STATE OF MICHIGAN
IN THE COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN and LUANNE KOZMA,

Plaintiffs-Appellants,

v

JOCELYN BENSON, official capacity Secretary of State; SALLY WILLIAMS, official capacity Director of Elections; and BOARD OF STATE CANVASSERS,

Defendants-Appellees.
/

Court of Appeals No. 350161

Court of Claims No. 18-000274-MM

BRIEF OF APPELLEES JOCELYN BENSON, SALLY WILLIAMS AND BOARD OF STATE CANVASSERS

ORAL ARGUMENT REQUESTED

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

s/Heather S. Meingast
Heather S. Meingast (P55439)
s/Erik A. Grill
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendants-Appellees
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: December 9, 2019

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

Plaintiffs-Appellants Committee to Ban Fracking in Michigan (CBFM) and LuAnne Kozma (collectively referred to in this brief as "CBFM") bring this appeal of right from the determination of the Court of Claims granting Defendants-Appellees Secretary of State Jocelyn Benson, Director of Elections Sally Williams, and Board of Canvassers' (the State Defendants) motion for summary disposition by order dated July 24, 2019. Under MCR 7.204(A)(1)(a), Plaintiffs-Appellants timely filed their claim of appeal on August 12, 2019. This Court has jurisdiction under MCR 7.203(A)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Michigan Election Law requires that initiative petitions must be filed with the Secretary of State and that they must be filed at least 160 days before the election at which the proposal would appear on the ballot. CBFM's petition was untimely on its face because it said that the proposal was to appear on the 2016 ballot. Did the Court of Claims correctly hold that the Secretary of State had the authority to reject this filing?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

2. Equitable estoppel is a doctrine to protect the judicial system—not individual parties—from a litigant advancing wholly inconsistent arguments in multiple cases. But the State Defendants' positions are not inconsistent, and instead CBFM's equitable estoppel claim reads the State Defendants' earlier arguments to find promises that were never there. Should CBFM's claim of equitable estoppel be rejected?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

3. In demonstrating an equal protection violation, the comparators must be prima facie identical in all relevant respects or, "directly comparable… in all material respects. CBFM failed to show that it was treated differently than any other similarly situated petition. Did the Court of Claims properly dismiss DBFM's equal protection claim?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

MCL 168.471, provides in part:

> 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 at which the proposed law is to be voted upon.

Const 1963, art 2, § 9, provides in part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum 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.
>
> * * *
>
> The legislature shall implement the provisions of this section.

INTRODUCTION

This appeal is CBFM's latest effort to maneuver an almost five-year-old initiative petition onto the ballot after failing to make a statutorily compliant filing for two consecutive election cycles. While CBFM once again seeks to challenge the signature "staleness" requirement of MCL 168.472a, that provision was not applied to its petition because CBFM has never successfully filed a petition for canvassing. Instead, its petition was rejected by the Director of Elections for failing to meet the facial requirements of being filed at least 160 days before the election "at which the proposed law would appear on the ballot." CBFM's petition stated on its face that the proposal was to be "voted on in the November 8, 2016 general election," but CBFM sought to file on the day before the 2018 general election to have this same petition placed on the ballot for the 2020 general election.

The Court of Claims correctly found that the Director was legally allowed—if not required—to reject CBFM's petition as facially defective, and that CBFM's arguments to the contrary were unavailing. CBFM now brings the same arguments before this Court and asks that this Court disregard statutory language, longstanding legal precedent, and even the language of its petition in order to compel the Secretary of State to canvass their petition for placement on the ballot in the 2020 general election. For the reasons stated more fully below, this Court should reject CBFM's arguments and affirm the opinion of the Court of Claims dismissing its claims.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. CBFM's first lawsuit

CBFM first filed suit in 2016 in this Court seeking declaratory judgment that MCL 168.472a was unconstitutional under article 2, § 9 of the Michigan Constitution. (App pp 27-42, Def's Mot. for Summ. Disp., Ex. 1, 2016 Compl.) This Court denied relief for lack of a case or controversy and CBFM appealed. The Court of Appeals' opinion affirming dismissal of that case summarizes some of the relevant facts:

