STATE OF MICHIGAN

COURT OF CLAIMS

FAIR AND EQUAL MICHIGAN, SENATOR ADAM HOLLIER, and REPRESENTATIVE MARI MANOOGIAN,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, JONATHAN BRATER, in his official capacity as Director of Elections, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants.
_____/

OPINION AND ORDER

Case No. 20-000095-MM

Hon. Cynthia Diane Stephens

Pending before the Court is plaintiffs' May 26, 2020 motion for temporary restraining order and preliminary injunction. Plaintiffs have established a substantial likelihood of success on the merits of their assertions with respect to whether the 180-day timeframe contained in MCL 168.472a is unconstitutional as applied, such that the operation of MCL 168.472a is hereby suspended and tolled as specified in this opinion and order. To that end, the Court will GRANT injunctive relief in part by tolling the signature-expiration deadlines contained in MCL 168.472a for 69 days, which is a period of time equal to the number of days that an Executive Order required persons to "Stay-at-Home" and to avoid gathering in groups not comprising members of a single household, i.e., from March 24, 2020 until June 1, 2020. However, to the extent that plaintiffs continue to request that: (1) the signature requirement contained in Const 1963, art 2, § 9; and (2) the statutory deadline for submitting signatures contained in MCL 168.471, be enjoined because

they are unconstitutional fails because the Court concludes plaintiffs are unable to demonstrate a substantial likelihood of success on the merits on either claim of constitutional infirmity. Additionally, the Court concludes that plaintiffs Adam Hollier and Mari Manoogian lack standing in this matter, and that they must be dismissed as a result.

I. SUMMARY OF HOLDINGS

In response to the issues presented in the parties' arguments the Court hereby concludes as follows:

1. The doctrine of laches does not apply to this case because the Court has had sufficient time to resolve the issues and because plaintiffs pursued their rights without any delay that has harmed defendants.

2. The individual legislator plaintiffs have no standing to bring suit because any loss of their right to a legislative vote is speculative and not immediate.

3. Fair and Equal failed to establish a substantial likelihood of success on the merits of either: (a) its as-applied challenge to the constitutionally mandated signature requirements for ballot qualification; or (b) its as-applied challenge to the application of the filing deadline for initiative petitions.

4. As to MCL 168.472a's prohibition against counting signatures made more than 180 days before an initiative petition is filed, Fair and Equal established a substantial likelihood of success on the merits, and has otherwise demonstrated that the factors pertinent to an issuance of injunctive relief are in their favor.

5. The Court hereby grants preliminary injunctive relief, only insofar as the operation of MCL 168.472a is concerned, by tolling the operation of the statute for a period of 69 days that began on March 24, 2020, and ended on June 1, 2020. This time period shall not be included in the computation of MCL 168.472a's signature-invalidation deadline.

II. BACKGROUND

A. PARTIES AND BASIC OVERVIEW

Plaintiff Fair and Equal is a ballot issue committee leading a proposed ballot initiative to amend this state's Elliot-Larsen Civil Rights Act to expand the statute's prohibition against discrimination based on "sex" to include "sexual orientation, and gender identity or expression."

The individual plaintiffs, State Senator Adam Hollier and State Representative Mari Manoogian (hereinafter Legislator plaintiffs), are members of the current state legislature and they are signors of the ballot initiative petition. Plaintiffs filed a multi-count complaint for declaratory relief asking this Court to determine that Const 1963, art 2, § 9's signature requirement, and certain time limitation provisions of the Michigan Election Law—MCL 168.471 and MCL 168.472a—are unconstitutional as applied due to the state action taken through the Governor's several COVID-19 Executive Orders. In particular, plaintiffs focus on the impact of what will be referred to as the various iterations of this state's "Stay-at-Home" Executive Orders. Defendants are all sued in their official capacities with respect to their responsibility for the implementation of several challenged constitutional and legislative mandates regarding initiative petitions.

