STATE OF MICHIGAN
IN THE SUPREME COURT

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff,

v

BOARD OF STATE CANVASSERS,

Defendant.
_____/

Supreme Court No. 161453

The action involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF IN SUPPORT OF DEFENDANT BOARD OF STATE CANVASSERS' MOTION FOR SUMMARY DISPOSITION

ORAL ARGUMENT REQUESTED

Dana Nessel
Attorney General

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

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: June 22, 2020

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

This Court has original jurisdiction to entertain an action for "mandamus against a state officer." MCR 7.203(C)(2), citing MCL 600.4401. Defendant Secretary of State is a "state officer," see Const 1963, art 5, § 3; MCL 168.21 for purposes of mandamus relief. *Protect MI Constitution v Secretary of State*, 297 Mich App 553, 566 (2012). Also, "any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court." MCL 168.479(1).

An action under MCL 168.479 must be initiated within seven business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. MCL 168.479(2). Plaintiff Committee to Ban Fracking in Michigan (CBFM) filed this action on June 10, 2020 challenging the Board of State Canvassers' June 8, 2020 determination of the insufficiency of their petition. Because the action was filed within seven days of the Board's action and more than 60 days before the November 3, 2020 general election, this case is within the Court's jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

1. A claim for mandamus requires both a clear legal duty and a clear legal right to the performance of that duty. Plaintiff Committee To Ban Fracking in Michigan (CBFM) has not demonstrated either a clear legal duty to accept their stale signatures or a clear legal right to the performance of that duty. Must their claim for mandamus fail as a matter of law?

   Plaintiff's answer: No.

   Defendant's answer: Yes.

2. MCL 168.472a provides that petition signatures older than 180 days may not be counted. Although Plaintiff CBFM argues that Section 472a is unconstitutional and that they should be allowed to submit signatures that are almost four years old, the provision is presumed constitutional and does not unduly burden or curtail the right of initiative. Has Plaintiff CBFM failed to demonstrate the unconstitutionality of Section 472a?

   Plaintiff's answer: No.

   Defendant's answer: Yes.

CONSTITUTIONAL PROVISION, STATUTEINVOLVED

Const 1963, art 2, § 9:

> 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.
>
> No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.
>
> 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. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.
>
> 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.
>
> Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. 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. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. 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 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.

INTRODUCTION

Plaintiff Committee to Ban Fracking in Michigan (CBFM) brings this action seeking a writ of mandamus against the Board of State Canvassers to compel the Board to accept hundreds of thousands of signatures signed months—sometimes years—before the petition was deemed filed with the Secretary of State on November 5, 2020. But MCL 168.472a expressly provides that signatures on initiative petition sheets older than 180 days prior to filing shall not be counted. Because the law expressly prohibits these signatures from being counted, CBFM cannot show that the Board has a clear legal duty to count such signatures, or that CBFM has a clear legal right to enforce such an action. CBFM is not entitled to mandamus relief.

Further, CBFM's challenge to the constitutionality of MCL 168.472a is unpersuasive and conflicts with prior decisions of this Court. This Court has ruled that the Legislature has the authority to establish the process by which initiative petitioned legislation shall reach the Legislature or the electorate, which readily includes determining the validity of petition signatures. CBFM's arguments against the constitutionality of the statute fail.

STATEMENT OF FACTS AND PROCEEDINGS

A. General requirements for initiative petitions in Michigan

Article 2, § 9 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Const 1963, art 2, § 9. With respect to initiatives, § 9 provides in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . 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. [Const 1963, art 2, § 9.]

The Michigan Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, MCL 168.1 *et seq*. Under the Constitution and the Election Law, in order for the people to place an initiative on the general election ballot, the people must: (1) prepare a petition that meets the form requirements of MCL 168.482; (2) gather the required number of valid signatures under article 2, § 9; and (3) timely file the petitions with the Secretary of State under MCL 168.472. After filing, Michigan's Board of State Canvassers must canvass the petition to determine whether there are sufficient valid signatures under MCL 168.476. Once the review is complete, the Board of State Canvassers must make an official declaration of the sufficiency or insufficiency of the initiative petition at least 100 days before the election at which the proposal is to be submitted. MCL 168.477(1).

