STATE OF MICHIGAN
COURT OF APPEALS

MAMIE GRAZIANO, GEORGE LOUIS CORSETTI, JIM WEST, and STEVE BABSON,

Plaintiffs-Appellants,

v

JONATHAN BRATER, in his official capacity as Director of Elections and Secretary of the Board of State Canvassers,

Defendant-Appellee.

COA No. 358913

Court of Claims
LC No. 21-000108-MZ

This case involves a ruling that a provision of the constitution, a statute, rule or regulation, or other state government action is invalid.

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BRIEF OF PLAINTIFFS-APPELLANTS
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants filed this action in the Court of Claims on May 19, 2021. On September 22, 2021, the Court of Claims dismissed the Complaint under MCR 2.116(C)(4) and (C)(8). This appeal timely followed on October 13, 2021. This Court has jurisdiction under MCR 7.203(A)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Does MCL 168.479(1) operate to limit subject matter jurisdiction more broadly than 479(2)?

   The Trial Court Says Yes

   Appellants Say No

2. Does Appellants' constitutional challenge to MCL 168.472a fall within the scope of MCL 168.479(2) when their injury arises from the disqualification of their own signatures, rather than the Board of State Canvassers' determination regarding the overall sufficiency of the petition they signed?

   The Trial Court Says Yes

   Appellants Say No

3. Does MCL 168.479(2) contravene Const 1963, art 1, § 17, art 3, § 2, and art 6, §§ 4, 5 and 28?

   The Trial Court Says No as to Const 1963, art 1, § 17, art 3, § 2, and art 6, §§ 4, 5.

   The Trial Court Did Not Answer as to Const 1963, art 6, § 28.

   Appellants Say: Yes

4. Is MCL 168.472a unconstitutional as applied to statutory initiative petitions under Const 1963, art 2, § 9?

   The Trial Court Did Not Answer.

   Appellants Say Yes.

INTRODUCTION

Plaintiffs-Appellants Mamie Graziano, George Louis Corsetti, Jim West, and Steve Babson ("Plaintiffs") are registered Michigan electors who signed a statutory initiative petition under Const 1963, art 2, § 9, but whose signatures were barred from being counted due to MCL 168.472a's ban on signatures dated over 180 days before a petition's filing date. They have consequently brought this action challenging the constitutional validity of MCL 168.472a as applied to signatures on statutory initiative petitions.

The Court of Claims dismissed Plaintiffs' Complaint under MCR 2.116(C)(4) and (8), finding that MCL 168.479 barred subject matter jurisdiction over their challenge to MCL 168.472a. The Court of Claims also rejected Plaintiffs' challenge to MCL 168.479's validity.

Plaintiffs argue that MCL 168.479 is inapplicable to their claim because their challenge is grounded on MCL 168.472a's direct application to bar the counting of their own petition signatures. Plaintiffs additionally argue that even if the scope of MCL 168.479 could applicably be found to extend to the subject matter of their challenge to 472a, the former statute is also unconstitutional on the basis of its non-severable provisions contravening the separation of powers under Const 1963, art 3, § 2, as well as the Supreme Court's exclusively vested authority under art 6, §§ 4-5. Further, they contend that, if applied to their challenge to MCL 168.472a, 479(2) would infringe

procedural due process protections under Const 1963, art 1, § 17 and the right to judicial review of agency decisions under art 6, § 28.

Finally, Plaintiffs argue that MCL 168.472a's prohibition on counting statutory initiative petition signatures older than 180 days constitutes a direct curtailment of a self-executing constitutional provision, which the legislature lacks constitutional authority to impose, and that the statute impairs the right of initiative with no justifiable basis.

Although the trial court did not reach the merits of Plaintiffs' challenge to MCL 168.472a, the record contains all necessary facts for resolving this challenge and the merits were fully briefed in the trial court. Therefore, Plaintiffs ask this Court to exercise its discretion to resolve the underlying question of MCL 168.472a's validity as applied to initiatives under Const 1963 art 2, § 9. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183 (1994).