> Plaintiff Committee to Ban Fracking in Michigan (CBFM) is engaged in a statutory initiative campaign that seeks to include a ballot option to ban horizontal hydraulic fracturing, which is commonly known as "fracking." . . . . Plaintiffs sought to have the issue on the 2016 ballot and, on April 14, 2015, the Board of State Canvassers approved the form of CBFM's initiative petition. On May 22, 2015, plaintiffs began circulating their petitions and collecting signatures. By November 18, 2015, the 180th day, plaintiffs had collected over 150,000 signatures—but that was less than the required number of 252,523. By June 1, 2016, the deadline for filing initiative petitions for the November 2016 ballot, plaintiffs had over 207,000 signatures—but, again, that was less than the required number.
>
> Plaintiff is apparently continuing to collect signatures with the same petition sheets in an effort to have the fracking issue on the November 2018 ballot. Accordingly, on June 1, 2016, plaintiffs filed this action challenging the 180–day rule set forth in MCL 168.472a. [App pp __, *Comm to Ban Fracking in Michigan v Dir of Elections*, unpublished opinion of the Michigan Court of Appeals, Docket No. 334480, dec'd Mar. 14, 2017.

The 180-day rule prohibits the counting of signatures on a petition that proposes to initiate legislation if the signature was made more than 180 days before the petition is filed with the Secretary of State. MCL 168.472a. Because it was taking CBFM so long to collect signatures, application of the 180-day rule to its

petition would have resulted in the discounting of stale signatures, potentially leaving CBFM without sufficient signatures to support its petition. But CBFM's case was dismissed for lack of an actual, live controversy because no adverse action had been taken as to the CBFM or its petition by the State:

> Plaintiffs, in effect, are claiming that they are unable to meet the 180–day rule set forth in MCL 168.472a with regard to their ballot initiative; thus, they filed this action seeking the declaration that the 180–day rule is unconstitutional. But this is not a "genuine, live controversy." This is not a case in which plaintiffs have collected the number of required petition signatures, albeit during a time-frame outside the 180–day rule, filed those petitions at least 160 days before the election, had those petitions rejected by defendants as insufficient, and then had their ballot proposal denied. In fact, defendants had made no adverse claim and had taken no adverse action that impacted plaintiffs' legal rights in any way before plaintiffs filed this action. That is, no controversy between the parties existed. Rather, plaintiffs are projecting that, in the future, if they ever collect the precise number of petition signatures required for their ballot initiative, they will be rejected by defendants because they do not meet the requirements of the 180–day rule. Thus, plaintiffs' claim sets forth a possible—not actual—controversy that may arise in the future which rests upon contingent, uncertain events that may not occur at all and the injury plaintiffs seek to prevent is merely conjectural or hypothetical.

After the dismissal of this case, CBFM continued to circulate its petition and obtain signatures.

B. CBFM's second lawsuit

The day before the November 6, 2018 General Election, Plaintiff LuAnn Kozma contacted the Bureau of Elections and stated that representatives of CBFM would arrive later in the day to file the petition. CBFM's counsel arrived late in the day on November 5, 2018 and attempted to file the petition with the Bureau. The petition was rejected for filing by Director of Elections Sally Williams, acting on

behalf of Secretary of State Ruth Johnson, because the petition inaccurately stated that the proposal was to be "voted on in the November 8, *2016* General Election," which rendered the filing untimely. (Appellants' App pp 034, Williams letter, emphasis added.)

CBFM and Ms. Kozma filed a complaint for writ of mandamus the next day, seeking emergency relief. (App pp 158-162, Def's Mot. for Summ. Disp., Ex. 3, 2018 Mandamus Compl.) In that complaint, CBFM asked this Court to "enter an immediate writ of mandamus requiring [former Secretary of State Ruth Johnson] to accept the filing of [CBFM's] statutory initiative petition on today's date or, in the alternative, provide injunctive or any other similar relief within the Court's discretion[.]" *Id.* CBFM argued that it was irrelevant that its petition contained a 2016 election date because the election statutes did not require a date to appear on the petition at all; that Director Williams was not authorized to reject the petitions; and that these Defendants had previously indicated in court pleadings that CBFM could submit the petition in 2018. *Id.* This Court summarily denied the complaint for mandamus in a one-page order on November 15, 2018. (App pp 164, Def's Mot. for Summ. Disp., Ex. 4, 11/15/18 Order.)

