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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PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Now comes the Plaintiff, by and through counsel, and, for the reasons outlined in the accompanying brief, hereby moves this Honorable Court under MCR 3.310(A)-(B) to enter a temporary restraining order and/or preliminary injunction requiring Defendant to canvass Plaintiff's statutory initiative petition, without exclusion of signatures dated over 180 days from the date of filing, by the statutory deadline of July 26, 2020.[1]

Pursuant to LR 2.119(2), by email Ellis Boal requested opposing counsel's concurrence to the relief sought in the early morning of July 6, 202, and no response has been received.

Respectfully submitted,

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Dated: July 6, 2020

[1] MCL 168.477(1).

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

Following Defendant Board of State Canvassers' declaration of insufficiency to Plaintiff's statutory initiative petition, Plaintiff brought this action challenging the constitutionality of MCL 168.472a's prohibition on counting signatures collected on statutory initiative petitions under Const 1963, art 2, § 9 if such signatures are dated more than 180 days prior to the petition's date of filing.

In light of the fast-approaching July 26, 2020 statutory deadline to complete the canvassing of petitions for any initiatives subject to potential placement on the November ballot,[2] Plaintiff concurrently brings this motion under MCR 3.310(A)-(B) for a temporary restraining order and/or preliminary injunction requiring Defendant to canvass Plaintiff's petition by the forthcoming July 26 deadline without exclusion of those signatures dated over 180 days before filing.

STATEMENT OF FACTS

In 1971, the Supreme Court decided *Wolverine Golf Club v Secretary of State*, 384 Mich 461 (1971), 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:

[2] MCL 168.477(1).

> 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. [384 Mich at 466].

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.

Apart from two stylistic wording changes made by a 1999 legislative amendment,[3] 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.

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:

[3] 1999 PA 219 substituted "that" for "which" and "the signature" for "it."

> 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...."
>
> 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. [OAG 1974, No. 4813 at 172 (quoting 384 Mich at 466]

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.

In *Consumers Power Company v Attorney General*, 426 Mich 1 (1986), 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. The Supreme Court based its holding on a distinct single-sentence provision of art. 12, § 2 serving to summon legislative aid in the regulation of circulation and signing for petitions under that constitutional section.

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.

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 Board of State Canvassers Secretary and State Elections Director, 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. 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 based on the "feeling that if it's good for one, it's good for the other."[4]

On June 9, 2016, the legislature enacted 2016 PA 142, which amended MCL 168.472a by replacing the preceding rebuttable presumption of staleness to

[4] Complaint ¶ 30.

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.

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 validity of their signatures, but rather attributed it the sole purpose of "help[ing] ensure the issues that make the ballot are the ones that matter most to Michiganders."[5]

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[6] and provides for the immediate verifiability of voters' registration status and residence information both presently and on a petition signature's date of signing.[7]

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[5] 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).

[6] MCL 168.476(1).

[7] *Id*.; MCL 168.509m; 509o; 509q.

On November 5, 2018, Plaintiff filed 271,021 vetted signatures on 52,015 petition sheets, amounting to 7% more than the applicable threshold of 252,523 signatures. Following an extended legal battle over the unlawful prior refusal of Defendant and the Secretary of State to accept Plaintiff's petition filing, the Board of State Canvassers officially declared Plaintiff's petition insufficient on June 8, 2020. Without conducting a sample or direct canvass of Plaintiff's petition, Defendant based its declaration on the Bureau of Elections' preliminary staff report's undisputed finding that approximately 89% of Plaintiff's petition signatures were collected over 180 days prior to the filing date, thus rendering them barred from being counted under MCL 168.472a.

STANDARD OF REVIEW

In ruling on a motion for preliminary injunction, the Court must consider four factors: (1) the movant's likelihood of succeeding on the merits, (2) the danger that the movant will suffer irreparable harm if the injunction is not issued; (3) the risk that the movant would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. *Barrow v City of Detroit Election Comm'n*, 305 Mich App 649, 662 (2014).

ARGUMENT

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS.

