM's signatures and notify the Canvassers.

According to Kozma's affidavit, by November 5, 2018, 150 new volunteers had joined the campaign.[36]

That day she and CBFM tendered 47 boxes containing 51,980 sheets of signatures for filing at the Secretary's office. They estimated the sheets contained 270,962 vetted signatures, which was 18,439 – or 7% – over the required threshold of 252,523.[37] The signatures were collected over a 3½-year period,[38] necessitating a ruling that 472a is unconstitutional in order for them to be canvassed.

Simultaneously Kozma informed the Secretary, as she had stated in the video of five months earlier, that "CBFM's new target election was November 2020."[39] Tendering the signatures that day was well in advance of the 160-day deadline set by 471 for the 2020 election.

The Secretary's staff acknowledged that CBFM tendered 270,962 signatures, but rejected the filing, refused to take custody of the boxes, and refused to notify the Canvassers that CBFM had filed. Pointing to the petition's front-page

36 Kozma affidavit ¶ 29, App 065.

37 Complaint ¶ 29, App 017.

38 Kozma affidavit ¶¶ 13, 20, 28, App 061-62, 064.

39 Kozma affidavit, ¶ 27, App 063.

reference to the 2016 election, of which the parties and the Courts already knew in the prior proceedings,[40] in writing the staff said the reference was "incorrect."[41]

Staff also acknowledged that the Canvassers could "overrule" the decision.[42]

Asked in discovery why the Secretary changed her oft-repeated assertion in 2016-17 that once CBFM collected enough additional signatures it could file using the same sheets,[43] she has not responded.

As will be argued below, Plaintiffs contend the 2016 voting date on the sheets was neither "incorrect" nor "correct." The complaint notes[44] the date was and could only be an expectation, as evidenced for instance by (a) the date's absence in the full text of the initiative on the back,[45] (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 and sometimes because the Legislature enacted the initiative in the veto-proof manner specified by Const 1963 art 2 § 9 without an election, or (c) the tens of thousands of voters who signed the CBFM

40 Kozma affidavit, exhibit 21, App 066-67.

41 Complaint exhibit 2, App 034.

42 Complaint ¶ 33, App 018.

43 Complaint, ¶ 30, App 017; attachment D revised interrogatory # 1, App 128.

44 Complaint ¶ 31, App 017.

45 Attachment A, App 113.

petition after the election in November 2016 when it was obvious the election had passed. Some 64,000 voters signed after the deadline for 2016.

An example of a committee choosing not to file though it had enough signatures is the 2018 initiative of Clean Energy Healthy Michigan ("CEHM"), cited in briefing to the Court of Claims.[46] This was because, as CEHM announced shortly before the filing deadline, with signatures in hand as a bargaining chip it was able to settle with the utilities.

Examples of the legislature acting to preclude citizen votes are the petitions of Right to Life of Michigan and MI Time to Care, described below.

Signers of the CBFM petition in 2017-18 include the current Governor and Attorney General who signed in April 2018, after the 2016 election was long past.[47]

(In citing these two signatures – of people who were then only private citizens seeking public office – Plaintiffs do not mean to suggest the signatures bind them in any way in this suit. In particular Attorney General Nessel has no obligation to recuse herself, the same as any judge or justice would have no obligation should it appear in the canvass that he or she signed. The only purpose for citing the two signatures is to show, as will be argued below, that among everyone else, these legally-attuned people who signed after the 2016 election

46 CBFM brief in opposition to summary disposition, p 4 n 10.

47 Complaint ¶ 31(c), App 017; attachment B, App 116.

would have known the obvious, that when they signed in 2017-18 the petition no longer aimed for the 2016 election.)

Kozma departed the Secretary's office on November 5 with the boxes. Three days later after negotiating with three other companies, CBFM retained Kent Records Management to store the signatures, where they are secure today.[48]

E. The Canvassers' inaction.

Ten days later on November 15, 2018, Kozma and CBFM counsel appeared before the Canvassers. In a letter, as well as verbally during the period for public comment, they asked that the Canvassers overturn the Secretary's decision. As was customary, agents of the Secretary were present. They made no comment or response. The Canvassers did not grant or deny the CBFM request, and neither they nor the Secretary placed it on a subsequent agenda.[49]

On June 20, 2018, Canvasser minutes show they went into closed session with the Attorney General, as is their practice, to discuss "trial or settlement strategy" for three suits unrelated to this one, in which the Canvasser board was a defendant.[50] It is only in such meetings that the Canvassers can decide whether to contest or accede to any lawsuit.

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48 Complaint ¶ 34, App 018.

49 Complaint ¶¶ 40-41, App 020; complaint exhibit 3, App 036.

50 Canvasser minutes, 6-20-18 < *https://www.michigan.gov/documents/sos/06-20-18_Approved_Mtg_Minutes_635775_7.pdf* >

But between the date this suit was served and the date Defendants moved for summary disposition, and extending even to the date this brief is being filed, Canvasser minutes do not show any closed- or open-session meetings where the Attorney General met with them to discuss strategy for this case.[51]

Had there been such a meeting it could not have resulted in a 2-2 tie because Member Shinkle would have been expected to again recuse himself due to the same conflict when the petition came before him in 2015.

