STATE OF MICHIGAN
IN THE COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN,

Plaintiff-Appellant,

v

BOARD OF STATE CANVASSERS,

Defendant-Appellee.
_____/

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.

BRIEF OF APPELLEE BOARD OF STATE CANVASSERS

ORAL ARGUMENT NOT REQUESTED

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Dated: September 2, 2020

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Committee to Ban Fracking (CBFM) appeals the Court of Claims' July 20, 2020 order dismissing its complaint for lack of jurisdiction and also denying its motion for declaratory and injunctive relief as moot. MCR 7.201(A)(1) provides that this Court has jurisdiction over final orders of the court of claims.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. MCL 168.479(2) provides that any person aggrieved by a determination of the board of state canvassers regarding the insufficiency of an initiative petition must file a legal challenge to that determination in the Michigan Supreme Court. In this case, the Supreme Court declined to grant relief to the Committee to Ban Fracking in Michigan, and the Committee then attempted to initiate a new challenge to the board's determination in the Court of Claims. Did the Court of Claims correctly conclude that it lacked jurisdiction?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

2. Over a century ago, the Michigan Supreme Court held that the denial of mandamus without a written opinion was not a determination on the merits for res judicata, although the Court recognized there were authorities holding as much. Here, the Committee to Ban Fracking filed a new legal challenge to the same action of the board of state canvassers less than week after the Supreme Court denied mandamus. Should the courts reconsider the application of res judicata in situation such as here?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

3. The Michigan Supreme Court has held that a statute setting a 180-day time period for collecting petition signatures is a constitutional means of ensuring that petition signers are registered electors. Here, the Committee to Ban Fracking in Michigan argues that the time period for petition signature validity is unconstitutional. Is the statutory 180-day time period for valid petition signatures constitutional, as previously held by the Michigan Supreme Court?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

MCL 168.479(2):

> If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person must file a legal challenge to the board's determination in the supreme court within 7 business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. Any legal challenge to the official declaration of the sufficiency or insufficiency of an initiative petition has the highest priority and shall be advanced on the supreme court docket so as to provide for the earliest possible disposition.

MCL 168.472a:

> 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.

Const 1963, art 2, § 9"

> 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.

INTRODUCTION

Plaintiff-Appellant Committee to Ban Fracking in Michigan (CBFM) brought this action in the Court of Claims less than a week after the Michigan Supreme Court denied a virtually identical claim for mandamus. This time, instead of mandamus, CBFM sought a preliminary injunction based upon the same arguments it raised before the Supreme Court. CBFM's claims in the Court of Claims were made in the wrong court, and were brought only after the correct court issued a determination CBFM found unsatisfactory. The Court of Claims correctly determined that it lacked the jurisdiction over CBFM's second bite at the apple.

Further, CBFM's challenge to the constitutionality of MCL 168.472a is unpersuasive and conflicts with prior decisions of the Michigan Supreme Court. CBFM seeks to compel the Board of State Canvassers (Board) to accept hundreds of thousands of signatures signed months—sometimes years—before the petition was deemed filed with the Secretary of State on November 5, 2020. But MCL 168.472a expressly provides that signatures on initiative petition sheets older than 180 days prior to filing shall not be counted. The Supreme Court has previously ruled that the Legislature has the authority to establish the process by which initiative petitioned legislation shall reach the Legislature or the electorate, which readily includes determining the validity of petition signatures. CBFM's arguments against the constitutionality of the statute fail. Also, CBFM failed to show that they would be irreparably harmed by the enforcement of a constitutionally valid statute where the Supreme Court has already denied mandamus regarding the same statute.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. General requirements for initiative petitions in Michigan

Article 2, § 9 of the Michigan Constitution empowers the people to propose laws or to enact or reject laws, called the initiative. Const 1963, art 2, § 9. With respect to initiatives, § 9 provides in relevant part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent for initiative . . . 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. [Const 1963, art 2, § 9.]

The Michigan Legislature implemented article 2, § 9 with respect to initiatives in various sections of the Michigan Election Law, MCL 168.1 *et seq*. Under the Constitution and the Election Law, in order for the people to place an initiative on the general election ballot, the people must: (1) prepare a petition that meets the form requirements of MCL 168.482; (2) gather the required number of valid signatures under article 2, § 9; and (3) timely file the petitions with the Secretary of State under MCL 168.472. After filing, Michigan's Board of State Canvassers must canvass the petition to determine whether there are sufficient valid signatures under MCL 168.476. Once the review is complete, the Board must make an official declaration of the sufficiency or insufficiency of the initiative petition at least 100 days before the election at which the proposal is to be submitted. MCL 168.477(1).