STATEMENT OF FACTS

The statutory initiative petition containing Plaintiffs' signatures was filed with Defendant-Appellee's ("Defendant") Bureau of Elections office on November 5, 2018. (Compl. ¶ 9). On June 3, 2020, the Bureau of Elections issued a Preliminary Staff Report on the petition's signatures for the Board of State Canvassers, discounting the signatures of each of the Plaintiffs and other similarly situated electors pursuant to MCL 168.472a and excluding

them from the estimated tally of "valid" signatures. *Id*. ¶ 10. The Board of State Canvassers declared the containing petition insufficient on June 8, 2020. *Id*.

Upon unsuccessfully seeking Supreme Court review of the Board of State Canvassers' declaration, the petition's sponsoring ballot question committee brought an action for declaratory and injunctive relief in the Court of Claims seeking to challenge the Board's finding of insufficiency to the petition. *Id*. ¶ 11. The Court of Claims then dismissed the committee's complaint on the ground that MCL 168.479(2) divested it of subject matter jurisdiction over the claim.[1] *Id*. ¶ 12. As a result of that jurisdictional finding, neither the decision of the Court of Claims nor the reviewing decision of this Court reached the merits of the committee's constitutional challenge to MCL 168.472a.[2] *Id*.

In contrast to the committee's injury by MCL 168.472a, Plaintiffs are directly and personally injured by the statute's disenfranchisement of their right as electors to have their own signatures counted and accorded legal

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[1] *Comm to Ban Fracking in Mich v Bd of State Canvassers*, unpublished opinion of the Court of Claims, issued July 20, 2020 (Docket No. 20-000125-MM), aff'd ___ Mich App ___ (2021) (Docket No. 354270); 2021 Mich. App. LEXIS 471.

[2] The Court of Appeals dissent did reach the merits of the constitutional challenge and concluded that MCL 168.472a is unconstitutional. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, ___ Mich App ___ (2021) (Docket No. 354270); 2021 Mich. App. LEXIS 471 (SHAPIRO, J., dissenting).

effect, irrespectively of any determination reached in regard to the petition's overall sufficiency. *Id*. ¶ 13. Accordingly, because Plaintiffs' injury is both distinct from and prior in accrual to the Board of State Canvassers' determination of insufficiency to the petition, their claim is not within the narrow scope of MCL 168.479(2). *Id*. ¶ 14.

As originally enacted in 1973, MCL 168.472a provided:

> 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. [Compl. ¶ 15].

In OAG 1974, No. 4813, the Attorney General opined that the 180-day signature limitation of MCL 168.472a, as then worded in its less restrictive original iteration, was unconstitutional as to both statutory initiative and constitutional amendatory initiative petitions. *Id*. ¶ 16. As to Const 1963, art 2, § 9, governing statutory initiative petitions, the Attorney General opined:

> This provision has been held to be self-executing. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). Although that provision concludes with language to the effect that the legislature should implement the provisions thereof, such language has been given a very limited construction by the Michigan Supreme Court, which held that this provision is merely:
>
> > "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Wolverine Golf Club v Secretary of State*, *supra,* at 466.
>
> I am consequently of the opinion that, as applied to signatures affixed to petitions which initiate legislation pursuant to Const 1963, art 2, § 9, §

> 472a is beyond the legislature's power to implement [and] said section and is therefore unconstitutional and unenforceable.[Compl. ¶ 16].

OAG 4813 was partially overruled twelve years later by *Consumers Power Company v Attorney General*, 426 Mich 1 (1986), but only as applied to constitutional amendatory petitions under Const 1963, art 12, § 2. *Id*. ¶ 17. However, notwithstanding that decision's full reliance on a unique provision of Const 1963, art 12, § 2, to which art 2, § 9 contains no parallel, Defendant's office immediately began applying the statute to signatures on both constitutional amendatory and statutory initiative petitions alike. *Id*.