Accordingly the governor-appointed Canvassers, whom the Secretary does not control, gave the Attorney General no authority to oppose this case.

F. Evidence in the public record

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, 2018, to the House Committee on Elections and Ethics. RTLM is the "premier expert" on initiating legislation in

51 Canvasser minutes, 2-25-19 <*https://www.michigan.gov/documents/sos/Approved_Minutes_022519_Meeting_658693_7.pdf*>;
Canvasser minutes, 5-23-19 <*https://www.michigan.gov/documents/sos/Approved_Minutes_052319_Meeting_658692_7.pdf*>;
Canvasser minutes, 6-10-19 < *https://www.michigan.gov/documents/sos/Approved_Minutes_061019_Meeting_658691_7.pdf* >
Canvasser draft minutes, 6-19-19 <*https://www.michigan.gov/documents/sos/061919_Draft_Mtg_Minutes_658694_7.pdf*>.

Michigan. It initiated four laws since 1987, all of them through the veto-proof method of the Legislature and none by a voter election. Reaching the ballot is "never" RTLM's intent. Plaintiffs cited this testimony to the Court of Claims:

> 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.*[52]

The trail blazed by RTLM has become the norm. In 2018 only one of four canvassed statutory initiative went to ballot. The Legislature passed the others.[53]

The following additional example did not come to the attention of the Court of Claims because Defendants denied it existed in their brief for summary disposition at page 9. There, Defendants attached sample petitions as their exhibit

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52 Genevieve Marnon, RTLM Testimony to House Elections Committee, 12-12-18 <*http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=ELEC-121218.mp4*>, beginning at 1:19:02 and 1:22:48 (emphasis added).

53 Bureau of Elections, "Initiatives And Referendums Under The Constitution Of The State Of Michigan Of 1963", January 2019 < *https://www.michigan.gov/documents/sos/Initia_Ref_Under_Consti_12-08_339399_7.pdf*>

5, falsely describing the samples as "*all* legislative initiative petitions filed or approved as to form in 2017-2018."[54]

Exhibit 5 should have, but did not, include the petition sheet of MI Time To Care ("MITTC") which is about to be described. Because MITTC's petition and the proceedings surrounding it are public records,[55] this Court may notice them.

On August 17, 2017, and July 27, 2018, the Canvassers reviewed MITTC's petition sheet. They would have seen it stated: "The proposed legislation is to be voted on at the General Election, November 6, 2018."[56] This expectation – including the phrase "is to be voted on" – was "incorrect" (as the Secretary would phrase it), because it had no reference to the possibility that the Legislature could act in the constitutional sequence, as with RTLM's petitions, and preclude an election by itself enacting the initiative. The incorrectness was known from the start, even before MITTC began circulating. But the Secretary accepted the signature filing and the Canvassers approved the form and the sufficiency of the

54 Defendants' brief in support of summary disposition, p 9 (emphasis added).

55 MRE 803(8).

56 MITTC petition, 2018, attachment H <*http://legislature.mi.gov/documents/2017-2018/initiative/pdf/MITimeToCareFINAL.pdf*> , App 174-75.

petition.[57] It went to the Legislature. As MITTC knew all along could happen but didn't tell signers, the Legislature precluded an election by enacting the proposal.[58]

(Within a few weeks in the same session, the Legislature amended the MITTC law. The constitutionality of "adopting-and-amending" – which is not relevant to this appeal – at this writing is before the Michigan Supreme Court.[59])

Like the sheets of MITTC, CBFM's sheets similarly had no reference to the possibility the Legislature could preclude an election by itself enacting its proposal. In this regard the expectation on CBFM's sheets was as "incorrect" as MITTC's. Even so, without explanation the Secretary tolerated this mistake, and condemned only CBFM's expectation about the election date.

The sentence which failed to inform signers that the Legislature might act, was known to be false from day 1. So this part of the sentence was worse than the part about exactly what date the election would be. Yet this part skated by the Secretary and Canvassers with no comment, and MITTC's even became law.

In every previous election cycle secretaries have accepted election petitions for filing and review by the Canvassers regardless of their own preliminary assumption of facial defects.[60]

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57 Attachment C, App 119.

58 2018 Public Act 369, MCL 408.961 et seq.

59 Cases ## 159160 and 159201.

Because the day after Plaintiffs' petition filing, November 6, 2018, was the next occurring general election at which a governor was elected, filing of signatures after November 5 would have been barred under 473b.

V. The holdings of the Court of Claims

The Court's holdings are listed here in the order in which it considered them.

Count IV, alleged violations of election law. 471 (at the relevant times) provided petitions

> 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.[61]

Analogizing the Secretary to a ticket-taker at a public event, the Court of Claims extended her limited duties as articulated in *Citizens Protecting Michigan's Constitution v Secretary of State,*[62] to hold that 471 "logical[ly]" (though not "expressly")[63] provides her with "authority … to enforce the 160-day rule." Ticket-taking is part of the Secretary's "role,"[64] the Court reasoned, because read in

60 *Morgan v Board of State Canvassers*, unpublished order of the Court of Appeals, issued June 8, 2018 (Docket # 344108) (failure to include candidate address on petition heading); *Delaney v Board of State Canvassers*, unpublished, Docket # 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 # 299805) (petition heading failing to conform to statutory font size requirement).