If the initiative petition is certified as sufficient, the Secretary of State must present it to the Legislature for enactment or rejection within 40 sessions days

under article 2, § 9. If the Legislature rejects the initiative, it must be submitted to the people for a vote at the next general election. Const 1963, art 2, § 9.

The following table shows the timeline of pertinent dates leading up to the November 2020 general election:

Date and Time	Action	Statute
By 5:00 pm on May 27, 2020	Petitions for legislative initiative filed with Secretary of State (340,047 valid signatures required)	MCL 168.471 Art 2, § 9
May 27, 2020 to July 23, 2020	Canvass of initiative petitions begins, including random sampling process; signature challenges permitted during this time period. (Canvassing may take up to 60 days)	MCL 168.476
July 24, 2020	Board of State Canvassers to declare sufficiency or insufficiency of initiative petitions	MCL 168.477
September 4, 2020	Board of State Canvassers must assign numerical designation and approve ballot wording for all statewide proposals, and Secretary of State must certify the ballot to county clerks	MCL 168.474a, 168.480, 168.648
September 5, 2020	County clerks begin ballot proofing and printing	MCL 168.689
September 19, 2020	Deadline for county boards of election commissioners to deliver AV ballots to county clerks for November Election	MCL 168.713
September 21, 2020	Deadline for county clerks to deliver AV ballots to local clerks; deadline for AV ballots to be available for delivery to military and overseas voters	MCL 168.759a, 168.714 Art 2 § 4 52 USC § 20302
November 3, 2020	General Election	

B. History of CBFM's initiative petition.

On April 14, 2015—over five years ago—the Board of State Canvassers approved the form of CBFM's initiative petition. *Committee to Ban Fracking in Michigan v Secretary of State*, unpublished opinion of the Court of Appeals, Docket

No. 350161, dec'd April 2, 2020, p 1)(slip opinion attached as Exhibit A). In January 2016, CBFM and its chairperson LuAnn Kozma filed a complaint seeking to challenge the constitutionality of the 180-day rule under former MCL 168.472a. *Id.* at 2. The Court of Claims granted defendants summary disposition, holding that no actual controversy existed because plaintiffs had not collected enough signatures to submit their petition to the Secretary of State and their ability to do so was speculative. *Id.* CBFM appealed that ruling, and the Court of Appeals affirmed. *Id.*, citing *Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, Docket No. 334480, dec'd March 14, 2017.

On June 9, 2016, Governor Snyder signed 2016 PA 142, which enacted Senate Bill 776 and amended MCL 168.472a to provide:

> 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.[1]

The law took immediate effect.

CBFM continued to gather signatures, and on November 5, 2018—one day before the 2018 general election—CBFM attempted to file its initiative petition with the Secretary of State. (Ex. A, p 2.) Former Secretary of State Ruth Johnson

[1] As originally enacted, MCL 168.472a created a rebuttable presumption as to the invalidity of a signature:

> 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.

declined to accept the petition because it stated on its face that it was to be voted on in the November 8, 2016 general election. *Id.* at 3. CBFM challenged the Secretary's action in December of 2018, and the Court of Claims held that the erroneous date referenced violated MCL 168.471, which requires that petitions must be filed at least 160 days before the election at which the proposal would be voted upon. *Id.* at 3-4. But the Court of Appeals reversed, finding that the error did not violate the 160-day rule. *Id.*

Pursuant to the Court of Appeals' order, CBFM's petition was deemed filed on November 5, 2018. Because this date preceded the 2018 gubernatorial election, CBFM's petition must contain signatures equal to 8% of the number of electors who voted for governor in the 2014 gubernatorial election, which amounts to 252,523 signatures. See Const 1963, art 2, § 9.[2] The actual petition sheets were removed from storage and delivered to the Secretary of State on May 1, 2020. (Exhibit B, May 19, 2020 Preliminary Staff Report, p 1). CBFM estimated that it provided 270,962 signatures gathered over a 3½ year period. (Ex. B., p 1). CBFM admitted that, out of those, "at most" 65,000 were gathered in the 180 days preceding the November 5, 2018 filing, and directed Bureau of Elections staff to the specific boxes containing the most recent signatures. (Ex. B, p 1-2). However, after review by the