C. CBFM's third lawsuit

CBFM and Ms. Kozma filed the instant lawsuit in December of 2018. As in the first lawsuit, they again alleged that MCL 168.472a is unconstitutional, and further alleged that Secretary Johnson[1] and Director Williams acted

[1] On January 1, 2019, Jocelyn Benson was sworn in as Secretary of State.

unconstitutionally or in violation of the election laws in rejecting the petition for filing on November 5, 2018. Plaintiffs asked the Court of Claims to "[d]eclare that Plaintiffs filed their petition on November 5, 2018 and enjoin Defendants Johnson and Williams to take possession of the petition . . . and provide official notice of such filing to Defendant Board of State Canvassers." (Plfs' Comp., p 21.) They further asked that the Court of Claims "[d]eclare that the extraneous election-date reference in the petition's front-page proposal summary does not preclude the petition's statutory compliance." *Id.* Last, CBFM requested that the Court of Claims declare MCL 168.472a "unconstitutional as applied to statutory initiatives under Const 1963, art 2, § 9," and "enjoin Defendants from applying it to discount voter signatures on statutory initiative petitions[.]" *Id.*

On July 24, 2019, the Court of Claims issued a written Opinion and Order granting Secretary Benson, Director Williams, and the Board of State Canvassers' motion for summary disposition and dismissing CBFM's claims.

STANDARD OF REVIEW

This Court reviews de novo a trial court's grant of a motion for summary disposition. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684 (2015), citing *Maiden v Rozwood*, 461 Mich 109, 118 (1999). In a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich 1, 10 (2005). The moving party bears the initial burden of specifically identifying

the undisputed factual issues and supporting its position with documentary evidence. MCR 2.116(G)(3)(b); *Maiden*, 461 Mich at 120; *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420 (1994). The burden then shifts to the non-moving party to show that a genuine issue of disputed facts exists and to produce evidence to establish those disputed facts. *Meagher v Wayne State Univ*, 222 Mich App 700, 719 (1997); *Neubacher*, 205 Mich App at 420. The court can grant the motion "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co.*, 451 Mich 356, 362-363 (1996).

ARGUMENT

I. Michigan Election Law—as authorized by the Michigan Constitution—requires not only that initiative petitions must be filed with the Secretary of State but also that they must be filed at least 160 days before the election at which the proposal would appear on the ballot, and the Secretary of State had the authority to reject CBFM's late filing.

Michigan Election Law requires that initiative petitions must be filed with the Secretary of State, and that they must be filed at least 160 days before the election at which the proposal would appear on the ballot. The Court of Claims correctly held that the Secretary of State has authority to reject late filings.

Counts III and IV of CBFM's complaint challenged the rejection of their attempted filing under Const 1963, art 2, § 9 and the Michigan Election Law, respectively. Although CBFM conflates these claims as one in its appeal brief, they are separate claims with different bases in law and distinct legal failings. The

Court of Claims opinion treated these claims separately, and the State Defendants do so here. State Defendants begin with Count IV because that claim more directly attacked the Secretary's legal authority to reject CBFM's attempted filing.

A. The Director of Elections—on behalf of the Secretary of State—has authority under the Michigan Election Law to reject facially non-conforming petitions.

CBFM argued that the Secretary of State and Director of Elections violated Michigan Election laws by rejecting their petition for filing in November, 2018 because the date on the petition is irrelevant and neither the Secretary of State—nor the Director of Elections on her behalf—were authorized to reject the petition for filing. (See e.g. Appellants' App pp 006, Plfs' Comp., ¶¶ 57-63.) This was the same argument CBFM made in their mandamus complaint, which this Court rejected. (Appellants' App pp 036, Ex. 3, 2018 Compl.; Ex. 4, 11/15/18 Order.) The Court of Claims likewise properly rejected these arguments.

