May 1, 2020

TO: Jonathan Brater, Director of Elections, Jocelyn Benson, Secretary of State, and Board of State Canvassers

FROM: LuAnne Kozma, Campaign Director, Committee to Ban Fracking in Michigan LuAnne Kozma

This letter accompanies our in-person delivery on this day of 47 boxes of petitions for the Committee to Ban Fracking in Michigan's statutory initiative, containing approximately 51,980 sheets and approximately 270,962 signatures, as filed properly and timely on November 5, 2018.

I attest that they are the same boxes, sheets and signatures we brought to the SOS office in 2018. They have been kept in a records management company for the past 17 months at the Committee's expense. We have not disturbed the petitions after they were put into storage. The chain of custody was with me until deposited and stored with Kent Records Management on November 8, 2018 through May 1, 2020, removed by me on May 1, 2020 and now delivered to the SOS office on the same day.

The Committee's petitions were the subject of litigation, *Committee to Ban Fracking in Michigan v Secretary of State* after the refusal by the Director of Elections and Secretary of State to accept possession of the petitions on November 5, 2018. As per the Michigan Court of Appeals decision of April 2, 2020:

> "On remand, the Secretary shall accept the petition for filing and forward it to the Board for canvassing as required by the statute [MCL 168.477(1)]. Further, we agree with plaintiffs [the Committee] that the Court of Claims erred in finding that the petition was not filed on November 5, 2018. Plaintiffs tendered their petition for filing, and even assuming the Secretary had the authority to reject it, the basis for

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doing so was erroneous. Because the Director wrongly refused to accept the filing, the petition must be treated as having been filed on that day. To hold otherwise would punish petition sponsors and the electorate for unlawful actions taken by election officials. Thus, the petition must be treated as having been filed on November 5, 2018. [Emphasis added]

In sum, plaintiffs submitted an initiative petition that was facially compliant with all statutory requirements. The Secretary was required to pass it on to the Board for the Board to determine the validity of the petition and canvass the signatures. If the Board rejects the petition, plaintiff may seek review before the Supreme Court. See MCL 168.479."

Our delivery of the petitions was delayed since then, due to actions by the SOS/DOE/Canvassers:

On April 2, the Committee's counsel wrote to the AG counsel to make arrangements to bring in the petitions. The AG counsel refused delivery.

Late on Friday, April 17 the AG's counsel notified our legal counsel to make arrangements to bring the signatures in.

On April 20 I called Mr. Brater's office and did not hear back.

On April 23 we received confirmation from the AG's counsel that the State would not seek leave to appeal.

On April 23 I called Mr. Brater again and sent a follow up email, trying to arrange delivery and to discuss the Canvassers' meeting.

On April 24, Mr. Brater replied and confirmed my request for delivery on May 4.

On April 29, I contacted Mr. Brater to arrange for earlier delivery on May 1.

On April 30, Mr. Brater confirmed delivery for May 1 and arranged for staff member Carol Pierce to be present to accept the delivery. He also provided a modified Petition Filing Receipt to acknowledge the Court of Appeals order

to accept the Committee's petitions as filed on November 5, 2018, noting 252,523 was the minimum number of valid signatures required on that date.

Sufficiency of Signatures and Challenge of MCL 168.472a

With our submission, we are now contesting the constitutionality of MCL 168.472a. This statute now eliminates and disqualifies *perfectly valid signatures* by Michigan registered voters that meet the criteria set forth in the constitution.

The number of signatures required for statutory initiative is determined by the Michigan Constitution in Article 2 Section 9, which states: *"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."*

Certainly any signatures obtained during the period between the November 4, 2014 and November 6, 2018 gubernatorial elections would meet the constitutional criteria. The Constitution gives no other constraints as to what signatures during this period would not meet the criteria. Furthermore, this constitutional section has been found by the courts to be *self-executing*.

The number of signatures required by the Constitution for statutory initiatives submitted between the 2014 and 2018 gubernatorial elections was 252,523.

It is the Committee's contention, therefore, that not counting signatures outside of a 180-day time period prior to filing imposed by MCL 168.472a directly violates the plain language of the right the People have reserved to themselves to invoke the statutory initiative set forth in Article 2 Section 9.

I will repeat what the Committee said at page 15 of our opening brief to the appellate court, citing to ¶¶ 13, 20, 28 of my affidavit: "The signatures were collected over a 3½-year period, necessitating a ruling that 472a is unconstitutional in order for them to be canvassed." At most, 65,000 signatures were collected in the 180 days prior to November 5, 2018. They can be found in the last of the numbered boxes.

As we will show in the Supreme Court on appeal of the Canvassers' decision, all of the Committee's 270,962 signatures should be considered as potentially valid signatures meeting the constitutional requirement.