B. STATUTORY AND CONSTITUTIONAL REQUIREMENTS

Plaintiffs seek to remedy what they alleged to be infringements on the right of initiative in the Michigan Constitution. The implementation of that right is the subject of both constitutional and statutory law. In its latest iteration the Michigan Constitution reaffirms the over one-hundred-year-old right to initiative. Const 1963, art 2, § 9 provides that the people of this state "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 Constitution also recites the modicum of voter support needed to invoke this power, noting that "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." *Id.* The parties agree that the 8% figure required for placing an initiative petition on the 2020 ballot is 340,047 signatures. While this is a self-executing constitutional provision, the Legislature has enacted a

number of implementation statutes setting forth the process by which initiatives are managed administratively by the executive branch. In accordance with established Michigan jurisprudence affording the Legislature the task of setting forth the time and place of electoral matters, MCL 168.471(1) requires that an initiative petition must be submitted to the Secretary of State at least 160 days before the general election date in even numbered years. Therefore, Fair and Equal had a filing deadline of May 27, 2020, which was 160 days before the November 3, 2020 general election. See MCL 168.471(1).

Once the signatures are submitted to the Secretary of State, defendant Board of State Canvassers must "canvass the petitions to ascertain if the petitions have been signed by the requisite number of qualified and registered electors." MCL 168.476(1). In determining if the requisite number of signatures have been submitted a signature "shall not be counted if the signature was made more than 180 days before the petition is filed with the office of secretary of state." MCL 168.472a. The Board of State Canvassers must then make a declaration as to whether the petition meets statutory requirements in advance of the general election. See MCL 168.477(1). In pertinent part, MCL 168.477(1) provides that the Board of State Canvassers:

> shall make an official declaration of the sufficiency or insufficiency of a petition under this chapter at least 2 months before the election at which the proposal is to be submitted. The board of state canvassers shall make an official declaration of the sufficiency or insufficiency of an initiative petition no later than 100 days before the election at which the proposal is to be submitted.

The statutory timelines work in conjunction with a separate 40-day period contained in art 2, § 9, which declares that if a petition is certified, the Secretary of State must present it to the Legislature for enactment or rejection within 40 session days. "If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election." *Id.*

C. PERTINENT UNCONTESTED FACTS

The Plaintiff presented the court affidavits and the Defendants offered a "declaration" made under penalty of perjury but not witnessed by a notary. Despite the fact that this is an as-applied challenge to certain statutes neither party asked for an evidentiary hearing. Therefore, for the purposes of this opinion the Court will consider the uncontested factual statements offered by the parties to be true. Those pertinent uncontested facts are as follows:

> 1. Defendant Board of State Canvassers approved plaintiff Fair and Equal's petition for circulation on or about January 28, 2020, and Fair and Equal began raising money and gathering signatures shortly thereafter.
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> 2. By March 9, 2020, Fair and Equal had collected 100,000 signatures and had a team of 628 volunteers and 145 paid signature gatherers. By the week of March 9, 2020, Fair and Equal had secured over 130,000 signatures.
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> 3. On or about March 10, 2020, Governor Gretchen Whitmer declared a state of emergency across this state in response to the COVID-19 pandemic. See Executive Order No. 2020-4.
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> 4. On March 24, 2020 a "Stay-at-Home Order" was issued by Governor Whitmer. Executive Order No. 2020-21. The order contained a number of restrictions on the daily lives of this state's citizens. Notably, the order required, with certain, limited exceptions, all individuals living in this state to stay at home, and it prohibited "all public and private gatherings of any number of people occurring among persons not part of a single household[.]" *Id*. at § 2. A willful violation of the order constituted a misdemeanor infraction.
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> 5. Fair and Equal continued gathering signatures during the week ending March 15, 2020, obtaining an additional 43,103 signatures that week.
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> 6. However, during the week ending March 22, 2020—Fair and Equal gathered only 7,348 signatures.
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> 7. With respect to signature-gathering efforts by mail that began after the issuance of the Stay-at-Home Orders, Fair and Equal made over 34,000 telephone calls to voters to determine whether they would be willing to accept mailed petitions; only approximately 700 voters agreed to receive petitions by mail, however.
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> 8. Fair and Equal also attempted to gather signatures online beginning April 13, 2020, but experienced limited success.

9. Fair and Equal spent a total of $131,321.15 on its electronic signature campaign, but received only 12,084 signatures as a result of these efforts.

10. Only Executive Order No. 2020-110, which largely lifted the stay-at-home orders, expressly mentioned or exempted constitutionally protected activity or activity protected by the First Amendment to the United States Constitution. However, a "Frequently Asked Questions" document that was released with EO 2020-21 declared that the order did not prohibit persons from engaging in outdoor activities protected by the First Amendment to the United States Constitution, so long as they remained "at least six feet from people from outside" their households. *Executive Order 2020-21 FAQs*, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-522631--,00.html (accessed June 8, 2020). All future iterations of the Governor's Stay-at-Home Orders contained similar directives in an "FAQ" section. As noted, EO 2020-110 eliminated many provisions of the previous Stay-at-Home Orders, but the order maintains some limitations on gatherings and it continues to require social distancing.

