STATE OF MICHIGAN

COURT OF CLAIMS

PRIORITIES USA and RISE, INC,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State,

Defendant,

and

MICHIGAN SENATE AND HOUSE OF REPRESENTATIVES,

Intervenors-Defendants.

______________________________/

OPINION AND ORDER REGARDING MOTIONS FOR SUMMARY DISPOSITION AND PRELIMINARY INJUNCTION

Case No. 19-000191-MZ

Hon. Christopher M. Murray

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CONSOLIDATED WITH:

PROMOTE THE VOTE,

Plaintiff,

v

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State,

Defendant.

______________________________/

No. 20-000002-MZ

Pending before the Court are defendant Secretary of State Jocelyn Benson's December 23, 2019 motion for summary disposition (challenging plaintiff Priorities USA standing to pursue these claims) and May 1, 2020 motion for summary disposition under MCR 2.116(C)(10); defendant Michigan House of

Representatives and Michigan Senate's ("the Legislature") May 1, 2020 motion for summary disposition under MCR 2.116(C)(10); plaintiff Promote the Vote's May 1, 2020 motion for summary disposition under MCR 2.116(C)(10); and plaintiffs' motion for preliminary injunction. All parties have had an opportunity to respond to opposing motions. The Court dispenses with oral argument because, through their briefs, the parties have done a thorough and professional job outlining their legal positions. See LCR 2.119(A)(6). For the reasons that follow, plaintiff Promote the Vote's motion for summary disposition and plaintiffs' motion for a preliminary injunction will be denied, and defendants' motions for summary disposition will be granted.

I. PERTINENT BACKGROUND

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These consolidated matters were filed by out-of-state political advocacy groups who claim that the Michigan Legislature enacted statutory provisions, and the Secretary of State implemented a policy, that unduly burdens Michigan voters' constitutional rights by restricting their ability to vote. Specifically, plaintiffs claim that newly enacted sections of a statute, MCL 168.497(2)-(5), place undue burdens on voters by: (1) narrowing the types of required documentation accepted for in-person voter registration performed within 14 days of election day[1]; and (2) requiring a "challenged ballot" for in-person voters on election day that prevents those voters from having the equal opportunity to vote. These statutory provisions, plaintiffs allege, are also contrary to the Michigan Constitution because they restrict the self-executing provisions within Const 1963, art 2, § 4. Further, plaintiffs claim that the Secretary's Automatic Registration Policy discriminates against persons younger than 17.5 years of age by not automatically registering them to vote when they first interact with the Secretary of State Office.

[1] This has been referred to in the briefs as the "documentation requirement."

After consolidating claims from another case and joining the Legislature as intervening defendants, all parties moved for summary disposition or other relief.[2] All parties have had an opportunity to respond to each motion, and the matter is ripe for decision.

A. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. PROPOSAL 3

In the 2018 general election, Michigan voters approved what was designated on the ballot as Proposal 3, which contained changes to Michigan election law. Specifically, Proposal 3 requires automatic voter registration at the Secretary of State's office and grants residents the ability to register to vote up to the day of the election as long as they register in person and have proof of residency. As amended by Proposal 3, Const 1963, art 2, § 4(1)(d), now provides residents with "[t]he right to be automatically registered to vote as a result of conducting business with the secretary of state regarding a driver's license or personal identification card, unless the person declines such registration." Further, as amended by Proposal 3, Const 1963, art 2, § 4(1)(f) now grants:

> The right to register to vote for an election by (1) appearing in person and submitting a completed voter registration application on or before the fifteenth (15th) day before that election to an election official authorized to receive voter registration applications, or (2) beginning on the fourteenth (14th) day before that election and continuing through the day of that election, appearing in person, submitting a completed voter registration application and providing proof of residency to an election official responsible for maintaining custody of the registration file where the person resides, or their deputies. Persons registered in accordance with subsection (1)(f) shall be immediately eligible to receive a regular or absent voter ballot.

