

STATE OF MICHIGAN
SUPREME COURT

COMMITTEE TO BAN FRACKING IN
MICHIGAN,

Plaintiff,

v

Case # _____

BOARD OF STATE CANVASSERS,

Defendant.

_____ /

Matthew Erard (P81091)
LAW OFFICE OF
MATTHEW S. ERARD, PLLC
Counsel for Plaintiff
400 Bagley St #939
Detroit, MI 48226
248.765.1605
mserard@gmail.com

Ellis Boal (P10913)
Counsel for Plaintiff
9330 Woods Road
Charlevoix, MI 49720
231-547-2626
ellisboal@voyager.net

_____ /

**COMPLAINT FOR REVIEW OF BOARD OF STATE CANVASSERS
DETERMINATION UNDER MCL 168.479**

Oral argument requested

RECEIVED by MSC 6/10/2020 12:31:45 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

INTRODUCTION.....1

PARTIES.....1

GENERAL ALLEGATIONS.....2

COUNT 1 — MANDAMUS OR OTHER APPROPRIATE REMEDY
PURSUANT TO MCL 168.479.....3

 I. MCL 168.472A IS UNCONSTITUTIONAL AS APPLIED TO
 STATUTORY INITIATIVES UNDER CONST 1963 ART 2, § 9.....3

 A. *Consumers Power Co* is Inapplicable to Statutory Initiatives
 under Const 1963, art 2, § 9.....5

 B. MCL 168.472a, as Amended by 2016 PA 142, Curtails the
 Constitutional Right of Initiative.....8

REQUEST FOR RELIEF.....10

TABLE OF AUTHORITIES

Cases

Comm to Ban Fracking in Mich v Secretary of State, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 350161), 2020 Mich. App. LEXIS 2563 (Exhibit A).....1

Consumers Power Co v Attorney General, 426 Mich 1 (1986).....5-8

Hamilton v Secretary of State, 221 Mich 541 (1923).....7

Kuhn v Dep’t of Treasury, 384 Mich 378 (1971).....8

Line v State, 173 Mich App 720 (1988).....5

Wolverine Golf Club v Secretary of State, 384 Mich 461 (1971).....passim

Wolverine Golf Club v Secretary of State, 24 Mich App 711 (1970), aff’d 384 Mich 461 (1971).....8

Woodland v Citizens Lobby, 423 Mich 188 (1985).....8

Constitutional Provisions

Const 1908, art 17, §2.....7

Const 1963, art 2, § 7.....1

Const 1963, art 2, § 9.....passim

Const 1963, art 12 § 2.....3, 6, 7

Statutes

MCL 168.472.....5

MCL 168.472a (and pre-2016 iteration).....passim

MCL 168.475(1).....2

MCL 168.477(1).....2, 10

MCL 168.479.....1, 2

MCL 168.509o.....9

MCL 169.202(3).....1

Legislative Acts

2016 PA 142.....2, 8-9

1999 PA 219.....5

Other Authorities

Board of State Canvassers, Meeting Transcript (March 24, 2016)
(Exhibit E).....6

Kenyon, *Housewife Seeks Cut in Legislators' Pay*, Battle Creek
Enquirer (March 24, 1972) (Exhibit D).....4

Mich Dep't of State, Bureau of Elections, *Committee to Ban Fracking
in Michigan Preliminary Staff Report* (June 3, 2020) (Exhibit B).....2

News-Palladium, *New Bill Eases Petition Rules*, News-Palladium
(July 26 1973) (Exhibit D).....4

OAG No. 4813 (August 13, 1974) (Exhibit C).....3-6

Office of Governor Rick Snyder, *Gov. Rick Snyder Signs Bill
Establishing 180-day Deadline for Petition Signatures on Proposed
Legislation and Constitutional Amendments* (published June 7, 2016)
< http://michigan.gov/snyder/0,4668,7-277-57577_57657-386394--,00.html >
(accessed today).....9

Times Herald, *Kelley Rules Petition Drive Time Limits Unconstitutional*,
Times Herald (August 14, 1974) (Exhibit D).....4

INTRODUCTION

1. Plaintiff Committee to Ban Fracking in Michigan (“the Committee”) brings this complaint under MCL 168.479, seeking review of the June 8, 2020 decision of the Board of State Canvassers (“the Canvassers”) declaring the number of countable signatures on the Committee’s statutory initiative petition to be insufficient under Const 1963 art 2, § 9.

2. In its opinion of April 2, 2020¹ (discussed below), the Court of Appeals noted MCL 168.479 to be the proper procedural avenue for review of the Canvassers’ determination.

