

Exhibit A

ELLIS BOAL
ATTORNEY

9:130 ^{Wood}BOYNE CITY ROAD, CHARLEVOIX, MICHIGAN 49720

231/547-2626 • ~~FAX 231/547-2628~~

ellisboal@voyager.net

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Board of State Canvassers
430 W Allegan
Lansing, MI 48918
elections@michigan.gov

Sent via email 11-14-18
Hand-delivered 11-15-18

Re: Elections bureau's refusal to allow filing of statutory initiative signatures

Dear Canvassers:

I write as counsel to the Committee to Ban Fracking in Michigan (CBFM). My co-counsel is Matt Erard, cc'd below.

As set out in the attached mandamus complaint of last week in the court of appeals, two years ago CBFM sued the director of elections, secretary of state, and the board of canvassers, seeking a declaration that the 180-day time limit of MCL 168.472a for collecting signatures for a statutory initiative is unconstitutional. In 2017 the court of appeals held the action unripe, saying CBFM was free to bring it again once we file the signatures. See the attached 2017 decision.

I write today about a new matter which arose only 10 days ago, on November 5, the day before the election. The next day, November 6, we filed a mandamus complaint in the court of appeals against the secretary of state and director of elections, noting they had refused to accept signatures. The court took no immediate action, so we amended the complaint a day later, November 7. Our papers in case # 346280 are attached, defendants have answered, and we await a court ruling.

However there need be no court ruling, should you decide to overrule the director as to the events of November 5, a power that you have, as conceded by Ms. Williams' agent Melissa Malerman in conversation that day.

Background: CBFM is a ballot question committee aiming now to place a

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statutory initiative on the 2020 ballot. The proposed ballot language can be viewed here: <http://letsbanfracking.org> . Generally it seeks to ban horizontal fracking and frack waste in the state, eliminate the state's statutory pre-WWII policy requiring environmental regulators to maximize oil-gas production and foster the oil-gas industry, and substitute a requirement that they protect climate.

Without specifying any particular election year in the order, this board approved the format of the petition sheets on April 14, 2015, by 3-0, with member Shinkle present but refusing to vote, in effect recusing himself without stating a reason. See exhibit 1 to the initial mandamus complaint.

Prior to the 2018 election the required number of valid signatures to achieve ballot status was 252,523. Since many more people voted for governor this year compared to the last election, that minimum jumped by 10's of thousands as of November 6. So it was critical that we file signatures before the election.

We did that. The afternoon of November 5 we delivered 47 boxes of signatures summing to more than the minimum, to the elections bureau on Allegan Street. Ms. Malerman, on behalf of Ms. Williams, rejected filing of the signatures, claiming a statement on the petition sheets was "incorrect."

"[T]he Initiative petition tendered by the Committee to Ban Fracking in Michigan, which the Committee to Ban Fracking in Michigan estimates consists of 47 boxes containing approximately 51,980 petition sheets bearing approximately 270,962 signatures, was rejected by the Secretary of State on this date by Sally Williams, Director of Elections."

Exhibit 2 to the initial mandamus complaint.

We argued the point for some 20 minutes, asking that the bureau take possession of the signatures and refer them to the canvassers, in the course of which Ms. Malerman acknowledged (as noted above) that the canvassers had power to overrule Ms. Williams. She refused to take the signatures.

We left with the 47 boxes. Eventually and at considerable expense, after inquiring to three other companies we were able find a secure location for them at Kent Record Management Inc. See the attached amended and supplemented mandamus complaint.

We filed the mandamus case the next day. But you may act without waiting for the court to act, as noted above.

The “incorrect” statement claimed by Ms. Williams was this: The sheets have a summary of the proposed ballot language on the front, and the full text on the back. The summary on the front includes this at the end:

“This proposal is to be voted on in the November 8, 2016 General election. THE FULL TEXT OF THE LEGISLATION TO BE INITIATED APPEARS ON THE REVERSE SIDE OF THIS PETITION.”

The reference to the 2016 election was what was “incorrect,” according to Ms. Williams.

(CBFM need not explain why it included a voting date on the sheet -- which was not a legal requirement -- but we will: At the time we hoped and expected to get enough signatures in time for the 2016 election. We also knew, as you do, that statutory ballot petition sheets historically have customarily included such language. Finally, we were influenced by the existence of the 180-day statute, 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.)