Under these new constitutional provisions, voters can register to vote within the 14-day window before or on election day by registering in-person and providing proof of residency. See Const 1963, art 2, § 4(1)(d), (f).

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[2] This was done at the suggestion of the Court during a scheduling conference.

2. 2018 PUBLIC ACT 603

Shortly after Proposal 3's approval, the Michigan Legislature enacted 2018 PA 603, which addresses voter registration. Specific to this lawsuit, MCL 168.497 provides that a person registering to vote for the first time in this state—or who is registering in a new locality within the state—and who wishes to register within 14 days of an election, may do so in-person if he or she provides the required "proof of residency." MCL 168.497(2) details the documentation acceptable to establish "proof of residency" as stated in Const 1963, art 2, § 4(1)(f):

> 1. An applicant may provide a state driver's license or a chauffer's license [MCL 168.497(2)(a)];
>
> 2. An applicant may provide an official state personal identification card [MCL 168.497(2)(b)].

MCL 168.497(3) provides an alternative means of satisfying "proof of residency" requirements if an applicant for voter registration does not have the "proof of residency" documents listed in MCL 168.497(2). Pursuant to MCL 168.497(3), the applicant may provide proof of residency by way of "any other form of identification for election purposes" " (a defined term that includes official photo IDs issued by a state, the U.S. government, the military, or a high school or institution of higher education)[3], as well as one of the following documents that includes the applicant's name and current address:

1. A current utility bill;
2. A current bank statement; or
3. A current paycheck, government check, or other government document.

In the event that a prospective voter is unable to produce the common items detailed in MCL 168.497(3), PA 603 provides that an applicant can also provide a signed affidavit indicating that the

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[3] MCL 162.2(k)(xi)

applicant does not have identification for election purposes. MCL 168.497(4). If a prospective voter chooses this option, they must also provide one of the following documents that includes the applicant's name and current address:

1. A current utility bill;
2. A current bank statement; or
3. A current paycheck, government check, or other government document. [MCL 168.497(4)]

If an individual registering to vote in-person 14 days or less before an election (or on election day) registers under subsection (3) or (4), "the ballot of that elector must be prepared as a challenged ballot" and the ballot "must be counted as any other ballot is counted unless determined otherwise by a court of law . . . ." MCL 168.497(5).

Finally, in accordance with art 2, § 4(1)(d)'s directive, Secretary Benson developed an Automatic Voter Policy to automatically register voters who interact with the Secretary of State's Office after turning 17.5 years of age.

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B. PLAINTIFFS' CLAIMS

According to the plaintiffs, both the additions to MCL 168.497 made by Public Act 603, as well as the Automatic Voter Registration Policy, unconstitutionally limit and alter Proposal 3's changes to the Michigan Constitution, ultimately unduly burdening young voters and violating art 2, § 4 of the Michigan Constitution. Specifically, plaintiffs claim that: (1) MCL 168.497(2)-(5) unduly burdens voters by limiting the types of documents accepted when showing proof of residency; (2) the "challenged ballots" provided under MCL 168.497(5) will deny some voters an equal opportunity to participate in Michigan's elections; and (3) the Automatic Registration Policy unduly burdens young voters by not automatically registering individuals that interact with the Secretary of State's Office *before* they turn 17.5 years of age.

Plaintiffs challenge these provisions under both the Michigan and United States Constitutions. Plaintiffs also argue that the amendments to Const 1963, art 2, § 4, are self-executing, and further restricting these new rights by statute violates the state constitution. Plaintiffs also argue that the restriction within the statutes and the Secretary's policy violate voters' rights under the federal constitution.

Plaintiffs' ultimate objective is to obtain a judgment declaring that MCL 168.497(2)-(5) violate art 2, § 4 of the Michigan Constitution; that the documentation requirement unduly burdens the right to vote and denies voters the equal protection of the law, in violation of Article 1, Section 2 of the Michigan Constitution.

