STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN COMPREHENSIVE CANNABIS LAW REFORM COMMITTEE a/k/a MILEGALIZE, Plaintiff, v MICHIGAN SECRETARY OF STATE, DIRECTOR OF BUREAU OF ELECTIONS, and BOARD OF STATE CANVASSERS, Defendants.	**OPINION AND ORDER** Case No. 16-000131-MM Hon. Stephen L. Borrello

Plaintiff brings this action challenging defendants' application of MCL 168.472(a), as amended by 2016 PA 142,[1] to plaintiff's legislative initiative petition. Enacted in 1973, MCL 169.472a provided, with respect to signatures on petitions to initiate legislation:

> It shall be rebuttably presumed that the signature on a petition that proposes an amendment to the constitution or is to initiate legislation, is stale and void if the signature was made more than 180 days before the petition was filed with the office of the secretary of state.

[1] Since this action has been pending, the Legislature amended MCL 168.472a to remove the rebuttable presumption of staleness and prohibit the counting of signatures that are more than 180 days old. Effective June 7, 2016, 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.

This version of the statute was in effect when plaintiff filed its petitions with defendant Secretary of State on June 1, 2016. MCL 168.472(a) established a rebuttable presumption of staleness for petition signatures that were obtained more than 180 days before the petition was filed with defendant Secretary of State. The Board of State Canvassers (the Board) determined that of the 354,000 petition signatures that plaintiff submitted, more than 200,000 were collected more than 180 days before the petition was submitted to defendant Secretary of State, thereby rendering them, in the opinion of the Board, stale and void under MCL 168.472a. Based on this ruling, plaintiff asks this Court to declare the statute, as well as defendants' procedure for rebutting the presumption, unconstitutional and enjoin defendants from applying the statute and defendants' procedures in enforcing same. Plaintiff also seeks a writ of mandamus ordering defendants to qualify the initiative for the November 2016 general election ballot. The Court has reviewed the parties cross motions for summary disposition and for the reasons set forth in this opinion, defendants' motion for summary disposition is GRANTED.

I. BACKGROUND

Plaintiff is a ballot question committee proposing legislation that would broadly legalize the use of marijuana in the State of Michigan.[2] On June 1, 2016, plaintiff submitted a legislative initiative petition to the Secretary of State, to place the proposal on the ballot for the November

[2] Nothing in this opinion should be read or construed as this Court expressing an opinion relative to the merits of the contents of this ballot initiative. This Court has not been asked and does not address whether the legalization of marijuana as set forth in the ballot initiative constitutes sound public policy. Should this initiative be placed on the ballot in this State, it is for the citizens of this State---not this Court---to espouse and ultimately decide the merits of this ballot initiative.

2016 election. It is undisputed that the minimum number of signatures needed is 252,523[3] and that plaintiff collected approximately 345,000 signatures.

Following receipt of the signatures, the Board denied plaintiff's petition because the Board found that more than 200,000 of the signatures were obtained more than 180 days before plaintiff filed the petition. At that time, MCL 168.472a provided that a signature on a petition to initiate legislation that was made more than 180 days before the petition was filed was rebuttably presumed to be stale and void. The Board's written procedure provided that the presumption could be rebutted by proof that the signer was registered to vote when the signer affixed their signature to the petition, and that the signer was registered to vote in Michigan within the 180-window before the petition was filed. To establish the latter element, the Board required proof by affidavit or certificate from the signer or from the appropriate county clerk. Plaintiff attempted to rebut the presumption of staleness of 137,029 signatures by submitting an affidavit of validity based on the qualified voter file (QVF). The Board deemed plaintiff's affidavit insufficient because the QVF did not establish that the persons who executed the presumptively stale signatures were properly registered to vote at the time they signed the petitions. Because plaintiff failed to rebut the presumption of staleness of a significant portion of the signatures, the Board determined that the petition lacked a sufficient number of valid signatures to meet the minimum requirement for placement on the November 2016 ballot.

