STATE OF MICHIGAN
COURT OF APPEALS

COMMITTEE TO BAN FRACKING
IN MICHIGAN,

Plaintiff-Appellant,

v

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

BOARD OF STATE CANVASSERS,

Defendant-Appellee

The appeal involves a ruling that a provision of the constitution, a statute, rule or regulation, or other state governmental action is invalid

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Ellis Boal (P10913)
Counsel for Plaintiff
9330 Woods Rd.
Charlevoix, MI 49720
231.547.2626
ellisboal@voyager.net

Matthew Erard (P81091)
LAW OFFICE OF
MATTHEW S. ERARD, PLLC
Counsel for Plaintiff
400 Bagley St #939
Detroit, MI 48226
248.765.1605
mserard@gmail.com

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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I. INTRODUCTION

On August 26, 2020, the time for Defendant to file a brief expired and this became a petition calendar case with priority.[1] On August 28 Defendant moved untimely for a 28-day extension citing unspecific "press of other business." Plaintiff opposed it later the same day, citing Court rules and protocols, as well as Defendant's history of "unlawful" dilatory actions (17 months + 39 days) leading to a time-crunch before the November 3, 2020, election. Then without the Court's permission Defendant filed a brief on September 2, creating another week of delay.

Plaintiff has moved to strike the brief, but is in the impossible position – should the Court allow the brief anyway – of having to reply to it.

II. MCL 168.479 DID NOT RESTRICT THE COURT OF CLAIMS' JURISDICTION.

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

1 MCR 7.213(C)(4).

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

Contrary to Defendant's further suggestion that Plaintiff could have sought a declaratory judgment under 479 as an "other appropriate remedy," the Supreme Court does not have original jurisdiction to issue declaratory relief and the legislature cannot extend the Supreme Court's jurisdiction by statute.[2] Upon having successfully contended that no challenge to MCL 168.472a could be ripe prior to that statute's direct enforcement against the plaintiff, Defendant's present theory as to post-enforcement jurisdictional exclusion would operate to shield 472a from ever facing a declaratory judgment challenge by any litigant in any court. Any party is entitled to judicial review of a statute claimed to be unconstitutional.[3]

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2 *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 68-69 (1940).

3 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, Commentaries *23, *109): "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded . . . [I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

Defendant further asserts that 479's purpose of ensuring rapid judicial determination of challenges to Board determinations would be defeated if such challenges could subsequently be brought in the Court of Claims. But that purpose clearly assumes and apparently seeks to compel that the Supreme Court will take jurisdiction to resolve them. Where, as here, the Supreme Court exercises its own constitutional prerogative by declining to rule on such claims, that purpose is already defeated. Having not seen fit to try to confer exclusive jurisdiction, the legislature left such claims to be governed by the rules of preclusion as applicable.

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

Though Defendant may wish otherwise, Michigan case law has long followed the "generally adopted [] rule that a denial of a writ of mandamus by a supervisory court, without opinion, is not entitled to preclusive effect."[4] As outlined by our state's Supreme Court:

> It does not follow, because the mandamus was denied, that the court passed upon the merits of plaintiff's application. 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 court might ascertain by consulting their own recollections the precise ground upon which that decision proceeded, it is obvious to the

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

> slightest reflection that such a course cannot be adopted. We are bound to proceed, in determining this case, on legal grounds.[5]

Despite acknowledging *Hoffman*'s binding status, Defendant urges the Court to simply presume that the Supreme Court found no clear legal duty to disregard 472a and must have therefore deemed it constitutional. The sophistry of this argument is starkly exposed by Defendant's reversal of its own previously taken position. Having argued in its response to the mandamus action that any finding of invalidity to the statute could not retroactively establish a clear legal duty at the time of issuing its insufficiency determination, Defendant cannot now sincerely contend that an order denying mandamus implies a constitutional upholding.