The Court of Claims instead ruled that in order to be valid, an initiative petition must be filed with the secretary of state at least 160 days before the election at which the proposed law is to be voted upon. (Appellants' App pp 090, Opinion & Order, p 11.) The Court correctly reasoned that, because the petitions must be filed with the Secretary, the Secretary is the only entity with any ability to enforce violations of the 160-day rule. *Id.* As the Court pointedly observed, "it would make little sense" for the Secretary of State to "immediately" forward a late-filed petition to the Board of Canvassers to begin canvassing. *Id.* Thus, the Secretary has the obligation to ensure that the filing requirements of MCL

168.471—including the 160-day rule—have been satisfied. The Court of Claims correctly held that the Secretary of State—and the Director of Elections acting on her behalf—have the authority to reject late petitions.

Much of CBFM's argument in this appeal focuses on what the statute meant by its reference (at that time) to the "election at which the proposed law is to be voted upon," and whether CBFM was even required to include an election in its petition language. Of course, as the Court of Claims stated, it matters little whether it needed to be included on the petition or not, because ultimately "it was included and it was erroneous." (Appellants' App pp 090, Opinion & Order, p 13, n 7.) But in its argument, CBFM makes a critical concession that warrants examination because it undercuts the validity of CBFM's entire position. CBFM argues that "there is no deadline" and that a ballot committee can file "whenever it wants." (Appellants' Brf, p 39). This is echoed again later in its brief, where CBFM contends that it filed its petitions more than 160 days before the "next" general election, because "there will always be a 'next' election." (Appellants' Brf, p 49). In other words, according to CBFM, it does not matter when CBFM files, because it will always be more than 160 days away from *some* election. This is effectively the ultimate reduction of CBFM's entire argument, and it is in direct conflict with established law of this State.

It is an oft-recited maxim of statutory construction that courts must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory. See *Wyandotte Elec Supply*

Co v Elec Tech Sys, 499 Mich 127, 140 (2016); *People v Cunningham*, 496 Mich 145, 154 (2014); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002); *Stowers v Wolodzko*, 386 Mich 119, 133 (1971). As far back as *Scott v Budd Co*, 380 Mich 29, 37 (1968), the Michigan Supreme Court held that it would not impart a nugatory meaning to words in a statute if the words are susceptible to being made effective. But, by arguing that there "is no deadline," CBFM seeks to render the 160-day requirement of MCL 168.471 completely ineffective and nugatory.

CBFM appears to maintain that the language of the statute must be construed so as to render it completely meaningless—that is, any filing at any time would always be more than 160 days from some future election, and so no filing could ever be untimely. But Section 471 expressly includes a filing deadline of 160 days before the general election, which CBFM asks this Court to interpret as having absolutely no consequence or effect. CBFM's construction of Section 471 would render the statutory language surplusage or nugatory, and this construction undergirds virtually the entirety of this appeal. This argument is contrary to over 50 years of jurisprudence in this State, and so it must be rejected.

Regardless, the Secretary of State, or Director Williams on her behalf,[2] acted properly within her limited statutory authority. As the filing official for petitions to amend the constitution, to initiate legislation, and for referendums, the Secretary of

[2] The Director of Elections is "vested with the powers and shall perform the duties of the secretary of state under . . . [her] supervision, with respect to the supervision and administration of the election laws." MCL 168.32(1). See also MCL 168.34.

State's gatekeeping duty is limited. *Citizens Protecting Michigan's Constitution Sec'y of State*, 280 Mich App 273, 286 (2008). But even this limited duty includes authority to conduct a rudimentary, facial review of a proposed filing to determine if it met, or at least purported to meet, filing requirements and whether it was timely.

