

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CONSUMERS POWER COMPANY,  
a Michigan corporation,  
and THE DETROIT EDISON COMPANY,  
a Michigan corporation,

No. 86-56487-CZ

Plaintiffs,

HON. ROBERT HOLMES BELL

v

FRANK J. KELLEY, ATTORNEY  
GENERAL, RICHARD H. AUSTIN,  
SECRETARY OF STATE, and BOARD  
OF STATE CANVASSERS,

Defendants.

FILED—30th CIRCUIT COURT

JUL 8 1986

BY: MARY JO GRAHAM

Deputy Clerk

John D. Pirich, P.C. (P23204)  
Michael J. Hodge (P25146)  
MILLER, CANFIELD, PADDOCK AND STONE  
Suite 900  
One Michigan Avenue  
Lansing, Michigan 48933  
Telephone: (517) 487-2070  
Attorneys for Plaintiffs

Gary P. Gordon (P26290)  
Assistant Attorney General  
Attorney for Defendants

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY DISPOSITION

FACTS

The facts of the instant case are not complicated.  
Pursuant to 1973 PA 112, the following provision was  
enacted:

It shall be rebuttably presumed that the  
signature on a petition which proposes  
an amendment to the constitution  
[pursuant to Const 1963, art 12, § 2] or  
is to initiate legislation [pursuant to  
Const 1963, art 2, § 9], 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.

MCLA 168.472a; MSA 6.1472(1).

Thereafter, upon request of Senator Gary Byker, the Attorney General issued 1973-1974 OAG, No. 4813, (August 13, 1974), p 171 addressing the constitutionality of § 472a, supra and opined that "as applied to signatures affixed to petitions which initiate legislation pursuant to Const 1963, art 2, § 9, § 472a of the Michigan Election Law is beyond the legislature's power to implement said section and is therefore unconstitutional and unenforceable." 1974 OAG, No. 4813, 172. It was further concluded that "with regard to signatures affixed to petitions proposing amendment to the State Constitution pursuant to Const 1963, art 12 § 2, § 472a of the Michigan Election Law is likewise unconstitutional." Id., p. 173.

As a result of 1974 OAG, No. 4813, Defendants Secretary of State and Board of State Canvassers have not enforced § 472a. "Although an opinion of the Attorney General is not a binding interpretation of law which courts must follow, it does command the allegiance of state agencies." Traverse City School District v Attorney General, 384 Mich 390, 410, n.2 (1971). See also, People v Waterman, 137 Mich App 429 (1984). Accordingly, since the issuance of 1974 OAG, No. 4813, proposals to amend the Constitution have been initiated containing signatures obtained more than 180 days before the petition was filed with the Secretary of State, contrary to § 472a.

More specifically, on July 7, 1986 the Michigan Citizens Lobby filed with the Secretary of State and the Board of Canvassers, initiative petitions to amend the State Constitution. These petitions purport to contain more than the 304,001 signatures necessary to place the proposal on the 1986 General Election Ballot. However, many of these signatures are as old as three years and it is submitted

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that the vast majority of the signatures are older than 180 days. Thus, the present dispute over the validity of 1974 OAG, No. 4813 or, more particularly, the constitutionality of § 472a, is brought directly into question.

I.

SECTION 472a ENJOYS A PRESUMPTION OF CONSTITUTIONALITY WHICH HAS NOT BEEN OVERCOME.

It is an indisputable proposition that a court:

"[W]ill not declare a statute unconstitutional, or affirm a trial court's finding of such unconstitutionality, 'unless it is plain that it violates some provisions of the Constitution and the constitutionality of the act will be supported by all possible presumptions not clearly inconsistent with the language and the subject matter.' Oakland County Taxpayers' League v Oakland County Supervisors, 355 Mich 305, 323; 94 NW 2d 875 (1959)." (Emphasis added.) Butcher v Department of Treasury, 141 Mich App 116, 119 (1984), aff'd Mich (No. 75282, rel'd June 27, 1986.) Accord, People v Massey, 137 Mich App 480 (1984); Smith v Robbins, 91 Mich App 284 (1979).

Moreover, in construing the relevant constitutional language, courts must consider the circumstances surrounding its adoption and the purpose thereof. Traverse City v Attorney General, supra, pp. 405-406; Butcher, supra.

Stated another way, "every legislative act is presumed to be constitutional and . . . every intendment must be indulged in by the courts in favor of its validity." (Emphasis added.) Thomas v Consumers Power Company, 58 Mich App 486, 495 (1975), aff'd in part, rev'd in part 394 Mich 459 (1975). Accord, Hall v Calhoun County Board of Supervisors, 373 Mich 642 (1964); City of Ecorse v Peoples Community Hospital Authority, 336 Mich 490 (1953). In the

case sub judice, observance of these well-settled principles inescapably leads to affirmance of the constitutionality of § 472a.