[2] As a result of the 2018 gubernatorial election, the current signature requirement for legislative initiative petitions is significantly higher; now 340,047 valid signatures are required. See also, Instructions for Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition, p 5, available at, https://www.michigan.gov/documents/sos/Initiative_and_Referendum_Petition_Instructions_2019-20_061119_658168_7.pdf.

Bureau of Elections, only 29,392 signatures could be confirmed as being dated within 180 days of filing. (Ex. B, p 2). Bureau staff thus concluded that there were no more than 29,392 valid petition signatures, and recommended rejection of the petition. Notably, the petition sheets filed by CBFM included duplicate signatures of CBFM chairperson LuAnn Kozma and its counsel, Ellis Boal, dated over a year apart. (Exhibit C, petition sheets).

During the May 22, 2020 Board of State Canvassers meeting, board members asked the Director of Elections to conduct a thorough count of every petition sheet and signature within CBFM's filing. (Exhibit D, June 3, 2020 Staff Report, p 1). That count confirmed that there were 271,021 total signatures, but only 29,392 dated within 180 days of the filing of the petition. (Ex. D, p 1-2). On June 8, 2020 the Board of State Canvassers met and voted to reject CBFM's initiative petition for having an insufficient number of valid signatures. See MCL 168.477.

ARGUMENT

I. Plaintiff has not demonstrated a clear legal right to the performance of the specific duties sought, and that the Board of State Canvassers has a clear legal duty to perform the acts requested. Because neither requirement is satisfied, mandamus relief should be denied.

The sole count of CBFM's complaint is for mandamus or "other appropriate remedy pursuant to MCL 168.479." (Complaint, p 3.) Although courts have held that mandamus is the appropriate remedy for a party seeking to compel action by election officials, see, e.g., *Wolverine Golf Club v Secretary of State*, 24 Mich App 711 (1970), aff'd 384 Mich 461 (1971); *Automobile Club of Mich Committee for Lower Rates Now v Secretary of State (On Remand),* 195 Mich App 613 (1992), a writ of mandamus remains an extraordinary remedy and will only be issued where: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result," *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 284 (2008), aff'd in result, 482 Mich 960 (2008), citing *Tuggle v Dep't of State Police*, 269 Mich App 657, 668 (2005). The specific act sought to be compelled must be of a ministerial nature, which is prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 286. "The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff." *White-Bey v Dept of Corrections*, 239 Mich App 221, 223 (1999).

CBFM has demonstrated neither a clear legal duty for the Board of State Canvassers to count signatures older than 180 days, nor that they have a right to the enforcement of such a duty. To the contrary, the act requested is directly contrary to law under MCL 168.472a. CBFM does not dispute that the counting of such signatures is proscribed by § 472a. Instead it appears to argue that the Board had a duty to disregard the statute. However, CBFM points to no prior decision of this or any court holding this statute to be unconstitutional that the Board could rely upon as authority for disregarding that law. Rather than there being a ministerial duty to accept signatures older than 180 days, there is instead a clearly defined duty to *reject* such signatures.

The Board of State Canvassers has no duty to ignore enactments of the Legislature, and Plaintiff has no legal right to have the Board count signatures that the Legislature has expressly excluded. Plaintiff CBFM is not entitled to the extraordinary relief of a writ of mandamus.