61 Court of Claims opinion, p 10 n 5, App 100.

62 280 Mich App 273, 286 (2008), aff'd in result only 482 Mich 960 (2008).

63 Court of Claims opinion, p 11, App 101.

64 Court of Claims opinion, text at n 6, App 103.

context with MCL 168.475(1) and 476(1), the Canvassers would otherwise have had to start canvassing even though the petition may be untimely, which "would make little sense."[65]

The Court noted that every CBFM petition sheet, using language which was both "unequivocal" and "ambiguous,"[66] assigned the 2016 election as the date the petition "is to be voted on." Kozma's declaration on November 5, that CBFM's new target election was in 2020, was unavailing because the Secretary lacks authority to conduct a "searching inquiry" beyond the face of the petition, the Court held, and "all objective indicia" in the petition itself showed it violated the 160-day rule. Accordingly no "filing" occurred on November 5 because the Secretary was "permitted, if not required" to reject it. Otherwise stated, the Court held "the petition was never accepted for filing and thus *was never 'filed.*'"[67]

The Court did not dispute that CBFM would have been free to omit all reference to an election date on the sheets. As Plaintiffs made note below[68] without dispute, Defendants do not contend that CBFM misinformed or misled the signers.

The Court distinguished the 1979 OAG, cited by Plaintiffs. Even were an OAG binding, the Court held, under 471 the OAG upheld only the ability of a

65 Court of Claims opinion, p 12, App 102.

66 Court of Claims opinion, pp 13, 15, App 103, 105.

67 Court of Claims opinion, p 14 n 8, App 104 (emphasis added).

68 Plaintiffs' opposition to motion for summary disposition, p 5 n 11.

petition's sponsor, due to having insufficient signatures, to continue circulating the same petition forms and postpone the contemplated election from one election to the next. But, the Court added, the OAG did not consider whether wording on the sheets themselves might have violated the 160-day rule (which at the time was a 120-day rule, changed later by 1999 PA 219).[69]

Count III, alleged a violation of Const 1963 art 2 § 9 in the Secretary's capricious refusal to acknowledge filing. With no discussion of the import of the "next general election" wording of paragraph 4 of the section, and with no citation of precedent, the Court repeated its finding that the signatures were untimely under 471 because not filed 160 days before the 2016 election.

Count II, alleged equitable estoppel. This can be only a defense, the Court held, not an independent claim, and in any event it applies only to factual representations not legal ones. Without explanation, the Court also transformed Defendants' representations of 2016-17 from "[Plaintiffs] *will/would* be able to file" to "[Plaintiffs] *could attempt* to file."[70]

Count V, alleged a denial of equal protection. Unaware of the MITTC petition whose existence Defendants had denied and without noticing that the sheets of "Abrogate Prohibition Michigan" bore had no date at all, the Court held

69 Court of Claims opinion, p 14 n 8, App 104.

70 Court of Claims opinion, p 16, App 106.

that the documentary evidence did not show CBFM's petition was treated differently from those of similarly situated entities. The Court added that none of the instances cited by Plaintiffs of petitions being accepted despite facial defects contained the "160-day defect" of this case.[71]

Count I, alleged the unconstitutionality of 472a. The Court held it is again moot because no signatures were filed.[72]

VI. Argument

A. Standard of review

Review of summary disposition under MCR 2.116(C)(10) or 2.116(I)(2) is *de novo* if the documentary evidence shows that there is no genuine issue of material fact.[73] Further:

> A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.[74]

71 Court of Claims opinion, pp 16-18, App 106-08.

72 Court of Claims opinion, pp 18-19, App 108-09.

73 *City of Holland v Consumers Energy Co*, 308 Mich App 675, 681-82 (2015).

74 *Nuculovic v Hill*, 287 Mich App 58, 62 (2010).

B. Principal constitutional provisions and statutes

Const 1963 art 2 § 9: "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative.... The power of initiative extends only to laws which the legislature may enact under this constitution.... To invoke the initiative ... petitions signed by a number of 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.

"...

"Any law proposed by initiative petition 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....

[Paragraph 4] "If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

"... No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature.... If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.

"The legislature shall implement the provisions of this section."

MCL 8.3a: "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

MCL 168.471: "... 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...."

MCL 168.472a: "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."

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. The notification shall be by first-class mail."

MCL 168.476(1): "Upon receiving notification of the filing of the petitions, the board of state canvassers shall canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors...."

MCL 168.476(2): "The board of state canvassers may hold hearings upon any complaints filed or for any purpose considered necessary by the board to conduct investigations of the petitions. To conduct a hearing, the board may issue subpoenas and administer oaths. The board may also adjourn from time to time awaiting receipt of returns from investigations that are being made or for other necessary purposes...."

MCL 168.477(1) (as worded during the events of this case before enactment of 2018 PA 608): "The board of state canvassers shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted...."

