State of Michigan
In the Supreme Court

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

Plaintiffs-Appellants,

v

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

Defendant-Appellee.

Docket No.

Court of Appeals No. 358913

Court of Claims
LC No. 21-000108-MZ
Hon. Christopher M. Murray

PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDER APPEALED FROM AND GROUNDS FOR APPEAL

On October 13, 2021, Plaintiffs-Appellants ("Plaintiffs") appealed from the September 22, 2021 order of the Court of Claims dismissing their complaint for declaratory and injunctive relief under MCR 2.116(C)(4) and (C)(8). On July 21, 2022, the Court of Appeals issued a published decision affirming the Court of Claims.

In accordance with MCR 7.305(B), Plaintiffs assert the following grounds for appeal:

1. The issue raises substantial questions about the proper construction and validity of MCL 168.479, as well as the validity of MCL 168.472a.
2. The case is against an officer of the state (Director of Elections Jonathan Brater) and the issue has significant public interest.
3. The issue involves legal principles of major significance to the state's jurisprudence, namely:
    i. Whether MCL 168.479 divests the lower courts of jurisdiction over a broad range of subject matter and whether that statute infringes the separation of powers, the exclusive powers of this Court, and due process protections; and

ii. Whether the legislature has the power to bar the counting of signatures older than 180 days on statutory initiative petitions under Const 1963, art 2, § 9.

4. The decision below is clearly erroneous and will cause substantial material injustice by both curtailing the subject matter jurisdiction of the lower courts to redress violations of constitutional and voting rights and further entrenching a highly constitutionally-suspect statute's longstanding resistance to judicial review. Further, the decision conflicts with *Paley v Coca Cola Co*, 389 Mich 583 (1973), and other Supreme Court and Court of Appeals decisions governing statutory construction principles.

INTRODUCTION

Plaintiffs-Appellants Mamie Graziano, George Louis Corsetti, Jim West, and Steve Babson ("Plaintiffs") are registered electors of this state who signed a statutory initiative petition under Const 1963, art 2, § 9. However, because each of the Plaintiffs signed the petition more than 180 days prior to the petition's date of filing, their signatures were barred from being counted under MCL 168.472a. Plaintiffs consequently brought this action for declaratory relief in the Court of Claims to challenge MCL 168.472a's infringement of their rights as

electors and petition signers.

The Court of Claims dismissed Plaintiffs' Complaint upon finding that MCL 168.479 barred it from exercising subject matter jurisdiction over their claim for relief. A panel of the Court of Appeals subsequently affirmed that finding in a published decision.

Plaintiffs argue that MCL 168.479 contains no express language divesting the lower courts of concurrent jurisdiction over its subject matter as would be required to support the interpretation given below. Further, Plaintiffs argue that 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 this Court's exclusively vested authority under art 6, §§ 4-5. Further, they contend that, if applied to bar their challenge to 472a, MCL 168.479(2) would infringe procedural due process 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.

Plaintiffs now seek leave to appeal the lower courts' holding that MCL 168.479 divested the Court of Claims of subject matter jurisdiction over their claim. Additionally, because the constitutional matter in controversy is one of pure law, in which the record contains all necessary facts and in which the merits were fully briefed in the trial court, Plaintiffs ask this Court to exercise its discretion[1] to resolve the underlying question of MCL 168.472a's validity as applied to signatures on statutory initiative petitions under Const 1963, art 2, § 9.

QUESTIONS PRESENTED FOR REVIEW

1. Does MCL 168.479 divest the Court of Claims of subject matter jurisdiction to issue a declaratory judgment on the validity of MCL 168.472a as applied to statutory initiative petitions under Const 1963, art 2, § 9?

The Court of Appeals says: **Yes**.

Plaintiffs-Appellants say: **No**.

1 See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183 (1994).

2. Insofar as MCL 168.479 may be found to divest the Court of Claims of subject matter jurisdiction over Plaintiffs' claim, does that statute contravene the separation of powers under Const 1963, art 3, § 2, the exclusive powers of this Court under art 6, § § 4-5, and the due process protections afforded by arts 1, § 17 and 6, § 28?