On June 9, 2016, the legislature enacted 2016 PA 142, which amended MCL 168.472a by replacing the preceding rebuttable presumption of staleness for signatures over 180 days old with a total prohibition of such signatures from being counted. *Id*. ¶ 18. As amended, the statute now provides:

> 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. [*Id*.]

In the Governor's press release regarding his signing of the legislation enacted as 2016 PA 142, the Governor asserted no interest relating to the

registration of petition signers, but rather attributed it the sole purpose of limiting "the issues that make the ballot."[3] *Id.* ¶ 19.

Eight years following the Supreme Court's *Consumers Power* decision, the legislature established the Qualified Voter File (QVF) through its enactment of 1994 PA 441. *Id.* ¶ 20. Use of the QVF is now statutorily required for the process of determining the validity of initiative petition signatures. MCL 168.476(1). The QVF provides for the immediate verifiability of voters' registration status and residence information both at the time of canvassing and on the petition signature's date of signing. *Id.*; MCL 168.509o; 509q.

ARGUMENT

I. PLAINTIFFS' CHALLENGE TO MCL 168.472A IS OUTSIDE THE SCOPE OF MCL 168.479.

Unlike the petition's sponsoring committee, whose only injury by MCL 168.472a arose from that statute's potential effect of reducing its total quantum of petition signatures below the sufficiency threshold, Plaintiffs stand directly injured by the statutory deprivation of their right to have their own signatures counted, regardless of the Board of State Canvassers' determination as to the sufficiency of the petition as a whole. Indeed,

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[3] Office of Governor Rick Snyder, *Gov. Rick Snyder Signs Bill Establishing 180-day Deadline for Petition Signatures on Proposed Legislation and Constitutional Amendments* (published June 7, 2016) <http://michigan.gov/snyder/0,4668,7-277-57577_57657-386394--,00.html>.

Plaintiffs would still suffer the exact same injury from MCL 168.472a if the Board had reached the opposite determination: finding that the petition contained enough signatures dated within 180 days prior to filing to render the petition sufficient.

Thus, Plaintiffs do not bring this action as persons aggrieved by a Board of State Canvassers determination regarding the sufficiency of insufficiency of an initiative petition, but rather as "petition signers possess[ing] a legally protected interest in having their signatures validated, invalidated, empowered, or disregarded according to established law." *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505 (2004).

A. Standard of Review

Whether a trial court has subject matter jurisdiction presents a question of law that this Court reviews de novo. *Reynolds v Robert Hasbany, MD PLLC*, 323 Mich App 426, 431 (2018). This Court also reviews de novo issues of statutory interpretation relating to jurisdiction. *Id*.

B. MCL 168.479(1) Does Not Operate to Limit Subject Matter Jurisdiction More Broadly than 479(2).

Recognizing that Plaintiffs' claim arises outside the purview of 479(2) "to the extent plaintiffs are only challenging the invalidation of their own signatures," the Court of Claims found that it was nonetheless divested of subject matter jurisdiction by the preceding subsection of 479(1). (COC

Opinion and Order at 5). Noting that 479(1) refers to persons aggrieved by "any determination made by the board of state canvassers," without similar limitation to only those regarding the sufficiency or insufficiency of an initiative petition, the court reasoned that "the statute still directs [Plaintiffs] to the Supreme Court, not this Court." *Id*.

Yet, while grounding its conclusion on the potentially broader scope of 479(1), the court ignored the most critical difference in the language of the statute's two subparts. Unlike the mandatory formulation of 479(2), the text of 479(1) is formulated with the permissive 'may,' thus signifying the legislature's intent "to outline a permissive, as opposed to mandatory, action available" to whatever broader class of aggrieved persons it may apply. *Old Kent Bank v Kal Kustom, Inc*, 255 Mich App 524, 532 (2003); see *People v Watkins*, 491 Mich 450, 484 (2012) ("Whatever motivated the Legislature to draft the [provisions] differently, we must give meaning to the permissive term 'may' used by the Legislature.").

