STATE OF MICHIGAN
COURT OF CLAIMS

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff,

Court of Claims # _____

v

Hon. _____

BOARD OF STATE CANVASSERS,

Defendant.
_____/

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VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This suit seeks a declaration that MCL 168.472a is unconstitutional as applied to statutory initiative petitions under Const 1963 art 2 § 9, and a preliminary and permanent injunction requiring Defendant to canvass Plaintiff's filed petition without exclusion of petition signatures under that statute.

2. MCL 168.472a states:

> 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.

PARTIES AND JURISDICTION

3. Plaintiff Committee to Ban Fracking in Michigan is a ballot question committee[1] properly formed under the laws of Michigan and headquartered in Charlevoix.

4. Defendant Board of State Canvassers is the four-member body established by statutory implementation of Const 1963, art 2, § 7, which is responsible for canvassing filed statutory initiative petitions and issuing an official declaration of each such petition's sufficiency or insufficiency.[2]

5. This Court has jurisdiction over claims for declaratory and equitable relief against state boards under MCL 600.6419(1)(a) and (7).

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1 MCL 169.202(3).

2 MCL 168.476-77(1).

PROCEDURAL HISTORY

6. On June 1, 2016, Plaintiff filed suit in this Court (Case No. 16-000122-MM) against Defendant Board of State Canvassers, along with the Director of Elections and Secretary of State, seeking a declaratory judgment holding MCL 168.472a unconstitutional as applied to statutory initiative petitions under Const 1963 art 2 § 9. This Court did not rule on the merits and instead held the suit unripe because Plaintiff had not yet filed its petition. The Court of Appeals affirmed.[3]

7. Upon filing its petition with the Secretary of State, Plaintiff filed suit against the same defendants in this Court on or about December 27, 2018, Case No. 18-000274-MM. It was re-assigned several times, ending with Hon. Christopher M. Murray.

8. In sum, the complaint alleged that Plaintiff began collecting signatures for a statutory ballot initiative in May, 2015. On November 5, 2018, it filed 271,021 signatures on 52,015 petition sheets, 7% more than the required minimum of 252,523.

9. Unlawfully (see below), the Bureau of Elections ("BOE") refused to accept Plaintiff's petition Plaintiff promptly notified Defendant, but it refused to overrule the BOE.

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3 *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.

10. The complaint in Case No. 18-000274-MM alleged several counts to overturn the refusal to accept the signatures. It also sought a declaration that MCL 168.472a is unconstitutional.

11. This Court did not reach the constitutional question of 472a, and on July 24, 2019, held that the defendants properly rejected the signatures.

A. On April 2, 2020, the Court of Appeals Reversed and Remanded to the Secretary of State.

12. On April 2, 2020, the Court of Appeals reversed and remanded to the Secretary of State, stating:

> Constitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights. [footnote omitted] … On remand, the Secretary shall accept the petition for filing and forward it to the Board for canvassing as required by the statute. … [T]he petition must be treated as having been filed on [November 5, 2018]. To hold otherwise would punish petition sponsors and the electorate for unlawful actions taken by election officials.[4]

13. In a footnote, the Court added that challenges to and sufficiency of a petition must be finally determined 100 days before the election,[5] which this year is on November 3. Which is to say, canvassing must be complete by July 26 (a Sunday), in order that the Legislature and the voters be able to consider the proposal this year.

14. The Court of Appeals did not retain jurisdiction. Like the Court of Claims, it did not reach the constitutional question.

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4 *Committee to Ban Fracking in Michigan 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, at p 5.

5 MCL 168.477.

B. Having already delayed for 17 months, Defendant delayed action again until June 8.

15. On June 8, 2020, over two months after the Court of Appeals, Defendant certified that Plaintiff's petition was insufficient.

16. Defendant made its determination on the basis of the BOE's staff report[6] finding that approximately 89% of the petition signatures were collected more than 180 days before the date of filing and thus barred from being counted under MCL 168.472a.

C. The Committee files in the Supreme Court under 479. The Court declines to rule.

17. Two days later, on June 10, 2020, Plaintiff filed an action for mandamus in the Supreme Court pursuant to MCL 168.479.

18. On July 2, 2020, the Supreme Court denied Plaintiff's petition through an order stating the following:

> On order of the Court, the motion for immediate consideration is GRANTED. The complaint for mandamus is considered, and relief is DENIED, because the Court is not persuaded that it should grant the requested relief. The motion to dismiss is DENIED as moot.[7]

19. Plaintiff now has no avenue for relief other than this Court. It returns here for a declaration, particularly one which would be in time for Defendant to complete its job by July 26, 2020 and in time for consideration by the Legislature or electorate this year.

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6 Exhibit A.

7 *Comm to Ban Fracking in Mich v Bd of State Canvassers*, __ Mich __ (2020), No. 161453 (July 2, 2020).

20. As Defendant previously agreed in Case No. 18-000274-MM, a denial of a writ of mandamus without opinion is not entitled to preclusive effect.[8] Accordingly the Supreme Court's order of July 2, 2020 is of no import in deciding the present case.