If the initiative petition is certified as sufficient, the Secretary of State must present it to the Legislature for enactment or rejection within 40 sessions days

under article 2, § 9. If the Legislature rejects the initiative, it must be submitted to the people for a vote at the next general election. Const 1963, art 2, § 9.

The following table shows the timeline of pertinent dates leading up to the November 2020 general election for an initiative petition:

Date and Time	Action	Statute
By 5:00 pm on May 27, 2020	Petitions for legislative initiative filed with Secretary of State	MCL 168.471 Art 2, § 9
May 27, 2020 to July 23, 2020	Canvass of initiative petitions begins, including random sampling process; signature challenges permitted during this time period. (Canvassing may take up to 60 days)	MCL 168.476
July 24, 2020	Board of State Canvassers to declare sufficiency or insufficiency of initiative petitions	MCL 168.477
September 4, 2020 (Board is meeting September 2 to perform these functions)	Board of State Canvassers must assign numerical designation and approve ballot wording for all statewide proposals, and Secretary of State must certify the ballot to county clerks	MCL 168.474a, 168.480, 168.648
September 5, 2020	County clerks begin ballot proofing and printing	MCL 168.689
September 19, 2020	Deadline for county boards of election commissioners to deliver AV ballots to county clerks for November Election	MCL 168.713
September 21, 2020	Deadline for county clerks to deliver AV ballots to local clerks; deadline for AV ballots to be available for delivery to military and overseas voters	MCL 168.759a, 168.714 Art 2 § 4 52 USC § 20302
November 3, 2020	General Election	

As noted in the table, the Board is scheduled to meet on September 2, 2020, to assign the designations and approve ballot wording for initiatives to be placed on

the November 3, 2020 General Election ballot.[1] The Secretary of State will thereafter certification this information to the counties, which will commence the ballot printing process.

B. History of CBFM's initiative petition.

On April 14, 2015—over five years ago—the Board approved the form of CBFM's initiative petition. *Committee to Ban Fracking in Michigan v Secretary of State*, unpublished opinion of the Court of Appeals, Docket No. 350161, dec'd April 2, 2020, p 1)(slip opinion attached as Exhibit A). In January 2016, CBFM and its chairperson LuAnn Kozma filed a complaint seeking to challenge the constitutionality of the 180-day rule under former MCL 168.472a. *Id.* at 2. 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 of State and their ability to do so was speculative. *Id.* CBFM appealed that ruling, and the Court of Appeals affirmed. *Id.*, citing *Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, Docket No. 334480, dec'd March 14, 2017.

On June 9, 2016, Governor Snyder signed 2016 PA 142, which enacted Senate Bill 776 and amended MCL 168.472a to provide:

> The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the

[1] See September 2, 2020 meeting notice, available at https://www.michigan.gov/documents/sos/00.BSC_Mtg_Notice_and_Attachments_700694_7.pdf

> signature was made more than 180 days before the petition is filed with the office of the secretary of state.[2]

The law took immediate effect.

CBFM continued to gather signatures, and on November 5, 2018—one day before the 2018 general election—CBFM attempted to file its initiative petition with the Secretary of State. (Appendix A, p 2.) 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. *Id.* at 3. 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. *Id.* at 3-4. But the Court of Appeals reversed, finding that the error did not violate the 160-day rule. *Id.*

Pursuant to the Court of Appeals' order, CBFM's petition was deemed filed on November 5, 2018. Because this date preceded the 2018 gubernatorial election, CBFM's petition must contain signatures equal to 8% of the number of electors who voted for governor in the 2014 gubernatorial election, which amounts to 252,523

[2] As originally enacted, MCL 168.472a created a rebuttable presumption as to the invalidity of a signature:

> 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.

signatures. See Const 1963, art 2, § 9.[3] The actual petition sheets were removed from storage and delivered to the Secretary of State on May 1, 2020. (Exhibit B, May 19, 2020 Preliminary Staff Report, p 1). CBFM estimated that it provided 270,962 signatures gathered over a 3½ year period. (Appendix B., p 1). CBFM admitted that, out of those, "at most" 65,000 were gathered in the 180 days preceding the November 5, 2018 filing, and directed Bureau of Elections staff to the specific boxes containing the most recent signatures. (Appendix B, p 1-2). However, after review by the Bureau of Elections, only 29,392 signatures could be confirmed as being dated within 180 days of filing. (Appendix B, p 2). Bureau staff thus concluded that there were no more than 29,392 valid petition signatures, and recommended rejection of the petition. Notably, the petition sheets filed by CBFM included duplicate signatures of CBFM chairperson LuAnn Kozma and its counsel, Ellis Boal, dated over a year apart. (Exhibit C, petition sheets). While Kozma and Boal crossed out their earlier signatures before filing the petition sheets, it is unknown why they both signed the petition twice.