11. The "Stay at Home Order" was lifted as to the entire state as of June 1, 2020, although the order continues to place limitations on the size of gatherings and on the ability of citizens to assemble.

12. Defendants, through defendant Jonathan Brater, presented a timeline for managing petitions which involved myriad governmental actors at the state and local level that supported the need to begin the administrative process associated with initiative petitions within days of May 27, 2020 filing deadline.

D. CURRENT REQUEST FOR INJUNCTIVE RELIEF

Plaintiffs allege that the combination of the Executive Orders issued pursuant to the COVID-19 pandemic, the pandemic itself and enforcement of the statutory and constitutional signature requirements and statutory deadlines, unconstitutionally prevented them from obtaining ballot access. Plaintiffs do not, however, challenge the validity of any of the Governor's Stay-at-Home orders or otherwise suggest that the same were unnecessary. In their complaint plaintiff's request for relief can be summarized as follows:

1. A suspension of the filing deadline for petitions;

2. A relaxation of the constitutional signature requirements;

3. A suspension of the ban of using signatures that are more than 180 days old.

After Oral argument plaintiffs presented and alternative prayer for relief which was:

> A suspension of the ban of using signatures that are more than 180 days old until such time that there is no state Executive order or state public health order prohibiting public gatherings of 5,000 or more persons in Michigan in response to COVID-19 in effect, or until January 17, 2022;

This court perceives this new request to be an abandonment of the previous prayer for relief but will nevertheless address plaintiffs' previous requests in a cursory manner for the sake of completeness.

III. ANALYSIS

A. THE LEGISLATORS LACK STANDING TO PURSUE THIS MATTER

As an initial matter, the Court first is compelled to conclude that the individual legislators lack standing to pursue this matter. The legislators have not identified the type of interest that would overcome the "heavy burden" they must establish so as to give rise to legislative standing. See *Dodak v State Admin Bd*, 441 Mich 547, 555; 495 NW2d 539 (1993); *League of Women Voters*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), slip op at 8. To that end, they only speculate that *if* the petition garnered enough signatures and *if* the petition had been presented to the Legislature, they would be deprived of their ability to vote on the measure. Nor have they identified a personal and legally cognizable interest particular to them, rather than a generalized grievance. See *League of Women Voters*, __ Mich App at __, slip op at 8. Cf. *Dodak*, 441 Mich at 560-561 (finding standing where a legislator lost a particular—as opposed to a speculative or contingent—right to participate in the legislative process).

B. LACHES DOES NOT APPLY

Before turning to Fair and Equal's likelihood of success on the merits, the Court briefly will address, and reject, defendants' laches argument. Even assuming plaintiffs tarried in bringing this action, the Court is convinced that the action is not the sort of last-minute, potentially election-

delaying lawsuit that courts have declined to address. See, e.g., *Crookston v Johnson*, 841 F3d 398, 398 (CA 6, 2016).[1] Given the parties' adequate and competent compliance with the expedited briefing schedule, this case is not one in which there is "inadequate time to resolve factual disputes and legal disputes . . . ." *Id.* (citation and quotation marks omitted).

C. GENERAL PRINCIPLES

Injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted). Analysis of whether this remedy is appropriate requires an examination of:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* (citation and quotation marks omitted).]

While the factual context is always important in the analysis of a request for injunction, it is of even greater importance when, as here, the request is based upon an as-applied challenge. "A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge." *In re forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). "When faced with a claim that application of a statute renders it unconstitutional, the court must analyze the statute 'as applied' to the particular case." *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000). In other words, "[a]n as-

[1] While this Court is not bound by the decisions of lower federal courts, it may utilize such decisions as persuasive authority. *Bienenstock & Assocs, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016).

applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v City of Menlo Park*, 146 F3d 629, 635 (CA 9, 1998). See also *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) ("An as-applied challenge, to be distinguished from a facial challenge, alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action") (citation and quotation marks omitted).

