THE 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.	Case No. 24-000041-MZ HON. CHRISTOPHER P. YATES

5/6/2024 MICHIGAN ALLIANCE FOR RETIRED AMERICANS AND DOWNRIVER/DETROIT CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF AMICI INTEREST[1]

The Michigan Alliance for Retired Americans (the "Alliance") and Detroit/Downriver Chapter of the A. Philip Randolph Institute ("DD APRI") (together, "Amici") have an interest in protecting their members' voting rights and an interest in their own efforts to promote voter turnout among their members and constituencies, both of which are threatened by this lawsuit.[2]

INTRODUCTION

Over the last several years, Michigan has expanded access to voting, including absentee voting, through a thoughtful series of ballot measures and bipartisan legislation. These reforms have made it easier for all Michiganders to vote and have their votes counted, making it more likely that the result of Michigan's elections will truly reflect the will of the electorate, not merely of those voters who successfully navigate what can sometimes be a complex or burdensome voting process. These efforts have paid off in higher voter participation while continuing to ensure that Michigan's elections remain safe and secure.

Plaintiffs' lawsuit is just another in a long line of meritless attempts by Republican Party groups since the 2020 election to undermine these efforts and make voting harder. In this litigation, Plaintiffs challenge the Michigan Secretary of State's December 2023 guidance and Rule 168.24, both of which guide election workers on how to properly verify signatures on an absent ballot application or carrier envelope to comply with the Michigan Constitution and Election Law and minimize erroneous voter disenfranchisement. As a threshold matter, Plaintiffs lack standing to bring this lawsuit because they have not suffered a particularized injury and allege only

[1] No counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund its preparation or submission. No person other than Amici, their members, or their counsel and Priorities USA made such a monetary contribution.

[2] See generally Brief in Support of 4/5/2024 Motion of the Alliance and DD APRI to Intervene as Defendants or, in the Alternative, Participate as Amici Curiae.

hypothetical and unsubstantiated harms. But on the merits, too, Plaintiffs' challenge cannot succeed. It rests on a cherry-picked reading of the Secretary's guidance that cannot be reconciled with the context and plain text of the relevant laws, as Plaintiffs attempt to cobble together a plausible reason to reach the outcome that they desire. In reality, this case is driven—not by a legitimate legal theory—but by Plaintiffs' fundamental policy disagreement with the Legislature's decision to enact voter-friendly laws in recent years. The Secretary's guidance is entirely consistent with the Michigan Constitution and Election Law, providing a procedure for clerks to verify absent application and ballot signatures as mandated by recently enacted Michigan law. Plaintiffs' arguments to the contrary are nonsensical. Their substantive challenge to the Secretary's guidance relies on an unusual understanding of the word "verify" that is divorced from its constitutional and legislative context, and a single phrase from the Secretary's guidance that is substantially clarified, and caveated, in the remainder of the document. And Plaintiffs' procedural challenge ignores that the Secretary has legal authority to advise election officials without following formal rulemaking procedures. Plaintiffs' challenge to Rule 168.24 fails for similar reasons—it is entirely consistent with the Michigan Constitution Election Law.

Plaintiffs' driving policy view is also misplaced. Plaintiffs operate from the false premise that stricter signature matching would more accurately verify voters' identity when such relief would only increase rejection rates for validly cast absent ballot votes, undermining years of efforts to expand and protect access to the franchise by both Michigan's citizens and legislators alike.

BACKGROUND

I. Michigan has expanded access to voting and minimized disenfranchisement over the last several years.

For years, Michigan's citizens and leaders have been working to make voting—especially absentee voting—more accessible. In November 2018, voters passed Ballot Proposal 18-3 "by a

better than two-to-one margin,"[3] amending Michigan's Constitution and Election Law and guaranteeing no excuse absentee voting for all Michiganders.[4] In November 2022, Michiganders again overwhelmingly voted to expand voting rights, passing Ballot Proposal 22-2 ("Prop 2") to enshrine the "fundamental right to vote" into the Constitution. Const 1963, art 2, § 4(1)(a).[5] Prop 2 further expanded absentee voting by expanding access to drop boxes, creating a state-funded ballot tracking and notification system, and allowing voters to be placed on a permanent absentee voter list.[6] As relevant, Prop 2 added language requiring clerks to "verify the identity of a voter who applies for an absent voter ballot" to Article 2 § 4(1)(h) of the Michigan Constitution. Notably, the revised text also provides that it should "be liberally construed in favor of voters' rights in order to effectuate its purposes," Const 1963, art 2, § 4(1)(m), minimizing wrongful disenfranchisement.

Michigan's Legislature has also shown its commitment to expanding access to the franchise by enacting expansive bipartisan legislation to make voting easier for all Michiganders. See, e.g., MCL 168.1 *et seq*.[7] This includes enacting Public Act 82 of 2023, which went into effect

[3] Kat Stafford, Detroit Free Press, *Voters approve Proposal 3, bringing sweeping changes to Michigan's election law* <https://perma.cc/Q3QJ-DCXV> (posted November 6, 2018) (accessed April 30, 2024).

[4] House Fiscal Agency, *Ballot Proposal 3 of 2018* <https://perma.cc/Q3UJ-85ZZ> (accessed April 30, 2024).

[5] See also House Fiscal Agency, *Ballot Proposal 2 of 2022* <https://perma.cc/T4BM-3LDR> (accessed April 30, 2024) ("Prop 2"); Holly Kuhn, House Fiscal Agency, *Background Brief: Proposal 22-2 and Related Changes to the Michigan Election Law* <https://perma.cc/GT5F-MW84> (January 19, 2024) (accessed April 28, 2024) ("Kuhn"); Executive Office of the Governor, *Gov. Whitmer Signs Bipartisan Legislation Expanding Voting Rights* <https://perma.cc/VNQ6-3CL7> (July 18, 2023) (accessed April 28, 2024) ("Bipartisan Legislation Press Release").

[6] Prop 2.

[7] See also Kuhn; Bipartisan Legislation Press Release.

on February 13, 2024, and added MCL 168.766a to the Michigan Election Law.[8] MCL 168.766 instructs clerks on how to review voters' absent ballot application and carrier envelope signatures with their on-file signatures. MCL 168.766a continues Michigan's pro-voter trend by making it clear that clerks should *only* reject a signature "if it differs in significant and obvious respects from the elector's signature on file" and that "[s]light dissimilarities must be resolved in favor of the elector [because] [e]xact signature matches are not required."

As Michigan's laws and statutes continue to evolve to make voting more accessible, Michigan's Secretary of State has also issued various rules and guidance to clerks to give them the tools they need to process ballots consistent with Michigan's evolving laws. See, e.g., Mich Admin Code R 168.21–26; Complaint, Ex. A. Michigan's efforts to make voting more accessible have been wildly successful and contributed to historically high voter turnout.[9]

II. Plaintiffs seek to undermine Michigan's attempts to expand safe and secure access to voting across the state.

Plaintiffs now ask the Court to restrictively interpret Michigan's strides to expand access to voting and prevent wrongful disenfranchisement. On March 28, 2024, Plaintiffs the Republican National Committee ("RNC"), the Michigan Republican Party ("MRP"), the National Republican Congressional Committee ("NRCC"), Chesterfield Township Clerk Cindy Berry, and individual voters filed this suit seeking to undermine Michigan's absentee voting system. Specifically, Plaintiffs allege that guidance issued by the Secretary in December 2023 ("December 2023 guidance") and Mich Admin Code R 168.24 ("Rule 168.24") regarding absentee ballot signature matching violate the Michigan Constitution and Election Law. Complaint ¶¶ 7–9.

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[8] See Michigan Legislature, *Senate Bill 370 of 2023 (Public Act 82 of 2023)* <https://perma.cc/7MXX-Z8P4> (accessed Apr 28, 2024).

[9] See, e.g., David Eggert, AP News, *Record 5.5M voted in Michigan; highest percentage in decades* <https://perma.cc/2CLX-367W> (Nov 5, 2020) (accessed Apr 30, 2024).

Plaintiffs' lawsuit threatens to introduce confusion and uncertainty into the signature verification process and to disenfranchise absentee voters—including Amici's[10] members— based on minor and inconsequential differences between signatures. It would also undo many efforts by Michigan's citizens and leaders to make absentee voting easier and more accessible. Indeed, this lawsuit is just one in a long list of lawsuits brought by Republican groups that attempt to push back on Michigan's efforts to expand voting access and instead make it harder for Michiganders to participate in the democratic process.[11]

ARGUMENT

I. Plaintiffs lack standing.

As Defendants argue, Plaintiffs lack standing because they seek only declaratory relief, but they do not meet the requirements of MCR 2.605. MCR 2.605 requires an "actual controversy,"

[10] Given their strong interest in protecting the voting rights of their members, the Alliance and DD API moved to intervene as defendants or, in the alternative, participate as amicus curiae on April 5, 2024. This Court denied the parties' request to intervene but allowed them to participate as amici pursuant to MCR 7.212(H) on April 17, 2024.

[11] See, e.g., *Donald J Trump for President, Inc v Benson*, unpublished order and opinion of the Michigan Court of Claims, issued January 6, 2021 (Docket No. 20-000225-MZ) (attached as Exhibit A) (lawsuit filed by the Trump campaign attempting to stop the counting of absentee ballots); *King v Whitmer*, 141 S Ct 1449; 209 L Ed 2d 172 (2021) (mem) (lawsuit filed by individual Republican voters seeking to decertify Michigan's 2020 presidential election results); *Karamo v Winfrey*, unpublished opinion of the Third Judicial Circuit Court, issued November 7, 2022 (Docket No. 22-012759-AW), p. 4 (attached as Exhibit B) (lawsuit filed by Republican candidate for Secretary of State seeking preliminary injunction mandating "all eligible Detroit voters vote in person or" "be required to go to the Detroit City Clerk's Office to obtain the ballot" if voting absentee); *Lindsey v Whitmer*, unpublished opinion and order of the United States District Court for the Western District of Michigan, issued April 10, 2024 (Case No. 1:23-CV-1025) (attached as Exhibit C) (lawsuit filed by 11 Republican state legislators seeking to nullify two pro-voting constitutional amendments enshrined in the Michigan Constitution via 2018 and 2022 ballot initiatives); *Ickes v Whitmer*, unpublished opinion and order of the United States District Court for the Western District of Michigan, issued September 8, 2022 (Case No. 1:22-CV-817) (attached as Exhibit D) (lawsuit filed by Macomb County Republican Party challenging the results of the 2020 election); *Republican Nat'l Comm v Benson*, No 1:24-cv-00262-JMB-RSK (WD Mich 2024) (lawsuit filed by the RNC seeking to purge voters from the rolls).

which demands either allegations that Plaintiffs will be affected "different[ly] from the citizenry at large" or a statute showing that "the Legislature intended to confer standing on the litigant." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). There must also be a "present legal controversy, not one that is merely hypothetical or anticipated in the future." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020), quoting *Van Buren Charter Twp v Visteon Corp*, 503 Mich 960, 965 n. 16; 923 N.W.2d 266 (2019) (VIVIANO, J., dissenting). None of those requirements is met here.

First, Plaintiffs show neither a statute conferring standing nor an injury different from the citizenry at large. Individual Plaintiffs' asserted interests in having their votes counted equally with other voters' are shared with *all* Michigan voters, and not the type of "personal or unique" injury that confers standing. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 174; 952 NW2d 491, *abrogated on other grounds by* 508 Mich 520 (2022); *see* Complaint ¶¶ 18–20. And the MRP, RNC, and NRCC's asserted interests are exactly that same generalized interest in the conduct of fair elections. Complaint ¶¶ 21–23; *see also Mich Republican Party v Donahue*, opinion of the Court of Appeals, issued March 7, 2024 (Docket No. 364048), p. 9 (attached as Exhibit E) (holding that state and national parties' interest in fair elections is one they share with "the public at large" that does not confer standing).

That leaves Clerk Berry, who is at least subject to the challenged rule and guidance. But Clerk Berry does not identify any concrete signature or category of signatures that she will be forced to accept under the challenged rule and guidance, that she would otherwise reject under what she thinks is a proper construction of the law. In fact, the Complaint nowhere alleges that ballots from ineligible voters have been or will be counted due to the challenged guidance or rule. Clerk Berry's concern, like that of the other Plaintiffs, is therefore limited to an abstract objection

to the lawfulness of the challenged guidance. Clerk Berry has no greater interest in the abstract lawfulness of such guidance than any other Michigan citizen. To the contrary, an abstract interest in the government following the law is a prototypical public interest that cannot convey standing.

Second, Plaintiffs' claim that the challenged provisions will enable voter fraud is entirely hypothetical and unsupported by facts. See Complaint ¶¶ 98–106. Plaintiffs conclude that the review of absent voter ballot applications and ballot return envelopes pursuant to the December 2023 guidance "undoubtedly has and will continue to result in invalid ballots being counted despite missing or mismatched absent voter signatures." *Id*. ¶¶ 110, 112. But they allege no particular facts to support that broad assertion, and its very wording—"undoubtedly has and will continue to"—makes clear that Plaintiffs lack any particular factual basis for it. Moreover, as the Michigan Election Law recognizes, even a "missing or mismatched absent voter signature[]" does not mean that the ballot does not reflect the true votes of an eligible voter—that is why voters are entitled to cure such ballots. See MCL 168.766(3). Plaintiffs' allegations do nothing to suggest the existence of an "actual controversy" over the counting of ineligible voters' votes, rather than a hypothetical dispute about the details of election procedures.

II. The December 2023 signature guidance is lawful.

The December 2023 signature guidance is consistent with the Michigan Constitution and Election Law because it provides a procedure for verifying absent signatures, precisely what Michigan law demands. Plaintiffs' contrary argument relies entirely on an idiosyncratic understanding of the bare word "verify," stripped from its constitutional and statutory context, and a single sentence from the December 2023 signature guidance that is substantially clarified, and caveated, in the remainder of the document. The issuance of the December 2023 signature guidance was also fully consistent with the Michigan APA.

A. The December 2023 signature guidance is consistent with the Michigan Constitution and the Michigan Election Law.

The December 2023 signature guidance is entirely consistent with Michigan law's statutory and constitutional requirements for the verification of absent voter signatures. Plaintiffs' contrary argument relies entirely on the single word "verify," but the Constitution and relevant statutes say far more than that, and the guidance only provides a procedure for carrying out their demands.

Start with the Constitution. Article II, Section 4(1)(h) provides that election officials shall "verify the identity of a voter" who applies for or votes an absent voter ballot "*by comparing the voter's signature on the absent voter ballot application to the voter's signature in their registration record*" or, in the case of a voted ballot, to "the signature on the voter's absent voter ballot application." (Emphasis added.) This language requires verification only by comparing signatures: it does not impose free-floating verification requirements necessitating judicial interpretation.

The statutes Plaintiffs rely on similarly impose only a requirement to "verify" using certain procedures, not a free-standing demand. MCL 168.759(6) requires that absent voter ballot applications be "verif[ied] as provided under section 761." MCL 168.761, in turn, requires "verification" only via a signature comparison that "*must be made* using the procedures" section 766a requires. (Emphasis added). MCL 168.765 and 168.766, which govern voted ballots, specifically require verification "in accordance with section 766a." MCL 168.765(2); see also MCL 168.766(1)(b) (requiring verification follow procedures Section 766a requires). All roads thus lead to MCL 168.766a, which itself requires clerks to "review[] the signature using the process set forth in this section." MCL 168.766a(1). Under that process, "[a]n elector's signature is invalid only if it differs in significant and obvious respects from the elector's signature on file"; "[s]light dissimilarities must be resolved in favor of the elector"; and "[e]xact signature matches are not required." MCL 168.766a(2).

The governing provisions thus all prescribe a specific form of "verification." The question, then, should be whether the December 2023 signature guidance, taken as a whole, is consistent with the specific statutory and constitutional demands. Plaintiffs do not even try to argue that it is not, and they could not possibly succeed in doing so. The guidance undeniably meets the constitutional requirement to compare signatures, by advising clerks that they "must determine whether the signature being validated agrees sufficiently with the signature on file" and "must review all signatures." Complaint, Ex A at 3. And it also meets the more specific requirements of MCL 168.766a, by emphasizing that the signatures need not be "a perfect match" and listing some particular slight dissimilarities that are inadequate to invalidate a signature. *Id.* at 3–4.

Plaintiffs' challenge focuses on the December 2023 guidance's language referring to an "*initial* presumption of validity," but that is simply a way of explaining and applying MCL 168.766a's requirement that only "significant and obvious" discrepancies, not "slight dissimilarities," make signatures invalid. That becomes apparent when the guidance is read in full:

> 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.

Complaint Ex A at 3 (emphasis in original). Moreover, this language merely restates and explains the requirements of MCL 168.766a(1) and (2). It does not add any new requirements to the constitutional or statutory provisions at issue, nor is it in tension with them.

B. The December 2023 signature guidance did not violate the Administrative Procedures Act.

The December 2023 signature guidance is not an unpromulgated rule in violation of the APA. The Secretary has broad authority to administer elections and instruct election officials,

including by supervising, advising, and directing local election officials in how to perform their duties and "the proper methods of conducting elections." MCL 168.21, 168.31(1)(b).

In carrying out her duties by instructing the election officials she supervises, the Secretary is not obliged to follow the APA's rulemaking process. The Michigan Election Law empowers the Secretary to "issue instructions *and* promulgate rules pursuant to [the APA] . . . for the conduct of elections." MCL 168.31(1)(a) (emphasis added). This language makes clear that such instructions are not subject to the APA's rulemaking procedures; otherwise, the word "instructions" would be superfluous. See, e.g., *Estate of Buol ex rel Roe v Hayman Co*, 323 Mich App 649, 655; 918 NW2d 211 (2018). And, indeed, the Michigan Court of Appeals has stated that "instructions directed at . . . subordinates are not directives of 'general applicability' for purposes of the definition of 'rule' under MCL 24.207" and that the Secretary is "free to issue binding instructions applicable to election workers without" formal rulemaking. *O'Halloran v Secretary of State*, opinion of the Court of Appeals, issued October 19, 2023 (Docket No. 363503 and 363505), p. 14 (attached as Exhibit F), *app'n for leave to appeal docketed*, Nos. 166424, 166425 (Mich, 2023). While instructions directed to "outsiders" may "function as regulations of general applicability," *id.*, the December 2023 signature guidance is not directed to outsiders.

The December 2023 signature guidance is not a rule for another reason: it falls within the statutory exemption in MCL 24.207(h). That subsection expressly excludes from the definition of "rule" any "form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). The December 2023 signature guidance falls within that exemption because, as explained in the prior section, it "merely explains the statutory provision" governing signature verification—Section 766a—without altering the underlying standard. *Faircloth v*

Family Indep Agency, 232 Mich App 391, 405; 591 NW2d 314 (1998). Documents like that, which serve as an "explanatory guideline to assist" officials in making a "determination during the course of their duties," are not rules that must be promulgated under the APA. *Constantino v Mich Dep't of State Police*, 794 F Supp 2d 773, 776–79 (WD Mich, 2011).

The Court of Claims' unpublished decision in *Genetski v Benson* is not to the contrary, and has no preclusive effect here. See *Genetski*, unpublished opinion of the Michigan Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), pp. 7–14 (attached as Exhibit G). Collateral estoppel "precludes relitigation of an issue in a subsequent, different cause of action between the same parties" *only* when "the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). That test is not met, because the guidance at issue in this case is different from that at issue in *Genetski*, and the governing statutory provisions have been substantially amended since *Genetski* was decided.

First, the guidance at issue in *Genetski* imposed a stronger presumption, stating that signature review "begins with the presumption that" a signature is valid; "clerks should presume that a voter's [absent voter] application or envelope signature is his or her genuine signature"; and clerks "*must perform* their signature verification duties with the presumption that the voter's [absent voter] application or envelope signature is his or her genuine signature." *Genetski*, unpub op at 3–4, quoting guidance (emphasis added) (alterations in original). The December 2023 guidance, in contrast, refers to an "*initial* presumption of validity," and goes on to make explicit that this initial presumption "does *not* mean that all signatures are 'presumed valid' without further review." Complaint Ex A at 3.

Second, and critically, after *Genetski* was decided, the Legislature substantially changed the governing signature-comparison standard by enacting MCL 168.766a in July 2023. *Genetski*'s

holding was premised on the conclusion that the October 2020 guidance "change[d] the requirements of the law it is alleged to have interpreted." *Genetski*, unpub op at 13. Whatever the merits of this holding with respect to the October 2020 guidance and the preexisting state of the law, it is inapplicable to the December 2023 guidance, which does not alter and merely explains a procedure for applying the requirements of Section 766a.

As a result of those substantial differences between the issues in *Genetski* and the issues in this case, collateral estoppel has no role in this case. *Genetski* could not have addressed the validity of the yet-to-be-issued December 2023 guidance under the yet-to-be-adopted Section 766a.