II.

1974 OAG, NO. 4813 WHICH ANALYZED § 472a WAS INCORRECTLY DECIDED.

- A. 1974 OAG, No. 4813 Relied Upon Cases and Principles Applicable To Const 1908, Art 17 § 2, The Predecessor Provision To Const 1963, Art 12, § 2, And In So Doing Failed To Consider Vast Differences Between The Two Provisions.

The Attorney General, in 1974 OAG, No. 4813 (hereinafter "the AG Opinion"), quoted at length from the Supreme Court decision in Hamilton v Secretary of State (Hamilton I), 221 Mich 541 (1923). Hamilton I, however, dealt with Const 1908, art 17, § 2, which read:

"Amendments may also be proposed to this Constitution by petition of the qualified voters of this State. Every such petition shall include the full text of the amendment so proposed, and be signed by not less than ten per cent. of the legal voters of the State. Initiative petitions proposing an amendment to this Constitution shall be filed with the secretary of State at least four months before the election at which such proposed amendment is to be voted upon. Upon receipt of such petition by the secretary of State he shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors, and if the same has been so signed, the proposed amendment shall be submitted to the electors at the next regular election at which any State officer is to be elected. Any constitutional amendment initiated by the people as herein provided shall take effect and become a part of the Constitution if the same shall be approved by a majority of the electors voting thereon and not otherwise. Every amendment shall take effect thirty days after the election at which it is approved. The total number of votes cast for governor at the

regular election last preceding the filing of any petition proposing an amendment to the Constitution, shall be the basis upon which the number of legal voters necessary to sign such a petition shall be computed. The secretary of State shall submit all proposed amendments to the Constitution initiated by the people for adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the secretary of State. Such petition shall be signed by qualified voters in person only with the residence address of such persons and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached the affidavit of the elector circulating the same, stating that each signature thereto is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine, and that the persons signing the same are qualified electors. The text of all amendments to be submitted shall be published as constitutional amendments are now required to be published." (Emphasis added.)

At issue in Hamilton I was the attempt by the Attorney General and Secretary of State to invalidate signatures on an initiative petition which were obtained between 4 and 20 months prior to the filing of the petition. They argued that the Constitution was silent as to a time period for obtaining signatures and that art 17, § 2 contemplated a "reasonable time." 221 Mich 544. There was also no statute setting any limit. In rejecting this contention, the Supreme Court observed that:

The constitutional provision contains procedural rules, regulations and limitations; it maps the course and marks the way for the accomplishment of an end; it summons no legislative aid

and will brook no elimination or restriction of its requirements; it grants rights on conditions expressed, and if its provisions are complied with and its procedure followed its mandate must be obeyed. Its provisions are prospective in operation and self-executing. The vote for governor every two years fixes the basis for determining the number of legal voters necessary to sign an initiatory petition and start designated official action.

This primary essential to any step at all fixes distinct periods within which initiatory action may be instituted. A petition must start out for signatures under a definite basis for determining the necessary number of signatures and succeed or fail within the period such basis governs. (Emphasis added.)

A review of Const 1908, art 17, § 2 discloses that its provisions did indeed "map out" all details necessary for instituting the initiative process. Const 1963, art 17, § 2 set forth the number of signatures required, the period within which such signatures were to be obtained, the form of the petition, the manner of signing and circulating the petition, and a method for verifying the validity of the signatures thereon. The provision also stated that the circulator's affidavit constituted prima facie evidence that the signatures were genuine and the signators were qualified. In short, Const 1908, art 17, § 2 was self-executing and contained no provision authorizing legislative implementation. On the contrary, by its express language an initiative petition pursuant to art 17, § 2 was to become effective "as herein provided . . . and not otherwise." Const 1908, art 17, § 2 "summoned no legislative aid." Hamilton I, supra. In fact, it expressly precluded such. It is in this context that Hamilton I must be read.

In contrast to Const 1908, art 17, § 2, Const 1963, art 12, § 2 requires legislative implementation. The 1963 constitutional provisions summon legislative aid in several respects: "[a]ny such petition [proposing to amend the Constitution] shall be in the form, and shall be signed and circulated in such manner, as prescribed by law"; "[t]he person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition" (§ 1); "the question as it shall appear on the ballot shall be published in full as provided by law"; and "[c]opies of such publication shall be posted in each polling place and furnished to news media as provided by law (§ 2). The Convention Comment informs that "[d]etails as to form of petitions, their circulation and other elections procedures are left to the determination of the legislature." (Const 1963, art 12, § 2, Convention Comment, 3.) (Emphasis added.) It is eminently clear that Const 1963, art 12, § 2 does not preclude legislative action, but requires it.

