STATE OF MICHIGAN
IN THE 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

ORAL ARGUMENT REQUESTED

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Attorneys for Defendants

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PLAINTIFFS' 05/06/2024 RESPONSE IN OPPOSITION TO DEFENDANTS' 04/22/2024 MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

As explained in Plaintiffs' Verified Complaint and their Motion for Summary Disposition, the Secretary has unlawfully instructed election officials to review absent voter signatures through a lens of presumed validity despite clear, express mandates under the Michigan Constitution and Michigan Election Law requiring local election officials to "*verify*" those signatures by comparing them against the corresponding voter's "signature on file." The Secretary's presumption of validity violates the APA, the Michigan Election Law, and the Constitution.

Rule 168.24 of the Michigan Administrative Code suffers from a similar legal malady. While Rule 168.24 requires election officials to approve signatures with discrepancies based on mere speculation, that policy is inconsistent with the mandate that officials *verify* the identity of absent voters through the signature verification process set forth in our laws and Constitution.

The Secretary's arguments fail to rebut these claims. Instead, the Secretary focuses much attention on Plaintiffs' standing. But Plaintiffs represent all levels of interest in elections. They are voters, political parties who represent their own interests and those of their members and candidates, and even a local election official saddled with these unlawful policies. If these Plaintiffs don't have standing to challenge the presumption of validity and Rule 168.24, then no one does, and the Secretary's actions would be invulnerable to challenge. But that's not the law, as many courts have confirmed that these Plaintiffs have standing in similar contexts. And because this Court need only assure itself that one Plaintiff has standing here, the Court should quickly dispense with the Secretary's standing arguments, proceed to the merits, and enter a declaratory judgment in favor of Plaintiffs.

LEGAL STANDARDS

A motion under MCR 2.116(C)(8) tests whether the plaintiff's allegations are sufficient to establish a prima facie case, and should be granted only if the claim is so clearly unenforceable

that no factual development could justify the plaintiff's claim for relief. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations in the verified complaint, as well as any reasonable inferences that may be drawn from its allegations. *Singerman v Municipal Service Bureau*, 455 Mich 135, 139; 565 NW2d 383 (1997).

When, as here, the issue of standing is to be determined based on affidavits, pleadings, and other documentary evidence, standing is analyzed under MCR 2.116(C)(10). *Le Gassick v University of Michigan Regents*, 330 Mich App 487, 494 n 2; 948 NW2d 452 (2019). Under MCR 2.116(C)(10), summary disposition is available only when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, and any other admissible evidence in favor of the party opposing the motion. MCR 2.116(G)(5). See also *Maiden*, 461 Mich at 120.

ARGUMENT

I. Each Plaintiff has standing here to pursue declaratory judgment under MCR 2.605.

Fourteen years ago, the general rules of standing to sue in Michigan courts were set forth by the Michigan Supreme Court in *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). There, the Supreme Court clarified that unlike the federal judiciary, which is "bound by the limitations of a case or controversy [and] other federal rules of justiciability," *id*. at 363, standing principles in Michigan courts are based on prudential doctrines. *Id*. at 372. Indeed, "Michigan courts' judicial power to decide controversies [is] ***broader*** than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not."

Id. at 364 (emphasis added), citing *Washington-Detroit Theater Co. v Moore*, 249 Mich 673, 679–80; 229 NW 618 (1930).

To that end, our Supreme Court recognized that the purpose of Michigan's standing doctrine "is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy. Thus, 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." *Lansing Schools*, 487 Mich at 355 (cleaned up). As a result, under *Lansing Schools* a litigant has standing to sue in Michigan courts in any of these four separate scenarios:

> [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. [*Lansing Schools*, 487 Mich at 372. (Emphasis added)]

Here, Plaintiffs have standing to seek a declaratory judgment because each Plaintiff meets the requirements of MCR 2.605. MCR 2.605(A)(1) provides that "[i]n 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." Put another way, a plaintiff seeking declaratory judgment under MCR 2.605 "(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, Inc v Dir of Health & Human Servs*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 361727), slip op at 6, *lv pending*. As explained below, each Plaintiff satisfies both of those requirements.

A. Plaintiffs have alleged a "case of actual controversy" within the jurisdiction of this Court as required under MCR 2.605.

Plaintiffs have clearly alleged a "case of actual controversy" within this Court's jurisdiction under MCR 2.605. First, it is undisputed that this case is within this Court's jurisdiction. Under MCL 600.6419(1)(a), this Court has exclusive jurisdiction over "any claim or demand, statutory or constitutional . . . or any demand for . . . equitable[ ] or declaratory relief . . . against the state or any of its departments or officers[.]" Given that Plaintiffs pursue declaratory and equitable relief against Defendants—both of whom are state officers and sued in their official capacity—this Court has exclusive jurisdiction over this matter.

Second, Plaintiffs clearly allege a "case of actual controversy." As the Supreme Court held in *Lansing Schools*, "[t]he essential requirement of the term 'actual controversy' under [MCR 2.605] is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Schools*, 487 Mich at 372 n 20 (cleaned up). While "[t]he 'actual controversy' requirement prevents courts from involving themselves in hypothetical issues . . . it does not prohibit them from deciding issues before the occurrence of an actual injury." *Groves v Dep't of Corrections*, 295 Mich App 1, 10; 811 NW2d 563 (2011), citing *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978).

An actual controversy is clearly present here. It is undisputed that the Secretary's presumption of validity and Rule 168.24(1) were applied to more than 1 million absent voter applications and a commensurate number of ballot return envelopes during the February 27, 2024 presidential primary election. Pls' Compl ¶¶ 12, 104. Meanwhile, no one disputes that the Secretary intends to continue instructing local election officials to review absent voter signatures with an "initial presumption of validity" and to continue implementing that aspect of Rule 168.24 that permits local election officials to speculate as to reasons for discrepancies in signatures during

the August 2024 primary election, the November 2024 general election, and beyond. *Id*. at ¶¶ 13, 15, 110, 137, 145. Indeed, the Secretary defends those policies here precisely because she intends to continue their implementation during future elections. Secretary's Brief at 18-24 (hereinafter "Sec's Br") (defending the presumption of validity); *id*. at 24-28 (defending Rule 168.24).