We understand that the Board of State Canvassers is not a court, and has no power to rule on the constitutionality of statutes.

Committee to Ban Fracking Expects Election Officials to Expedite Staff Review, Scheduling of Canvassers meeting, and Canvassers' Determination of Insufficiency to Accommodate Tight Timeline for Placement on 2020 Ballot.

The Committee to Ban Fracking in Michigan has every right to expect the process from this point forward to be expedited to allow for our proposal to be on the 2020 ballot.

Given that the Secretary of State and Director of Elections unlawfully denied the Committee's signatures and delayed the process for 17 months in litigation, and given the Committee to Ban Fracking filed its signatures well over the 253,523 requirement in order for them to be considered, *two full years prior* to the 2020 election, and given that the timeline is now tight for the Committee's proposal to be on the 2020 ballot, accordingly we expect that the SOS staff will expedite their recommendation to the Canvassers without sampling the signatures, that the Canvassers also will expedite the scheduling of its meeting, to determine the Committee's petition signatures as insufficient, at which point (as the Court of Appeals said in section IV) the Committee would seek review in the Supreme Court.

"Activities necessary to manage and oversee elections" are deemed "necessary government activities" in Governor's Executive Order No. 2020-59 dated April 24, 2020. The Canvassers can and has met virtually on April 30. There are no reasons to delay the staff report or the Canvassers' meeting.

The foregoing is consistent with the June 7, 2016 staff review, two days later acted on by the Canvassers, of the petition filed that June 1 by Michigan Comprehensive Cannabis Law Reform, and we expect the same timely treatment, with a staff report by May 7 and a Canvassers' meeting the next day:

https://www.michigan.gov/documents/sos/Staff_Report_-_Cannabis_Law_Reform_526211_7.pdf

Because we filed on November 5, 2018, we expect priority over candidate petition filings and other initiative petition filings that took place after the Committee to Ban Fracking's.

To not expedite the staff review and Canvassers' meeting would delay our litigation, and further punish the Committee as petition sponsor and the electorate by threatening the Committee's and the voters' rights to have the proposal on the 2020 ballot. The Court will also expedite its proceedings. Even if something outside of the election officials' control delays us getting on the ballot in 2020 (i.e. extended Supreme Court deliberation), then the bottom line will be punishment of the electorate, because this would not be an issue if the signatures were not refused a year a half ago, or if the Canvassers had acted, or if the new administration had reversed course and not fought our case. The roadblocks the State has put before the Committee to Ban Fracking have had the intended consequences of disrupting and delaying this campaign. The People of Michigan deserve better.

My comments supersede any comments made by our attorney Ellis Boal at the April 30, 2020 Canvassers meeting to the contrary.

Enclosures:

Correspondence from Sally Williams, Director of Elections, dated November 5, 2018, rejecting the Committee to Ban Fracking in Michigan's petitions.

Michigan Court of Appeals decision, April 2, 2020, *Committee to Ban Fracking in Michigan v Secretary of State*, COA case # 350161, Court of Claims LC No. 18-000274-MM.

STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

November 5, 2018

TO WHOM IT MAY CONCERN:

On this date, the Committee to Ban Fracking in Michigan, tendered an Initiative Petition for the Initiation of Legislation, which contains the following heading:

> An initiation of legislation to prohibit the use of horizontal hydraulic fracturing or "fracking" and acid completion treatments of horizontal gas and oil wells, to prohibit emission, production, storage, disposal, and processing of frack and acidizing wastes created by gas and oil well operations; to eliminate the state's policy favoring ultimate recovery of maximum production of oil and gas; to protect water resources, land, air, climate; and public health; and to allow residents to enforce the provisions of this ballot language, by amending Public Act 451 of 1994 entitled "Natural Resources and Environmental Protection Act," by amending section 61502 and by adding sections 61528, 61529 and 61530. This proposal is to be voted on in the November 8, 2016 General Election.

The Initiative Petition tendered by the Committee to Ban Fracking in Michigan incorrectly states that it "is to be voted on in the November 8, 2016 General Election." Accordingly, the Initiative Petition tendered by the Committee to Ban Fracking in Michigan, which the Committee to Ban Fracking in Michigan estimates consists of 47 boxes containing approximately 51,980 petition sheets bearing approximately 270,962 signatures, was rejected by the Secretary of State on this date by Sally Williams, Director of Elections.

Sally Williams

BUREAU OF ELECTIONS
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STATE OF MICHIGAN

COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN and LUANNE KOZMA, Plaintiffs-Appellants, v SECRETARY OF STATE, DIRECTOR OF ELECTIONS, and BOARD OF STATE CANVASSERS, Defendants-Appellees.	UNPUBLISHED April 2, 2020 No. 350161 Court of Claims LC No. 18-000274-MM

Before: CAMERON, P.J., and SHAPIRO and LETICA, JJ.