During the May 22, 2020 Board meeting, board members asked the Director of Elections to conduct a thorough count of every petition sheet and signature within CBFM's filing. (Exhibit D, June 3, 2020 Staff Report, p 1). That count

[3] As a result of the 2018 gubernatorial election, the current signature requirement for legislative initiative petitions is significantly higher; now 340,047 valid signatures are required. See also, Instructions for Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition, p 5, available at, https://www.michigan.gov/documents/sos/Initiative_and_Referendum_Petition_Instructions_2019-20_061119_658168_7.pdf.

confirmed that there were 271,021 total signatures, but only 29,392 dated within 180 days of the filing of the petition. (Appendix D, p 1-2). On June 8, 2020 the Board met and voted to reject CBFM's initiative petition for having an insufficient number of valid signatures. See MCL 168.477; Exhibit E, June 8 Meeting Minutes.

On June 11, 2020, CBFM filed a complaint for mandamus with the Michigan Supreme Court, arguing that the MCL 168.472a was unconstitutional under Const. 1963, art 2, §9. (Exhibit F, Mandamus Complaint). On July 2, 2020, the Michigan Supreme Court entered an order in which it granted immediate consideration of CBFM's complaint, considered the complaint for mandamus and *denied* it. (Exhibit G, Michigan Supreme Court Order 7/2/2020). In the same order, the Michigan Supreme Court denied the Defendant's motion for summary disposition as moot. (Appendix G). CBFM turned around and filed a complaint and motion for preliminary injunction in the Court of Claims on July 6, 2020. (Exhibit H, Court of Claims Complaint & PI Motion). On July 20, 2020, the Court of Claims issued an opinion and order dismissing the complaint for lack of jurisdiction and denying the motion for preliminary injunction as moot. (Exhibit I, 7/20/2020 Opinion & Order). In that order, the Court of Claims determined that under MCL 168.479(2), the Michigan Supreme Court has exclusive jurisdiction over challenges to the board of state canvassers' determination of the sufficiency of an initiative petition. (Appendix I, p 4).

There have been 16 initiatives successfully proposed to the electorate or adopted by the Legislature since 1986—including one in 2018 after § 472a was amended. (Appendix J, Initiatives and Referendums, p 9-10).

ARGUMENT

I. The Court of Claims correctly held that challenges to a determination by the Board of State Canvassers on the insufficiency of an initiative petition must be filed in the Supreme Court, and that the Court of Claims lacked jurisdiction to hear CBFM's challenge.

A. Standard of Review

This Court reviews *de novo* whether a trial court properly granted summary disposition for lack of jurisdiction under MCR 2.116(C)(4). *Harris v. Venier*, 242 Mich App 306, 309 (2000). Further, "[a] trial court's decision to grant summary disposition pursuant to MCR 2.116(I)(1) is also reviewed de novo." *AK Steel Holding Corp v Dep't of Treasury*, 314 Mich App 453, 462 (2016). "[T]he court shall render judgment without delay" under this subrule "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact . . . ." MCR 2.116(I)(1).

Issues of statutory interpretation are also reviewed *de novo*. *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 112 (2014). "When interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. This requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Id*. (internal citations and quotation marks omitted).

B. Analysis

MCL 168.479 provides, in relevant part:

> (1) Notwithstanding any other law to the contrary and subject to subsection (2), any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.
>
> (2) If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person **must file** a legal challenge to the board's determination **in the supreme court** within 7 business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. . . . .. [Emphasis added.]

This provision, amended by 2018 PA 608, has been interpreted by Attorney General Dana Nessel as appearing to limit persons aggrieved by a board determination regarding the sufficiency of a petition to filing a legal challenge in the Michigan Supreme Court under § 479(2). OAG, 2019-2020, No. 7310 (May 22, 2019), attached as Appendix K, p 47:

> As a general matter, the Supreme Court retains complete discretion to consider which cases it will hear. See MCR 7.303(B); MCR 7.306. Supreme Court review is mandatory only in cases involving "a Judicial Tenure Commission order recommending discipline, removal, retirement, or suspension." MCR 7.303(A). In enacting § 479(2), the Legislature neither granted the Supreme Court jurisdiction nor withheld jurisdiction. *In re Mfr's Freight Forwarding Co,* 294 Mich at 69. Subsection 479(2) simply requires that an aggrieved person file a legal challenge to the sufficiency of an initiative petition in the Supreme Court. Nothing in § 479(2) requires the Supreme Court to exercise its jurisdiction; instead, it merely directs persons where to file legal challenges.
>
> Even though the Legislature may direct litigants to make their initial filings in the Supreme Court, there is, of course, no guarantee that the Supreme Court will actually take jurisdiction of that legal challenge.