PARTIES AND JURISDICTION

3. Plaintiff Committee to Ban Fracking in Michigan (CBFM) is a ballot question committee² properly formed under the laws of the State of Michigan and headquartered in Charlevoix. Through the efforts of over 950 volunteers from 60 Michigan counties, it has collected and filed over 271,000 petition signatures from Michigan voters for a statutory initiative under Const 1963 art, 2, § 9.

4. Defendant Board of State Canvassers is a state board established pursuant to Const 1963, art 2, § 7. Among other duties, the Board is responsible for issuing a

1 Exhibit A: *Comm to Ban Fracking in Mich v Secretary of State*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 350161), 2020 Mich. App. LEXIS 2563.

2 MCL 169.202(3).

declaration of sufficiency or insufficiency for a statutory initiative petition under Const 1963 art 2, § 9.³

5. This Court has original jurisdiction over an action challenging a determination of the Canvassers, filed within seven days after the Canvassers' determination, pursuant to MCL 168.479.

GENERAL ALLEGATIONS

6. On November 5, 2018, the Committee filed 271,021 vetted statutory initiative signatures with the Secretary of State, expecting she would notify the Canvassers per the election statute.⁴ The figure was 7% more than the minimum of 252,523 required at the time by the Constitution.⁵ Upon conducting a staff review of the petition, the Bureau concluded that only about 29,392 of the signatures were collected within 180 days preceding the date of filing.⁶ According to MCL 168.472a, this meant only the 29,392 are available to be canvassed, far fewer than the minimum.⁷

7. The Canvassers consequently declared the Committee's filing insufficient

3 MCL 168.477(1).

4 MCL 168.475(1).

5 Const 1963 art 2, § 9.

6 Exhibit B: Mich Dep't of State, Bureau of Elections, *Committee to Ban Fracking in Michigan Preliminary Staff Report* (Updated June 3, 2020).

7 The Bureau's staff report improperly describes the remaining signatures as "stale," reflecting 472a's former language which provided that signatures older than 180 days were rebuttably presumed to be stale and void. Under 472a's present language, as amended by 2016 PA 142, such signatures are irrebuttably barred from being counted.

without conducting a sample or direct canvass. However, should this Court hold 472a unconstitutional, then all 271,021 signatures would be sampled and canvassed, and this matter would be remanded for the Canvassers to start the work.

COUNT 1 — MANDAMUS OR OTHER APPROPRIATE REMEDY PURSUANT TO MCL 168.479

I. MCL 168.472A IS UNCONSTITUTIONAL AS APPLIED TO STATUTORY INITIATIVES UNDER CONST 1963, ART 2, § 9.

7. The statutory initiative procedure of Const 1963, art 2, § 9⁸ is a self-executing constitutional provision which, under *Wolverine Golf Club v Secretary of State*,⁹ grants the legislature no authority to impose additional restrictions on the time periods for circulation and signing. MCL 168.472a provides:

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.

8. In 1974, a year after 472a's original enactment, the Michigan Attorney General issued OAG 4813,¹⁰ which concluded that the statute's 180-day restriction violated the Michigan Constitution as applied to both constitutional and statutory initiatives. The Attorney General's reasoning was different for each type, as statutory initiatives are governed by Const 1963, art 2, § 9, whereas initiatives to

8 "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative...."

9 384 Mich 461 (1971).

10 Exhibit C: OAG No. 4813 (August 13, 1974).

amend the constitution are governed by Const 1963, art 12 § 2.

9. 472a was enacted originally in 1973. According to contemporaneous media accounts, the political background was a constitutional initiative of the “Legislative Salary Amendment Committee,” which proposed to cut lawmakers' salaries.¹¹

10. As to statutory initiatives, the Attorney General observed and opined:

This provision [art 2, § 9] has been held to be self-executing. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). Although that provision concludes with language to the effect that the legislature should implement the provisions thereof, such language has been given a very limited construction by the Michigan Supreme Court, which held that this provision is merely “a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate.” I am consequently of the opinion that, as applied to signatures affixed to petitions which initiate legislation pursuant to Const 1963 art 2, § 9, § 472a of the Michigan Election law is beyond the legislature's power to implement said section and is therefore unconstitutional and unenforceable.

