STATE OF MICHIGAN
COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DENNIS GROSSE, BLAKE EDMONDS and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.

No. 24-000041-MZ

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DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFFS' 04/22/2024 MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF QUESTIONS PRESENTED

1. Whether these Plaintiffs lack standing to challenge the Defendants' signature guidance and administrative rules where they do not have any interest that differs from the public at large and their interests are merely speculative?

2. Whether the Plaintiffs have failed to state a claim challenging the Defendants' signature guidance because the guidance does not provide for any presumption of validity and instead mirrors the language of MCL 168.766a?

3. Whether the Plaintiffs have failed to state a claim challenging Mich Admin Code, R 168.24 because the rule is consistent both with the Michigan Constitution and with Michigan election law?

4. Whether collateral estoppel does not apply to the decision in *Genetski v Benson* where that decision did not concern the same guidance from the Secretary that is the subject of this complaint, and where both the Michigan Election Law and the Michigan Constitution have been amended since that decision?

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INTRODUCTION

Defendants filed their own motion for summary disposition on the grounds that Plaintiffs lack standing and the complaint fails to state a claim for which relief can be granted. The arguments presented in Defendants' motion serve equally well to defeat this motion for summary disposition filed by Plaintiffs, and Defendants' arguments are reproduced here in this response in Arguments I and II. For those reasons, summary disposition should instead be granted to the Defendants under MCR 2.116(I)(2).

Further, Plaintiffs' arguments concerning collateral estoppel are not well-founded where neither Defendants' guidance to clerks nor the Michigan Election Law—or, for that matter, even the state constitution—are the same as was presented in the *Genetski v Benson* decision on which Plaintiffs' argument relies. Because of the emphasis Plaintiffs place on this issue in their motion, Defendants address it separately in Argument III below.

STATEMENT OF FACTS

The facts stated in Plaintiffs' motion are essentially identical to the allegations in their complaint, and the facts presented in Defendants' motion for summary disposition require no modification. For the convenience of the Court, the Defendants' statement of facts is reproduced below.

The process for reviewing voter signatures on absent voter (AV) ballot applications and AV ballot envelopes is governed by the constitution, by statutes, by administrative rules, and by guidance issued by the Secretary of State. The constitutional, statutory, and administrative structures are detailed in the following subsections.

A. Constitutional provisions

Since 2018, the Michigan Constitution has expressly included the right to vote by AV ballot. Proposal 3 of 2018 amended article 2, §4 to provide that every citizen has:

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> The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail. . . . [Const 1963, art 2, §4(1)(h).[1]]

In November of 2022, voters again amended article 2 to secure additional voting rights, including the following with respect to applying for and voting an AV ballot:

> . . . . Voters shall have the right to prove their identity when applying for or voting an absent voter ballot other than in person by providing their signature to the election official authorized to issue absent voter ballots. *Those election officials shall: (1) verify the identity of a voter who applies for an absent voter ballot other than in person by comparing the voter's signature on the absent voter ballot application to the voter's signature in their registration record; and (2) verify the identity of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record. If those election officials determine from either of the comparisons in (1) or (2) of this part (h) of subsection (4)(1) that the signatures do not sufficiently agree*, or if the voter's signature on the absent voter ballot application or absent voter ballot envelope is missing, the voter has a right to be notified immediately and afforded due process, including an equitable opportunity to correct the issue with the signature. [Const 1963, art 2, §4(1)(h) (emphasis added).]

Notably, subsection 4(1) continues to provide that the rights provided in that subsection "shall be liberally construed in favor of voters' rights in order to effectuate its purposes." Const 1963, art 2, §4(1). Subsection 4(2) of article 2 authorizes the Legislature to "enact laws to regulate the time, place and manner of all . . . 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 . . . absentee voting." Const 1963, art 2, §4(2).

[1] Following Proposal 2018-3, the right to absentee voting was contained in article 2, §4(1)(g). Proposal 2022-2 moved the language formerly contained in subsection (g) to subsection (h).

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The Legislature has done so with respect to absent voting, and has implemented many of the constitutional requirements through amendments to the Michigan Election Law, MCL 168.1 *et seq*.

B. Statutory provisions

1. AV ballot applications

Section 759 of the Michigan Election Law prescribes the process for applying for an AV ballot. In order to receive an AV ballot, a voter must request an application for an AV ballot and submit that application to an election official. MCL 168.759(1)-(2). Subsection 759(3) requires that the application be signed, that a digital image of an elector's signature from a Michigan driver license or personal identification card or an electronic image of an elector's physical signature is an acceptable signature for the AV ballot application, and that an AV ballot application that is submitted and missing a signature is subject to the requirements of MCL 168.761 and MCL 168.766a. MCL 168.759(3). Under subsection 759(8), the application for an AV ballot must include an "instruction" to the applicant to sign the application. MCL 168.759(8). Under subsections 759(15)–(16), the Secretary of State must provide an online AV ballot application that includes the opportunity to use an elector's stored digital signature. MCL 168.759(15)–(16).

Upon receiving an AV ballot application, a "clerk must immediately determine if the applicant is registered to vote in that city or township *and if the signature on the application agrees sufficiently with the signature on file for the individual as required in subsection (2).*" MCL 168.761(1) (emphasis added). Subsection 761(2) provides, in pertinent part, that city or township clerks compare voters' signatures on AV ballot applications to the voters' signatures on

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file[2] before issuing an AV ballot, and that "[*s*]*ignature comparisons must be made using the procedures required under section 766a.*" MCL 168.766(2).

Section 766a provides the following with respect to signature comparisons:

> (1) A clerk may determine that a signature on an elector's absent voter ballot application . . . does not *agree sufficiently* with the signature on file *only after reviewing the signature using the process set forth in this section.*
>
> (2) An elector's signature *is invalid only if it differs in significant and obvious respects from the elector's signature on file. Slight dissimilarities must be resolved in favor of the elector. Exact signature matches are not required to determine that a signature agrees sufficiently with the signature on file*. [MCL 168.766a(1)–(2).]

If the clerk of a city or township rejects an AV ballot application "*because the signature on the absent voter ballot application does not agree sufficiently with the signature on file* or because the elector failed to sign the absent voter ballot application, the applicant must be provided notice and the opportunity to cure the deficiency as provided under section 766a." MCL 168.761(2) (emphasis added). See also MCL 168.766a(3). But if the signature on the AV ballot application agrees with the signature on file, the clerk will issue an AV ballot to the voter.

