STATE OF MICHIGAN
COURT OF CLAIMS

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff,

No. 20-000125-MM

v

Hon. Christopher M. Murray

BOARD OF STATE CANVASSERS,

Defendant.
_____/

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PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S JULY 6, 2020 MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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I. MCL 168.479 DOES NOT RESTRICT THIS COURT'S JURISDICTION.

Defendant proposes that MCL 168.479 should be read to divest this Court of jurisdiction over the present challenge and elevate Defendant's own legal interpretations to stand above all but the state's highest court. Despite neither subsection containing any language conferring exclusive jurisdiction, Defendant relies on reading 479(2)'s mandatory language, as to the time-limit for seeking original Supreme Court intervention, in isolation from the from the text of 479(1).

Rather than limiting subject matter jurisdiction over any legal challenge implicating a Board of State Canvassers determination, the statute simply provides that "subject to" the specifications of subsection (2), any person who feels aggrieved by a Board of State Canvassers determination "*may* have the determination reviewed by mandamus or other appropriate remedy in the supreme court." MCL 168.479. The seven-day filing requirement is thus mandatory only as a condition precedent for pursuing that discretionary avenue for potential relief.

Contrary to Defendant's further suggestion that Plaintiff could have sought a declaratory judgment under 479 as an "other appropriate remedy," the Supreme Court does not have original jurisdiction to issue declaratory relief[1] and the

[1] See Const 1963, art 6, § 4; *Stephenson v Golden*, 279 Mich 710, 732 (1937) ("This court has no original equity jurisdiction") (relying on equivalent enumeration by Const 1908 art 7, § 4); cf. *Musselman v. Governor*, 200 Mich App 656, 667 (1993) ("We have no original jurisdiction to issue a declaratory

legislature cannot extend the Supreme Court's jurisdiction by statute. *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 68-69 (1940). Upon having successfully contended that no challenge to 472a could be ripe prior to that statute's direct enforcement against the plaintiff, Defendant's present theory as to post-enforcement jurisdictional exclusion would operate to shield 472a from ever facing a declaratory judgment challenge by any litigant in any court.

II. The SUPREME COURT'S ORDER DECLINING EXTRAORDINARY RELIEF HAS NO BEARING ON THE PRESENT ACTION.

Though conceding, as it must, that Michigan follows the "generally adopted [] rule that a denial of a writ of mandamus by a supervisory court, without opinion, is not entitled to preclusive effect,"[2] Defendant urges the Court to simply presume that the Supreme Court found no clear legal duty to disregard 472a and must have therefore deemed it constitutional. The sophistry of this argument is starkly exposed by its reversal of Defendant's own previously taken position. Having then argued that any finding of invalidity to the statute could not retroactively establish a clear legal duty at the time of issuing its insufficiency determination, Defendant cannot sincerely contend that an order denying mandamus implies a constitutional

judgment.").

[2] *Miller Dollarhide, PC v Tal*, 174 P3d 559, 564 (Okla 2006) (citing "Judgment Granting or Denying Writ of Mandamus or Prohibition as Res Judicata," 21 ALR3d 206, 248 (Supp 2003)).

upholding.

In contrast to a declaratory judgment, the extraordinary remedy of mandamus exists only as a "writ of grace and not a writ of right." *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13 (1984). Moreover, not only must the party seeking such relief establish that the act requested is a clear legal duty of a ministerial nature, but also that "no other remedy exists, legal or equitable, that might achieve the same result." *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248 (2016).

Defendant is well familiar with the fact that such divergent standards for declaratory and mandamus relief may lead to very different dispositions of cases involving the same legal challenges, given its prior occurrence within the very span of preceding litigation concerning Plaintiff's statutory initiative petition. Having brought an action for mandamus challenging the Secretary of State's rejection of Plaintiff's petition filing, which the Court of Appeals then denied without opinion,[3] Plaintiff then brought a declaratory judgment action asserting the very same legal arguments. In the latter case, the Court of Appeals granted Plaintiff full relief,[4] including Hon. Judge Shapiro who sat on both panels.