III. Rule 168.24 is consistent with Michigan Election Law and the Michigan Constitution.

Plaintiffs' argument that Rule 168.24 conflicts with the Michigan Constitution and Election Law must similarly be rejected because it was a validly promulgated rule, subject to the Secretary's authority, and does not conflict with any statute or legislative intent. So long as an agency does not issue a rule that conflicts with a statute, it has broad "authority to interpret the statutes they administer and enforce." *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 160–61; 975 NW2d 52 (2021). An agency's "[r]ules need not be mere reiterations of a statute[.]" *Chrisdiana v Dep't of Community Health*, 278 Mich App 685, 689; 754 NW2d 533 (2008). And courts defer to an agency's interpretation of a statute and may "not overrule that construction absent cogent reasons." *Brightmoore Gardens*, 337 Mich App at 160. To withstand judicial scrutiny, it is sufficient that a rule: (1) is "within the matter covered by the enabling statute"; (2) "complies with the underlying legislative intent"; and (3) is "neither arbitrary nor capricious." *Ins Institute of Mich v Comm'r, Fin & Ins Servs, Dep't of Labor & Economic Growth*, 486 Mich 370, 385; 785 NW2d 67 (2010), quoting *Chesapeake & Ohio R Co v Mich Pub Serv Comm*, 59 Mich App 88, 98–99; 228 NW2d 843 (1975). Rule 168.24 passes this test.

First, Rule 168.24 falls within the matter covered by its enabling statute, MCL 168.766a. MCL 168.766a concerns the validity of signatures on absent voter ballot applications and envelopes and how clerks should resolve potential discrepancies. Similarly, Rule 168.24 concerns the validity of such signatures and how clerks should resolve potential discrepancies. Rule 168.24 therefore clearly falls within the matter covered by MCL 168.766a.

Second, Rule 168.24 complies with the underlying legislative intent and accords with the language of MCL 168.766a. Section 766a is a pro-voter statute passed as part of Michigan's efforts to make voting *easier* for Michiganders and which protects voters' absent ballot applications and ballots from being wrongly discarded for erroneously mismatched signatures. See *supra* at Background I. MCL 168.766a expressly provides that a signature "is invalid only if it differs in significant and obvious respects from the elector's signature on file," "[s]light dissimilarities must be resolved in favor of the elector, and "[e]xact signature matches are not required." MCL 168.766a(2). This is a lenient standard, showing the Legislature's intent to not penalize voters for minor signature variations. *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017) ("The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. . . . We begin by examining the language of the statute, which provides 'the most reliable evidence of its intent[.]' "), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Rule 168.24 is consistent with that approach because directing election officials to consider possible explanations for signature discrepancies provides one way of ensuring that they do not invalidate signatures based on "slight dissimilarities," as MCL 168.766a provides, while providing further explanation of what it means for signatures to "differ[] in significant and obvious respects"—the governing statutory standard.

Rule 168.24 does not otherwise conflict with the Michigan Constitution or Election Law. Plaintiffs' challenge to Rule 168.24 relies again on the single word "verify," stripped of all context. As discussed, *supra* at Argument II.A, Plaintiffs ignore that the Michigan Constitution and statutes make clear that to "verify" a signature or the voter's identity means to apply the standards set out in MCL 168.766a. As for Plaintiffs' allegation that Rule 168.24 "requir[es] election officials to approve signatures with discrepancies based on mere speculation," Plaintiffs' Brief at 2, it is plainly false. Rule 168.24 simply directs election officials to *consider* various explanations for signature discrepancies. Whether the clerk *accepts* any of the explanations in determining whether a pair of signatures "agree sufficiently" ultimately remains at their discretion. Accordingly, Rule 168.24 does not conflict with MCL 168.766a, or any other provision cited by Plaintiffs.

Third, Rule 168.24 is neither arbitrary nor 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[.]' " *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141; 807 NW2d 866 (2011), quoting *Nolan v Dep't of Licensing & Regulation*, 151 Mich App 641, 652; 391 N.W.2d 424 (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.' " *Mich Farm Bureau*, 292 Mich App at 141–42, quoting *American Trucking Ass'ns, Inc v United States*, 344 US 298, 314; 97 L Ed 337 (1953). "[A] rule is not arbitrary or capricious merely because . . . it [may] displease[] [plaintiffs]." *Mich Farm Bureau*, 292 Mich App at 145.

Rule 168.24 provides helpful standards for clerks to rely on when determining whether two signatures "agree sufficiently." Without Rule 168.24, clerks would have less guidance to rely upon so voters would be at greater risk of having their ballots needlessly rejected. And as Secretary

Benson's February 23, 2022 letter to the Legislature's Joint Committee on Administrative Rules explained, "The five factors in R 168.24(1) are similar to factors included in signature matching guidance in other states and election jurisdictions . . . [and] are drawn from real world situations that filing officials observe election after election." Exhibit 1 to Defendants' Brief. Accordingly, there is more than "[a] reasonable ground" to justify the Secretary's adoption of Rule 168.24.

IV. Plaintiffs' underlying assumption that stricter signature verification would be more accurate and would make voting more secure is false.

The Court should also reject Plaintiffs' standing and merits arguments for a more fundamental reason: they depend entirely on Plaintiffs' unsupported assumption that stricter signature verification rules would be a better way to "verify" voters' identity and would make elections more secure. The appropriate parameters for signature comparisons are a policy question that the Legislature and the Secretary have permissibly resolved, not a legal question for this Court. But in any event, Plaintiffs' assumption that stricter signature verification would be more accurate is just wrong. Applying stricter standards would not make elections more accurate and secure; it would only serve to disenfranchise voters by rejecting additional valid signatures.

Signature verification is an inherently inexact process. Natural variations in how a person signs their name are common, including as a result of age, disability, poor eyesight, illness, injury, alcohol and drug use, medication, pen and paper type, writing surface or position, recent name changes, or psychological factors.[12] These variations disproportionately affect particular groups. Young voters are less likely to have consistent signatures because cursive is rarely taught and their

[12] Tomislav Fotak, et al, *Handwritten signature identification using basic concepts of graph theory*, 7 WSEAS Transactions on Signal Processing 145 (2011); see also Harrison, et al, Federal Bureau of Investigation, *Handwriting Examination: Meeting the Challenges of Science and the Law* <https://perma.cc/CL3H-GYZH> (October 2009) (accessed April 30, 2024) ("[n]o one person writes exactly the same way, even within several repetitions of writings.").

signatures can vary significantly from when they first get their driver's license to years later as they register and vote.[13] Older voters and voters who are ill or have a disability are also particularly likely to have signatures that can vary dramatically and become more unrecognizable over time.[14] First-time absentee voters and voters who have undergone a name change, including married women, transgender people, and domestic abuse survivors, are all more likely to have their ballots rejected due to changes with their signature. The ballots of non-native English speakers and people of color are also disproportionately rejected due to signature mismatch.[15] For example, people of color comprised only 28 percent of Florida's absentee voters in 2018 but 47 percent of all ballots rejected due to signature mismatch. In North Carolina, minority voters' ballot rejection rates were more than double those of white voters during early voting in the 2020 presidential election.[16]

The difficulties caused by natural variations in signatures are compounded by the fact that signature matching in the electoral context is conducted by laypersons with only limited training. Laypersons, such as election officials, are between three-and-a-half and five-and-a-half times more likely than handwriting and forensic experts to declare an authentic signature non-genuine.[17] Forensic handwriting experts undergo years of schooling, training, and certification[18] and review

[13] Blumenstein, *The Perfect Match: Solving the Due Process Problem of Signature Matching with Federal Agency Regulation*, 24 Vand J Ent & Tech L 121, 133–35 (2021) ("Blumenstein").

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Kam, et al., *Signature Authentication by Forensic Document Examiners*, J Forensic Sci, 46(4), 884–88 (2001) (finding that laypersons had a 26.1 percent error rate in identifying non-genuine signatures when comparing six signature samples as compared to experts' 7.05 percent error rate); Sita, et al., *Forensic Handwriting Expertise for Signature Comparison*, J Forensic Sci, 47(5), 1–8 (2002) (finding that laypersons had a signature matching error rate of 19.3 percent whereas experts' error rate was only 3.4 percent).

[18] See, e.g., Graham, The Atlantic, *Signed, Sealed, Delivered--Then Discarded* <https://perma.cc/K6RH-BVQF> (October 21, 2020) (accessed April 30, 2024).

various signature samples. Election officials, meanwhile, undergo minimal, if any, training on signature matching, have only one or two signature samples to review, and work long hours counting thousands of ballots while pressured to get election results tallied as quickly as possible. In Michigan, new election clerks are required to attend a two-day training, of which signature verification is just one of many topics.[19] Technical guidance on how to verify the accuracy of a signature is minimal and high-level.[20] Yet clerks have unfettered discretion to determine whether an absent ballot application or carrier envelope signature matches a voter's signature on file.[21]

The result is that making signature matching more demanding does not make signature matching more accurate—it just means more valid ballots are rejected. A clerk's determination of a mismatched signature is one of the main reasons why absent ballots are rejected nationwide, including in Michigan.[22] But a study of Ohio elections revealed that for every ballot correctly rejected for a mismatched signature, thirty-two valid ballots were erroneously rejected.[23] In other

[19] See Mich Dep't of State, *Accreditation for New Election Officials* <https://perma.cc/BC2G-W7D4> (accessed April 30, 2024).

[20] See, e.g., Mich Bureau of Elections, *Absent Voter Ballot Processing: Signature Verification and Voter Notification Guidance* <https://perma.cc/GCD5-NJDA> (last updated April 2, 2021), (accessed April 30, 2024), at 2–4.

[21] See, e.g., *Election Officials' Manual, Chapter 6: Michigan's Absent Voter Process*, Mich Bureau of Elections (February 2024), at 12 ("Manual Ch. 6"); *Election Officials' Manual, Chapter 8: Absent Voter Ballot Processing*, Mich Bureau of Elections (February 2024), at 5; see also, Mich Dep't of State, *Fact Check* <https://perma.cc/XU2B-ZMP7> (accessed April 30, 2024).

[22] See Buchanan & Parlapiano, New York Times, *Two of These Mail Ballot Signatures Are by the Same Person. Which Ones?* <https://perma.cc/DNZ4-WHLY> (October 7, 2020) (accessed May 6, 2024) ("Nationally, 1.4 percent of mail ballots were rejected in 2018, with 67,000 thrown out for signature mismatch (the third-most common reason)"); Altamirano & Wang, *Ensuring All All* [sic] *Votes Count: Reducing Rejected Ballots*, Harvard Kennedy School (August 2022), at 5, 8; see also Bloomgarden, et al, Healthy Elections Project, *Behind the Scenes of Mail Voting: The Rules and Procedures for Signature Verification in the 2020 General Election* (October 28, 2020), at 45.

[23] Report of Alexander Street, PhD at ¶ 19, *League of Women Voters of Ohio v LaRose*, No. 2:20-cv-03843-MHW-KAJ (SD Ohio 2020), ECF No 24-8.

words, 97 percent of signatures that failed verification were legitimate ballots that were rejected improperly.[24] The overwhelming result of making signature matching rules stricter would therefore be to invalidate additional valid absent voter ballots, not to catch more fraud.

Plaintiffs, of course, claim that their concern is voter fraud. But aside from a brief reference to a nearly 20-year-old national report and the unsubstantiated claims of one state representative, Complaint ¶¶ 57, 98, Plaintiffs fail to allege any basis for concluding that the challenged rule and guidance enable voter fraud in Michigan, or that the relief Plaintiffs seek would prevent it. During the 2020 general election, Michigan's first with no excuse absentee voting, "no canvassers reported [that] any fraud or other illegal activity occurred."[25] Countless reports and studies have also shown that voter fraud is exceedingly rare, including within absentee voting.[26] There is thus no reason to conclude that granting Plaintiffs' requested relief would make elections safer. Studies consistently show that "ballot rejection rate[s] likely exceed[] the rate of documented voter fraud."[27] And as scholars have noted, "the most significant threat to American elections [are] the deliberate efforts to undermine the credibility of [] results" and voter methods, not nonexistent voter fraud.[28]

Moreover, Michigan has multiple safeguards to protect against fraud, and Plaintiffs allege no credible basis to conclude that they are inadequate, making their requested relief entirely unnecessary to achieve their claimed end. For example, all applicants for an absent ballot must

[24] *Id.* at ¶ 19.

[25] *Fact Checks*, Mich Dep't of State <https://perma.cc/U6D5-9ACU> (accessed April 30, 2024).

[26] *Debunking the Voter Fraud Myth*, Brennan Center for Justice <https://perma.cc/T2G8-MWH6> (January 31, 2017) (accessed April 30, 2024) (compiling studies and cases); Auerbach & Pierson, *Does Voting by Mail Increase Fraud? Estimating the Change in Reported Voter Fraud When States Switch to Elections by Mail*, 8 Statistics and Public Policy 2021, 18–41.

[27] Jensen, *Signed, Sealed, Delivered? Problems with the Use of Signature Matching to Verify Mil Voter* Identity, 16 Fla A & M UL Rev 25, 41 (2022).

[28] *Id.* at 45 n 106 (internal citations omitted).

certify—subject to criminal penalties explicitly spelled out on the face of the application—that "the statements in th[e] absent voter ballot application are true." MCL 168.759(7), (8). It is also a felony to forge a signature on an absent ballot application, a warning that applicants receive on the application. MCL 168.759(8). Applicants are also warned that Michigan law restricts who can be in possession of a signed absentee ballot application. MCL 168.759(7). Specifically, only an applicant, her immediate family, someone in her household, someone whose job it is to handle mail, a registered Michigan elector chosen by the applicant to help return her application, or an authorized election official can physically handle an absent ballot application. MCL 168.759(8). Any registered elector the applicant chooses to help return their application must certify that, among other things, they "have not made any markings on the application"; "have not altered the application in any way"; "have not influenced the applicant"; and is "aware that a false statement" means committing a misdemeanor. MCL 168.759(8). Further, a voter applying for an absent ballot in person, in addition to signing the application, MCL 168.759(3), must show photo identification or affirm they do not have one. MCL 168.761(6).

Michigan law also provides safeguards against fraud for casting absent ballots—which voters can only receive after surviving the signature matching review already applied to absent ballot applications. MCL 168.761(1). For example, the absent ballot envelope informs voters that "AN ABSENT VOTER WHO KNOWINGLY MAKES A FALSE STATEMENT IS GUILTY OF A MISDEMEANOR." MCL 168.761(4). Similarly, anyone assisting a voter to complete an absent ballot must identify herself, MCL 168.764a(1), and sign an affidavit that warns "AN INDIVIDUAL WHO ASSISTS AN ABSENT VOTER AND WHO KNOWINGLY MAKES A FALSE STATEMENT IS GUILTY OF A FELONY." MCL 168.761(1). Michigan law further makes it a felony for anyone other than a voter, her immediate family, a person who resides in her

household and has been asked by the voter to return the ballot, a person "whose job it is to handle mail," and an election clerk or their assistant to possess "an absent voter ballot." MCL 168.761(4); see also MCL 168.932. Even the Postal Service's procedures provide informal checks on fraud: ballots are returned if the voter does not live at the designated address.[29]

What Plaintiffs do not mention is that, in Michigan and elsewhere, Plaintiffs' supporters are substantially less likely to vote absentee than Plaintiffs' opponents.[30] A change in the verification rules that indiscriminately increases the rejection of valid absent voter ballots would therefore mostly disenfranchise voters who oppose Plaintiffs' candidates.[31] The Michigan courts should not be in the business of second-guessing the Legislature's and Secretary's policy determination regarding the appropriate standards for verifying signatures where Plaintiffs provide no legitimate basis for doing so, and the relief they seek would only further their partisan ends.

CONCLUSION

For all the above reasons, Amici respectfully request that this Honorable Court grant Defendants' motion for summary disposition and dismiss Plaintiffs' Complaint.

Respectfully submitted,

Dated: May 6, 2024

s/ *Sarah S. Prescott*
Sarah S. Prescott (P70510)
Attorney for Amicus Curiae
105 E. Main Street

[29] See, e.g., Manual Ch. 6 at 13 ("Absent voter ballots cannot be sent by forwardable mail. Absent voter ballot envelopes should be printed with the postal instruction 'Return Service Requested.'").

[30] Wilkinson, Bridge Michigan, *Michigan absentee ballots data shows heavy interest in Democratic counties* <https://perma.cc/DRB7-6272> (October 12, 2022) (accessed April 30, 2024) (reporting that voters in counties supporting President Biden requested more absent ballots than those in counties supporting former President Trump).

[31] Blumenstein at 135; see also Mindy Acevedo et al., *Ensuring Equal Access to the Mail-in Ballot Box*, 68 UCLA L Rev Discourse 4, 10–11 (2020).

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**Admitted pro hac vice*

PROOF OF SERVICE

Sarah Prescott certifies that on the 6th day of May 2024, she caused the above document in this matter to be filed with the Clerk of the Court via the Court's ECF system, MiFILE, which will serve a copy of said document(s) on all counsel of record and parties *in pro per*.

s/ *Sarah S. Prescott*
Sarah Prescott

Exhibit A

2021 WL 433995 (Mich.Ct.Cl.) (Trial Order)
Michigan Court of Claims.
Ingham County

DONALD J. TRUMP FOR PRESIDENT, INC., and Eric Ostegren, Plaintiffs,
v.
Jocelyn BENSON, in her official capacity as Secretary of State, Defendant.

No. 20-000225-MZ.
January 6, 2021.

Opinion and Order

Cynthia Diane Stephens, Judge.

***1** Pending before the Court is defendant's November 25, 2020 motion for summary disposition. Because this case is moot, the motion is GRANTED.

The underlying allegations in this case have been set forth in this Court's November 6, 2020 opinion and order—denying emergency declaratory relief—and need not be repeated herein. In short, plaintiffs contend that plaintiff Eric Ostegren, a credentialed election challenger, was excluded from an absent voter ballot counting board. In addition, the complaint makes allegations about video surveillance of absent voter ballot drop-boxes.

Defendant asks the Court to dismiss this matter as moot. "An essential element of our courts' judicial authority is that the courts do not reach moot questions or declare rules of law that have no practical legal effect in a case." *In re Detmer/Beaudry*, 321 Mich App 49, 55; 910 NW2d 318 (2017) (citation and quotation marks omitted). "A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy." *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) (citation and quotation marks omitted). Or, "[s]tated differently, a case is moot when it presents nothing but abstract questions of law which do not rest upon existing facts or rights." *In re Detmer/Beaudry*, 321 Mich App at 56 (citation and quotation marks omitted).

Following this Court's denial of emergency declaratory relief, plaintiffs sought leave to appeal. The Court of Appeals denied the application, and the majority's order opined that the State Board of Canvassers' certification of election results "clearly rendered plaintiff's claims for relief moot." *Donald J Trump for President, Inc v Secretary of State*, unpublished order of the Court of Appeals, entered December 4, 2020 (Docket Nos. 355378; 355397). The Court sees no reason it could stray from this conclusion, see *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 16; 837 NW2d 686 (2013) (explaining the law of the case doctrine), nor would it reach a different conclusion, even if permitted to do so. The questions posed in this case are clearly moot. To that end, votes have been counted, the results of the election have been certified, and this state's electors have been seated. The dates for these activities have since come and gone. See MCL 168.46; MCL 168.47; MCL 168.841; MCL 168.842; MCL 168.845. This Court is incapable of rendering the relief requested by plaintiffs at this point in time, and it will dismiss this matter as moot as a result. Finally, there is no merit in plaintiffs' assertion that, the Court should hear this case because the issues are of public significance and are likely to recur, yet escape judicial review. Cf. *League of Women Voters of Mich v Secretary of State*, _____ Mich _____, _____ n _____; _____ NW2d _____ (2020) (Docket Nos. 160907; 160908), slip op at 14 n 26. Any argument by plaintiffs that the issues and unique facts of this case are likely to recur are entirely speculative.

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED because this case is MOOT.

***2** This is a final order that resolves the last pending claim and closes the case.

January 6, 2021

<<signature>>

Cynthia Diane Stephens

Judge, Court of Claims

Exhibit B

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRANDEN GIACOBZAAI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiff,

v.

Case No. 22-012759-AW
Hon. Timothy M. Kenny

JANICE WINFREY, in her official capacity As the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity.

Defendants.

OPINION & ORDER

At a session of this Court
Held on: November 7, 2022
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

INTRODUCTION

On October 26, 2022, thirteen days before the November 8th general election, Plaintiffs filed a complaint for mandamus, preliminary injunction, declaratory judgment,

and other relief against Janice Winfrey in her official capacity as the Detroit City Clerk and the City of Detroit Board of Election Inspectors in their official capacity. Plaintiffs sought expedited scheduling and an emergency hearing on their motion for preliminary injunction. A motion to disqualify all 58 members of the Third Circuit Court bench was also filed but resolved on October 31, 2022.

The Court held multiple status conferences on November 1 and November 2 in order to provide both Plaintiffs and Defendants the opportunity to facilitate the expedited hearing in this case. Discussion included the exchange of witness lists and exhibits in advance of the November 3, 2022 evidentiary hearing on Plaintiffs' motions for injunctive relief. Plaintiffs submitted a "restatement of relief requested" with supporting statements at a status conference . There was no indication whether Plaintiffs intended to abandon the relief requested in the October 26, 2022 complaint.