For that reason, the Secretary's reliance on *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561; 957 NW2d 731 (2020) ("*LWVM*"), is misplaced. As the Secretary would have it, the Plaintiffs' interests here "are based on conjecture about possible future events about signatures or choices made by clerks at some unknown time in the future." Sec's Br, at 16. Setting aside the Secretary's own clear intention to continue implementing the challenged policies during elections that are merely months away—i.e., some jurisdictions will begin verifying absent voter ballot signatures for the August primary election on June 27, 2024, so less than 8 weeks from now, see Pls' Compl at ¶ 16—this case is completely distinct from *LWVM*.

In *LWVM*, the plaintiffs sought a declaratory judgment as to the legality of a statute regulating the circulation of ballot question petitions. On appeal, however, those plaintiffs admitted they could not show a present legal controversy because they no longer had any plans to sign petitions for ballot questions. *LWVM*, 506 Mich at 586. Indeed, the petition they had sought to sign had been abandoned during the litigation, and they had no plans to sign any existing petitions. *Id*. at 580-87. So, the Supreme Court held that declaratory judgment was not needed due to the absence of an actual controversy, and therefore those plaintiffs lacked standing because they did not satisfy MCR 2.605. *Id*. at 586-87 ("As the remaining plaintiffs now admit, and the [Secretary] agrees, they cannot show a present legal controversy rather than a hypothetical or anticipated one.").

This case is completely different from *LWVM*. The policies challenged here were applied to absent voter signatures during the February 27, 2024 presidential primary election, and by all

accounts will be applied in the weeks to come for the August 2024 and November 2024 elections. To that end, in *Genetski*, this Court already rejected this same argument when the Secretary tried to escape liability for her unauthorized presumption of liability. *Genetski v Benson*, No. 20-000216-MM, 2021 WL 1624452, at *3-6 (Mich Ct Cl, 2021), attached to Pls' Compl as Ex. B (rejecting the Secretary's argument and finding instead there was an actual controversy because the *Genetski* plaintiffs "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," and "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.") (cleaned up).

An actual controversy exists here between Plaintiffs and the Secretary just as it did in *Genetski*. *Id*. Same presumption, same controversy. This Court should deny the Secretary's motion and proceed to the merits of the case.

B. Each Plaintiff is an "interested party" under MCR 2.605 and *Lansing Schools*.

A plaintiff seeking declaratory judgment must also be an "interested party." MCR 2.605(A)(1). While it appears neither the Court of Appeals nor the Supreme Court has expressly defined the meaning of an "interested party" under MCR 2.605(A)(1), recent decisions of the Court of Appeals suggest that the question of whether a claimant has sufficient interest to seek declaratory relief is analogous to the question of whether a claimant can establish standing by demonstrating a "special injury or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large." See, e.g., *T & V Assoc, Inc*, ___ Mich App at ___; slip op at 6, quoting *Lansing Schools*, 487 Mich at 372.

Plaintiffs satisfy this "interested party" requirement many times over. Plaintiffs the Republican National Committee ("RNC"), National Republican Congressional Committee ("NRCC"), and Michigan Republican Party ("MRP")—collectively, the "Republican

Committees"—are running candidates who will suffer competitive electoral injuries because of the presumption of validity and the unlawful speculation permitted under Rule 168.24. Voters will have their votes diluted by ballots where the corresponding signatures do not meet the signature-matching criteria under MCL 168.766a but are accepted anyway because they were reviewed through a lens of presumed validity or because an election official speculated as to "possible explanations" for "discrepancies in signatures" under Rule 168.24 rather than rejecting signatures that do not sufficiently match as required by law. And election officials will be saddled with the impossible choice of whether to enforce the Constitution and state law *or* the Secretary's Rules and instructions—all of which are binding on election officials.

Each of these injuries and interests is sufficient to confer standing here. And to reach the merits, this Court need only assure itself that one of these Plaintiffs has standing to pursue declaratory relief. *Dodak v State Admin Bd*, 441 Mich 547, 561; 495 NW2d 539 (1993) ("Having determined that at least one of the plaintiffs has standing, we turn next to [the merits of the case]."). As explained below, each of the Plaintiffs have standing based on their special injuries and substantial interests—all of which are detrimentally impacted in a manner different from the citizenry at large, and any one of which is sufficient to confer standing.

1. The Republican Committees are "interested parties" under MCR 2.605.

Each of the Republican Committees is an interested party under MCR 2.605 by virtue of their own substantial interests and special injuries that are detrimentally affected by the policies challenged here. And while the Secretary attempts to characterize those interests and injuries as "shared by all citizens equally" rather than "special or unique" to the respective Plaintiffs, see Sec's Br, at 14-16, the substantial interests and special injuries set out here are detrimentally affected in a manner different from the citizenry at large.

As a preliminary matter, the Secretary's reliance on the Court of Appeals' recent decision in *Michigan Republican Party v Donahue*, ___ Mich App ___ ; ___NW3d___ (2023) (Docket No. 364048) is unpersuasive. As it relates to this case, *Donahue*—a split decision for which an application for leave to appeal is pending with the Supreme Court, see Sup Ct Docket No. 166973—merely stands for the notion that a claimant seeking declaratory relief is an "interested party" for standing purposes under MCR 2.605 if it has a "special injury, right, or substantial interest" different from the citizenry at large. *Donahue*, ___ Mich App at ___; slip op at 12-13, citing *Lansing Schools*, 487 Mich at 372. Of course, we already know that's the standard, and each of the Republican Committees satisfy that standard for the reasons shown below.

Before applying that standard, however, a brief description of each of the Republican Committees will assist the Court in its application of *Lansing Schools*. First, the RNC is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). Pls' Compl at ¶ 23; see also Affidavit of Alex Latcham, Senior Deputy Political Director of the RNC ("RNC Aff"), at ¶ 2, attached as **Exhibit D**.[1] The RNC manages the Republican Party's business at the national level, including the development and promotion of the Republican Party's national platform and election strategies. RNC Aff at ¶ 3. The RNC also supports Republican candidates for public office at the federal and state levels across the country, including those on the ballot in Michigan. *Id*. ¶¶ 4-5. It also assists state parties throughout the country, including the Michigan Republican Party, to educate, mobilize, assist, and turn out voters. Pls' Compl at ¶ 23; RNC Aff at ¶ 7. To that end, the RNC has made significant contributions and expenditures in support of Republican candidates

[1] For ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with the exhibits attached to their 04/22/2024 Motion for Summary Disposition, which included Ex's A, B, & C.

up and down the ballot in Michigan during past election cycles, and will do so again in 2024. Pls' Compl at ¶ 23; RNC Aff at ¶¶ 5, 7, 12-13.