MCL 168.479 (as worded during the events of this case before enactment of 2018 PA 608): " Any person or persons, feeling themselves aggrieved by any determination made by said board, may have such determination reviewed by mandamus, certiorari, or other appropriate remedy in the supreme court."

MCL 168.485: "A question submitted to the electors … shall be worded [on the ballot] so as to apprise the voters of the subject matter of the proposal or issue, but need not be legally precise...."

C. Summary of argument

Under Michigan's common-usage statute, "tendering" initiative signatures to the Secretary is "filing" them. The sentence on the petitions which mis-anticipated the election date was unneeded and ambiguous. CBFM had no power, either on the petition sheets or on the date of tendering/filing, to determine the election at which its proposal would or could be voted. Per the Constitution and 471 – which are to be construed liberally to favor exercise of initiative rights – the election has to be the "next general election" after the Legislature does its job. This might be in 2020 or conceivably even later. Historically the Secretary and Canvassers have tolerated mistaken extraneous language on petition sheets, and they themselves have acted untimely. Defendants offer no evidence and do not argue that the sentence misled or misinformed signers in any way, and it is only the signers whose interests are at issue. As a prerequisite to deciding the ripeness issue in 2016-17, the courts necessarily determined the petition was not dead, as

Defendants claim now it was. Discovery is incomplete. Hundreds of volunteer circulators relied on Defendants' truthful words, and equity should not allow public officials to reverse course.

D. Preliminary: the Attorney General's representation of the Canvassers

Plaintiffs object to the Attorney General appearing for the Canvassers in any capacity. Unlike the Secretary, the Canvassers can decide litigation strategy – including whether to contest or accede to a suit – only when they meet. In a meeting, the Canvassers might have insisted on a different strategy than the Secretary's.

The record shows that after being served the Canvassers never met about this case, and never authorized the Attorney General to file a motion.

E. Counts IV and III: Violations of the Constitution and election law.

Since they are intertwined, Plaintiffs treat the arguments under counts IV and III together.

It was on the 160th day before the 2016 election that CBFM admitted it had only 207,000 signatures, decided to continue collecting with the same sheets, and sued to challenge the 180-day statute.

Defendants' answer and affirmative defenses then did not say what they say today, that on the day of the suit CBFM's initiative died, even the ripeness issue was foreclosed, and CBFM's 800 volunteers could only put down their clipboards

and go home. Instead for a year Defendants consumed Plaintiffs, the courts, and themselves with the ripeness issue.

Below in the present case, Defendants contended that 471 "contemplates" that a ballot question committee must "in some manner" designate an election date,[75] though the Legislature rejected a 2009 Senate bill which would have imposed that obligation.[76]

Plaintiffs put an end to that theory, by noting that it would apply alike both to constitutional and statutory initiatives, and showing that in 2017 Defendants approved the constitutional initiative sheet of "Abrogate Prohibition Michigan" which bore no election date.[77] The Court of Claims rejected the theory.

The Court's theory is rather that 471 logically allowed the Secretary herself to enforce the 160-day rule, that the disputed sentence bound CBFM, and that ticket-taking and reading the "tickets" is part of the Secretary's role because of 471's context with other election laws. Therefore, echoing an argument found only in Defendants' reply brief,[78] the Court held:

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

76 Legislative history, 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.") <*http://legislature.mi.gov/doc.aspx?2009-SB-0952*>

77 Exhibits 2-A and 2-B to Plaintiffs' opposition to motion for summary disposition, App 083-89.

78 Defendants' reply brief, p 4; cf MCR 2.116(G)(1)(a)(iii).

> [c]ontrary to plaintiffs' assertions, it matters little whether this reference [to the 2016 election on the sheets] need not have been included on the petitions. It was included and it was erroneous.[79]

The Court cited no precedent. This passage was the heart of its error.

1. 471 and Const 1963 art 2 § 9 paragraph 4

In 1970 Judges Lesinski and Levin of this Court, in separate opinions in *Wolverine Golf Club*, carefully detailed the history of the statutory initiative provisions at the 1961 Convention leading to the 1963 Constitution. Particularly Judge Lesinski wrote, quoting the Convention chairman of the committee on legislative powers on the changes in 1963 from the Constitution of 1908:

> "Removed from constitutional status are the provisions on content and *time of filing petitions*, canvassing of names on petitions, type sizes, and right of the legislature to prescribe penalties...."[80]

Both judges' histories were approved by the Supreme Court, in affirming unconstitutionality of the requirement of filing at least 10 days before the start of a legislative session under MCL 168.472.[81]

In the present case, the Court of Claims relied on 471's "context" considered in tandem with 475(1) and 476(1), which say the Secretary is to notify the Canvassers "immediately" of a filing so they can "begin canvassing."[82]

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79 Court of Claims opinion, p 13 n 7, App 103.

80 24 Mich App at 734 (emphasis added).

81 24 Mich App at 714, 738; 384 Mich 461, 465-66 (1971).