Here, Bureau of Elections staff reviewed a number of CBFM's petition sheets, observed the petition's reference to the November 6, 2016, General Election, and confirmed with CBFM that each sheet contained the same reference to the 2016 General Election. Director Williams, on behalf of the Secretary of State, determined the petition should be rejected because it was not offered for filing "at least 160 days before the election at which the proposed law is to be voted upon." MCL 168.471. Whether the petition was offered timely under section 471 was a decision that the Secretary of State was authorized to make as the filing official at the time.

CBFM's petition contained a facial defect that was apparent even without any additional inquiry, but which was nonetheless confirmed by CBFM when it acknowledged that each sheet referred to the 2016 election. As noted above, CBFM's petition was approved as to form by the Board of State Canvassers—but in April of 2015. As approved, the petition and each signature sheet stated that "the proposal is to be voted on in the November 8, 2016 General Election." (Plfs' Comp., Ex. 1.) The inclusion of the election date raised no concerns in 2015, when CBFM first began circulating, because November 8, 2016, was, in fact, the next general election at which a statewide proposal like CBFM's could be voted upon. At that time, the petition was approved well in advance of the 160-day deadline.

But CBFM failed to gather a sufficient number of signatures and could not file its petition in 2016. CBFM continued to circulate the petition and collect signatures into 2018, but likewise did not even attempt to file its petition in time for placement upon the November 6, 2018 General Election ballot. Instead, on November 5, 2018—the day before the November 6, 2018 General Election—CBFM attempted to file with the Secretary of State for placement on the 2020 ballot a petition that, on its face, stated that it was to be voted upon in 2016.

The State Defendants agree that neither MCL 168.482 nor MCL 168.544c expressly required CBFM to include the date of the election at which the proposal would be voted upon on the face of its petition. But, MCL 168.471 did provide that "[i]nitiative 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*."[3] (Emphasis added). Because the election at which the proposal will be voted upon sets the outermost filing date, section 471 contemplated that a petition sponsor will designate in some manner which general election the sponsor seeks to have the "proposed law . . . voted upon." Ordinarily, petition sponsors include this information on the face of the petition, just as CBFM did here. For example, all legislative initiative petitions filed or approved as to form

[3] As noted elsewhere, MCL 168.471 was amended effective December 28, 2018 to read, "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."

in 2017–2018 included the date of election. (App pp 166-172, See e.g. Def's Mot. for Summ. Disp., Ex. 5, Sample Petitions.)

By CBFM's own admission, every petition sheet collected by CBFM designates the November 8, 2016 General Election as the election at which the proposal would be "voted upon." Under Section 471, this would have made the filing deadline for CBFM's petition June 1, 2016, and it was no longer possible for any petition to have been filed by that date. The passage of time rendered CBFM's petition defective in a way that was conspicuous on the face of the petition. CBFM still does not identify any constitutional provision, statute, or case law that would have permitted the Secretary of State to ignore the heading of CFBM's petition and construe the express reference to the November 2016 general election as instead referring to the November 2020 General Election, as CBFM requests.

While rejection of a proposed petition filing is rare, the Secretary of State has rejected other non-conforming petitions in the past. For example, in *O'Connell v Director of Elections, et al*, the former Director of Elections rejected an affidavit of candidacy filed by a judicial candidate that stated the candidate was an incumbent for the office sought when the candidate was not, in fact, the incumbent. 317 Mich App 82, 86-87 (2016).[4] This defect was apparent from the face of the affidavit, and it was rejected by the Director of Elections acting for the Secretary of State as the filing official. Similarly, former Secretary of State Johnson rejected the qualifying

[4] The Secretary of State is the filing official for judicial nominating petitions and judicial affidavits of candidacy. MCL 168.409b.

petition of a candidate for Attorney General in 2018 because the petition did not purport to contain sufficient signatures. *Graveline v Johnson, et al*, 336 F Supp 3d 801 (ED Mich, 2018). Likewise, the timing defect of CBFM's petition was apparent from the face of the petition and it was properly rejected for filing on November 5, 2018 by Director Williams.

B. The Michigan Constitution authorizes the Legislature to pass legislation implementing the initiative process that sets filing requirements and deadlines consistent with article 2, § 9.