Accordingly, in directly construing the statutory provisions at issue, this Court concluded that the permissive formulation of 479(1) "provides that the Michigan Supreme Court may review the issue" and thus "merely serves as an invitation of judicial review to an aggrieved party." *Comm to Ban Fracking in Mich v Bd of State Canvassers*, ___ Mich App ___, ___ (2021) (Docket No. 354270); 2021 Mich. App. LEXIS 471 at *13. Conversely, in construing 479(1)

as a mandatory provision, divesting subject matter jurisdiction beyond the limitation specified by 479(2), the trial court's conclusion is not only wholly inconsistent with this Court's interpretation of the statute, but also with the general canon that courts must avoid an interpretation that would render any part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177 (2012).

Citing over a century of judicial precedent, the Supreme Court has uniformly required that statutes be read with a presumption against the divestiture of jurisdiction: "[I]t is very natural and reasonable to suppose that the Legislature, in so far as they should think it needful to authorize interpretations and the shiftings of jurisdiction, would express themselves with clearness and leave nothing for the play of doubt and uncertainty." *Paley v Coca Cola Co*, 389 Mich 583, 593 (1973). Thus, absent a clear and unambiguous expression of legislative intent to divest jurisdiction otherwise vested, it is an "invariable rule" that courts must "resolve every doubt in favor of retention rather than divestiture of jurisdiction." *Id.* at 591.

Here, the trial court has taken the very opposite approach. Having departed from multiple construction canons and even this Court's binding interpretation to find a divesture of subject matter jurisdiction beyond that expressly provided in the legislative text, the trial court's construction of 479(1) cannot be sustained. Indeed, when the legislature "intends to divest"

subject matter jurisdiction, it "is more than familiar with the wording or language needed to accomplish that intended goal." *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 643 (2018).

C. Subject Matter Jurisdiction Cannot Turn on Speculation Regarding Plaintiffs' Subjective Sentiments.

In reference to Plaintiffs' prayer for relief including a request to enjoin Defendant's Bureau of Elections to issue a new or amended staff report crediting the countability of their petition signatures and others similarly situated, the trial court inferred that Plaintiffs' desire for such further relief indicates their "dissatisfaction with the Board of State Canvassers' decision as to the sufficiency of the petition in general." (COC Opinion and Order at 5). Solely upon that basis, the trial court inferred that Plaintiffs feel aggrieved by the Board of State Canvassers' determination regarding the sufficiency or insufficiency of the petition they signed.

As the Supreme Court has explained, subject matter jurisdiction concerns "the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending." *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333 (2017). Particularly in light of the narrow construction that must be applied as to its scope, MCL 168.479(2) can only reasonably be construed to divest jurisdiction where the Board's determination regarding

the sufficiency or insufficiency of an initiative petition constitutes the nature of the injury by which a person is aggrieved. To holds otherwise would result in an impossibly subjective standard whereby jurisdiction would turn on a litigant's personal sentiments regarding collateral matters.

II. MCL 168.479(2) CONTRAVENES THE SUPREME COURT'S EXCLUSIVE POWERS AND CONSTITUTIONAL DUE PROCESS PROTECTIONS.

MCL 168.479(2) unconstitutionally encroaches on the Supreme Court's exclusive powers under Const 1963, art 6, §§ 4 and 5, as well as the separation of powers under art 3, § 2, by integrally relying upon provisions intended to limit the Supreme Court's constitutionally vested discretion and procedural authority. Further, if applied to divest subject matter jurisdiction over Plaintiffs' challenge to MCL 168.472a, MCL 168.479(2) would contravene the due process protections of Const 1963, arts 1, § 17 and right to judicial review afforded by art 6, § 28.