82 Court of Claims opinion, p 12, App 102.

The Court did not notice the Secretary's admission[83] that the Canvassers could overrule her – an admission undergirded by 476(2) which is part of the very same "context." That statute says that the Canvassers can "conduct investigations" and hold hearings to do a "searching inquiry" – the phrase used by the Court of Claims – about the sentence on the petition sheets, an inquiry which Plaintiffs agree the Secretary herself cannot do.[84] Moreover on receipt of the petition sheets the Canvassers also

> [possess] the authority to consider questions of form, and thus "issues other than whether there are sufficient valid signatures to qualify the proposal for certification."[85]

What would the Canvassers investigate about the disputed sentence on the CBFM sheets? Answer: The nature and history of Secretaries accepting filing of election petition sheets regardless of defects on them, the history of postponing initiative votes to a following election, the Secretary's own history of untimely action (an example is given in the next subsection), and the information Plaintiffs requested in discovery including the nature, history, and consequences of unfulfilled election expectations on sheets like those of MITTC, back to 1963.

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83 Court of Claims opinion, pp 11-15, App 101-05.

84 Court of Claims opinion, p 13, App 103.

85 *Auto Club of Michigan Committee for Lower Rates Now v Secretary of State*, 195 Mich App 613, 624 (1992); cf MCL 168.552(9) (in final determinations of petition investigations in primary elections Canvassers may consider deficiencies on the "face" of a petition).

But what neither the Canvassers nor the Secretary can do, as held by *Wolverine Golf Club,*[86] is to place an "additional obligation" or "undue burden" on the "self-executing" provisions of Const 1963 art 2 § 9, by binding CBFM to the date stated on the sheets, as though it were a private contract between CBFM and the signers, if that date was different from the "next" date after filing, canvassing, and legislative consideration. To repeat, the fourth paragraph of art 2 § 9 says:

> If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the *next general election*. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the *next general election*.[87]

No interpretation is needed to divine the intent of this wording. This paragraph 4 is the overarching "context" of the case, and it means a Court may not give the Secretary or even CBFM itself power to determine an election date.

After *Wolverine Golf Club* struck down 472 in 1971, and for 28 years until 1999 PA 219 put the 160-day rule for statutory initiatives into 471, no statute regulated the timing of filing of statutory initiative petitions. Contrary to the Court of Claims,[88] Plaintiffs do not contend the 160-day statute itself contravened

86 384 Mich 461, 466 (1971).

87 Emphasis added.

88 Court of Claims opinion, p 15, App 105.

Wolverine Golf, because 471 is open-ended; an initiative proposal can always appear on the "next" ballot, no matter when the petition might have been filed.

Instead, if there is to be any election at all, the date would be determined by the date when the Canvassers and the Legislature finish their jobs.

"[P]rovisions of the Michigan Election Law ... demonstrate that the Legislature knows how to construct language...."[89] It constructed language about rejection of petitions in MCL 168.475(2) (disallowing supplemental filing of petitions), but opted for no such language in the context here. Nor is there a rule under the Administrative Procedures Act[90] for rejection of petition filings.

Consider some hypotheticals. Suppose instead of mis-anticipating an election date CBFM sheets had incorrectly stated

> this proposal is to be voted on when signatures summing to at least *five percent* of the total vote cast for all candidates for governor at the last preceding general election are filed and canvassed,

but then CBFM filed the correct number (over *eight percent*) of valid signatures. Just as here, Const 1963 art 2 § 9 would require Defendants to ignore the mistake and place the proposal on the ballot.

Again, suppose the reverse of the situation here. Suppose in 2015 CBFM had anticipated that 472a was unconstitutional, expected collecting and filing

89 *Stand Up for Democracy v Secretary of State*, 492 Mich 588, text at n 23 (2012).

90 MCL 24.201 et seq.

would take a long time, and stated on the sheets "This proposal is to be voted on in the November 3, *2020*, General Election." Then suppose CBFM unexpectedly got enough signatures to file in time for 2016 or 2018. Under 471, that filing would therefore also be in plenty of time for 2020. So the signatures would be canvassed and the Legislature given its shot. Then, could the Secretary have determined that the 2020 date ruled, and waited till 2020 to place it on the ballot? Under the Constitution, no.

If CBFM had simply omitted the sentence from the sheets, the Court implied,[91] there would be no quarrel and by today the canvassing would be complete. Defendants, who had the burden on summary disposition, have never alleged or tried to show prejudice to anyone arising from the disputed sentence, particularly to signers. There is no expert testimony and no Canvasser finding to indicate that signers would or might have cared about the date on which the proposal would be voted, or cared if there would be an election at all.

Indeed, we see just the opposite, at least for the Governor, Attorney General, and the tens of thousands of signers in 2017-18 after the 2016 election was over. And in initiative law, it is the signers whose interests are at stake. The Secretary herself has no interest.

91 Court of Claims opinion, p 13 n 7, 103 App.

Consider also the context of *enactment* of the Constitution. At the 1961 Convention leading up to it, several well-regarded delegates[92] 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."

Granted these delegate speeches addressed a proposed change for constitutional initiatives[93] not statutory initiatives, at issue here. But the same grass-roots-friendly sentiment undoubtedly animated delegates alike as to both types. So this Court insists on "liberal" construction in statutory initiative cases:[94]

> This Court has a tradition of jealously guarding against legislative *and administrative* encroachment on the people's right to propose *laws and* constitutional amendments through the petition process.[95]

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92 Attachment E, App 139, 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 the Attorney General's 7/15/86 brief to circuit court in *Consumers Power v Attorney General*, 426 Mich 1 (1986).