During the November 3, 2022 evidentiary hearing, Plaintiffs did not testify nor introduce any substantive exhibits into evidence. In this case, Plaintiffs' hearing witnesses consisted solely of Christopher Thomas, former Michigan State Elections Director for over 30 years and Daniel Baxter, Director of Absentee Voting Operations for the Detroit City Clerk.

On November 4, 2022, final argument was conducted. This followed the all-day November 3 evidentiary hearing on Plaintiffs' injunctive relief request. During the final argument, Plaintiffs' counsel was unwilling to indicate what relief Plaintiffs were seeking. Instead, counsel indicated the relief sought would be shared with the Court and opposing counsel only when Plaintiffs submitted their brief later that day.

During the 48 hours between November 2nd and November 4th, Plaintiffs' relief requests changed three times. Despite Plaintiffs' arguments to "shed light in a dark place", they have failed dramatically. Over an eight-hour evidentiary hearing, no evidence of election law violations for the November 8, 2022 election was produced.

In recognition of the failure to sustain their burden of proof, Plaintiffs now seek a third form of relief – one that has been rejected by Michigan appellate courts since 1974.

Rejecting Plaintiffs' claims does also require this Court to examine the alleged twelve election law violations. As noted below, in the Preliminary Injunction section, all twelve allegations are unsubstantiated and/or misinterpret Michigan election law.

PRELIMINARY INJUNCTION

Plaintiffs originally sought a preliminary injunction that would mandate all eligible Detroit voters vote in person or, alternatively, if seeking an absentee ballot would be required to go to the Detroit City Clerk's Office to obtain the ballot. Late on Friday, the Court received *Plaintiffs' Findings of Facts, Conclusions of Law and Request for Relief.* In this document, for the first time, Plaintiffs modified their request for injunctive relief and sought to enjoin various alleged violations after the November 8, 2022 election. Plaintiffs also seek an injunction to require the City of Detroit's Clerk's Office to comply with State Election Law regarding validating signatures on absentee ballots.

In *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 N.W.2d 896, (2012) (citation omitted), a Court considers the following factors in determining whether to grant a preliminary injunction:

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

The Court finds Plaintiffs are not likely to prevail on the merits. The relief sought specifically requiring eligible Detroit voters to vote in person or to pick up absentee ballots at the Clerk's Office is a clear violation of Const. 1963, Art. II, §4. The Court also finds, as stated in detail below, that Plaintiffs have failed to establish the twelve alleged violations of Michigan election law regarding the counting of absentee ballots in the City of Detroit.

Plaintiff called Christopher Thomas and Daniel Baxter regarding this issue. No testimony received by the Court established any such violation. Indeed, the Court finds

that the extensive testimony elicited from Mr. Thomas and Mr. Baxter clarified the implementation of very complex sections of the Michigan Election Code. This includes the intersection of MCL 168.766 and MCL 168.765a regarding signature verification for absentee ballots when an Absentee Voter Counting Board (AVCB) is used. Ultimately, the Court finds that Plaintiffs presented no evidence in support of their allegations and Plaintiffs' interpretation does not accurately interpret or apply these sections.

The Court finds that Plaintiffs have not met their burden of establishing irreparable harm if the injunction is not issued. Plaintiffs present argument, but not evidence, in support of the alleged election code violations. If violations of Michigan election law on or related to the November 8, 2022 election occur or are subsequently established regarding the validity of absentee votes, Plaintiffs may pursue their available remedies. There is no irreparable harm at this time.

The Court further finds that to grant relief at this time would egregiously harm the eligible voters of the city of Detroit. Absentee voting had been in effect for weeks before Plaintiffs filed their lawsuit. As of November 3, 2022, approximately 60,000 absentee ballots have been returned to the Detroit City Clerk's Office. The preliminary injunction would serve to disenfranchise tens of thousands of eligible voters in the city of Detroit. Additionally, the city of Detroit would be the only community in Michigan to suffer such an adverse impact. Such harm to the citizens of the city of Detroit, and by extension the citizens of the state of Michigan, is not only unprecedented, it is intolerable.

The harm to the public interest if the injunction is issued is incalculable. The idea that the Court would single out one community in the state to be treated adversely when

Plaintiffs have provided no evidence in support of their allegation simply cannot be allowed to occur.

Finally, regarding the amended request for injunctive relief, the Court finds the prospective nature of the relief troubling. The law limits the use of injunctive relief to extraordinary circumstances. Thus the inclusion of injunctive relief in Subchapter 3.300 of the Michigan Rules of Court. "[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural. *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974). As Plaintiffs no longer seek injunctive relief regarding the November 8, 2022 election, the Court finds that Plaintiffs' waived the present request for relief. The Court further finds that Plaintiffs offer no basis for this Court to order injunctive relief for future elections. As Plaintiffs now present no claim for injunctive relief on this issue, the Court dismisses the claim as moot.

(i) Voter Signature Comparison Standard

Plaintiffs claim Defendants cannot carry out their absentee voter signature comparison requirements under MCL 168.761(2) in the absence of a standard set by the Court or any alternative method of identification. Plaintiffs assert the Clerk's Office present comparison of signature is a violation of Michigan election law.

MCL 168.761(2) does not require the Secretary of State to establish and distribute a standard for absentee voter signature comparison.

As revealed in the evidentiary hearing testimony, the Detroit City Clerk's office utilizes a "reasonable agreement" signature comparison standard, not a "presumption of validity" one.

In the absence of a constitutional, statutory or case law obligation to develop a statewide standard, or at this late date, impose a new identification requirement, Plaintiffs' claim fails.

(ii) Effective Monitoring of Drop Boxes

The following was asserted in Plaintiffs' second requested relief:

> **Plaintiffs request declaratory relief that effective monitoring include a review of the depositing of absentee ballots to monitor against a person 'stuffing' multiple ballots at one time or depositing a solitary ballot multiple times (sic). As the statute does not require real time monitoring, the monitoring can be of a recording**.

Plaintiffs offer no legal or factual support for the request for a declaratory ruling to monitor for individuals "stuffing" the ballot box during the absentee voting period for the November 8, 2022 general election. Plaintiffs presented no testimony in support of "stuffing the ballot box"; however, during the evidentiary hearing, Daniel Baxter testified that the city of Detroit provides for video monitoring for each of its twenty drop boxes in accordance with MCL 168.761d(2)(c). In addition, Mr. Baxter testified that the City maintains the recordings for at least thirty days. Thus, no factual basis exists for the requested declaratory relief.

In addition, Michigan law provides for individuals, other than the absentee voter, to return the absentee ballot. See MCL 168.761 and MCL 168.764. Plaintiffs' request for declaratory relief presents the City with the impossible challenge of discerning an individual properly returning one or more absentee ballots to the drop box as provided by law from the unproven illegal fraudster stuffing the ballot box. Plaintiffs' burden consists of more than articulating a fear or possible illegal conduct. The Court finds no legal basis for declaring the proposed relief on the record before it.

(iii) Absentee Ballot Signature Comparison at the Absentee Voting Counting Board

Plaintiffs contend Defendants are violating MCL168.766 by not requiring signature comparisons to be conducted by the "board of election inspectors". The claim lacks merit.

MCL 168.766 relates to voting precincts rather than AVCB as exist in the city of Detroit. MCL 168.765a controls the signature comparison responsibilities at the counting board. MCL 167.765a(6) clearly places the responsibility for comparing the signatures on the envelopes with the signatures on the Qualified Voter File (QVF) with the Clerk's Office and not with election inspectors.

Because the law supports the practice used by the city of Detroit, Plaintiffs' claim fails.

(iv) Ballot Rejection

Plaintiffs assert that for the November 8th election, the Clerk's Office will not reject ballots as required under MCL 168.797a.

At the evidentiary hearing, Daniel Baxter testified the Detroit City Clerk's Office has rejected between 100 -1,500 ballots per election in the past and will continue to do so for the November 8th election if the Michigan election laws require.

The statute Plaintiffs rely on, MCL 168.797a, refers to in-person voting at a polling station and does not apply to the absentee voting process.

Plaintiffs' argument is without merit.

(v) Absentee Ballot Information Posting

Plaintiff's assertion that there is no evidence to indicate compliance with MCL 168.765 (5) fails. The section relied upon requires the Clerk's Office to post the number of absentee ballots mailed and returned at 8:00 a.m. on Election Day and before 9:00 p.m. on Election Night.

Witness Christopher Thomas testified the Clerk's Office intends to comply with all election law requirements, including MCL 168.765 (5).

Plaintiffs' allegation speculates about a future event. Preliminary injunction relief is not available for future, speculative events. *Dunlap v City of Southfield*, 54 Mich. App. 398; 221 N.W.2d 237 (1974).

(vi) Rejection of Ballots That Do Not Match

Plaintiffs claim the Detroit City Clerk's Office violates MCL 168.765a(6) by failing to reject absentee ballots with ballot numbers that do not match with the ballot numbers sent to voters by the Clerk's Office. Plaintiffs argue the non-matching ballots are merely counted along with ballots matching the numbers sent by the Clerk's Office. No evidentiary hearing evidence supports Plaintiffs' claim.

Christopher Thomas testified that when a non-matching absentee ballot is received, it is marked as a challenged ballot and segregated form the ballots counted. The Clerk's Office preserves all non-matching ballots for any future audit purposes.

In addition, Mr. Thomas testified that voters within the same household have mistakenly inserted their absentee ballot into the security envelope of another member of the household. Election staff with minimal effort can identify, match, and cure this defect when processing absentee ballots, thereby preserving both votes with no harm to the voting process.

(vii) Duplication of Ballots in Special Circumstances

Plaintiffs' contention that duplication of ballots, for overseas military personnel, and registered voters temporarily residing overseas, disregards Michigan election law MCL 168.798b permitting duplication. In fact, Michigan law clearly permits this process. "Absentee votes cast on paper ballots may be recorded by election inspectors on ballot cards for counting by tabulating equipment." MCL 168.798C(1).

Mr. Thomas testified established procedure throughout the state permits duplication of ballots for the above described groups, because ballots for overseas voters are incompatible with those used in high-speed tabulators.

Duplicate ballots are made at the Counting Board, and approved by Republican and Democratic election inspectors where election challengers are present.

Plaintiffs have established no statutory violation.

(viii) High-Speed Tabulators and (x) Ballot Adjudication

Plaintiffs contend the Detroit City Clerk is using uncertified high-speed tabulators to count votes. They also claim there is no uniform state procedure for the use of tabulators and MCL 168.765a(8) precludes their use. Plaintiffs state the use of the high-speed tabulators to adjudicate the absentee ballot is a "manipulation" of them and unlawful under Michigan election law.

MCL 168.37, 168.795 and 168.795a indicate ballots are to be counted by use of an electronic voting system. An "electronic voting system" is defined under MCL 168.794(f) as "a system in which votes are recorded and counted by electronic tabulating equipment". MCL168.794(e) defines "electronic tabulating equipment" as "an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results".

Testimony at the evidentiary hearing revealed the City of Detroit uses the Dominion Voting Systems. Christopher Thomas testified the Dominion system was adopted by the City of Detroit after the 2019 Dominion approval by the Board of State canvassers. Mr. Thomas testified the approval came after testing by a federal government agency.

The approved Dominion Voting System contains an optional "adjudication" software component. The adjudication feature is used by the City of Detroit to process issues of over-votes, tiny marks or spots on the ballots or stray marks. As indicated in Mr. Thomas' evidentiary hearing testimony, the adjudication process complies with the requirements of MCL 168.803 and is not used as a mechanism for election workers to guess about voter intent.

Ballot Image Preservation

Plaintiffs assert the high-speed scanners "create a ballot image that is altered by the adjudication process." Hearing evidence failed to support this claim.

During the evidentiary hearing, Christopher Thomas testified that any new image created is retained together with the original image by means of special tape in the event a dispute about the ballot ever arises. In addition, Mr. Thomas testified that the Clerk retains the original ballot which would be used in the case of any review of recount.

The Court finds that Plaintiffs failed to carry its burden on this point.

(xi) Ballots Rejection

Plaintiffs claim that MCL 168.792(2) requires the rejection of an over-vote ballot is incorrect.

Christopher Thomas testified that when a tabulator rejects a ballot, the ballot must be examined consistent with the requirements of MCL 168.803. An identifiable over-vote is not counted; however, to the extent possible, the Clerk preserves the unspoiled portions of the ballot and counts those votes. A stray mark, however, can be corrected to permit the vote to be counted.

(xii) Platform Access

Plaintiff asserts MCL 168.733 entitles election challengers to be present on the Detroit Counting Board platform. The platform contains computer equipment used by a number of Detroit City Clerk supervisors, the IT vendor and Mr. Christopher Thomas. The hearing evidence indicated the platform has seating for four or five people only.

Plaintiffs' reliance on MCL 168.733 is incorrect. No ballot processing occurs on the platform. No ballot tabulation of specific precincts occurs there either.

DECLARATORY JUDGMENT

Plaintiffs' third relief request made on November 4th stated:

> **In recognition that the city of Detroit promotes honest, open and transparent government, the Plaintiffs request injunctive relief prospectively after the November 8, 2022 election to 1) stream the camera for public access to the video feed allowing he public to assist in monitoring; 2) to require that there is sufficient storage to preserve this duration of the drop boxes for the 24 months required for preservation of election records; and (3) to ensure that the recording is disclosed under FOIA to interested parties to review.**

The Court conducted an expedited evidentiary hearing on Plaintiffs' complaint and motion for a preliminary injunction in this matter on November 3, 2022. The parties returned the next morning to present summary closings in support of their respective positions. Plaintiffs' counsel, despite a direct question from this Court, either could not articulate or refused to identify the specific relief sought. Only after 5:00 p.m. on Friday, November 4, 2022 did the Court learn that Plaintiffs had modified its original request for relief to request prospective injunctive relief regarding the processing of signatures on ballot applications. This change directly impacts the Plaintiffs standing to bring this case for declaratory relief, as MCR 2.605(A)(1) requires an actual controversy. As Plaintiffs relief may be addressed by the Supreme Court in *O'Halloran v Secretary of State*, __ Mich __ ; __ N.W.2d __ (2022)(Docket No. 164955), the Court finds Plaintiffs' action premature, as any injury at this point is hypothetical or anticipated. *League of Women Voters v Secretary of State*, 506 Mich 561, 586; 957 N.W.2d 731 (2020). As Plaintiffs now present no claim for relief on this issue, the Court dismisses the claim.

WRIT OF MANDAMUS

In *Committee to Ban Fracking in Michigan v. Board of State Canvassers*, 335 Mich. App. 384, 394; 966 N.W.2d 742 (2021) the Michigan Court of Appeals held "Mandamus is a discretionary writ and an extraordinary remedy." In seeking the writ, the plaintiff bears the burden of demonstrating entitlement to it. *Citizens for the Protection of Marriage v Board of State Canvassers*, 263 Mich. App. 487; 688 N.W.2d 538 (2004).

> To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show: 1) the plaintiff has a clear, legal right to performance of the specific duty sought, 2) the defendant has a clear, legal duty to perform, 3) the act is ministerial and 4) no other adequate legal or equitable remedy exists that might achieve the same result.

Rental Properties Owners Association of Kent County v Kent County Treasurer, 308 Mich. App. 498, 518; 866 N.W.2d 817 (2014).

Michigan appellate courts have defined a clear legal right as "one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal questions to be decided." *Rental Properties Owners Association of Kent County v Kent County Treasurer*, supra. Additionally, the Courts have defined a ministerial act as one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale County Senior Services Inc. v Hillsdale County,* 494 Mich. 46, 58 n 11; 832 N.W.2d 728 (2013).

In the present case, Plaintiffs claim the validity of absentee voter signatures can only be established by having the Election Inspectors view each ballot and either agree or disagree about the identity of the person signing the absentee ballot envelope. In the event of a dispute, Plaintiffs contend the City Board of Canvassers would be required to resolve the signature validity dispute. Plaintiffs' claim clearly involved acts of analysis,

hence discretion on the part of those evaluating the signatures of the ballot envelopes. Defendants cannot establish that the comparison evaluation constitutes a ministerial act because it does involve a duty that requires the exercise of discretion or judgment. For this reason alone, Plaintiff's mandamus writ application fails.

LACHES

Plaintiffs' complaint and request for declaratory judgment, preliminary injunction, and mandamus were filed 13 days before the November 8, 2022 General Election. MCL 691.1031 states:

> "There shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected."

Clearly, the rebuttable presumption applies in the present case.

In *Home-Owners Ins. Co. v Perkins*, 328 Mich. App. 570, 589; 939 N.W.2d 705 (2019) the Court of Appeals held "A party guilty of laches is estopped from asserting a right it could have and should have asserted earlier."

In the present case, Plaintiffs contend they waited for more than two months after filing challenges arising out of the August 2, 2022 Primary Election without receiving information from the Detroit City Clerk's Office regarding election practices in the City of Detroit's August 2, 2022 primary election.

The Federal and State Appellate Courts have consistently held that delays in filing complaints in election matters, until shortly before the election date or the time for sending out absentee ballots, is grounds for denying relief. In *O'Brien v Skinner*, 409 U.S. 1240; 92 S. Ct 79; 34 L.Ed.2d 211 (1972) on an application to Justice Marshall to Stay State Court judgment involving voting rights of State Jail inmates, Justice Marshall noted:

> "Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly. But the very importance of the rights at stake militates against hasty or ill-considered action. This Court cannot operate in the dark, and it cannot require state officials to do the impossible. With the

case in this posture, I conclude that effective relief cannot be provided at this late date."

Michigan Courts have ruled similarly in *Bigger v City of Pontiac*, 390 Mich. 1, 4:210 N.W.2d 1 (1973) (citation omitted) involving bond funding for the Pontiac Silverdome, the Michigan Supreme Court held:

"In cases where because of the nature of the subject matter absolute time-limits must be observed, the law requires a speedy resort to the Courts by those who wish to prevent or modify contemplated transactions or procedures."

Similarly in *Schwartz v Secretary of State*, 393 Mich. 42, 50; 222 N.W.2d 517 (1974), the Supreme Court noted: "Waiting until the eleventh hour to challenge some aspect of the electoral process has served as grounds for denying relief." Similar rulings are found in *Kuhn v Secretary of State*, 228 Mich. App. 319; 579 N.W.2d 101 (1998) and *New Democratic Coalition v Austin*, 41 Mich. App. 343; 200 N.W.2d 749 (1972).

This Court finds the reason given by Plaintiffs fails to rebut the statutory presumption of laches. As explained in *Home-Owners Insurance Company* case and *Nykoriak v Napoleon*, 334 Mich. App. 370; 964 N.W.2d 895 (2020), Plaintiffs did not have to wait two months in order to take legal action regarding the conduct of an August 2, 2022 election. The delay is unjustified. Indeed, nothing prevented Plaintiffs from pursuing any available administrative or legal remedy regarding the Department of Elections' alleged failure to address and resolve challenges arising out of the August 2, 2022 primary election prior to filing this complaint.

Plaintiffs now seek injunctive relief to prevent alleged future violations of Michigan election law. Plaintiffs argue that they waited on information from the resolution of the challenges arising out of the August 2, 2022 alleged election law violations before filing

this action. Plaintiffs fail to establish how these alleged violations justify their requested relief in the present action regarding a separate election.

The Court looks to see whether there has been prejudice to the Defendants caused by the delay when considering applying the doctrine of laches. In the present case, the delay impacts approximately 60,000 absentee ballots that have been returned to the City of Detroit's Clerk's Office by the time the November 3, 2022 injunctive hearing occurred. The Court believes that it is reasonable to assume that additional ballots have arrived since the conclusion of that hearing. The prejudice to the city of Detroit, and by extension the voters who have submitted absentee ballots, is enormous. Tens of thousands of city of Detroit voters would be disenfranchised unless the doctrine of laches is applied in this eleventh-hour challenge.

Testimony at the injunctive hearing also indicated that the City of Detroit has expended tremendous time and resources training approximately 1,200 volunteer workers for the November 8, 2022 election. Daniel Baxter testified that the City could not prepare and present additional training, even if justified, to the volunteer workers by November 8th.

The present case represents the quintessential example of the application of the laches doctrine. Plaintiffs sat on their hands for months before bringing a complaint claiming violations of Michigan statutory election law in the August, 2022 primary and the relief sought would create the potential harm of disenfranchising tens of thousands of Detroiters in the November 8, 2022 general election. This is unacceptable and cannot be permitted.

CONCLUSION

On numerous occasions Plaintiffs have asserted the Detroit City Clerk's procedures for the November 8, 2022 election violate Michigan election laws and are reflective of corruption in our state's largest city. While it is easy to hurl accusations of violations of law and corruption, it is another matter to come forward and produce the evidence our Constitution and laws require. Plaintiffs failed, in a full day evidentiary hearing, to produce any shred of evidence. No exhibits, no testimony from any of the Plaintiffs, no evidence from Mr. Thomas or Mr. Baxter indicate the procedures for the November 8, 2022 election violate Michigan election laws.

Plaintiffs have raised a false flag of election law violations and corruption concerning Detroit's procedures for the November 8th election. This Court's ruling takes down that flag.

Plaintiffs' failure to produce any evidence that the procedures for this November 8th election violate state or federal election law demonizes the Detroit City Clerk, her office staff, and the 1,200 volunteers working this election. These claims are unjustified, devoid of any evidentiary basis and cannot be allowed to stand.