A. Standard of Review

This Court reviews questions of statutory and constitutional interpretation de novo. *King v Oakland Co Prosecutor*, 303 Mich App 222, 239 (2013).

B. MCL 168.479(2) Infringes the Separation of Powers under Const 1963, Article 3, § 2 and the Supreme Court's Exclusively Vested Authority Under Const 1963, Article 6, §§ 4-5.

Prior to the amending enactment of 2018 PA 608, MCL 168.479 was

interpreted to permit actions for mandamus against the Board of State Canvassers to be filed in either the Supreme Court or the Court of Appeals. See *Citizens Protecting Mich's Constitution v Sec'y of State*, 324 Mich App 561, 583 (2018). Accordingly, because the Supreme Court maintained full discretion over whether to exercise review, such actions were uniformly initiated below.

In adding the new provisions of MCL 168.479(2), the legislature sought to revive MCL 168.479 from its effective dormancy by pairing a seven-day time limitation for filing a legal challenge in the Supreme Court with the requirement of mandatory review and advancement on the Court docket. As stated by the introducing sponsor of the amending legislation, Rep. James Lower, when directly questioned about "forcing the Supreme Court's hand":

> We want to make sure that voters do have these things heard as soon as possible, because if it's going to go on the ballot, and it's going to go before voters, let's get these issues taken care of and in as expedient a manner as we can have possible.[4]

Under the separation of powers provision of Const 1963, art 3, § 2, the powers "exclusively entrusted to the judiciary by the Constitution [ ] may not be . . . interfered with by the other branches of government without

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[4] Mich House of Representatives, Elections and Ethics Committee Hearing (December 12, 2018), available at https://house.mi.gov/SharedVideo/PlayVideoArchive.html?video=ELEC-121218.mp4 (10:45 to 11:40).

constitutional authorization." *Maldonado v Ford Motor Co*, 476 Mich 372, 391 (2006). In contrast to the various constitutional provisions authorizing statutory governance over the jurisdictional powers of the lower courts,[5] Const 1963, art 6, § 4 vests the Supreme Court unqualified discretion over the exercise of its power to "hear and determine prerogative and remedial writs." See *In re Mfr's Freight Forwarding Co*, 294 Mich 57, 69 (1940) ("The jurisdiction of this court is fixed and defined by the Constitution.").

In the same manner, Const 1963, art 6, § 5 vests the Supreme Court with exclusive power to prescribe the rules of practice and procedure for all courts of the state. "It is beyond question that the authority to determine rules of practice and procedure rests exclusively with [the Supreme] Court." *McDougall v Schanz*, 461 Mich 15, 26 (1999) (citing Const 1963, art 6, § 5). And this "exclusive rule-making authority in matters of practice and procedure is further reinforced by separation of powers principles." *Id*. at 27 (citing Const 1963, art 3, § 2).

Given that the Supreme Court could not possibly confer its "highest priority" to any action under MCL 168.479(2) without exercising its power of original review, MCL 168.479(2) directly infringes the Supreme Court's plenary authority under art 6, § 4 to hear and determine extraordinary writs

[5] See Const 1963, art 6, §§ 10, 13, 15, 26.

or abstain therefrom according to its sole discretion. And the statute's further mandate that such cases be advanced in the Supreme Court docket equally infringes the Court's exclusive authority under art 6, § 5. Indeed, that the Supreme Court has not in the three years following 479(2)'s enactment even adopted any court rule amendment to authorize the filing of original mandamus actions in the Supreme Court,[6] let alone advance such proceedings on the Court docket, shows plainly that the statute's directives have not been "acquiesce[d] [to] and adopt[ed] for retention at judicial will." *McDougal*, 461 Mich at 27.

Despite acknowledging the potential unconstitutionality of the above-referenced statutory language regulating the Supreme Court's treatment of filings under 479(2), the trial court concluded that the Supreme Court can simply disregard such language and thus render it severed in effect. But such an indeterminate severance would ignore the "manifest intent of the legislature"[7] to confer mandatory jurisdiction.