[3] For a legislative initiative, Const 1963, art 2, § 9 requires signatures totaling at least 8% of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. For the 2016 election, that number is 252,523.

Plaintiff, through their counsel, thereafter brought this action seeking from this Court a writ of mandamus and declaratory and injunctive relief. Additionally, plaintiff asks this Court to declare MCL 168.472a and the Board's policy unconstitutional, to enjoin defendants from applying the statute and the policy, and to order defendants to certify its petition as valid and qualify the initiative for placement on the November 2016 election ballot.

In response, defendants, through their respective counsel, moved for summary disposition under MCR 2.116(C)(4) (lack of jurisdiction), (C)(5) (lack of standing) (C)(7) (immunity) and (C)(8) (failure to state a claim). Thereafter, plaintiff filed a response seeking summary disposition in its favor.

II. STANDARD FOR WRIT OF MANDAMUS

Plaintiff has the burden of establishing entitlement to the extraordinary remedy of a writ of mandamus. *Wilcoxon v City of Detroit Election Comm*, 301 Mich App 619, 632; 838 NW2d 183 (2013). In order to prevail in this action, plaintiff must establish that (1) it has a clear legal right to the performance of the duty sought to be compelled, (2) the defendants have a clear legal duty to perform such act, (3) the act is ministerial in nature such that it involves no discretion or judgment, and (4) plaintiff has no other adequate legal or equitable remedy. *Id*. An act is ministerial if it is "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Citizens Protecting Michigan's Constitution v Sec of State*, 280 Mich App 273, 286; 761 NW2d 210, aff'd 482 Mich 960 (2008), quoting *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006).

III. CONSTITUTIONAL CHALLENGE TO MCL 168.472A

Plaintiff argues that the former MCL 168.472a impermissibly infringed on the right to utilize the initiative process under Const 1963, art 2, § 9. Plaintiff also argues that the statute violated its rights under the First Amendment, Fifth Amendment and Fourteenth Amendment of the Michigan and United States Constitutions.

Const 1963, art 2, § 9 governs the legislative initiative process, and requires the Legislature to implement its provisions. Article 2, § 9 of the state constitution governs statutory initiatives, and requires the Legislature to implement its provisions. Section 9 states in pertinent part:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. . . . To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
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> * * *
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> **Initiative; duty of legislature, referendum**
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> Any law proposed by initiative shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.
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> * * *
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> **Legislative implementation**
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> *The legislature shall implement the provisions of this section.* [Const 1963, art 2, § 9 (emphasis added).]

Central to cases challenging the constitutionality of MCL 168.472(a) is the question of what authority if any, the Michigan Constitution grants to the legislature to develop rules or

restrictions to the ballot initiative process. A brief review of case law on this issue illustrates something of a transformation in the law over the past 45 years.

In *Wolverine Golf Club v Sec of State*, 384 Mich 461; 185 NW2d 392 (1971), plaintiffs sought to place an initiative pertaining to daylight savings time on the ballot for the November 1970 election. At that time, MCL 168.472 required petitions to be filed at least 10 days before the start of the legislative session. When the plaintiffs inquired about submitting their petition in February, the deadline had already passed because the Legislature was already in session. Because plaintiffs were precluded from utilizing the initiative process in the November 1970 election, they brought a mandamus action challenging the statute and our Supreme Court struck down the statute, ruling in part, that such a restriction on the use of the initiative process was not within the Legislature's authority. Our Supreme Court determined that the statute was not consistent with implementation of the constitutional provision, reasoning:

> 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 the electorate. This constitutional procedure is self-executing.
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> As pointed out by Judge Lesinski in the opinion below, 24 Mich App 711, 725, 180 NW2d 820, 8266 (1970):
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> > 'it is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision. *Soutar v St Clair County Election Commission* (1952), 334 Mich 258, 54 NW2d 425; *Hamilton v Secretary of State* (1924), 227 Mich 111, 125, 198 NW 843, 848:
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> > "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provision is that the right guaranteed shall not be curtailed or any undue burdens placed thereon."'
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> Whether we view the ten day filing requirement in an historical context or as a question of constitutional conflict, the conclusion is the same—the

> requirement restricts the utilization of the initiative petition and lacks any current reason for so doing.
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> We hold that the petitioners were entitled to file their initiative petitions without regard to the ten day before session requirement, and since the Board of State Canvassers has notified the Secretary of the Senate and the Clerk of the House of Representatives of the sufficiency of such petitions, petitioners are entitled to have the matter submitted to the legislature now in session. 384 Mich at 466-467.

