UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

RUTH JOHNSON, TERRI LYNN LAND, and MARIAN SHERIDAN,

Plaintiffs,

v.

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

Defendant,

MICHIGAN ALLIANCE FOR RETIRED AMERICANS, DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE, CHARLES ROBINSON, GERARD MCMURRAN, and JIM PEDERSEN,

Intervenor Defendants.

Case No. 1:20-CV-00948

BRIEF IN SUPPORT OF INTERVENORS' MOTION TO DISMISS COMPLAINT UNDER FED. R. CIV. P. 12(B)(1) OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS UNDER FED. R. CIV. P. 12(C)

TABLE OF CONTENTS

CONCISE STATEMENT OF REASONS

1. Plaintiffs' Complaint should be dismissed because it no longer presents a live case or controversy. The Michigan Court of Appeals' decision invalidating the very "policy" that Plaintiffs challenge, and the Secretary's subsequent guidance making clear that any such policy has ceased, has mooted this case.

2. In the alternative, Plaintiffs' Complaint should be dismissed for lack of standing because Plaintiffs have not suffered an injury-in-fact sufficient to satisfy the clearly established requirements of Article III and attempt to invoke the rights of a legislative body that is not currently before the Court.

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

INTRODUCTION

This case no longer presents a live case or controversy and should be dismissed. Plaintiffs Ruth Johnson, Terri Lynn Land, and Marian Sheridan filed this lawsuit with one aim: to invalidate the Michigan Court of Claims' previously issued order in *Michigan Alliance for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl., Sept. 18, 2020), ECF No. 20-6 PageID.1625-45 (the "*Alliance* Decision"), which required Michigan election officials to count absentee ballots *in the current election* that were postmarked by November 2, 2020, if they were received by November 17.[1] Plaintiffs sought an order from this Court that would require the Secretary to, instead, impose the statutory deadline in place before the *Alliance* Decision altered it for this election, which requires all ballots received after 8 p.m. on Election Day—November 3, 2020—to be rejected. *See* Mich. Comp. Laws § 168.764a (the "Statutory Ballot Receipt Deadline").

The Michigan Court of Appeals has since reversed the *Alliance* Decision. *Michigan Alliance for Retired Americans v. Benson*, No. 354993 (Mich. Ct. App., Oct. 16, 2020), ECF No. 35-2 PageID.3827. Neither the plaintiffs in that case (Intervenors here) nor any other parties have sought to or intend to seek further review of the Michigan Court of Appeals' ruling, which took

[1] Plaintiffs refer to the extended deadline for ballots to be received and counted as the Secretary's "Late-Receipt Policy," although neither their Complaint nor their motion for preliminary injunction points to a specific policy or guidance document issued by the Secretary or her Office. Rather, the Complaint, filed 11 days after the *Alliance* Decision was issued, sets forth that "[t]he Secretary's website also continues to recognize that Michigan law provides that 'absentee ballot[s] must be received by your city or township clerk *by 8 p.m. on Election Day*' to be counted." ECF No. 1 PageID.9-10 (emphasis added).

immediate effect.[2] And the Secretary has since issued guidance confirming that the Statutory Ballot Receipt Deadline (which Plaintiffs sought to reimpose through this lawsuit), will be enforced in the present election, replacing any purported "policy" that Plaintiffs challenged in their Complaint. ECF No. 41 PageID.3868-69.

The Michigan Court of Appeals' ruling and the Secretary's updated guidance have mooted Plaintiffs' claims. Any ruling that this Court could issue in this case at this point would be nothing more than an advisory opinion. Under Article III of the Constitution, this Court may exercise jurisdiction only over live cases and controversies, the adjudication of which would affect the legal rights of the parties. As a result, this case must be dismissed. But even if it were not moot, it should still be dismissed for lack of jurisdiction because Plaintiffs lacked standing to pursue it from the outset. Thus, even if there were something left for this Court to decide as a substantive matter (and there is not), well-established standing principles would preclude the exercise of federal jurisdiction and independently require dismissal of this case.