21. The canvassing deadline of July 26, 2020 is fast approaching. Plaintiff does not have a ruling on the point it has tried to adjudicate for four years, first because it had not filed signatures yet, and now even after it did file. The Committee is entitled to a ruling.

GENERAL ALLEGATIONS

22. In 1971, the Supreme Court decided *Wolverine Golf Club v Secretary of State*,[9] striking down MCL 168.472's prohibition on filing statutory initiative petitions fewer than ten days prior to the start of a legislative session. The reason: Const 1963, art 2, § 9 did not authorize the Legislature to impose such a restriction on the process for invoking a statutory initiative:

> There is no specific authority for such statute in 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 the 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.[10]

23. In 1973, the Legislature enacted 168.472a, which then provided:

> 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.

8 See *Hoffman v Silverhorn*, 137 Mich 60, 64 (1904).

9 384 Mich 461 (1971).

10 *Id*. at 466 (internal quotation mark omitted).

24. 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]

25. Apart from two stylistic wording changes made by a 1999 legislative amendment,[12] this same original version of 472a, permitting rebuttal of the presumed staleness of signatures older than 180 days, was in force when Plaintiff began collecting signatures on its initiative petition in May of 2015.

26. In OAG 1974, No. 4813, the Attorney General opined that the 180-day signature limitation of MCL 168.472a, as then worded in its less-stringent original formulation, was unconstitutional as to both statutory initiative and constitutional amendatory initiative petitions, upon respectively differing grounds. As to Const 1963, art 2, § 9, governing statutory initiative petitions, the Attorney General opined:

> This provision has been held to be self-executing [citing *Wolverine Golf Club*]. 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...."

11 Exhibit B, 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.

12 1999 PA 219 substituted "that" for "which" and "the signature" for "it."

> 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 is beyond the legislature's power to implement [and] said section and is therefore unconstitutional and unenforceable.[13]

27. In the ensuing twelve years, initiative petitions, including some with signatures gathered more than 180 days before filing, were filed with the Secretary of State, certified by the Board of State Canvassers, and approved by vote of the people.

28. In *Consumers Power Company v Attorney General*,[14] the Supreme Court affirmed a judgment of the circuit court which overruled OAG 1974, No. 4813, but only as applied to constitutional amendatory initiatives under Const 1963, art. 12, § 2. Grounding its holding *entirely* upon a distinct provision in the text of art 12, § 2, the Supreme Court reasoned:

> Of extreme importance to resolution of the present controversy is focus on the absence of a call for legislative action in Const 1908, art 17, § 2 and the clear presence of one in Const 1963, art 12, § 2 as evidenced in the sentence:
>
> > Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.
>
> . . . .
>
> This distinction is of considerable significance and indeed provides the authorization for the Legislature to have enacted MCL 168.472a, MSA 6.1472(1). The Constitution of 1963, unlike that of 1908, does summon legislative aid in the area of the form of these petitions as well as in the areas of circulation and signing.[15]

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13 Exhibit C: OAG 1974, No. 4813 at 172 (quoting 384 Mich at 466).

14 426 Mich 1; 392 NW2d 513 (1986).

15 426 Mich at 5-9.

29. In contrast to Const 1963, art 12, § 2, the language of art 2, § 9 contains no similar call for legislative action respecting the manner of circulating and signing statutory initiative petitions. Hence, the Court's *Consumers Power* decision did not disturb the finding of OAG 4813 as applied to statutory initiatives.

30. On August 8, 1986, while *Consumers Power* was on appeal from the circuit court, Defendant Board of State Canvassers adopted a policy of attempting to implement the 180-day statute and applied it to *both* constitutional *and* statutory initiatives. The policy stood without challenge until December 14, 2015, when then serving State Elections Director and Secretary of the Board of State Canvassers, Christopher Thomas, proposed an amendment to the 1986 implementation policy. By letters of January 8 and 21, 2016, Plaintiff's legal counsel reminded Defendant that *Consumers Power* did not apply to statutory initiatives, and that *Wolverine Golf Club* continued to bind them as to statutory initiatives.

31. Plaintiff's legal counsel testified to Defendant to the same effect on March 24, 2016. On this occasion, in response to a specific query about *Wolverine Golf Club* and *Consumers Power*, Defendant's Secretary admitted that the Secretary of State's Bureau of Elections had been treating petitions under Const 1963, art 2, § 9 the same as petitions under art 12, § 2:

> MR. BOAL: So whatever else you decide, the Attorney General's opinion [OAG 4813] continues to bind you as to statutory initiatives. It was only overturned as to constitutional initiatives [by *Consumers Power*]. I've said this before. I've asked for anybody who disagrees with me to say that they disagree with me, including Chris Thomas, including John Griffin, who is back here representing the oil and gas industry, and no one has come forward with any counter argument to that. So I consider that this stands, you know, unrebutted.
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> . . .
>
> MR. THOMAS: I guess I would only say I don't have a case to cite about a legislative initiative. I would say we have applied it to a legislative initiative as we've canvassed petitions ever since the 1986 case. So I guess there is a feeling that if it's good for one, it's good for the other. I don't see anything that specifically would say that if 180 days is good for getting ten percent of the vote, why wouldn't it be good for getting eight percent of the vote? So we have operated under it just so. I take your point. I don't have a case and I don't have anything else. But just so the record's clear, we have operated that way.[16]

32. On June 9, 2016, the legislature enacted 2016 PA 142, which amended MCL 168.472a by replacing the preceding rebuttable presumption of staleness to signatures over 180 days old with the irrebuttable preclusion of such signatures from being counted. As amended, the wording of MCL 168.472a now states:

> 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.