Stripped of the corresponding requirement that timely-filed challenges under the statute are of highest priority, the statute would be substantively transformed from an express lane for adjudication into a general barricade to

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[6] See MCR 3.305(A).
[7] MCL 8.5; see *People v Betts*, ___ Mich ___, ___ (2021) (Docket No. 148981), slip op at 30; 2021 Mich. LEXIS 1304 at *40-41

obtaining judicial review. Because the object of compelling reliance on the Supreme Court's original jurisdiction would be defeated if the legislature cannot correspondingly require such jurisdiction's exercise by the Court, the statute fails the critical "test for severability . . . [of] whether it can be presumed that the Legislature 'would have passed the one provision without the other.'" *Seals v Henry Ford Hosp*, 123 Mich App 329, 335 (1983) (internal brackets omitted).

C. Extending 479(2) to Plaintiffs' Claim would Infringe Procedural Due Process Protections Under Const 1963, art 1, § 17.

Const 1963, art 1, § 17 requires that one deprived of liberty or property must be afforded the opportunity to be heard at a meaningful time and in a meaningful manner. *In re BGP*, 320 Mich App 338, 343 (2017). Having a legally protected interest in the proper validation and counting of their petition signatures, *Deleeuw*, 263 Mich App at 505, Plaintiffs would be absolutely deprived of access to the courts to challenge their deprivation of that interest if MCL 168.479(2) were construed to deprive the trial court of subject matter jurisdiction over Count I of their Complaint.

Though the trial court noted that MCL 168.479(2) provides Plaintiffs a process for seeking judicial relief, such a mechanism affords no hearing as of right nor even a high probability of obtaining judicial review, at least insofar as the statute's 'highest priority' directive is not followed. Moreover, because

Plaintiffs' injury is not of the nature governed by MCL 168.479(2), its procedure does not provide a proper basis for their claim.

Furthermore, MCL 168.479(2) operates to fully preclude the availability of declaratory or injunctive relief to the extent that it vests exclusive subject matter jurisdiction to a court that "has no original equity jurisdiction" of its own. *Stephenson v Golden*, 279 Mich 710, 732 (1937); see *Mfr's Freight*, 294 Mich at 68 (observing that the legislature cannot expand nor diminish the Supreme Court's jurisdiction).[8] Accordingly, the statute further infringes due process, as well as Const 1963, art 3, § 2 and 6, § 5, by "divest[ing] [all] court[s] completely of equity jurisdiction" over its targeted subject matter. *Wikfman v Novi*, 413 Mich 617, 648 (1982).

D. Extending 479(2) to Plaintiffs' Claim would Infringe the Protections Afforded by Const 1963, art 6, § 28.

As with procedural due process protections, applying MCL 168.479(2) to divest jurisdiction over Plaintiffs' challenge to MCL 168.472a would fully deprive them of their right under Const 1963, art 6, § 28 to seek judicial review of administrative agency decisions of a quasi-judicial nature affecting

[8] See Const 1963, art 6, § 4 and accompanying convention comment (MCLS Const. Art. VI, § 4 (Annotations)), noting that the general term "prerogative and remedial writs" is intended to refer to the list of historic writs specified by Const 1908, art 7, § 4. Hence, the Supreme Court's original jurisdiction under the current Constitution is substantively unchanged from that enumerated by the 1908 Constitution.

private rights, including whether such decisions were authorized by law. For purposes of art 6, § 28, an agency acts in a quasi-judicial capacity when it makes adjudicative decisions, as opposed to rule-making decisions. *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 489 n 1 (1998). And an agency decision made in violation of the constitution is a decision that is not authorized by law for purposes of the art 6, § 28 review inquiry. *Id*. at 488.

