STATE OF MICHIGAN
SUPREME COURT

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff,

v

BOARD OF STATE CANVASSERS,

Defendant.
_____/

Supreme Court Case # 161453

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This action challenges the constitutionality of a state statute.

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INTRODUCTION

On June 10, 2020, Plaintiff Committee to Ban Fracking in Michigan (CBFM) filed a complaint for mandamus or other appropriate relief under MCL 168.479, seeking review of a Board of State Canvassers declaration of insufficiency to its statutory initiative petition. In response to Plaintiff's complaint, Defendant moved for summary disposition under MCR 2.116(C)(8) and (10) on June 22, 2020.

Although Plaintiff questions whether a motion for summary disposition under Michigan's Rules of Civil Procedure could procedurally be granted under the jurisdiction of this Court, Plaintiff respectfully submits this brief in response to the arguments presented by Defendant.

STATEMENT OF FACTS

On November 5, 2018, Plaintiff filed 271,021 vetted statutory initiative signatures with the Secretary of State, expecting she would notify Defendant Board of State Canvassers per the election statute.[1] The figure was 7% more than the minimum of 252,523 required at the time by the Constitution.[2] 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.[3] Under application of MCL 168.472a, this meant only those 29,392 signatures are available to be canvassed, far fewer than the

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1 MCL 168.475(1).

2 Const 1963 art 2, § 9.

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

minimum.[4]

Defendant consequently declared the Committee's filing insufficient without conducting face review or a sample or direct canvass. Plaintiff then brought the present action in this Court under MCL 168.479 seeking a writ of mandamus or other appropriate order holding MCL 168.472a unconstitutional as applied to statutory initiative petitions and requiring Defendant to timely canvass Plaintiff's petitions without exclusion of those signatures dated more than 180 days before the date of filing.

ARGUMENT

I. DEFENDANT HAS A CLEAR LEGAL DUTY TO ACT IN ACCORDANCE WITH THE CONSTITUTION AND DETERMINATION OF THIS COURT.

Defendant Board of State Canvassers contends that because the constitutional validity of MCL 168.472a had yet to be judicially resolved at the time of Defendant's declaration of insufficiency to Plaintiff's petition, Plaintiff cannot satisfy the mandamus requirement of showing a clear legal duty to disregard enforcement of the statute. Having prevented Plaintiff's prior challenge to the statute by successfully contending that a declaratory ruling would not be ripe until it has actually applied the statute to

4 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.

discount Plaintiff's signatures,[5] Defendant now seeks to forge a Catch-22 whereby remedial relief would depend on the statute's preceding judicial invalidation.

Contrary to Defendant's postulation, the "Board of State Canvassers has a clear legal duty to act in accordance with Const 1963, art 2, § 9." *Bingo Coalition for Charity--Not Politics v Bd of State Canvassers*, 215 Mich App 405, 414 (1996). Accordingly, as Defendant appears to acknowledge in spite of its own argument, the writ of mandamus has regularly been used to address "questions of the interpretation of Const 1963, art 2, § 9." *Id*. at 413 (citing *Wolverine Golf Club v Secretary of State*, 384 Mich 461 (1971); *Auto Club of Michigan Comm for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613 (1992), complaint for mandamus granted 440 Mich 1209 (1992); *Newsome v Bd of State Canvassers*, 69 Mich App 725 (1976)).

Although Defendant suggests that applying constitutional interpretation to the validity of MCL 168.472a would go beyond a clearly defined or ministerial legal duty, a "plaintiff's ability to show a clear legal right or a clear legal duty for purposes of mandamus does not depend upon the difficulty of the legal question presented" nor exclude those "situations where the interpretation of the controlling statute is in doubt." *Berdy v Buffa*, 504 Mich 876 (2019).

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5 Exhibit A: *Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), 2017 Mich. App. LEXIS 405 at *3, 8.

Applying such principles to constitutional interpretation in the context of a citizens' initiative, the Court of Appeals recently explained that "*this Court* is obliged to make the threshold determination of whether an initiative petition meets the constitutional prerequisites for acceptance on the ballot" and that the Board would then have a clear legal duty of a ministerial nature as "a result of this Court's decision." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 585-86 (2018), aff'd 503 Mich 42 (2018). The same reasoning applies to this Court's presently pending determination under MCL 168.479. As long as the constitutional invalidity of 472a, "once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie." *Berdy*, 504 Mich at 876.