A. MCL 168.472a is Unconstitutional as Applied to Statutory Initiative Petitions Under Const 1963, art 2, § 9.

As a constitutional power reserved to the people of Michigan, the statutory initiative procedure under Const 1963, art 2, § 9 is not merely an election process, but rather "an express limitation on the authority of the legislature." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214 (1985). Because MCL 168.472a imposes a direct curtailment of a self-executing constitutional provision permitting no legislative intrusion, its extension to statutory initiative petitions cannot be constitutionally sustained.

1. The Statutory Initiative Provision of Const 1963, art 2, § 9 is Self-Executing and Prohibitive of Legislative Meddling.

The statutory initiative procedure of Const 1963, art 2, § 9 is a self-executing constitutional provision which grants the legislature no authority to impose additional obligations on its criteria for an initiative's invocation. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971).

In *Wolverine Golf Club*, the Supreme 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 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. [384 Mich at 466].

In enacting valid legislation supplemental to a self-executing constitutional provision, such legislation must have the "object to further the exercise of constitutional 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 "shall not be counted," 472a not only subjects the process to additional obligations, but directly contravenes the process and benchmark criteria set forth by the constitution itself.

In spite of *Wolverine Golf Club* and the issuance of an Attorney General Opinion finding 472a's less-stringent former iteration to be invalid as to statutory initiative petitions on the basis of that precedent,[8] Defendant has relied fully on *Consumers Power Company v Attorney General*, 426 Mich 1 (1986), to justify enforcing the statute against constitutional amendatory and statutory initiative

[8] OAG 1974, No. 4813

petitions alike.[9] Yet not only was the *Consumers Power* Court's review exclusively limited to the constitutionality of 472a's former version as applied to constitutional amendatory initiatives under Const 1963, art 12, § 2, but its ratio decidendi very strongly further underscores the invalidity of the statute's application to initiatives under art 2, § 9.

Despite the statute having then imposed only a rebuttable presumption of staleness to signatures collected over 180 days before filing, the *Consumers Power* Court fully grounded its holding upon the distinct provision of art 12, § 2 providing that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." 426 Mich at 5. Noting the "extreme importance" of the fact that the sentence just quoted "summons legislative aid . . . in the areas of circulating and singing," the Court held that this distinct sentence of art 12, § 2 is what "provides the authorization for the Legislature to have enacted MCL 168.472a" as a measure to "prescribe by law the manner of signing and circulating petitions to propose constitutional amendments." 426 Mich at 6, 9 (emphasis added).

The *Consumers Power* Court correspondingly relied on that sentence of art 12, § 2 to distinguish its holding from that previously reached in *Hamilton v Secretary of State*, 221 Mich 541 (1923). There, notwithstanding Const 1908, art 17, § 2's

[9] See Complaint ¶ 31 (quoting 2016 testimony of Defendant's then-serving Secretary Christopher Thomas).

equivalent limitation of petition signers to "registered electors of this state," the Supreme 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. 221 Mich 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." *Id*. Rather, "it grants rights on conditions expressed, and if its provisions are complied with and its procedure followed its mandate must be obeyed." *Id*.

2. MCL 168.472a Unconstitutionally Curtails the Right of Initiative.

Following the Supreme Court's very narrow construction of art 2, § 9's implementation clause,[10] the Court of Appeals very recently reaffirmed that 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 measure. Providing no facilitative function, it operates only as an extra-constitutional barrier to *prevent* petitioned legislation from reaching the legislature or the electorate.

[10] *Wolverine Golf Club*, 384 Mich at 466.

Having reviewed the version of 472a existing prior to the amendment of 2016 PA 142, the *Consumers Power* Court predicated its upholding of the statute's application to constitutional amendatory initiatives 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. [426 Mich at 8].

But the 2016 amendment replaced the rebuttable presumption with an irrebuttable exclusion of signatures older than 180 days from being counted. Consequently, MCL 168.472a now imposes precisely the type of curtailment that the Supreme Court comparatively contemplated and implied would fail to "follow[] the dictates of the constitution," even as applied to art 12, § 2.