Accordingly, Plaintiffs are entitled to judicial review of the Bureau of Elections' adjudicative decision affecting their personal rights as petition signers, including review of whether that decision violated Const 1963, art 2, § 9. Hence, in the event that MCL 168.479(2) could be construed to reach Count I of Plaintiffs' Complaint, that statute would further conflict with the rights afforded by art 6, § 28.

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

As a constitutional power reserved to the people of Michigan, the statutory initiative procedure under Const 1963, art 2, § 9 is not merely an election process, but rather "an express limitation on the authority of the legislature." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214 (1985). Because MCL 168.472a imposes a direct curtailment of a self-executing constitutional provision permitting no legislative intrusion, its extension to signatures on

statutory initiative petitions cannot be constitutionally sustained.

A. Standard of Review

This Court reviews questions of constitutional interpretation de novo. *King*, 303 Mich App at 239. Where a party raises an issue in the trial court and pursues it on appeal, the issue is appropriately before this Court. *Peterman*, 446 Mich at 183.

B. The Statutory Initiative Provision of Const 1963, art 2, § 9 is Self-Executing and Prohibitive of Legislative Meddling.

The statutory initiative procedure of Const 1963, art 2, § 9 is a self-executing constitutional provision which grants the legislature no authority to impose additional obligations on its criteria for an initiative's invocation. *Wolverine Golf Club v Sec'y of State*, 384 Mich 461, 466 (1971).

In *Wolverine Golf Club*, the Supreme Court affirmed a decision of the Court of Appeals which had ordered the Board "forthwith" to accept initiatory petitions "for canvass" and immediate submission to the Legislature, though the petitions violated the 10-day timing provision of MCL 168.472. The reason: MCL 168.472 was not a "constitutionally permissible implementation" of art 2, § 9:

> We do not regard this statute as an implementation of the provision of Const 1963 art 2, § 9. We read the stricture of that section, "the legislature shall implement the provisions of this section," as a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or electorate. This constitutional procedure is self-executing. . . . It is settled law that the legislature may

> not act to impose additional obligations on a self-executing constitutional provision. [384 Mich at 466].

In enacting valid legislation supplemental to a self-executing constitutional provision, such legislation must have the "object to further the exercise of constitutional right and make it more available, and such law must not curtail the rights reserved, or exceed the limitations specified." *Wolverine Golf Club v Sec'y of State*, 24 Mich App 711, 730 (1970), aff'd 384 Mich 461 (1971). Conversely, by mandating that valid and verifiable signatures of registered electors "shall not be counted," 472a not only subjects the process to additional obligations, but directly contravenes the process and benchmark criteria set forth by the constitution itself.

In spite of *Wolverine Golf Club* and the issuance of an Attorney General Opinion finding 472a's less-stringent former iteration to be invalid as to statutory initiative petitions on the basis of that precedent,[9] Defendant's office has relied fully on *Consumers Power Company v Attorney General*, 426 Mich 1 (1986), to justify enforcing the statute against constitutional amendatory and statutory initiative petitions alike. Yet not only was the *Consumers Power* Court's review exclusively limited to the constitutionality of 472a's former version as applied to constitutional amendatory initiatives

[9] OAG 1974, No. 4813.

under Const 1963, art 12, § 2, but its reasoning strongly further underscores the invalidity of the statute's application to initiatives under art 2, § 9.

Despite the statute having then imposed only a rebuttable presumption of staleness to signatures collected over 180 days before filing, the Supreme Court's *Consumers Power* decision fully grounded its holding upon the distinct provision of art 12, § 2 providing that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." 426 Mich at 5. Noting the "extreme importance" of the fact that the sentence just quoted "summons legislative aid . . . in the areas of circulating and signing," the Supreme Court held that this distinct sentence of art 12, § 2 is what "provides the authorization for the Legislature to have enacted MCL 168.472a" as a measure to "prescribe by law the manner of signing and circulating petitions to propose constitutional amendments." 426 Mich at 6, 9 (emphasis added).