93 Const 1963 art 12 § 2.

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

95 *Ferency v Secretary of State*, 409 Mich 569, 601 (1980) (emphasis added).

2. Tendering/filing, and ambiguity of the disputed sentence

The Court's finding – that CBFM didn't actually "file" 270,962 signatures when it "tendered" them on November 5 – defied common notions of English.

The meaning of common words is a fact question, to be resolved if doubtful in CBFM's favor.

"The question is," as Alice retorted to Humpty Dumpty,[96] "whether you can make words mean so many different things." The answer of course is "no." Under MCL 8.3a words must be construed according to common English usage. Thus in treating of the words "tendering" and "filing," *Wolverine Golf Club* itself made no distinction between them.[97]

Consider the situation of an attorney who tenders or files a suit or a pleading which is untimely and the filing clerk knows it. It is still the clerk's duty to accept the filing and refer the papers to the judge for a decision.

That is what the partisan Secretary should have done. Election law gave her even less authority than the Court of Claims' "ticket-taker." Her job was limited to to receiving and conveying filings to the bipartisan Canvasser Board.[98] Acknowledging this, the Court nevertheless contended that "the statute does not

96 *Through The Looking Glass*, Chapter 6 <*http://sabian.org/looking_glass6.php*>

97 384 Mich at 464.

98 *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 286 (2008), aff'd in result only 482 Mich 960 (2008).

expressly mandate which entity … is to enforce the 160-day rule,"[99] ignoring the above-quoted teaching of *Auto Club v Secretary of State.*[100]

The Secretary and the Court read the sheets, and focused on the one sentence which CBFM could have omitted. The Court held that this sentence was both "unequivocal" and "ambiguous."

Of course, it can't be both. "Ambiguous" is the correct reading. Given the ambiguity, we can say with Polonius[101] it follows ineluctably "as the night the day" that it was merely an expectation which went unfulfilled. The Court should disregard it.

First, as already noted, it is the timing of the deliberations of the Canvassers and Legislature, not CBFM or the Secretary, which determines the "next" election at which a statutory initiative will be voted. There is no deadline. Nothing – not 471 or even 472a or 473b – prevents a ballot question committee from filing signatures *whenever* it wants, at the beginning, middle, or end of a governor's term. Even had CBFM collected signatures in time for 2016, the Legislature could have proved the sentence to be a mirage, as it did for MITTC.[102]

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99 Court of Claims opinion, p 11, 101 App.

100 195 Mich App 613, 624 (1992).

101 *Hamlet* 1.3.78-80, Shakespeare Navigators, "Hamlet: Act 1 Scene 3" <*https://www.shakespeare-navigators.com/hamlet/H13.html*>

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

Second, the statutory standard for form and content of petitions is that of "strict" compliance with the Secretary's prescribed format.[103] Defendants and the Court of Claims make no contention that the disputed sentence violated the format statutes.[104] It could have just been omitted. Extraneous language, not prohibited by the format statutes, does not render a petition invalid.[105]

Third, the construction "is to be voted" on the sheets (which tracked the wording of then-471, which in turn tracked the language of Const 1963 art 12 § 2, not art 2 § 9) left doubt as to whether a proposal actually would be voted at all, if the Legislature enacted it during the 40 session days. A ballot question committee which includes a date does so at its peril, if as the Court of Claims held, that date would supersede Const 1963 art 2 § 9 paragraph 4. In 2018 PA 608, after the events of this case and just as the complaint was being filed, the Legislature recognized that 471 lacked mention of the requirement that a proposal with enough valid signatures go before the Legislature first before it could go to the voters. The "is to be voted" verbiage is now removed and 471 says:

103 *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 602-03 (2012); see MCL 168.544d.

104 MCL 168.482 and 544d.

105 *Auto Club of Michigan Committee for Lower Rates Now v Secretary of State*, 195 Mich App 613, 616, 624 (1992).

> 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.*[106]

(Though earlier this year in *League of Women Voters v Secretary of State*[107] the Court of Claims struck down parts of 2018 PA 608, it did not strike down the Act's re-wording of the 160-day requirement.)

Even without the legislative change, consider the grammar of the "is to be" construction. According to any treatment of English usage,[108] "is to be" does not necessarily convey an absolute. Rather it denotes something that "is expected to happen at a future time ... as a result of either some duty … or some set plan." Granted, "duty" may possibly refer to an absolute legal duty. But a "plan" envisions that unexpected conditions could arise which end up unsatisfied. Plans don't always work out. Any statement about the future is bound to be speculative.

Fourth, experience shows the Secretary and the Canvassers themselves don't always act timely, even though as the Court of Claims noted the Canvassers are to "begin canvassing" on receiving notification of the filing of the petitions.[109]

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106 2018 PA 608 (emphasis added).