The analytical framework for these as-applied challenges is also dependent on the standard of review applied to the state action which is alleged to have caused a constitutional injury. The parties agree that as recognized in *League of Women Voters*, __ Mich App at __, slip op at 16, the circulation of an initiative petition involves "core political speech" that is deserving of First Amendment[2] protection. As was recently recognized by the United States Court of Appeals for the Sixth Circuit in another ballot initiative case, challenges to nondiscriminatory, content-neutral ballot initiative requirements are evaluated under what is known as the "*Anderson-Burdick*" test.[3] *Thompson v Dewine*, __ F3d __ (CA 6, 2020), slip op at * 2. Under this test, if a state imposes " 'reasonable nondiscriminatory restrictions[,]' courts apply rational basis review and 'the State's important regulatory interests are generally sufficient to justify' the restrictions.' " *Thompson*, __ F3d at __, slip op at *2, quoting *Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992) (further citation omitted). However, if a state imposes "severe restrictions, such as

[2] Plaintiffs in the instant case have only raised claims that implicate this state's constitution; however, because the "rights to free speech under the Michigan and federal constitutions are coterminous," our courts look to federal authority when construing this state's free speech guarantee. *Burns v Detroit (On Remand)*, 253 Mich App 608, 620-621; 660 NW2d 85 (2002).

[3] See *Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983), and *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

exclusion or virtual exclusion from the ballot, strict scrutiny applies." *Id.* And for "cases between these extremes, [courts] weigh the burden imposed by the State's regulation against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Id.*, quoting *Burdick*, 504 US at 434 (further citation omitted). Fair and Equal argues that the level of scrutiny for each of questioned petition requirements is strict scrutiny and that under that standard the number of signatures, the filing deadline, and the limitation on signature validity all fail. Defendants ask the court to apply an intermediate or rational basis analysis and reach the contrary result.

D. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THE CLAIM THAT THE 180-DAY LIMITATION ON THE VALIDITY OF SIGNATURES IN MCL 168.472A IS CONSTITUTIONALLY INFIRM AS APPLIED

The Court will first turn to the only challenge on which Fair and Equal demonstrated a likelihood of success on the merits: its contention regarding the 180-day limitation on the validity of signatures. In ordinary times this challenge would fail because there is a legitimate if not compelling state interest in play. However, for 69 days the people of the state were ordered to "stay at home" except for activity that was necessary to sustain or protect human life or health. Violation of this imperative was a misdemeanor. Defendants have asserted that the Executive Orders included an exception for First Amendment activity such as petition drives. The Court notes that while EO 2020-110 contains such language, no other order expressly did so. Instead the First Amendment protection was found in the FAQ on a governmental website. Of course, like legislative analysis or court rule commentary, the FAQ section did not have the force of law. It is undeniably true that during the "stay at home" period there were several assemblies both at the State Capital and elsewhere where people gathered for the purpose of expressing political views.

In some instances, on information and belief, some of the persons assembled were ticketed. In some instances, people were not. However, all were in jeopardy of arrest. Defendants have argued that it was not the state action that burdened the plaintiff's ability to seek signatures but the pandemic itself. However, nowhere in *Anderson-Burdick* is it mandated that the state action must be sole cause of a burden. The court in *Esshaki v Whitmer (Esshaki I)*, __ F Supp 3d __ (ED Mich, 2020), analyzed the effect of all the executive orders in combination with the pandemic itself. In reviewing the district court finding the Sixth Circuit affirmed "the district court correctly determined that the combination of the state's enforcement of the ballot access provisions and the Stay-at-Home orders imposed a severe burden on the plaintiffs' ballot access . . . ." *Esshaki v Whitmer (Esshaki II)*, __ Fed Appx __, __ (CA 6, 2020), slip op at * 1. Therefore, this Court applies strict scrutiny to application of the 180 provision, finding it imposed a "severe" burden under the circumstances.

Through the lens of strict scrutiny this Court acknowledges the legitimate state interest in the smooth administration of the election. The Court also notes that the asserted intent of the implementation of the rule is to assure that only persons who are qualified electors are counted toward the ballot signatory threshold. However, the same reality that caused most people to obey the stay at home order also caused them to not move from state-to-state in any great numbers. The state has the tools to examine the signatures when and if the petitions are filed to assure the residency of the signatories. It is noteworthy that the state in the Executive Orders explicitly tolled the statutes of limitations for numerous civil activities from drivers' license expiration to civil action filing deadlines. Accordingly, a tolling of the signature expiration for ballot questions is no less burdensome or fraught with peril to the public. "The spirit of the Constitution is not met if the rights it grants are unnecessarily impaired under the guise of implementation." *League of*

Women Voters of Michigan, __ Mich App at __, slip op at 12. As a result, the Court concludes Fair and Equal has established a likelihood of success with respect to the constitutionality of MCL 168.472a as it has been applied, such that it is appropriate to "toll" or "suspend" the running of the 180-day period for the length of time the residents of this state were forced to remain in their homes during the various iterations of this state's Stay-at-Home orders.