II. Plaintiff CBFM is not entitled to any "other" relief where MCL 168.472a is constitutional.

Although Plaintiff CBFM's complaint expressly invokes only mandamus relief—to which, as discussed above, it is not entitled—CBFM also vaguely refers to "other appropriate" remedies pursuant to MCL 168.479. (Complaint., p 3). But § 479 does not provide or suggest particular causes of action on which relief might be based. It is incumbent upon CBFM to premise their request for relief with a legal cause of action. Because they have stated only a claim for mandamus and no other causes of action, and because their claim for mandamus fails to meet the legal

requirements, CBFM has failed to state a claim for which relief may be granted and its complaint must be dismissed under MCR 2.116(C)(8). The Board recognizes, however, that courts have resolved "threshold" legal questions involving the constitutionality of an action or statute in the context of a mandamus action. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 283, quoting *Michigan United Conservation Clubs v Sec'y of State,* 463 Mich 1009 (2001). See also *Wolverine Golf Club v Sec'y of State*, 384 Mich 461, 466 (1971). Nevertheless, CBFM's claims still fail as a matter of law because § 472a, as amended, is constitutional.[3]

A. Statutes are presumed to be constitutional

When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent. Further, when considering a claim that a statute is unconstitutional . . . the wisdom of the legislation" is not part of the inquiry. *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003) (citations omitted). "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the

[3] The Court of Claims previously concluded in a different case that § 472a, before its amendment, was constitutional as applied to initiative petitions. See *Michigan Comprehensive Cannabis Law Reform Comm v Secretary of State*, Court of Claims No. 16-000131-MM. (See Exhibit F, COC Opinion & Order.) See also *Myers v Johnson,* 2017 WL 2021064 (ED Mich, May 12, 2017) (subsequent case and decision regarding Michigan Comprehensive Cannabis Law Reform Committee's challenge to MCL 168.472a).

Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (quotation marks and citations omitted).

B. Self-executing constitutional provisions may be supplemented

A constitutional provision is deemed self-executing, "if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced[.]" *Wolverine Golf Club v Hare*, 24 Mich App 711, 725-726 (1970), aff'd sub nom *Wolverine Golf Club*, 384 Mich 461 (1971) (quotation marks and citations omitted). "Whether a constitutional provision is self-executing is largely determined by whether legislation is a necessary prerequisite to the operation of the provision." *Id.* at 725. But even self-executing constitutional provisions can be supplemented through legislation. "It is well-recognized law that a legislature may not impose additional obligations on a self-executing constitutional provision." *Durant v Dep't of Educ*, 186 Mich App 83, 98 (1990), citing *Wolverine Golf Club,* 384 Mich at 466. See also *League of Women Votersv Secretary of State,* 2020 WL 423319 (Mich App, January 27, 2020) (analyzing constitutionality of several election statutes). "However, this does not mean that a legislature may not enact legislation that would supplement such a provision":

> "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon." [*Durant*, 186 Mich App at 98, quoting *Hamilton v Sec of State,* 227 Mich 111, 125 (1924), quoting *State, ex rel Caldwell v County Judge,* 22 Okla 712, 98 P 964 (1908).]

Notably, article 2, § 4 provides that "except as otherwise provided" in the Constitution "the legislature shall enact laws to regulate *the time, place and manner of all . . . elections*[.]" Const 1963, art 2, § 4(2) (emphasis added).]

Thus, regardless of whether article 2, § 9 is self-executing, the Legislature may enact supplemental legislation so long as it does not unduly burden or curtail the rights provided by the Constitution.

C. Section 472a does not unduly burden or curtail the right of initiative.

CBFM's central argument is that MCL 168.472a's exclusion of signatures collected more than 180 days prior to the filing of the petition is unconstitutional. Their argument relies almost entirely upon their interpretation of *Wolverine Golf Club v Secretary of State*, , in which this Court struck down a requirement that initiative petitions must be filed at least 10 days before the start of the legislative session. 384 Mich at 466-467. There, the Court held that article 2, § 9 was self-executing, and that the Legislature lacked the power to impose additional restrictions on the exercise of the right of initiative. *Wolverine*, 384 Mich at 466. But the Court also stated that article 2, § 9's provision that, "'the legislature shall implement the provisions of this section'" was "a directive to the legislature to formulate *the process by which initiative petitioned legislation shall reach the legislature or the electorate*." *Id.* (emphasis added).