Meanwhile, the NRCC is a national committee as defined by 52 U.S.C. § 30101(14), and the Republican Party's congressional campaign committee with its principal place of business at 320 First Street S.E., Washington, D.C. 20003. Pls' Compl at ¶ 22; see also Affidavit of James Zenn, Regional Political Director of the NRCC ("NRCC Aff"), at ¶ 2, attached as **Exhibit E**. The NRCC is the only national political party committee exclusively devoted to electing Republican candidates to the U.S. House of Representatives from across the United States, including from Michigan's 13 congressional districts. Pls' Compl at ¶ 22; NRCC Aff at ¶ 3. Each election cycle, the NRCC supports the election of Republicans to the U.S. House of Representatives by providing direct financial contributions, political guidance, and by making independent expenditures to advance political campaigns. Pls' Compl at ¶ 22; NRCC Aff at ¶ 4. The NRCC also undertakes voter education, registration, and turnout programs, as well as other party-building activities. Pls' Compl at ¶ 22; NRCC Aff at ¶ 5. 2024 will be no different, as several of NRCC's members—including incumbents Rep. John Moolenaar (MI-2), Rep. Tim Walberg (MI-5), Rep. Lisa McClain (MI-9), Rep. John James (MI-10)—will be on the ballot for the November 2024 general election. NRCC Aff at ¶ 6.

Finally, plaintiff MRP is a "major political party" under the Michigan Election Law. See MCL 168.16. Among its general purposes, MRP promotes and assists Republican candidates who seek election or appointment to partisan federal, state, and local office in Michigan. Pls' Compl at ¶ 21. See also Affidavit of Paul Cordes, Senior Advisor to the MRP ("MRP Aff"), at ¶ 4, attached as **Exhibit F**. MRP works to further its purpose by, *inter alia*, devoting substantial resources toward educating, mobilizing, assisting, and turning out voters in Michigan. *Id.* at ¶¶ 3-6, 10. To

that end, MRP has made significant contributions and expenditures in support of Republican candidates up and down the ballot in Michigan for the past many election cycles, and will do so again in 2024. See *id.*

(i) The Republican Committees have substantial interests that were and continue to be detrimentally affected in a manner different from the citizenry at large.

Both as representatives of their candidates and voters, and as organizations in their own right, the Republican Committees have a substantial interest in getting Republican candidates elected to office. That includes ensuring that Republicans can seek office in a fair, competitive environment where the Legislature's identity and signature verification requirements—and other valid laws aimed at protecting the integrity and reliability of Michigan's elections—are enforced. And there can be no doubt that this interest in getting Republican candidates elected to office is unique and separate from any held by the public at large.

Both the Republican Committees and the candidates they represent are competitors in Michigan elections. The Republican Committees have made significant contributions and expenditures in support of Republican candidates for elections in federal, state, and local elections in Michigan for the past several elections, and intend to do so again in 2024. RNC Aff at ¶¶ 3-8; NRCC Aff at ¶¶ 3-7; MRP Aff at ¶¶ 4, 6. This includes educating, mobilizing, and assisting voters who support Republican candidates. RNC Aff at ¶¶ 12-13; NRCC Aff at ¶¶ 4-5; MRP Aff at ¶ 10.

In addition—and separate from their own respective organizational interests—the Republican Committees include as members Republican candidates for office here in Michigan. RNC Aff at ¶¶ 5-8; NRCC Aff at ¶¶ 3, 6-7; MRP Aff at 4-6. "It is not disputed that, under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest." *Lansing Schools*, 487 Mich at 373 (citation omitted); see also *Eu v San Francisco Co Democratic Central Comm*, 489 US 214, 222–23; 109 S Ct 1013; 103

L Ed 2d 271 (1989) (recognizing that political parties are expressive associations under the First Amendment); *Bay Co Democratic Party v Land*, 347 F Supp 2d 404, 422 (ED Mich, 2004) (collecting cases, and finding that the Michigan Democratic Party and Bay County Democratic Party had standing to represent the voting rights of its members that, like here, challenged directives issued to local election officials concerning the casting and tabulation of ballots).

With that in mind, each of the Republican Committees brought this suit on behalf of itself *and its members*. See Pls' Compl at ¶ 21. ("MRP brings this action on behalf of itself and its members," and "has a direct, personal, and substantial interest . . . to protect not only its own rights, but those of its candidates and members."); *Id.* at ¶ 22 ("The NRCC brings this action on behalf of itself and its members," several of whom "currently serve as congressional representatives for districts in Michigan" and will be candidates this year in Michigan elections.); *Id*. at ¶ 23. ("RNC brings this action on behalf of itself and its members," and "has a direct, personal, and substantial interest . . . to protect not only its own rights, but those of its candidates and members.")

Many of these candidates are well-known. Representatives John Moolenaar (MI-2), Tim Walberg (MI-5), Lisa McClain (MI-9), and John James (MI-10)—all members of NRCC—are running for reelection to the House and will be on the ballot in November. NRCC Aff at ¶¶ 6-7. And former President Donald Trump is the presumptive Republican nominee, with the caveat that he will not become the official nominee until the Republican National Convention in July. RNC Aff at ¶¶ 4-6. All of these individuals will appear on the ballot in November, and all are affected by the policies challenged here. RNC Aff at ¶¶ 14-16.