2. AV ballot return envelopes

After the AV ballot is completed and returned to the local clerk's office by one of the provided methods, see MCL 168.764a, the city or township clerk first reviews the voter's return envelope, which includes review of the voter's signature:

> The city or township clerk shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance

[2] As used in the Michigan Election Law, "signature on file" means any of the following: (1) any signature of an elector contained in the qualified voter file (QVF); (2) if the QVF does not contain a voter's digitized signature, the signature of the elector contained on the master card; or (3) only for purposes of the signature comparison under § 766 for an AV ballot return envelope, the signature of the AV ballot application. MCL 168.766a (7).

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> with section 766.[3] *The review under this subsection includes verifying the signature on each absent voter ballot return envelope in accordance with section 766a*. . . . If the city or township clerk determines that the elector's signature on the absent voter ballot return envelope is missing *or does not agree sufficiently with the signature on fil*e, the clerk shall reject the absent voter ballot and provide the elector with notice and the opportunity to cure the deficiency in accordance with [MCL 168.766(4)]. [MCL 168.765(2) (emphasis added).]

Again, with respect to signature comparisons, subsection 766a(1) provides that a clerk can only determine a signature on an AV ballot envelope does not agree sufficiently with the signature on file "after reviewing the process set forth in this section." MCL 168.766a(1). And subsection 766a(2) mandates that a signature is "invalid *only if* it differs in significant and obvious respects from the elector's signature on file." MCL 168.766a(2) (emphasis added). "Slight dissimilarities must be resolved in favor of the elector," and "[e]xact signature matches are not required to determine that a signature agrees sufficiently with the signature on file." *Id.*

If a clerk determines that a signature does not agree sufficiently with the signature on file or if the signature is missing, the clerk must reject the AV ballot return envelope and provide the elector with notice and an opportunity to cure the deficiency. MCL 168.765(2), MCL 168.766a(3). A voter may cure a deficiency by completing and submitting a cure form. MCL 168.766a(5). A clerk may accept a cure form if the signature on the cure form agrees sufficiently with the signature on file. MCL 168.766a(5). If the clerk determines that the signature on the cure form does not agree sufficiently with the signature on file, the cure form will be rejected and the clerk must notify the voter and provide information on other methods to cure the deficiency. MCL 168.766a(5).

[3] Subsection 766(1)(b) provides that part of the clerk's review of whether the AV ballot may be approved for tabulating includes verifying "[u]sing the procedures required under section 766a, the signature on the absent voter ballot return envelope agrees sufficiently with the elector's signature on file." MCL 168.766(1)(b).

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C. Administrative rules

In July of 2021, the Department of State initiated rulemaking under the Administrative Procedures Act, MCL 24.201 *et seq.*, to promulgate standards for signature matching on AV ballot applications and AV ballot envelopes.[4] The Legislature declined to take action on the rule set, so by default the rules became effective December 19, 2022. See MCL 24.245a(7).[5] The rules are at Mich Admin Code, R 168.21-26.

1. Rule 168.22

The initial draft of Rule 2, R 168.22, provided the following:

> R 168.22 Sufficient agreement of voter signature; *initial presumption of validity*.
>
> Rule 2. (1) In determining for purposes of section 761(2) of the Michigan election law, 1954 PA 116, MCL 168.761, whether a voter's absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the voter's signature on file, signatures must be reviewed *beginning with the presumption that the voter's signature is his or her genuine, valid signature*. . . . [Emphasis added.][6]

Subsection 2(2) provided that a "voter's signature should be considered invalid only if it differs in significant and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter. Exact matches are not required to determine that a signature agrees sufficiently with the signature on file."[7] And subsection 2(3) authorizes election officials to contact voters if the official "has genuine concerns about the signature's validity."[8]

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[4] See Request for Rulemaking, 2021-61 ST, available at ARS Public - RFR Transaction (state.mi.us) (accessed May 6, 2024.)

[5] See *id*.

[6] The initial draft is available online at ARS Public - RFR Transaction (state.mi.us) (accessed May 6, 2024.)

[7] *Id.*

[8] *Id.*

As Plaintiffs describe in their complaint, during the public comment period, several legislators provided comments opposing subsection 2(1)'s inclusion of the presumption of validity as being contrary to the law. (Compl, ¶¶ 54-57, Exs D & E.) The Legislature's Joint Committee on Administrative Rules (JCAR) proposed, among other changes, that the Secretary remove the "presumption" language from Rule 2, and the Secretary agreed, stating:

> The Secretary accepts JCAR's proposal to strike the instruction in R 168.22(1) that local election officials must begin review of a voter's signature on an absent voter ballot application or an absent voter ballot envelope with a "presumption" that the signature is valid. While the language reflects current practice, and while the Secretary does not read the presumption language in the same manner the language was read by JCAR, the confusion created by the term justifies its removal from the rule. The Secretary will remove [the] term presumption from R 168.22(1) without otherwise substantially changing the text of the Ruleset already reviewed by JCAR. [Compl, ¶ 58, Ex F, ¶ 2.]

A final, redline version of the ruleset incorporating JCAR's and the Secretary's agreed-to changes, including those to Rule 2(1), was generated. (Compl, ¶ 59, Ex G.)[9] As amended, Rule 2(1) provided:

> R 168.22 Sufficient agreement of voter signature; *initial presumption of validity;* voter contact by clerk.
>
> Rule 2. (1) In determining for purposes of section 761(2) of the Michigan election law, 1954 PA 116, MCL 168.761, or for the purposes of 766(2), 1954 PA 116, MCL 168.766, whether a voter's absent voter ballot application signature or absent voter ballot envelope signature agrees sufficiently with the voter's signature on file, ~~signatures must be reviewed beginning with the presumption that the voter's signature is his or her genuine, valid signature. A~~**a**n election official may **determine that**~~decline to accept~~ a signature **does not agree sufficiently with the signature on file** only ~~if,~~ after reviewing **the** ~~an~~ absent voter ballot application signature or absent voter ballot envelope signature using the process set forth in these rules~~, the election official determines that the signature does not agree sufficiently with the signature on file~~. [Compl, ¶ 59, Ex G (italics added).][10]

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[9] The redline is also available online at [ARS Public - RFR Transaction (state.mi.us)]() (accessed May 6, 2024.)

[10] *Id.*

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As can be seen above, while the "presumption" language was struck from the text of the rule, it was not struck from the catchline. So, as promulgated, R 168.22, contains the language in its catchline. Mich Admin Code, R 168.22.