C. DEFENDANTS' RESPONSES

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All defendants have moved for summary disposition, arguing that neither the statutory amendments nor the policy unduly burdens the right to register to vote, or to vote. Secretary Benson argues that plaintiffs have failed to identify an actual controversy sufficient to support a claim for declaratory relief, and that plaintiffs' claims are hypothetical in nature such that they fail to show actual injury. Moreover, Secretary Benson argues that plaintiffs do not meet the requirements for standing to request a declaratory judgment, as they are not eligible to vote in Michigan themselves, and they have not pleaded any special injury or right, or substantial interest that will be detrimentally affected by the challenged provisions. The Legislature argues that it acted appropriately under the constitutional mandate to regulate the time, place, and manner of elections and that the challenged provisions do not unduly burden the right to vote as they serve the state's interest in preserving the purity of elections.

II. ANALYSIS[4]

[4] The Secretary of State initially filed a motion for summary disposition challenging Priorities USA's standing to pursue this declaratory action. Because the standing of other plaintiffs (that are making the same arguments) have not been challenged, deciding whether one party has standing is not prudential. Nevertheless, the Court notes that Priorities USA would have great difficulty establishing organizational

In reviewing and deciding the merits, the Court will apply the standards for deciding a motion filed pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A. RESTRICTIONS ON SELF-EXECUTING PROVISION

The Court will first address plaintiffs' assertion that the constitutional amendments provided by Proposal 3 were "self-executing," and that the subsequent statutory amendments to implement the mandates of Proposal 3 are unconstitutional by unduly restricting the rights recognized in Proposal 3. This is a facial challenge to MCL 168.497(2)-(5), and as a result, plaintiffs have a difficult burden to overcome. As stated in *Bonner v City of Brighton*, 495 Mich 209, 223; 848 NW2d 380 (2014):

> A party challenging the facial constitutionality of an ordinance "faces an extremely rigorous standard." To prevail, plaintiffs must establish that " 'no set of circumstances exists under which the [ordinance] would be valid' " and " '[t]he fact that the ... [ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient' " to render it invalid. Indeed, " 'if any state of facts reasonably can be conceived that would sustain [the ordinance], the existence of the state of facts at the time the law was enacted must be assumed' " and the ordinance upheld. Finally, because facial attacks, by their nature, are not dependent on the facts surrounding any particular decision, the specific facts surrounding plaintiffs' claim are inapposite. [Citations omitted.]

And, as with all challenges to the constitutionality of a statute, the Court must presume the statute is valid, and plaintiffs have the burden of proving otherwise. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

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standing, as it concedes must do to establish the actual controversy requirements of MCR 2.605. For one, Priorities USA lacks *any* members who reside in Michigan, and not having *any* Michigan voting members within this state would be "fatal to [its] associational standing." *Jacobson v Florida Sec of State*, 957 F3d 1193, 1204 (CA 11, 2020) (rejecting the standing of Priorities USA in a Florida election law challenge). It is difficult to discern how Priorities USA would have a substantial interest in the application of a state statute when it has no members residing in the state. Other organizations that actually have state membership can pursue these challenges. Second, the evidence of how its resources would actually be diverted is too generalized to constitute an injury. Priorities argued (response brief, p 15) that the same injury to its resources at issue in *Jacobson* are at issue here. But since the response brief was filed the Eleventh Circuit reversed the favorable district court ruling on that precise issue. *Jacobson*, 957 F3d at 1205.

It is true, as plaintiffs argue, that the Legislature may not enact laws that impose additional burdens on a self-executing constitutional provision. That much was made clear in *Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392, 395 (1971). But what that also means, stated in the positive, is that the Legislature may enact laws that supplement self-executing provisions, as long as those laws do not unduly burden the constitutional rights granted:

> 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. [*Hamilton v Sec of State*, 227 Mich 111, 125; 198 NW 843 (1924), quoting *State, ex rel Caldwell v Hooker*, 22 Okla 712; 98 P 964 (1908).]

See also *Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 97-99; 463NW2d 461 (1990).

