STATE OF MICHIGAN
COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff-Appellant,

Court of Appeals No. 354270
Court of Claims No. 20-000125-MM

v

BOARD OF STATE CANVASSERS,

Defendant-Appellee.
_____/

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PLAINTIFF-APPELLANT'S RENEWED MOTION TO EXPEDITE APPEAL

Now comes the Plaintiff-Appellant, Committee to Ban Fracking in Michigan ("the Committee"), by and through counsel, and hereby brings this renewed motion to expedite Plaintiff-Appellant's appeal based on the following:

1. On July 24, 2020, this Court denied the motion to expedite due to that motion's failure to specify a date by which a decision is needed or to detail how the Court may properly and reasonably provide relief in an appropriate timeframe before the November 3, 2020 general election. Accordingly, the Committee now seeks to cure those defects to the motion previously filed.

2. The Committee is the sponsor of a statutory initiative under Const 1963, art 2, § 9. On November 5, 2018, it filed vetted signatures of 271,021 Michigan voters in order to invoke its initiative for the 2020 November election.

3. For the next 17 months, Defendant Board of State Canvassers ("the Canvassers") and Secretary of State unlawfully refused to accept or acknowledge the Committee's petition filing until ordered to do so by this Court on April 2, 2020. *Comm to Ban Fracking in Mich v. Secretary of State* ("*CBFM II*"), unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 350161), 2020 Mich. App. LEXIS 2563. This Court further ruled that the petition must be treated as having been filed on November 5, 2018, noting that "[t]o hold otherwise would punish petition sponsors and the electorate for unlawful actions taken by election officials." *Id*. at *7.

4. For the next three weeks following this Court's April 2 decision, the Canvassers and Secretary of State continued to disallow delivery of the petition from its secure storage facility, while purportedly contemplating whether to seek review in the Supreme Court.

5. On May 1, 2020, they finally accepted delivery of the petition, which was accompanied by a written plea for processing speed in light of both MCL 168.477(1)'s requirement for a petition to be certified 100 days prior to the November 3, 2020 election and the need for judicially resolving the validity of MCL 168.472a once applied to the Committee's signatures.[1]

6. In spite of the Committee's plea, the Canvassers continued to delay ruling on the Committee's petition's insufficiency for the next 39 days until June 8, 2020. In defiance of this Court's order to treat Committee signatures as having been filed in 2018, during the 39 days the Canvassers and the Bureau of Elections acting on their behalf, took the time to canvass the signatures of numerous other petitions filed long after the Committee's petition, including another statutory initiative petition filed over a year after that of the Committee.[2] By contrast, according to a public record, similar review of the

1 Committee Director LuAnne Kozma's letter of May 1, 2020, is attached. The letter and attachments are a public record, having been attached to the Secretary of State's initial "Preliminary Staff Report" of May 19. 2020.

2 See Appellant's Brief at 3-4 & nn 6-8.

signatures of another committee in 2016 took just nine days.[3]

7. As expected, the Canvassers based their ruling of insufficiency on the Bureau of Elections' staff report's finding that approximately 89% of the petition's 271,021 signatures were signed more than 180 days before the petition's date of filing, thus barring those signatures from being counted under MCL 168.472a.[4]

8. The Canvassers did however conduct a "thorough count of every petition sheet and signature" filed by the Committee.[5]

9. Two days later, on June 10, 2020, the Committee filed an original action for mandamus relief in the Supreme Court pursuant to MCL 168.479. As the Attorney General has pointed out,[6] 479 does not and cannot control the

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3 Mich Dep't of State, *Staff Report of "Michigan Comprehensive Cannabis Law Reform" Initiative Petition* (June 7, 2016), <https://michigan.gov/documents/sos/Staff_Report_-_Cannabis_Law_Reform_526211_7.pdf> (accessed today).

4 The Committee previously brought a declaratory judgment action challenging the validity of 472a before the filing of its petition, which was ruled to be unripe in advance of the statute being applied to the Committee's filed signatures. See *Comm to Ban Fracking in Mich v Dir of Elections* ("*CBFM I*"), unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), 2017 Mich. App. LEXIS 405. Accordingly, the Committee now seeks to finally resolve that statute's validity through the present action following the statute's application.

5 Def's 7/15/2020 Resp Br in Opp to Pl's 7/6/2020 Mot for TRO and/or Prelim Inj (below) at 5.

6 Def's 7/15/2020 Resp Br in Opp to Pl's 7/6/2020 Mot for TRO and/or Prelim Inj (below), Exhibit G, answer to Question 5(A), pp 47-49.

Supreme Court's exercise of jurisdiction. On July 2, 2020, the Supreme Court denied mandamus relief without opinion.

10. One business day later, the Committee filed the present action for declaratory and injunctive relief in the Court of Claims and concurrently moved for a preliminary injunction requiring the Canvassers to canvass the Committee's petition without the exclusion of signatures under 472a.[7]

11. On July 20, 2020, following expedited briefing on the Committee's motion for preliminary injunction, the Court of Claims denied the motion and dismissed the case upon the sole ground of construing that MCL 168.479 deprived the court of subject matter jurisdiction over the Committee's claim. The Committee then brought the present appeal on July 22, 2020 with the immediate filing of its appellant brief and motions to expedite and provide immediate consideration.

12. In order to satisfy the 100-day requirement of MCL 168.477(1), the Canvassers would have needed to issue their declaration of sufficiency to the Committee's petition by yesterday, July 26, 2020. Additionally, Const 1963, art, 2, § 9 provides for 40 session days for legislative consideration of a proposed

7 The parties agree that the Supreme Court's denial of mandamus relief without opinion does not have preclusive effect under presently governing case law. See *Hoffman v Silverthorn*, 137 Mich 60, 64 (1904).

initiative before it is sent to the ballot.[8] Further, MCL 168.480 requires that the Secretary of State to certify the wording of ballot questions by September 4, 2020, and MCL 168.759a(5) requires that the contents of the ballot must be finalized for military and overseas voters by September 19, 2020.