In this connection, the Attorney General's observation in 1974 OAG, No. 4813 that Const 1963, art 12, § 2 "does not contain any general statement to the effect that the legislature is authorized to implement any of its provisions," Id. p. 172, is clearly erroneous and contrary to the language of Const 1963, art 12, § 2. Unlike former Const 1908, art 17, § 2, the present § 2 of Article 12 is not self-executing and supplemental legislation is necessary. In this respect, the AG Opinion erred in relying upon Hamilton I, supra, by failing to take note of and analyze the fact that initiatory § 2 of Article 12 of the Constitution of 1963 differs in important respects from the corresponding sections of the Constitution of 1908 as

those sections stood when certain past decisions were considered and released. Carman v Secretary of State, 384 Mich 443, 447 (1971).

In summary, because Const 1963, art 12, § 2 explicitly envisages legislative implementation, in contrast to Const 1908, art 17, § 2, Hamilton I does not govern the present situation or constitutional provision. The Attorney General, therefore, erred in his reliance upon Hamilton I without analysis of the key differences in "the summoning of legislative aid" between the two constitutional provisions.

B. 1975 OAG, No. 4813 Improperly Relied Upon Cases And Principles Pertaining To Const 1963, Art 2, § 9 And Ignored The Intent Of The Framers Expressed In Art 12, § 2.

The AG Opinion, in addition to relying upon inapplicable Const 1908, art 17, § 2 principles, failed to take note of the distinction between Const 1963, art 12, § 2 and Const 1963, art 2, § 9 -- the statutory initiative provision. In declaring § 472a unconstitutional, 1974 OAG, No. 4813 extrapolated the holding in Wolverine Golf Club v Secretary of State, 384 Mich 461 (1971) dealing with the statutory initiative of Const 1963, art 2, § 9, to cover the constitutional amendment provision of Const 1963, art 12, § 2. The Attorney General remarked that the implementation language of Const 1963, art 2, § 9 ("The legislature shall implement the provisions of this section.") was narrowly construed in Wolverine, supra, and since Const 1963, art 12, § 2, contained no such implementation provisions he reasoned that a court would give Const 1963, art 12, § 2 a more limited construction. 1974 OAG, No. 4813, p. 173.

As argued in Part A, the Attorney General's conclusion ignored the legislative implementation language

of Const 1963, art 12, § 2, and in fact placed on it a more restrictive gloss inasmuch as the language of Const 1963, art 2, § 9 is not "even broader" than Const 1963, art 12, § 2 in the sense of delegating greater legislative authority. Const 1963 art, 12, § 2 in unambiguous terms directs that the Legislature provide a manner for determining the validity and sufficiency of signatures. Obviously, this constitutional language is not self executing. It directs that the Legislature regulate the process of petition circulation for determining the validity of signatures. Section 472a is the legislative response to this directive.

Prior to adoption of Const 1963, art 12, § 2, an initial proposal was entertained at the Constitutional Convention which would have established a maximum signature requirement of 300,000 for petitions to amend the state Constitution. This proposal was defeated on the basis that article 12 petitions should be difficult to pass and by no means should be made easier than an article 2 petition to initiate legislation. A set maximum would substantially lessen the burden of initiative proponents, and the record of the Convention is replete with discussions that such would be an undesirable result. These sentiments were aptly expressed at the Convention by Delegate Stevens:

We do not want to make it easy to amend the constitution. The recent vote shows that. What we want to do is to keep it rather difficult to do it, but we do not want it easier to amend the constitution than it is to pass an ordinary statute, and that is what this amounts to. (2 Official Record, Constitutional Convention 1961, p. 2463, Comments by Mr. Stevens.)

Other statements by various delegates reflect the same purpose: "the constitution should not be easy to

amend," (Id., comments by Mr. Wanger); "the use of the initiative should not be made easier," (Id., comments by Mr. Hutchinson); "initiating questions . . . should be made difficult," (Id. p. 2469, comments by Mr. Hutchinson); the provisions should "make it more difficult for the constitution to be changed[;] . . . [a]t some place it should be difficult," (Id., p. 2470, comments by Mr. J. B. Richards); and the constitution should not "promote" initiatory amendments thereto, (Id., comments by Mr. Powell).