In contrast to a declaratory judgment, the extraordinary remedy of mandamus exists only as a "writ of grace and not a writ of right."[6] Moreover, not only must the party seeking such relief establish that the act requested is a clear legal duty of a ministerial nature, but also that "no other remedy exists, legal or equitable, that might achieve the same result."[7]

Defendant is well familiar with the fact that such divergent standards for declaratory and mandamus relief may lead to very different dispositions of cases involving the same legal challenges, given its prior occurrence within the very span

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5 *Hoffman v Silverhorn*, 137 Mich 60, 64 (1904).

6 *Teasel v Dep't of Mental Health*, 419 Mich 390, 415 n 13 (1984).

7 *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248 (2016).

of preceding litigation concerning Plaintiff's statutory initiative petition. Having brought an action for mandamus challenging the Secretary of State's rejection of Plaintiff's petition filing, which the Court of Appeals then denied without opinion,[8] Plaintiff then brought a declaratory judgment action asserting the very same legal arguments. In the latter case, the Court of Appeals granted Plaintiff full relief,[9] including Hon. Judge Shapiro who sat on both panels.

Finally, given that the Supreme Court's jurisdiction over Plaintiff's mandamus petition was no less discretionary than any application for leave to appeal, and further that the Court expressly declined to pass on Defendant's motion to dismiss as moot, it can hardly be assumed that the Supreme Court's denial was based on any factor other than Plaintiff's petition's failure to be among the very few filings selected for the Court's review. As observed by the very Attorney General opinion that Defendant cites and exhibits, "Nothing in § 479(2) requires the Supreme Court to exercise its jurisdiction … [T]here is ... no guarantee that the Supreme Court will actually take jurisdiction of that legal challenge."[10]

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8 *Comm to Ban Fracking in Mich v Secretary of State*, unpublished order of the Court of Appeals, issued November 15, 2018 (Docket No. 346280).

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

10 OAG, 2019- 2020, No. 7310 (May 22, 2019), pp 48-49, Exhibit K to Defendant's Response brief.

IV. MCL 168.472A IS UNCONSTITUTIONAL AS APPLIED TO STATUTORY INITIATIVE PETITIONS UNDER CONST 1963, ART 2, § 9.

In spite of the Supreme Court's holding that the legislature may not impose additional obligations on the constitutional process for invoking the legislative power reserved under art 2, § 9,[11] Defendant proposes that the restriction imposed by MCL 168.472a is merely supplemental legislation enacted under the legislature's general authority to "regulate the time, place and manner of all nominations and elections" under Const 1963, art 2 § 4(2).

Significantly, MCL 168.472a obstructs initiatives from being invoked for legislative adoption prior to any potential stage of submission to the electorate. But even if the time, place, and manner clause of art 2, § 4(2) could be read broadly enough to extend to the initiative petition process, it is directly constrained by the preceding clause stating, "Except as otherwise provided in this constitution . . . ." In establishing the statutory initiative power as both a reservation of legislative authority and a self-executing constitutional procedure, the framers of art 2, § 9 have so "otherwise provided."

Moreover, far from having the "object to further the exercise of constitutional right and make it more available," as the basic condition for enacting

11 *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971).

valid legislation supplemental to a self-executing constitutional provision,[12] 472a operates only to "curtail the rights reserved"[13] and redefine the constitutional standard for a statutory initiative's invocation. Judge Lesinski wrote in *Wolverine Golf Club*, "*any* deadline will act as a restraint on a constitutional right...."[14]

Although Defendant relies on the legislative purpose attributed to 472a's former iteration in *Consumers Power Co v Attorney General*,[15] dealing solely with its application to initiatives under Const 1963, art 12 § 2, that decision further forecloses the argument that 472a could be validly enacted as mere supplemental legislation under art 2, § 4 or the legislature's plenary power. There, even despite the statute having then imposed only a rebuttable presumption of staleness to signatures collected over 180 days before filing, the Supreme Court found that, but for the distinct language of art 12, § 2 summoning legislative aid as to the manner of circulation and signing, the legislature would not have constitutional "authorization" to impose such a regulation on constitutional amendatory petition signatures and the Court's holding in *Hamilton v Secretary State*[16] would control.

As an alternative source of authorization to art 2, § 4, Defendant points to art

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

13 *Id*.

14 24 Mich App at 735 (emphasis added).