Further, the Legislature is unconstrained to enact laws that aid in providing clarity and to safeguard against abuses:

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> 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. [*Wolverine Golf Club v Hare*, 24 Mich App 711, 730; 180 NW2d 820, 829 (1970), aff'd sub nom *Wolverine Golf Club v Hare*, 384 Mich at 466 (citation and quotation marks omitted).]

Although all parties agree that the constitutional provisions provided by Proposal 3 are self-executing, not surprisingly, they do not agree on whether the statutory provisions unduly burden the rights granted. As explained below, they do not.

Although Const 1963, art 2, § 4 is considered a self-executing provision, it contains no definition of "proof of residency." The residence[5] of a voter is important for voting purposes, as it anchors individuals to the locality where he/she principally resides. See MCL 168.11(1). Once the residence of a

[5] Michigan law already provided a definition of "residence" for purposes of voter registration. MCL 168.11(1).

voter is determined, local election officials provide voters with a voter registration card and a precinct at which to vote, amongst other things. See MCL 168.491; MCL 168.727; MCL 168.729. Additionally, who a person can vote for in most instances is determined by where one resides.[6] Thus, by defining the important and undefined phrase "proof of residency," the Legislature properly supplemented the constitutional provision. Indeed, had it not enacted such a provision, state and local election officials would be left to their own devices in determining what is an acceptable form to provide "proof of residency." Without this statutory definition, what each resident must provide as proof of residency could be different in all 83 counties. Ensuring application of a state-wide standard to an undefined constitutional phrase is well within the powers of the Legislature. See 1963 Mich Const, art 2, § 4(2) (providing that the Legislature "shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 18-20; 740 NW2d 444 (2007).

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Through MCL 168.497(2)-(5) the Legislature provided a clear, unambiguous procedure for voter registration that guides both voters and election officials through the voter registration process. This clarity will not only increase registration efficiency, but also serves the state's interest in preserving uniformity in election procedures. Therefore, MCL 168.497(2)-(5) are reasonable supplementations to the constitutional provision by defining "proof of residency."

[6] For example, all county offices, county ballot proposals, circuit court and Court of Appeals judges, and state senate and representatives, are location-dependent offices. The same is true for congressional offices.

In addition to the above, plaintiffs argue that the Secretary's Automatic Registration Policy unduly burdens and curtails the self-executing provisions within art 2, § 4 of the Michigan Constitution by only registering voters who are 17.5 years or older when they conduct business with the Secretary of State's Office. Const 1963, art 2, § 4(1)(d). However, the Automatic Registration Policy is not a policy, but rather a restatement of state law, specifically MCL 168.493a and MCL 168.492, and is consistent with the right of "electors qualified to vote" being entitled to automatically register to vote when doing business with the secretary of state offices. See art 2, § 4.

Michigan's Constitution, in conjunction with court interpretations, defines an elector qualified to vote as any resident that has reached the age of 18. See Const 1963, art 2, § 1; US Const Am 26 (prohibiting states from denying the right to vote to United States citizens "who are eighteen years of age or older"). The Constitution grants these qualified voters the right to be automatically registered as a result of conducting business with the secretary of state. Const 1963, art 2, § 4(1)(d). Plaintiffs do not challenge MCL 168.492, which states that an elector qualified to vote is someone 17.5 or older, and nowhere does the Constitution grant individuals under the age of 17.5 the right to be automatically registered when conducting business with the secretary of state. Their assertion that the Automatic Registration Policy unduly burdens constitutional rights under art 2, § 4 is without merit as a result.

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B. DO MCL 168.497(2)-(5) PLACE AN UNCONSTITUTIONAL BURDEN ON VOTERS?

Although the right to vote is not enumerated in either the federal or state constitutions, the United States Supreme Court has held that citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 16, citing *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972). While there is a judicially determined constitutional right to vote, this right is not absolute. *Dunn,* 405 US at 336; *In re Request for Advisory Opinion Regarding*

Constitutionality of 2005 PA 71, 479 Mich at 16. In fact, the states have the power to impose voter qualifications and to regulate access to the franchise in many different ways. *Dunn*, 405 US at 336. See also US Const, art 1, § 4.