The Court of Appeals says: **Did not answer.**

Plaintiffs-Appellants say: **Yes.**

3. Is MCL 168.472a's ban on counting signatures older than 180 days unconstitutional as applied to signatures on statutory initiative petitions under Const 1963, art 2, § 9?

The Court of Appeals says: **Did not answer.**

Plaintiffs-Appellants say: **Yes.**

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Prior Proceedings

On July 20, 2021, Defendant-Appellee ("Defendant") moved for summary disposition on the asserted grounds that MCL 168.479 bars the Court of Claims from exercising jurisdiction over Plaintiffs' claim, that Plaintiffs lack of standing to challenge the validity of 479, and that MCL 168.472a is constitutional.

On September 22, 2022, the Court of Claims awarded summary disposition to Defendant under MCR 2.116(C)(4) and (8) and dismissed Plaintiffs' complaint, upon finding that MCL 168.479 barred subject matter jurisdiction over Plaintiffs' challenge to MCL 168.472a. The Court of Claims rejected Defendant's argument that Plaintiffs lack standing to challenge 479(2). However, it concluded that the first sentence of MCL 168.479(2) was constitutional and that declaratory relief was not warranted as to the second sentence of that subsection. Based on its jurisdictional finding, the court declined to reach the merits of Plaintiffs' challenge to MCL 168.472a.

On July 21, 2022 a panel of the Court of Appeals issued a published decision affirming the Court of Claim's jurisdictional finding. In spite of Plaintiffs' constitutional challenge to MCL 168.479 being conditioned on the finding of that statute to bar subject matter jurisdiction, the Court of Appeals declined to address Plaintiffs' challenge to 479's validity, having purportedly resolved the case on other grounds. The Court of Appeals similarly declined to address Plaintiffs' constitutional challenge to MCL 168.472a.

B. 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.[2] *Id.* ¶ 12. As a result of that jurisdictional finding, neither the Court of Claims nor Court of Appeals reached the merits of the committee's constitutional challenge to MCL 168.472a.[3] *Id.*

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[2] *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 335 Mich App 384 (2021).

[3] 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*, 335 Mich App 384

In contrast to the committee's injury by MCL 168.472a as challenged in its proceedings described above, 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 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:

(SHAPIRO, J., dissenting).

> 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."[4] *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.

[4] 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>.

ARGUMENT

I. MCL 168.479 Does Not Divest the Court of Claims of Jurisdiction over Plaintiffs' Action for Declaratory Relief.

As amended by 2018 PA 608, MCL 168.479 provides:

> (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. 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.

Relying on its prior decision in *Committee to Ban Fracking in Michigan v Board of State Canvassers*, 335 Mich App 384 (2021), the Court of Appeals reaffirmed that MCL 168.479 "'creates an exception to the exclusive jurisdiction of the Court of Claims." *Graziano v Brater*, ___ Mich App ___ (2022), slip op at 3 (quoting 335 Mich App at 395). Yet despite the sufficiency of that finding to harmonize that statute with

MCL 600.6419(1),[5] the Court of Appeals has further concluded that MCL 168.479 divests the Court of Claims of jurisdiction over any claim deemed to implicate its statutory subject matter.

Citing over a century of state judicial precedent, this Court has uniformly required that statutes be read with a presumption against the divestiture of subject matter 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) (quoting *Wight v Warner*, 1 Doug 384, 386 (1844)).[6] Hence, absent a clear and unambiguous expression of legislative intent to divest jurisdiction otherwise vested, it is this

[5] MCL 600.6419(1) provides that "[e]xcept as provided in sections 6421 and 6440, the jurisdiction of the court of claims is exclusive" over "any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."