13. Because it is now too late for the Canvassers to certify the petition in accordance with the July 26, 2020 deadline of 477(1), a narrowly limited adjustment of established deadlines will be necessary to prevent the far greater evil of blocking a properly invoked initiative and thereby further "punish[ing] petition sponsors and the electorate for unlawful actions taken by election officials." *CBFM II*, *supra*. Accordingly, both parties agree that the Court may, if necessary, exercise its equitable power to limit the 40-day period for legislative review of the Committee's proposed initiative should it find 472a unconstitutional.[9]

14. Indeed, such an equitable adjustment is well precedented under

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8 Notably, both chambers of the Legislature are scheduled to recess throughout the month of August except for August 6 and 12. And the Senate is additionally scheduled to recess on September 3-8, 11-14, and 18. See Mich House of Representatives, *2020 Session Schedule* (last updated July 22, 2020), <https://house.mi.gov/PDFs/Current_Session_Schedule.pdf>; Mich Senate, *Session Schedule 2020*, <https://senate.michigan.gov/maincalendar.html>, accessed today.

9 Def's 7/15/2020 Resp Br in Opp to Pl's 7/6/2020 Mot for TRO and/or Prelim Inj (below) at 21; Pl's 7/16/2020 Reply Br in Supp of Pl's 7/6/2020 Mot for TRO and/or Prelim Inj (below) at 9.

equivalent circumstances. In *Ferency v Secretary of State*, 409 Mich 569 (1980), the Supreme Court addressed an initiative sponsor whose petition failed to be certified by the Canvassers in time for the 60-day deadline set forth by Const 1963, art 12, § 2. The deadline had passed not because of the Canvassers' delay, but because they complied with an erroneous circuit court ruling. Like the Committee here, that committee (the Tisch Coalition) "did everything the constitution requires of it." 409 Mich at 600.

15. The *Ferency* Court responded: "It would be manifestly unfair to hold that because the deadline has passed this Court can afford no relief." *Id*. at 601. Expiration of the 60-day deadline did not preclude the certification of the ballot proposal. The Court reversed the lower court and directed the Canvassers to attend to the canvassing duties of MCL 168.477 "and such other statutory duties as may follow thereon, observing, in each instance, *to the maximum extent practicable*, the time limits prescribed for the performance of such various duties." *Id*. at 602 (emphasis added).[10]

16. The Committee additionally notes that Const 1963, art 2, § 9 does not

10 See also *SawariMedia LLC v Whitmer*, order of the United States District Court for the Eastern District of Michigan issued July 17, 2020, (Case No. 20-cv-11246), 2020 U.S. Dist. LEXIS 125860 (Holding that, whereas the state failed to propose a remedy that resolves the constitutional infirmity, the "Defendants are 'precluded from enforcing the petition deadline against Plaintiffs' unless and until the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court orders otherwise.") (quoting *SawariMedia LLC v. Whitmer*, 963 F3d 595, __ (2020), 2020 U.S. App. LEXIS 20716 at *6).

require the canvassing of signatures to be rigorous. Until the Qualified Voter File ("QVF") was developed, the general practice thereof involved only the mere tabulation of the number of signatures submitted.[11]

17. The Canvassers were not required to utilize the QVF until March 10, 2000 when MCL 168.476(1) became effective[12] and could not have used it prior to January 15, 1995 when the QVF came into existence.[13] Accordingly, for 22 years after the 1963 Constitution, no methodical procedure existed for validating signatures, yet the Canvassers and Attorney General considered the process satisfactory and constitutional.

18. Here, the Bureau of Elections has already conducted such a tabulation of the Committee's petition and determined that it has 18,498 more signatures than required to satisfy the constitutional threshold.

19. Having prevented a timely canvass of the Committee's signatures in the ordinary manner through their unlawful actions and negligence, the Canvassers have forgone rigor. They cannot prove insufficiency. Adhering to the constitutional timeline to the "maximum extent practicable" at this stage should reasonably necessitate that the petition be certified forthwith on the basis

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11 See, e.g., Appellant's Brief at 11 (quoting Pollock, *The Initiative and Referendum in Michigan* (Ann Arbor: University of Michigan Press, 1940), p 9.

12 1999 PA 219.

13 1994 PA 441.

of the signature tabulation already completed.

20. As in baseball, a tie goes to the runner. In this case, the runner would be the Committee. In *CBFM II*, this Court emphasized that initiative provisions "'should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights.'" 2020 Mich. App. LEXIS 2563 at *5 (quoting *Newsome v Riley*, 69 Mich App 725, 729 (1976)).

21. Accordingly, in order to avoid any undue delay and prevent or minimize the need for any curtailment of the 40-day legislative review period, the Committee proposes that the Court order an expedited schedule as follows:

- The Canvassers are to respond immediately to the merits of this appeal.
- The Committee may reply (if necessary) one business day later.
- The Court would rule by August 3, 2020 or the soonest practicable date thereafter.

RELIEF REQUESTED

Wherefore, the Committee respectfully requests that the Court:

A. Grant its renewed motion to expedite the appeal;

B. Order the briefing and decision schedule above, and

C. Should the Court grant relief on the appeal, limit the 40-day period for legislative review of the Committee's initiative to accord with that time

frame to only the maximum extent practicable prior to finalization of the November ballot.

Respectfully submitted,

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