Plaintiffs' motions for mandamus, preliminary injunction, and declaratory judgment are DENIED.

For the reasons stated in this Court's opinion, Plaintiffs' complaint is DISMISSED.

This is a final order and closes the case.

November 7, 2022
Date

Hon. Timothy M. Kenny, Chief Judge
Third Judicial Circuit Court of Michigan

Exhibit C

2024 WL 1711052
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

JONATHAN LINDSEY, et al., Plaintiffs,

v.

GRETCHEN WHITMER, et al., Defendants.

Case No. 1:23-cv-1025
|
Filed 04/10/2024

OPINION AND ORDER

JANE M. BECKERING United States District Judge

***1** Jonathan Lindsey, a state senator, along with one other state senator and nine state representatives, initiated this case against Gretchen Whitmer in her official capacity as Michigan's governor, Jocelyn Benson in her official capacity as Michigan's secretary of state, and Jonathan Brater in his official capacity as Michigan's director of elections. Plaintiffs seek declaratory and injunctive relief related to their claim that Michigan's adoption of constitutional amendments through a citizen-led initiative process violates their rights as legislators, taxpayers, and voters under the Elections Clause of the United States Constitution. Defendants moved to dismiss Plaintiffs' Complaint (ECF No. 15). For the following reasons, the Court grants Defendants' motion, closes this case, and therefore dismisses as moot the other motions pending in this case. [1]

[1] Jim Pedersen, Andrea Hunter, Michigan Alliance for Retired Americans, Detroit/Downriver Chapter of the A. Philip Randolph Institute, and Detroit Disability Power filed a Motion to Intervene as defendants in this case (ECF No. 5), and they subsequently filed a Motion to Strike (ECF No. 10) and a Motion to Expedite (ECF No. 20).

I. BACKGROUND

A. Factual Background

One of the ways in which Michigan's Constitution can be amended is by petition of the registered electors of Michigan (Compl. ¶ 24, citing MICH. CONST. Art. XII, Sec. 2). Michigan's Constitution provides in pertinent part the following:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated

> in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

MICH. CONST. Art. XII, Sec. 2; *see* Compl. ¶¶ 26–28. After the correct number of valid signatures and their sufficiency are ascertained, the proposed amendment to the constitution is placed on the ballot as a ballot proposal to be considered by Michigan voters (Compl. ¶ 29). Any proposal that is approved by a majority of voters voting on the ballot proposal becomes part of the constitution and goes into effect 45 days after the date on which it was approved (*id.* ¶ 31). Michigan's Constitution does not require state legislative approval for the amendment (*id.* ¶¶ 24–25).

2** ***2018 Constitutional Amendment. Michigan Ballot Proposal 3 ("Proposal 3") was a citizen-initiated ballot initiative approved by voters in Michigan as part of the 2018 federal elections (*id.* ¶ 33). The proposal reformed Michigan elections by protecting the right to a secret ballot; ensuring access to ballots for military and overseas voters; adding straight-ticket voting; automatically registering voters; allowing any citizen to vote at any time, provided they have a proof of residency; allowing access to absentee ballots for any reason; and auditing election results (*id.* ¶ 34). The measure amended Section 4 of Article II of the Michigan Constitution (*id.* ¶ 35, referencing Pls. Ex. A [ECF No. 1-1]). The proposal was approved with 67 percent of the vote (*id.* ¶ 36). State legislative approval was not obtained for the amendment because such approval is not required (*id.* ¶ 37).

2022 Constitutional Amendment. In 2022, Michigan Ballot Proposal 2, the Right to Voting Policies Amendment a/k/a Promote the Vote ("Proposal 2"), was a citizen-initiated proposed constitutional amendment in the state of Michigan, which was voted on as part of the 2022 Michigan elections (*id.* ¶ 38). The amendment changed voting procedures in Michigan with the stated goal of making it easier to vote (*id.* ¶ 39). Various voting rights advocacy groups gathered 669,972 signatures, enough for the amendment to be placed on the 2022 ballot (*id.* ¶ 40). On August 31, 2022, the four-member Board of State Canvassers, which is responsible for determining whether candidates and initiatives should be placed on the ballot, deadlocked 2–2, with challengers arguing that the ballot title of the initiative was misleading (*id.* ¶ 41). On September 9, 2022, the Michigan Supreme Court ruled that the initiative should be placed on the November ballot (*id.* ¶ 42). The ballot measure amended Article 2, Sections 4 and 7, of the Michigan Constitution (*id.* ¶ 43, referencing Pls. Ex. B [ECF No. 1-2]). Proposal 2 was approved with 60 percent of the vote (*id.* ¶ 44). Again, state legislative approval was not obtained for the amendment because such approval is not required (*id.* ¶ 45).

Governor Whitmer, Secretary Benson, and Director Brater have supervisory control over local election officials for all elections and for the performance of their election duties for state-level ballot proposals, such as the 2018 and 2022 ballot proposals (*id.* ¶ 61, citing MICH. COMP. LAWS § 168.21). Defendants are also responsible for enforcement of laws governing all elections, including federal elections (*id.* ¶ 62). After a constitutional provision regulating federal elections goes into effect, Defendants implement the constitutional provisions regulating federal elections (*id.* ¶ 32).

B. Procedural Posture

On September 28, 2023, Plaintiffs filed this action, alleging that Governor Whitmer, Secretary Benson, and Director Brater support and enforce laws that violate the Elections Clause of the United States Constitution (Compl. ¶¶ 35, 43, & 46–47, 58, 62). Specifically, Plaintiffs seek a declaratory judgment that "the use of the petition-and-state-ballot-proposal process under Michigan Constitution, Art. XII, Sec. 2, for regulation of

times, places, and manner of federal elections is unconstitutional and violates the Elections Clause because the state legislature's approval and the state legislators' participation are not required, and that the process violated Plaintiffs' federal rights under the Elections Clause" (ECF No. 1 at PageID.15). Plaintiffs also seek a declaration that "the 2018 and 2022 constitutional amendments, in their entirety, are constitutionally invalid, unenforceable, and have no legal effect on the state legislature enacting laws, subject to the Governor's veto power, to regulate times, places, and manner of federal elections" (*id.* at PageID.15). According to Plaintiffs, the amendments were "not constitutionally enacted" and are "legally null-and-void" (*id.* ¶¶ 64 & 74).

***3** Additionally, because Plaintiffs allege that those same petition-and-state-ballot-proposal processes could be used in the future to amend the Michigan Constitution to regulate the times, places, and manner of federal elections (*id.* ¶ 48), Plaintiffs also seek injunctive relief enjoining Defendants from "funding, supporting, or facilitating" the use of either the petition-and-state-ballot-proposal process or the 2018 and 2022 constitutional amendments themselves "to regulate times, places, and manner of federal elections" (*id.* at PageID.15).

In lieu of answering the Complaint, Defendants filed the motion to dismiss at bar (ECF No. 15). Plaintiffs filed a response in opposition (ECF No. 19), and Defendants filed a reply (ECF No. 22). Having considered their submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d).

II. ANALYSIS

A. Motion Standard

Defendants' motion to dismiss is filed pursuant to Federal Rule of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted). Whether a party has standing is an issue of the court's subject-matter jurisdiction under Rule 12(b)(1). *See Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017); *Kepley v. Lanz*, 715 F.3d 969, 972 (6th Cir. 2013); *Roberts v. Hamer*, 655 F.3d 578, 580–81 (6th Cir. 2011). A facial attack on standing challenges whether a complaint adequately pleads standing, even accepting its facts as true. *Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 543 (6th Cir. 2021); *Primus Grp., LLC v. Smith & Wesson Corp.*, 844 F. App'x 824, 826 (6th Cir. 2021). "In reviewing a facial attack to a complaint under Rule 12(b)(1) for lack of standing, '[courts] must accept the allegations set forth in the complaint as true' while drawing all inferences in favor of the plaintiff[.]" *Hile v. Michigan*, 86 F.4th 269, 273 (6th Cir. 2023) (citation omitted).

Rule 12(b)(6) authorizes a court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). Specifically, a complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). The court views the complaint in the light most favorable to the plaintiff, accepting as true all well-pled factual allegations and drawing all reasonable inferences in favor of the plaintiff. *Gavitt v. Born*, 835 F.3d 623, 639–40 (6th Cir. 2016). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Discussion

Defendants argue that Plaintiffs' lack of standing prevents this Court from exercising jurisdiction over the subject matter of Plaintiffs' claims. Defendants also argue that Plaintiffs' claims otherwise fail on their merits based on

established precedent from the United States Supreme Court. Subject-matter jurisdiction is the threshold question. This Court is obligated to confirm jurisdiction under Rule 12(b)(1) before proceeding with any adjudication on the Complaint's allegations under Rule 12(b)(6). *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."); *Chapman v. Tristar Prod., Inc.*, 940 F.3d 299, 304 (6th Cir. 2019) ("We are required in every case to determine—sua sponte if the parties do not raise the issue—whether we are authorized by Article III to adjudicate the dispute."). Without subject-matter jurisdiction, this Court lacks power to consider the merits of Plaintiffs' claims, *see Bell v. Hood*, 327 U.S. 678, 682 (1946) (explaining that motion to dismiss for failure to state a claim may be decided only after establishing subject-matter jurisdiction because determination of the validity of the claim is, in itself, an exercise of jurisdiction); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990) ("[W]e are bound to consider the 12(b)(1) motion first, since the Rule 12(b)(6) challenge becomes moot if this court lacks subject-matter jurisdiction."), or, indeed, issue any order, *see U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1087 (6th Cir. 1992) (explaining that where a district court lacks subject-matter jurisdiction, its orders are "void"). In short, "[t]o succeed on the merits, a party must first reach the merits, and to do so it must establish standing." *Online Merchants Guild v. Cameron*, 995 F.3d 540, 547 (6th Cir. 2021). Consequently, the Court turns first to analyzing Defendants' Rule 12(b)(1) standing argument, and the Court finds the argument dispositive.

***4** Defendants argue that Plaintiffs lack standing to bring their claims against them where all three of their theories of injury fly in the face of controlling precedent (ECF No. 16 at PageID.190–196). Defendants argue that even if Plaintiffs could identify a concrete and particularized injury, their claims also suffer from two other fatal Article III flaws: (1) their request for invalidation of the 2018 and 2022 Amendments is not redressable because the legislature has independently codified nearly all of those policies into Michigan's election statutes; and (2) their "freewheeling challenge" to a future, unidentified use of the proposal process to regulate federal elections is far too speculative to satisfy Article III's imminence requirement (*id.* at PageID.197–199).

In response, Plaintiffs argue that they have "supreme" law-making power, to wit: a "particularized right or privilege under the Electors [sic] Clause to have an opportunity to cast a binding vote on state laws regulating federal elections" (ECF No. 19 at PageID.231–235). They assert that an individual legislator's loss of this right or privilege is not an "institutional injury" (*id.*). Additionally, Plaintiffs argue that their claims are redressable because "[t]his Court has the legal authority to issue an order declaring the 2018 and 2022 state constitutional amendments as violative of the Elections Clause" (*id.* at PageID.248). Last, Plaintiffs argue that their claims are also not speculative but are "targeted against the process of adopting these constitutional amendments without state legislative approval ... specifically as it relates to regulating federal elections" (*id.* at PageID.248–249). [2]

2 Plaintiffs also argue that "[b]ecause there exists an individual state legislator's right or privilege under the Elections Clause, an action lies under 42 U.S.C. § 1983 as a mechanism to seek a judicial remedy" (ECF No. 19 at PageID.236–244). The argument is misplaced. As Defendants point out in their reply, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing" (ECF No. 22 at PageID.285 n.1, quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

Defendants' argument has merit.

Article III, § 2 of the United States Constitution provides that the judicial power of the federal courts extends only to "Cases" and "Controversies." " '[S]tanding,' by itself, traditionally has referred to whether a plaintiff can satisfy Article III's case-or-controversy requirement[.]" *Roberts*, 655 F.3d at 580 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979)). Standing "ensure[s]

that federal courts do not exceed their authority" and "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), as revised (May 24, 2016). The doctrine of standing requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)). *See also United States v. Texas*, 599 U.S. 670, 675 (2023) ("Article III standing is 'not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787.' ") (citation omitted). As the Sixth Circuit recently opined, Article III gives courts the power to adjudicate "Cases" and "Controversies," not "hypothetical disputes." *Savel v. MetroHealth Sys.*, No. 23-3672, ___ F.4th ___, 2024 WL 1190973, at *3 (6th Cir. Mar. 20, 2024).

***5** The United States Supreme Court has held that "the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. The plaintiff must have suffered "(1) a concrete and particularized injury-in-fact which (2) is traceable to the defendant's conduct and (3) can be redressed by a favorable judicial decision." *Dickson v. Direct Energy, LP*, 69 F.4th 338, 343 (6th Cir. 2023). The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the elements. *Spokeo*, 578 U.S. at 338; *Lujan*, 504 U.S. at 561. "A plaintiff must prove Article III standing 'with the manner and degree of evidence required at the successive stages of the litigation.' " *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1022 (6th Cir. 2024) (quoting *Lujan*, 504 U.S. at 561). Where, as here, a case is at the pleading stage, the plaintiff must "clearly ... allege facts demonstrating" each element. *Spokeo, supra.*

The standing analysis in this case turns on the injury-in-fact requirement, a requirement that establishes a plaintiff's "personal stake in the outcome of the controversy." *Kareem*, 95 F.4th at 1022 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). In their Complaint, Plaintiffs allege three ways they have been injured—as (1) "legislators," (2) "taxpayers," and (3) "voters" (Compl. ¶ 63). The Court considers each theory in turn.

Legislators. First, Plaintiffs allege they have "individual legislator standing to challenge usurpation of state legislative powers" (*id.* ¶ 65). Plaintiffs alleges that "as state legislators," they have "federal rights under the Elections Clause U.S. Const., Art. 1, Sec. 4, Cl. 1, to oversee and participate in making legislative decisions regulating the times, places and manner of federal elections" (*id.* ¶ 67). Plaintiffs allege that "Defendants caused injury to Plaintiffs when they supported and enforced laws and when they support and enforce constitutional provisions enacted through the petitioning and ballot question processes that usurp the state legislature's powers and violate the state legislator's federal rights under the Elections Clause" (*id.* ¶ 72).

As Defendants point out, the Supreme Court and the Sixth Circuit have directly rejected this type of "legislator standing" (ECF No. 16 at PageID.190). The Supreme Court has expressly held that "individual members lack standing to assert the interests of a legislature." *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. ___, ___; 139 S. Ct. 1945, 1952 (2019). Similarly, the Sixth Circuit has held that "[a]n individual legislator, or group of legislators, do not have Article III standing based on an allegation of an institutional injury, or a complaint about a dilution of legislative power[.]" *State by & through Tenn. Gen. Assembly v. U.S. Dep't of State*, 931 F.3d 499, 514 (6th Cir. 2019). The Sixth Circuit reasoned that because the "nature of that injury" is "abstract and widely dispersed" among the legislative body, individual legislators cannot "claim a 'personal stake' in [such a] suit," and the abstract nature of their alleged injury renders it " '[in]sufficiently concrete' to establish Article III standing." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 830 (1997)). *See also Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 453 (6th Cir. 2017) ("The general rule that individual legislators lack standing to sue in their official capacity as [members of a legislature] follows from the requirement that an injury must be concrete and particularized."). Plaintiffs' asserted injury—the deprivation of the power to cast a binding vote—is neither concrete nor particularized because it is shared by every single member of the Michigan Legislature. [3]

[3] An individual legislator (or group of legislators) may sue as an authorized representative of a legislative body if they have been expressly chosen by the body to do so. *See Tennessee*, 931 F.3d at 514; *see also Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 801–02 (2015) (distinguishing a suit brought by individual legislators with one brought by the legislature itself or an authorized member). However, Plaintiffs do not allege in their Complaint (nor argue in briefing) that the Michigan Legislature has authorized them to serve as its representative in this litigation.

6** ***Taxpayers. Second, Plaintiffs allege that they have standing as "taxpayers" to bring this lawsuit because Defendants "use state funds to support and enforce current regulations governing federal elections as a result of past amendments to the Michigan Constitution which are legally unauthorized under the Elections Clause, including the use of state funds for similar petitioning or ballot questions in the future that affect federal elections without legislator involvement" (Compl. ¶ 77). According to Plaintiffs, Defendants cause injury to Plaintiffs when they "fund" statewide referenda on such legally invalid ballot questions (*id.* ¶ 78). Plaintiffs allege that as state legislators, they are "uniquely injured by such illegal disbursement or illegal use of taxpayers funds because, if the referendum passes, there is a violation of the state legislators' federal rights under the Elections Clause" (*id.* ¶ 79).

In general, "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). The Supreme Court has reasoned that if every "taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (plurality op.). "[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.' " *United States v. Richardson*, 418 U.S. 166, 174 (1974). Like their asserted injury as legislators, Plaintiffs' asserted injury as taxpayers is neither concrete nor particularized. [4]

[4] The Supreme Court has recognized that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause violates the First Amendment's prohibition against laws respecting the establishment of a religion. *See Flast v. Cohen*, 392 U.S. 83, 105–06 (1968). However, Plaintiffs do not allege an Establishment Clause violation.

Voters. Third, Plaintiffs allege that they have standing as "voters" to bring this lawsuit because "when such a referendum violating the Elections Clause is offered, Plaintiffs' personal vote in favor or against the referendum is wasted" (Compl. ¶ 81). According to Plaintiffs, "Defendants cause injury by unnecessarily burdening Plaintiffs' voting rights when they supervise, fund, or otherwise support statewide referenda on such legally invalid ballot questions" (*id.* ¶ 82).

Again, controlling precedent wholly rejects Plaintiffs' voter-standing theory. The Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014). "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.*

In *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam), the injury the plaintiffs alleged was also that the law —the Elections Clause—had not been followed. The Supreme Court held that "this injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id.* As Defendants correctly point out, Plaintiffs' claim that the election regulations under which

they must vote were enacted unlawfully is likewise a prototypical generalized grievance: "every other voter in Michigan could make the exact same claim" (ECF No. 16 at PageID.192–193).

***7** In sum, Plaintiffs have not met their burden at the pleading stage to demonstrate injury-in-fact and have concomitantly failed to demonstrate Article III standing. *See Savel*, 2024 WL 1190973, at *3 ("If the plaintiff fails to satisfy *any* of the three standing requirements, we have no jurisdiction because there is no case or controversy to decide, and we must dismiss the case.") (emphasis added). Without standing for bringing their claims, Plaintiffs ask this Court for nothing more than a "jurisdiction-less 'advisory opinion.' " *Mann Constr., Inc. v. United States*, 86 F.4th 1159, 1162 (6th Cir. 2023) (quoting *California v. Texas*, 141 S. Ct. 2104, 2116 (2021)). Thus, dismissal under Rule 12(b)(1) is required. *See also Davis v. Colerain Twp., Ohio*, 51 F.4th 164, 176 (6th Cir. 2022) (indicating that dismissal for lack of subject-matter jurisdiction is without prejudice); FED. R. CIV. P. 58 (providing for entry of judgment).

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (ECF No. 15) is GRANTED.

IT IS FURTHER ORDERED that the motions to intervene (ECF No. 5), to strike (ECF No. 10), and to expedite (ECF No. 20) are DISMISSED as moot.

All Citations

Slip Copy, 2024 WL 1711052

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Exhibit D

2022 WL 4103030
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan, Southern Division.

Jason ICKES, et al., Plaintiffs,

v.

Gretchen WHITMER and Jocelyn Benson, Defendants.

No. 1:22-cv-817
|
Signed September 8, 2022

Attorneys and Law Firms

Daniel J. Hartman, Law Office of Daniel J. Hartman, Petoskey, MI, for Plaintiffs.

OPINION AND ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

Paul L. Maloney, United States District Judge

***1** Plaintiffs filed this lawsuit challenging the certification of Michigan's 2020 presidential election results. [1] Along with their complaint, Plaintiffs filed a motion for a temporary restraining order. (ECF No. 2.) Plaintiffs ask the Court to restrain Defendant Gretchen Whitmer and Jocelyn Benson, and those acting in concert with them, from destroying any records relating to the 2020 presidential election. Upon careful review of the motion for emergency relief, the Court will deny the request for a temporary restraining order.

1 Plaintiffs filed their complaint on Friday, September 2, 2022, at 6:47 p.m. Plaintiffs filed a second complaint at 7:10 p.m. An amended complaint supersedes the original complaint, which becomes a nullity. See Hayward v. Cleveland Clinic Found., 759 F.3d 601, 617 (6th Cir. 2014) (citing 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1476 (3d ed. 2010)); Drake v. City of Detroit, 266 F. App'x 444, 448 (6th Cir. 2008). Where necessary, the Court references the second filed complaint.

I.

