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' Reply

Request for Oral Argument

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I. Points not disputed

A. The State does not try to rebut, address, or even quote Const 1963 art 2 § 9 paragraphs 3 and 4,[1] which dictate when and even whether a citizen initiative vote will be set and take place.

B. The State does not deny the Secretary's and Attorney General's longstanding practice for statutory initiatives – documented in 1970, 1979, and 2000, and consistent with MCL 168.471 ("471") and the Constitution – that "if an initiative cannot go on the ballot at the upcoming election, it will be on the ballot for the one after." Or, as the Secretary worded it in 1970, "filing after the statutory deadline results in submission of the issue to the following legislative session."[2]

C. The State does not dispute the authenticity or relevance of the petitions "Abrogate Prohibition Michigan"[3] or "Michigan Time to Care" (MITTC).[4]

D. The State does not cite or acknowledge MCL 8.3a, or acknowledge that words including "tendering" and "filing" are to be understood according to common English usage, that the meaning of a common word is a fact question, or that in common English these two words amounted to the same thing as seen in the Supreme Court's discussion in *Wolverine Golf v Secretary of State*.[5]

E. Save for a spurious reference in one sentence near the end of its brief,[6]

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1 Defendants' brief, p vii.
2 Plaintiffs' opening brief, pp 12-13.
3 Plaintiffs' appendix 083-089.
4 Plaintiffs' appendix 119-25, 174-78.
5 384 Mich 461, 464 (1971). See Plaintiffs' opening brief, p 38.
6 Defendants' brief, p 19.

the State no longer contends as it did to the Court of Claims that MCL 168.473b prevents filing of signatures prior to the 2018 governor election which would be voted on after that election,[7] a theory which the Court of Claims did not adopt.[8] All 473b does is require that signatures collected before a governor's election are filed no later than that election date, and CBFM complied with that.

F. The State concedes its defense to be that the CBFM petition died on June 1, 2016,[9] the day Plaintiffs filed the declaratory suit. In that suit the State did not make the timeliness "issue … part of [that] case"[10] (as it could, should, and would have had it considered timeliness a meritorious defense).

G. The State does not dispute that <u>if</u> the CBFM petition really did die that day, then the Courts' ripeness decisions thereafter addressed mere hypotheticals.

II. Errors in the State's brief

A. After misquoting 471,[11] the State repeats an error it made about 471 below, that it supposedly sets an "outermost" filing date.[12] Rather, as seen from the wording it sets an innermost date:

... Initiative petitions under section 9 of article II of the state constitution of

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7 Defendants' brief in support of summary disposition, 3/7/19, pp 11-13, Defendants' appendix 0018-20.
8 Court of Claims opinion, p 14 n 8, Plaintiffs appendix 104.
9 Defendants' brief, p 12.
10 Defendants' brief, p 19.
11 Defendants' brief, p vii.
12 Defendants' brief, p 11; Defendants' brief in support of summary disposition, 3/7/19, p 8, Defendants' Appendix 0015; Plaintiffs' brief in opposition to summary disposition, 4/4/19, p 10 n 23.

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....[13]

B. The State falsely describes exhibit 5 to its brief below[14] as "all legislative initiative petitions filed or approved as to form in 2017-18,"[15] even though exhibit 5 omits the 2017 petition of MITTC.[16] In effect the State is telling this Court the MITTC petition did not exist. It made the same false claim below, as Plaintiffs pointed out in the opening brief.[17]

C. The State again asserts, as it did to the Court below, that 471 "contemplated" that a ballot question committee "will designate in some manner which general election the sponsor seeks" to have a vote,[18] Plaintiffs' opening brief disproved this, by reference to the "Abrogate Prohibition Michigan," petition which bore no voting date.[19] The Court below did not accept State's argument.[20]

D. The State falsely claims that Plaintiffs "conflate" counts III and IV (violations of Const art 2 § 9 *paragraph 4* and 471, respectively.)[21] Then the State conflates the two by reducing count III to "the Constitution allows 471 to exist" and pivoting right back to its count IV argument, asserting the State can use 471 to

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13 Emphasis added. See Plaintiffs' opening brief, p 28.
14 Defendants' appendix 0016, 0165-72.
15 Defendants' brief, p 11 (emphasis added).
16 Plaintiffs' Appendix 174A.
17 Plaintiffs' opening brief, pp 20-22.
18 Defendants' brief, p 11.
19 Plaintiffs' opening brief, p 31.
20 Court of Claims opinion, p 13 n 7, Plaintiffs appendix 103.
21 Defendants' brief, p 6.

determine an election date by viewing a petition front. The State completely avoids Const 1963 art 2 § 9 paragraph 4 and the Secretary's violation of it.