Then, in 1973, the Legislature enacted MCL 168.472a. One year later, the attorney general issued an opinion (OAG) proclaiming the statute to be unconstitutional. 1974 OAG 4813. Although an opinion of the attorney general is binding on state agencies and officers, such opinions do not have the force of law and are not binding on the courts. *Cox v D'Addario*, 225 Mich App 113, 126; 570 NW2d 284 (1997); *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 691; 503 NW2d 465, lv den 444 Mich 852 (1993). Contrary to the 1973 OAG, in *Citizens for Capital Punishment v Sec of State*, 414 Mich 913 (1982), the Michigan Supreme Court issued an order upholding the legislature's enactment of statutes governing the form of petitions and imposing certain signature requirements for proposing constitutional amendments and initiating legislation. The plaintiffs challenged the defendant's rejection of 29 signatures as invalid on plaintiffs' petition to submit a proposed constitutional amendment to the electorate. The Court relied on the language in Const 1963, art 12, § 2, that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." Our Supreme Court concluded that by enacting the statutes, "the Legislature has provided those details as contemplated by art 12, § 2 of the 1963 Constitution." 414 Mich at 914. The Court went on to state that the statutes were constitutional:

> The plaintiffs have also argued that to the extent that there are requirements for valid signatures other than that the signers be registered electors, those other requirements are unconstitutional. However, those requirements, in essence, are authorized by the constitution itself, which specifically directs that 'any such

> petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.' The Legislature has set forth the form of the petition. In enacting these statutory requirements, therefore, the Legislature has followed the dictates of the constitution an action which cannot, in this instance, be said to be unconstitutional. Furthermore, the requirements of these statutes serve to further the important state interest of insuring the purity of elections. *Citizens for Capital Punishment*, 414 Mich at 915.

Our Supreme Court next issued what this Court considers the dispositive ruling on the issues raised in this case. In *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), the plaintiffs sought a ruling that MCL 168.472a was constitutional. The trial court and Court of Appeals upheld the constitutionality of the statute, and our Supreme Court affirmed. Our Supreme Court based its decision, in part, on the changes to the provision governing proposed constitutional amendments between the 1908 and 1963 Constitutions. As previously quoted, Const 1963, art 12, § 2 includes the following language regarding petitions that propose a constitutional amendment: "Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." The predecessor provision in the 1908 constitution contained no such language. Our Supreme Court found this change significant, and determined that the "call for legislative action" was authority for MCL 168.472a, providing for a rebuttable presumption of staleness of signatures after 180 days:

> Of extreme importance to resolution of the present controversy is focus on the absence of a call for legislative action in Const 1908, art 17, § 2 and the clear presence of one in Const 1963, art 12, § 2 as evidenced in the sentence:
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> "Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law."
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> The defendants strenuously argue that the above-quoted sentence found in art 12, § 2 should not be construed to authorize the Legislature to enact a law which provides for the staleness of signatures, subject to a rebuttable presumption. We disagree.

> The language just quoted from art 12, § 2 of our constitution clearly authorizes the Legislature to prescribe by law for the manner of signing and circulating petitions to propose constitutional amendments. 426 Mich at 5-6.

In *Consumers Power Co*, our Supreme Court acknowledged that it had previously interpreted art 12, § 2 to be self-executing in *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980). But our Supreme Court also noted that two years later, in *Citizens for Capital Punishment v Sec of State*, it upheld the Legislature's enactment of statutes prescribing the form of petitions.

