Order

Michigan Supreme Court
Lansing, Michigan

March 8, 2024

Elizabeth T. Clement,
Chief Justice

164763

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

MAMIE GRAZIANO, GEORGE LOUIS CORSETTI, JIM WEST, and STEVE BABSON,
Plaintiffs-Appellants,

v

SC: 164763
COA: 358913
Ct of Claims: 21-000108-MZ

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

_____/

On December 7, 2023, the Court heard oral argument on the application for leave to appeal the July 21, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WELCH, J. (*dissenting*).

This case concerns an initiative petition signed by plaintiffs to ban oil and gas extraction by horizontal hydraulic fracturing—commonly known as fracking—in Michigan. The instant appeal concerns the narrow issue of whether the Court of Claims had subject-matter jurisdiction over plaintiffs' complaint. Because I disagree with the courts below that the Court of Claims lacked subject-matter jurisdiction over plaintiffs' complaint, I respectfully dissent from the Court's decision to deny leave to appeal. I also write to address my concerns regarding the issue underlying plaintiffs' complaint: whether the 180-day time limit for initiative petition signatures set forth in MCL 168.472a is constitutional.

I. BACKGROUND

The challenged statute, which was enacted in 2016, provides that "[t]he 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." MCL 168.472a. Plaintiffs represent that they are

registered electors who signed an initiative petition to ban fracking, which was promulgated by the Committee to Ban Fracking in Michigan (the Committee). Plaintiffs signed the petition more than 180 days before the Committee filed it with the Secretary of State.

The Committee began to circulate its petition in May 2015. At that time, the Committee sought to have the issue included on the November 2016 ballot. In order to place the initiative on the 2016 general election ballot, the Committee needed to gather 252,523 signatures. See Const 1963, art 2, § 9 ("To invoke the initiative . . . , petitions signed by a number of registered electors, not less than eight percent . . . 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."). The newly enacted time limit for signature validity went into effect in June 2016. The Committee failed to reach the signature threshold needed for placement on the November 2016 ballot. Despite the expiration of the 180-day time limit for most of the signatures, the Committee continued to collect signatures with the goal of reaching the signature requirement set forth in Const 1963, art 2, § 9 and securing placement on a future ballot.

By June 2020, the Committee submitted its petition to the Secretary of State, representing that it had amassed the constitutionally required number of signatures. The Board of State Canvassers (the Board) then certified that the petition was insufficient under MCL 168.472a because the Committee had collected approximately 89% of the signatures more than 180 days before submitting the petition. In response, the Committee filed a complaint for a writ of mandamus in this Court, asking it to declare the 180-day rule in MCL 168.472a unconstitutional. On July 2, 2020, this Court denied the requested mandamus relief. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 505 Mich 1137, 1137 (2020) ("The complaint for mandamus is considered, and relief is denied, because the Court is not persuaded that it should grant the requested relief.").

On July 6, 2020, immediately after having its request for mandamus relief rejected by this Court, the Committee then filed another action in the Court of Claims. It sought to have MCL 168.472a declared unconstitutional as applied and argued that the Court of Claims had jurisdiction because it is the exclusive forum to seek declaratory relief against the state. The Court of Claims rejected the Committee's claims, ruling that the Court of Claims lacked subject-matter jurisdiction because MCL 168.479 provided that challenges to the Board's decision could be filed in the Michigan Supreme Court only.[1] The Court of

[1] 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.

Appeals agreed with the Court of Claims. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 335 Mich App 384 (2021).[2]

In 2021, plaintiffs commenced the instant action in the Court of Claims as registered Michigan electors—as opposed to the Committee itself—who signed the petition, but whose signatures were barred from being counted because of the 180-day restriction of MCL 168.472a. Plaintiffs requested that the Court of Claims, among other things, declare MCL 168.472a unconstitutional as applied to petitions under Const 1963, art 2, § 9.

The Court of Claims granted defendant's motion for summary disposition, concluding that, as with the prior action filed by the Committee, it lacked subject-matter jurisdiction pursuant to MCL 168.479 to hear plaintiffs' challenge to the Board's determination regarding the sufficiency of a petition. The Court of Claims held that plaintiffs should have filed their claim in the Michigan Supreme Court.[3] The Court of Appeals affirmed the Court of Claims' judgment, noting that it had previously rejected identical arguments made by the Committee. *Graziano v Brater*, 342 Mich App 358, 368 (2022).