15 426 Mich 1 (1986).

16 221 Mich 541, 544 (1923).

2, § 9's implementation clause, despite its extremely narrow judicial construction as simply "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Wolverine Golf Club*.[17] Conversely, by serving no function other than to prevent petitioned legislation from reaching the legislature or electorate, 472a is tailored only to defeat that clause's directive. "The spirit of the Constitution is not met if the rights it grants are unnecessarily impaired under the guise of implementation."[18]

Defendant further proposes that permitting longer periods of circulation risks leading voters to become confused about whether they have already signed a petition. To the contrary, it is the procedure's subjection to 472a that actually foments the sort of voter confusion that Defendant theorizes, due to the fact that re-signing the petition and having one's original signature stricken is the only potential means to avoid having one's signature rendered uncountable after the passage of 180 days.[19] Naturally, this leads to frequent confusion among voters

17 384 Mich at 466.

18 *League of Women Voters v Secretary of State*, __ Mich App __, __ (2020), 2020 Mich. App. LEXIS 709 at *27, quoting *Wolverine Golf Club*, 24 Mich App at 735.

19 At page 6 Defendant's brief contends the Committee's petition sheets included "duplicate signatures" of its chairperson and counsel, which the Committee crossed out before filing. Crossing out signatures is part of any committee's pre-filing vetting process. Cross-outs done according to Defendant's procedure are not "duplicates." See "Sponsoring a Statewide Initiative, Referendum, or Constitutional Amendment Petition" (June 11, 2019), p 9, available at < https://perma.cc/4NW2-4UHM >.

over not merely whether they have signed the petition, but just when they did so.

Finally, Defendant disingenuously concludes that Plaintiff's claims "reduce to a general complaint that gathering signatures for an initiative petition is difficult."[20] Defendant then goes on to cite the Supreme Court's discussion in *Woodland v Mich Citizens Lobby*[21] regarding convention's desire to make the initiative process tough, rather than easy, during a debate over potentially reducing the signature threshold from eight to five percent of the last gubernatorial vote.

Far from raising any complaint as to the difficulty of the constitutional procedure under 2, § 9, Plaintiff and its nearly 1,000 volunteers have already surmounted the very burdens that those convention delegates saw fit to ensure the appropriate level of hurdle. To the extent that Plaintiff's challenge implicates the severity of burdens at all, it is only with respect to the legislature having exceeded its authority by acting to statutorily heighten such burdens beyond the level set forth by the constitution. That the constitution's framers debated the appropriate threshold and framed the present standard to be sufficiently tough only underscores the fact that they did not intend for the legislature to modify or raise such barriers beyond the levels constitutionally prescribed.

V. REQUEST FOR RELIEF

20 Defendant's Response brief at 25.

21 423 Mich 188, 217 (1985).

Wherefore, the Committee respectfully requests that this Honorable Court:

1. Reverse the Court of Claims' dismissal and denial of its motion for preliminary injunction;
2. Hold MCL 168.472a unconstitutional as applied to statutory initiatives under Const 1963, art 2 § 9;
3. Order the Canvassers to certify the Committee's petition as sufficient based on the Bureau of Elections' tabulation confirming it substantially exceeds the requisite threshold of 252,523 signatures; and
4. Exercise its equitable power[22] to limit or dispense with the 40-day period for legislative review, as well as the September 4 deadline[23] for election officials to assign numerical designation, approve ballot wording for statewide proposals, and certify the ballot to county clerks.

Respectfully submitted,

/s/ Matthew Erard
Matthew Erard (P81091)
LAW OFFICE OF
MATTHEW S. ERARD, PLLC
Counsel for Plaintiff
400 Bagley St #939
Detroit, MI 48226
248.765.1605
mserard@gmail.com

/s/ Ellis Boal
Ellis Boal (P10913)
Counsel for Plaintiff
9330 Woods Road
Charlevoix, MI 49720
231.547.2626
ellisboal@voyager.net

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22 *Ferency v Secretary of State*, 409 Mich 569, 598-602 (1980).

23 MCL 168.474a, 168.480, 168.648.