What the foregoing instructs is that restrictions were intended to be imposed upon the constitutional initiative process; and certainly this included restrictions to insure the integrity of the process and to prevent fraud and abuse. This is especially true where the fundamental laws of the state are concerned and where, pursuant to the language of the constitution, the Legislature has provided a reasonable manner for determining the validity of signatures. Moreover, the record of the Constitutional Convention also instructs that the considerations and understanding with respect to Const, 1963, art 2, § 9 were not the same as those attendant to Const, 1963, art 12, § 2. The process of amending the Constitution was logically intended to be more restrictive than the process of initiating legislation. By failing to analyze § 472a in this context, the AG Opinion overlooked the "common understanding" of the framers, the primary inquiry of constitutional construction. Traverse City School District v Attorney General, supra.

That the same considerations do not apply to both Const 1963, art 2, § 9 and Const 1963, art 12, § 2 is further manifested in the discussions on the recall

provision of the Constitution, namely, Const 1963, art 2, § 8. Rather than linking art 2, § 9 conceptually with art 12, § 2, the framers of the 1963 Constitution viewed art 2, § 9 and art 2, § 8 as complementary provisions intended to control legislative power. Article 12, § 2 was not included since it was not primarily designed to curb legislative authority. \*

The Convention debate supports the view that art 2, §§ 8 and 9 were regarded as "the right of the electorate to, first of all, initiate legislation without giving reasons, to review legislation without giving reasons, and to recall elective officers without giving reasons." (Emphasis added.) (2 Official Record, Constitutional Convention 1961, p. 2263.) Similarly, it was stated: \*

I would only point out to you that only 2 other areas comparable to this one, the matter of recall, are the matters of the initiative and the referendum. You will recollect that the provisions relative to the initiative and the referendum are specifically and expressly detailed in the constitution so that the question of cause could not come up because, very conceivably, if they were not, people who wanted to initiate legislation as a popular movement would have to give reasons for the initiating of such legislation. And with respect to the rejecting of legislation on the referendum, they would have to give reasons why this legislation should be rejected and this would be subject to judicial review. I am certain that this is not what you contemplate with respect to the initiative and the referendum and it shouldn't be contemplated with respect to recall. (Emphasis added.) (Id., p. 2266.)

The difference in purpose between Const 1963, art 2, §§ 8 and 9 and art 12, § 2 is of twofold significance. First, it demonstrates the erroneous conclusions reached in the AG Opinion. Restrictions, by the Legislature, upon the

right to initiate legislation are contrary to the purpose of art 2, § 9. Both art 2, § 8 and § 9 are direct responses to suspicion of the Legislature and manifestations of a desire to make it more receptive to the will of the people. There was even concern that the Legislature's refusal to act might interfere with this desire. Indeed, the Convention Comment to art 2, § 9 states that "[m]atters of legislative detail contained in the present section of the constitution are left to the legislature. The language makes it clear, however, that this section is self-executing and the legislature cannot thwart the popular will by refusing to act." (Emphasis added.) Consequently, the analysis employed in the AG Opinion, viz: that art 2, § 9 has "even broader" implementation language, is clearly unsupported by the debates at the Constitutional Convention, not to mention the language of the provision itself. With elimination of this unfounded and erroneous premise, the conclusion fails.

The second significant point for distinguishing between art 2, § 9 (statutory initiative) and art 12, § 2 (constitutional amendment) is that it underscores the purpose of the latter provision. Unlike art 2, § 9, the constitutional amendment process of art 12, § 2 is not traditionally within the legislative sphere. Article 12, § 2 does not reflect an intent to divest the Legislature of its traditional authority. The Legislature may still propose constitutional amendments pursuant to art 12, § 1. Article 2, §§ 8 and 9, on the other hand, are antagonistic to legislative authority, i.e., they grant to the people the right to recall legislators and to initiate and to reject legislation. Under these circumstances, it is only logical to conclude that greater restraint on the Legislature's

ability to legislate pursuant to art 2, §§ 8 and 9 is a necessary corollary.

In this connection, the Convention record discloses that the provisions of art 12, § 2 were intended to provide but a "bare skeleton" or a "minimum that was necessary." (2 Official Record, Constitutional Convention 1961, pp. 2460, 2467.) In other words, supplemental legislation was intended and therefore required. The Convention's principal concern with art 12, § 2 was to protect the minority from the will of the majority and, to this end, to make use of the constitutional amendment initiative difficult. (2 Official Record, Constitutional Convention 1961, pp. 2468-2470.) The specific language of the provision "summons legislative aid" and the Convention Comment informs that matters relating to petitions and election procedures "are left to the determination of the legislature." In 1974 OAG, No. 4813, the Attorney General did not discuss or analyze any of these considerations.