2. Rule 168.24

In addition to R 168.22, the Secretary promulgated R 168.23 and R 168.24. Rule 3 directs election officials to consider whether there are "redeeming qualities" to a signature when determining whether a voter's signature agrees sufficiently with the signature on file and directs the Bureau of Elections to provide examples of signatures with redeeming qualities and of questionable signatures. Mich Admin Code, R 168.23(1). Rule 3 describes eight "redeeming qualities," which include whether there are similar distinctive flourishes, or whether it appears the voter's hand was trembling or shaking, or whether the style has changed slightly from the signature on file. Mich Admin Code, R 168.23(2)(a)-(h).

Turning to Rule 4, subsection 4(1) explains how election officials should resolve discrepancies between a voter's signature on an AV ballot application or AV ballot envelope and the signature on file:

> (1) Elections officials shall consider the following *as possible explanations for the discrepancies in signatures*:
>
> (a) Evidence of trembling or shaking in a signature could be health-related or the result of aging.
>
> (b) The voter may have used a diminutive of their full legal name, including, but not limited to, the use of initials, or the rearrangement of components of their full legal name, such as a reversal of first and last names, use of a middle name in place of a first name, or omitting a second last name.
>
> (c) The voter's signature style may have changed slightly over time.
>
> (d) The signature may have been written in haste.

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> (e) The surface of the location where the signature was made may have been rough, soft, uneven, or unstable. [Mich Admin Code, R 168.24(1) (emphasis added).]

Subsection 4(2) provides that officials can consider factors applicable to a particular voter and any "plausible reason" a voter may offer to explain a discrepancy:

> (2) In addition to the characteristics listed in R 168.23(2)(f) and (g), *the elections official may also consider factors applicable to a particular voter,* such as the age of the voter, the age of the signature or signatures contained in the voter's record, the possibility that the voter is disabled, the voter's primary language, and the quality of any digitized signature or signatures contained in the voter's record, *and any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature*. [Mich Admin Code, R 168.24(2) (emphasis added).]

As with Rule 2, JCAR proposed changes to Rule 4, raising concerns similar to those alleged here by Plaintiffs. (Defs' Ex 1, 2/23/22 JCAR letter.) The Secretary rejected those concerns, stating:

> The five factors in R 168.24(1) are similar to factors included in signature matching guidance in other states and election jurisdictions. In the Secretary's judgment, the factors provided in the rule are neither vague nor ambiguous, and JCAR provides no evidence to the contrary. Likewise, JCAR declares, with no evidence, that some of the five factors "seem unlikely" to occur. JCAR's opinion is not born out in the real world - all five factors are drawn from real world situations that filing officials observe election after election. The Secretary also finds JCAR's suggestion that the rule should be changed because the rule envisions such common situations as a signature being made in haste, or a voter's signature changing as the voter ages, unconvincing. Finally, the Secretary disagrees with JCAR's assertion that the rule creates undue flexibility in the signature-matching process. As with R 168.23(2), the Secretary believes that R 168.24(1) strikes the correct balance between creating a uniform, statewide floor on the signature matching process while allowing local election officials to tailor the process to the needs of their communities. [Compl, Ex F, ¶ 5.]

D. Signature comparison guidance

The Secretary of State is expressly authorized to issue instructions and provide directions and advice to election officials for the conduct of elections. MCL 168.31(1)(a)-(b). The Secretary first issued guidance to election officials instructing how to conduct signature

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comparisons as the result of a federal lawsuit in 2020. In *Priorities USA, et al v Benson, et al,* the plaintiffs challenged the Secretary's lack of guidance to election officials for making signature comparisons. They sought an injunction "to prevent the erroneous rejection of absentee ballots and ballot applications under the arbitrary, opaque, and error-prone signature matching process…." (Defs' Ex 2, *Priorities USA, et al v Benson, et al*, Case No. 3:19-cv-13188 (ED Mich 2019), Mot Vol Dismissal).[11] But the plaintiffs ultimately moved to voluntarily dismiss their complaint after the Director of Elections issued guidance to clerks on how signatures should be compared. (*Id*.) The Court later entered a stipulation to dismiss on May 8, 2020.

But a few months later, that guidance was challenged in the Michigan Court of Claims in *Genetski, et al v Benson, et al,* Case No. 20-000216-MM, in which the plaintiffs—including the Michigan Republican Party—claimed that the signature guidance was invalid because it had not been promulgated as a rule, and the Secretary argued that the guidance was merely an instruction issued under her authority in MCL 168.31(1)(a) and was not required to be promulgated. As Plaintiffs note in the instant complaint, the Court of Claims issued an opinion on March 8, 2021, holding that the guidance constituted a "rule" that required promulgation because the clerks were mandated to follow the guidance. (Compl, ¶49-50, Ex B, p 7-14). The guidance was thereafter modified, consistent with the opinion, to reflect that election officials were not mandated to follow the guidance. Although not obligated to pursue rulemaking, the Department of State later initiated the rule set discussed above, which took effect in December 2022.

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[11] The Michigan House and Senate intervened as party defendants in that case.

On July 20, 2023, the Legislature enacted Public Act 82 of 2023, which, among other things, created MCL 168.766a and the signature verification requirements discussed in Section B above.[12] The act took effect on February 13, 2024. See Const 1963, art 4, § 27.

In December of 2023, following the passage of Public Act 82, the Bureau of Elections issued instructions to local elections officials titled "Signature Verification, Voter Notification, and Signature Cure." (Compl, Ex A). On page 3 of those instructions, under the heading "Verifying the voter's signature against the QVF," the guidance states:

> Clerks must determine whether the signature being validated agrees sufficiently with the signature on file. Voter signatures are entitled to an *initial* presumption of validity. An initial presumption of validity does *not* mean that all signatures are "presumed valid" without further review. Instead, clerks must review all signatures and should determine that a signature does not agree sufficiently on file only after completing review of the signature as described in these instructions and in Michigan election law, MCL 168.766a, *et seq*.; and R. 168.21, *et seq*. [*Id.*, p 3 (emphasis in original).]

Plaintiffs filed this lawsuit on March 28, 2024—over a year *after* the Secretary's signature comparison rules took effect, and *after* MCL 168.766a became effective.

STANDARD OF REVIEW

The decision to grant a request for declaratory relief is within a court's discretion. *PT Today, Inc. v Comm'r of Office of Fin & Ins Servs,* 270 Mich App 110, 126 (2006) ("The language of MCR 2.605 is permissive rather than mandatory"). This is true even if a case or controversy exists. *Allstate Ins Co v Hayes*, 442 Mich 56, 74 (1993).

Plaintiffs have filed this motion under MCR 2.116(I)(1), which provides that "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment

[12] The legislative history is available at Senate Bill 370 of 2023 (Public Act 82 of 2023) - Michigan Legislature (accessed May 6, 2024.)