MCL 168.479 provides this Court original jurisdiction over legal challenges to determinations of the Board of State Canvassers regarding the insufficiency of a petition and for review of Board of State Canvassers determinations "by mandamus or other appropriate remedy." *Id*. Because no statute or court rule appears to directly provide this Court with original jurisdiction to issue declaratory or injunctive relief, Plaintiff's Complaint reflects the statutory language of 479 in seeking a writ of mandamus or other appropriate order providing equivalent relief. To the extent that 479 can be construed to envision or authorize other remedies, Plaintiff seeks any form of remedial relief that this Court is empowered to issue.

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

In spite of this Court's holding that the legislature may not impose additional obligations on the constitutional provision for invoking the legislative powers reserved under art 2, § 9,[6] Defendant proposes that the restriction imposed by MCL 168.472a is merely supplemental legislation enacted under the legislature's general authority to "regulate the time, place and manner of all nominations and elections" under Const 1963, art 2, § 4.

Significantly, MCL 168.472a obstructs initiatives from being invoked for legislative adoption prior to any potential stage of submission to the electorate. But even if the time, place, and manner clause of art 2, § 4 could be read broadly enough to extend to the initiative petition process, it is directly constrained by the preceding clause stating, "Except as otherwise provided in this constitution . . . ." In establishing the statutory initiative power as both a reservation of legislative authority and a self-executing constitutional procedure, the framers of art 2, § 9 have so 'otherwise provided.' "It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision." 384 Mich 461, 466.

In enacting valid legislation supplemental to a self-executing constitutional provision, such legislation must have the "object to further the exercise of constitutional

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

right and make it more available, and such law 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). Conversely, by mandating that valid and verifiable signatures of registered electors from 2015-17 and part of 2018 "shall not be counted," 472a contravenes the unfettered nature of the Constitution's self-executing benchmark 8% criterion.

Though (citing no legislative history) Defendant relies on the legislative purpose attributed to 472a's former iteration in *Consumers Power Co v Attorney General*, 426 Mich 1 (1986), dealing solely with its application to initiatives under art 12, § 2, that decision further forecloses the argument that 472a could be validly enacted as mere supplemental legislation under art 2, § 4 or the legislature's plenary power. Despite the statute having then imposed only a rebuttable presumption of staleness to signatures collected over 180 days before filing, this Court fully grounded its holding upon the finding that the distinct provision of art 12, § 2 summoning legislative aid as to the manner of circulation and signing[7] is what "provides the authorization for the Legislature to have enacted MCL 168.472a" to regulate petitions *circulated under that section*. 426 Mich at 9.

7 "Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." Const 1963, art 12, § 2.

In *Consumers Power Co*, this Court correspondingly relied on that provision of art 12, § 2 to distinguish its prior holding in *Hamilton v Secretary State*, 221 Mich 541 (1923). See 462 Mich at 5-9. There, notwithstanding Const 1908, art 17, § 2's equivalent limitation of petition signers to "registered electors of this state," this Court rejected the state defendant's contention that signatures dated 20 months prior to filing on a petition circulated under that section were not collected within a reasonable period. *Id*. at 544. Here, just as with the former constitutional provision at issue in *Hamilton*, the self-executing procedure of art 2, § 9 "summons no legislative aid and will brook no elimination or restriction of its requirements." 221 Mich at 544. Rather, "it grants rights on conditions expressed, and if its provisions are complied with and its procedure followed its mandate must be obeyed." *Id*.

As an alternative source of authorization to art 2, § 4, Defendant points to art 2, § 9's implementation clause despite its unequivocally narrow construction. As this Court pronounced in rejecting the proposition that the timing restriction of MCL 168.472 could be an implementation of 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 the electorate. This constitutional procedure is self-executing." [*Wolverine Golf Club*, 384 Mich at 466].

"The clear intent in this provision is 'to limit the power of the legislature to that which is 'necessary' to the effective implementation of the initiative right.'" *League of Women Voters v Secretary of State*, __ Mich App __, __ (2020), 2020 Mich. App. LEXIS 709 at *27, quoting *Wolverine Golf Club*, 24 Mich App at 735.

Yet, 472a represents the very opposite of such an implementation provision. Providing no facilitative function, it operates only as an extra-constitutional barrier to *prevent* petitioned legislation from reaching the legislature or the electorate.

Although Defendant bafflingly asserts[8] that 472a is "functionally no different than a requirement that petition signers be registered voters" (a requirement already established by statute[9] in addition to art 2, § 9 itself), the present formulation of 472a could hardly be more poorly tailored to such an objective. While even those signers indicated by the Qualified Voter File (QVF) to be unregistered on the date of signing may rebut the presumption of invalidity to their signatures,[10] 472a imposes an absolute bar to counting *valid* signatures of registered electors dated over 180 days, irrespectively of those electors' immediately verifiable registration status and residence information.[11]

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8 Defendant's Brief in Support of Motion for Summary Disposition at 12.