E. PLAINTIFFS DO NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM RELATED TO MCL 168.471'S DEADLINES

Whether viewed through the lens of intermediate or strict scrutiny, Fair and Equal's as-applied challenge to the filing deadline contained in MCL 168.471 fails to demonstrate a likelihood of success. Defendants assert that it was Fair and Equal's decision as to when to begin their petition drive that occasioned an exacerbation of the burden caused by the fielding deadline. Fair and Equal counters that it was the failure of the Board of Canvassers to timely review their ballot language that delayed their efforts. In any case, Fair and Equal fails to convince this Court that the state's need for an orderly process for vetting the petitions, coupled with its compelling interest in implementing the support threshold of the constitution for ballot access, is either insubstantial nor rationally related to deadlines. Plaintiffs ask this court to be guided the analysis of *Esshaki I*, __ F Supp 3d __; 2020 WL 1910154. However, by defendants' own admissions in *Esshaki I*, the administrative process for managing a candidate petition afforded the state much more flexibility in altering due dates in that case. In this case not only do defendants have to review petition signatures, but they must also meet the constitutional timeline for submission of any certified questions to the Legislature. The legislative timeline then impacts the ballots of all 83 counties. Even if this court were to find that the burden on the constitutional rights initiative and its

companion right under the First Amendment was severe, this Court has no basis to find that the timeline of the statute is not sufficiently narrow to meet constitutional muster.

F. PLAINTIFFS DO NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM WITH RESPECT TO ART 2, § 9

Fair and Equal is even less likely to succeed on the merits on their challenge to the constitutional signature requirement found in art 2, § 9. Fair and Equal only asserts a challenge to the signature requirement under this state's constitution.[4] They argue that, as applied to the current case, art 2, § 9's signature requirements conflict with the assembly and speech rights enshrined in art 1, §§ 3 and 5.

The Court's evaluation of this issue is first shaped by the notion that, contrary to what Fair and Equal has advocated for, the Court must not be quick to find a conflict between two constitutional provisions and should instead avoid a construction wherein one provision would nullify or impair another provision. See *Taxpayers for Mich Constitutional Gov't v State*, __ Mich App __, __; __ NW2d __ (2019), issued October 29, 2019 (Docket No. 334663). In other words, and contrary to Fair and Equal's position, this Court should not seek out a conflict between art 2, § 9, and art 1, §§ 3 and 5. Furthermore, and assuming for the sake of argument that the constitutional provisions identified by Fair and Equal did conflict, this State's Supreme Court has explained that, given a conflict between a general provision and a specific provision, "the specific provision must control." *Advisory Opinion of Constitutionality of 1978 PA 426*, 403 Mich 631,

[4] Thus, the *Anderson-Burdick* test, which is applied in cases where a litigant's rights protected by the First Amendment to the United States Constitution are alleged to be infringed by state law, is of little use to Fair and Equal. Here, by contrast, the issue regarding constitutional signature requirements involves a purported conflict between two sections of this state's constitution.

639; 272 NW2d 495 (1978). This rule is: "grounded on the premise that a specific provision must prevail with respect to its subject matter, since it is regarded as a limitation on the general provision's grant of authority. The general provision is therefore left controlling in all cases where the specific provision does not apply." *Id.* at 639-640. In this case, the more specific provision is the signature requirement contained in art 2, § 9, and the more general provisions are the constitutional guarantees of free assembly and speech contained in art 1, §§ 3 and 5. To the extent the COVID-19 pandemic would render them to be in conflict, this rule of constitutional construction would dictate that art 2, § 9 would prevail in the context of the number of signatures required for an initiative petition.