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without delay." A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might disagree. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019). A trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Gyarmati v Bielfield*, 245 Mich App 602, 604 (2001), citing *Sharper Image v Dep't of Treasury,* 216 Mich App 698, 701 (1996).

ARGUMENT

I. Plaintiffs lack standing to seek declaratory relief because they do not have a sufficient interest that is distinguishable from that of the public at large and their alleged interests are hypothetical.

Plaintiffs' complaint does not state any legal causes of action, and instead each count seeks various declarations that the Secretary of State's guidance to clerks or Rule 168.24 conflict with the Michigan Election Law or constitution, or that the guidance was not appropriately promulgated under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Where there is no legal cause of action, a plaintiff must meet the requirements of MCR 2.605, which provides:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

Pursuant to MCR 2.605, "[t]he existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ* (*On Remand*), 293 Mich App 506, 515 (2011) (citation omitted). "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. Though 'a court is not precluded from reaching issues before actual injuries or losses have occurred,' there still must be 'a present legal controversy, not one that is merely

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hypothetical or anticipated in the future.' " *League of Women Voters of Michigan v Sec'y of State*, 506 Mich 561, 586 (2020) (internal footnotes and citations omitted). "The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted). A litigant may also have standing in this context if they have a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 (2010).

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Plaintiffs here are the Republican National Committee (RNC), the Michigan Republican Party (MRP), the National Republican Congressional Committee (NRCC), Chesterfield Township Clerk Cindy Berry, and two individual citizens and voters. (Compl, ¶18-23). Each of the Plaintiffs allege injury in general terms. Plaintiff Dennis Gross is a citizen who intends to vote by absentee ballot and alleges an interest in "ensuring that his vote counts and is not diluted," and that his opportunity to vote in future elections is equal to the opportunity provided to other voters. (Compl, ¶18). Plaintiff Blake Edmonds is a citizen who intends to vote in-person at a polling place, and similarly alleges an interest in "ensuring that his vote counts and is not diluted," and that his opportunity to vote in future elections is equal to the opportunity provided to other voters. (Compl, ¶19). Clerk Berry alleges both an interest as a voter in "ensuring that her vote counts and is not diluted," and as a clerk who is subject to the signature guidance and Rule 168.24. (Compl, ¶20). For its part, the MRP alleges an interest in having elections conducted "in a free, fair, and transparent manner" on behalf of itself and its candidates

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and members. (Compl, ¶21). The NRCC is a national committee operating out of Washington, D.C., that supports the election of Republican candidates to the U.S. House of Representatives, including candidates in Michigan, and asserts an interest on behalf of itself and its members. (Compl, ¶22). The complaint, however, does not allege how the NRCC or its members have been affected by either the signature guidance or Rule 168.24. Lastly, the RNC is a national committee of the Republican Party, and the complaint states that the RNC supports state parties, such as MRP, by "supporting MRP's efforts to "ensure that elections in Michigan are conducted in a free, fair, and transparent manner," as well as to "protect the right to vote of its members and of all Americans." (Compl, ¶23). The RNC states that it "brings this action on behalf of itself and its members," and alleges that it has an interest to "protect not only its own rights but those of its members." (*Id.*).

In short, each of these Plaintiffs do not assert any claim to legal standing and are instead alleging standing under MCR 2.605 by virtue of a "substantial interest" in having fair elections that are conducted in accordance with the constitution and with the election law. But such an interest is not special or unique to the Plaintiffs, and it is instead shared by all citizens equally. See *Lansing Sch Educ Ass'n*, 487 Mich at 372. Indeed, Plaintiff RNC actually alleges that they are asserting interests on behalf of "all Americans." (Compl, ¶23).

The recent Court of Appeals decision in *Mich Republican Party v Donahue*, __ Mich App __, Docket No. 364048 (Mar 7, 2024) (2024 Mich App LEXIS 1732; 2024 WL 995238) is instructive here. (Copy attached as Exhibit 3.) There, the MRP and RNC brought claims challenging the partisan composition of election inspector appointees under Michigan Election Law and similarly alleged they had an interest in having the election law applied correctly. After reviewing the Supreme Court's decisions in both *Lansing Sch Educ Ass'n* and *Detroit Fire*

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Fighters Ass'n v Detroit, 449 Mich 629 (1995), the Court of Appeals determined that RNC and MRP lacked standing:

> In *Detroit Fire Fighters*, the plaintiffs had the most to gain from the hiring of new firefighters, but that interest was secondary to the primary goal behind the legislation, which was to provide greater safety to the public. Similarly, in this case, the legislation at issue is helpful to major political parties. But the overall benefit of the statutes falls upon the public at large. *The benefit of election integrity is shared by each member of the public, rather than benefiting major political parties more than the public.* Therefore, plaintiffs do not have a special right or a substantial interest in the enforcement of MCL 168.674(2) and MCL 168.765a(2) that is different from the public and do not have standing to enforce the statutes on that basis. [*Donahue*, 2024 Mich App LEXIS 1732 at *27 (emphasis added).]

Likewise, in this case, the benefits of election integrity, in having "votes counted and not diluted," and in "fair elections" are also shared by all members of the public. So, the interests of the Plaintiffs here are not different from that of the public. The Plaintiffs have not been injured in any unique way, and so they do not have standing to bring these claims.

Insofar as Clerk Berry states that she—in her capacity as a clerk—is obliged to follow the signature guidance and Rule 168.24, her stated interests differ from the other plaintiffs. But the problem for Clerk Berry is that her concerns about the guidance and rule are entirely hypothetical. As the Michigan Supreme Court held in *League of Women Voters*, a declaratory judgment is not appropriate where it might only be perhaps needed in the future:

> As the remaining plaintiffs now admit, and the Secretary of State agrees, they cannot show a present legal controversy rather than a hypothetical or anticipated one. A declaratory judgment is not needed to guide plaintiffs' future conduct. Plaintiffs only ask for a declaratory judgment because it perhaps may be needed in the future should they decide to sign some initiative. They have no plans now to sign any. Therefore, because plaintiffs do not meet the requirements of MCR 2.605, they do not have standing.

League of Women Voters of Michigan, 506 Mich at 586–587. But Clerk Berry's interests—indeed, all of the Plaintiffs' claimed interests—are based on conjecture about possible future events about signatures or choices made by clerks at some unknown time in the future.

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Clerk Berry has not identified a single signature that she has been—or imminently will be—required to accept because of either the guidance or rule that she otherwise would not have accepted under the requirements of the Michigan Election Law. Her concern over whether she is subject to the guidance and rule, therefore, are abstract and unconnected to any practical application of her duties. Clerk Berry also does not allege that she contacted the Defendants before filing this lawsuit to clarify how the guidance or rule should be applied. Instead, she relies on her own unspecified attempts to "reconcile" the guidance and rule with the constitution and election law. She has not, then, alleged any actual controversy involving the application of either the signature guidance or Rule 168.24.