As electoral competitors, the Republican Committees and their candidates have a substantial interest in fair elections where all valid election laws are enforced. Courts across the country have recognized that forcing "a candidate" and "that candidate's party" "to participate in

an illegally structured competitive environment" imposes a legally cognizable "injury." *Mecinas v Hobbs*, 30 F4th 890, 898 (CA 9, 2022) (cleaned up) (collecting cases); see, e.g., *Nelson v Warner*, 12 F4th 376, 384 (CA 4, 2021); *Pavek v Donald J. Trump for President, Inc.*, 967 F3d 905, 907 (CA 8, 2020); *Green Party of Tenn v. Hargett*, 767 F3d 533, 544 (CA 6, 2014); *Shays v FEC*, 414 F3d 76 , 84–85 (DC Cir 2005); *Smith v Boyle*, 144 F3d 1060, 1062–63 (CA 7, 1998). This includes when executive officials—such as the Secretary in this instance—"set the rules of the game in violation of statutory directives." *Shays*, 414 F3d at 85. And while "Michigan's standing doctrine meaningfully differs from that of the federal courts, in that unlike the United States Constitution, Michigan's Constitution 'does not inherently incorporate the federal case-or-controversy requirement,'" that difference is inconsequential where, as here, standing principles in federal court—which, again, are more strict than those in Michigan courts—are helpful in analyzing standing. See *Northern Mich Environmental Action Council v City of Traverse City*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 332590), 2017 WL 4798638, at *3 n 3, citing *Lansing Schools*, 487 Mich at 366 (attached hereto as **Exhibit G**).

While *Northern Mich Environmental* is an unpublished opinion, its analysis is persuasive and applies equally here. Given that "Michigan courts' judicial power to decide controversies [is] ***broader*** than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power," *Lansing Schools*, 487 Mich at 364 (emphasis added), it makes perfect sense to consider federal court decisions when analyzing a litigant's injuries or interests under *Lansing Schools*. Surely, if an injury or interest satisfies the "injury" prong of the federal courts' Article III standing inquiry—i.e., a concrete and particularized injury that is actual or imminent, see *Lujan v Defs of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 2d 351 (1992)—then it also satisfies the requirement for a special injury, right, or substantial

interest that will be detrimentally affected in a manner different from the citizenry at large under Michigan's broader standing doctrine. See *Lansing Schools*, 487 Mich at 364.

The inquiry is straightforward here. If the presumption of validity and Rule 168.24 are applied to absent voter signatures during the August 2024 primary election and the November 2024 general election, the Republican Committees' interests will be impaired because the Republican Committees and their members will "be[] forced to participate in an 'illegally structure[d] competitive environment'" where the mandates under the Constitution and the Michigan Election Law requiring election officials to verify the identity of absent voters through the statutory signature verification process are disregarded. *Mecinas*, 30 F4th at 898 (alteration in original), quoting *Shays*, 414 F.3d at 87. And since Plaintiffs seek relief that would, among other things, enjoin the application of the presumption of validity and Rule 168.24 during the impending elections, their interest here in preventing an illegally structured competitive environment is sufficient under MCR 2.605. *See*, *e.g.*, *Priorities USA v Nessel*, opinion of the U.S. District Court for the Eastern District of Michigan, issued May 22, 2020 (Case No. 19-13341), 2020 WL 2615504, at *4 (permitting RNC and MRP to intervene as defendants in suit challenging constitutionality of absentee voter statutes where intervention was necessary to protect their "competitive interests in defending the constitutional election laws in Michigan in order to preserve a fair playing field and prevent change to Michigan's competitive environment in the upcoming 2020 elections."), attached hereto as **Exhibit H**.

The policies challenged here—both of which pertain to absentee voting—favor Democrats. Indeed, Democrats have been more likely than Republicans to vote by absentee ballot since at least 2010. See Charles Stewart III, *How We Voted in 2022* (May 23, 2023), p 10, available at <https://perma.cc/444Z-58ZY> (accessed May 3, 2024). "In 2020, the partisan gap in voting by

mail opened up wide." *Id*. And during the 2022 general election, 46% of Democratic voters nationwide voted by mail, while only 27% of Republicans did so. *Id*.

Michigan is no exception from this nationwide trend. See Wilkinson, *Analysis: Absentee voting gave Democrats big lead before election day*, Bridge Michigan (November 11, 2022) available at <https://www.bridgemi.com/michigan-government/analysis-absentee-voting-gave-democrats-big-lead-election-day> (accessed May 3, 2024) ("Democrats prove far more likely to vote absentee," and "Democrats continue to use absentee ballots more often in Michigan, [the 2022 general] election shows, raising questions about the timing of campaign strategies and last-minute media blitzes."); see also Wayne County, Clerk, *Election Results, Feb. 2024 Presidential Primary Election, Voting Stats* <https://www.waynecounty.com/documents/clerk/offsum_22724.pdf> (accessed May 3, 2024) (more than 65% of votes cast for Democratic presidential candidates were submitted via absentee ballots (i.e., 103,833 absentee ballots of 158,729 total Democrat votes) while only 49% of votes cast for Republican presidential candidates were submitted via absentee ballots (i.e., 52,558 absentee ballots of 106,805 Republican total votes)). Thus, it is entirely reasonable for the Republican Committees to fear that if the mandate requiring election officials to verify the identity of absent voters through the signature verification process set forth in our laws and Constitution gives way to the presumption of validity and unlawful speculation under Rule 168.24, any resulting increase in tabulated absentee ballots may impair the Republican Committees' prospects for electoral success. RNC Aff at ¶¶ 10-11, 14-16; NRCC Aff at ¶¶ 9-10, 12-14; MRP Aff at ¶¶ 8-12.

Of course, whether the presumption of validity and Rule 168.24 favors Republicans or Democrats is irrelevant to the merits. Those policies will rise and fall on their compliance with the Constitution and state law, not on which party benefits from the challenged policies. But there can

be no question that the Republican Committees' (and their candidates') substantial interest in getting Republican candidates elected to office—including their interest in ensuring that Republicans can seek office in a fair, competitive environment where the Legislature's identity and signature verification requirements are enforced—are substantial interests that are detrimentally affected here in a manner different from the citizenry at large. The Republican Committees are therefore "interested parties" under MCR 2.605, the Secretary's motion must be denied, and this Court should proceed with considering the merits of this case.

(ii) The Republican Committees have special injuries stemming from the challenged policies, and those injuries differ from any injury experienced by the citizenry at large.

Any adverse effect to the Republican Committees' interest in a fair and competitive electoral environment becomes a competitive *disadvantage*, which then constitutes an injury under *Lansing Schools*. See *Texas Democratic Party v Benkiser*, 459 F3d 582, 586 (CA 5, 2006) ("A second basis for the [political party's] direct standing is harm to its election prospects."). As explained above, the policies challenged here favor Democrats. See *supra* section I.B.1.i. Thus, the acceptance of any absentee ballots that lack sufficiently matching signatures in compliance with the Constitution and the Michigan Election Law reduce the Republican Committees' chances of electoral victory.