The Michigan Constitution provides for the right of initiative in article 2, § 9 but does not otherwise prescribe the form for petitions to initiate legislation. Instead, § 9 provides that the "legislature shall implement the provisions of this section." Const 1963, art 2, § 9. The Legislature implemented § 9 through a number of enactments within the Michigan Election Law. Under MCL 168.482(1) and (2), a petition must be printed on 8 ½ x 14 inch paper, and the "heading" of "INITIATION OF LEGISLATION" must appear on each part of the petition and "shall be . . . printed in capital letters in 14-point boldfaced type." The petition must then include a statement by the electors and a warning to the electors regarding the consequences of signing a petition more than once, or signing another individual's name, etc. MCL 168.482(4) and (5). "The remainder of the petition form shall be as provided following the warning . . . in section 544c(1)," and "shall comply with the requirements of section 544c(2)." MCL 168.482(6). Sections 544c(1) and (2) impose additional formatting requirements relating to information required from electors

and the certificate of the circulator. MCL 168.544c (1)-(2). MCL 168.471, in turn, provides the time for filing the petitions with the secretary of state.

Each of these provisions is an exercise of the authority granted to the Legislature by article 2, §9 to implement the form and manner for initiative petitions to be filed. As the Court of Claims aptly observed, CBFM has already tacitly conceded that Section 471 was constitutional as a legislative implementation of article 2, § 9. (Appellants' App pp 090, Opinion & Order, p 15).

The Court of Claims recognized that the Secretary of State's role with regard to initiative petitions was limited, and that the State Defendants are not permitted to make any determinations about the merits or validity of the proposal itself. (Appellants' App pp 090, Opinion & Order, p 10-12). But the Court of Claims nonetheless acknowledged that the Secretary's role functioned like a "ticket-taker," whose role included ensuring that the filing requirements of Section 471 have been satisfied before forwarding the petition to the Board of State Canvassers for canvassing. *Id*., pp 11-12. In essence, the Secretary has the authority—granted by the Legislature pursuant to article 2, §9—to conduct a basic check that the petitions satisfy the form and timing requirements. Because this facial review is authorized by the legislation implementing article 2, §9, it cannot also violate article 2, §9. CBFM's petition was untimely on its face, and so the Secretary properly rejected the attempted filing. Count III of CBFM's complaint was, therefore, appropriately dismissed.

II. CBFM's claims of equitable estoppel must be rejected because it was not raised in the Court below, and because it is based on CBFM's assumptions instead of any statements by the State Defendants.

At the outset, it warrants repetition that equitable estoppel is not a cause of action, as CBFM attempted to plead in its complaint. *Casey v Auto Owners Ins Co,* 273 Mich App 388, 399 (2006) (equitable estoppel "is not a cause of action unto itself; it is available only as a defense"). Without citing to any rule or case that would permit it to do so, CBFM asserts that it is now—on appeal—"reframing" this count as judicial estoppel. But judicial estoppel was never pleaded by CBFM, never ruled upon by the Court of Claims, and never raised in a motion for reconsideration by CBFM. Accordingly, this argument is inappropriately raised for the first time on appeal. See *Bajis v Dearborn*, 151 Mich App 533, 536 (1986), lv den 426 Mich 876 (1986) ("As a general rule, questions not raised or ruled upon by a lower court or tribunal, or alleged erroneous action as to which no objection was made, cannot be presented to or considered by a reviewing court.")

Even were this Court to consider this argument without it having been raised below, it would still fail on its merits. The Supreme Court has noted, however, that in order for the doctrine of judicial estoppel to apply, the claims must be "wholly inconsistent," explaining that the doctrine "is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play 'fast and loose' with the legal system." *Paschke v Retool Indus*, 445 Mich 502, 609 (1994).