11. *Wolverine Golf Club* fully underscores the Attorney General’s reasoning and conclusion. There, this Court affirmed a decision of the Court of Appeals which had ordered the Canvassers “forthwith” to accept initiatory petitions “for canvass” and immediate submission to the Legislature, though the petitions violated the 10-day timing provision of MCL 168.472. The reason: MCL 168.472

11 Exhibit D: (Kenyon, *Housewife Seeks Cut in Legislators' Pay*, Battle Creek Enquirer (March 24, 1972), p 6; News-Palladium, *New Bill Eases Petition Rules*, News-Palladium (July 26 1973), p 10; Times Herald, *Kelley Rules Petition Drive Time Limits Unconstitutional*, Times Herald (August 14, 1974), p 10).

was not a “constitutionally permissible implementation” of art 2, § 9:

We do not regard this statute as an implementation of the provision of Const. 1963 art. 2, § 9. We read the stricture of that section, “the *legislature shall implement* the provisions of this section,” as a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or electorate. This constitutional procedure is *self-executing*. . . . It is *settled law* that the legislature may not act to impose additional obligations on a self-executing constitutional provision.¹²

12. OAG 4813 bound the Bureau of Elections for many years thereafter.

During that time, numerous ballot petitions were undoubtedly filed in good faith with signatures that had been gathered more than 180 days before.¹³

A. *Consumers Power Co* is Inapplicable to Statutory Initiatives under Const 1963, art 2, § 9.

13. In 1986, this Court affirmed a declaratory judgment finding MCL 168.472a, as then worded, valid as applied to constitutional initiative petitions, thus overruling OAG 4813 as applied to that type of initiative.¹⁴

14. At the time, and until 2016,¹⁵ 472a stated:

It shall be rebuttably presumed that the signature on a petition which proposes an amendment to the constitution or is to initiate legislation, is stale and void if it was made more than 180 days before the petition was filed with the office of the secretary of state.

15. However, despite the considerable care taken by this Court, the Court

12 384 Mich at 466, emphasis added.

13 *Line v State*, 173 Mich App 720, 724 (1988).

14 *Consumers Power Co v Attorney General*, 426 Mich 1 (1986).

15 The intervening amendment of 1999 PA 219 changed the word “which” to “that” and the word “it” to “the signature.”

of Appeals, and the parties to limit the scope of that decision to only constitutional initiatives under art 12 § 2, the Bureau of Elections and the Canvassers have since operated from the unfounded position that *Consumers Power Co* upheld the validity of MCL 168.472a in *toto*.

16. In acknowledging that *Consumers Power Co* did not address OAG 4813's conclusion as to 472a's restriction of statutory initiative petitions, then-serving State Elections Director Christopher Thomas grounded such a stance entirely on the bureaucratically-intuited "feeling that if it's good for one, it's good for the other."¹⁶

17. Contrary to the Bureau of Elections' feeling drawn from that decision, *Consumers Power Co* turned entirely on the language of a distinct, single-sentence provision of Const 1963, art 12 § 2:

Any such petition shall be in the form, and shall be *signed and circulated* in such manner, as prescribed by law.¹⁷

18. Noting the "extreme importance" of the sentence just quoted, this Court found that the text of art 12 § 2 serves to explicitly "summon legislative aide . . . in the areas of circulation and signing."¹⁸ Accordingly, *Consumers Power Co* not only relied on such summoning language to distinguish art 12, § 2 from its

16 Exhibit E: Board of State Canvassers Meeting Transcript (March 24, 2016), pp 24-25.

17 Emphasis added.

18 *Consumers Power Co*, 426 Mich at 6, 9.

1908 constitutional predecessor reviewed in *Hamilton v Secretary of State*,¹⁹ but also expressly declared such language to be the very basis of “authorization for the Legislature to have enacted MCL 168.472a.”²⁰

19. While art 12 § 2 thus “clearly authorizes the Legislature to prescribe by law for the manner of signing and circulating petitions *to propose constitutional amendments*,”²¹ art 2, § 9 contains no similar authorizing language for statutory initiatives.²² Rather, the only form of legislative implementation contemplated by art 2, § 9, as to statutory initiatives, has been found by this Court to be limited solely to the process by which the proposed legislation of a successfully petitioned initiative shall reach the legislature and electorate.²³

20. Just as the “absence of a call for legislative action in Const 1908, art 17, § 2” underpinned *Consumers Power Co*’s harmony with *Hamilton*, the equivalent absence of such a call under Const 1963, 2, § 9 underpins *Consumer*

19 221 Mich 541 (1923).

20 426 Mich at 9.

21 *Id.* at 6 (emphasis added).