[6] Such a presumption must apply even more forcefully in the context of limiting access to the courts to challenge statutes restricting the initiative process. See *Ferency v Secretary of State*, 409 Mich 569, 593 (1980) ("[W]here, as here, there is doubt as to the meaning of legislation regulating the reserved right of initiative, that doubt is to be resolved in favor of the people's exercise of the right.").

Court's "invariable rule" to "resolve every doubt in favor of retention rather than divestiture of jurisdiction." *Id.* at 591; see *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 643 (2018) (observing that 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.").

Accordingly, because MCL 600.6419(1) only explicitly curtails the jurisdiction of the circuit court, it has been construed to avoid conflict with MCL 600.4401(1)'s vestiture of original jurisdiction in the Court of Appeals over actions for mandamus against state officers. *O'Connell v Dir of Elections*, 316 Mich App 91, 102-04 (2016). Likewise, in reversing a circuit court's finding that only the Court of Appeals could exercise subject matter jurisdiction over actions involving the Headlee Amendment,[7] the latter court held that, "absent a specific grant of exclusivity," it shared concurrent jurisdiction with the court below. *Waterford Sch Dist v State Bd of Educ*, 98 Mich App 658, 664-65 (1980).

Looking to the statute at issue, MCL 168.479 contains no legislative expression providing for exclusive subject matter jurisdiction nor any declared intent to limit other remedies for which proper standing is

[7] Const 1963, art 9, §§ 25-34.

present. Absent any such language, it thus leads naturally to the construction that the legislature sought only to establish an operative procedure for such challenges to enter the scope of this Court's original jurisdiction. Yet contrary to this Court's instruction that courts must strive to construe statutes embracing the same subject to avoid conflict, *House Speaker v State Admin Bd*, 441 Mich 547, 568-569 (1993), the Court of Appeals has taken the very opposite approach.

Far from setting forth exclusive subject matter jurisdiction, the statute simply provides that "subject to" its specified time limitation, a person aggrieved by a Board determination "*may* have the determination reviewed by mandamus or other appropriate remedy in the supreme court." MCL 168.479 (emphasis added).[8] As so formulated, it merely invites a particular judicial remedy, bypassing the procedural limitation of MCR 3.305(A)(1),[9] while prescribing a limited time

[8] As a prior Court of Appeals opinion analogously explained in applying statutory construction principles to an arbitration clause, "The use of the word 'may' in the context of submission of the dispute to arbitration, and the word 'must' for the process of submission of the dispute, strongly supports the view that the arbitration provision is permissive." *Skalnek v Skalnek*, unpublished per curiam opinion of the Court of Appeals, issued Oct 26, 2017 (Docket No. 333085); 2017 Mich. App. LEXIS 1741 at *9.

[9] MCR 3.305(A)(1) provides that "[a]n action for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims."

window for commencing that remedy's pursuit.

A. Plaintiffs' Claim is Not within the Subject Matter of MCL 168.479(2).

Unlike the sponsoring committee of Plaintiffs' signed petition, 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, 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).

Dismissing the distinguishable nature of Plaintiffs' interest, the Court of Appeals theorized that the Board's determination regarding the sufficiency or insufficiency of the petition necessarily includes the Board's determination of whether Plaintiffs' "individual signatures are valid or invalid." *Graziano*, ___ Mich App ___, ___; slip op at 5. Yet even looking beyond the fact that such a determination is precisely what MCL 168.472a prohibits, the Court of Appeals applied its own eisegesis to the text in assuming that the condition for divesting jurisdiction is reducible to any element it may include.

Even assuming that MCL 168.479(2) can properly be found to divest jurisdiction from the lower courts, such divestiture could only reasonably apply 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. Because Plaintiffs' standing to challenge 472a arises directly from their own injuries, rather than as a byproduct of feelings regarding the success of the petition they signed, their claim is not within the scope of MCL 168.479.