9 See MCL 168.476(1); 482(4)-(5); 482e.

10 MCL 168.476(1).

11 See MCL 168.509o; 509q. The QVF had not yet come into existence at the time of this Court's *Consumers Power Co* decision. See 1994 PA 441.

Equally baffling is Defendant's sophistical claim[12] that 472a "does not impose" an absolute time limit and it allows Plaintiff to circulate petitions "for any duration of time" – even while it is saying signatures on petitions between 2015 and early 2018 are not "valid."

In resorting to the same form of policy defense rejected in *Hamilton*, 221 Mich at 544, Defendant exhorts this Court to simply conclude that discounting older signatures best serves the petition invocation process and does not impose an insurmountable burden.[13] Specifically, Defendant proposes that longer periods of circulation risk leading voters to become confused about whether they have already signed a petition, which Defendant attempts to support with the plainly false allegation that Plaintiff's director and co-counsel had both signed the petition in duplicate. Conversely, as Defendant's own exhibit shows, both of such signers intentionally crossed out and replaced their original signatures in the precise manner prescribed by the Department of State.[14]

12 Defendant's Brief in Support of Motion for Summary Disposition at 16.

13 By notable comparison, the legislature has not seen fit to impose any time restriction on the validity or countability of signatures collected on nominating petitions for partisan primary and nonpartisan office candidates. See MCL 168.542, et seq. By further comparison, signatures as old as 15 months on a referendum petition under art 2, § 9 are counted, say if a law is passed in January of a session, signature collection starts immediately, the session ends the following December, and collection continues for 90 more days followed by filing.

Ironically, it is the procedure's subjection to 472a that actually foments the type of voter confusion that Defendant theorizes, due to the fact that re-signing the petition and having one's original signature stricken is the only potential means to avoid having one's signature rendered uncountable after the passage of 180 days. Naturally, this leads to frequent confusion among voters and signers over not merely whether they have signed the petition, but *when* precisely they did so.

Finally, Defendant disingenuously concludes that Plaintiff's claims "generally reduce to a complaint that gathering signatures for an initiative petition is difficult."[15] Defendant then goes on to cite this Court's discussion in *Woodland v Mich Citizens Lobby* regarding the Convention's desire to make the initiative process tough, rather than easy, during a debate over potentially reducing the signature threshold from eight to five percent of the last gubernatorial vote. 423 Mich 188, 217 (1985).

Far from raising any complaint as to the difficulty of the constitutional procedure under 2, § 9, Plaintiff and its nearly 1,000 volunteers have already surmounted the very burdens that those convention delegates saw fit to ensure the appropriate level of hurdle. To the extent that Plaintiff's challenge implicates the severity of burdens at all, it is only

14 See Mich Dep't of State, *Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition* (June 11, 2019), p 9, available at < https://perma.cc/4NW2-4UHM > (accessed today) ("Best practice: … Any petition signer entries found by the sponsor to be invalid may be crossed out with a line prior to filing.").

15 Defendant's Brief in Support of Motion for Summary Disposition at 16.

with respect to the legislature having exceeded its authority by acting to statutorily heighten such burdens beyond the level set forth by the constitution. That the constitution's framers debated the appropriate threshold and framed the present standard to be sufficiently tough only underscores the fact that they did not intend for the legislature to modify or raise such barriers beyond the levels constitutionally prescribed.

As an "express limitation on the authority of the Legislature," serving as a "gun-behind-the-door to be taken up on those occasions when the legislature itself does not respond to popular demands," the statutory initiative procedure of art 2 § 9 was framed to be insulated from legislative hindrance in recognition of that inherent tension. *Woodland*, 423 Mich at 214, 217; see also *Wolverine Golf Club*, 24 Mich App at 728-29. Having been targeted by a constitutionally unauthorized statute serving only to curtail the exercise of that right, this Court must secure the power reserved from legislative encroachment.

REQUEST FOR RELIEF

Wherefore, Plaintiff respectfully requests that this Court:

1) Deny Defendant's motion for summary disposition;

2) Hold MCL 168.472a unconstitutional as applied to statutory initiative petitions under Const 1963, art 2, § 9; and

3) Enter a writ of mandamus or other appropriate order directing the Board of State Canvassers to:

a) Canvass Plaintiff's statutory initiative petition without exclusion of those signatures dated more than 180 days from the petition's date of filing; and

b) Issue a declaration of sufficiency or insufficiency for Plaintiff's petition by the statutory deadline of July 26, 2020.

Respectfully submitted,

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