Given that the constitutional language and history indicate that the Legislature was authorized to act under art 12, § 2, it is manifest, as discussed below, that § 472a was a valid exercise of legislative authority in that it establishes a manner of signing and circulating petitions and a presumption for determining the validity and sufficiency of signatures in order to safeguard the constitutional initiative process against fraud and abuse. This is entirely consistent with the purpose and general scheme of art 12, § 2.

III.

SECTION 472a REPRESENTS NECESSARY AND APPROPRIATE  
LEGISLATION PURSUANT TO ART 12, § 2 AND CONSTITUTES A  
VALID EXERCISE OF LEGISLATIVE AUTHORITY.

Argument I above brought to light that Const 1963, art 12, § 2 is governed by neither Const 1908, art 17, § 2 nor Const 1963, art 2, § 9 considerations. Article 12, § 2 "summons legislative aid." Moreover, 1974 OAG, No. 4813 proceeds from the false premise that, the Legislature is without authority to enact facilitating legislation. This is contrary to established principles.

In Hamilton v Secretary of State (Hamilton II), 227 Mich 111, 125 (1924), expounding upon the same controversy as in Hamilton I, the Supreme Court adopting the rationale of State, ex rel Caldwell v County Judge, 221 Okla 712, 718, 98 P 964 (1908) stated:

The 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. (Emphasis added.)

This was also quoted in Wolverine Golf Club v Secretary of State, 384 Mich 461, 466 (1971). Furthermore, Caldwell, supra, held that:

In cases where a provision is self-executing, legislation may still be desirable, by way of providing a more specific and convenient remedy and facilitating the carrying into effect or execution of the rights secured, making every step definite, and safeguarding the same so as to prevent abuses. Such legislation, however, must be in harmony with the spirit of the constitution, and its object to further the exercise of constitutional right and make it more

available, and such laws must not curtail the rights reserved, or exceed the limitations specified. (Emphasis added.)

Thus, facilitating legislation is not precluded especially where art 12, § 2 "otherwise expressly indicates" that such legislation is to be provided. Indeed, a closer review of Wolverine, supra, relied upon in the AG Opinion, reveals that it supports Plaintiffs' position herein.

The very situation which presently exists was addressed in the Court of Appeals' decision in Wolverine Golf Club v Secretary of State, 24 Mich App 730-732 (1970), aff'd 384 Mich 461 (1971). In discussing State, ex rei Kiehl v Howell, 77 Wash 651, 138 P 286 (1914), the Wolverine court observed that Kiehl involved a constitutional provision similar to Const 1963, art 12, § 2, reserving the right of initiative to the people if the appropriate petitions were filed at least four (4) months prior to the election. The constitutional provision further authorized "facilitating legislation."

Pursuant to the "facilitation" clause, the Washington Legislature enacted a provision requiring all petitions to be filed not earlier than ten (10) months before the election. In upholding the provision, the Kiehl court noted that the legislation allowed for greater certainty that voters who signed the petition were still residents of the state and that six (6) months was a reasonable period of time to garner the required signatures.

In discussing Kiehl, the Wolverine court also noted a Colorado decision, Yenter v Baker, 126 Colo 232, 248 P 2d 311 (1952), wherein the Colorado court invalidated a statute requiring that petitions be filed eight (8) months before the election while the constitution required such

filing four (4) months before the election. The Wolverine court observed:

The foregoing cases, although reaching different results, are not inconsistent. In Kiehl, supra, the challenged statute did not enlarge upon the minimum filing requirement which was included in the constitution. Rather, a different requirement was formulated. The court concluded that the statute did not conflict with the constitution or unreasonably limit the petition drive period, a maximum requirement imposed being considered necessary for assuring the validity of the signatures.

In Yenter, supra, the now-defunct statute enlarged on the filing limitation already present in the constitution, increasing the difficulty of the existing requirement. In the present case the ten-day filing requirement imposes a time limitation for the convenience of the legislature in addition to the 40-session-day period expressed in the constitution. In this respect the statute conflicts with the express language of the constitution. (Emphasis added.) 24 Mich App 731-732.

The Kiehl decision, tacitly approved in Wolverine, governs the instant controversy. A requirement imposed "for the convenience of the legislature" is invalid. However, a requirement "necessary for assuring the validity of the signatures" is a valid exercise of legislative authority.

More importantly, Wolverine expressly held that "we do not intimate that a time limit necessary and reasonable for the effective administration of the initiative process . . . might be invalid." (Emphasis added.) 24 Mich App 738. Furthermore, in affirming the Court of Appeals, the Supreme Court in Wolverine specifically adopted this rationale by holding that "the [ten-day filing] requirement restricts the utilization of the initiative petition and lacks any current reason for doing so." (Emphasis added.) 384 Mich 466.