> The Court retains its authority to direct or remand a complaint for writ of mandamus to the Michigan Court of Appeals for an initial decision, and the Court may well direct a legal challenge filed under section § 479(2) to be refiled in the Court of Appeals. MCR 7.300(B). Accordingly, the first sentence of § 479(2) does not violate article 6, § 4.
>
> It is my opinion, therefore, that the provision in MCL 168.479(2), as amended by 2018 PA 608, requiring an aggrieved person to file a legal challenge regarding a determination as to the sufficiency of an initiative petition in the Michigan Supreme Court is not unconstitutional under article 6, § 4 of the Michigan Constitution.[4]

Here, CBFM plainly felt aggrieved by the Board's determination that its petition was insufficient, and filed a challenge in the Supreme Court. After the Supreme Court denied relief, CBFM then filed another challenge in the Court of Claims. The only named defendant in the Court of Claims action was the Board. CBFM's complaint expressly alleged that the Board has determined that CBFM's petition was insufficient. (Appendix H, Complaint, p 5, ¶15). The relief requested in the complaint included a request for an injunction requiring the Board to canvass its petition in order that it might be found to be sufficient for the 2020 election. (Appendix H, p 14). Therefore, under the plain language of § 479, CBFM's challenge to the Board's determination could only have been filed in the Supreme Court.

This Court, in fact, observed in CBFM's earlier appeal that, if the Board rejected its petition, they "may seek review before the Supreme Court" and cited to § 479. See *Committee to Ban Fracking in Michigan v Secretary of State,*

[4] OAG 7310 is available at https://www.ag.state.mi.us/opinion/datafiles/2010s/op10389.htm.

unpublished opinion per curiam, issued April 2, 2020 (Docket No. 350161). Indeed, that is exactly what CBFM did, and the Supreme Court denied the complaint.[5]

Also, § 479(1) provides that the Board's determination may be reviewed through a complaint for mandamus, "or other appropriate remedy" in the Supreme Court. Thus, CBFM was not limited to only mandamus actions and could have included in its Supreme Court complaint the same claim for declaratory relief it attempted to make in the Court of Claims. And, in fact, CBFM *did* include a request for declaratory relief in its Supreme Court filing—it expressly requested that the Supreme Court "declare MCL 168.472a unconstitutional," which is the same request it made to the Court of Claims. (Appendix F, p 10). The Supreme Court decided not to grant that relief. (Appendix G).

CBFM argues that § 479 merely concerned mandamus claims and did not change the Court of Claims' jurisdiction over declaratory and equitable claims under MCL 600.6419(1)(a). But, as the Court of Claims recognized in its opinion, subsection (1) directs petition proponents to the Supreme Court, "Notwithstanding any other law to the contrary." (Appendix H, p 6). Further, MCL 168.479(2) also expressly states, "If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person must file a legal challenge to the board's determination *in the*

[5] CBFM describes the Supreme Court's order as the Court "declines to rule" on CBFM's complaint. (Appendix G, Complaint, p 5). That is not accurate, and the Supreme Court's order expressly states that CBFM's complaint was considered and relief was denied. (Appendix G). The order further stated that the Board's motion to dismiss was denied as moot. (Appendix G).

supreme court within 7 business days…." As the Court of Claims held, the Legislature has clearly expressed its intent to "funnel all who felt aggrieved by a Board decision with respect to petition validity to one and only one Court: the Supreme Court." (Appendix H, p 6).

CBFM next argues that the Court of Claims' interpretation of §479 would "bar any constitutional violation implicating a Board of State Canvassers decision from being redressed," but that is not correct. (CBFM Brf, p 20.) The avenue of relief for CBFM—or any other party aggrieved by a determination of the Board regarding the insufficiency of an initiative petition—is a challenge filed in the Supreme Court, as provided in § 479. Notably, the Attorney General's opinion also recognized that the Supreme Court had the ability to remand CBFM's complaint for mandamus to the Court of Appeals: "[T]he Court may well direct a legal challenge filed under section § 479(2) to be refiled in the Court of Appeals." (Appendix K, pp 48-49). That the Supreme Court did not elect to do so in this case does not mean that CBFM had no avenue for relief, or that any petition requirements would be "insulated" from a challenge, but rather that the Supreme Court considered CBFM's complaint in this case and denied relief. CBFM may not like the Supreme Court's decision, but that does not negate MCL 168.479's express limitation on how and where claims such as this are to be filed.[6]

[6] Indeed, CBFM could have filed a motion for rehearing under MCR 7.311(F) in the Supreme Court.

