STATE OF MICHIGAN
IN THE COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff-Appellant,

v

BOARD OF STATE CANVASSERS,

Defendant-Appellant.
_____/

Court of Appeals No. 354270

Court of Claims No. 20-000125-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

APPELLEE BOARD OF STATE CANVASSERS' ANSWER IN OPPOSITION TO APPELLANT COMMITTEE TO BAN FRACKING IN MICHIGAN'S RENEWED MOTION TO EXPEDITE

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ARGUMENT

Plaintiff-Appellant Committee to Ban Fracking in Michigan (CBFM) has already moved for expedited consideration on July 22, 2020. This Court denied the motion on July 24, 2020 "in light of the totality of the circumstances, including the failure of the motion to specify the date by which a decision is needed, or to detail how this Court may properly and reasonably be expected to provide in an appropriate timeframe before the November 3, 2020 general election."

On July 27, 2020, CBFM filed a "renewed motion to expedite appeal." CBFM's "renewed" motion, therefore, is effectively a motion for reconsideration of its previously-filed motion. Motions for reconsideration in this Court are governed by MCR 7.215(I), which provides that such motions are subject to the restrictions contained in MCR 2.119(F)(3). MCR 2.119(F)(3), in turn, requires that the parties not "merely present[] the same issues ruled on by the court, either expressly or by reasonable implication" but show some "palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." CBFM's motion fails to demonstrate any palpable error by which this Court was misled and that would require a different disposition. Rather, CBFM recites the same recitation of facts it provided in its merits brief (which it relied upon for its earlier motion to expedite), fails to address the Court's request for a date by which a decision is necessary, and proposes a method for resolving the case by November 3, 2020 that is neither proper nor

reasonable. For the reasons that follow, CBFM's motion for reconsideration should be denied.

CBFM's motion misstates the record to suggest that the Board of State Canvassers ("the Board") unreasonably delayed its review of CBFM's petition. That is not accurate. On November 5, 2018—one day before the 2018 general election—CBFM attempted to file its initiative petition with the Secretary of State. Former Secretary of State Ruth Johnson declined to accept the petition because it stated on its face that it was to be voted on in the November 8, 2016 general election. CBFM challenged the Secretary's action in December of 2018, and the Court of Claims held that the erroneous date referenced violated MCL 168.471, which requires that petitions must be filed at least 160 days before the election at which the proposal would be voted upon. But the Court of Appeals reversed, finding that the error did not violate the 160-day rule. Thus, the 17 months during which CBFM accuses the Board of "unlawfully" refusing to accept its petition was time during which CBFM appealed the Court of Claims' decision upholding the Secretary of State's refusal to accept what appeared to be an untimely petition. While this Court reversed that decision, it cannot be said that the 17 months taken during CBFM's appeal of the Court of Claims order are chargeable to the Secretary of State behaving unreasonably.

CBFM then criticizes the Secretary of State and the Board for taking the time permitted them under the Court Rules to consider whether to appeal to the Supreme Court before accepting CBFM's petition on May 1, 2020. Next CBFM

complains that the Board canvassed other petitions, but nothing in this Court's order required CBFM's petition to receive any higher priority than other timely-filed petitions. Nonetheless, the Board considered CBFM's petition on May 22, 2020 based on the fraction of CBFM's signatures that it acknowledged were the only ones collected during the 180 days before filing. (Exhibit A, Board Meeting Minutes, May 22, 2020.) During that meeting, the Board asked the Bureau of Elections staff to determine the raw count of signatures filed—not merely the number of non-stale signatures filed. *Id.* This review, notably, was limited to a mere count of the signatures, and CBFM's signatures have never been fully canvassed to determine whether the signatures belong to registered electors or if there are duplicates, etc. For example, both CBFM's chairperson and counsel signed the petition twice, and their signatures would therefore be invalid. (Exhibit B, Petition sheets.) On June 8, 2020, the Board convened again and found CBFM's petition to be insufficient based upon its lack of non-stale signatures. (Exhibit C, Board Meeting Minutes, June 8, 2020).

Two days later—on June 10, 2020—CBFM filed its complaint for mandamus in the Michigan Supreme Court under MCL 168.479. But the complaint for declaratory relief in the Court of Claims—from which this appeal is taken—was not filed until July 7, 2020. This gap of almost a month between the Board's denial and CBFM's complaint in the Court of Claims is unexplained by CBFM. CBFM's delay in filing in the Court of Claims is incompatible with its argument that its claim for declaratory relief is somehow separate or distinct from its claim for mandamus in

the Supreme Court. Either CBFM must acknowledge that the proper venue for relief was with the Supreme Court and that it is trying to get a second bite at the apple with this claim for declaratory relief, or it must concede that it could have filed in the Court of Claims almost a month before it did and thus is ill-positioned to demand expedited review now.

Nonetheless, all of the procedural facts CBFM recites in its motion for reconsideration were included in its merits brief, which CBFM explicitly cited to in its original motion to expedite when it said:

> As fully outlined in the brief, the need for speed is due totally to the Canvassers' above "unlawful" action (so termed by this Court), added to which was their 39 days of foot-dragging in acting on the Committee's signatures once signatures were allowed in the door. [Motion to Expedite, p 2.]

As a result, CBFM is restating the same issues it raised in its earlier motion and has failed to demonstrate any palpable error by which this Court was misled in denying the motion.

Moreover, CBFM has failed to adequately address the failings identified by this Court when it denied the motion to expedite. This Court expressly noted the failure of CBFM to specify "the date by which a decision is needed." In its motion for reconsideration, CBFM still fails to state a date by which a decision is needed—indeed, it acknowledges that in order to satisfy MCL 168.477(1), a decision would have been needed by July 26, 2020. (Motion for Recon., ¶12, p 4.) Further, CBFM acknowledges that Const 1963, art 2, § 9 requires that the Legislature consider an initiative proposal for 40 session days and MCL 168.480 requires that the ballots be certified on September 4, 2020. *Id.* Subtracting 40 days from September 4 arrives

at July 26, 2020. CBFM, then, should recognize that the time by which a decision was necessary has already passed. Instead, it flatly proposes that the Court rule by August 3, 2020 or some date thereafter. CBFM does not explain from where it derived the August 3 date, or why a decision is needed by that time.

Finally, CBFM fails to adequately address how this Court may "properly and reasonably" provide relief for the November 3, 2020 election. Instead, CBFM proposes to forgo the constitutionally-provided 40 session days for review by the Legislature and that its petition be certified without canvassing the signatures for validity. (Mot for Recon, ¶13, p 5; ¶¶ 19-20, p 7-8.) CBFM stated that the Board "agreed" that the Court might limit the 40-day review based upon its argument in opposition to CBFM's request for a temporary restraining order (TRO). That brief, however, was filed July 15, 2020, and the implication was that a TRO entered at that time would require some small curtailment of the 40 days in order to conduct any meaningful canvass of the signatures. Now, CBFM proposes invading the Legislature's 40 days by over one-quarter of the total time *and* eliminating any determination of the validity of CBFM's signatures. The Board does not agree that eliminating a canvass entirely is either reasonable or proper—especially for a petition that circulated for over four years and where even CBFM's own chairperson signed the petition more than once. Simply put, there are several indications that a substantial number of CBFM's signatures would likely be invalid if subject to even a facial review of their validity, and only 18,499 would need to be invalid for the petition to be insufficient. (See e.g. Mot. for Recon., ¶18, p 7.)

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendant-Appellee Board of State Canvassers respectfully requests that this Honorable Court deny Plaintiff-Appellant Committee to Ban Fracking in Michigan's motion for reconsideration.

Respectfully submitted,

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