PER CURIAM.

Plaintiffs appeal the Court of Claims order granting summary disposition to defendants under MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons stated in this opinion, we reverse and remand to the Secretary of State to forward plaintiffs' petition to the Board of State Canvassers.

I.

Plaintiff Committee to Ban Fracking in Michigan is engaged in a statutory initiative campaign to ban horizontal hydraulic fracturing, which is commonly known as "fracking." Plaintiff LuAnne Kozma is the director of that campaign. In April 2015, the Board approved the form of plaintiffs' initiative petition. The front-page summary of the proposed legislation provided that "[t]his proposal is to be voted on in the November 8, 2016 General Election." No date of election was provided in the full language of the petition's text.

Plaintiffs began circulating their petition for signatures in May 2015. At the time, MCL 168.472a provided a rebuttable presumption that signatures on a petition made 180 days before

filing would not count.[1] 180 days after they had begun circulation, plaintiffs had collected approximately 150,000 signatures. The number of valid signatures to achieve ballot status was 252,523 signatures.

In January 2016, plaintiffs filed a complaint seeking to challenge the constitutionality of the 180-day rule under former MCL 168.472a. 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 and their ability to do so was speculative. Plaintiffs appealed that ruling, and we affirmed. *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), pp 2-4.

Plaintiffs continued to collect signatures and on November 5, 2018—the day before the 2018 election—plaintiffs sought to file the initiative petition with the Secretary for a vote, if necessary, in the 2020 election. According to plaintiffs, they had collected about 270,962 signatures. However, the Director of Elections refused to accept the petition because the front-page summary stated that it was to be voted on at the November 8, 2016 general election and that election had already passed. Plaintiffs filed a complaint in this Court seeking a writ of mandamus requiring the Director to accept their legislative initiative petition. We denied the complaint. *Comm to Ban Fracking in Mich v Secretary of State*, unpublished order of the Court of Appeals, entered November 15, 2018 (Docket No. 346280).[2]

In December 2018, plaintiffs filed the instant complaint, challenging the Secretary's action in several respects including a claim that the Secretary had usurped the power of the Board, which is the only entity charged by statute with determining the sufficiency and adequacy of an initiative petition. Plaintiffs also alleged that the petition did not violate MCL 168.471, which provides that petitions must be filed at least 160 days before the election at which the proposal would be voted on. Defendants moved for summary disposition, arguing that inclusion of the incorrect election date was a defect that rendered plaintiffs' petition invalid and untimely. According to defendants, MCL 168.471 contemplates that the petition's sponsor will designate the general election in which the sponsor sought to have the proposed legislation voted upon.

In its opinion and order, the Court of Claims found that even though there is no statutory requirement that initiative petitions include an expected election date, the erroneous date resulted in a violation of MCL 168.471. The proposed legislation was to be voted on in the November

[1] Effective June 7, 2016, MCL 168.472a was amended to remove the rebuttable presumption and now provides that signatures that are more than 180 days old "shall not be counted[.]" 2016 PA 142.

[2] In the present action, the Court of Claims requested that the parties brief whether the doctrine of res judicata barred the action. Specifically, the trial court asked whether the Court of Appeals' order denying mandamus relief was a final judgment. Both plaintiffs and defendants stated that this Court's order did not decide the issue on the merits.

2016 general election, an election as to which the 160-day cutoff had long passed at the time of petition's filing. Accordingly, the Court of Claims granted defendants summary disposition.

We reverse because we agree with plaintiffs that the petition did not violate the 160-day rule. Given our ruling, we need not address whether the Secretary acted outside of her authority by rejecting the petition or any of the other issues raised on appeal.[3]

II.

We review de novo a lower court's decision on a motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). We also review de novo questions involving the interpretation and application of statutes. *Linden v Citizens Ins Co of America*, 308 Mich App 89, 91-92; 862 NW2d 438 (2014).

III.

The Michigan Constitution provides that "[t]he 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." 1963 Const, art 2, § 9. To invoke the power of initiative, petitions must be signed by registered voters amounting to not less than 8% of the total vote cast for all candidates for governor in the preceding election for governor. 1963 Const, art 2, § 9. The Legislature is required to enact or reject the initiative within 40 session days of when the initiative is received. Const 1963, art 2, § 9. "The legislature shall implement the provisions of this section." Const 1963, art 2, § 9. "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." *Newsome v Riley*, 69 Mich App 725, 729; 245 NW2d 374 (1976).