This electoral injury supports both direct standing by the Republican Committees and their associational standing on behalf of Republican candidates. "[C]andidates … have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a concrete and *particularized* injury to candidates such as the Electors." *Carson v. Simon*, 978 F3d 1051, 1058 (CA 8, 2020) (emphasis added). "In fact, it's hard to imagine anyone who has a more *particularized* injury than the candidate has." *Hotze v Hudspeth*, 16 F4th 1121, 1126 (CA 5, 2021) (Oldham, J., dissenting) (emphasis added). "Voluminous" authority

demonstrates that candidates and parties alike suffer particularized injury when their "chances of victory would be reduced." *Texas Democratic Party*, 459 F3d at 587, n 4 (collecting cases). And, again, if an injury is sufficiently particularized to satisfy the "injury" prong under Article III standing, then it also constitutes an injury that affects the claimant in a manner different from the citizenry at large under *Lansing Schools*. 487 Mich at 364 (Michigan's prudential standing doctrine is broader than Article III standing inquiry).

Elections "are zero-sum," which is why "[a] benefit provided to [one] but not to others necessarily advantages the former … at the expense of the latter." *Students for Fair Admissions, Inc. v President and Fellows of Harvard Coll*ege, 600 US 181, 218-29; 143 S Ct 2141; 216 L Ed 2d 857 (2023). "Because a head-to-head election has a single victor, any benefit conferred on one candidate is the effective equivalent of a penalty imposed on all other aspirants for the same office." *Vote Choice, Inc. v DiStefano*, 4 F3d 26, 38 (CA 1, 1993); see also *Schulz v Williams*, 44 F3d 48, 52-53 (CA 2, 1994) (affidavit satisfied the competitive-injury test by stating that election rules "could siphon votes from the Conservative Party line and therefore adversely affect the interests of the Conservative Party"); *DNC v Reagan*, 329 F Supp 3d 824, 841 (D Ariz, 2018) (finding Democratic Party had standing because the challenged laws affected voters "who tend to vote disproportionately for Democratic candidates") (cleaned up).

The injuries to the Republican Committees—and their members and candidates—are different from any experienced by the citizenry at large and are thus sufficient under *Lansing Schools*. MRP, RNC, and NRCC each have standing, and the Secretary's motion should be denied.

2. The individual Plaintiffs have substantial interests, rights, and injuries that were and continue to be detrimentally affected in a manner different from the citizenry at large.

Plaintiffs Dennis Grosse, Blake Edmonds, and Cindy Berry—all Michigan citizens and registered and eligible voters, Pls' Compl ¶¶ 18-20—have standing, too. These voters tend to vote

for and support Republican candidates. See, e.g., Affidavit of Plaintiff Cindy Berry ("Berry Aff") at ¶¶ 3, 22, attached as **Exhibit I**. The policies challenged here, however, favor Democrats over Republicans—a partisan advantage detailed above, *supra* section I.B.1.i. Such an injury to *Republican* voters is sufficiently different from any injury experienced by the citizenry at large to confer standing here. Compare *Save Our Downtown v City of Traverse City*, 343 Mich App 523, 545; 997 NW2d 498 (2022) ("Plaintiffs' complaint sufficiently pleaded a voting-rights case," and plaintiffs—including an individual voter—had a "substantial interest in enforcing the voting provisions of the city charter under which they live," which was sufficiently different for standing purposes from those individuals who were not subject to the city charter), with *In re Pub Act 619 of Pub Acts of 2002, MCL 33322201*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2005 (Docket No. 257500), 2005 WL 659654, at *8 ("The individual plaintiffs have not alleged that the power of their votes has been diminished vis-à-vis other voters throughout the state, as did the plaintiffs in [*Baker v Carr*, 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962)]"), attached hereto as **Exhibit J**.

While *In re Pub Act 619* is an unpublished decision, its recognition of *Baker v Carr* is especially pertinent here. Vote dilution is an obvious form of injury suffered by voters when unlawful votes are counted—an injury that most often occurs in "the racial gerrymandering and malapportionment contexts," where one block of voters is "harmed compared to irrationally favored voters from other districts." *Wood v Raffensperger*, 981 F3d 1307, 1314 (CA 11, 2020) (cleaned up). The individual Plaintiffs here, no less than redistricting plaintiffs, "are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Baker,* 369 US at 208 (cleaned up). See also Berry Aff at ¶¶ 3, 18-23.

This partisan injury is not common to the citizenry at large. A Michigan resident who did not vote in the last election or does not plan to vote in an upcoming election would not share that injury. Nor would a voter that does plan to vote but tends to vote for or support candidates affiliated with the Democratic Party. Partisan disadvantage is a standard injury caused by laws that, for example, "dilute[] the votes of Indiana Democrats." *Davis v Bandemer*, 478 US 109, 119; 106 S Ct 2797; 92 L Ed 2d 85 (1986) (collecting cases challenging redistricting rules that "minimize or cancel out the voting strength of racial or political elements of the voting population"), abrogated by *Rucho v Common Cause*, 588 US 684; 139 S Ct 2484; 204 L Ed 2d 931 (2019). And while the U.S. Supreme Court has held that partisan redistricting is nonjusticiable as a *prudential matter*, that Court has never questioned that "diluting the electoral strength of Democratic voters" is a legitimate Article III injury. *Rucho*, 588 US at 692. Indeed, that mathematical "disadvantage" in the effectiveness of a citizen's vote that is the basis for standing in redistricting is the *same injury* that is the basis for standing here. *Baker*, 369 US at 206. See also Berry Aff at ¶¶ 18-23. That "disadvantage to themselves as individuals," however slight, is an injury in fact. *Id*.

Partisan injury is a concrete and particularized injury under Article III, and so it constitutes a special injury different from the citizenry at large under *Lansing Schools*, too. 487 Mich at 364. The individual Plaintiffs have standing, and the Secretary's motion should be denied.

3. Plaintiff Cindy Berry—a township clerk—has substantial interests and injuries that were and continue to be detrimentally affected in a manner different from the citizenry at large.