BACKGROUND

This lawsuit challenges the injunctive relief ordered by the Michigan Court of Claims in the *Alliance* Decision, which was the product of substantial litigation. In that case, the Alliance challenged three restrictions on absentee voting, including the restriction at issue here, Mich. Comp. Laws § 168.764a, which ordinarily requires that absentee ballots received after 8 p.m. on Election Day must be rejected, regardless of when the voter completed the ballot and put it in the

[2] The Alliance's counsel indicated during the October 19 hearing that the Alliance planned to appeal the Court of Appeals' ruling. While that statement was accurate at the time, the Alliance ultimately decided not to appeal after further consultation. The Alliance's counsel informed Plaintiffs' counsel accordingly.

mail. After reviewing the Alliance's extensive evidence, the Court of Claims found that the "unrefuted documentary evidence concerning the effects of the pandemic and mail delays" made the "statutory ballot receipt deadline" an "impermissible restriction on the self-executing right to vote" under the Michigan Constitution. ECF No. 20-6 PageID.1634. Accordingly, the Court of Claims preliminarily enjoined the Secretary from enforcing the Statutory Ballot Receipt Deadline during the November election, and ordered that all absentee ballots postmarked on or before November 2, 2020, and received at the local clerk's office on or before November 17, "are eligible to be counted." *Id*. PageID.1626. On September 30, the Court of Claims issued a permanent injunction with the same terms as the preliminary injunction. *See* ECF No. 20-17 PageID.1772-1778.

The Secretary and the Attorney General subsequently announced that they did not intend to file an appeal because, after "carefully considering] the Court's opinion," they "determined, in their Executive capacities, that it was not in the best interests of the State or the people of Michigan to appeal the Court's preliminary injunction." ECF No. 20-12 PageID.1733.

Eleven days after entry of the *Alliance* Decision, on September 29, Plaintiffs—who are not parties to the *Alliance* case—brought this collateral attack, seeking to undo the *Alliance* Decision. *See* ECF No. 1 PageID.1-19. They filed a motion for preliminary injunction the next day. ECF No. 4 PageID.45-46. The Alliance properly sought intervention in this lawsuit on October 2, 2020, ECF No. 9 PageID.151-185, which the Court granted on October 6, 2020, ECF No. 13 PageID.202.

Plaintiffs describe the deadlines set forth in the *Alliance* Decision for mailing and receiving absentee ballots as the Secretary's Late-Receipt Policy. *See generally* ECF No. 1 PageID.13-14. That is incorrect. Rather, those deadlines were *required terms* of an injunction issued by a court interpreting and applying the Michigan Constitution. Nevertheless, on the evening of Friday,

October 16—the day after the parties here fully briefed Plaintiffs' motion for preliminary injunction—the Michigan Court of Appeals reversed the trial court's *Alliance* Decision. ECF. Nos. 35 & 35-1 PageID.3824-38. The Court of Appeals' ruling took immediate effect. *Id*. PageID.3825. The Secretary promptly notified this Court of the state court reversal, *id*. PageID.3824-25, and Plaintiffs filed a notice requesting that this Court hold their motion in abeyance pending further developments, ECF No. 36 PageID.3849-51. This Court subsequently issued an order holding Plaintiffs' motion in abeyance. ECF No. 37 PageID.3853-54.

In the meantime, after careful consideration, the Alliance decided not to appeal the Court of Appeals' ruling, which remains in effect. On Monday, October 19, the Secretary issued new guidance to local clerks, confirming that the Statutory Ballot Receipt Deadline would be in effect for the November election and rescinding any guidance based on the *Alliance* Decision. ECF No. 41 PageID.3868-877. The Secretary's October 19 guidance clearly states that "the previous Michigan Election Law rules are in place. Ballots must be received by 8 pm on Election Day." ECF No. 41-2 PageID.3873. Indeed, even before the Court of Appeals' decision, the Secretary's office emphasized that "[t]he Secretary of State [was] consistently urg[ing] voters to apply for and return absent voter ballots as far ahead of Election Day as possible."[3] Therefore, the Late-Receipt Policy—which was the sole subject of this lawsuit—is no longer in effect.

LEGAL STANDARD

"Pursuant to Rule 12(b)(1), a party may assert the defense of lack of subject [jurisdiction] matter at any time by motion." *Hirt v. Richardson*, 127 F. Supp. 2d 849, 852 (W.D. Mich. 2001);

[3] Beth LeBlanc, *Appeals Court Rejects Counting Michigan's Late Ballots*, DETROIT NEWS (Oct. 16, 2020), https://www.detroitnews.com/story/news/politics/2020/10/16/appellate-panel-wont-allow-michigans-late-ballots-counted/3685251001/.

see also Ogle v. Church of God, 153 F. App'x 371, 374-75 (6th Cir. 2005) (holding that "12(b)(1) motion [was] proper vehicle for considering whether subject matter jurisdiction exist[ed] in a particular case" even when "defendants filed the motion after filing their answer to the complaint") (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). The plaintiff bears the burden of establishing that the court has jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted).