Consistent with that constitutional principle, the people, through the Michigan Constitution, granted the Legislature broad power to regulate elections:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. [Const 1963, art 2, § 4.]

Most notably, art 2, § 4 empowers the Legislature to enact laws that protect the purity of elections and to guard against abuses of the elective franchise. With this authority, the Legislature may enact laws to preserve the purity of elections by reducing the potential for fraudulent voting, so long as the regulations only regulate the elective franchise, rather than destroy it:

> All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, and guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential." [*Todd v Bd of Election Com'rs*, 104 Mich 474, 483; 64 NW 496 (1895), quoting Cooley, Const Lim 753].

See also *In re Req for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 18. Overall, the citizens' right to vote can be said to be in competition with the state's interest in ensuring uniform, efficient and fair elections.

The U.S. Supreme Court's decisions in *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), set the framework for analyzing whether these provisions violate a Michigan resident's right to vote in violation

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of the state and federal constitutions. The Michigan Supreme Court utilizes the *Anderson-Burdick* balancing test to assess equal protection challenges to an election law under the Michigan Constitution. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 7, 20. In doing so, the Court noted that, rather than applying a strict scrutiny analysis to each challenge to an election law's constitutionality, a "flexible standard" should be used when a regulation imposes only a reasonable, nondiscriminatory restriction:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" 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."
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. [*In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 21, citing *Burdick*, 504 US at 434.]

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The Court now turns to an application of *Anderson-Burdick* to the provisions challenged by plaintiffs.

1. DOCUMENTATION REQUIREMENT

The Court rejects plaintiffs' argument that the documentation requirements within MCL 168.497(2)-(4) run afoul of the *Anderson-Burdick* framework by placing a severe burden on the constitutional right to register to vote in the 14 days prior to Election Day. As with most regulatory statutes, this legislation imposes some burden on some residents, as it requires an individual to bring to the election office or polling place some form of proof of residency. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 22, 22 n 49. But both the United States and

Michigan Supreme Courts have held that requiring voters to produce photo identification is not a severe burden on their right to vote:

> For most voters who need them, the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting. *Crawford v Marion Co Election Bd*, 553 US 181, 198; 128 S Ct 1610, 1621; 170 L Ed 2d 574 (2008).

See, also In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich at 23-24.

The burden on voters to provide proof of residency is minimal given the exhaustive list of acceptable documents outlined in MCL 168.497(2)-(4). The list of approved documents allows Michiganders to register to vote within 14 days before election day with any type of common paperwork. If a voter has a driver's license, state[7] or federal identification card, and a current utility bill, bank statement, paycheck, government check, or "other government document" (about as broad a phrase one could find), the burden is satisfied. But even if a voter has no identification card, he/she can simply fill out an affidavit to that effect, and simply produce one form of the other documentation. Further, the restrictions are eased if the prospective voter applies to register before the 14-day period. Voters are also able to update their addresses and prove their residency over the internet, without having to leave their home.[8] And, finally, it is worth pointing out that should a person not have the proper documentation, that person may vote with a challenged ballot that is counted that day, the same as all other ballots. See MCL 168.497(5). In essence, the challenged ballot provision—which plaintiffs also challenge as

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[7] Which includes an identification card issued by every high school, college or university in this state. See MCL 168.2(k)(xi) (defining "identification for election purposes").

[8] See *ExpressSOS. Anytime. Anywhere.*, https://www.michigan.gov/sos/0,4670,7-127-1640_14837-380898--,00.html (accessed June 24, 2020).

unconstitutional—is a safety net provided by the state to ensure voters get to vote on election day. Any issues as to the legality of the vote are determined later. Hence, MCL 168.497(2)-(4)'s documentation requirements impose only "reasonable, nondiscriminatory restrictions" on the right to vote while serving the state's precise interest in preserving the purity of elections and preventing voter fraud. *Crawford*, 553 US at 198.