> (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.

[2] The Court of Appeals rejected the Committee's argument that because MCL 168.479(1) provides that a person "may" have a determination by the Board reviewed in the Michigan Supreme Court, a party could therefore file a suit in the Court of Claims after the Michigan Supreme Court denied mandamus relief. *Comm to Ban Fracking*, 335 Mich App at 396. The Court of Appeals disagreed, concluding that "[t]he stated purpose of MCL 168.479 is to have our Supreme Court decide any legal challenge to the sufficiency or insufficiency of an initiative petition as promptly as possible." *Id.* at 397. The Court of Appeals noted that MCL 168.479(1) must be read together with MCL 168.479(2), which clearly requires that any such legal challenge be filed in the Michigan Supreme Court. *Id.* at 396-397.

[3] The Committee, as already noted, did in fact file an action requesting mandamus relief in the Michigan Supreme Court, but that request was denied. Thus, the Committee appears to have been in a "tails you lose, heads I win" dilemma.

II. DISCUSSION

Our Constitution provides that "[t]he people reserve to themselves the power to propose laws and to enact and reject laws" through the initiative process. Const 1963, art 2, § 9. "To invoke the initiative," the Constitution requires "petitions signed by a number of registered electors, not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected . . . ." *Id*. Although the Constitution does not provide a time frame for petitions, in 2016, the Legislature imposed an onerous time frame when it enacted MCL 168.472a. Under that statute, "[t]he 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." MCL 168.472a.

With respect to challenges to subject-matter jurisdiction, "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." MCL 168.479(1). Moreover, "[i]f 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 . . . ." MCL 168.479(2) (emphasis added).

I agree with the lower courts, therefore, that the plain language of MCL 168.479 indicates that litigants can challenge a determination by the Board regarding the "sufficiency or insufficiency of an initiative petition" in this Court only and that the Court of Claims lacks subject-matter jurisdiction over such challenges. I disagree, however, with the lower courts' conclusion that plaintiffs' complaint only challenges the "sufficiency or insufficiency" of the Board's decision regarding the petition in this case.

Through their complaint, plaintiffs asked the Court of Claims to "[d]eclare that MCL 168.472a is unconstitutional" and "[e]njoin [the Board] to canvass the Plaintiffs' petition signatures with others accompanying their filing . . . ." The complaint, which disputes the constitutionality of the signature time limit set forth in MCL 168.472a, is the exact sort of challenge that the Court of Claims exists to hear. See MCL 600.6419(1)(a) (conferring jurisdiction upon the Court of Claims "[t]o hear and determine 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."). For that reason, I would reverse the Court of Appeals' judgment and remand the case to the Court of Claims to consider plaintiffs' complaint on the merits.

By denying leave to appeal, moreover, this Court avoids hearing the potentially meritorious arguments that MCL 168.472a is unconstitutional. "The *people reserve to themselves the power* to propose laws and to enact and reject laws" through the initiative process. Const 1963, art 2, § 9 (emphasis added). "[U]nder a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Kuhn v Dep't of Treasury*, 384 Mich 378, 385 (1971).

At the same time, "[t]he only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon." *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971) (quotation marks and citations omitted). Article 2, § 9 is self-executing. *Id*. Accordingly, this Court's task is to "liberally construe[]" Article 2, § 9 in favor of the people, *Kuhn*, 384 Mich at 385, and to examine MCL 168.479 for any "undue burdens placed" upon the rights of the people to enact an initiative, *Wolverine Golf Club*, 384 Mich at 466.

Here, the Constitution sets forth a requirement for the number of signatures needed to invoke the initiative, but it does not provide a time limit for signature collection. Const 1963, art 2, § 9. By imposing a roughly six-month time limit for petition committees to collect hundreds of thousands of signatures, MCL 168.472a, the Legislature has arguably placed an extraordinary burden upon people hoping to exercise their constitutional right to the initiative. MCL 168.472a effectively limits the initiative power to committees with large funds to hire signature collectors. Although no one would doubt that a statute imposing a single-day time limit to gather initiative signatures would not pass constitutional muster, I believe it is the job of this Court to decide what limits in fact do pass muster. See *Wolverine Golf Club*, 384 Mich at 466.

For these reasons, I respectfully dissent from the Court's decision to deny leave to appeal.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 8, 2024

Clerk

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