While the Supreme Court construed that the rebuttable presumption imposed by 472a's former iteration was intended to fulfill the constitutional directive that petition signers must be registered electors of the state,[11] the statute's present formulation could hardly be more poorly tailored to that 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,[12] the statute now imposes an absolute bar to counting *valid* signatures of registered

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[11] *Consumers Power Co*, 426 Mich at 8

[12] MCL 168.476(1)

electors dated over 180 days, irrespectively of those electors' immediately verifiable registration status and residence information.[13]

No longer a safeguard for simply subjecting older signatures to greater scrutiny, the legislature has transformed 472a into a mechanism for restricting the utilization of the initiative process. Indeed, with open acknowledgment of its sole aim of reducing the number of initiatives making the ballot,[14] the legislature has done so even as the QVF has superannuated any distinction as to the determinable validity of older signatures relative to those signed closer to the time of filing.

II. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ISSUED.

Absent a preliminary injunction, Plaintiff would be denied the opportunity to place its statutory initiative for approval by the legislature or the state's voters, putting to waste all of the great many thousands of hours donated by Plaintiff's nearly 1,000 volunteer circulators. The 271,021 state voters who signed Plaintiff's petition would also be denied not only the invocation of their supported initiative, but even the chance to simply have their signatures counted.

Further, because Plaintiff has no other recourse to challenge 472a's exclusion of its petition signatures, a preliminary injunction is the only means to prevent an unconstitutional statute from irreparably depriving Plaintiff's exercise of the right

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13 *Id*.; MCL 168.509m; 509o; 509q.

14 See Office of Governor Rick Snyder, *supra* n 5.

secured by Const 1963, art 2, § 9. See *Garner v Mich State Univ*, 185 Mich App 750, 764 (1990) (observing that even a "temporary loss of a constitutional right constitutes irreparable harm which cannot be adequately remedied by an action at law.").

III. NO HARM TO DEFENDANT IS APPLICABLE.

To the extent that Defendant would incur any conceivable burden from canvassing Plaintiff's petition, it is one squarely within its primary duties and substantially minimized by Defendant's random sampling procedure for petition signatures. And any harm to Defendant from the need for a temporary restraining order or preliminary injunction at this time has been brought on by Defendant itself, having spent 17 months maintaining and defending the unlawful refusal to recognize and accept Plaintiff's petition filing, followed by additional rounds of delay in issuing its declaration of insufficiency.[15] The balance of harms thus weighs decidedly in favor of Plaintiff.

IV. GRANTING A PRELIMINARY INJUNCTION WILL ADVANCE THE PUBLIC INTEREST.

Plaintiff does not seek a preliminary injunction to directly advance its initiative to the legislature or election ballot, but rather only to require that Defendant canvass Plaintiff's signatures by the July 26, 2020 statutory deadline without excluding those collected over 180 days prior to filing. That date being the final

[15] See Complaint ¶¶ 7-15.

date for completion of that process before the potential placement of Plaintiff's initiative on the November ballot would otherwise become foreclosed. The scope of preliminary injunctive relief requested is thus limited only to that which is essential to preventing irreparable harm and preserving the status quo.

Finally, while the public interest may generally be served by seeing the execution of the laws enacted by the people's representatives, that interest is dampened when such a law's object is to curtail a power that the people expressly "reserve to themselves" in their constitution. Const 1963, 2, § 9. Particularly in so far as MCL 168.472a is constitutionally infirm, the public interest must align with constitutional protection as "it is always in the public interest to prevent enforcement of unconstitutional laws." *Roe v Snyder*, 240 F Supp 697, 712 (ED Mich 2017). Plaintiff's high likelihood of success on the merits of its constitutional challenge thus supports the public interest in enjoining the present violation.

REQUEST FOR RELIEF

Wherefore Plaintiff respectfully requests that this Honorable Court:

A. Grant a temporary restraining order and/or preliminary injunction requiring Defendant to canvass Plaintiff's petition signatures by the July 26, 2020 statutory deadline, without exclusion of those signatures dated more than 180 days before the date of filing; and

B. Order Defendant to file its response to this motion within two days of the date of service.

Respectfully submitted,

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