107 Court of Claims docket ## 19-000084-MM, 19-000092-MZ (9/27/19).

108 See for instance Wikipedia, "'Going-to' future, the *be* + *to* construction," undated <*https://en.wikipedia.org/wiki/Going-to_future#The_be_+_to_construction* >

109 Court of Claims opinion, p 12, 102 App.

Thus, in 2018 this Court considered a constitutional initiative, whose signatures were filed with the Secretary on December 18, 2017. Typically in canvassing for statewide ballot proposals, it takes only 60 days for a sample to be selected, analyzed, and presented to the Canvassers for certification.[110] But by the time the Court ruled on the resulting mandamus case on June 7, 2018, the Canvassers had not certified the signatures.[111] The Canvassers finally certified them as sufficient on June 20, six months after the filing.[112] There had been no court order directing the Canvassers or Secretary to wait. They could and should have acted promptly in December 2017, as they did in the 2008 case with the same caption *Citizens Protecting Michigan's Constitution v Secretary of State.*[113] Instead they ignored the command of 476(1).

110 Affidavit of Melissa Malerman, 7/8/16, ¶¶ 8-10, filed in *Michigan Comprehensive Cannabis Law Reform Committee v Johnson*, Court of Claims Docket # 16-000131-MM, dismissed, 8/23/16, leave to appeal denied by Court of Appeals, 9/7/16, application for leave to appeal denied by Supreme Court, 500 Mich 858 (2016), Attachment I, App 182-84.

111 *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 567-69, 612 (2018), aff'd SC Case # 157925 (7/31/18).

112 Canvasser minutes, 6-20-18 < *https://www.michigan.gov/documents/sos/06-20-18_Approved_Mtg_Minutes_635775_7.pdf* >

113 280 Mich App 273, 281 (2008), aff'd in result only 482 Mich 960 (2008).

In this case, even had CBFM filed signatures in time for 2016, litigation and appeals over the canvassing process[114] could have forced a vote to be put over to the next election, even despite Michigan's rules for expediting election cases.[115]

The following example from California provides an analogy. In that state there are rules[116] like Michigan's for expediting election cases. *We Care – Santa Paula v Herrera* was a mandate case. The court was faced with the plaintiff's prayer asking it to put an initiative specifically on the 2005 ballot. By the date the court ruled in 2006 that election had already occurred.[117]

The timeline was this: A city clerk initially rejected an initiative petition for failure to contain the text of the measure. The plaintiff sued for mandate. The trial court denied it but the plaintiff appealed and won reversal in 2006. After ruling on the merits the appeals court added:

> The city contends [plaintiff] We Care's appeal is moot. The contention is based on the prayer in We Care's petition for writ of mandate requesting that the city be required to place the initiative on the November 2005 ballot. The city points out that the November 2005 election occurred as scheduled without the initiative and the results have been certified. … But we can still grant effective relief. *The initiative may be placed on some future ballot*. The appeal is not moot.[118]

114 MCL 168.479.

115 MCR 7.213(C)(4).

116 *Hayward Area Planning Assn v Superior Court*, 218 Cal App 3d 53, 55-56 (1990).

117 139 Cal App 4th 387 (2006).

118 139 Cal App 4th at 391; emphasis added.

In the present case as noted, after canvassing begins the Chamber of Commerce has threatened proceedings over the initiative title.[119] If the Chamber proceeds that could take time and the Canvassers again might sit till it is resolved.

Alternatively, even the present case might linger past the deadline for 2020 should there be dissents, remands, or appeals. Voters might not see the CBFM proposal on the ballot until 2022.

Fifth, regardless of what the petition sheets said about a voting date, CBFM itself might have legally preempted it, as CEHM did, by settling before filing.

Sixth, compare the statute directing the form of the summary of the proposal should it appear on the ballot. The summary for people actually in the voting booth is allowed to be imprecise:

> A question submitted to the electors … shall be worded [on the ballot] so as to apprise the voters of the subject matter of the proposal or issue, but *need not be legally precise*....[120]

F. Count II: Estoppel and equity

As mentioned, Plaintiffs reframe the estoppel count (count II) as judicial not equitable estoppel, relying on the same facts – that Defendants are reneging on Court representations made in 2016-17, at a time when everyone including the Courts[121] knew of the disputed sentence on the petition sheets. Unlike equitable

119 Attachment F, p 12, App 149.

120 MCL 168.485 (emphasis added).

121 Kozma affidavit, exhibit 21, App 066-67.

estoppel, judicial estoppel applies to positions argued successfully by a party in a previous court, whether the position is legal[122] or factual. That is, "there must be some indication that the court in the earlier proceeding accepted that party's position as true"; the doctrine applies even if success in the previous case was merely "implied."[123] In a 2017 opinion this Court utilized it for a plaintiff.[124]

Defendants' representations here were unqualified (except of course for the requirement that CBFM have enough signatures). Further, as Plaintiffs show above, the representations were a correct re-statement of the law. The representations explained why CBFM could persevere without interference, to tee up their challenge to 472a and get the signatures canvassed.

However labeled, equitable and judicial estoppel are substantively equivalent in this case. The Court of Claims addressed the merits of estoppel – incorrectly as Plaintiffs note elsewhere – by transforming the meaning of Defendants' representations of 2016-17.