Decisions regarding a temporary restraining order are within the discretion of a district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). Under Rule 65, a court may issue a temporary restraining order, without notice to the adverse party, only if two conditions are met. Fed. R. Civ. P. 65(b)(1). First, the moving party must establish specific facts through an affidavit or a verified complaint or affidavit showing that an immediate and irreparable injury will result to the moving party before the adverse party can be heard in opposition to the motion. Fed. R. Civ. P. 65(b)(1)(A). Second, the counsel for the moving party must certify in writing any efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b)(1)(B). In addition, the court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party*, 543 F.3d at 361 (citation omitted). The four factors are not prerequisites that must be met but are interrelated concerns that must be balanced together. *See Northeast Ohio Coalition for Homeless and Serv. Emps. Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Our United States Supreme Court cautions

that temporary restraining orders are extraordinary and drastic remedies that may be issued only under "stringent restrictions" and their limited availability "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 438-39 (1974).

II.

A.

***2** Rule 65(b)(1)(A) imposes two requirements on the party seeking a temporary restraining order. First, the party must identify an irreparable harm that will occur before the opposing party can be heard in opposition to the motion. Second, the party must attest to the veracity of the facts establishing irreparable harm either by affidavit or through a verified complaint.

The Court concludes Plaintiffs have not met the requirements contained in Rule 65(b)(1)(A). Plaintiffs titled their pleading "Verified Complaint" (ECF No. 3 PageID.46) but failed to include a signature from any plaintiff and also failed to include a statement indicating that the allegations in the complaint are made under penalty of perjury. *See* 28 U.S.C. § 1746; *Williams v. Browman*, 981 F.2d 901, 904-05 (6th Cir. 1992), *accord Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017) ("But, a verified complaint is not just a pleading; it is also the equivalent of an affidavit ... because it 'contains factual allegations that if included in an affidavit or deposition would be considered evidence, and not merely assertion.' ") (citation omitted); *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 994-95 (8th Cir. 2001) (stating that "a complaint signed and dated as true under penalty of perjury satisfies the requirements of a verified complaint, 28 U.S.C. § 1746.").

Attached to their motion, Plaintiffs filed two affidavits. Attorney Russell Newman filed one affidavit. (ECF No. 2-2 PageID.38-39.) Counsel does not make any allegations about an irreparable harm that will occur before Defendants can be heard in opposition to the motion. Plaintiffs also attached an affidavit from Plaintiff Ken Beyer. (ECF No. 2-3 PageID.40.) Beyer attests that Michigan law requires the preservation of election records. (*Id.* ¶ 4.) He attests that he sought election records through FOIA requests and that some records have not been provided and some have been reported lost or deleted or destroyed or are otherwise unattainable without a court order. (*Id.* ¶ 5.) Beyer does not allege, under penalty of perjury, that Defendants will destroy election records before they can be heard in opposition to this motion.

B.

In their factual allegations, Plaintiffs summarize concerns about the certification of voting machines used in Michigan for the November 2020 election. Plaintiffs allege that no county in Michigan used a properly certified electronic voting system. (ECF No. 3 Compl. ¶ 53 PageID.55.) Plaintiffs conclude, therefore, that the electronic voting systems that were used violated Michigan law and the election is void *ab initio* and should not have been certified.

Plaintiffs describe their claim as arising under the First, Ninth and Fourteenth Amendments and explains that they have a "constitutional right to vote for the candidate of [their] choice, [and] also the constitutional right not to have [their] vote diluted, canceled out, and/or nullified by the counting of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent and/or unverifiable votes." (ECF No. 3

Compl. ¶ 104 PageID.63.) Plaintiffs allege, because Defendants failed to properly certify the voting machines used in the State of Michigan for the November 2020 election, their votes were diluted, canceled out, and/or nullified. (*Id*. ¶ 106.) And, Plaintiffs allege that if the information and data required to be preserved for 22 months under 52 U.S.C. § 20701 is destroyed, it will be impossible to demonstrate the failure of certification of voting machines. (*Id*. ¶ 107 PageID.64.)

***3** The Court concludes Plaintiffs are not likely to succeed on the merits of their claim. First, Plaintiffs have only a generalized grievance that would be common among all people who cast a vote in the November 2022 election and not a particularized, individual injury. Consequently, Plaintiffs likely do not have standing to raise this concern about machines used in the November 2022 election or the possible destruction of records. *See Pirtle v. Nago*, No. 22-381, 2022 WL 3915570, at *3-*4 (D. Haw. Aug. 31, 2022). Second, Plaintiffs likely cannot establish an Equal Protection claim. On the facts alleged in the complaint, all ballots cast in Michigan were treated equally, albeit by allegedly uncertified voting machines. Plaintiffs were able to cast a ballot for their electors of choice and their votes were counted. Plaintiff have not pled facts to show that their votes were canceled, diluted or nullified. Third, 52 U.S.C. 20701 likely does not create a private right of action. *See Fox v. Lee*, No. 4:18cv529, 2019 WL 13141701, at *1 (N.D. Fla. Apr. 2, 2019); *see also Soudelier v. Dept. of State Louisiana*, No. 22-2436, 2022 WL 3686422, at *1 (E.D. La. Aug. 25, 2022) (citing *Fox*); *Pirtle*, 2022 WL 3915570, at *3 (citing *Fox* and *Soudelier*). Likely, the Attorney General or his or her representative may enforce the requirements of § 20701. *See Fox*, 2019 WL 13141701 at *1; *see also* 52 U.S.C. § 20703. Fourth, Plaintiffs may not have sued the correct parties. Under Michigan statute, City and county clerks or the Board of County Canvassers appear to have responsibility for retaining election records, not the Governor or the Secretary of State. *See* Mich. Comp. Laws § 168.810a. Plaintiff have not alleged any practice or policy of either Defendant directing county officials to destroy election records.

The Court also finds that Plaintiffs have not established an irreparable harm that will occur before Defendants can be heard in opposition. At best, Plaintiffs allege in the complaint that the time required by statute to preserve records ended on September 4, 2022. That allegation does not, however, establish that Defendants will begin to destroy records as soon as the retention requirement passes. In addition, even if the federal statute, 52 U.S.C. § 20701 provides for a twenty-two month retention period, state law requires the retention of election records for two years. Mich. Comp. Laws § 168.811.

Having found that the first two factors weigh against granting ex parte relief, the Court need not consider the other two factors.

III.

Accordingly, the Court declines to grant Plaintiffs a temporary restraining order. Plaintiffs have not met the requirements for emergency ex parte injunctive relief because they did not attest, under penalty of perjury, to the veracity of the factual allegations necessary for the specific relief sought. Plaintiffs also have not demonstrated any imminent irreparable harm or a likelihood of success on the merits of their claims.

ORDER

For the reasons provide in the accompanying Opinion, the Court **DENIES** Plaintiffs' motion for a temporary restraining order. (ECF No. 2.)

Plaintiffs must serve Defendants as soon as possible. Plaintiffs must file proof of service no later than Monday, September 12, 2022.

Having denied the request for a temporary restraining order, the Court will treat the motion as a request for a preliminary injunction. Defendants must file a response no later than Monday, September 19, 2022. Plaintiffs may file a reply by Monday, September 26, 2022. After reviewing the briefs, the Court may hold a hearing if necessary.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 4103030

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Exhibit E

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellants,

v

DAVINA DONAHUE, WILLIAM KIM, and STACEY KAAKE,

Defendants-Appellees.

FOR PUBLICATION
March 7, 2024
9:10 a.m.

No. 364048
Genesee Circuit Court
LC No. 22-118123-AV

Before: M. J. KELLY, P.J., and JANSEN and GARRETT, JJ.

M. J. KELLY, P.J.

In this case under the Michigan Election Law, MCL 168.1 *et seq.*,[1] plaintiffs, the Michigan Republican Party and the Republican National Committee, appeal by right the trial court's order granting summary disposition in favor of defendants, Davina Donahue, William Kim, and Stacie Kaake,[2] under MCR 2.116(I), on the basis that plaintiffs lacked standing to bring their claims. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

Plaintiffs initiated this action for declaratory relief and mandamus based upon their allegations that, before the August 2, 2022 primary and the November 8, 2022 general election,

[1] Sections of the Michigan Election Law were recently amended by our Legislature. See 2024 PA 259. Because the amendments do no substantively alter the statutory provisions at issue in this case, for ease of reference, citations to the pertinent statutory sections are to the current version of the statute.

[2] During the dispute in this case, Donahue was the interim Flint city clerk, Kim was the Flint city attorney, and Kaake was the Flint city assessor. All defendants were members of the Flint board of election commissioners.

the city of Flint's board of election commissioners violated the requirements stated in MCL 168.674 and MCL 168.765a, which require that a city's board of election commissioners shall appoint, "as nearly as possible," the same number of election inspectors[3] from each major political party to work each in-person-voting election precinct and absent voter counting board.

According to plaintiffs' verified complaint, on May 12, 2022, they provided to the then-Flint city clerk (Donahue's predecessor) the applications of 122 Republicans who sought appointment to work as election inspectors in the August 2, 2022 primary election. The board of election commissioners, however, appointed 442 Democrat election inspectors and only 27 Republican election inspectors. After plaintiffs complained about how few Republicans had been appointed, the board of election commissioners appointed an additional 22 Republicans to work as election inspectors in the primary election.

Thereafter, on September 9, 2022, plaintiffs sent a letter to the then-city clerk with a list of 61 Republicans interested in working as election inspectors for the November 8, 2022 general election and asking for the clerk's written assurance that the clerk would contact and seek to appoint each of the 61 people listed. On October 15, 2022, the board of election commissioners appointed 562 election inspectors, but only 57 were Republicans. Plaintiffs also received anecdotal reports that city election officials were turning away Republicans who inquired about serving as election inspectors. On October 21, 2022, plaintiffs sent a letter to defendants asking the board of election commissioners to fulfill its statutory duty to appoint, as nearly as possible, an equal number of election inspectors from each major political party. Plaintiffs also requested that the board of election commissioners take affirmative steps to recruit Republican election inspectors and facilitate their appointments. In response, on October 25, 2022, the Flint city attorney stated that the board of election commissioners had, at that time, appointed over 120 Republican election inspectors and that the board intended to continue contacting the potential Republican election inspectors that plaintiffs had previously identified.

Three days later, on October 28, 2022, plaintiffs filed their complaint against defendants, alleging violations of MCL 168.674 and MCL 168.765a. In their prayer for relief, plaintiffs sought a declaratory judgment determining that the board of election commissioners was violating its statutory duties regarding the partisan appointment of election inspectors. Plaintiffs also asked the trial court to require the board of election inspectors to take several affirmative steps that plaintiffs identified to recruit Republican election inspectors. Plaintiffs sought expedited proceedings and requested an ex parte show-cause order requiring defendants to file an answer to plaintiffs' complaint by noon on November 1, 2022. On October 31, 2022, the trial court entered a show-cause order directing defendants to file an answer by 5:00 p.m. on November 1, 2022, and the court scheduled the hearing for 12:30 p.m. on November 2, 2022.

On November 1, 2022, defendants answered the trial court's show-cause order and filed a brief in opposition to plaintiffs' request for writs of mandamus. As relevant to the issues raised on appeal, defendants argued that they were entitled to summary disposition of plaintiffs' claims because plaintiffs lacked standing to challenge the partisan composition of election-inspector

[3] Election inspectors are the poll workers who administer in-person voting and count ballots.

appointees. Following the show-cause hearing, the trial court agreed, and entered an order dismissing plaintiffs' claims without prejudice. This appeal follows.

II. MOOTNESS

We must first address defendants' assertion that the issues raised on appeal are moot. "The applicability of a legal doctrine, such as mootness, is a question of law which this Court reviews de novo." *Can IV Packard Square v Packard Square LLC*, 328 Mich App 656, 661; 939 NW2d 454 (2019) (quotation marks and citation omitted). Whether a case is moot is an issue that may be raised by a party at any time, and it is a threshold question that a court must address before considering the substantive issues of the case. *Equity Funding Inc v Milford*, 342 Mich App 342, 349; 994 NW2d 859 (2022). "As a general rule, this Court does not decide moot issues." *Can IV Packard Square*, 328 Mich App at 661. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). "An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Id.* This case arises from an alleged violation of election laws before the November 8, 2022 general election, which has already occurred. Consequently, this case is moot regarding the 2022 general election because there is no relief that this Court can provide to remedy any breach of election laws during that election.

"However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review." *Barrow v Detroit Election Comm*, 305 Mich App 649, 660; 854 NW2d 489 (2014). An election-law issue is typically one of public significance when the "interpretation and application of Michigan's election laws extend beyond" a particular election and affect "future candidates and the public." *Gleason v Kincaid*, 323 Mich App 308, 315-316; 917 NW2d 685 (2018). Here, the question regarding who can seek enforcement of MCL 168.674 and MCL 168.765a extends beyond the 2022 general election. The issue is not confined to the circumstances of a particular elected office or ballot question in a single election. Election inspectors must be appointed to work at every election. MCL 168.672. Boards of election commissioners are required to appoint election inspectors from each major political party in equal-as-possible numbers for each election, and major county party chairpersons are entitled to challenge the appointment of individual election inspectors in every election in which a state or federal office appears on the ballot. MCL 168.674(2)—(3). Therefore, whether a major political party has standing to enforce the partisan-composition requirements of MCL 168.674(2) and MCL 168.765a(2) is a question of public significance.

The issue of who has standing to enforce the partisan-composition requirements is also likely to recur. An issue is likely to recur when a statute at issue is expected to be implemented again in the future. *T & V Assoc, Inc v Dir of Health & Human Servs*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 361727); slip op at 4, lv pending. Regarding election law, an issue is considered likely to recur when it is expected that the same controversy will arise in future elections. *Barrow*, 305 Mich App at 660. Unless the partisan-composition requirements of MCL 168.674(2) and MCL 168.765a(2) are repealed, they will be implemented in every election. Moreover, the fact that MCL 168.674 sets forth a process by which the county chair of a major political party may challenge election-inspector appointments shows that partisan challenges to election-inspector appointments are expected. Consequently, challenges to the partisan

composition of slates of election-inspector appointees—and who has standing to enforce the requirements—are likely to recur.

Finally, election inspectors are appointed at least 21 days before an election. MCL 168.674(1).[4] Even if this Court expeditiously considered an appeal in a similar challenge, it is unlikely any relief could be implemented before an election. If this Court ordered a board of election commissioners to recruit and appoint more election inspectors from a particular party, the board would then have to actually recruit people and make the appointments. From the time appointments are made, the process for major party county chairpersons to challenge the qualifications of individual election inspectors can last up to eight days. MCL 168.674(3) and (4). Further, the election inspectors must be trained before election day. MCL 168.683. In light of "the strict time constraints" necessitated by the election process, "in all likelihood, such challenges often will not be completed before a given election occurs, rendering the discussion, as in this case, moot before appellate review." *Gleason*, 323 Mich App at 316. Therefore, the issue is likely to evade judicial review.

In sum, although the issues raised in this case are moot as to the 2022 general election, because the case involves a matter of public significance that is likely to recur, yet evade judicial review, we will reach the merits of the appeal.

III. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiffs argue that the trial court erred by granting summary disposition under MCR 2.116(I)(1) because, contrary to the trial court's determination, they have standing to bring their claims. This Court reviews de novo a trial court's decision to grant summary disposition. *Sobiecki v Dep't of Corrections*, 271 Mich App 139, 140; 721 NW2d 229 (2006). Under MCR 2.116(I)(1), "[i]f 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." Whether a party has standing is a question of law that is reviewed de novo. *Connell v Lima Twp*, 336 Mich App 263, 281; 970 NW2d 354 (2021). Likewise, we review de novo questions of statutory interpretation. *Id.*

B. ANALYSIS

The appointment of election inspectors is partisan in nature. Those applying to be election inspectors must designate their political party affiliation. MCL 168.677(2). On or before May 15 of each year, "the county chair of a major political party may submit to the city or township clerks in that county a list of individuals who are interested in serving as an election inspector in that

[4] Under the version of the statute in effect at the time of the 2022 general election, MCL 168.674(a) provided that election inspectors had to be appointed between 21 and 40 days before each election. See 2018 PA 120. Because the issues related to the 2022 primary are moot, we rely upon the time limits that will, likely, be present during future disputes.

county." MCL 168.673a.[5] Each voting precinct must have at least three election inspectors. MCL 168.672. A city's board of election commissioners is required to appoint at least three election inspectors to each precinct and may appoint as many election inspectors as, in the board's opinion, are "required for the efficient, speedy, and proper conduct of the election." MCL 168.674(1). "The board of election commissioners shall appoint at least 1 election inspector from each major political party and shall appoint an equal number, as nearly as possible, of election inspectors in each election precinct from each major political party." MCL 168.674(2). "The board of election commissioners may appoint as election inspector an individual on the list submitted by a major political party . . . ." MCL 168.674(1). Election-inspector appointments must be made at least 21 days before election day. MCL 168.674(1). Within two days of appointing election inspectors, a board of election commissioners must, in writing, notify "the county chair of each major political party of the names and political party affiliations of appointed election inspectors and the precincts to which those inspectors were appointed." MCL 168.674(2).

Under MCL 168.764d, a city clerk may enter into an agreement with other cities to create an absent voter counting board that counts all the absentee votes from each participating city. The same rules regarding the process for appointing partisan election inspectors for in-person voting at precincts apply to the appointment of election inspectors to an absent voter counting board. MCL 168.765a(2) and (4). There must always be at least one election inspector from each major political party present at an absent voter counting board. MCL 168.765a(8).

The county chairperson of a major political party has a statutory right to challenge an individual's appointment to serve as an election inspector. MCL 168.674(3). Within four days of receiving the list of appointed election inspectors from a board of election commissioners, a major political party county chairperson may challenge an individual election inspector's appointment on the basis of the "qualifications of the election inspector, the legitimacy of the election inspector's political party affiliation, or whether there is a properly completed declaration of political party affiliation in the application for that election inspector on file in the clerk's office." MCL 168.674(3). A major party county chairperson's challenge to an election inspector's appointment is brought to the city's board of election commissioners. MCL 168.674(3). If the challenge is to the appointee's political affiliation, the appointee is given two business days to respond to the challenge, and the appointment is revoked if the appointee does not respond. MCL 168.674(4). The board must decide the partisan challenge and notify the county chairperson of the decision within two business days of receiving the appointee's response. MCL 168.674(4).

MCL 168.674 does not explicitly grant a major party county chairperson a right to challenge the requirement that the board must appoint, as nearly as possible, an equal number of election inspectors from each major political party to each election precinct. See MCL 168.674. Indeed, MCL 168.674(2) and MCL 168.765a(2) are silent regarding who, if anyone, has standing

[5] The Republican party is a major political party. See MCL 168.16 (stating that the major political parties are "the 2 political parties whose candidate for the office of secretary of state received the highest and second highest number of votes at the immediately preceding general election in which a secretary of state was elected.").

to enforce the partisan-composition. On appeal, plaintiffs argue that, under *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), they have standing.

In *Lansing Sch*, the Supreme Court explained that, historically, "[t]he purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Id*. at 355 (quotation marks and citation omitted). Under the doctrine, "the standing inquiry focuses on whether a litigant is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Id*. (quotation marks and citation omitted). In *Lansing Sch*, the Court held that

> a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has 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. [*Id*.]

Plaintiffs concede that they do not have a legal cause of action because MCL 168.674 and MCL 168.765a do not create an explicit statutory right for a major political party to sue to enforce the partisan-composition provisions.[6] Plaintiffs argue instead that they have standing to enforce the partisan-composition provisions because (1) they meet the requirements for seeking a declaratory judgment under MCR 2.605, (2) they have a special right, a special injury, or a substantial interest, which is detrimentally affected in a manner different from the citizenry at large, and (3) the statutory scheme implies that the Legislature intended to confer standing upon the major political parties to enforce the partisan-composition requirements.

We first address plaintiffs' argument that the statutory scheme implies that the Legislature intended to confer standing upon them to enforce the partisan-composition requirements. Generally, "ordinary citizens have standing to enforce the law in election cases." *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 506; 688 NW2d 847 (2004). That is "because without the process of elections, citizens lack their ordinary recourse." *Id*. at 505-506. However, when there is a "statute to the contrary," a private person may not seek mandamus to enforce an election law "without showing a special interest distinct from the interest of the public." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 587; 957 NW2d 731 (2020).

In *White v Highland Park Election Comm*, 312 Mich App 571, 573; 878 NW2d 491 (2015), this Court held that the provisions of MCL 168.674(3) and (4) that allow major party chairpersons to challenge the appointment of individual election inspectors strips the right to seek enforcement

[6] It is worth noting that, because MCL 168.674 and MCL 168.765a do not create an explicit statutory right for the chair of a major political party to sue to enforce the partisan-composition provisions, such an individual also lacks a legal cause of action and would have to rely upon the alternative methods set forth in *Lansing Sch* in order to establish standing to enforce the partisan-composition requirements.

of the partisan-composition provision of MCL 168.674(2) from citizens who do not have a special interest in the enforcement of the statute. This Court's decision in *White* indicates that major party county chairpersons are essentially delegated the responsibility to enforce the partisan-composition provision of MCL 168.674(2) on behalf of the major political parties. *Id*. Plaintiffs argue that, nevertheless, the statutory framework implies that the Legislature intended for major political party state and national organizations to enforce the partisan-composition provisions of MCL 168.674(2) and MCL 168.765a(2).