Plaintiffs might argue that—under *Deleeuw v State Bd of Canvassers*, 263 Mich App 497 (2004) and *Helmkamp v Livonia City Council*, 160 Mich App 442 (1987)—the bar for standing is lower in election cases. But the Supreme Court has already rejected that argument in *League of Women Voters*:

> However, these cases should not be interpreted as allowing any citizen to bring an action for declaratory judgment regarding the constitutionality of any election law that might affect his or her interests in the future.
>
> * * *
>
> In both of these situations, the facts demonstrated that there was a present legal controversy. Not so here, where there is no such controversy because MFTE is not currently pursuing a ballot initiative and the other plaintiffs have not alleged that they have any concrete plans to sign any other petition (much less shown that their signatures would not be counted due to 2018 PA 608). There is no specific circumstance that plaintiffs claim should be different—they only want instruction going forward. *And nothing in the relevant caselaw gives any voter standing to challenge any election-related laws at any time.*
>
> * * *
>
> In any event, plaintiffs do not meet the requirements of MCR 2.605, and therefore under *Lansing Sch*. they have no standing. [*League of Women Voters of Michigan*, 506 Mich at 587-588(emphasis added).]

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In this case, Plaintiffs' claims are similarly untethered to any specific circumstance, and so they have not established the existence of an actual controversy that would support standing under MCR 2.605.

Because the Plaintiffs have not alleged any interests that are different from the public at large, and because Clerk Berry's claims are entirely hypothetical and abstract, all Plaintiffs lack standing. As a result, the Plaintiffs are not entitled either to summary disposition in their favor under MCR 2.116(I)(1) or to any declaratory judgment. Instead, the Defendants are entitled to summary disposition under MCR 2.116(I)(2).

II. Plaintiffs are not entitled to declaratory relief because the Secretary's signature guidance does not need to be promulgated as a rule, and where her administrative rules do not violate the constitution or the Michigan Election law.

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Here, Plaintiffs' complaint for declaratory and injunctive relief fails entirely because there is no violation of the APA, the Michigan Election Law, or the Michigan Constitution.

A. Counts I, II, and III fail to state a claim because the signature guidance is consistent with the law and is not a "rule" that requires promulgation.

1. The signature guidance is consistent with the constitution and Michigan Election Law.

Counts I and II of the complaint assert that the Secretary's "presumption of validity" violates article 2, §4(1)(h) of the constitution and sections 759, 761, 765, and 766 of the election law, because the constitution and statutes all require that a voter's signature on AV ballot applications and AV ballot return envelopes "agree sufficiently" with the signature on file. (Compl, ¶107-122). By the express language of Counts I and II, the only content in the Defendants' signature guidance to which Plaintiffs object is the supposed "presumption of validity" of signatures. (See e.g. Compl, ¶109, 116.) Similarly, Plaintiffs contend in Count III that the "presumption of validity" is a rule that requires promulgation. Because each of these

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claims depend on the existence of a presumption of validity, they must necessarily fail because *there is no presumption of validity in the signature guidance.*

Counts I, II, and III rely entirely on a single sentence on page 3 referring to an "initial presumption of validity." (Compl, Ex A, p 3). Plaintiffs, however, appear not to have continued reading, as the next two sentences negate the premise of their claims:

> Clerks must determine whether the signature being validated agrees sufficiently with the signature on file. Voter signatures are entitled to an *initial* presumption of validity. **An initial presumption of validity does *not* mean that all signatures are "presumed valid" without further review.** Instead, clerks must review all signatures and should determine that a signature does not agree sufficiently on file only after completing review of the signature as described in these instructions and in Michigan election law, MCL 168.766a, et seq.; and R. 168.21, et seq. [*Id*. (bolded emphasis added.)]

The guidance explicitly states that signatures are *not* "presumed valid without further review." So, the guidance simply does not include a "presumption of validity." Because there is no such "presumption" in the guidance, there is no conflict with the constitution or Michigan Election Law, and no new "rule" to promulgate. Plaintiffs' claims fail on the face of the guidance they seek to challenge.

It is true that the guidance refers to an "*initial* presumption of validity."[13] It is foreseeable that Plaintiffs may argue that there is no difference between a presumption and an initial presumption. However, such an argument would still fall flat in light of the last sentence of the guidance quoted above. The meaning of "initial presumption of validity" is not left open to interpretation—it is expressly stated in the guidance that an initial presumption does not mean

[13] Even after the content for "initial presumption of validity" was removed from the text of the rule during promulgation, the catchline to Mich Admin Code, R 168.22 still reads, "Sufficient agreement of voter signature; *initial presumption of validity*; voter contact by clerk." (Emphasis added.) So, some guidance about how that language should be understood was necessary to avoid possible confusion among local clerks.

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that signatures are presumed valid, "[i]nstead, clerks must review all signatures and should determine that a signature does not agree sufficiently on file only after completing review of the signature as described in these instructions and in Michigan election law." (*Id.*) The guidance explicitly instructs clerks that they *must* review all signatures, and that they should determine that a signature does not "agree sufficiently" *only after* completing the review required by law. Simply put, an "initial presumption of validity" is nothing more than a starting point for the statutorily-mandated review.

Again, Plaintiffs might conceivably argue that even such a starting point is somehow in conflict with the election law. But these sentences from the guidance cite specifically to MCL 168.766a, which provides that that clerks may determine that a voter's signature does not agree sufficiency "*only after* reviewing the process set forth in this section." MCL 168.766a(1). (Emphasis added). By its plain text, the statute does not permit a presumption that a signature is *invalid*—a signature can only be determined not to agree sufficiently after the review is completed.

It is notable that subsection 766a(2) also states that, "[a]n elector's signature is invalid *only if* it differs in significant and obvious respects from the elector's signature on file." (Emphasis added). And it further states that "[s]light dissimilarities must be resolved in favor of the elector," and that "[e]xact signature matches are not required to determine that a signature agrees sufficiently with the signature on file." MCL 168.766a(2). On its face, the statute is lenient in favor of the validity of the voter's signature.

Regardless, all the "initial presumption of validity" requires is that clerks perform the statutory review on all signatures, and that they determine that a signature does not sufficiently

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agree only *after* the review is completed according to law. That is not only consistent with Michigan Election Law, it is expressly required by MCL 168.766a(1).