The Supreme Court's *Consumers Power* decision correspondingly relied on that sentence of art 12, § 2 to distinguish its holding from that previously reached in *Hamilton v Secretary of State*, 221 Mich 541 (1923). There, notwithstanding Const 1908, art 17, § 2's equivalent limitation of petition signers to "registered electors of this state," the Supreme Court rejected the state defendant's contention that signatures dated 20 months prior to filing on a petition circulated under that section were not collected within a

reasonable period. 221 Mich at 544. Here, just as with the former constitutional provision at issue in *Hamilton*, the self-executing procedure of art 2, § 9 "summons no legislative aid and will brook no elimination or restriction of its requirements." *Id*. Rather, "it grants rights on conditions expressed, and if its provisions are complied with and its procedure followed its mandate must be obeyed." *Id*.

C. MCL 168.472a Unconstitutionally Impairs the Right of Initiative.

Following the Supreme Court's very narrow construction of art 2, § 9's implementation clause,[10] the Court of Appeals recently reaffirmed that the "clear intent in this provision is 'to limit the power of the legislature to that which is 'necessary' to the effective implementation of the initiative right.'" *League of Women Voters v Sec'y of State*, 331 Mich App 156, 179 (2020) (quoting *Wolverine Golf Club*, 24 Mich App at 735), vacated for mootness, 506 Mich 561 (2020). Yet, 472a represents the very opposite of such an implementation measure. Providing no facilitative function, it operates only as an extra-constitutional barrier to *prevent* petitioned legislation from reaching the legislature or the electorate.

Having reviewed the version of 472a existing prior to the amendment of 2016 PA 142, *Consumers Power* predicated its upholding of the statute's

[10] *Wolverine Golf Club*, 384 Mich at 466.

application to constitutional amendatory initiatives on the fact that:

> The purpose of the statute is to fulfill the constitutional directive of art. 12 sec. 2 that only the registered electors of this state may propose a constitutional amendment. The statute does not set a 180-day time limit for obtaining signatures. The statute itself *establishes no such time limit*. It states rather that if a signature is affixed to a petition more than 180 days before the petition is filed it is presumed to be stale and void. But that presumption can be rebutted. [426 Mich at 8].

But the 2016 amendment replaced the rebuttable presumption with an irrebuttable exclusion of signatures older than 180 days from being counted. Consequently, MCL 168.472a now imposes precisely the type of curtailment that the Supreme Court comparatively contemplated and implied would fail to "follow[] the dictates of the constitution," even as applied to art 12, § 2. 426 Mich at 7-8.

While the Supreme Court construed that the rebuttable presumption imposed by 472a's former iteration was intended to fulfill the constitutional directive that petition signers must be registered electors of the state, the statute's present formulation could hardly be more poorly tailored to that objective. While even those signers indicated by the Qualified Voter File ("QVF") to be unregistered on the date of signing may rebut the presumption of invalidity to their signatures,[11] the statute now imposes an absolute bar to counting *valid* signatures of registered electors dated over 180 days,

[11] MCL 168.476(1).

irrespectively of those electors' immediately verifiable registration status and residence information. See MCL 168.476(1); 509o; 509q.

No longer a safeguard for simply subjecting older signatures to greater scrutiny, the legislature has transformed 472a into a mechanism for restricting the utilization of the initiative process. Indeed, with open acknowledgment of its sole aim of reducing the number of initiatives making the ballot,[12] the legislature has done so even as the QVF has superannuated any distinction as to the determinable validity of older signatures relative to those signed closer to the time of filing.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, Plaintiffs respectfully request that this Honorable Court reverse the decision of the Court of Claims and declare that MCL 168.472a is unconstitutional as applied to signatures on statutory initiative petitions under Const 1963, art 2, § 9.

[12] See Office of Governor Rick Snyder, *supra* n 3.

Respectfully submitted,

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