CBFM's reliance on *Wolverine* is misplaced. The issue in that case was the legislative imposition of an additional limitation on when the power of initiative could be exercised that was not contained in the Constitution itself. This Court in

Wolverine interpreted § 9's implementation clause, which states "the legislature shall implement the provisions of this section" as a directive. *Id.* More specifically, the Court held that the implementation clause was, "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Id.* After noting that § 9 was self-executing, the Court quoted, with approval, the earlier Court of Appeals decision where it stated, "[t]he only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any *undue burdens* placed thereon." *Id.*, quoting *Wolverine Golf Club v Sec'y of State*, 24 Mich App 711, 725 (1970) (emphasis added) (internal quotations omitted).

Here, unlike the statute at issue in *Wolverine,* § 472a contains no restriction on when CBFM could file their initiative petition. Neither does Section 472a limit the subject matter of an initiative or restrict the ability of circulators to engage the electorate in any meaningful way. Instead, § 472a addresses the validity of petition signatures—a subject that easily fits within the description of "the process by which the initiative petition legislation shall reach the legislature or the electorate." *Wolverine*, 384 Mich at 466. It is functionally no different than a requirement that petition signers be registered voters. So, the validity of signatures is within the scope of the Legislature's constitutional authority under article 2, § 9 to "implement the provisions of this section."

Moreover, the 180-day expiration period for signature validity has been previously upheld by this Court in *Consumers Power Co v Attorney General*, 426 Mich 1 (1986). In that case, this Court overturned an Attorney General Opinion declaring unconstitutional MCL 168.472a's "rebuttable presumption" that petition signatures more than 180 days old were stale and void. *Consumers Power*, 426 Mich at 7-9. The Attorney General Opinion reached the exact conclusion CBFM urges here—that the 180-day period was an unconstitutional limitation on article 2, § 9. But his Court rejected that conclusion. The Court observed that the statute did not set a 180-day time limit for obtaining signatures—only that signatures on a petition more than 180 days old were presumed invalid. *Consumers Power*, 426 Mich at 7-8. This Court's reasoning was that the 180-day period furthered the constitutional requirement that only registered electors may engage in the petition processes under article 2, § 9:

> So too in the present situation, the Legislature has followed the dictates of the constitution in promulgating MCL 168.472a [ ]. The statute sets forth a requirement for the signing and circulating of petitions, that is, that a signature which is affixed to a petition more than 180 days before that petition is filed with the Secretary of State is rebuttably presumed to be stale and void. The *purpose of the statute is to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment.* [*Consumers Power,* 426 Mich at 7-8 (emphasis added).]

This Court's concern is especially justified where, as here, the petition in question circulated for almost four years. As noted above, by November 2018, CBFM's petition was supported only by a fraction of the number of timely acquired signatures of registered voters. This is to say nothing of the risk that electors may

justifiably be confused about whether they have previously signed the petition, as even CBFM's chair and counsel appear to have done. (Ex. D).

CBFM attempts to distinguish *Consumers Power* as addressing constitutional amendments under art 12, § 2 instead of initiative proposals under article 2, § 9. But article 2, § 9 includes a similar requirement that only registered electors may sign petitions:

> *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. [Const 1963, art 2, § 9 (emphasis added).]

This Court has thus recognized that a similar 180-day signature expiration period is a lawful fulfillment of a constitutional directive that only registered electors may participate in the process. The same conclusion should apply in this case to a similar constitutional requirement that only registered electors may initiate legislation.

Just like the statute in *Consumers Power*, the legislative enactment of § 472a is presumed to be constitutional. *Consumers Power,* 426 Mich at 9, citing *Hall v Calhoun Co Bd of Supervisors*, 373 Mich 642 (1964). A court will not declare a statute unconstitutional unless it is plain that it violates some provision of the constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter. *Id.,* citing *Oakland Co Taxpayers' League v Oakland Co Supervisors*, 355 Mich 305, 323 (1959). In this case, the statute does not violate any provision of the

Constitution, and instead furthers the constitutional directive that petition signers must be registered electors.