To this latter point, plaintiffs scoff at the notion that there is any real state interest in preventing voter fraud, claiming there are few reported instances in this state. But that only proves that what the state has previously done regarding voter identification, see e.g., *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 15-16, has worked. That is why courts have uniformly recognized the substantial interest a state has in ensuring that the prospective voter is actually who they claim to be in order to prevent election fraud:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear. [*Crawford*, 553 US at 196.]

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This same point was well-made by the Michigan Supreme Court when upholding the use of photo identification:

> The photo identification provision contained in MCL 168.523 imposes only a "reasonable, nondiscriminatory restriction" on the right to vote that is warranted by the precise interest identified by the state—Michigan's compelling regulatory interest in preventing voter fraud as well as enforcement of the constitutional directive contained in art 2, § 4 to "preserve the purity of elections" and "to guard against abuses of the elective franchise." The identification requirement applies evenhandedly to every registered voter in the state of Michigan without making distinctions with regard to any class or characteristic. In every circumstance, a registered voter need only take one of two actions in order to cast an in-person ballot-either present photo identification or sign an affidavit. The affidavit alternative is equally available to a voter who chooses not to obtain

> identification, a voter whose faith precludes him from obtaining photo identification, a voter who cannot obtain identification, or a voter who simply lost his identification.
>
> Moreover, the statute is a reasonable means to *prevent* the occurrence of in-person voter fraud. As our Secretary of State has indicated, "without a personal identification requirement it is nearly impossible to detect in-person voter fraud." In-person voter fraud is, by its very nature, covert. In order to prevent in-person voter fraud, it is reasonable to require the person seeking to cast a ballot to provide reliable identification that he is, in fact, the individual registered to vote. The prevention of fraud in the first instance is critical, because it is impossible to remedy the harm inflicted by the fraudulently cast ballot by correcting the vote count, as our constitution requires that ballots remain secret. Conducting the election anew is the only remedy available to purge the taint of a fraudulently cast ballot, a solution described as "imperfect" and having a "negative impact on voter turnout." [*In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 25-26 (citations omitted).]

The documentation requirements serve this purpose by clearly defining the acceptable documents in order to prevent voter fraud.

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Similarly, plaintiffs' concern, that defendants' failure to prove that wide-spread voter fraud exists nullifies the state's interest in preventing voter fraud, is rebuffed by the principle that the Legislature's regulatory interests need only be "sufficiently weighty to justify the limitation" imposed on voters' rights, and that "elaborate, empirical verification" of the Legislature's justifications is not required. *Timmons v Twin Cities Area New Party*, 520 US 351, 364; 117 S Ct 1364, 1372; 137 L Ed 2d 589 (1997) (citation and quotation marks omitted). Additionally, because there are circumstances in which application of MCL 168.497(2)-(4) are constitutional, plaintiffs' challenge must fail.[9]

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[9] Plaintiffs repeatedly suggest that "younger voters," such as college-age adults, will be most harmed by these provisions. The Court rejects this notion. For one thing, when addressing facial challenges courts cannot focus on any possible effects on a discrete population, but must focus on any effects on the voting population as a whole. *Crawford*, 553 US at 202-203. Second, plaintiffs' argument overlooks the broad range of documents that suffice under the statute, the majority of which are readily available to college students, and the fact that registration can be accomplished over the internet, something "younger voters" are surely able to utilize. Third, plaintiffs' argument gives no credence to Michigan's young voters' ability to understand and follow clear voter registration procedures.