In *Spohn v Van Dyke Pub Sch,* 296 Mich App 470, 489-490 (2012), this Court provided an indepth explanation of the doctrine:

> The doctrine of judicial estoppel is driven by the important motive of promoting truthfulness and fair dealing in court proceedings. Judicial estoppel differs from such other forms of estoppel as promissory estoppel and equitable estoppel in that judicial estoppel focuses on the relationship between the litigant and the judicial system as a whole, rather than solely on the relationship between the parties. Of utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped. [Quotation marks and citation omitted.]

Further, the purpose of judicial estoppel, "is to protect the judicial process, not the parties." *Id.* at 489.

Further, even where the elements of judicial estoppel are technically satisfied, the doctrine still may not necessarily be imposed. That is because judicial estoppel is "an equitable doctrine invoked by a court at its discretion" in order to "protect the integrity of the judicial process." *Opland v Kiesgan*, 234 Mich App 352, 365 (1999) (quotation marks and citation omitted). As a result, it "should be applied with caution to avoid impinging on the trust-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." *Spohn*, 296 Mich App at 480 (quotation marks and citation omitted); see also *Opland*, 234 Mich App at 363-364 (quotation marks and citation omitted) ("The doctrine of judicial estoppel is to be applied with caution."). As this Court explained in *Opland*, judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice," and "[i]t is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims . . . ." 234 Mich App at 364 (quotation marks, citations, and alterations omitted). Rather, "[i]t is applied against litigants because

of their 'deliberate manipulation' of the courts.'" *Id.*, quoting *Helfand v Gerson*, 105 F3d 530, 536 (CA 9, 1997). "The doctrine 'is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.'" *Opland*, 234 Mich App at 364, quoting *Levinson v United States*, 969 F2d 260, 264 (CA 7, 1992).

The doctrine of judicial estoppel simply does not fit the circumstances here. CBFM fails to identify where it was that the State Defendants ever "unequivocally" asserted that CBFM would be able to file petitions without regard to the timeliness of the submission. See A*uto-Owners Ins Co v Harvey*, 219 Mich App at 474. In the prior proceeding, CBFM was attempting to file a petition that it admitted was far below the required number of signatures. CBFM was attempting to challenge the constitutionality of MCL 168.472a and its proscription against counting signatures made more than 180 days before filing the petition—a statute that had never been applied to CBFM because CBFM did not have enough signatures. In fact, CBFM had not yet even attempted to file its petition. The argument relied upon by the State Defendants and the Court at the time centered on whether there was any actual case or controversy:

> As discussed in the argument above, CBFM has not filed their petition yet, and unless and until they collect tens of thousands of additional signatures, their petition may never be filed. But, under MCL 168.473b, signatures collected prior to a general election in which a governor is elected cannot be filed after that election. So, even if this Court were to accept CBFM's argument regarding MCL 168.472a, they must collect all of the necessary signatures in time to be on the ballot for the 2018 election, or any signatures they have collected will be discarded anyway. It is entirely unclear when—or even if—CBFM's petition will be filed.

> Alternatively, it is also conceivable that CBFM might benefit from a spontaneous surge of popular support and quickly collect all of the necessary signatures within a 180-day span of time. That would render the earlier and outdated signatures unnecessary to a determination of whether the proposal reaches the ballot. CBFM and Kozma dismiss this option, citing a "diminished pool" of sympathetic voters. (Appellants' Br., p 22). This is a curious lament, considering that—as of 2014—there were 7,413,142 registered voters in Michigan. In any event, CBFM's claims presently depend upon contingent future events that may not occur, or might occur in an unexpected way.

(App pp 188, Defendants-Appellees Brf, p 9). The statement CBFM seeks to rely upon as a "promise" occurs in that context:

> If and when Plaintiffs obtain the additional signatures they require, then they would be able to file their petition. But until the minimum number of signatures has been collected, any application of MCL 168.472a to CBFM's petition is hypothetical.

(*Id.*, p 4). From this statement, CBFM contends that it was assured it would be able to file its petition at any time in 2018 with no questions asked. But the quoted statement does not include any such assurance about time of filing. Instead, it is framed as a conditional statement about the need for a sufficient number of signatures. So, there is no support in the text of the brief for the kind of "unequivocal" assertion that would be required to support the invocation of judicial estoppel. CBFM does not allege—nor could they—that the State Defendants themselves made statements or took actions to induce CBFM to believe their petition would be accepted for filing in 2018 regardless of its timeliness.