22 By further notable comparison, the separate provision of art 2, § 9 governing referendum invocation does set forth a time limit for conducting the invocation petition process, even despite that provision’s distinctly non-self-executing status. See *id.* (“The power of referendum . . . 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.”) (emphasis added). Hence, the framers’ omission of any similarly set time-limit for the process of invoking statutory initiative petitions under the same section must be construed as intentional.

23 *Wolverine Golf Club*, 384 Mich at 466.

Power Co's harmony with *Wolverine Golf Club*. Indeed, such a dissimilar absence of legislative regulatory authorization under art 2, § 9's is fully accordant with that section's distinct purpose as "a reservation of legislative authority which serves as a limitation on the powers of the Legislature."²⁴

B. MCL 168.472a, as Amended by 2016 PA 142, Curtails the Constitutional Right of Initiative.

21. "In cases where a provision is self-executing," any supplementary legislation "must be in harmony with the spirit of the Constitution and its object to further the exercise of constitutional right and make it more available, and such laws must not curtail the rights reserved, or exceed the limitations specified."

Wolverine Golf Club v Secretary of State, 24 Mich App 711, 730 (1970), aff'd 384 Mich 461 (1971).

22. Having reviewed the version of 472a existing prior to the amendment of 2016 PA 142, *Consumers Power Co* had predicated its holding on the fact that:

The purpose of the statute is to fulfill the constitutional directive of art. 12 sec. 2 that only the registered electors of this state may propose a constitutional amendment. The statute does not set a 180-day time limit for obtaining signatures. The statute itself *establishes no such time limit*. It states rather that if a signature is affixed to a petition more than 180 days before the petition is filed it is presumed to be stale and void. But that presumption can be rebutted.²⁵

23. But the 2016 amendment removed the rebuttable presumption.

24 *Woodland v Citizens Lobby*, 423 Mich 188, 215 (1985); see also *Kuhn v Dep't of Treasury*, 384 Mich 378, 385 n 10 (1971).

25 426 Mich at 8 (emphasis added).

Instead, even valid signatures--those of registered electors as established by the qualified voter file²⁶ in effect on the date of a signature--'shall not be counted' if they were collected more than 180 days before the petition filing.

24. Consequently, 472a now imposes precisely the form of curtailment of which *Consumers Power* found that the statute stopped short, even as applied to constitutional amendatory initiatives.

25. In removing the word “stale” from the statutory language as amended by 2016 PA 42, the Legislature has shown that 472a is not intended to ensure the continued registration of petition signers, but rather only to heighten the burden of invoking a citizens’ initiative.²⁷

26. Given that the absolute time limit now imposed on circulating statutory initiative petitions incontestably operates “to impose additional obligations on” the process set forth by art 2, § 9,²⁸ the foundation for upholding OAG 4813’s undisturbed finding as to 472a’s infringement of statutory initiative

26 MCL 168.509o.

27 Indeed, in the Governor’s press release announcing his signing of the amendatory bill enacted as 2016 PA 142, the Governor asserted no objective related to the voter registration status of petition signers, but rather attributed it the purpose of “help[ing] ensure the issues that make the ballot are the ones that matter most to Michiganders.” See Office of Governor Rick Snyder, *Gov. Rick Snyder Signs Bill Establishing 180-day Deadline for Petition Signatures on Proposed Legislation and Constitutional Amendments* (published June 7, 2016) < http://michigan.gov/snyder/0,4668,7-277-57577_57657-386394--,00.html > (accessed today).

28 *Wolverine Golf Club*, 384 Mich at 466.

rights is all the more firmly grounded today. The logic of OAG 4813 remains compelling and dispositive.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court declare MCL 168.472a unconstitutional and enter a writ of mandamus or other appropriate order directing the Board of State Canvassers to:

- 1) Canvass Plaintiff’s statutory initiative petition without exclusion of those signatures dated more than 180 days from the petition’s date of filing and
- 2) Issue a declaration of sufficiency or insufficiency for Plaintiff’s petition by the statutory deadline of July 26, 2020.²⁹

Respectfully submitted,

/s/ Matthew Erard
 Matthew Erard (P81091)
 LAW OFFICE OF
 MATTHEW S. ERARD, PLLC
 Counsel for Plaintiff
 400 Bagley St #939
 Detroit, MI 48226
 248.765.1605
 mserard@gmail.com

/s/ Ellis Boal
 Ellis Boal (P10913)
 Counsel for Plaintiff
 9330 Woods Road
 Charlevoix, MI 49720
 231.547.2626
 ellisboal@voyager.net

Dated: June 10, 2020

29 MCL 168.477(1).