Conversely, CBFM makes no attempt to explain what purpose it believes § 479 serves if CBFM—or anyone else aggrieved by a Board determination on petition validity—could still file nearly-identical challenge in the Court of Claims. The apparent purpose of § 479—i.e. rapid determination of challenges to Board determinations—would be utterly defeated by such "second chances," which themselves would then be subject to appeals both in this Court and then back to the Supreme Court.

Instead, the plain language of MCL 168.479 is clear—any challenge to the Board of State Canvassers' determination on an initiative petition must be filed in the Supreme Court. The Court of Claims correctly recognized that it lacked jurisdiction to hear CBFM's challenge to the Board of State Canvassers' determination under MCL 168.479, and properly dismissed CBFM's complaint under MCR 2.116(C)(4) and 2.116(I)(1).

II. CBFM's second challenge to the Board's determination should be precluded.

A. Issue Preservation

The Board of State Canvassers raised this argument in its response to CBFM's motion for TRO or preliminary injunction. The Court of Claims did not rule on the Board's argument, but it presents an alternative ground for upholding the Court of Claims' dismissal of CBFM's complaint.

B. Standard of Review

This Court reviews the applicability of the doctrine of res judicata *de novo*. *Stoudemire v Stoudemire*, 248 Mich App 325, 332 (2001).

C. Analysis

Res judicata, or "claim preclusion," precludes relitigating a claim that is predicated on the same underlying transaction as a claim litigated in a prior case. *Duncan v Michigan*, 300 Mich App 176, 194 (2013). The doctrine of res judicata was created in order to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380 (1999). Res judicata operates to bar a second action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586 (1999). Res judicata is broadly applied in Michigan, barring not only claims already litigated, but also every claim arising from the same transaction that could have been brought by exercising reasonable diligence. *Dart*, 460 Mich at 586. The burden of establishing res judicata is upon the party asserting that doctrine. *Baraga Co v State Tax Comm*, 466 Mich 264, 269 (2002).

In *Hoffman v Silverthorn*, the Michigan Supreme Court addressed whether mandamus proceedings can have res judicata effect. 137 Mich 60, 64 (1904). There, the plaintiff had previously initiated a mandamus proceeding relating to a property transaction in the Supreme Court, which complaint was denied "without any written opinion being filed." *Id*. at 63-64. The same plaintiff thereafter filed an action for ejectment as to the property and prevailed in the trial court. *Id*. at 62.

The defendants appealed, and argued, among other things, that the mandamus proceeding was res judicata. *Id.* at 64.

The Court in *Hoffman* observed that "[i]f the decision in the mandamus proceedings was made upon the merits, we think that decision would be decisive between the parties to that proceeding and their privies." *Id.* (citation omitted). The Court continued, however, that "[i]t does not follow, because the mandamus was denied, that the court passed upon the merits of plaintiff's application." *Id.* The Court further explained:

> That mandamus may have been denied because no case was made that appealed to the discretionary power of the court, because relator had a manifest legal remedy of which he could not be deprived, or because mandamus was not the proper remedy. If the mandamus was denied for either of these reasons, no authority need be cited to the proposition that that decision was not res judicata. Though the members of this cour[t] might ascertain by consulting their own recollections the precise ground upon which that decision proceeded, it is obvious to the slightest reflection that such a course cannot be adopted. [*Id.*]

Significantly, the *Hoffman* Court noted that "[t]here are authorities which hold that when there are several issues presented, and a general judgment rendered, it will be presumed that all issues were decided in favor of the prevailing party." *Id.* at 65 (citations omitted). But the Court continued, "the better authority, in our judgment, is opposed to this doctrine, and casts upon the party asserting that such a judgment determined a particular issue the burden of proving it." *Id.* (citations omitted). The Court then concluded that "there was no evidence before the lower court tending to prove upon what ground the decision was made," and "that court correctly decided that the mandamus proceedings were not res judicata." *Id.*

Hoffman has not been overruled or called into question with respect to its holding that a denial of mandamus relief without any written opinion is not res judicata. Therefore, this Court may be bound to adhere to its holding. However, the circumstances presented here—where a party files a second complaint within a week of the Supreme Court's denial of mandamus—suggest that the *Hoffman* decision should be reconsidered. This is exactly the kind of vexatious and multiplicitous litigation that res judicata is intended to prevent, and it almost certainly would apply but for a paragraph in an opinion from more than a century ago. In this case, CBFM seeks injunctive relief based upon its claim that MCL 168.472a is unconstitutional under Const 1963, art 2, §9. But CBFM has already litigated that exact question before the Michigan Supreme Court—it was the core of CBFM's complaint for mandamus.[7] The Supreme Court "considered" that complaint and denied it, concluding that it was not persuaded that relief should be granted.