Significantly, this Court stated in a footnote that it declined to address whether the 180-day period burdened the right of initiative because the plaintiffs had failed to establish such a burden:

> While it might have been shown that 180 days is insufficient time in which to collect a required number of valid signatures, that showing was not made in circuit court. The record contains no evidence that the 180-day limitation does or does not impose an unreasonable burden on the people's right to propose constitutional amendments. Accordingly, the trial court [judge] correctly concluded, on the record before him, that he could not say as a matter of law that the statute's presumption of validity had been overcome. [*Consumers Power*, 426 Mich at 10, n 3 (internal citation omitted).]

CBFM here has similarly failed to demonstrate that the 180-day expiration period imposes an unreasonable burden on the ability of the people to mount an initiative campaign. To the contrary, there is a record of exactly the opposite: there have been 16 initiatives successfully proposed to the electorate or adopted by the Legislature since the *Consumers Power* decision in 1986—including one in 2018 after § 472a was amended. (Exhibit E, Initiatives and Referendums, p 9-10). A successful effort may require more organization or popular support among the electorate, but it is clearly possible to gather a sufficient number of signatures within the 180-day window. See, e.g., *American Constitutional Law Foundation, Inc v Meyer*, 120 F3d 1092, 1099 (CA 10, 1997), aff'd 525 US 182 (1999) ("Although some measures might fare better under a longer or indeterminate period, the current deadline [of six months] is not a significant burden on the ability of organized proponents to place a measure on the ballot.")

Finally, CBFM argues that the removal of the word "stale" from the statute when it was amended in 2016 somehow demonstrates a legislative intent to heighten the burden on initiative proposals, or that the removal of the reference to "rebuttable presumption" raises the burden on petition proponents. (Complaint, p 9, ¶23-26.) This argument is also misplaced. The statute does not impose an "absolute time limit." Instead, petitions may be circulated at any time, and for any duration of time. The statute instead merely addresses the validity of *signatures* after a certain period of time. CBFM can—and, indeed, has—circulate its petition for as long as they wish. But CBFM offers no authority for a constitutional right to have signatures assumed to be valid for years after signing.

CBFM's claims generally reduce to a complaint that gathering signatures for an initiative petition is difficult. But—as this Court observed in *Woodland v. Michigan Citizens Lobby*, 423 Mich 188, 217 (1985)—the initiative process was not intended to be easy to fulfill. During the Constitutional Convention there was an effort to reduce the signature requirement from eight to five percent was strongly resisted and defeated, as succinctly expressed by delegate Kuhn:

> It's tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That's what we have a senate and house of representatives for.

Id., quoting 2 Official Record, Constitutional Convention 1961, p 2394. As this Court explained in *Woodland*, the initiative process is intended as a last resort for the people when the Legislature fails to act on issues that so inflame the citizenry on a grass-roots level that there is no need to endeavor to reach disinterested an unknowing citizens. 243 Mich at 218. That CBFM experienced any difficulty

gathering a sufficient number of signatures thus suggests that there was not the intended level of interest to justify the invocation of the initiative process.

The 180-day signature expiration period has been upheld by the Court in a similar context and is consistent with other constitutional directives. CBFM has failed to demonstrate that the 180-day period is an unreasonable burden on the ability of the people to engage in the initiative process. CBFM's challenge to MCL 168.472a must fail.

CONCLUSION AND RELIEF REQUESTED

Plaintiff Committee to Ban Fracking has failed to demonstrate any entitlement to mandamus or other relief and their challenge to the constitutionality of MCL 168.472a fails as a matter of law. Defendant Board of State Canvassers therefore respectfully requests that this Honorable Court enter an order granting summary disposition and dismissing the complaint in its entirety and with prejudice.

Alternatively, if this Court is not persuaded that MCL 168.472a is constitutional, the Defendant respectfully requests that the Court enter an order to that effect no later than July 6, 2020, so the Defendant may take the necessary actions to canvass CBFM's petition and refer it to the legislature, if appropriate.

Respectfully submitted,

Dana Nessel
Attorney General

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

/s/Erik A. Grill
Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: June 22, 2020