In this connection, § 472a has the valid, accepted purpose of safeguarding the right to initiative and preventing abuse. Caldwell, supra; Hamilton II, supra. Const 1963, art 12 , § 2 permits only the "registered electors of this state..." to propose constitutional amendments by petition. Section 472a, by establishing a rebuttable presumption that signatures more than 180 days are invalid provides greater certainty that the voters signing the petition are still registered electors of the state. Kiehl, supra; Wolverine, supra. If 1974 OAG, No. 4813 is sustained, initiative proponents will have four years to garner the requisite signatures. During such an extended period of time, mere inadvertent error will lead to an untolled number of duplicate signatures. Assuring that persons who affixed their signatures to the petition are still registered, resident voters would be an insurmountable task; yet, the likelihood that many of the signatories are, in fact, no longer registered voters of this state will increase dramatically. Moreover, the statute, by creating a rebuttable presumption, places the burden of demonstrating current registration where it rightly belongs -- upon the proponents of the proposal -- instead of placing it upon state officials who are required to determine whether petition signers are registered in the cities and townships indicated on the petition. Towards obviating these deficiencies, § 472a is both necessary and appropriate.

Additionally, § 472a fosters a fair, intelligent and informed initiative process, State v Snell 168 Or 153, 160; 121 P 2d 930 (1942); Wolverine, supra, and it promotes the intention of the framers to discourage frivolous and minority-based initiative petitions. 2 Official Record, Constitutional Convention 1961, pp. 2463, 2468-2470. By

setting a reasonable period for "freshness" of signatures, the 180-day rule of § 472a ensures that the petition reflects the will of the people in that over a longer period of time intervening acts of the Legislature or agencies of the executive branch may result in the desired action being taken other than by constitutional amendment. It was this very concern that the constitutional initiative would be employed unnecessarily which was the subject of debate at the Convention and which occasioned defeat of the proposal to establish a 300,000 maximum signature requirement. As held in State v Snell, supra, p. 160:

Any legislation which tends to ensure a fair, intelligent and impartial accomplishment may be said to aid or facilitate the purpose intended by the Constitution. Any safeguard against deception and fraud in the exercise of the initiative and referendum powers tends to assure to the electorate the benefits conferred by [the initiative provision.]

Accord, State v Campbell, 265 Or 82; 506 P2d 163 (1973), app dis 414 US 803 (1973).

In the context of the Wolverine decision, the Supreme Court recognized the above principles in holding that the legislation at issue there "lack[ed] any current reason for [restricting utilization of the initiative petition]." 384 Mich 466. To begin, Wolverine dealt with art 2, § 9. The discussion in Argument I demonstrated that, with respect to art 12, § 2, the framers expressed an unambiguous desire to restrict the use of constitutional initiative, so that a more compelling reason for the restriction would be required. In any event, contrary to the legislative action in Wolverine, § 472a is supported by current, valid reasons.

Both Hamilton I and the Attorney General ruled that the applicable time period within which to secure signatures -- 2 years -- was intended to be set by the term of the governor. However, pursuant to Const 1963, art 5, § 21, the term of office, i.e., the frequency of gubernatorial elections was changed from two (2) to four (4) years. The Constitutional Convention is completely silent as to the effect of art 5, § 21, as it relates to art 2, § 9 or art 12, § 2. Given the increase from two to four years, § 472a represents necessary legislation. X

When the intention of the framers to discourage use of the constitutional initiative is considered, as evidenced by the statements supporting deletion of the 300,000 signature maximum, in conjunction with the understanding that the constitutional language was to provide but a "bare skeleton" or "a minimum that was necessary" and the express authorization to the Legislature to prescribe the manner and form of signing and circulating petitions, the silence on the effect of art 5, § 21 cannot be read as mandating four years within which to obtain signatures. Such a construction would be contrary to the "common understanding" of the people. Traverse City, supra.

Further evidence that art 12, § 2 was not intended to provide a four-year basis within which to obtain the requisite signatures, but, rather, that this was a matter entrusted to the Legislature, is the analysis employed by the Supreme Court in Hamilton I. The Hamilton Court analyzed the following language of Const 1908, art 17, § 2:

{T]he total number of votes cast for governor at the regular election last preceding the filing of any petition . . . shall be the basis upon which the

number of legal voters necessary to sign  
such a petition shall be computed."  
(Emphasis added.)

The emphasized language was construed to require a person  
"to sign" (an active verb) within the "basis" period.