In this case, when plaintiff filed its petition, MCL 168.472a provided with respect to petition signatures to initiate legislation:

> It shall be rebuttably presumed that the signature on a petition that proposes an amendment to the constitution or is to initiate legislation, is stale and void if the signature was made more than 180 days before the petition was filed with the office of the secretary of state.

In *Consumers Power Co*, a constitutional challenge to the statute's rebuttable presumption was raised with respect to a petition proposing a constitutional amendment under art 12, § 2. Our Supreme Court held:

> [T]he Legislature has followed the dictates of the constitution in promulgating MCL 168.472a. The statute sets forth a requirement for the signing and circulating of petitions, that is, that a signature which is affixed to a petition more than 180 days before that petition is filed with the Secretary of State is rebuttably presumed to be stale and void. The purpose of the statute is to fulfill the constitutional directive of art 12, § 2 that only the registered electors of this state may propose a constitutional amendment. 426 Mich at 7-8.

This Court has carefully considered the arguments of plaintiff relative to this and all other issues raised. This Court finds that plaintiffs have made compelling arguments relative to whether our Supreme Court properly decided *Consumers Power Co.* Ultimately though, this Court is legally bound to follow precedent set forth by our Supreme Court. And in *Consumers*

Power Co, our Supreme Court clearly held the very provisions which plaintiff seeks this Court to hold unconstitutional constitutional. 426 Mich at 7-8. In so holding, this Court also notes that plaintiff made a thoughtful effort to distinguish *Consumers Power Co* on the basis that it involved a constitutional amendment initiative, and this case involves a legislative initiative. Plaintiff highlights the difference in language between art 12, § 2 and art 2, § 9, the respective constitutional provisions for the initiatives, and urges this Court to adopt a narrow interpretation. However, contrary to plaintiff's characterization of *Consumers Power Co*, our Supreme Court did not limit its holding that the rebuttable presumption contained within MCL 168.472a was constitutional merely because the case involved a constitutional amendment proposal. Rather, our Supreme Court held that the plain language of MCL 168.472a applies to signatures on petitions both to amend the constitution and to initiate legislation. Additionally, our Supreme Court expressly stated, and without qualification, that "this statute is constitutional." *Consumers Power Co*, 426 Mich at 10.

Lastly, the plain language of art 2, § 9 and our Supreme Court's reasoning in *Consumers Power Co* and *Citizens for Capital Punishment* compel the same result reached in this case. Art 2, § 9 *requires* petitions signed by a certain number of registered electors in order to invoke the initiative process. It also *requires* the Legislature to implement its provisions. As our Supreme Court recognized, the purity of elections is an important state interest that is furthered by the rebuttable presumption that signatures more than 180 days old are stale and void. *Consumers Power Co*, 426 Mich at 7; *Citizens for Capital Punishment*, 414 Mich at 915. The statute is also consistent with the Court's interpretation of the purpose of the implementation directive in *Wolverine Golf Club*, "to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate[.]" *Wolverine Golf Club*, 384 Mich at 466. And as

Consumers Power Co illustrates, the determination in *Wolverine Golf Club* that art 2, § 9 is self-executing should not preclude the Legislature's enactment of a statute imposing a rebuttable presumption of staleness for signatures collected more than 180 days before the submission of the petition. Accordingly, plaintiff is not entitled to relief on this issue.

IV. CONSTITUTIONAL CHALLENGE TO THE BOARD'S 1986 PROCEDURE

Plaintiff challenges the constitutionality of the Board of State Canvassers' procedure for rebutting the presumption of staleness of petition signatures. In 1986, the Board adopted the following procedure:

> The proponent of an initiative petition could rebut the presumption posed by MCL 168.472a by:
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> (1) Proving that the person who executed the signature was properly registered to vote at the time the signature was executed and
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> (2) Proving with an affidavit or certificate of the signer or appropriate clerk that that the signer was registered to vote in Michigan within the "180 day window period" and further, that the presumption posed under MCL 168.472a could not be rebutted through the use of a random sampling process.