Plaintiff Cindy Berry—Clerk for Chesterfield Township, Michigan—also has an independent basis for standing under MCR 2.605. As township clerk, Mrs. Berry is responsible for running the Township's elections. Berry Aff at ¶ 4. Pertinent here, Clerk Berry is also responsible for ensuring that the identity of all absent voters is verified through the absent voter signature verification process as required by the Constitution and the Michigan Election Law. *Id*. at ¶¶ 5-7.

To that end, the Constitution mandates that election officials such as Clerk Berry must "verify the identity of a voter who applies for an absent voter ballot other than in person by comparing the voter's signature on the absent voter ballot application to the voter's signature in their registration record." Const 1963, art 2, § 4(1)(h). So, too does the Michigan Election Law. See, e.g., MCL 168.761. That verification process also applies to absent voter ballots. Const 1963, art 2, § 4(1)(h) (mandating that election officials "verify the identity of a voter who votes an absent voter ballot . . . by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record."). See also MCL 168.765(2); MCL 168.766(1); Berry Aff at ¶¶ 5-7.

Despite those legal duties to *verify* absent voter signatures, the Secretary instructed local officials such as Clerk Berry to *presume* the validity of signatures on absent voter applications and absent ballot return envelopes through her "Signature Verification Instructions." Berry Aff at ¶ 8. Similarly, the Secretary's policy requiring election officials to consider "possible explanations for discrepancies in signatures" under Rule 168.24(1) of the Michigan Administrative Code also appears to be inconsistent with the Constitution and Michigan law. *Id*. at ¶¶ 9-12.

As a local clerk, Plaintiff Berry is subject to the Secretary's Signature Verification Instructions as well as Rule 168.24. *Id*. at ¶ 13. As a public official, however, Clerk Berry swore an oath to support the Michigan Constitution and to faithfully discharge the duties of her office. *Id*. at ¶ 14. And while Clerk Berry attempted to reconcile both Rule 168.24 and the presumption of validity found in the Secretary's Signature Verification Instructions against the text of the Constitution and the Michigan Election Law, both seem—from Clerk Berry's perspective—to be incompatible with the identity verification and signature verification mandates under the Constitution and the law. *Id*. at ¶ 15.

There can be no doubt that Clerk Berry is an "interested party" under MRC 2.605. Michigan law empowers the Secretary to investigate, or cause to be investigated by local authorities, the administration of election laws, and to report violations of those laws and regulations for prosecution. See MCL 168.31(h). From Clerk Berry's perspective, it seems possible that she could face penalty or even removal from her position as Clerk if she applies rules or guidance such as those challenged here that are inconsistent with the law or Constitution. Berry Aff at ¶ 16. And in today's hyper-political climate, it also seems possible to Clerk Berry that she could face removal from her position as Clerk if she does not apply rules or guidance to which she is subject as a local clerk. *Id*.

Put another way, Clerk Berry has been saddled with the impossible choice of whether to enforce the Constitution and state law *or* the Secretary's Rules and instructions—all of which are binding on Clerk Berry. For that reason, Clerk Berry seeks a judicial declaration here as to whether she is and will continue to be subject to Rule 168.24(1) and the presumption of validity found in Secretary's Signature Verification Instructions. Berry Aff at ¶ 17.

In *Genetski*, this Court found that "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," a circumstance that "clearly presents an actual controversy that is appropriate for declaratory relief." *Genetski*, at *4. It would make no sense for the *Genetski* court to conclude that Clerk Genetski—a county clerk with little responsibility regarding the verification of absent voter signatures—was an interested party under MCR 2.605, but for this Court to find otherwise where Clerk Berry is a township clerk that is actually responsible for overseeing the absent voter signature verification

process. See, e.g., Const 1963, art 2, § 4(1)(h); MCL 168.761; MCL 765(2); MCL 168.766; MCL 168.766a. Clerk Berry is far more of an interested party here than was the county clerk in *Genetski*.

C. In light of the Plaintiffs' documentary evidence, the Secretary has failed to meet the requirements for summary disposition on the issue of standing.

Under MCR 2.116(C)(10), "the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). And while the Secretary failed to support her argument against standing with any such documentary evidence, Plaintiffs nevertheless responded with affidavits and documentary evidence setting out specific facts that demonstrate they do indeed have standing here. Thus, Plaintiffs have established standing under MCR 2.605 (or, at worst, there remains a genuine issue of material fact as to the issue of standing, which in turn would necessitate denial of the Secretary's motion). See also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–18; 537 NW2d 185 (1995) (nonmovant is entitled to "the benefit of reasonable doubt" under MCR 2.116(C)(10)).

This is especially true given that "the bar for standing is lower when," like here, "a case concerns election law." *LWVM*, 506 Mich at 587. As recognized by our Supreme Court, "[e]lection cases are special . . . because without the process of elections, citizens lack their ordinary recourse." *Id*. (internal citation omitted). For that reason specifically, the Supreme Court has "found that ordinary citizens have standing to enforce the law in election cases." *Id*. And if "ordinary citizens" have standing to enforce the election law, then these Plaintiffs do, too—especially where political parties and committees, candidates, local clerks, and these voters are affected by the election rules here in manners so different from the citizenry at large.

II. The Secretary has not shown that the presumption of validity is consistent with the Constitution and the Michigan Election Law.

Substantively, the Secretary begins with an attempt to downplay the presumption of validity, claiming that the "initial presumption of validity' is nothing more than a starting point for the statutorily-mandated review." Sec's Br, at 19. As the Secretary argues, reviewing absent voter signatures through a lens of presumed validity is consistent with the law because the Signature Verification Instructions "cite specifically to MCL 168.766a, which provides that clerks may determine that a voter's signature does not agree sufficiency '*only after* reviewing the process set forth in this section." Sec's Br, at 19 (citing MCL 168.766a(1)) (emphasis provided by Secretary).

But the Secretary *never* explains what specific language in section 766a authorizes that the statutory signature verification process be completed through a review that starts with an initial presumption of validity—as opposed to starting from a place of neutrality. Indeed, rather than explain *how* section 766a authorizes the application of an initial presumption of validity during the signature review process, the Secretary argues instead that "the statute does not permit a presumption that a signature is *invalid*—a signature can only be determined not to agree sufficiently after the review is completed." Sec's Br, at 19-20 (emphasis in original). But Plaintiffs never claimed that the law requires the review of signatures to begin with a presumption of invalidity, and the Secretary's failure to identify—with specificity—the source of her initial presumption of validity looms large here.