Plaintiffs' central contention is that MCL 168.674(2) confers a right to partisan parity of election-inspector appointments to major political parties' state and national organizations, whereas MCL 168.674(3) and (4) create a separate and distinct right for major party county chairpersons regarding challenges to individual election-inspector appointments. In support of their positions, both plaintiffs and defendants invoke the doctrine of *expressio unius est exclusion alterius*, which means "the expression of one thing is the exclusion of another." See *Mich Ambulatory Surgical Ctr v Farm Bureau Gen Ins Co of Mich*, 334 Mich App 622, 632; 965 NW2d 650 (2020). Under the *expressio-unius* doctrine, it is presumed that, when the Legislature employs a list or series in a statute, the Legislature intended to exclude all items that are not listed. *Id*. Plaintiffs argue that by expressly granting major party county chairpersons the authority to challenge the qualifications of individual election-inspector appointees, the Legislature intended to exclude from county chairpersons the authority to challenge the overall partisan composition of election-inspector appointees. Defendants, on the other hand, argue that by expressly giving authority to only county chairpersons regarding partisan challenges to election-inspector appointees, the Legislature intended to exclude all others from making partisan challenges to the appointment of election inspectors.

Given that it appears that the *expressio-unius* doctrine could be invoked by both parties, we conclude that the more appropriate canon of statutory construction to employ is *casus omissus pro omisso habendus est* (nothing is to be added to what the text states or reasonably implies). See *Id*. Under *casus-omissus* doctrine, a court is prohibited "from supplying provisions omitted by the Legislature." *Id*.

Here, considering the Michigan Election Law as a whole, it can be properly concluded that the Legislature intended to omit a right for major political party state and national organizations to challenge the partisan composition of a slate of election-inspector appointees. Indeed, the Legislature has shown that it knows how to give authority to a major political party's statewide organization when it chooses to do so. Under the Michigan Election Law, the state board of canvassers is responsible for receiving the election results from across the state, determining the outcome of each election and ballot question, and certifying the results. MCL 168.841(1). The Legislature has given the state central committee of each major political party the ability to nominate three of its members for appointment to the state board of canvassers and submit those nominees to the governor. MCL 168.22a(1).[7] In addition, the Legislature has (recently) directed that the majority leaders and minority leaders shall also submit the names of one individual to

[7] Under the recently amended version of MCL 168.22a, a nominating role is also given to the majority and minority leaders in the senate and house. See MCL 168.22a(1)(b).

serve as nominee for each position that is up for reappointment of that major political party. MCL 168.22a(1)(a). Further, under the recently amended version of MCL 168.22a, a nominating role is also given to the majority and minority leaders in the senate and house. See MCL 168.22a(1)(b). The governor is then required to appoint one of the nominated individuals to the state board of canvassers. MCL 168.22a(1). If a state central committee of a major political party or the majority or minority leaders of the same major political party fail to provide nominees to the governor, the governor is, nevertheless, required to nominate a member of that major political party to the state board of canvassers. MCL 168.22a(5).

The Legislature has also given state and national parties the ability to have direct control over who may monitor election inspectors' administration of polling and ballot counting. Poll inspectors are not the only volunteers the major parties rely upon to promote the integrity of elections at polling and ballot-counting facilities. Political parties and other interested organizations have a statutory right to appoint election challengers and coordinate election challengers' activities. MCL 168.730(1) and (3). Election challengers have the right to raise challenges to a person's right to vote, perceived election process violations by election inspectors, and perceived violations of ballot-counting procedures. MCL 168.733(1). State or local officials must approve a party or organization's eligibility to appoint election challengers. MCL 168.731(1).

In contrast, MCL 168.674 and MCL 168.765a do not provide any role directly to the state or national organizations of major political parties. A board of election commissioners' duty to make partisan appointments is independent of the actions of a major political party's state and national organizations. The statutes only give a role to major political party county chairpersons, and that role is limited. Major party county chairpersons may submit lists of prospective election-inspector appointees to city clerks. MCL 168.673a. However, prospective election inspectors must apply for the position directly to a city clerk. MCL 168.677(1). Boards of election commissioners may, but are not required to appoint candidates from a county chairperson's list. MCL 168.674(1). Thus, MCL 168.674(1) anticipates that a board of election commissioners will not rely exclusively on the major party county chairpersons, or the efforts of state and national organizations, to fulfill the partisan-composition requirements. Moreover, after making election-inspector appointments, a board of election commissioners is required to send a list of appointees and their party affiliations to major party county chairpersons, not the major political parties' state or national organizations. MCL 168.674(2).

To construe MCL 168.674 and MCL 168.765a as granting to major political parties' state and national organizations a right to enforce the partisan-composition provisions would read into the statutes provisions that the Legislature did not include. The Legislature has shown in other statutes that it knows how to give authority to major political parties' state or national organizations. The responsibility for appointing as-equal-as-possible numbers of election inspectors from the two major political parties rests with boards of election commissioners. The statutes at issue in this case only offer a role to county chairpersons to assist boards of election commissioners in locating prospective election inspectors to meet the partisan-composition requirements. The Legislature has not given state or national political party organizations a role in that process. Therefore, major political party county chairpersons, not plaintiffs, are the proper parties to litigate the responsibilities of boards of election commissioners to fulfill their statutory obligations. See *White*, 312 Mich App at 573.

In conclusion, the statutory schemes of MCL 168.674 and MCL 168.765a do not imply that the Legislature intended to confer standing upon major political parties to enforce the partisan-composition requirements of the statutes. Plaintiffs do not have standing on that basis to bring their claims in this case.

We next address plaintiffs' argument that they have standing to enforce the partisan-composition requirements of MCL 168.674(2) and MCL 168.765a(2) on the basis that they have a special injury, right, or substantial interest regarding the enforcement of the statutes. Although this Court has not addressed whether major political parties have standing to enforce the partisan-composition provisions of MCL 168.674(2) and MCL 168.765a, this Court has addressed the issue as it pertains to an individual. See *White*, 312 Mich App at 572. In *White*, the plaintiff, an individual, brought an action seeking a declaratory judgment against the Highland Park Election Commission and a writ of mandamus to require the commission to appoint Republican election inspectors when no Republicans had applied for the position or been appointed. *Id*. The trial court ruled that the plaintiff lacked standing to pursue the claims. *Id*. This Court agreed, reasoning as follows:

> . . . MCL 168.674(2) provides no legal cause of action, neither to White nor to any other member of the public, to enforce its provisions. Nor does White, who as to this issue is no different than all other members of the public (and she did not even allege that she was a resident of Highland Park, where the electors would have been working), have a substantial interest in seeing the statute enforced. See *Lansing Sch Ed Ass'n*, 487 Mich at 372. Indeed, the statute explicitly gives the right to enforce the political party designations to the major political party county chairs, MCL 168.674(3), which is consistent with other parts of the statute that allow those same county chairs to submit names on behalf of their parties to city election officials for use as election inspectors. See MCL 168.673a and MCL 168.674(1). As noted, the statute does not provide for a civil cause of action, but instead provides county chairs with the ability to file administrative appeals to challenge certain inspector appointments. MCL 168.674(3) and (4). In essence, the Legislature has created a form of public enforcement through an administrative appeal process, and has made that process available only to county chairs of the major political parties. White does not have standing to sue to enforce the provisions of MCL 168.674. [*Id*. at 573.]

Plaintiffs do not argue that *White* was incorrectly decided. Rather, they argue that the trial court erred by applying *White* to this case without separately considering the test for standing articulated in *Lansing Sch*. According to plaintiffs, the holding in *White* only applied to the specific facts of that case. We agree because, although the *White* Court applied the standing test from *Lansing Sch* to an individual, it did not address whether the standing analysis would be different for a major political party. *Id*. at 572-573. Therefore, the decision in *White* is instructive, but not dispositive. We must, therefore, consider whether plaintiffs have shown under the analysis from *Lansing Sch* that they have a special injury, right, or a substantial interest regarding the enforcement of the partisan-composition provisions that is different from the interest of the public at large.

In *Lansing Sch*, the Supreme Court considered whether the plaintiffs had standing to bring claims on the basis that the statute at issue conferred upon them a substantial interest or a special right that, if violated, would injure them in a way that was different from the injury suffered by the public at large. *Lansing Sch*, 487 Mich at 373. The plaintiffs were four Lansing School District teachers, the Lansing Schools Education Association, the Michigan Education Association, and the National Education Association. *Id*. at 353. The teachers alleged that they were physically assaulted by students in a school and the students were suspended, but not expelled. *Id*. The plaintiffs filed suit against the Lansing School District and the Lansing Board of Education seeking a declaratory judgment, injunctive relief, and a writ of mandamus to force the defendants to enforce MCL 380.1311a(1), which requires a school district to expel a student who physically assaults a school employee at school. *Id*. at 353-354. The Court concluded that the plaintiffs had standing "because they have a substantial interest in the enforcement of MCL 380.1311a(1) that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced." *Id*. at 373. The Court observed that "the purpose of the section is to create a safer school environment and, even more specifically, a safer and more effective working environment for teachers." *Id*. at 374. The teachers' interest in enforcing that right was different from the citizenry at large because members of the public are generally not inside schools and only an assault against a school employee led to the mandatory expulsion of the offending student. *Id*. Therefore, the statute conferred upon the teachers a right to be protected from physical assault and the plaintiffs had standing to seek enforcement of that statutory right. *Id*. at 376.[8]

In *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629; 537 NW2d 436 (1995), the Supreme Court considered another case involving whether the plaintiffs had an interest that was different from the public at large. In that case, the Detroit city council had appropriated funds for the city to hire more firefighters, and the mayor of Detroit refused to spend the appropriated funds for that purpose. *Id*. at 632. The Detroit Fire Fighters Association and several of its firefighter-members sought a writ of mandamus to require the mayor to spend the funds that the city council had appropriated and hire more firefighters. *Id*. The plaintiffs alleged that the firefighters suffered a unique injury because the failure of the city to hire more firefighters caused the existing

[8] The Court held that the professional organization plaintiffs had standing in the case because it was undisputed that the teacher-plaintiffs were members of the professional organizations and an organization has standing to litigate the interests of its members when the members personally have standing. *Lansing Sch*, 487 Mich at 373 n 21. Plaintiffs briefly contend that they have organizational standing based upon the interests and rights of the individual Republican election inspectors that allegedly lost their opportunity to serve as election inspectors due to the actions of defendants. We disagree. Plaintiffs have not shown that their individual members would have standing to challenge a board of election commissioners' decision to not appoint them to an election inspector position. In general, individuals do not have a right to hold an appointed governmental position. *Aguirre v Michigan*, 315 Mich App 706, 717; 891 NW2d 516 (2016). Moreover, MCL 168.674(1) and (2) do not require that any person in particular be appointed. Plaintiffs argument, therefore, lacks merit.

A closer question, and one not raised on appeal, is whether plaintiffs would have organizational standing based upon the rights and interests of the Republican chair for Genesee County. Because the issue has not been raised, we decline to consider it.

firefighters to incur greater risks of physical harm, emotional distress, and a loss of morale, as well as alleging that the department would lose efficiency of operations. *Id*. at 635. The Court held that the plaintiffs did not suffer an injury unique from the general public. *Id*. at 638. The Court noted that a firefighter who fights 200 fires a year is at greater risk of injury than a firefighter who fights 100 fires a year. *Id*. However, the Court concluded that having fewer firefighters in the fire department increased the risk of physical harm for both the firefighters and the residents of the city who were at danger during fires. *Id*. Therefore, the plaintiffs lacked standing because the interest in having more firefighters employed by the city was shared between the members of the fire department and the members of the public at large. *Id*.

This case is more similar to *Detroit Fire Fighters* than it is to *Lansing Sch*. In *Lansing Sch*, the statute at issue was designed to protect school employees from physical harm and to help teachers better educate students. *Lansing Sch*, 487 Mich at 374. There was a benefit conferred directly upon school employees that was in service to the broader goal of providing a better education to students. The benefit to the public at large was attenuated from the primary purpose of the statute. Here, the benefit of the statute is not as directly conferred upon major political parties as it was upon the teachers in *Lansing Sch*. Rather, the partisan-composition requirements of MCL 168.674(2) and MCL 168.765a(2) create a right for major political parties insofar as they make it easier for the major political parties to help protect the integrity of elections. However, the statutes at issue in this case cannot be interpreted as providing some benefit or assistance to a major political party toward having its candidates elected. The Michigan Constitution requires the Legislature to preserve the "purity" of elections. 1963 Const, art II, § 4. Statutes must be construed in a manner that is constitutional when possible. *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 317 Mich App 1, 24; 894 NW2d 758 (2016). Although the Michigan Election Law gives the major political parties a role in the administration of elections, the statutes must be read as a means of preserving the purity of elections. The benefit to a major political party of having its candidate elected is ancillary to the goal of ensuring the proper outcome of an election. The benefit of the partisan-composition provisions of MCL 168.764(2) and MCL 168.765a(2) is conferred upon the public at large. Having equal numbers of election inspectors from both major political parties serves a checks-and-balances function in the administration of elections. When an equal number of election inspectors are members of each major political party, there is a reduced chance that a party's members will commit improprieties. In that regard, partisan balance also offers to the public some assurance of propriety in polling and ballot counting because the public knows that one major political party has not been allowed to administer an election unchecked. That is, like in *Detroit Fire Fighters*, the intent behind the legislation at issue is to provide a benefit to the public at large. See *Detroit Fire Fighters*, 449 Mich at 638. 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.

Plaintiffs also contend that they suffered a special injury because they expended time and resources to recruit Republican election-inspector candidates and they were injured when the board

of election commissioners did not appoint those candidates. Plaintiffs were not injured in a unique way on the basis of any violations of MCL 168.674(2) and MCL 168.765a(2). The statutes do not give a direct role to the major political parties' state or national organizations in the appointment of partisan election inspectors and a board of election commissioners is not required to appoint election-inspector candidates that are identified by major political parties. MCL 168.674(2) and MCL 168.765a(2) did not require defendants to act in response to plaintiffs' efforts. Therefore, any alleged injury plaintiffs suffered regarding unrequited efforts to have Republican election-inspector candidates appointed was not a result of noncompliance with MCL 168.674(2) and MCL 168.765a(2). Stated differently, defendants' actions (or inactions) did not injure plaintiffs because defendants were not required to act in any particular way in response to plaintiffs' recruitment activities. Thus, plaintiffs have not shown that they suffer a special injury when the partisan-composition provisions of the statutes are violated.

In conclusion, plaintiffs have not shown special injury, right, or a substantial interest in the enforcement of the partisan-composition provisions of MCL 168.674(2) or MCL 168.765a(2). Therefore, plaintiffs do not have standing to enforce the statutes on that basis.

Finally, plaintiffs argue that they have standing to pursue a declaratory judgment pursuant to MCR 2.605. Under MCR 2.605(A)(1):

> 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.

In *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006), this Court explained:

> The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants.

"[T]o assert a claim for declaratory judgment under MCR 2.605, the plaintiff (1) must allege a 'case of actual controversy' within the jurisdiction of the court, and (2) the claimant must be an 'interested party seeking a declaratory judgment.' " *T & V Assoc*, ___ Mich App at ___; slip op at 6.

We first consider whether plaintiffs are interested parties under MCR 2.605. "Generally, a party has standing if the party has a real interest in the cause of action or the subject matter of the cause of action." *Id*. at ___; slip op at 7. When considering standing in the context of MCR 2.605, "a party's interest is sufficient if the party has a legally protected interest that is in jeopardy of being adversely affected . . . ." *Id*. at ___; slip op at 6.

Although it does not appear that this Court or the Supreme Court has offered a definitive statement, this Court's post-*Lansing-Sch* decisions indicate that the inquiry into whether a plaintiff has a sufficient interest to seek a declaratory judgment is not substantively different from the inquiry into whether a plaintiff can establish standing by showing a special injury, right, or

substantial interest created by the statute. In *Lansing Sch*, the Court did not analyze whether the plaintiffs could fulfill the requirements to obtain a declaratory judgment and remanded the case to this Court for consideration of that issue. *Lansing Sch*, 487 Mich at 373. On remand, the *Lansing Sch* Court determined that the plaintiffs had an interest to seek a declaratory judgment on the basis that the Supreme Court had held that the plaintiffs had established a substantial interest in the enforcement of the statute at issue, without further inquiry. *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 517; 810 NW2d 95 (2011). In another case, employees of Central Michigan University (CMU) sought a declaratory judgment to stop a university policy from being implemented that would have restricted employees' rights to run for public office. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 489-493; 815 NW2d 132 (2012). This Court held that the employees had standing to seek a declaratory judgment regarding the policy "because the university employees have a special and substantial interest in ensuring that the CMU officials' policies do not violate their statutory rights under the Act, and that interest is different from any rights or interests of the public at large." *Id*. at 497, citing *Lansing Sch*, 487 Mich at 372. Thus, this Court has used substantively the same language for determining whether a party has a sufficient interest to pursue a declaratory judgment as it uses to determine whether a party has standing to bring an action on the basis of having a special injury, right, or a substantial interest in the enforcement of a statute. Without deciding that one cannot show an interest sufficient to seek a declaratory judgment without also meeting the requirements to show a special injury, right, or a substantial interest, it can be concluded that the inquiries are, at least, very similar.

Here, plaintiffs cannot show that they are interested parties who are entitled to a declaratory judgment. Plaintiffs do not have a legally protected interest in the enforcement of MCL 168.674(2) and MCL 168.765a(2) that is in jeopardy of being adversely affected that is different from the interest of the public at large. See *T & V Assoc*, ___ Mich App at ___; slip op at 6. Plaintiffs offer only cursory treatment regarding whether they have a sufficient interest to seek a declaratory judgment, and plaintiffs make a much more in-depth argument regarding standing on the basis of a special injury, right, or a substantial interest. Given the similarity of the inquiries regarding the two theories of standing, and given that we have already concluded that plaintiffs cannot establish that they have standing on the basis of a special injury, right, or a substantial interest, we conclude that plaintiffs are not interested persons for purposes of a declaratory judgement.[9]

In conclusion, plaintiffs do not have standing to pursue a declaratory judgment regarding the enforcement of MCL 168.674(2) and MCL 168.765a(2).

Affirmed. Defendants may tax costs as the prevailing parties. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Kristina Robinson Garrett

[9] In light of our conclusion that plaintiffs are unentitled to seek a declaratory judgment because they are not "interested parties," we need not determine whether there is an actual controversy in this case.

Exhibit F

STATE OF MICHIGAN

COURT OF APPEALS

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER,

Plaintiffs-Appellees,

v

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,

Defendants-Appellants

FOR PUBLICATION
October 19, 2023
9:15 a.m.

No. 363503
Court of Claims
LC No. 22-000162-MZ

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellees,

v

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,

Defendants-Appellants.

No. 363505
Court of Claims
LC No. 22-000164-MZ

Before: BOONSTRA, P.J., and BORRELLO and FEENEY, JJ.

PER CURIAM.

This consolidated appeal concerns various challenges by plaintiffs[1] to a manual defendants published in May 2022 providing instructions to election challengers and poll challengers. The manual was not published as a formal administrative rule under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. As the trial court, the Court of Claims observed at the opening of its opinion, "[a]n executive branch department cannot do by instructional guidance what it must do by promulgated rule. This straightforward legal maxim does most of the work in resolving these two consolidated cases." Not only do we agree with this observation, we also agree with the trial court's resolution on the issues now challenged on appeal. Accordingly, we affirm.

The May 2022 manual, titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers," is the latest version of a manual that defendants have published for the past 20 years, with the most recent version having been published in October 2020. The manual provides instructions[2] for election challengers and poll watchers. Plaintiffs filed these cases challenging various provisions in the manual. Plaintiffs include elections challengers for the November 2022 general election, two candidates for the Legislature, the Michigan Republican Party, and the Republican National Committee.

The trial court summarized the facts underlying this case as follows:

> Plaintiffs include several election challengers for the November 2022 general election; two candidates for the Michigan Legislature; the Michigan Republican Party; and the Republican National Committee. Section 730 of the Michigan Election Law, MCL 168.1 *et seq*., permits political parties to designate challengers to be present in the room where the ballot box is kept during the election. MCL 168.730. These consolidated cases relate to a manual that the Michigan Bureau of Elections regularly issues relating to election challengers and poll watchers. By all accounts, the Bureau has issued several iterations of the manual since at least 2003; the one just prior to the current one was issued in October 2020. In May 2022, defendants drafted and published the current version titled, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" ("May 2022 Manual"). . . .

[1] As did the trial court, when necessary to distinguish between the two sets of plaintiffs, we shall refer to the plaintiffs in Docket No. 363503 as the "O'Halloran plaintiffs" and those in Docket No. 363505 as the "DeVisser plaintiffs." When no such distinction is necessary, they shall collectively be referred to simply as "plaintiffs."

[2] The introductory paragraph of the manual describes its purpose as follows:

> This publication is designed to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan. Election challengers and poll watchers play a constructive role in ensuring elections are conducted in an open, fair, and orderly manner by following these instructions.