CBFM then sought to have the Court of Claims enter a decision that would necessarily be inconsistent with the Michigan Supreme Court's denial of mandamus. If—as the Supreme Court concluded—there was no clear legal duty for the Board of State Canvassers to accept CBFM's stale signatures based on CBFM's claim that MCL 168.472a was unconstitutional, how could the Court of Claims (or, for that matter, this Court) make a determination that the same statute is

[7] CBFM's mandamus complaint—like this action—was also brought against the Board of State Canvassers.

unconstitutional where—if it were unconstitutional—there would have been a legal duty to accept the signatures? What is the merit of having the Michigan Supreme Court review and deny a mandamus complaint, only to have the same issue raised again in a lower court a week later with another round of "emergency" briefing? This process wastes the courts' time, the parties' resources, and does incredible violence to the finality of the courts' judgments. It should not be allowed, and CBFM's attempt at a second bite at the apple should be barred by res judicata.

III. Even if the Court of Claims had jurisdiction to hear CBFM's second challenge to the Board's determination, CBFM would still not have been entitled to a TRO or preliminary injunction because they have not demonstrated a likelihood of success on the merits.

A. Issue Preservation

In their motion and response, CBFM and the Board each argued their respective positions on whether a TRO or preliminary injunction should be issued. The Court of Claims did not rule on the likelihood of success after determining that it lacked jurisdiction to decide CBFM's challenge, and it dismissed CBFM's motion for TRO or preliminary injunction as moot. While the Court of Claims did not reach the substance of CBFM's motion, it is an alternative basis for upholding the Court of Claims' denial of CBFM's motion for TRO or preliminary injunction.

B. Standard of Review

The grant or denial of a preliminary injunction is within the sound discretion of the trial court, and this Court will not reverse that decision absent an abuse of that discretion. *Davis v City of Detroit Fin Review Team,* 296 Mich App 568, 612-613 (2012). An abuse of discretion exists when the decision is outside the range of

principled outcomes. *Id.* The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity jurisdiction and the evidence in the case. *Id.* An abuse of discretion may arise from the trial court's misunderstanding of controlling legal principles. *Id.* A question of statutory interpretation is a question of law that this Court reviews de novo. *Id.* This Court reviews the facts on which the tried court relied in exercising its discretion for clear error.

C. Analysis

A preliminary injunction is extraordinary relief and "should issue only in extraordinary circumstances." *Mich State Emps Ass'n v Dep't of Mental Health,* 421 Mich 152, 157, 158 (1984); *Mich Coal of State Emp Unions v Civil Serv Comm'n,* 465 Mich 212, 226 n11 (2001). The Michigan Supreme Court has held that, in order to obtain a preliminary injunction, plaintiffs must prove that: (1) they are likely to prevail on the merits; (2) they will be irreparably harmed if an injunction is not issued; (3) the harm to plaintiffs absent an injunction outweighs the harm that an injunction would cause the Defendant; and (4) there will be no harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34 (2008); *MSEA v Dep't of Mental Health*, 421 Mich 152, 157-158 (1984). When seeking injunctive relief, plaintiffs have the burden of proof on each of these factors. *Detroit Fire Fighters Ass'n*, 482 Mich at 34; MCR 3.310(A)(4).

Here, CBFM failed to demonstrate a likelihood of success on the merits. Specifically, CBFM's challenge to the Board's determination is not likely to succeed because MCL 168.472a is constitutional.

1. Statutes are presumed to be constitutional

When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent. Further, when considering a claim that a statute is unconstitutional . . . the wisdom of the legislation" is not part of the inquiry. *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003) (citations omitted). "[I]t is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution" that the statute's validity will not be sustained. *Phillips v Mirac, Inc,* 470 Mich 415, 423 (2004) (quotation marks and citations omitted).

2. Self-executing constitutional provisions may be supplemented

A constitutional provision is deemed self-executing, "if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced[.]" *Wolverine Golf Club v Hare*, 24 Mich App 711, 725-726 (1970), aff'd sub nom *Wolverine Golf Club*, 384 Mich 461 (1971) (quotation marks and citations omitted). "Whether a constitutional provision is self-executing is largely determined by whether legislation is a necessary prerequisite to the operation of the provision." *Id.* at 725. But even self-executing constitutional provisions can be supplemented through legislation. "It is well-recognized law that a legislature may not impose additional obligations on a self-executing constitutional provision." *Durant v Dep't of Educ*, 186 Mich App 83, 98 (1990), citing *Wolverine Golf Club,* 384 Mich at 466. See also *League of Women Votersv*

Secretary of State, 2020 WL 423319 (Mich App, January 27, 2020) (analyzing constitutionality of several election statutes). "However, this does not mean that a legislature may not enact legislation that would supplement such a provision":

> "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon." [*Durant*, 186 Mich App at 98, quoting *Hamilton v Sec of State,* 227 Mich 111, 125 (1924), quoting *State, ex rel Caldwell v County Judge,* 22 Okla 712, 98 P 964 (1908).]