The canon of statutory construction known as *casus omissus pro omisso habendus est*—i.e., nothing is to be added to what the text states or reasonably implies, and which prohibits courts from supplying provisions omitted by the Legislature, see Scalia & Garner, Reading Law: The Interpretation of Legal Texts (St. Paul: Thomson/West, 2012), p. 93—takes it from here. Considering the Michigan Election Law as a whole, the Legislature clearly intended to omit *any*

presumption of validity—initial or otherwise—from MCL 168.766a. And we know this because the Legislature has shown—on several occasions—that it knows how to give a presumption of validity or invalidity in the context of reviewing voter signatures when it chooses to do so.

Under the Michigan Election Law, if an elector was not registered to vote on the day they signed a recall petition, then "there is a rebuttable ***presumption*** *that the signature is invalid*." MCL 168.961a(4) (emphasis added); see also MCL 168.961(6) ("If the qualified voter file indicates that, on the date the elector signed the recall petition, the elector was not registered to vote, there is a rebuttable ***presumption*** *that the signature is invalid*.") (emphasis added). Likewise, the Legislature extended that same presumption as to signatures on initiative and referendum petitions. MCL 168.476(1) ("If," when using the QVF to determine the validity of petition signatures, the "file indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable ***presumption*** *that the signature is invalid*.") (emphasis added). And further yet, the Legislature expressly provided for a presumption as to signatures on candidate nominating petitions, too. MCL 168.552(13) ("If the [QVF] indicates that, on the date the elector signed the petition, the elector was not registered to vote, there is a rebuttable ***presumption*** *that the signature is invalid*.")(emphasis added).

Meanwhile, there is no "presumption" whatsoever in the text of MCL 168.766a. MCL 168.766a was enacted on July 20, 2023 as part of an update to the Michigan Election Law. See 2023 PA 82. At that time, the above-described presumptions that are expressly provided elsewhere in the Michigan Election Law had been in existence for years, the ink had surely dried on the *Genetski* Court's 2021 decision rejecting the Secretary's presumption of validity as an invalid rule under the APA, and the Legislature was most certainly aware of the fact that the Secretary had abandoned the presumption of validity during the rulemaking process given that—as the Secretary

admits—the Legislature declined to act on the rule set. See Sec's Br, at 6 (explaining that while the Legislature declined to act on the proposed rules, they nonetheless became effective December 19, 2022 by virtue of the Michigan APA). Yet in the face of all those dynamics, the Legislature *did not* see fit to provide for a presumption of validity when it added signature matching standards to the Michigan Election Law under section 766a in July 2023.

Our Legislature could have added a presumption as to the validity of absent voter signatures—maybe even the one favored by the Secretary—but it chose not to do so. And "[w]hen 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." *Spalding v Swiacki*, 338 Mich App 126, 138; 979 NW2d 338 (2021). If the Legislature intended for there to be a presumption of validity in MCL 168.766a, it would have added one when it enacted that provision 10 months ago. But it didn't. The presumption of validity is directly inconsistent with Michigan law and the Constitution. The Secretary has failed to satisfy her burden, and her motion should be denied accordingly.

III. The presumption of validity is a "rule" that was not promulgated in accordance with the APA.

Next, the Secretary claims the presumption of validity is not a rule because it "does not establish any substantive standards, and only restates the language of the statute." Sec's Br, at 22-23. As discussed above, however, there is no support in Michigan law allowing the statutory signature verification process to be completed though a lens of presumed validity. See also Pls' Mot for SD, at 15-18. Despite the Secretary's contention otherwise, the presumption of validity is clearly a "substantive standard implementing the program," see *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). Indeed, the "program" is the signature verification process under the Constitution and Michigan law, and the "substantive standard" is

the Secretary's policy requiring that the signature verification process be completed from the starting point of an "initial presumption of validity." Pls' Compl, Ex. A, at 3. Thus, the presumption is a rule that was not promulgated in accord with the APA. Pls' Mot for SD Mot, at 11-13.

Nor are the APA issues in this case any different from those that were litigated in *Genetski*. The policy challenged there was in a "document stat[ing] that signature review begins with the presumption that the signature on an absent voter ballot application or envelope is valid." *Genetski*, at *3 (cleaned up). So too here. Pls' Compl, Ex. A, at 3 ("Voter signatures are entitled to an *initial* presumption of validity.") (emphasis in original). The Secretary conceded as much. Sec's Br, at 19 (characterizing the "'initial presumption of validity' [a]s nothing more than a starting point for the statutorily-mandated review.") And the fact that MCL 168.766a did not exist when *Genetski* was decided is irrelevant to the application of collateral estoppel because, as explained above, section 766a does not authorize the Secretary to mandate that absent voter signatures be reviewed through an initial presumption of validity.

Finally, while the Secretary claims that the inclusion of the words "initial presumption of validity" in the catch line of Rule 168.22 somehow keeps the presumption of validity within the Rule itself, Sec's Br, at 19 n 13—this, despite the fact that the Secretary abandoned the presumption of validity mid-rulemaking due to heavy public opposition, Pls' Compl ¶¶ 51-63—Michigan law provides otherwise. The "rules of construction prescribed in any statute that are made applicable to all statutes of this state also apply to [promulgated] rules." MCL 24.232(1). And to that end, MCL 8.4b clearly states that "[t]he catch line heading of any section of the statutes that follows the act section number *shall in no way* be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate[.]" *Id*. Rather, catch lines are merely "inserted for purposes of convenience." *Id*.

The presumption of validity is not part of Rule 168.22; the Secretary abandoned the presumption, and her efforts to implement the policy anyway violate the APA.