But the 2016 voting date was neither correct nor incorrect. It was only a prediction, as evidenced by the other circulated ballot petitions which you have approved over the years that had similar language, but never appeared on the ballot. It is also evidenced by the tens of thousands of people who signed the CBFM petition after November 2016 when it was obvious that date had passed.

Importantly, signers were directed in capital letters to the back side for the full text, where the summary is repeated but without a predicted election date.

As noted in the initial mandamus complaint at ¶ 15, nothing in Michigan election law or the SOS rules for statutory initiative petitions contemplates that the summary include reference to a particular election date.

Finally and perhaps most importantly, as you will see in ¶¶ 9 and 11 of the initial mandamus complaint, the defendants in the 2016 case including this board all stated explicitly that CBFM would be free to file signatures using the same sheets when we reached the minimum of 252,523. On October 27, 2016, after the deadline for getting on the 2016 ballot had passed, and knowing the summary on the sheets referred to that election, through counsel you wrote:

“If and when Plaintiffs obtain the additional signatures they require, then they would be able to file their petition.”

The court knew it too, noting that CBFM was “continuing to collect signatures with the same petition sheets.” You cannot go back on your word.

Defendants' opposition to the mandamus case, filed yesterday, acknowledges that you said this, and they said it too. (The court of appeals said the same, noting that CBFM was “continuing to collect signatures with *the same petition sheets*” (emphasis added).) But defendants assert that they/you were only “speculating,” and besides they/you were referring to collection for CBFM's then-goal of 2018, not 2020.

Defendants' opposition acknowledges that CBFM's petition “was rejected for filing” on November 5. The rejection was, defendants claim, pursuant to MCL 168.471, which refers to “filing” but has no definition of the word.

CBFM's change of its goal from 2018 to 2020 is a distinction without a difference.

Defendants' only case citation is *O'Connell v Director of Elections*, 317 Mich App 82, 86-87 (2016). *O'Donnell* involved a false affidavit by a candidate, which was not just a prediction but false from day 1, that he was an “incumbent” judge when he was not. The case turned on the definition of “incumbent,” and the constitution's “criteria for incumbency ... could not be plainer,” the court said.

By contrast this case turns on the definition of “filing” in MCL 168.471, a term which has no definition other than the common usages of English.

According to these, “filing” and “tendering” are one and the same. CBFM did everything it could possibly do to “file” its signatures, by showing up timely with 47 boxes at the election bureau. CBFM did file but Ms. Williams refuses to acknowledge it.

We are not asking today that you decide whether there is or is not anything wrong with the summary. We only ask that you order Ms. Williams to take possession of the signatures from Kent Record Management, and process them in the usual way for canvassing. When the issue of the propriety of the summary language comes properly before you, we will provide additional argument.

Finally, we expect member Shinkle to again recuse himself. Whatever his reason

3½ years ago – and he cannot claim to remember it clearly now after so much time – it still applies today when the same petition is before him.

Very truly yours,



Ellis Boal

Encl: Committee to Ban Fracking in Michigan et al v Director of Elections, Secretary of State, and Board of State Canvassers, COA Decision, Case No. 334480.

3/14/17

Plaintiff's Emergency Complaint And Motion For Writ Of Mandamus, 11-6-18

Emergency Motion For Same-Day Immediate Consideration, 11-6-18

Motion to Amend and Supplement the Complaint, 11-7-18

Amended and Supplemented Complaint, 11-7-18

c: Matt Erard, 400 Bagley, Apt 939, Detroit, MI, 48226, 248-765-1605
LuAnne Kozma, CBFM, Box 490, Charlevoix, MI, 49720, 231-944-8750
Ruth Johnson, SOS, 430 W Allegan, Lansing, MI, 48918, 517-373-2510
Sally Williams, Elections, 430 W Allegan, Lansing, MI, 48918, 517-373-2540
Bill Schuette, AG, 525 W Ottawa, Box 30212, Lansing, MI, 48909, 517-373-1110
Jocelyn Benson, SOS Elect, 19310 Berkeley, Detroit, MI 48221, 313-409-9737
Dana Nessel, AG Elect, 645 Griswold, Detroit, MI, 48226, 313-556-2300