In sum, the requirements set forth in MCL 168.497(2)-(4) do not place a severe burden on voters; in fact, the broad list of acceptable documents allows for nearly every Michigan resident to identify themselves and successfully obtain a voting ballot. Not only do these provisions allow for prospective voters to use *any* form of government-issued photo identification (including high school or college identification cards), in conjunction with a current bank statement, utility bill, or government check or document, but they also allow those with no identification to simply verify under oath as to that unavailability, and then provide one of the forms of written documentation. These forms of identification are readily available to anyone of voting age, whether they drive a car, attend high school or college, or have any other form of government identification. These provisions are broadly written in order to effectuate, not limit, the constitutional mandate of providing "proof of residency," and help enforce the state's interest in preventing fraud and preserving election purity. Those justifications clearly outweigh the minimal burden these statutory provisions have on voting rights.

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2. CHALLENGED BALLOT

Plaintiffs argue that MCL 168.497(5)'s instructions to issue challenged ballots to voters who register without photo identification (and instead register by any of the documents listed under MCL 168.497(3)-(4)) violates a voter's constitutional right to the equal protection of the law. See Const 1963, art 1, 2. A challenged ballot is a ballot that has the voter's polling number written on the back of the ballot, which can be later identified upon court order. See MCL 168.497(5); MCL 168.747; MCL 168.748. Plaintiffs allege that this identification measure violates a voter's constitutional right to equal protection of the law, specifically because it denies certain voters the right to a "secret" ballot. But as defendants argue, a challenged ballot is treated the same as any other ballot on election day; the voters' votes are entered and tabulated with all other votes cast in the precinct. Thus, despite it being marked on the outside as challenged, upon presentment of identification, the voter was eligible to receive, and did receive, a

regular ballot. This complies with art 2, § 4(1)(f), and does not deny a person voting with a challenged ballot the equal protection of the law.

Additionally, to the extent any burden is placed on a voter's rights, it is minimal. As just noted, a challenged ballot is a "secret ballot" in the sense that its vote will be counted the same as a normal ballot, and its contents will not be revealed to the public. MCL 168.497(5). It is only in the event of a contested election, where the challenged ballot is at issue, that the ballot may be inspected or identified; however, this inspection may only occur with either: the voter's written consent; or only *after* the individual has been convicted of falsely swearing the ballot; or the voter was deemed to be unqualified. MCL 168.747. Therefore, the only way for the vote to be revealed—absent express written consent—is under court order and even then, only in two limited circumstances that require a prior determination of falsehood. This is not a severe burden, and it places no burden on the voter at the time of voting, nor does it impact the tabulation of those particular votes cast on election day.

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In contrast, the state has an interest in ensuring the integrity of ballots should it be needed. This specific interest is properly served by this regulation, as in the event of suspected voter fraud, the court may reveal the identity of the voter and a determination can be made. Overall, the burden imposed on voters' rights is minimal, and the legislation is within the scope of the state's interest in preserving the purity of elections.

Under *Anderson-Burdick* these statutory provisions are reasonable, nondiscriminatory regulations, and pass a rational basis review. *Burdick*, 504 US at 434. This holds true in part because, " 'the State's important regulatory interests are generally sufficient to justify' the restrictions," *id.*, quoting *Anderson*, 460 US at 788, but also because these provisions provide uniformity across the state as to what is needed to prove residency, and help fend against voter fraud. As explained, the burden placed by these provisions

on the right to vote is minimal, while courts have long recognized—as have the people of this state through constitutional enactments—the strong state interest in preventing voter fraud and the conducting of fair and honest elections.

III. CONCLUSION

For these reasons, defendants' motions for summary disposition on the merits are GRANTED, plaintiff Promote the Vote's motion for summary disposition is DENIED, plaintiffs' motion for preliminary injunction is DENIED as moot, as is defendant Benson's December 23, 2019 motion for summary disposition, and the complaints are DISMISSED with prejudice.

This is a final order that closes this case.

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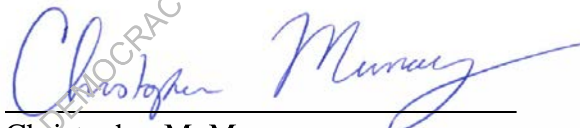

DATE: June 24, 2020

Christopher M. Murray
Judge, Court of Claims