E. The State falsely states "In the prior proceeding, CBFM was attempting to file a petition that it admitted was far below the required number of signatures."[22] As the proceedings of the ripeness case show, CBFM was not filing a petition; it was only seeking a declaration.

F. The State wrongly contends that in the mandamus suit this Court rejected two important Plaintiff contentions of the present suit,[23] though the mandamus Court did not specify any reasoning, and there is no claim of *res judicata* in this case.[24]

III. The election date of a statutory initiative, if one is to be set, is *only* determined by the Constitution according to the date when the Canvassers and Legislature finish their jobs, all of which follows after the filing of petition signatures, not before. 471 simply allows them time to do that. An election date or procedure stated otherwise on the petition front does not supersede that constitutional process.

The State argues that Plaintiffs' theory "is contrary to over 50 years of jurisprudence in the State," because it renders 471 "ineffective and nugatory," "completely meaningless," and "having absolutely no consequence or effect."[25]

The argument arises from the State's wrong understanding that 471 sets an

22 Defendants' brief, p 17 (emphasis added).
23 Defendants' brief, p 7.
24 Court of Claims opinion, p 9 n 4, Plaintiffs appendix 099.
25 Defendants' brief, p 9.

"outermost" filing date, and that it contemplates that a ballot committee will "designate" an election date. Quoting this passage of State's brief in full:

> 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."[26]

Correctly, the Court of Claims did not accept this. The date of which 471 speaks is only the date "before the election at which the proposed law is to be voted," before which petitions must be filed.

And what *election* date might that be? CBFM's mistaken "identified target election"[27]? No. If there is any election at all,[28] it is determined by Const 1963 art 2 § 9 paragraphs 3 and 4. The Court of Claims noted these paragraphs only in passing,[29] and did not notice or evaluate whether they controlled the outcome here. But they do. Trumping the election date which CBFM noted optimistically on its sheets, those paragraphs say the actual election is the "next" one after canvassing and Legislative consideration, both of which can occur only after the filing of petitions. In other words, the Constitution precludes both the Secretary and CBFM from predetermining a different election date.

And there is nothing "outermost" about the 471 filing date. The State leaves

26 Defendants' brief, p 11 (emphasis added).
27 Defendants' brief, p 21.
28 Cf Const 1963 art 2 § 9 paragraph 3.
29 Court of Claims opinion, p 10, Plaintiffs appendix 100.

out the qualifier "*at least*" in referring to "160 days before the general election."[30] A sponsor might choose to file well in advance of it, as CBFM did here before the 2020 election. With Court approval[31] last year a committee filed petitions in December 2017, nine months before the deadline.[32]

The Court of Claims wrongly decided that, whether required or not, CBFM's projected 2016 election date on the petition front was both "the *erroneous* election date" (and so allowing the Secretary to reject the petition using 471), and tacitly the *true, actual* election date as determined, and still asserted, by the Secretary today and incongruently, the reason for rejecting:

> Contrary to plaintiffs' assertions, it matters little whether this reference [the 2016 date on the sheets] need not have been included on the petitions. It was included, and it was erroneous. As such, the erroneous election date gave rise to the Secretary of State's limited authority to reject the petition.[33]

Here the Court's error, in addition to the impossibility of the stated election date being both true and false at the same time, was to ignore Const 1963 art 2 § 9 paragraphs 3 and 4 and how *they*, not a petition sheet front, not the Secretary, and not a ballot question committee, control the setting of the actual election date.