Further, the constitution supports that clerks should not determine that a signature does not agree sufficiently until after comparing the signature. The language of §4(1)(h) provides a clear sequence: 1) A voter may prove their identity when applying for or voting an AV ballot by using their signature; 2) the election officials compare the voter's signature to the signature on their voter record or on the AV ballot application; and 3) "if" the election officials determine that the signature does not agree sufficiently, then the voter is notified and given the opportunity to cure the defect. Const 1963, art 2, §4(1)(h).

The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. *League of Women Voters of Mich v Sec'y of State*, 508 Mich 520, 580 (2022), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468 (2004). The lodestar principle is that of "common understanding," the sense of the words used that would have been most obvious to those who voted to adopt the constitution. *Id.,* quoting *Straus v Governor*, 459 Mich 526, 533 (1999).

Here, the constitution—in the language as it would be commonly understood—contemplates that a determination that the signatures do not agree sufficiently be made *only* after the comparison of the signatures. This conclusion is bolstered by the language appearing at the end of §4(1):

> All rights set forth in this subsection shall be self-executing. *This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes*. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. . . . [Emphasis added.]

Liberally construing the right to vote an absent ballot clearly supports that a signature cannot be determined invalid until after it has been reviewed. Likewise, §4(1) also provides that

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the Legislature is authorized to *expand* voters' rights beyond what is provided in the constitution. As stated earlier, MCL 168.766a provides explicit protections for voters in how their signatures are reviewed. As a result, the Defendants' guidance that clerks perform the signature comparison and verification process before determining that signatures do not sufficiently agree is also consistent with the constitution and is not unlawful. See *Chrisdiana v Dep't of Cmty Health,* 278 Mich App 685, 689 (2008) (Even though not promulgated "'an agency policy is still required to be within the matter covered by the enabling statute, comply with the underlying legislative intent, and not be arbitrary or capricious.'") (internal citation omitted).

Because the Defendants' guidance is consistent both with the constitution and the Michigan Election law, Plaintiffs fail to state a claim under Counts I, II, and III. So, Plaintiffs are not entitled either to summary disposition in their favor under MCR 2.116(I)(1) or to any declaratory judgment. Instead, the Defendants are entitled to summary disposition under MCR 2.116(I)(2).

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2. The signature guidance is not a rule that required promulgation under the Administrative Procedures Act.

Again, as argued above, the Defendants' guidance expressly states that signatures are *not* "presumed valid," and that clerks are required to review all signatures on AV ballot applications and AV ballot return envelopes, and that clerks determine that a signature does not agree sufficiently only *after* the review is completed according to law. Because there is no "presumption of validity," there is no "rule" that required promulgation under the APA.

Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered

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by the agency." MCL 24.207. An agency must utilize formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404 (1998).

Here, as discussed above, the "initial presumption of validity" is described in the guidance in terms that essentially mirror MCL 168.766a. The guidance states, "[i]nstead, clerks must review all signatures and should determine that a signature does not agree sufficiently on file only after completing review of the signature as described in these instructions and in Michigan election law, MCL 168.766a, et seq.; and R. 168.21, et seq." (Compl, Ex A, p 3). MCL 168.766a, in turn, states: "A clerk may determine that a signature on an elector's absent voter ballot application or absent voter ballot envelope does not agree sufficiently with the signature on file only after reviewing the signature using the process set forth in this section." Even a cursory reading prompts the conclusion that they say essentially the same thing.

While it may best be described as a base restatement of what MCL 168.766a requires, the "initial presumption of validity" is—at most—an interpretation or explanation of the requirements of MCL 168.766a. It does not establish any substantive standards, and only restates the language of the statute. It is simply not a "rule" that needed to be promulgated.

Because the signature guidance fails to meet the definition of a "rule" under the APA, it did not require promulgation. So, the Defendants' December 2023 guidance does not violate the APA. So, Plaintiffs' Count III fails to state a claim, and the Plaintiffs are not entitled either to summary disposition in their favor under MCR 2.116(I)(1) or to a declaratory judgment. Instead, the Defendants are entitled to summary disposition under MCR 2.116(I)(2).

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B. Counts IV and V fail to state a claim for declaratory relief because Rule 168.24 is consistent with the Michigan Election Law and the constitution.

"Agencies have the authority to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Bd of Ed,* 442 Mich 230, 240 (1993). But "agencies may not do so by promulgating rules that conflict with the statutes they purport to interpret." *Chrisdiana,* 278 Mich App at 688-689, citing *Clonlara,* 442 Mich at 240-241, 243-244. "Rules need not be mere reiterations of a statute," but the " 'rules must be within the matter covered by the enabling statute, they must comply with the underlying legislative intent, and they must not be arbitrary and capricious.' " *Id.*, quoting *Cevigney v Economy Fire & Cas Co,* 185 Mich App 256, 263 (1990). See also *Michigan Farm Bureau v Dep't of Env't Quality,* 292 Mich App 106, 123 (2011) (a rule "must pass a three-part test to be valid: (1) the rule must be within the subject matter of its enabling statute; (2) the rule must comply with the legislative intent underlying the enabling statute; and (3) the rule must not be arbitrary and capricious.") (citations omitted).

In reviewing an agency's interpretation, this Court must accord the agency's interpretation "respectful consideration." *In re Complaint of Rovas*, 482 Mich 90, 103 (2008) (cleaned up). There must be cogent reasons for overruling an agency's interpretation of a statute. *Id.* (cleaned up). Agency interpretations should be respectfully considered, "especially where the interpretation of a statute involves 'reconciling conflicting policies' or 'more than ordinary knowledge respecting the matters subjected to agency regulations.' " *Chrisdiana*, 278 Mich App at 689 (cleaned up).

Here, Plaintiffs' Counts IV and V challenge Mich Admin Code, R 168.24, which provides factors that election officials may consider as "possible explanations" for differences in a voter's signatures. Of particular note, R 168.24(2) specifically refers to officials making a "follow-up" inquiry with the voter about a questionable signature:

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(2) In addition to the characteristics listed in R 168.23(2)(f) and (g), the elections official may also consider factors applicable to a particular voter, such as the age of the voter, the age of the signature or signatures contained in the voter's record, the possibility that the voter is disabled, the voter's primary language, and the quality of any digitized signature or signatures contained in the voter's record, *and any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature.* [Emphasis added].

Plaintiffs contend that this promulgated rule violates article 2, §4(1)(h) and sections 765 and 766 of the Michigan Election Law by allowing clerks to approve a voter's signature based on "mere speculation." (Compl, ¶¶ 9-11, 37-39, 46, 92, 135, 143.)