This Court made particular note that CBFM was continuing collecting using the "same petition sheets" – sheets which bore the disputed sentence. Thus the

122 *Wells Fargo Bank v Null*, 304 Mich App 508, 537 (2014).

123 *Paschke v Retool Indus*, 445 Mich 502, 509, 510 (1994).

124 *Esch v Yacob*, unpublished order of the Court of Appeals, issued June 13, 2017 (Docket # 332933), pp 8-9.

Court "indicated" it accepted Defendants' position "as true." Defendants are accordingly estopped to assert that CBFM could not file with those sheets.

Because today's case and the 2016-17 case are different proceedings, the law-of-the-case doctrine[125] technically does not apply. Nor does the doctrine of *stare decisis*, because this Court did not publish its 2016 opinion. Accordingly Plaintiffs note only in passing that if Defendants' view be accepted that the CBFM petition died on June 1, 2016, then the Courts' ripeness decisions after that date incorrectly addressed mere hypothetical questions, something which this Court said three times it could not do. Implicit in the ruling was rejection of what Defendants urge today, that the disputed sentence had already ended the campaign.

There is an equitable consideration. The Court of Claims held that CBFM must honor the sentence about the election date on its sheets, even while public officials dishonor an implicit acknowledgment that the sentence posed no problem.

The Court of Claims sidestepped the representations in two ways. First it noted Defendants were really referring only to the 2018 election which CBFM was aiming for at the time, as Kozma's affidavit said.

But the representations were general in nature and did not specifically allude to 2018. Even if they had, CBFM's change from 2018 to a future election was a

125 *Webb v Smith*, 224 Mich App 203, 209 (1997); *Grievance Administrator v Lopatin*, 462 Mich 235, 260 (2000).

distinction without a difference.[126] On the face of Defendants' assertions, since 2016 was already past, they were assuring everyone that CBFM will and would be able to file for a future election *after* 2016.

Thus, suppose CBFM had been able to collect enough signatures to file for 2018, Defendants' position today would still be that the disputed sentence precluded filing. Conversely, suppose CBFM had said in the first litigation it was targeting 2020 not 2018, Defendants would have made all the same successful ripeness arguments.

Second, the Court of Claims sidestepped in holding in effect Defendants could not possibly have meant what they stated:

> 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....*[127]

The problem with this reasoning is that CBFM committed no "statutory violation" of any "applicable law." As already pointed out, it is the Constitution, not the Secretary and not CBFM, which "chooses" the election date. CBFM

126 Complaint ¶ 58, App 025.

127 Court of Claims opinion, p 16, App 106 (emphasis added).

strictly complied with the formatting statutes. And it filed more than 160 days before the "next" election to follow after canvassing and legislative consideration. The only thing they "violated" was their own expectation on the sheets.

In the federal system, an agency's views are known not only by its decisions but also by its briefs to the US Supreme Court, even a brief in a case not before the Court.[128] The same has to be true in Michigan. Defendants must advocate for what they stated in so many words in 2016-17 to this Court and the Supreme Court, not merely that CBFM could "attempt" to file but that CBFM "would" be able to file.

More assurance than that a litigant could hardly hope for. Defendants' about-face today is unconscionable and worthy of Court scrutiny.[129] It is working a profound injustice on the hundreds of volunteer circulators, and the tens of thousands of voters who signed after the 2016 election, not to mention CBFM's expenditure of funds and the courts' own resources in adjudicating the ripeness issue, all in reliance on the integrity of Defendants' representations.

G. Count V: Denial of equal protection

In considering the claim under Const 1963 art 2 § 1 and US Const Am XIV,[130] the Court of Claims held CBFM presented no evidence that it was treated

128 *Retail Clerks v Schermerhorn*, 373 US 746, 756 (1963).

129 Cf MCR 1.109(E)(5)(b), 7.211(C)(8), 7.216(C)(1)(b).

130 Complaint ¶ 67, App 026.

differently from a similarly situated entity.[131] But as noted, the Secretary treated CBFM differently from "Abrogate Prohibition Michigan," whose petition was approved though it had no date at all, and differently from MITTC though its sheets did not allow the possibility the Legislature could act.

Equally important comparators are the above-cited *Morgan*, *Delaney*, and *Tea Party* cases, which show Secretaries historically have accepted petitions filings regardless of facial defects. The Court of Claims sought to distinguish them, noting that that none of them concerned the 160-day rule.[132] But neither did CBFM's. Compliant with 471 and Const 1963 art 2 § 9 paragraph 4, CBFM tendered signatures more than 160 days before the "next" general election following canvassing and legislative consideration, whenever that election might be. There will always be a "next" election.

H. Count I: Unconstitutionality of 472a.

This claim is neither unripe nor moot. The complaint outlines it.[133] Plaintiffs will elaborate it more fully should this Court reverse or remand.

131 Court of Claims opinion, p 17, App 107.

132 Court of Claims opinion, p 17, App 107.

133 Complaint ¶¶ 42-49, App 023-24.

VII. Conclusion

Signatures were filed on November 5. The Court should order the Secretary to take possession and notify the Canvassers so briefing can begin on the constitutionality of the 180-day statute. Alternatively, the case should be remanded for discovery.

Respectfully submitted,

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