Plaintiff argues that this procedure violates their First, Fifth and Fourteenth Amendment rights, because it is not narrowly tailored, is unduly burdensome, and is arbitrary and capricious.

The Court finds that plaintiff's constitutional arguments are fundamentally an additional and repetitive challenge to the rebuttable presumption of the former MCL 168.472a. As previously discussed, the presumption itself was held to be constitutional in *Consumers Power Co*. Hence, plaintiff is left to argue that this Court should strike down the Board's procedure as bad policy to be replaced with the use of the QVF.

The record reveals that following hearings before the Board, a change to the policy was voted on and failed to pass with a 2-2 vote. Plaintiff contends that the QVF would be preferable to the Board's current procedure. Plaintiff additionally argues that it rebutted the presumption of staleness by referring the Board to the qualified voter file to verify the 137,000 signatures in question. However, by doing so plaintiff is essentially trying to shift the burden of rebutting the presumption to the Board. This argument contradicts the rule of law that the party seeking to rebut the presumption bears the burden.

Additionally, plaintiff's preference for a different procedure does not, by itself, make the Board's adopted procedure unconstitutional. Moreover, it is imperative when deciding constitutional questions that each branch of government embraces and understands the limits of their respective constitutional powers. Relative to the policy considerations complained of by plaintiff, in the absence of any definitive case law or statute so holding, plaintiff has failed to establish that this Court possesses the legal or constitutional authority to dictate to the Board of State Canvassers a particular methodology that it must employ in fulfilling its canvassing duties. Accordingly, plaintiff is not entitled to relief on this issue.

V. 2016 PA 142

The Legislature recently enacted 2016 PA 142, amending MCL 168.472a to remove the rebuttable presumption of staleness of signatures to initiate legislation. MCL 168.472 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." The amendment became effective June 7, 2016.

This Court has searched the record for any evidence wherein the Board or any governmental agency sought to enforce on plaintiffs any provision of 2016 PA 142. In the absence thereof, plaintiff fails to state a claim for declaratory relief regarding the constitutionality of MCL 168.472a as amended. No case of actual controversy exists because the statute as amended was not applied to plaintiff's petition. MCR 2.605(A)(1); *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978) (this court's authority to enter a declaratory judgment depends on the existence of a case of actual controversy). Simply stated, plaintiff has failed to present any evidence that any entirety or person sought to enforce against plaintiff any provision of 2016 PA 142. In the absence thereof, there is no actual controversy for this Court to decide. *Shavers*, 402 Mich at 588. Furthermore, although the statute *might* be applied to plaintiff *in the future*, any challenge to the statute is not ripe for adjudication at this time. *Huntington Woods v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008) (the ripeness doctrine prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained). Consequently, this Court is devoid of the authority to determine the constitutionality of MCL 168.472a as amended.

VI. CONCLUSIONS

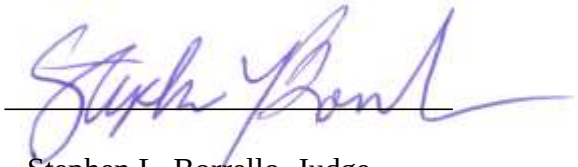
After having considered the arguments presented by their respective parties through their counsel, this Court finds that based on our Supreme Court's decision in *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), defendants have no clear legal duty to count the presumptively stale and void petition signatures that plaintiff submitted. Additionally, the record reveals that plaintiff failed to rebut the stated presumption contained in MCL 168.472a, said presumption being consistent with the Board's written procedures. As a

consequence thereof, plaintiff's petitions lacked the minimum number of signatures and the Board had no clear legal duty to place the initiative on the ballot.

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED. No costs are awarded a public question being involved. *City of Bay City v Bay County Treasurer*, 292 Mich App 156, 172; 807 NW2d 892 (2011).

This order resolves the last pending claim and closes the case.

Dated: August 23, 2016



Stephen L. Borrello, Judge
Court of Claims