First, Rule 4 falls well within its enabling statutes given the language of § 766a. And, as noted above, the Legislature has long authorized the Secretary to issue instructions and promulgate rules for the conduct of elections. See MCL 168.31(1)(a)-(b);[14] see, e.g., *Elliott v Secretary of State*, 295 Mich 245, 249 (1940) ("Under the statute it is the duty of the Secretary of State to prepare rules, regulations and instructions for the conduct of elections, and to advise local election officials as to the proper method of conducting elections.")

Second, again, considering the language of § 766a, Rule 4 is also well within the underlying legislative intent of treating a signature as valid unless it differs in "significant and obvious respects" from the signature on file. See *Chrisdiana,* 278 Mich App at 689. Rule 4 simply clarifies and explains what the statute already requires.

It appears from Plaintiffs' allegations that their claims rest on their interpretation that Rule 4 is some kind of substitute for the review of signatures to determine whether they agree sufficiently with the signature on file, as required by article 2, §4(1)(h), MCL 168.761, MCL 168.765, and MCL 168.766. But that is not at all the most reasonable interpretation of the rule.

[14] The reference to rule promulgation under the APA was added to § 31 in 1999. See 1999 PA 220.

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Rule 4(1) begins by stating only that elections may "consider the following as possible explanations for the discrepancies in signatures." Mich Admin Code, R 168.24(1). Notably, the word "consider" is not compulsory—it does not compel the clerks to reach any particular conclusion, merely to consider whether a reasonable explanation may apply. Also, the rule's reference to "discrepancies" necessarily indicates that the signature review required by law has already occurred, and the clerk has discovered differences as a result of that review. The rule merely provides that—having performed the required review—clerks may consider these as *possible* explanations where appropriate. Simply put, if the signature of "Robert Smith" appears as "R Smith" or "Bob Smith," the clerk *may* consider that as an explanation if the signature otherwise sufficiently agrees.

Rule 4(2) also provides that, "[i]n addition to the characteristics listed in R 168.23(2)(f) and (g), the election official may also consider factors applicable to a particular voter, such as the age of the voter, the age of the signature or signatures contained in the voter's record, the possibility that the voter is disabled, the voter's primary language, and the quality of any digitized signature or signatures contained in the voter's record, and any other plausible reason given by the voter *that satisfies the clerk when following up on a questionable signature*." (Emphasis added). Rule 4 thus contemplates that explanations are being provided to the clerk as part of the clerk following up with the voter on a questionable signature. This may be read in conjunction with MCL 168.766a(6), which provides that "[t]he secretary of state may issue instructions to clerks to provide electors with other options, other than by providing a signature under subsection (5), to cure the deficiency in the elector's absent voter ballot application or absent voter ballot return envelope." Following up with a voter, who may then provide an explanation for an issue with their signature, is one way to cure a deficiency. Even so, Rule 4(2)

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still expressly states that the explanation must "satisfy the clerk." No clerk is required to accept *any* explanation, or to "speculate" as to the reason for a discrepancy.

So, once again, it is difficult to reconcile Plaintiffs' claims with the Legislature's expressed will in MCL 168.766a(2), which states that exact matches are not required in order to determine that a signature sufficiently agrees with the signature on file, that slight dissimilarities must be resolved in favor of the voter, and that a signature can only be determined invalid if it differs in "significant and obvious respects."

Third and last, Rule 4 is not arbitrary or capricious. " 'Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical[.]' " *Michigan Farm Bureau*, 292 Mich App at 141, quoting *Nolan v Dep't of Licensing & Regulation,* 151 Mich App 641, 652 (1986). "In general, an agency's rules will be found to be arbitrary only if the agency 'had no reasonable ground for the exercise of judgment.' " *Id.* at 141-142, quoting *American Trucking Associations, Inc v United States,* 344 US 298, 314 (1953).

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That is not the case here. This promulgated rule does not call for the agency to exercise its will without consideration of principles or circumstances, or apt to change on a whim. To the contrary, the purpose of the rule is to provide some structure for the clerks to refer in their duty to review signatures to determine whether they "agree sufficiently"—an act that could, in the absence of articulated standards, devolve into caprice. The rule, then, actually helps clerks apply regular standards in the review of signatures.

So, Rule 4 does not conflict with either the constitution or the Michigan Election Law. Plaintiffs' claims in Counts IV and V fail to state a claim, and the Plaintiffs are not entitled either

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to summary disposition in their favor under MCR 2.116(I)(1) or to a declaratory judgment. Instead, the Defendants are entitled to summary disposition under MCR 2.116(I)(2).

III. Defendants are not collaterally estopped from providing different guidance about new laws that were not in existence at the time of the *Genetski* decision.

Plaintiffs' brief cites repeatedly to the *Genetski* opinion, and Plaintiffs argue that the issue of whether the "presumption of validity" is a rule that requires promulgation was conclusively determined in that case and is now subject to collateral estoppel. (Plfs' 4/22/2024 Brief, p 13-15.) Plaintiffs' argument simply misses the mark.

Collateral estoppel " 'precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding.' " *Radwan v Ameriprise Ins Co*, 327 Mich App 159, 166 (2018), quoting *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528 (2014). Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel. *Id.*, quoting *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 529. In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action. *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 528, citing *Detroit v Qualls*, 434 Mich 340, 357 (1990). The issues must be identical, and not merely similar. *Id.*, citing *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340 (2002). "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is

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mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Monat v State Farm Ins Co,* 469 Mich 679, 682-684 (2004). Here, Plaintiffs cannot satisfy the first and third factors.

In this case, the issues are simply not identical to those in *Genetski*. Notably, the Plaintiffs have not attached any copies of the 2020 guidance for comparison to the current guidance. This is a conspicuous omission—if the issues were truly identical, then the easiest way to demonstrate that would be to compare the language from the 2020 guidance to the 2023 document and show how they are the same. The Plaintiffs have not done so. But the description of the guidance provided in Judge Murray's opinion itself shows that the language in the 2020 guidance was not the same. (See Plfs' 4/22/2024 Brief, Ex B, p 2-4 ("Under a heading entitled 'Procedures for Signature Verification,' the document stated that signature review 'begins with the presumption that' the signature on an absent voter ballot application or envelope is valid.")) But, insofar as the Plaintiffs here seek to rely on *Genetski* for collateral estoppel, the Secretary's 2020 guidance was attached as Tab 3 to the plaintiffs' complaint in *Genetski.* (Defs' Ex 4, *Genetski* Complaint, Tab 3, Oct. 6, 2020 Guidance.)[15]

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Even a casual review of the 2020 guidance shows little similarity with the 2023 guidance. The 2020 guidance says that "Signature review begins with the presumption that the voter's AV application or envelope signature is his or her genuine signature." (Defs' Ex 4, p 2). The 2023 guidance, however, explicitly states that signatures are not "presumed valid" without further

[15] Plaintiffs' motion is not brought under MCR 2.116(C)(8) and is instead based on MCR 2.116(I)(1), which provides: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits *or other proofs* show that there is no genuine issue of material fact, the court shall render judgment without delay." (Emphasis added).