Const 1963, art 12, § 2, on the other hand,  
requires that a petition "be signed by registered  
electors . . . equal in number to at least 10 percent of the  
total vote cast for all candidates for governor at the last  
preceding general election." (Emphasis added.) The  
preceding gubernatorial election does not provide "the  
basis" within which period a person is "to sign" the  
petition. The active verb has been made passive, and the  
term "basis" has been completely excised from art 12, § 2.  
Article 12, § 2, with its express "summoning of legislative  
aid," only indicates that petitions are to "be signed" by a  
given number of persons determined by the preceding  
election. This is the clearest illustration that art 12, §  
2 sought to constitutionally abrogate Hamilton I.

Moreover, setting aside that the Attorney General  
erroneously concluded that art 12, § 2 did not authorize the  
Legislature to enact a "staleness" provision, the  
reasonableness of the time period has been tacitly  
acknowledged in 1976 OAG, No. 4964, p. 403, wherein the  
Attorney General concluded that the 90-day "staleness"  
provision of MCLA 168.955; MSA 6.1955, relative to recall  
petitions pursuant to art 2, § 8, was not unreasonable.  
Indeed, it is interesting to note that the Michigan Court of  
Appeals recently upheld the legislation which implements the  
constitutional right of recall. 1954 PA 116, as amended,  
MCLA 168.951; MSA 6.1951. Specifically, the court upheld  
legislation which requires hearings to determine the clarity  
of the reasons given for the recall (§ 952), it prohibits

counting signatures on petitions where the reasons for the recall are different than those determined to be of sufficient clarity by the County Elections Commission, (§ 961) and requires that the filing official shall determine the "sufficiency" of the petition within thirty-five (35) days of filing. (§ 963). See Mayor of Highland Park v Wayne County Elections Commission, Court of Appeals Slip Opinion, April 7, 1986. (A copy of the opinion is attached hereto). In reaching its decision the Court held, inter alia:

"Although we do not lightly reject the Circuit Court's thoughtful decision, we conclude that it erred in finding § 952 unconstitutional under Const 1963, art 2, § 8. Statutes are presumed to be constitutional. O'Brien v Hazelet and Erdal, 410 Mich 1; 299 NW2d 336, 1980. The presumption of constitutionality may even justify construction of the statute that is rather against a natural interpretation of the language used, if necessary, to sustain the enactment. People v Bandy 35 Mich App 53, 57; 192 NW2d 115, Lee denied 386 Mich 753, 1971 [Slip Opinion, p 6].

In sum, § 472a does not unduly burden the right of constitutional initiative. Indeed, it enacts necessary measures to ensure its integrity. Pursuant to convention statements, the deletion of restrictive constitutional language, the purpose of art 12, § 2, and the express summoning of legislative aid, MCLA 168.472a; MSA 6.1472(1) is appropriate, authorized and necessary legislation.

Arguments I and III set forth, respectively, the common understanding of the people in adopting art 12, § 2 and the necessity and appropriateness of § 472a. When "every intendment" of the Legislature is "indulged in," § 472a must be sustained.

The common understanding of the people was to discourage use of the constitutional initiative process and

to empower the Legislature to put the flesh on the "bare skeleton" of art 12, § 2 and facilitate the "minimum that was necessary." Indeed, the very language of art 12, § 2 summons legislative aid, which aid enjoys a presumption of constitutionality and the indulgence of this Court.

Inasmuch as § 472a safeguards the right to initiative by preventing fraud and abuse and by creating certainty as to the validity of petition signatures, as discussed more fully above, this legislative exercise, far from contravening art 12, § 2, facilitates its purpose.

To strike down § 472a as unconstitutional under these circumstances, is to ignore and/or abrogate the longstanding constitutional principle that legislation is to be supported by all possible presumptions of constitutionality. It would also be directly contrary to the specific language of art 12, § 2 and the intent of the people. In light of the erroneous assumptions, analyses and reliance upon inapplicable case law, 1974 OAG No. 4813 has clearly failed to overcome this presumption. For these reasons Plaintiffs request that this Court declare § 472a, 1954 PA 116, the Michigan Election Law, constitutional.

#### IV.

THE DOCTRINE OF LACHES IS WHOLLY  
INAPPLICABLE AND INAPPROPRIATE IN THE  
INSTANT CASE

The Attorney General's office has indicated to Plaintiffs that it intends to raise the Doctrine of Laches on behalf of Defendants as a defense and bar to the present action. Hence, the following argument is provided in anticipation of the Attorney General's brief which is to be filed prior to oral argument.

Laches is an affirmative defense that does not merely depend upon the passage of time, but, rather, requires intervening circumstances that "would render inequitable any grant of relief to the dilatory plaintiff." In Re Crawford Estate, 115 Mich App 19, 25 (1982). The party asserting laches must also establish prejudice as a result of delay and that the delay was a result of a want of due diligence on the part of the plaintiff. *Id.*, p.26.