Fair and Equal invites the Court to examine the purpose of art 2, § 9, and to conclude that the same supports its position. However, the rule of constitutional interpretation Fair and Equal cites in support of this position only applies when a court is tasked with "construing constitutional provisions where the meaning may be questioned . . . ." *Advisory Opinion*, 403 Mich at 640 (citation and quotation marks omitted). Here, there have been no compelling arguments as to why the meaning of the various provisions at issue may or should be questioned. Caselaw has recognized that "[t]he initiative process of art 2, § 9 was not intended to be easy to fulfill." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 217; 378 NW2d 337 (1985). As articulated in *Woodland*, the debate at the Constitutional Convention shows that the delegates "strongly resisted" and ultimately rejected a proposal that would have lowered the signatures requirement threshold. *Id*. Quoting from the Constitutional Convention Record, the *Woodland* Court explained:

> It's tough. We want to make it tough. It should not be easy. The people should not be writing the laws. That's what we have a senate and house of representatives for. [*Id*. at 217, quoting 2 Official Record, Constitutional Convention 1961, p. 2394.]

Stated otherwise, the delegates intended that it be difficult to invoke the initiative process, and this intent acknowledged the notion that many proposed initiatives would not make the ballot. The purpose of art 2, § 9 does not support lowering the signature threshold.

As a final attempt to justify a lowering of the signature threshold requirements, Fair and Equal argues that refusing to lower the signature requirements would violate their right to equal protection under the law. Fair and Equal has not identified any other ballot initiative petitions for which signature requirements have been lowered, however, nor could counsel do so when asked at oral argument. This state's constitution provides that "no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

> The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. [*Id.* at 318 (citations and quotation marks omitted).]

"To be considered similarly situated, the challenger and his comparators must be prima facie identical in all relevant respects or directly comparable . . . in all material respects." *Demski v Petlick*, 309 Mich App 404, 464; 873 NW2d 596 (2015) (citation and quotation marks omitted).

Finally, Fair and Equal fails to establish the threshold requirement of being similarly situated to another entity for which signature requirements were lowered. To the extent Fair and Equal's briefing sought to compare its petition with the nominating petitions at issue in *Esshaki I*, the same would be unsuccessful. Fair and Equal and the plaintiffs in *Esshaki I* are not prima facie identical, nor are they directly comparable. Notably, the plaintiffs at issue in *Esshaki I* were arguing that certain statutory requirements should yield to the United States Constitution. Here,

Fair and Equal is asking the Court to find that certain provisions of the Michigan Constitution should be given priority over Art 2, § 9's signature requirements. This is a significant difference that shows a lack of a similar situation.

In sum, Fair and Equal is unable to demonstrate a likelihood of success on the merits of their request to lower the signature requirements contained in art 2, § 9.

G. REMAINING FACTORS FOR INJUNCTIVE RELIEF

As for the remaining factors required for the issuance of preliminary injunctive relief, the Court will focus only on the claim that has a substantial likelihood of success on the merits: the claim related to the 180-day signature invalidation found in MCL 168.472a. And on that claim, given the nature of the constitutional violation occasioned by application of MCL 168.472a under the current circumstances, Fair and Equal can establish the existence of irreparable harm. See, e.g., *Libertarian Party of Ohio v Husted*, 751 F3d 403, 412 (CA 6, 2014) (remarking that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief") (citation and quotation marks omitted). In addition, given that the suspension or tolling of the 180-day period effectuated by this Court's order will not affect the 2020 ballot or its preparation, the harm to the state will be minimal, if any. Finally, the Court finds little, if any, harm to the public. Indeed, given the widespread public support Fair and Equal has asserted existed for its initiative, and given the opportunity for petition signers to have their petition counted in the future, the public derives a benefit from the issuance of injunctive relief with respect to the operation of the 180-day provision found in MCL 168.472a. Additionally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Libertarian Party of Ohio*, 751 F3d at 412 (citation and quotation marks omitted). Thus, the necessary prerequisites exist for this Court to issue preliminary injunctive relief.

IV. CONCLUSION

IT IS HEREBY ORDERED that the motion for preliminary injunction is GRANTED in part, insofar as the operation of the 180-day deadline found in MCL 168.472a is concerned. To that end, the Court will toll or suspend the statute's 180-day signature expiration deadline for a period of 69 days, which is equal to the amount of time that residents of this state were ordered to "Stay at Home." Hence, the operation of the signature expiration deadline is hereby tolled from March 24, 2020, until June 1, 2020 and that time period shall not be counted when computing MCL 168.472a's 180-day signature-invalidation deadline.

IT IS HEREBY FURTHER ORDERED that the motion for preliminary injunction is DENIED in all other respects.

This is not a final order and it does not resolve the last pending claim or close the case.

Date: June 10, 2020

Cynthia Diane Stephens
Judge, Court of Claims