Notably, article 2, § 4 provides that "except as otherwise provided" in the Constitution "the legislature shall enact laws to regulate *the time, place and manner of all . . . elections*[.]" Const 1963, art 2, § 4(2) (emphasis added).]

Thus, regardless of whether article 2, § 9 is self-executing, the Legislature may enact supplemental legislation so long as it does not unduly burden or curtail the rights provided by the Constitution.

3. Section 472a does not unduly burden or curtail the right of initiative.

CBFM's central argument is that MCL 168.472a's exclusion of signatures collected more than 180 days prior to the filing of the petition is unconstitutional. Their argument relies almost entirely upon their interpretation of *Wolverine Golf Club v Secretary of State*, 24 Mich App 711 (1970), aff'd sub nom *Wolverine Golf Club*, 384 Mich 461 (1971), which struck down a requirement that initiative petitions must be filed at least 10 days before the start of the legislative session. 384 Mich at 466-467. There, the Court held that article 2, § 9 was self-executing, and that the Legislature lacked the power to impose additional restrictions on the exercise of the right of initiative. *Wolverine*, 384 Mich at 466. But the Court also

stated that article 2, § 9's provision that, "'the legislature shall implement the provisions of this section'" was "a directive to the legislature to formulate *the process by which initiative petitioned legislation shall reach the legislature or the electorate*." *Id.* (emphasis added).

CBFM's reliance on *Wolverine* is misplaced. The issue in that case was the legislative imposition of an additional limitation on when the power of initiative could be exercised that was not contained in the Constitution itself. The SupremeCourt in *Wolverine* interpreted § 9's implementation clause, which states "the legislature shall implement the provisions of this section" as a directive. *Id.* More specifically, the Court held that the implementation clause was, "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Id.* After noting that § 9 was self-executing, the Court quoted, with approval, the earlier Court of Appeals decision where it stated, "[t]he only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any *undue burdens* placed thereon." *Id.*, quoting *Wolverine*, 24 Mich App at 725 (emphasis added) (internal quotations omitted).

Here, unlike the statute at issue in *Wolverine,* § 472a contains no restriction on when CBFM could file their initiative petition. Neither does Section 472a limit the subject matter of an initiative or restrict the ability of circulators to engage the electorate in any meaningful way. Instead, § 472a addresses the validity of petition

signatures—a subject that easily fits within the description of "the process by which the initiative petition legislation shall reach the legislature or the electorate." *Wolverine*, 384 Mich at 466. It is functionally no different than a requirement that petition signers be registered voters. So, the validity of signatures is within the scope of the Legislature's constitutional authority under article 2, § 9 to "implement the provisions of this section."

Moreover, the 180-day expiration period for signature validity has been previously upheld by this Court in *Consumers Power Co v Attorney General*, 426 Mich 1 (1986). In that case, the Supreme Court overturned an Attorney General Opinion declaring unconstitutional MCL 168.472a's "rebuttable presumption" that petition signatures more than 180 days old were stale and void. *Consumers Power*, 426 Mich at 7-9. That Attorney General Opinion reached the exact conclusion CBFM urges here—that the 180-day period was an unconstitutional limitation on article 2, § 9.

But the Supreme Court rejected that conclusion. The Court observed that the statute did not set a 180-day time limit for obtaining signatures—only that signatures on a petition more than 180 days old were presumed invalid. *Consumers Power*, 426 Mich at 7-8. The Supreme Court reasoned that the 180-day period furthered the constitutional requirement that only registered electors may engage in the petition processes under article 2, § 9:

> So too in the present situation, the Legislature has followed the dictates of the constitution in promulgating MCL 168.472a [ ]. The statute sets forth a requirement for the signing and circulating of petitions, that is, that a signature which is affixed to a petition more

> than 180 days before that petition is filed with the Secretary of State is rebuttably presumed to be stale and void. The *purpose of the statute is to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment.* [*Consumers Power,* 426 Mich at 7-8 (emphasis added).]

The Supreme Court's concern is especially justified where, as here, the petition in question circulated for almost four years. As noted above, by November 2018, CBFM's petition was supported by only a fraction of the number of timely acquired signatures of registered voters. This is to say nothing of the risk that electors may justifiably be confused about whether they have previously signed the petition.