On September 28, 2022, plaintiffs Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, "O'Halloran Plaintiffs"), sued defendants in this Court in Docket No. 22-000162-MZ. O'Halloran, Giacobazzi, and Cushman are designated election challengers for the November 2022 general election. Penny Crider is a candidate for the Michigan House of Representatives, and Kenneth Crider is a candidate for the Michigan Senate. The O'Halloran Complaint raises two claims. In Count I, the O'Halloran Plaintiffs allege that the May 2022 Manual violates Section 733 of the Michigan Election Law, MCL 168.733. In Count II, the O'Halloran Plaintiffs assert that the May 2022 Manual was promulgated without the proper notice-and-comment requirements outlined in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

Two days later, plaintiffs Richard DeVisser (another election challenger), the Michigan Republican Party, and the Republican National Committee (collectively, "DeVisser Plaintiffs") sued defendants separately in Docket No. 22-000164-MM. In Count I, the DeVisser Plaintiffs allege that certain provisions of the May 2022 Manual violate the Michigan Election Law. Like the O'Halloran Plaintiffs, the DeVisser Plaintiffs also allege that the May 2022 Manual is a rule promulgated without the required notice-and-comment procedures outlined in the APA.

Both sets of plaintiffs request . . . a declaration that the publication is void in toto, or alternatively, that certain passages must be removed before the November 2022 general election. The O'Halloran Plaintiffs have moved for a temporary restraining order ("TRO") and preliminary injunction; similarly, the DeVisser Plaintiffs have sought expedited declaratory relief under MCR 2.605(O).

. . . [T]his Court consolidated the cases on October 3, 2022, and ordered defendants to show cause why the relief requested in the complaints should not be granted. Defendants responded and moved for summary disposition . . . .

. . . Defendants . . . assert that the May 2022 Manual did not need to be promulgated through notice-and-comment rulemaking because the Michigan Election Law grants the Secretary of State broad authority to issue instructions, advice, and directives, and the May 2022 Manual fits within these categories. . . .

Both sets of plaintiffs responded to defendants' motion for summary disposition. They reiterate that the May 2022 Manual's language extends beyond the Michigan Election Law and should have been promulgated as a rule in accordance with the APA.

The trial court issued its extensive opinion and order on October 20, 2022.[3] Ultimately, the trial court granted some but not all of the relief plaintiffs requested. Plaintiffs have not appealed and challenged the denial of that relief. While the trial court rejected some of what it described as "broad, sweeping" requests for relief, it did identify five specific areas where plaintiffs were entitled to relief: (1) the credential-form requirement, (2), communication with election inspectors other than the "challenger liaison," (3) the prohibition on recording "impermissible challenges," (4) the prohibition on electronic devices in the Absent Voter Counting Board (ACVB) facilities, and (5) appointment of challengers on election day. On appeal, defendants do not challenge the last category. Accordingly, we consider the first four and, like the trial court, shall look to each in turn.

There are two primary issues present in this case. First, whether the challenged provisions in the manual are consistent with Michigan Election Law, MCL 168.1 *et seq*., or are in conflict with the statute. And, second, whether defendants needed to promulgate those provisions, even if authorized by statute, by a formal rule as required by the Administrative Procedures Act (APA), MCL 24.201 *et seq*., which the manual was not. While a rule promulgated in accordance with the APA has the force of law, *Slis v Michigan*, 332 Mich App 312, 346; 956 NW2d 569 (2020), other pronouncements do not, *Twp of Hopkins v State Boundary Comm'n*, 340 Mich App 669, 689; 988 NW2d 1 (2022). As explained in *Hopkins*:

> The APA "applies to all agencies and agency proceedings not expressly exempted." MCL 24.313. An "agency" is defined as a "state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 24.203(2). There is no dispute that the Commission is a state agency. The APA defines a "rule" to include "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 ...." MCL 24.207. A "rule" does not include a "guideline" "that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). The APA defines "guideline" as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7). The APA prescribes how

[3] On November 3, 2022, the Supreme Court ordered that "the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from the Court of Appeals decision, until further order of this Court." *DeVisser v Secretary of State*, 510 Mich 994; 981 NW2d 30 (2022); *O'Halloran v Secretary of State*, 510 Mich 970; 981 NW2d 149 (2022). Two Justices separately concurred, and two dissented, in lengthy separate statements. *DeVisser*, 510 Mich at 994-1018; *O'Halloran*, 510 Mich at 970-994.

> agencies adopt guidelines, MCL 24.224 and MCL 24.225 and specifies that "[a]n agency shall not adopt a guideline in lieu of a rule," MCL 24.226. [340 Mich App at 689.]

Moreover, an administrative rule cannot conflict with a statute. *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 161; 975 NW2d 52 (2021) ("an administrative agency is not empowered to change law enactive by the Legislature. . . .When an administrative rule conflicts with a statute, the statute controls"). Because this case involves an interpretation of a statute, we review the trial court's decision de novo. *Slis*, 332 Mich App at 335.

Const 1963, art 2, § 4(2) continues to provide[4] as follows:

> Except as otherwise provided in this constitution or in the constitution or laws of the United States 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. . . .

According to MCL 168.21, "[t]he secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." Further, under MCL 168.31(1), the Secretary "shall do all of the following":

> (a) Subject to subsection (2),[5] issue instructions and promulgate rules pursuant to the administrative procedures act . . . for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations

[4] The recent amendment of Const 1963, art 2, § 4(1) only expressly recognizes that the right to vote includes the right to be free from impositions of unreasonable burdens in doing so. The new provisions neither added anything to existing authority as concerns the extent to which the Secretary of State may issue binding authority without recourse to APA rulemaking, nor otherwise call for reading the pertinent provisions of the Election Law in a different light. Accordingly, the constitutional amendment of which the amicus curiae makes issue does not obviate the need to review the decision below on its merits under then-existing law.

[5] Subsection (2) requires the Secretary of State to "promulgate rules establishing uniform standards for state and local nominating, recall, and ballot question petition signatures."

in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.

* * *

(e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

* * *

(h) Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution.

* * *

(n) Create an election day dispute resolution team that has regional representatives of the department of state, which team shall appear on site, if necessary.

Nondelegation Doctrine

Although neither the trial court nor the parties have framed their positions in terms of nondelegation doctrine, to the extent that defendants suggest that their prerogative to issue "instructions . . . for the conduct of elections" under MCL 168.31(1)(a) authorizes them to issue any new requirement without following APA rule procedures simply by calling it an instruction, that doctrine is implicated.

Our state Constitution includes the following provision: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. Thus, our Constitution prohibits the Legislature from delegating its lawmaking powers to the executive branch. The "essential purpose" of the doctrine is "to protect the public from misuses of the delegated power." *Blue Cross & Blue Shield v Governor*, 422 Mich 1, 51; 367 NW2d 1 (1985). The Legislature may, however, authorize an administrative agency to exercise certain powers when fulfilling its legislatively created duties and responsibilities. See, e.g., *Mich Central R Co v Mich R Comm*, 160 Mich 355, 361-368; 125 NW 549 (1910); *G F Redmond & Co v Mich Securities Comm*, 222 Mich 1, 192 NW 688 (1923). The test for determining whether the Legislature has properly authorized such agency action is whether the Legislature has prescribed "standards . . . as reasonably precise as the subject matter requires or permits" when granting regulatory or rulemaking authority to an administrative agency. *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25, 27 (1956).

One legal commentator has concluded that "Michigan decisions" provide "no clear rule as to when a legislative rule must be promulgated or, for that matter, whether a rule is legislative or interpretative." McKim, III, *The Sometimes Dubious Efficacy of Michigan Department of*

Treasury "Rules," "Revenue Administrative Bulletins," "Letter Rulings," "Questions and Answers" and Other Publications, 60 Tax Law 1019, 1048 (2007).

Although we are aware of no authority that stands for the proposition that the Legislature may not delegate to the executive branch the authority to issue a rule, as defined by MCL 24.207, without requiring the APA's rulemaking procedures, we proceed in our review while keenly mindful of the nondelegation doctrine and the caselaw calling for adherence to APA procedures in particular.|

Rulemaking

The APA defines a "rule" 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 by the agency." MCL 24.207. The APA further states that "[a]n agency shall not adopt a guideline in lieu of a rule." MCL 24.226. "An agency's failure to follow the process outlined in the APA renders a rule invalid." *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015), lv den 499 Mich 887 (2016). "In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory." *Danse Corp v Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002).

After setting forth the general definition of an administrative "rule," MCL 24.207 sets forth a list of things that do not constitute such rules, including the following:

> (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
>
> * * *
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

"[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *American Federation of State, Co & Mun Employees v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996).

Defendants argue that the challenged instructions fall under the "permissive statutory power" exception to the definition of "rule" set forth in MCL 24.207(j). In support, defendants cite *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19; 703 NW2d 822 (2005), and *Hinderer v Dep't of Social Servs*, 95 Mich App 716, 727; 291 NW2d 672 (1980).

In *By Lo Oil*, 267 Mich App at 47, this Court recited that "Subsection 7(j) excepts administrative action from the APA's definition of 'rule' when the Legislature has either explicitly

or implicitly authorized the action in question," and concluded that the agency's use of an administrative bulletin to determine certain tax liability came under that exception because the pertinent statute "explicitly required the department to 'prescribe' the invoice required . . . and did not mandate the department to do so pursuant to the procedural requirements of the APA."

In *Hinderer*, 95 Mich App at 727, this Court approved an agency's use of a "lag budgeting system" for reducing benefits for a recipient of the Aid to Families with Dependent Children program, which was not promulgated as an APA rule, on the ground that the agency was statutorily empowered to "adopt . . . a budgetary method of the director's own choosing."

Defendants assert that the Secretary of State's duty under MCL 168.31(1)(a) to "issue instructions and promulgate rules . . . for the conduct of elections" includes the legislative authority "to issue instructions rather than rules" as an exception to the requirement that administrative rules be promulgated in accord with the APA. The trial court held that "the Secretary's responsibility for issuing instructions is distinct from the authority to promulgate rules, where the latter has the force and effect of law, but the former does not." In fact, defendants' position would leave them at liberty to issue binding regulations at will, without ever having to adhere to the notice-and-hearing requirements of the APA. MCL 168.31(1)(a) preserves the distinction between mere instructions and APA rules, thus calling on the defendants to respect that distinction and issue each kind of regulation with the degree of formality that is required.

The question, then, for each of the four contested facets of the May 2022 Manual at issue is whether the challenged regulation comports with the Election Law, and, if so, whether it constitutes a sufficient extension of that enabling law that its validity depends on promulgation as an APA rule.

The credential form requirement.

MCL 168.732 requires that election challenges possess written credentials:

> Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

Defendants have created a form that challengers are purportedly required to use to establish their credentials. Specifically, on pages 4-5 of the manual,[6] it states:

> This authority, also known as the Michigan Challenger Credential Card, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger.

The trial court noted that this appears to be a new requirement and that in the past the political parties issued their own credential forms to challengers. The trial court further stated that it did not take issue with having a uniform credential form, but ultimately concluded that the Secretary lacks the authority to require that challengers use defendants' form:

> [O]ur Legislature expressly set out the "evidence" needed to show that a person was properly credentialed as a challenger. In MCL 168.732, a section entitled, "Presence of challenger in room containing ballot box; *evidence of right to be present*," (emphasis added), our Legislature set forth the following three items that evidence a valid challenger: (a) "[a]uthority signed by the recognized chairman or presiding officer" of the organization or committee (here, major political party); (b) the written or printed name of the challenger; and (c) the precinct number for the challenger's assigned precinct. Because our Legislature set forth three specific requirements that a person must satisfy to evidence that the person is a valid challenger, defendants cannot, in the absence of a promulgated rule, add a fourth, i.e., the mandatory use of a particular form issued by the Secretary of State.

The trial court did acknowledge that the Secretary of State can certainly create a form for the challengers' convenience. As the trial court observed,

> our Legislature has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies with the Michigan Election Law—nothing more is required. The provision in the May 2022 Manual requiring the use of the uniform challenger-credential form violates the Michigan Election Law and APA.

[6] All references to the manual are from the version appended as an exhibit to the trial court's October 20, 2022 opinion.

We agree with the trial court. The Legislature has neither required nor authorized the creation of a mandatory form. Indeed, given that the Legislature has set forth the requirements for challenger credentialing, nothing more may be added.[7]

The requirement that communication only be with the "Challenger Liaison."

On page five of the manual, defendants create the position of "Challenger Liaison," who is one of the election inspectors. On the top of page six, the manual it states in bold print: "**Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff**." This directive is reinforced later on the page with this statement: "Challengers must communicate only with the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." The restriction is again repeated on page 21. According to the manual, a violation of this or any other instruction or a direction given by an election inspector results in a warning being issued and a repeat violation may result in the challenger's ejection.

The trial court concluded that this requirement was inconsistent with the statute:

> Plaintiffs argue that the manual's limitation on which inspectors the challengers may interact with violates MCL 168.733(1)(e), which provides that a challenger may bring certain issues to "an election inspector's attention" without restriction to a *particular* inspector.
>
> The authority to designate a "challenger liaison" is absent from the Michigan Election Law—in fact, the very label appears nowhere in statute. Defendants have not presented this Court with any statute, common law, case law, or promulgated rule that gives them the authority to restrict with which election inspector a challenger can communicate. Our Legislature provided a challenger the right to communicate to "an" election inspector, and defendants cannot artificially restrict that to a designated inspector. Whether it makes sense to have such a liaison is one thing; it is another thing entirely to require, at the risk of being ejected, a challenger to speak to only the designated liaison. This provision of the May 2022 Manual goes well beyond what is provided in law and impermissibly restricts a challenger's ability to bring certain issues to any inspector's attention. Accordingly,

[7] We do note some apparent contradiction in the trial court's opinion. It states that "defendants cannot, in the absence of a promulgated rule, add a fourth" requirement. [10/20/20 Opinion and Order, p 15.] This would imply that defendants could, if it had promulgated a rule, establish the requirement. It later states that mandatory use of defendants' uniform challenger credential form "violates the Michigan Election Law and APA." But if it would violate the election statute, then it would seem to follow that defendants could not require the use of the form even if it did promulgate a rule. In any event, at this point we need not engage in an extensive analysis of this point as defendants have not promulgated this as a rule.

the manual must be revised to make clear that a challenger need not bring an issue to the attention of only a liaison challenger, but instead can bring such issue to the attention of any election inspector at the applicable location. [Emphasis in original.]

MCL 168.733(1) provides in pertinent part:

> The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:
>
> * * *
>
> (e) Bring to *an* election inspector's attention any of the following . . . .

As the trial court stated, the statute itself authorizes a challenger to bring a matter to the attention of "an election inspector," not a "challenger liaison." We agree with the trial court that it may be beneficial to designate one of the election inspectors as the challenger liaison to serve as a central point of contact for the challengers. But the statute does not grant defendants the authority to require that a challenger only bring matters to such a liaison and, perhaps more importantly, the statute explicitly authorizes challengers to communicate with any election inspector. Defendants' attempt to restrict that right is a violation of the statute.

The prohibition on recording "impermissible challenges."

This issue involves a restriction in the manual on what challenges may be made. The manual explains the process for making a challenge:

> A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below. Assuming the challenge is permissible, the substance of the challenge, the time of the challenge, the name of the challenger, and the resolution of the challenge must be recorded in the poll book. If the challenge is rejected, the reason for that determination must be recorded in the poll book.
>
> An impermissible challenge, as explained below, need not be noted in the poll book.

The manual defines an "impermissible challenge" as:

> Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:
>
> • Challenges made to something other than a voter's eligibility or an election process;
>
> • Challenges made without a sufficient basis, as explained below; and

• Challenges made for a prohibited reason.

The manual then states that while an election inspector is not required to note an impermissible challenge in the poll books, they may do so. In fact, it "encourages" an inspector to note the content of the impermissible challenge and any warning given to the challenger. If a challenger makes multiple impermissible challenges, the inspector is encouraged to note the content and number of such challenges. The manual then states in bold type: "**Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**"

MCL 168.727(2) outlines the duties of an election inspector when a challenge is made:

> (2) Upon a challenge being made under subsection (1), an election inspector shall immediately do all of the following:
>
> (a) Identify as provided in sections 745 and 746 a ballot voted by the challenged individual, if any.
>
> (b) Make a written report including all of the following information:
>
> (i) All election disparities or infractions complained of or believed to have occurred.
>
> (ii) The name of the individual making the challenge.
>
> (iii) The time of the challenge.
>
> (iv) The name, telephone number, and address of the challenged individual.
>
> (v) Other information considered appropriate by the election inspector.
>
> (c) Retain the written report created under subdivision (b) and make it a part of the election record.
>
> (d) Inform a challenged elector of his or her rights under section 729.

As the trial court noted, the statute does not use the terms "permissible" and "impermissible" in describing challenges.[8] Nor does it require the documentation of only "permissible" challenges. It requires the documentation of all challenges, permissible or impermissible. Accordingly, the trial court concluded that

> to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election

[8] MCL 168.727(3) does state that a "challenger shall not make a challenge indiscriminately and without good cause." And it also provides that an "individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor." But it does not excuse such improper challenges from being documented.

> inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.*

The trial court did conclude the statutory documentation requirement only extends to challenges regarding voter qualification and that defendants have the discretion to adopt a recordkeeping system regarding challenges not involving voter rights, i.e., for a reason other than those listed in MCL 168.727(1) or MCL 168.733(1)(c).

The trial court also addressed the prohibition on making repeated impermissible challenges and it resulting in the challenger's removal. MCL 168.733(3) provides a basis for expulsion of a challenger: "Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board." The statute does not authorize defendants to adopt a rule providing other reasons for expulsion. Accordingly, unless the repeated "impermissible" challenges rise to the level of disorderly conduct, we agree with the trial court that there is no basis in law for the challenger's expulsion.

The prohibition on electronic devices in the Absent Voter Counting Board (ACVB) facilities.

The final provision of the manual that the trial court found problematic is the restriction on electronic devices in the ACVB: "No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day."[9] A challenger in violation of this rule may be ejected from the AVCB facility.

The trial court found statutory authority regarding restrictions on communicating certain information, but not on a ban of the possession of electronic devises:

> Thus, MCL 168.765a(9) and (10), collectively, prohibit a challenger from disclosing information relating to the processing of absentee ballots before the polls close, the disclosure of which is a felony. But MCL 168.765a does not categorically prohibit the possession of electronic devices in the AVCB facility or otherwise suggest that physical sequestration includes (or equates to) a prohibition on the possession of electronic devices.

The trial court then noted that the Legislature had plenty of opportunity in recent amendments to the election statute to include such a restriction, but did not do so:

> MCL 168.765a was enacted four years ago as a provision in a 2018 update to the Michigan Election Law. See 2018 PA 123. Our Legislature amended the same statute twice in 2020. See 2020 PA 95 and 2020 PA 177. Cell phones and

[9] The manual does permit challengers at polling places to possess electronic devices, with some restriction on their use. The prohibition on possessing one only applies to an ACVB.

> other electronic devices have been prevalent for decades and have long had the capability to record. In the face of the existence of these devices, our Legislature did not see fit to ban them in AVCB facilities when it added section 765a to the Michigan Election Law in 2018 or when it amended the statute twice in 2020. Rather, our Legislature enacted two different prophylactic measures to guard against the communication of election-related information—I.e., first, the taking of an oath, and second, physical sequestration at the AVCB facility—and, for violating either measure or otherwise communicating election-related information, our Legislature imposed the penalty of a felony conviction. See MCL 168. 765a(9) and (10). Our Legislature could have added a third prophylactic measure, maybe even the one favored by defendants, but it chose not to do so. When our Legislature enacts a public policy in one particular way but not another, its choice must be respected and enforced by the other two branches. *Spalding v Swiacki*, 338 Mich App 126, 138; 979 NW2d 338 (2021) ("When the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional.").

In sum, use of an electronic device to communicate information regarding the processing or tallying of votes is prohibited, under pain of a felony conviction, but the mere possession of an electronic device is not permitted under Michigan's election law. While the cautious approach is, as the trial court points out, for a challenger or poll watcher to simply leave their electronic device outside the room, the statute simply does not require it. As the trial court stated, "[p]rohibiting electronic devices in the AVCB facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule. The Court declines to read a prophylactic measure into a statute that does not appear in its plain language." We agree.

Defendants have broad authority to issue binding non-rule instructions on election workers, but not on challengers or other outside observers. Election workers, including inspectors, conduct operations that come under the authority of the Secretary of State, and thus while doing so are effectively the Secretary's subordinates. Accordingly, instructions directed at such subordinates are not directives of "general applicability" for purposes of the definition of "rule" under MCL 24.207. Defendants are thus free to issue binding instructions applicable to election workers without resort to the APA's formal rulemaking procedures. In contrast, election challengers, by the nature of the office, are outsiders standing ready to raise objections to how elections are conducted. Instructions directed at the latter thus go beyond defendants' immediate scope of inherent supervisory authority and instead function as regulations of general applicability, which for that reason must be issued as properly promulgated APA rules. Defendants may issue mere instructions that are binding on election workers who operate as defendants' employees and subordinates, but regulations targeting election challengers or poll watchers reach beyond defendants' general supervisory scope and must be promulgated as APA rules.