II. MCL 168.479(2) Contravenes this Court's Exclusive Powers and Constitutional Due Process Protections.

MCL 168.479(2) unconstitutionally encroaches on this 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 this 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. MCL 168.479(2) Infringes the Separation of Powers Under Const 1963, Article 3, § 2 and this 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 this 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 this 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.[10]

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 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,[11] Const 1963, art 6, § 4 vests this 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 this Court with exclusive power to prescribe the rules of practice and procedure for all

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[10] 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).

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

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 this 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 this Court's plenary authority under art 6, § 4 to hear and determine extraordinary writs or abstain therefrom according to its sole discretion. And the statute's further mandate that such cases be advanced in this Court's docket equally infringes this Court's exclusive authority under art 6, § 5. Indeed, that this Court has not in the four years following 479(2)'s enactment even adopted any court rule amendment to authorize the filing of original mandamus actions in this Court,[12] let alone advance such proceedings on this 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.

[12] See MCR 3.305(A).

Despite acknowledging the potential unconstitutionality of the above-referenced statutory language regulating this Court's treatment of filings under 479(2), the trial court concluded that this 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"[13] 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 obtaining judicial review. Because the object of encouraging reliance on this Court's original jurisdiction would be defeated if the legislature cannot correspondingly require such jurisdiction's exercise by this 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).

B. 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

[13] MCL 8.5; see *People v Betts*, 507 Mich 527, 563 (2021).

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.

MCL 168.479(2) also operates to fully preclude the availability of declaratory or injunctive relief to the extent that it vests exclusive subject matter jurisdiction in 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).[14] Accordingly, as construed to vest exclusive subject matter jurisdiction in this Court, 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. *Wikman v Novi*, 413 Mich 617, 648 (1982).

C. Extending 479(2) to Bar 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 Plaintiffs of their right under Const 1963, art 6, § 28 to seek judicial review of administrative agency decisions of a quasi-judicial nature affecting 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*

[14] 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.

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 bar 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." *League of Women Voters of Mich v Sec'y of State*, 508 Mich 520, 536 (2022). 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. 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). "The significance of designating a constitutional provision as self-executing is that, while implementing legislation is to some extent inevitable and necessary, the courts will protect a self-executing provision from legislative encroachment." *League of Women Voters*, 508 Mich at 540.

In *Wolverine Golf Club*, this Court affirmed a decision of the Court of Appeals which had ordered the Board 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,[15] 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

[15] OAG 1974, No. 4813.

applied to constitutional amendatory initiatives 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," this 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).

This 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).[16] 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*.

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

As this Court recently explained, a legislative measure regulating the statutory initiative process exceeds the proper scope of the implementation clause when it "does not merely fill in necessary

[16] See *League of Women Voters*, 508 Mich at 550 ("It is true that the current constitutional language 'summons legislative aid,' *Hamilton*, 221 Mich at 544, in a way that the Constitution of 1908 did not, and it was on this basis that we upheld, in *Consumers Power Co*, the constitutionality of 1973 PA 112, which established a rebuttable presumption that petition signatures older than 180 days had been given by someone no longer registered to vote in Michigan.") (emphasis added) (ellipsis omitted).

details, but rather adds a substantive obligation." *League of Women Voters*, 508 Mich at 541. Here, 472a represents the very opposite of a proper 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 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 this 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 this Court's *Consumers Power* decision 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,[17] the statute now imposes an absolute bar to counting *valid* signatures of registered electors dated over 180 days, 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,[18] 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.

[17] MCL 168.476(1).
[18] See Office of Governor Rick Snyder, *supra* n 4.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Plaintiffs respectfully request that the Court grant leave to appeal or, in lieu of granting leave, peremptorily reverse the Court of Appeals' decision, reverse the Court of Claims' grant of summary disposition to Defendant, and remand.

Respectfully submitted,

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Dated: September 1, 2022

PROOF OF SERVICE

I hereby certify that on September 1, 2022, I served the foregoing document on the counsel of record for the Defendant-Appellee through the Court's electronic filing system.

I further certify that notice of the filing of the foregoing application was served on the clerks of the Court of Appeals and Court of Claims.

/s/ Matthew S. Erard
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