33. 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 or the validity of their signatures, but rather attributed to it the

16 Exhibit D.

sole purpose of "help[ing] ensure the issues that make the ballot are the ones that matter most to Michiganders."[17]

34. Under 1994 PA 441, enacted eight years after the Supreme Court's *Consumers Power* decision, the legislature established the Qualified Voter File. Use of this technology is now statutorily mandated for the process of determining the validity of initiative petition signatures[18] and provides for the immediate verifiability of voters' registration status and residence information both presently and on a petition signature's date of signing.[19]

CLAIMS

VIOLATION OF CONST 1963, ART 2, § 9

35. Plaintiff incorporates by reference all preceding paragraphs as though repeated herein.

36. Because the language of Const 1963, art 2, § 9 summons no legislative aid in the areas of circulating and signing, the legislature's extension of MCL 168.472a to statutory initiative petitions unlawfully infringes the reserved legislative powers of the

17 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 July 3, 2020).

18 MCL 168.476(1).

19 *Id*.; MCL 168.509o; 509q.

people by curtailing the operation of the self-executing constitutional provision governing the statutory initiative process.[20]

37. Because Const 1963 art 12, § 2's included call for legislative regulation is what "distin[guishes]" that section from other self-executing constitutional provisions "and indeed provides the authorization for the Legislature to have enacted MCL 168.472a" as applied to initiatives there under,[21] it follows inescapably that no such authorization exists for 472a's extension to initiatives under art 2, § 9.

38. The omission by Michigan's constitutional framers of any similar such legislative regulatory authorization under art 2, § 9 is a reflection of that section's critically distinct purpose "as an express limitation on the authority of the Legislature."[22]

39. Because neither the Attorney General nor any court has overruled the finding of OAG 1974, No. 4813, as applied to initiatives under Const 1963, art 2, § 9,[23] Defendant's present policy of enforcing 168.472a's 180-day exclusion of voter signatures on statutory initiative petitions contravenes Defendant's binding obligation to abide formal attorney general opinions.[24]

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20 See *Wolverine Golf Club,* 384 Mich at 466.

21 *Consumers Power Co*, 426 Mich at 9.

22 *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214; 378 NW2d 337 (1985).

23 Since 2016 PA 142's later amendment to MCL 168.472a only increased the stringency of the legislative restriction deemed invalid by the Attorney General, OAG 4813 extends *a fortiori* to 472a's current form.

24 See *Mich Beer & Wine Wholesalers Ass'n v Attorney Gen*, 142 Mich App 294, 300; 370 NW2d 328 (1985).

40. Even if the Legislature were constitutionally vested the power to regulate the initiative process prescribed by art 2, § 9 in parallel to that prescribed by art 12, § 2, MCL 168.472a's unqualified mandate that legally *valid* signatures "shall not be counted" is a direct curtailment of the right and invocation-standard set forth by the Constitution.[25]

41. In banning the countability of signatures of immediately verifiable voter registrants alongside the mandatory use of the Qualified Voter File for signature validation, MCL 168.472a lacks any rational connection to ensuring the registration of petition signers.[26]

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25 Even in view of art 12, § 2's legislative regulatory authorization, the Supreme Court predicated its upholding of MCL 168.472a's restriction on constitutional amendatory initiative petitions on the since-legislatively-reversed fact that:

> 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. [*Consumers Power Co*, 426 Mich at 8].

26 Indeed, as openly confirmed by the Governor's written statement at the time of signing 2016 PA 142 into law, the present version of 472a is intended solely to reduce the successful invocation of the initiative power.

REQUEST FOR RELIEF

Wherefore, Plaintiff asks this Honorable Court to:

a. Declare MCL 168.472a unconstitutional as applied to statutory initiatives under Const 1963, art 2, § 9;

b. Enter a preliminary and permanent injunction requiring Defendant to canvass Plaintiff's petition, without exclusion of petition signatures under MCL 168.472a, by the statutory deadline of July 26, 2020; and

c. Grant such other and further relief as the Court deems equitable and just.

Respectfully submitted,

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Dated: July 6, 2020

VERIFICATION

I am an attorney. I read the foregoing complaint. I verify from personal knowledge all the facts in it except those which are in public records.

Dated: July 6, 2020

_____
Ellis Boal