CBFM attempts to distinguish *Consumers Power* as addressing constitutional amendments under art 12, § 2 instead of initiative proposals under article 2, § 9. But article 2, § 9 includes a similar requirement that only registered electors may sign petitions:

> *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. [Const 1963, art 2, § 9 (emphasis added).]

The Supreme Court has thus recognized that a similar 180-day signature expiration period is a lawful fulfillment of a constitutional directive that only registered electors may participate in the process. The same conclusion should apply in this case to a similar constitutional requirement that only registered electors may initiate legislation.

Just like the statute in *Consumers Power*, the legislative enactment of § 472a is presumed to be constitutional. *Consumers Power,* 426 Mich at 9, citing *Hall v*

Calhoun Co Bd of Supervisors, 373 Mich 642 (1964). A court will not declare a statute unconstitutional unless it is plain that it violates some provision of the constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter. *Id.,* citing *Oakland Co Taxpayers' League v Oakland Co Supervisors*, 355 Mich 305, 323 (1959). In this case, the statute does not violate any provision of the Constitution, and instead furthers the constitutional directive that petition signers must be registered electors.

Significantly, the Supreme Court stated in a footnote that it declined to address whether the 180-day period burdened the right of initiative because the plaintiffs had failed to establish such a burden:

> While it might have been shown that 180 days is insufficient time in which to collect a required number of valid signatures, that showing was not made in circuit court. The record contains no evidence that the 180-day limitation does or does not impose an unreasonable burden on the people's right to propose constitutional amendments. Accordingly, the trial court [judge] correctly concluded, on the record before him, that he could not say as a matter of law that the statute's presumption of validity had been overcome. [*Consumers Power*, 426 Mich at 10, n 3 (internal citation omitted).]

CBFM has similarly failed to demonstrate that the 180-day expiration period imposes an unreasonable burden on the ability of the people to mount an initiative campaign. To the contrary, there is a record of exactly the opposite: there have been 16 initiatives successfully proposed to the electorate or adopted by the Legislature since the *Consumers Power* decision in 1986—including one in 2018 after § 472a was amended. (Exhibit J, Initiatives and Referendums, p 9-10). A successful effort may require more organization or popular support among the

electorate, but it is clearly possible to gather a sufficient number of signatures within the 180-day window. See, e.g., *American Constitutional Law Foundation, Inc v Meyer*, 120 F3d 1092, 1099 (CA 10, 1997), aff'd 525 US 182 (1999) ("Although some measures might fare better under a longer or indeterminate period, the current deadline [of six months] is not a significant burden on the ability of organized proponents to place a measure on the ballot.")

Finally, CBFM argues that the removal of the word "stale" from the statute when it was amended in 2016 somehow demonstrates a legislative intent to heighten the burden on initiative proposals, or that the removal of the reference to "rebuttable presumption" raises the burden on petition proponents. (Complaint, p 9, ¶23-26.) This argument is also misplaced. The statute does not impose an "absolute time limit." Instead, petitions may be circulated at any time, and for any duration of time. The statute instead merely addresses the validity of *signatures* after a certain period of time. CBFM can—and, indeed, has—circulate its petition for as long as they wish. But CBFM offers no authority for a constitutional right to have signatures assumed to be valid for years after signing.

CBFM's claims reduce to a general complaint that gathering signatures for an initiative petition is difficult. But—as the Supreme Court observed in *Woodland v. Michigan Citizens Lobby*, 423 Mich 188, 217 (1985)—the initiative process was not intended to be easy to fulfill. During the Constitutional Convention, an effort to reduce the signature requirement from eight to five percent was strongly resisted and defeated, as succinctly expressed by delegate Kuhn:

> It's tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That's what we have a senate and house of representatives for.

Id., quoting 2 Official Record, Constitutional Convention 1961, p 2394. As this Court explained in *Woodland*, the initiative process is intended as a last resort for the people when the Legislature fails to act on issues that so inflame the citizenry on a grass-roots level that there is no need to endeavor to reach disinterested an unknowing citizens. 243 Mich at 218. That CBFM experienced any difficulty gathering a sufficient number of signatures thus suggests that there was not the intended level of interest to justify the invocation of the initiative process.

The 180-day signature expiration period has been upheld by the Court in a similar context and is consistent with other constitutional directives. CBFM has failed to demonstrate that the 180-day period is an unreasonable burden on the ability of the people to engage in the initiative process. So, CBFM cannot establish a likelihood of success on the merits, and so they were not entitled to a TRO or a preliminary injunction. It is thus unnecessary to address the other preliminary injunction factors.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Board of State Canvassers respectfully requests that this Honorable Court enter an order AFFIRMING the Court of Claims' opinion and order dismissing the complaint against them.

Respectfully submitted,

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Dated: September 2, 2020