The Court of Claims erred in concluding that the inclusion of an expected election date in the summary meant that the initiative could only be voted on that date. This was legal error because it is statutory law, not the circulator's intent, that determines when an initiative is to be voted on. MCL 168.471 states in relevant part that initiative petitions "must be filed with the secretary of state at least 160 days *before the election at which the proposed law would appear on the ballot if the legislature rejects or fails to enact the proposed law*." (Emphasis added). Given that initiative petitions are not required to state the election at which the proposed law will appear, we fail to see why the reference to an already-passed election should be the date from which the

[3] Plaintiffs raised several other issues in their complaint. They asserted that the 180-day limit on signature gathering is unconstitutional, that the Secretary's actions violated equal protection and that the Secretary was estopped from refusing to accept the petition because of statements defendants made in the prior action before the Court of Claims. The Court of Claims did not address the 180-day rule, but ruled in defendants' favor on the other claims.

160-day period is calculated. By statute, the petition may not be voted on in an election less than 160 days away, and so, whatever the petitioner's intent, the relevant election date is the next one that is at least 160 days away.[4]

Regardless of any representation by plaintiffs, because the petition was filed on November 5, 2018—one day before the November 2018 election—the November 2020 is the election that the proposed law would appear on if not approved by the Legislature. That is clear from a review of the timing requirements governing initiative petitions. Upon receiving notification from the Secretary, the Board canvasses the petition and the supporting signatures, MCL 168.476(1), and "meets to make a final determination on challenges to and sufficiency of a petition," MCL 168.476(3). The Board is required to do so at least two months before "the election at which the proposal is to be submitted." MCL 168.477(1), as amended by 2012 PA 276.[5] The Legislature must act on an initiative petition within 40 session days. Const 1963, art 2, § 9. Thus, the statute and constitutional provisions governing initiative petitions establish that for a petition filed on November 5, 2018, the election at which the proposed law would appear on the ballot if the Legislature rejected or failed to enact the petition was the November 2020 election. Accordingly, compliance 160-day rule in this case is measured from the November 2020 election. Plaintiffs satisfied that part of MCL 168.471 because the petition was filed at least 160 days before that election.[6]

On remand, the Secretary shall accept the petition for filing and forward it to the Board for canvassing as required by the statute.[7] Further, we agree with plaintiffs that the Court of Claims

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[4] This does not entitle a petitioner to collect signatures indefinitely because signatures obtained prior to the general election preceding the filing are void. See MCL 168.473b.

[5] MCL 168.477 now provides that this period is 100 days for initiative petitions.

[6] In addition, MCL 168.473b does not preclude plaintiffs' petition from appearing on the November 2020 ballot. That statute provides that "[s]ignatures on a petition . . . to initiate legislation collected prior to a November general election at which a governor is elected shall not be filed after the date of that November general election." MCL 168.473b requires that signatures on a petition to initiate legislation be filed before the upcoming general election, but it does not state that those signatures become invalid after that election. Nor does it require that the petition be voted in the upcoming general election if not acted on by the Legislature. And plaintiffs complied with this statutory section by filing their petition on November 5, 2018, one day before the upcoming gubernatorial election.

[7] It is the Board's responsibility to make an official declaration regarding the adequacy and sufficiency of the petition. MCL 168.477(1). It is also the Board's duty to approve the summary of the proposed amendment's purpose, MCL 168.482b, which is where the alleged defect in this case is located. "In essence, the Board ascertains whether sufficient valid signatures support the petition *and whether the petition is in the proper form.*" *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 585; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018) (emphasis added). The Board in fact routinely determines whether the form of a petition complied with the Legislature's requirements. See e.g., *Council About Parochiaid v Secretary of*

erred in finding that the petition was not filed on November 5, 2018. Plaintiffs tendered their petition for filing, and even assuming the Secretary had the authority to reject it, the basis for doing so was erroneous. Because the Director wrongly refused to accept the filing, the petition must be treated as having been filed on that day. To hold otherwise would punish petition sponsors and the electorate for unlawful actions taken by election officials. Thus, the petition must be treated as having been filed on November 5, 2018.

IV.

In sum, plaintiffs submitted an initiative petition that was facially compliant with all statutory requirements. The Secretary was required to pass it on to the Board for the Board to determine the validity of the petition and canvass the signatures. If the Board rejects the petition, plaintiff may seek review before the Supreme Court. See MCL 168.479.

Reversed and remanded to the Secretary for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Douglas B. Shapiro
/s/ Anica Letica

State, 403 Mich 396, 397; 270 NW2d 1 (1978) (Board determined that the petitioner complied with statutory form requirements when descriptive material was attached to the petitions during circulation); *Stand Up for Democracy v Secretary of State*, 297 Mich App 45, 55; 824 NW2d 220 (2012), rev'd 492 Mich 588 (2012) (Board rejected a petition that did not comply with statutory font requirements); *Auto Club of Mich Comm for Lower Rates Now v Secretary of State*, 195 Mich App 613, 624; 491 NW2d 269 (1992) (Board determined that a tear sheet did not comply with statutory form requirements).