Moreover, the fact of delay is not dispositive, *i.e.*, "the delay...may always be explained, and ...satisfactorily accounted for." Department of Treasury v Campbell, 107 Mich App 561, 571 (1981). Finally, it is well established that laches will not be applied to a situation where the plaintiff was precluded from acting upon the claim or was otherwise unable to so act, as where the claim was not ripe, jurisdiction was lacking or the plaintiff was not "in legal condition to do so." Gamble v Folsom, 49 Mich 141, 148 (1882). See also, Campbell, *supra*, pp. 571-572; Fred Macy Company v Macy, 143 Mich 138, 152 (1906); Backus v Backus, 207 Mich 690, 696 (1919); Detroit Trust Company v Dunitz, 59 F 2d 905 (CA 6, 1953). And the doctrine of laches is not to be applied when the result will defeat justice. Guaranty Trust Company of New York v Grand Rapids, G,H, & M Ry Company, 7 F Supp 511 (DC MI, 1934).

The obvious defect in Defendants' theory is that, had the instant lawsuit been filed before the petitions were approved as to form for the 1986 general election, there would have been no case or controversy to invoke the

jurisdiction of this Court. Because the MCL Proposal at issue here was not approved by The Board of State Canvassers until April, 1986, any earlier challenge by Plaintiffs would have been pure speculation, i.e., Plaintiffs were in no "legal condition" to take any action. This is especially true where the very nature of the instant challenge involves the staleness provision of §472a, and the matter only became ripe when it appeared that stale signatures were intended to be used for the 1986 election.

Under Defendants' theory, Plaintiffs should have filed suit at a time when there was no way of knowing whether an actual controversy existed. This position cannot withstand close scrutiny. In other words, delay, if it can indeed be deemed delay, can be "explained and satisfactorily accounted for". As in Campbell, supra, where the Plaintiff was statutorily precluded from acting any earlier than it did, the lack of ripeness prior to the filing for approval of the instant petitions for the 1986 election precluded Plaintiffs from acting earlier and also precludes application of the doctrine of laches.

In addition, the instant situation does not involve a matter over which Plaintiffs had control but failed to take any action. Although the non-enforcement of §472a potentially affected every initiative proposal since the issuance of the AG Opinion in 1974, Plaintiffs were in no position to act on behalf of the general public where their interests were not affected by the proposal. This is simply not the typical case in which the doctrine of laches is applied, wherein an existing relationship between the parties gives rise to a right which the Plaintiff only dilatorily asserts. In this connection, there are no "intervening circumstances which would render inequitable

any grant of relief to the dilatory Plaintiff." Crawford, supra, p.25.

On the contrary, the integrity of the initiative process is presently at issue. Under these circumstances, justice requires resolution of this matter, Guaranty Trust Company, supra. Equity will not intervene to preclude the present challenge where, first, Plaintiffs are not at fault and have not failed to raise an existing right based on the relationship of the parties and, moreover, a matter of great public interest is at stake.

Finally, prejudice has not been established. Defendants have no interest in the placement of the proposal on the ballot. That is, Defendant state agencies are entrusted with the duty of enforcing the law, whatever that may be determined to be. They may not complain or raise the issue of laches relative to properly enforcing the law as this Court determines.

With respect to the proposed Intervening Defendant, it may not claim prejudice for the reason that its reliance upon 1974 OAG, No. 4813 was at its own peril. Attorney General opinions are binding upon state agencies, but they are not binding upon Intervening Defendant. As with any legislation, Intervening Defendant was presumed to have knowledge of the directive of §472a, and its choice to rely upon the validity of 1974 OAG, No. 4813 as a shield against §472a cannot now be used as a sword against Plaintiffs. Section 472a represents necessary and appropriate legislation to safeguard the initiative process. The proposed Intervener's decision to rely upon the AG Opinion, binding only upon state agencies, People v Waterman, supra; Traverse City v Attorney General, supra, does not provide support for its claim that it is presently prejudiced by

this lawsuit. For all these reasons, the doctrine of laches does not apply.

CONCLUSION

Based upon the foregoing arguments it is apparent that § 472a of the Election Law, which enjoys a presumption of constitutionality, should be declared constitutional and enforceable by the Defendants notwithstanding the Attorney General's opinion to the contrary.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE,  
Attorneys for Consumers Power Company  
and Detroit Edison Company

By   
John D. Pirich, P.C. (P23204)

By   
Michael J. Hodge (P26146)  
Business Address:  
Suite 900  
One Michigan Avenue  
Lansing, Michigan 48933  
Telephone: (517) 487-2070

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MILLER, CANFIELD, PADDOCK AND STONE