The Court also cited no precedent. But there is a precedent and it points the

30 Defendants' brief p 9.
31 *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).*
32 Const 1963 art 12 § 2
33 Court of Claims opinion, p 13 n 7, Plaintiffs appendix 103, echoed at Defendants' brief p 8.

other way: the Michigan Time to Care petition.[34] It proves the Defendants' practice of allowing petition filing despite the sheets errors about the election. The MITTC sheets stated an election date without mention of possible Legislative enactment, which the Defendants knew might negate an election altogether (and it never did occur). Canvassers approved the MITTC sheets and the Legislature enacted it into law. MITTC's error was not exactly the same as CBFM's, but it was error nonetheless, about how statutory initiative election dates operate.

Does the allowance of filing petitions in advance make 471 nugatory? No. Indeed 471 is constitutional[35] and has substance. This is because of the State's historic practice – which the Court of Claims sought to distinguish[36] – that if an initiative cannot go on the ballot at an upcoming election, it will be on the ballot for the one after. 471's deadline only rules out placing a statutory initiative proposal on the ballot in an election occurring in less than 160 days from filing, because there would not be enough time for the Canvassers, Legislature, and Secretary to do their duties. By contrast, in acknowledging that Michigan's election law does not actually require a petition to list any anticipated election date at all[37] – such that the statutory operation of 471 is invoked only by such an improvidently included reference – Defendants' reading would plainly contravene

34 Plaintiffs' appendix 119-25, 174-78.
35 See Plaintiffs' opening brief, p 34.
36 Court of Claims opinion, p 14, Plaintiffs appendix 104.
37 Defendants' brief at 11.

the maxim that "[s]tatutes must not be construed to produce absurd results."[38] This Court insists on "liberal" construction, jealously to guard against "administrative encroachment" in statutory initiative cases.[39] As Plaintiffs have noted,[40] the State's actions instead place an "additional obligation" and an "undue burden" on indirect statutory initiatives.`

IV. Judicial estoppel

Contrary to Defendants' assertion that Plaintiffs have failed to preserve their judicial estoppel claim by mere virtue of the divergent heading-title affixed to Count II of their Complaint, this Court is "not bound by the labels that parties attach to their claims," but rather may properly look "beyond mere procedural labels to determine the exact nature of the claim."[41] Having pleaded that Defendants are estopped from adopting a new legal position fully conflicting with that presented in the prior litigation, the nature of the Claim set forth by Count II is exactly that of judicial estoppel.

Unable to deny the element of prior success in inducing this Court to believe that Plaintiffs would be assured the opportunity to ripen their claims upon fulfilling the signature threshold "with the same petition sheets,"[42] Defendants now contest

38 *People v Tennyson*, 487 Mich 730, 741 (2010).
39 Plaintiffs' opening brief, p 37 n 94 and accompanying text.
40 Plaintiffs' opening brief, p 34.
41 *Jahnke v Allen*, 308 Mich App 472, 475 (2014).
42 *Committee to Ban Fracking v Director of Elections*, unpublished per curiam decision of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), 2017 Mich App LEXIS 405 at *2.

the "unequivocal" character of their assurances upon the basis that such statements were "conditional" upon Plaintiffs timely filing their signatures. Yet, even putting aside Defendants' actual and official knowledge of the petition heading language pursuant to MCL 168.483a, such an argument is utterly nonsensical amid Defendants' presently adopted stand that the petition was already void from the prior litigation's very onset.

In once more turning to the sort of gamesmanship that they concurrently purport to disown, Defendants finally resort to baseless obfuscation in proclaiming that their assurances made in the prior proceedings "did not, and could not have, waived the application of MCL 168.473b."[43] Because Defendants' directly preceding sentence acknowledges that Plaintiffs tendered their filing "the day *before* th[e 2018] election," there is no basis for implicating any question as to a waiver of that statutory provision.

V. Unconstitutionality of 472a

The unconstitutionality claim is now ripe. The complaint outlines it. Plaintiffs will brief it more fully should this Court reverse or remand.

VI. The Supreme Court has acted on "Adopt-and-amend"

Plaintiffs' opening brief noted our Supreme Court had not yet advised about

43 Defendants' Brief, p 19 (emphasis added).

the constitutionality of 2018 PA 368 and 369.[44] That Court has now acted.[45]

VII. Conclusion

Signatures were filed November 5, 2018. 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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44 Plaintiffs' opening brief, p 22.

45 *In Re Requests Of House Of Representatives Request and Senate for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, SC ## 159160, 159201, *https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/RecentCourtOrders/19-20-Orders/159160;%20159201.pdf* .