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review. (Compl, Ex A, p 3) (emphasis in original). The guidance is not the same, and so the issue is not the same and there is no collateral estoppel.

Further, the 2020 guidance—in the same section discussing the "presumption of validity"—includes two subsections. In the first, the guidance directed clerks to consider whether there are "redeeming qualities" for the voter's signature. (Defs' Ex 4, p 2). As discussed above, the consideration of "redeeming qualities" has now been promulgated into Rule 168.23. In the second subsection, the 2020 guidance instructed clerks that a voter's signature be considered questionable only if it differs in "multiple, significant, and obvious respects from the signature on file." (*Id.*) Again, as discussed above, this has since been codified into MCL 168.766a(2), which states that a voter's signature is invalid "only if it differs in significant and obvious respects from the elector's signature on file." The Court's opinion in *Genetski*, however, made specific reference to these two subsections as supporting its conclusion that the guidance was a rule. (Plfs' 4/22/2024 Brief, Ex B, p 3.)

In holding that the 2020 guidance was a "rule" that required promulgation, the Court's opinion stated that, "nowhere in this state's election law has the Legislature indicated that signatures are to be presumed valid, nor did the Legislature require that signatures are to be accepted so long as there are any redeeming qualities in the application or return envelope signature as compared with the signature on file." (*Id.*, p 10.) The Court then went on to state that "[p]olicy determinations like the one at issue—which places a thumb on the scale in favor of a signature's validity—should be made pursuant to properly promulgated rules under the APA or by the Legislature." (*Id.*) The *Genetski* opinion was thus very much grounded in the state of the law at that time.

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But not only is the 2023 guidance not the same as the 2020 guidance, the current law is not the same as the law considered by the Court in *Genetski*. "Redeeming qualities" is now a promulgated rule. MCL 168.766a did not exist at the time of the decision in *Genetski*. Even the constitution is different; it was amended a year after the *Genetski* opinion to specifically protect voters' rights to vote absentee. And while the Defendants are confident that the changes in law support the guidance as presented in the 2023 document, for purposes of collateral estoppel it is sufficient to observe that the *Genetski* opinion did not address—and could not have addressed—the same law. As a result, the issues raised and decided in *Genetski* are not the same as presented here.

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Moreover, the legal nature of the issue in *Genetski* precludes the application of collateral estoppel here. For estoppel to apply, "a question of *fact* essential to the judgment must have been actually litigated and determined by a valid and final judgment." *Monat v State Farm Ins Co,* 469 Mich 679, 682 (2004) (emphasis added.) Courts are reluctant to apply claim preclusion doctrines when questions of law are involved and the causes of actions do not arise from the same subject matter or transaction. *Young v Edwards,* 389 Mich 333, 338 (1973). In *Monat,* the Michigan Supreme Court noted that collateral estoppel need not be applied where, "[t]he issue is one of law and … a new determination is warranted in order to take account of an intervening change in the applicable legal context[.]" *Monat*, 469 Mich at 683, n 2. Here, the Plaintiffs are seeking to apply collateral estoppel to a legal conclusion—that is, whether a particular instruction was a rule within the meaning of the APA—despite intervening changes in law. So, collateral estoppel does not apply here.

Ultimately, Plaintiffs' argument rests heavily on the mere presence of the words "presumption" and "validity" together in a sentence. While the 2023 guidance may use these

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words, it uses them in an entirely different context—and under a different legal framework—that is almost nothing like what was presented in *Genetski*. To hold that the Secretary cannot use such vocabulary—regardless of legal context, usage, or expressed meaning—would be to elevate form over substance. Simply put, the APA does not prohibit or forbid the use of certain words and is instead directed towards the actual actions of the agency and whether they sought to evade APA requirements. See *AFSCME v Dep't of Mental Health*, 452 Mich 1, 9 (1996). That is not what happened here.

Because the guidance here is only restating the requirements already imposed by MCL 168.766a, it cannot be argued that the Secretary has somehow placed a "thumb" on the scales in favor of a signature's validity. (Compl, Ex B, p 9-10.) Whatever "policy decision" may be implicated here, it was a decision made by the Legislature when it enacted MCL 168.766a—not a decision made by the Secretary of State.

Lastly, for collateral estoppel to apply, the parties in the second action must be the same as or privy to the parties in the first action. *VanVorous v Burmeister*, 262 Mich App 467, 480 (2004). A "privy" has been defined as encompassing:

> [A] person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee.... In order to find privity between a party and a nonparty, Michigan courts require both a substantial identity of interests and a working or functional relationship ... in which the interests of the non-party are presented and protected by the party in the litigation. [*Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 12-13 (2003).]

Plaintiffs' argument for collateral estoppel relies on the presence of MRP, who is the only plaintiff here that was also a party in the *Genetski* case. For the reasons discussed above, however, MRP lacks standing here. If MRP is dismissed from this action based on lack of standing, none of the other Plaintiffs were parties to *Genetski* and would not be entitled to raise collateral estoppel in the absence of MRP. But even if MRP has standing, and assuming the

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other Plaintiffs do as well, the other Plaintiffs are not entitled to the benefit of collateral estoppel since they are not privies of MRP, especially the individual Plaintiffs, where it cannot be said that any of the other Plaintiffs have a substantial identity of interests with MRP such that their interests were presented and protected by the MRP in the *Genetski* litigation.

Because Plaintiffs' have not established that Defendants should be collaterally estopped from defending the 2023 signature guidance on grounds that it is not a rule, Plaintiffs are not entitled to summary disposition in their favor under MCR 2.116(I)(1) or to a declaratory judgment. Instead, the Defendants are entitled to summary disposition under MCR 2.116(I)(2).

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Secretary of State Jocelyn Benson and Director of Election Jonathan Brater respectfully request that this Honorable Court deny Plaintiffs' motion for summary disposition and/or for declaratory relief, and instead grant Defendants' motion for summary disposition and dismiss the complaint in its entirety and order any other relief the Court determines to be appropriate under the circumstances.

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Respectfully submitted,

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Dated: May 6, 2024

PROOF OF SERVICE

Erik A. Grill certifies that on May 6, 2024, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Erik A. Grill
Erik A. Grill

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