Furthermore, there was no discussion in the Defendants-Appellees brief—or the Court's decision—about the inclusion of the "to be voted on in the November 8, 2016 General Election" language in the petition. Thus, there is nothing "wholly inconsistent" with the State Defendants' position now. Indeed, CBFM did not even

address the timeliness issue in its own briefs. That issue simply was not part of the case because the question at bar concerned whether CBFM could challenge the statute when it had not achieved the minimum number of signatures to even file its petition and start the canvass.

But even if this isolated comment could be construed as suggesting that CBFM could file its petition in 2018, it would clearly have been with the understanding that it had to be timely filed for placement on the November 2018 General Election ballot—not filed the day before that election. The State Defendants did not, and could not have, waived the application of MCL 168.473b.[5] Indeed, CBFM elsewhere quoted in their complaint another portion of Defendants-Appellees' appellate brief that specifically warned about the application of section 473b to CBFM's petition. (Plfs' Comp., ¶ 37).

Finally, under these circumstances, CBFM could not have *justifiably* relied on any language in the appellate brief to believe that CBFM's petition would be accepted by former Secretary Johnson or Director Williams at any point in the future and without any question as to whether the petition meets the statutory requirements for canvassing. For the same reasons, any prejudice CBFM suffered is the result of CBFM's own actions in failing to timely file their petition, not the actions of the Secretary of State, Director Williams, or the Board of Canvassers.

[5] MCL 168.473b provides that "[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."

III. CBFM's equal protection claim was properly dismissed because it failed to show that it was treated differently than any other similarly situated petition.

Again, it is not clear that CBFM has preserved an appeal of the dismissal of its equal protection claim, since—as the Court of Claims noted—it made no argument opposing summary disposition of that count. (Opinion & Order, p 17).

Nonetheless, the claim would still fail on its merits because CBFM failed to show any other petition that was accepted for filing with a similar facial conflict with the 160-day rule. The Michigan Supreme Court has held that Michigan's equal protection clause is coextensive with the Equal Protection Clause of the U.S. Constitution, and requires that all persons similarly situated be reated alike under the law. *Shepherd Montessori Ctr. Milan v Ann Arbor Charter Twp.,* 486 Mich. 311, 318 (2010) (citing *City of Cleburne v Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). The threshold inquiry when reviewing the validity of state action under equal protection is whether the plaintiff was treated differently than a similarly situated entity. *Id.* This Court has previously held that, to be considered "similarly situated" for purposes of equal protection, the 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 (2013).

Applying that standard, CBFM's argument fails to satisfy that threshold inquiry because it is attempting to compare its petition to other petitions that did not have the same facial defect. CBFM points only to petitions that either had no date reference or that did not recite the constitutional process allowing the Legislature to act before the proposal is placed on the ballot. (Appellants' Brf., p

49). These are neither identical nor directly comparable because they do not involve petitions that sought to be submitted far past the identified target election. The Court of Claims correctly held that CBFM simply failed to state a claim for a violation of the Equal Protection Clause.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs-Appellants CBFM and Kozma have failed to show that the Secretary of State violated either Section 471 of the Michigan Election Law or article 2, § 9 of the Constitution by rejecting a petition that on its face violated the 160-day rule. Their arguments for judicial estoppel and equal protection are improperly raised before this Court, but also fail on their merits.

For these reasons, Defendants-Appellees Secretary of State Jocelyn Benson, Director of Elections Sally Williams, and the Board of State Canvassers respectfully request that this Honorable Court enter an order affirming the Court of Claims' order granting summary disposition in their favor and dismissing the complaint, together with any other relief that this Court determines to be appropriate.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

s/Heather S. Meingast
Heather S. Meingast (P55439)
s/Erik A. Grill
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendants-Appellees
P.O. Box 30736
Lansing, Michigan 48909

Dated: December 9, 2019