In conclusion, the relief that the trial court granted with respect to these issues is "that defendants shall have the discretion either to (1) rescind the May 2022 Manual in its entirety; (2) revise the May 2022 Manual to comply with this Opinion and Order; or (3) revise an earlier iteration of the manual to comply with this Opinion and Order." For the reasons stated above, we

are not persuaded that the trial court erred in granting this relief, and defendants shall comply with the trial court's decree.

Affirmed. Plaintiffs may tax costs.

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Kathleen A. Feeney

Exhibit G

STATE OF MICHIGAN

COURT OF CLAIMS

ROBERT GENETSKI, County of Allegan Clerk, individually and in his official capacity, and MICHIGAN REPUBLICAN PARTY,

Plaintiffs,

v

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

Defendants.
_____/

OPINION AND ORDER GRANTING SUMMARY DISPOSITION IN PART TO PLAINTIFFS AND GRANTING SUMMARY DISPOSITION IN PART TO DEFENDANTS

Case No. 20-000216-MM

Hon. Christopher M. Murray

Before the Court is defendants' January 20, 2021 motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8), as well as plaintiffs' February 3, 2021 cross-motion for summary disposition filed pursuant to MCR 2.116(C)(8). Plaintiffs' cross-motion will be GRANTED in part with respect to Count II of the amended complaint because the challenged signature-matching standards were issued in violation of the Administrative Procedures Act. As a result of the grant of summary disposition in plaintiffs' favor on Count II, Count I of the amended complaint will be dismissed without prejudice. In addition, defendants' motion for summary disposition will be GRANTED in part with respect to Counts III and IV of the amended complaint.

I. BACKGROUND

The issues raised implicate signature-matching requirements for absent voter ballot applications and absent voter ballot return envelopes contained in this state's election law. MCL

168.759 and MCL 168.761 require voters to sign applications for absent voter ballots in order to receive a ballot. In addition, this state's election laws require voters who choose to vote by absent voter ballot to sign their absent voter ballot return envelopes in order to have their ballots counted. MCL 168.764a. The signatures on the applications and the return envelopes are compared against signatures in the qualified voter file or those that appear on the "master registration card" in order to determine whether the signatures match. Signatures on applications or return envelopes that do not "agree sufficiently" with those on file are to be rejected. MCL 168.761(2). As of October 6, 2020, MCL 168.761(2)[1] was amended by 2020 PA 177 to give notice to voters' whose signatures do not "agree sufficiently" with those on file that their absent voter ballot application has been rejected. The purpose of the notice is to give voters the opportunity to correct inaccuracies with absent voter ballot signatures. The same notice requirements also apply to rejected signatures for absent voter ballots. MCL 168.765a(6). There is no dispute that this state's election law does not define what it means for signatures to "agree" or to "agree sufficiently" for purposes of comparing the signature on file with the signature on a received absent voter ballot application or absent voter ballot.

On the day PA 177 became effective, defendant Jocelyn Benson issued what defendants refer to as "guidance" for local clerks who are charged with inspecting signatures on absent voter ballot applications and ballots. The document, which was entitled "Absent Voter Ballot Processing: Signature Verification and Voter Notification Standards" largely mirrored guidance

[1] 2020 PA 302 further amended MCL 168.761 and other provisions of this state's election law. Those amendments do not become effective until June 27, 2021. This opinion and order only examines those provisions of the statute that are currently in effect at this time. And no issues have been raised with respect to the yet-to-be-effective statutory requirements.

defendant Benson had previously issued. This guidance regarding signature verification forms the heart of the issues in the present case and it requires additional examination.

The stated purpose of the at-issue document was to "provide[ ] standards" for reviewing signatures, verifying signatures, and curing missing or mismatched signatures. 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. Further, the form instructs clerks to, if there are "any redeeming qualities in the [absent voter] application or return envelope signature as compared to the signature on file, treat the signature as valid." (Emphasis in original). "Redeeming qualities" are described as including, but not being limited to, "similar distinctive flourishes," and "more matching features than nonmatching features." Signatures "should be considered questionable" the guidance explained, only if they differ "in multiple, significant and obvious respects from the signature on file." (Emphasis in original). "[W]henever possible," election officials were to resolve "[s]light dissimilarities" in favor of finding that the voter's signature was valid.[2]

The section on signature-verification procedures goes on to repeat the notion that "clerks should presume that a voter's [absent voter] application or envelope signature is his or her genuine signature, as there are several acceptable reasons that may cause an apparent mismatch." (Emphasis omitted). Next, the guidance gave excuses or hypothetical explanations for why signatures on absent voter ballot applications and absent voter ballots might not be an exact match to those that are on file. Finally, the document again mentioned the presumption when, in

[2] The guidance included a chart with what were deemed to be acceptable and unacceptable "defects" in signatures.

conclusion, it stated that clerks "*must perform* their signature verification duties with the presumption that the voter's [absent voter] application or envelope signature is his or her genuine signature." (Emphasis added). By all accounts, the guidance set forth in that document was not limited to the then-upcoming November 2020 general election, nor has it been rescinded. Rather, it appears that the guidance remains in effect for local clerks with respect to upcoming elections.

II. PLAINTIFFS' COMPLAINT

Plaintiff Robert Genetski is the Allegan County Clerk. He, along with plaintiff Michigan Republican Party, filed a complaint alleging that defendant Benson's October 6, 2020 guidance is unlawful. The December 30, 2020 amended complaint alleges that the presumption in favor of finding valid signatures is unlawful, as is the directive to find "any redeeming qualities" for signatures. They contend that the presumption contained in the guidance issued by defendant Benson will allow invalid votes to be counted. Plaintiff Genetski has not, however, alleged that this guidance caused him to accept a signature that he believed was invalid.

The four-count amended complaint asks the Court to issue declaratory and injunctive relief with respect to future elections. Count I alleges that defendant Benson violated various provisions of this state's election law by issuing the challenged guidance regarding signature-matching requirements which allegedly conflicts with this state's election law. They ask the Court to issue injunctive relief to remedy the allegedly unlawful guidance. Additionally, they seek a declaratory ruling regarding the validity of defendant Benson's guidance.

Count II of the amended complaint alleges that defendant Benson's guidance was a "rule" as defined by the Administrative Procedures Act (APA) that was issued without compliance with the APA. Plaintiffs allege that the guidance is in fact a rule because it is generally applicable and

requires local election officials to apply a mandatory presumption of validity to signatures. Plaintiffs ask the Court to declare that the "rule" is invalid.

Count III alleges a violation of Const 1963, art 1, §§ 2 and 5, as defendant Benson's guidance will result in the counting of invalid absent voter ballots which will ultimately result in the dilution of valid votes cast by this state's electorate. They argue that defendant Benson's guidance is so vague and imprecise that it cannot be applied uniformly throughout the state.[3]

Count IV alleges that plaintiff Genetski had a right to request an audit of his choosing under Const 1963, art 2, § 4(1)(h) as it relates to absent voter ballots. Plaintiffs acknowledge that defendants have announced and/or completed a state-wide audit of the November 2020 general election; however, according to plaintiffs, the audit does not address plaintiffs' concerns because it did not review whether signatures on absent voter ballots were properly evaluated. Plaintiffs ask the Court to declare that the right to request an audit under art 2, § 4(1)(h) encompasses the type of absent-voter-ballot review requested in the amended complaint. Plaintiff also suggests the manner in which such an audit should be conducted.

III. ANALYSIS

A. MOOTNESS AND RIPENESS

Defendants argue that this Court should refrain from evaluating the merits of plaintiffs' complaint because the issues are either moot or not ripe. With respect to mootness, there is no dispute that Count III, which raises an equal protection claim arising out of the November 2020

[3] Plaintiffs' briefing has conceded that this claim is now moot, with the November 2020 election having already come and gone. As a result, the Court will not address this claim in any additional detail.

general election, is moot and must be dismissed. However, the Court declines to find that plaintiffs' remaining challenges are either moot or not ripe. Those issues concern the validity of guidance that is still in effect (Counts I and II), or an audit (Count IV) that, according to the plain text of art 2, § 4(1)(h) and MCL 168.31a, may be requested after the election has occurred. Moreover, defendants have not advanced a specific mootness/ripeness argument with respect to the audit claim. As a result, the Court declines to find that the issues raised in Counts I, II, and IV of the amended complaint would have no practical effect on an existing controversy or that it would be impossible to render relief. Cf. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016) (describing the mootness doctrine).

The Court also rejects defendants' contention that there is no actual controversy. As noted, plaintiffs seek declaratory relief. MCR 2.605(A)(1) requires that there be "a case of actual controversy" for the issuance of declaratory relief. "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). Here, plaintiffs—particularly plaintiff Genetski, who is a local clerk subject to the guidance at issue—sought a declaration regarding whether he is and will continue to be subject to guidance that by all accounts remains in effect at this time. This clearly presents an actual controversy that is appropriate for declaratory relief. See *id.*

Defendants argue that no actual controversy exists because the Legislature could change the applicable law, or because defendant Benson could decide to revoke the guidance. That argument would seek to turn the requirements of declaratory relief on their head and would eviscerate the purpose of declaratory relief. If the Court were to adopt the view that no actual controversy exists because the law could change, there could be no limit to the number of cases

that could be dismissed as moot. Here, plaintiffs have sought a declaration as to their legal rights with respect to the validity of a currently existing directive issued by defendant Benson in advance of the next election. That the law could hypothetically change in the future is not a reason to avoid issuing a declaration of the parties' currently existing legal rights, as plaintiffs have sought here. Indeed, the ability to seek an advance declaration of legal rights on an existing policy is one of the very reasons why the declaratory judgment rule was adopted in the first instance. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (discussing the purposes of the declaratory judgment rule).

B. WHETHER DEFENDANT'S ACTIONS VIOLATED THE APA

The dispositive issue, as the Court see it, concerns the APA and whether defendant Benson was required to comply with the APA when she issued the "Signature Verification and Voter Notification Standards." The Secretary of State has authority, under MCL 168.31(1)(a), to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." 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 by the agency."[4] MCL 24.207. A "rule" not promulgated in accordance with the

[4] There is no dispute that defendant Benson is subject to the APA, generally. See MCL 24.203(2) (defining "agency" in a way that includes the Secretary of State). The only dispute is whether this particular action is subject to the APA.

APA's procedures is invalid. MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982).

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; 591 NW2d 314 (1998). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).

As for whether the guidance or directive at issue is a "rule" subject to the APA, the Court must look beyond the labels used by the agency and make an independent determination of whether the action taken by the agency was permissible or whether it was an impermissible rule that evaded the APA's requirements. *AFSCME*, 452 Mich at 9. In other words, the Court "must review the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id.* (citation and quotation marks omitted).

Examining the "Signature Verification and Voter Notification Standards" through that lens, the Court agrees with plaintiffs that the same constitutes a "rule" that should have been promulgated pursuant to the APA's procedures. The standards are generally applicable to all absent voter ballot applications and absent voter ballots, and it contains a mandatory statement from defendant, this state's chief election officer, see MCL 168.21, declaring that all local clerks

"*must perform* their signature verification duties" in accordance with the instructions. (Emphasis added). In addition, clerks must presume that signatures are valid. That this presumption is mandatory convinces the Court that it is not merely guidance, but instead is a generally applied standard that implements this state's signature-matching laws. See MCL 24.207 (defining "rule"); *AFSCME*, 451 Mich at 8 (describing what constitutes a "rule" under the APA); *Spear v Mich Rehab Servs*, 202 Mich App 1, 5; 507 NW2d 761 (1993) (focusing on the mandatory nature of policies in support of the conclusion that the same constituted a "rule" under the APA).

Defendants cite three statutory exceptions to rulemaking—MCL 24.207(g), (h), and (j)—but the Court is not persuaded that the standards are saved by any of these exceptions. The first argument is that MCL 24.207(j), which is sometimes referred to as the "permissive power exception," applies and exempts the standards from the APA's rulemaking requirements. MCL 24.207(j) exempts from the APA's definition of "rule," a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." Here, defendant Benson points to MCL 168.31(1)(a) as the source of her "permissive statutory power." That statute provides that the Secretary of State "shall" "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." MCL 168.31(1)(a). According to defendant Benson, MCL 168.31(1)(a) allows her to eschew the rule-making process in order to issue "instructions" like the standards at issue.

The Court disagrees. First, the Court disagrees with defendants' characterization of the standards at issue, for the reasons stated above. Second, the cited statutory authority requires defendant Benson to issue instructions that are "in accordance with the laws of this state." MCL 168.31(1)(a). Here, it is not apparent that the mandatory presumption of signature validity is "in

accordance with the laws of this state."[5] To that end, 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. Policy 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. See *AFSCME*, 452 Mich at 10.

Third, a review of the plain language of MCL 168.31(1) and of caselaw discussing the permissive-power exemption does not support defendants' argument.[6] The primary problem with defendant Benson's argument is that the language in MCL 168.31(1) is too generic to support her positions. MCL 168.31(1)(a) simply states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections." If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the APA rule-making process, then defendants would never have to issue APA-promulgated rules for any election-related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw. See, e.g., *AFSCME*, 452 Mich at 12. That is, while defendant has statutory discretion to decide whether to take certain actions, the implementation of her discretionary decisions—absent a more precise directive than is contained in the statutes at issue—

[5] Given that the standards are invalid for being enacted without compliance with the APA, the Court declines, for now, to determine whether the mandatory presumption imposed is contrary to the law, as plaintiffs have alleged in Count I. Resolution of that issue becomes unnecessary in light of the decision to grant relief to plaintiffs on Count II of the complaint.

[6] The Court incorporates and restates its reasoning and discussion of a similar issue from *Davis v Benson*, (Docket Nos. 20-000207-MZ & 20-000208-MM).

must still adhere to the APA if that implementation takes the form of a rule. See *id.* (recognizing that the Department of Mental Health did not need to take a certain action; however, once the Department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule."); *Spear*, 202 Mich App at 5 (holding that while the agency's "decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule under [MCL 24.207(j)], the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act."). Thus, while defendant Benson undoubtedly has discretion under MCL 168.31 to issue guidance or to instruct local clerks regarding signature validity requirements, the implementation of her discretionary decision can still be subject to the APA's requirements.

Furthermore, the caselaw relied on by defendants in arguing for a different conclusion is easily distinguishable, and, in some cases, even lends support for the Court's conclusion. See e.g., *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Servs*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); *Mich Trucking Ass'n v Mich Pub Serv Comm*, 225 Mich App 424, 430; 571 NW2d 734 (1997); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). In the cases cited above, the pertinent agency's enabling statute expressly or impliedly authorized the specific action later taken by the administrative agency; additionally, and significantly, those statutes also permitted the specific action to be achieved either through rulemaking *or* other means. See *Detroit Base Coalition*, 428 Mich at 187-188 ("The situations in which courts have recognized decisions of [an agency] as being within the [MCL 24.207(j)] exception are those in which explicit or implicit authorization for the actions in question has been found."). Here, MCL 168.31(1) provides generalized authority to defendant, and it lacks

specificity with respect to the action taken (implementation of a mandatory presumption of signature validity), making the statute distinguishable from the statutes at issue in cases such as *Detroit Base Coalition, Mich Trucking Ass'n*, and *By Lo Oil Co.*[7]

Defendants raise concerns that this Court's interpretation of MCL 168.31(1)(a) would leave the term "instructions" without any practical effect. According to defendants, this Court's view would raise questions regarding whether defendant Benson could do anything when advising and directing local election officials as to the proper methods of conducting elections. The Court disagrees with the premise of defendants' position because, regardless of what is permissible under MCL 168.31, it is apparent that that which occurred here is not permissible, absent compliance with the APA. Here, defendant issued a mandatory directive and required local election officials to apply a presumption of validity to all signatures on absent voter ballot applications and on absent voter ballots. The presumption is found nowhere in statute. The mandatory presumption goes beyond the realm of mere advice and direction, and instead is a substantive directive that adds to the pertinent signature-matching statutes. And for similar reasons, defendants' arguments about efficiency and the need for quick action do not change the Court's decision. That is, nothing about the Court's opinion should be read as limiting the Secretary of State's ability to take quick action when she so desires. However, when that action takes the form of a rule, then the APA and MCL 168.31 require that the APA be invoked. In other words, the statute gives the Secretary of State

[7] Remarkably, defendants continue to place reliance on the conclusions of the majority in *Pyke v Dep't of Social Servs*, 182 Mich App 619; 453 NW2d 274 (1990). But as noted in prior opinions, Judge Shepard's dissent in *Pyke* was later adopted by the *Palozolo* Court, and as that Court noted, its decision was binding under what is now MCR 7.215(J)(1). *Palozolo v Dep't of Social Servs*, 189 Mich App 530, 533-534 & n 1; 473 NW2d 765 (1991). The *Pyke* Court's view on MCL 24.207(j) is irrelevant.

the authority and the ability to meet the needs of a situation. But when the action taken constitutes a "rule" under MCL 24.207, the appropriate procedures must be followed.

Defendants' citation to the rule-making exceptions contained in MCL 24.207(g) and (h)—which are the primary exemptions cited in their reply briefing—are no more convincing. Turning first to MCL 24.207(g), this subsection is an exception to the APA's rule-making requirements for an "intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public." This exception is inapplicable, however, because the at-issue standard involves a mandatory presumption that directly affects local election officials' duties with respect to the determination of whether a voter's signature on either an absent voter ballot or a returned ballot will be deemed to be valid. Cf. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563; 609 NW2d 593 (2000) (finding that a directive fit within the exception where it did not create any obligations or require compliance).

Nor is defendants' citation to the exception contained in MCL 24.207(h) convincing. That exception applies to a "form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). This exception "must be narrowly construed and requires that the interpretive statement at issue be merely explanatory." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 248; 501 NW2d 88 (1993) (citation and quotation marks omitted). If the purported "interpretive" statement changes the requirements of the law it is alleged to have interpreted, the exception does not apply. *Id.* See also *Schinzel v Dep't of Corrections*, 124 Mich App 217, 221; 333 NW2d 519 (1983). Here, because nothing in this state's election law refers to a presumption of validity, let alone a mandatory presumption, the standards at issue cannot be

deemed to be merely explanatory. See *Clonlara*, 442 Mich at 248, 251. That is, rather than merely explaining existing obligations under the law, the standards have imposed new obligations that do not appear within the plain language of this state's signature-matching statutes.

In sum, the standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements amounted to a "rule" that should have been promulgated in accordance with the APA. And absent compliance with the APA, the "rule" is invalid. Whether defendant Benson had authority to implement that which she did not need not be decided at this time because it is apparent the APA applied to the type of action taken in this case. Accordingly, plaintiffs are entitled to summary disposition on Count II of the complaint, and the Court will dismiss Count I without prejudice as a result.

C. PLAINTIFFS' AUDIT CLAIMS ARE WITHOUT MERIT

Finally, the Court examines Count IV of the complaint, which concerns plaintiffs' request for an audit. Const 1963, art 2, § 4(1)(h), provides that a qualified Michigan voter has the right to have "*the results* of statewide elections audited" in a manner prescribed by law. (Emphasis added). MCL 168.31a, amended after adoption of the aforementioned audit language, provides as follows:

> (1) In order to ensure compliance with the provisions of this act, after each election the secretary of state may audit election precincts.
>
> (2) *The secretary of state shall prescribe the procedures for election audits* that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. *The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures*. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. *An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results*

> *of at least 1 statewide race or statewide ballot question in a precinct selected for an audit.* An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.
>
> (3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit. [Emphasis added.]

Plaintiffs acknowledge that an audit of the November 2020 general election results was conducted. They argue that they have the right to request an audit with respect to the subject of their choosing—signatures on absent voter ballot applications and on absent voter ballots—and in the manner of their choosing. For at least two reasons this claim is not supported by art 2, § 4 or the implementing statute, MCL 168.31a. First, the constitution speaks of an audit of election *results*, not signature-matching procedures. Second, while the statute allows for an audit that includes "reviewing the documents, ballots, and procedures" used in the election, the statute plainly leaves it to the Secretary of State to "prescribe the procedures for election audits" and mandates that the Secretary of State shall conduct audits "as set forth in the prescribed procedures." In other words, there is no support in the statute for plaintiffs to demand that an audit cover the subject of their choosing or to dictate the manner in which an audit is conducted. MCL 168.31a(2) leaves that to the Secretary of State. As a result, plaintiffs have failed to state a claim on which relief can be granted as it concerns Count IV, and this count will be dismissed with prejudice pursuant to MCR 2.116(C)(8).

IV. CONCLUSION

IT IS HEREBY ORDERED that pursuant to MCR 2.116(C)(10), plaintiffs' cross-motion for summary disposition is GRANTED in part with respect to Count II of the amended complaint because the guidance issued by the Secretary of State on October 6, 2020, with respect to signature-matching standards was issued in violation of the Administrative Procedures Act.

IT IS FURTHER ORDERED that pursuant to MCR 2.116(C)(8) defendants' motion for summary disposition is GRANTED in part on Counts III and IV of the amended complaint.

IT IS FURTHER ORDERED that Count I of the amended complaint is dismissed without prejudice, for the reason that the at-issue standards are invalid under the Administrative Procedures Act.

This is a final order that resolves the last pending claim and closes the case.

Date: March 9, 2021

Christopher M. Murray
Judge, Court of Claims