Rule 12(b)(1) motions for lack of subject matter jurisdiction "generally come in two varieties," facial and factual. *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325. A facial challenge to jurisdiction "questions the sufficiency of the pleading," which a court reviews by "tak[ing] the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss." *Id*. When reviewing a factual challenge, on the other hand, "no presumptive truth applies to the factual allegations," and "the district court must therefore weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist." *Id*. "[A] trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id*.

Alternatively, this Court may consider the Alliance's motion as one brought under Rule 12(c), which "affords a party the ability to make a motion on the pleadings after the pleadings are closed." *Hirt*, 127 F. Supp. at 852. A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss brought under Rule 12(b)(6). *Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Grp.*, 463 F.3d 478, 487 (6th Cir. 2006). A complaint must allege all material elements of a "viable legal theory" to be sufficient. *Com. Money Ctr., Inc. v. Ill. Union Ins. Co.*,

508 F.3d 327, 336 (6th Cir. 2007). In deciding a 12(c) motion, a court can consider matters of public record. *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008); *Lozar v. Birds Eye Foods, Inc.*, 678 F. Supp. 2d 589, 599 (W.D. Mich. 2009) (holding that "matters of public record" include "pleadings, orders and other papers on file in another action pending in the court; records or reports of administrative bodies; or the legislative history of laws, rules or ordinances.") (quotation marks and citations omitted).

ARGUMENT

I. Plaintiffs' action is moot.

"The case or controversy requirement in Article III of the Constitution determines the power of the federal courts to entertain a suit." *Hanrahan v. Mohr*, 905 F.3d 947, 960 (6th Cir. 2018) (quoting *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 429 (6th Cir. 2013)). Accordingly, "[a] federal court cannot exercise jurisdiction over a dispute in which a judgment will in no way affect the legal relations of the parties who have the adverse legal interests." *Hirt*, 127 F. Supp. at 853 (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)). A case becomes "'moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Hanrahan*, 905 F.3d at 960 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). In other words, "[i]f events occur during the pendency of the litigation that render a decision on the merits meaningless . . . , the case becomes moot." *Hirt*, 127 F. Supp. at 853 (citing *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986)).

That is precisely what has happened here. Plaintiffs' Complaint challenges a Late-Receipt Policy which is no longer in effect, and the Secretary has not only "affirmatively state[d] that she intends to follow the relevant Michigan statutes concerning absentee ballots," but also issued guidance to local clerks directing them to apply the Statutory Ballot Receipt Deadline following

the Michigan Court of Appeals' ruling reversing the *Alliance* Decision that gave rise to the alternative policy Plaintiffs sought to overrule. ECF Nos. 41 & 41-2 PageID.3868-877. The allegedly illegal Late-Receipt Policy that was the subject of Plaintiffs' challenge has been terminated. *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012) ("'[C]essation of the allegedly illegal conduct by government officials . . . provides a secure foundation for a dismissal based on mootness so long as it appears genuine.'") (quoting *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990)); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) (holding plaintiffs' statutory challenges were "effectively nullified by the recent statutory amendments"); *Brandywine, Inc. v. City of Richmond, Ky.*, 359 F.3d 830, 836 (6th Cir. 2004) (holding city's repeal of an allegedly unconstitutional provision of an ordinance mooted plaintiff's claims for declaratory and injunctive relief).

Under the Sixth Circuit's precedents, Plaintiffs' case would be moot even if the Secretary *voluntarily* changed her policy during the course of the present litigation. Here, however, the case for mootness is even stronger. What the Plaintiffs called the Secretary's Late Receipt Policy (which was the subject of the Plaintiff's challenge) was never voluntary to begin with. It was compelled by the *Alliance* Decision, and when that decision was reversed by the Michigan Court of Appeals, the Secretary reverted to the Plaintiffs' preferred Statutory Ballot Receipt Deadline, again as mandated by state court orders. Thus, there is no question that the Secretary's latest guidance to local clerks, ECF No. 41 PageID.3868-877, is "genuine." *Bench Billboard Co.*, 675 F.3d at 981. It comports with the Secretary's own litigation position in the state court proceeding, where she and the Attorney General vigorously defended the Statutory Ballot Receipt Deadline, and, as a result of the outcome of that case on appeal, the Secretary is now precluded from extending the Statutory Ballot Receipt Deadline *regardless* of this Court's actions.