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[3] *Comm to Ban Fracking in Mich v Secretary of State*, unpublished order of the Court of Appeals, issued November 15, 2010 (Docket No. 346280)

[4] *Comm to Ban Fracking in Mich v Secretary of State*, unpublished per curiam disposition of the Court of Appeals, issued April 2, 2020 (Docket No. 350161), 2020 Mich. App. LEXIS 2563

Finally, given that the Supreme Court's jurisdiction over Plaintiff's mandamus petition was no less discretionary than any application for leave to appeal, and further that the Court expressly declined to review the briefing on Defendant's motion to dismiss as moot, it can hardly be assumed that the Supreme Court's denial was based on any factor other than Plaintiff's petition's failure to be among the very few filings selected for the Court's review. As observed by the very Attorney General opinion that Defendant cites and exhibits, "Nothing in § 479(2) requires the Supreme Court to exercise its jurisdiction" and "there is, of course, no guarantee that the Supreme Court will actually take jurisdiction of that legal challenge." OAG, 2019- 2020, No. 7310 (May 22, 2019), pp 48-49.[5]

III. MCL 168.472A IS UNCONSTITUTIONAL.

In spite of the Supreme Court's holding that the legislature may not impose additional obligations on the constitutional process for invoking the legislative power reserved under art 2, § 9, *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971), 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

[5] Exhibit G to Defendant's Response brief.

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.'

Moreover, far from having the "object to further the exercise of constitutional right and make it more available," as the basic condition for enacting valid legislation supplemental to a self-executing constitutional provision,[6] 472a operates only to "curtail the rights reserved"[7] and redefine the constitutional standard for a statutory initiative's invocation.

Although 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 Const 1963, 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. There, even despite the statute having then imposed only a rebuttable presumption of

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[6] *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 730 (1970), aff'd 384 Mich 461 (1971).

[7] *Id*.

staleness to signatures collected over 180 days before filing, this Court clearly found that, but for the distinct language of art 12, § 2 summoning legislative aid as to the manner of circulation and signing, the legislature would not have constitutional "authorization" to impose such a regulation on constitutional amendatory petition signatures and the Court's holding in *Hamilton v Secretary State*, 221 Mich 541, 544 (1923), would control its decision.

As an alternative source of authorization to art 2, § 4, Defendant points to art 2, § 9's implementation clause, despite its extremely narrow judicial construction as simply "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Wolverine Golf Club*, 384 Mich 466. Conversely, by serving no function other than to prevent petitioned legislation from reaching the legislature or electorate, 472a is tailored only to defeat that clause's directive. "The spirit of the Constitution is not met if the rights it grants are unnecessarily impaired under the guise of implementation." *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.

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 process and does not impose an insurmountable burden. Specifically, Defendant proposes that permitting longer periods of

circulation risks 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.[8]

Ironically, it is the procedure's subjection to 472a that actually foments the sort 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 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."[9] Defendant then goes on to cite the Supreme Court's discussion in *Woodland v Mich Citizens Lobby* regarding convention's desire to make the initiative process tough, rather than easy, during a debate over potentially reducing

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[8] 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> ("Any petition signer entries found by the sponsor to be invalid may be crossed out with a line prior to filing.").

[9] Defendant's Response brief at 17.

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 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.

IV. The BALANCE OF HARMS WEIGHS SQUARELY IN PLAINTIFF'S FAVOR AND AN INJUNCTION WILL SUPPORT THE PUBLIC INTEREST.

Though Defendant makes the general proclamation that a state suffers harm when enjoined from enforcing an enacted statute, it is well established that the weight of such harm dissipates in so far as the statute in question is likely constitutionally infirm, in which case "it is at best questionable whether [a] defendant can suffer harm by being restricted from enforcing that law." *Roe v Snyder*, 240 F Supp 3d 697, 712 (ED Mich 2017) (internal quotation marks omitted). So too, "when a constitutional violation is likely [] the public interest

militates in favor of injunctive relief." *Miller v City of Cincinnati*, 622 F3d 524, 540 (CA 6, 2010). Moreover, where, as here, the statute at issue is challenged on the basis of encroaching on a power reserved from the legislature by the people, even the general assumption that a law reflects the interest of the people acting through their representatives cannot reasonably be drawn.

Finally, Defendant's claim that it is not possible at this date to canvass the petition's 200,000+ signatures before the July 26 deadline is highly misleading and false in light of Defendant's actual canvassing procedure whereby a random sample is drawn of only a very small fraction of the petition sheets in order to estimate the number of valid signatures. While it is fully within Defendant's ability to complete its canvass by such standard means by July 26, Plaintiff would not object to the Court's exercise of its equitable power to limit the 40-day period for legislative review so as to accord with that timeframe only to "the maximum extent practicable." *Ferency v Secretary of State*, 409 Mich 569, 606 (1980); see *id.* at 598-602.

REQUEST FOR RELIEF

Wherefore Plaintiff respectfully requests that this Honorable Court 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.

Respectfully submitted,

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