In sum, the Michigan Court of Appeals' decision invalidating the very "policy" that Plaintiffs challenge here, and the Secretary's subsequent guidance making clear that the Statutory Ballot Receipt Deadline remains in force, has mooted this case. *See N. Nat. Gas Co. v. Grounds*, 931 F.2d 678, 684 (10th Cir. 1991) ("Generally speaking, an intervening judicial decision entered in a collateral proceeding moots a case where the decision resolved the dispute." (citing *Alton v. Alton*, 347 U.S. 610, 611 (1954); *Lomenzo v. WMCA, Inc.*, 384 U.S. 887 (1966) (per curiam)). Moreover, the Alliance has not appealed, which means there is no live controversy before the Court; there are only hypothetical scenarios that cannot satisfy the constitutional prerequisites for the exercise of this Court's jurisdiction. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) ("Our decisions have required that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'") (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

This Court should accordingly dismiss this action as moot.

II. Plaintiffs lack standing.

In the alternative, if the Court were to find some live controversy remained, it should nevertheless decline to exercise jurisdiction because Plaintiffs lack standing—and have lacked standing, from the outset of this litigation—to pursue the claims that they assert in this action. As explained in the Alliance's opposition to Plaintiffs' motion for preliminary injunction, *see* ECF No. 26 PageID.3403-413, Plaintiffs have not suffered an injury-in-fact sufficient to satisfy the clearly established requirements of Article III, and they attempt to invoke the rights of a legislative body that is not currently before the Court, all of which violates long-held standing doctrines.

To avoid dismissal on Article III grounds, a plaintiff must show (1) an injury in fact, meaning "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) a causal connection between the injury and the defendant's conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Additionally, prudential considerations require that "'a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Int'l Union v. Dana Corp.*, 278 F.3d 548, 559 (6th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

The Alliance detailed its arguments challenging Plaintiffs' standing in its opposition to Plaintiffs' motion for preliminary injunction, which it incorporates here. *See* ECF No. 26 PageID.3403-413. Rather than repeating those arguments, the Alliance simply notes that, since its previous filing, even *more* federal courts have rejected similarly-situated plaintiffs' standing to bring equivalent claims. *See, e.g.*, *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *4-5 (W.D. Pa. Oct. 28, 2020) (finding "the vote dilution alleged by [plaintiffs] is too generalized to establish standing"); *Moore v. Circosta*, Nos. 1:20CV911, 1:20CV912, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020) (finding "the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing"), *injunction denied*, *Wise v. Circosta*, No. 20-2104, 2020 WL 6156302, at *2 (4th Cir. Oct. 20, 2020), *injunction denied*, *Moore v. Circosta*, No. 20A72, 2020 WL 6305036 (U.S. Oct. 28, 2020). This Court should do the same.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that this Court dismiss Plaintiffs' case.

DATED: November 2, 2020

Respectfully submitted,

By: */s/ Uzoma N. Nkwonta*

Marc E. Elias (DC #442007)
Uzoma N. Nkwonta (DC #975323)
Courtney A. Elgart (DC #1645065)
Jyoti Jasrasaria (DC #1671527)
Emily Brailey (CA #300317)
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
Telephone: 202.654.6200
MElias@perkinscoie.com
UNkwonta@perkinscoie.com
CElgart@perkinscoie.com
JJasrasaria@perkinscoie.com
EBrailey@perkinscoie.com

Reina Almon-Griffin (WA #54651)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
Telephone: 206.359.8000
RAlmon-Griffin@perkinscoie.com

Danielle Sivalingam (Serbin)
(CA #294369)
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Century City, California 90067
Telephone: 310.788.9900
DSivalingam@perkinscoie.com

Sarah S. Prescott (P70510)
SALVATORE PRESCOTT &
PORTER, PLLC
105 E. Main Street
Northville, MI 48167
(248) 679-8711

Attorneys for Intervenors

CERTIFICATE OF SERVICE

Uzoma N. Nkwonta certifies that on the 2nd day of November 2020, he served a copy of the above document in this matter on all counsel of record via the CM/ECF system.

/s/ Uzoma N. Nkwonta

Uzoma N. Nkwonta (DC #975323)
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
Telephone: 202.654.6200
UNkwonta@perkinscoie.com

Attorney for Intervenors