IV. The Secretary has not shown that Rule 168.24 is consistent with the Constitution and the Michigan Election Law.

In Counts IV and V of their Verified Complaint, Plaintiffs allege that the Secretary's policy requiring election officials to consider "possible explanations for discrepancies in signatures" as embodied by Rule 168.24(1) violates the Constitution and the Michigan Election Law. See Pls' Compl at Counts IV & V. See also Pls' Mot for Summ Disp, at 18-19. Specifically, Rule 168.24, requires election officials to consider as "possible explanations" for "discrepancies in signatures" the notions that, *inter alia*, a "voter's signature style may have changed slightly over time," the voter's "signature may have been written in haste," or the voter may have signed their absent voter application or ballot return envelope on a surface that was "rough, soft, uneven, or unstable." Mich Admin Code, R 168.24(1). That invitation for speculation, however, is inconsistent with the Constitution and the Michigan law.

In response, the Secretary invites the Court to apply the following three-part test to Rule 168.24, through which Michigan courts consider whether a promulgated rule is substantively valid:

> Where an agency is empowered to make rules, courts employ a three-fold test to determine the [substantive] validity of the rules it promulgates: (1) whether the rule is within the matter covered by the enabling statute; (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, when [sic] it is neither arbitrary nor capricious.

Luttrell v Dep't of Corrections, 421 Mich 93, 100; 365 NW2d 74 (1984); see Sec's Br, at 24-27.

As the Secretary would have it, Rule 168.24 passes the first two parts of the *Luttrell* test because the Rule "merely provides that—having performed the required review—clerks may consider these as *possible* explanations where appropriate." Sec's Br, at 26 (emphasis in original). There is, however, no provision in the Constitution or Michigan Election Law that permits an

election official to identify "discrepancies in signatures" such that the signature does not meet the matching standards under MCL 168.766a(2), but accept the signatures anyway because it appears that a "signature ***may*** have been written in haste," or the absent voter ***may*** have signed their application or ballot return envelope on a "rough, soft, uneven, or unstable" surface. Rather, if a signature "differs in significant and obvious respects from the elector's signature on file," then the signature must be rejected under MCL 168.766a(2)-(3)—notwithstanding the presence of the types of discrepancies described in Rule 168.24(1). This direct inconsistency with the law means that Rule 168.24 fails parts (1) and (2) of the *Luttrell* test. See *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008) ("When considering an agency's statutory construction, the primary question presented is whether the interpretation is consistent with or contrary to the plain language of the statute . . . the court's ultimate concern is a proper construction of the plain language of the statute.").

Nor is the Secretary's interpretation of the Michigan Election Law entitled to any special consideration, as "Michigan courts have never adopted the *Chevron* deference doctrine, which is followed by the federal courts." *Mich Farm Bureau v Dep't of Env't Quality*, 292 Mich App 106, 129; 807 NW2d 866 (2011), citing *Chevron, USA, Inc v Natural Resources Defense Council, Inc.*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984). Rather, under Michigan law, an agency's interpretation of a statute "is not binding on Michigan courts and cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Emagine Ent, Inc. v Dep't of Treasury*, 334 Mich App 658, 664; 965 NW2d 720 (2020) (cleaned up).

The Secretary also fails to point to any provision under the law permitting election officials to "follow up" with a voter regarding a questionable signature outside of the cure process set forth in Michigan law. Sec's Br, at 26-27. And while section 766a(6) most certainly permits the

Secretary to "issue instructions to clerks to provide electors with other options, other than by providing a signature under subsection (5), to cure the deficiency in the elector's [signature]," that is not license for the Secretary to rewrite the law. Indeed, Michigan law does permit the Secretary to make rules and issue instructions, but that authority is expressly conditioned on its exercise being consistent with the law. See MCL 168.31(1)(a) ("The secretary of state shall . . . issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections and registrations *in accordance with the laws of this state*.") (emphasis added). On those grounds alone, the Secretary's "arbitrary and capricious" standard has no bearing on whether Rule 168.24 violates the Constitution or Michigan law.

The invitation under subsection 766a(6) for the Secretary to "issue instructions to clerks to provide electors" with non-signature options for curing deficient signatures is clearly meant to ensure that voters are informed of other options available to the voter *under Michigan law*, such as by providing photo ID. See, e.g., Const 1963, art 2, § 4(1)(g). It is not an invitation to end-run the carefully-crafted signature verification framework set out in the Constitution and the Michigan Election Law that preserves the purity of elections and guards against abuses of the elective franchise by ensuring that each absent voter application and absent voter ballot originated from, and was completed by, the intended voter.

CONCLUSION

Plaintiffs respectfully request that this Court deny the Secretary's motion for summary disposition, and instead grant summary disposition for Plaintiffs under MCR 2.116(I)(1), enter a declaratory judgment under MCR 2.605, and award the relief sought in the Verified Complaint.

Dated: May 6, 2024

Respectfully submitted,

/s/ *Robert L. Avers*

Robert L. Avers (P75396)

Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

EXHIBIT D

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

STATE OF MICHIGAN
IN THE 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

AFFIDAVIT OF ALEX LATCHAM

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Attorneys for Defendants

/

AFFIDAVIT OF ALEX LATCHAM

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I, Alex Latcham, being first duly sworn, state as follows under oath:

1. I am the Senior Deputy Political Director of the Republican National Committee (the "RNC"). I am over the age of eighteen and I have personal knowledge of the following facts. If called as a witness, I could and would competently testify thereto.

2. The RNC is the national committee of the Republican Party, with its principal place of business at 310 First Street S.E., Washington, D.C. 20003. The RNC represents over 30 million registered Republicans in all 50 states, the District of Columbia, and the U.S. territories. It is comprised of 168 voting members representing state Republican Party organizations.

3. The RNC manages the Republican Party's business at the national level, coordinates fundraising and election strategy, and develops and promotes the national Republican platform.

4. The RNC organizes and operates the Republican National Convention, which nominates a candidate for President and Vice President of the United States.

5. The RNC works to elect Republican candidates to state and federal office. In November 2024, its candidates will appear on the ballot in Michigan for election to the Presidency, U.S. Senate, and U.S. House of Representatives.

6. For example, former President Donald Trump is the presumptive Republican nominee, although he will not become the official nominee until the Republican National Convention in July.

7. The RNC engages in various activities to help elect Republicans in Michigan. One of these activities is providing support to the Michigan Republican Party in its efforts to elect Republican candidates.

8. The RNC has vital interests in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Michigan elections. The RNC is a plaintiff in this case to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its members, affiliated voters, and candidates.

9. The policies challenged in this lawsuit—the presumption of validity as to absent voter signatures, and Rule 168.24 of the Michigan Administrative Code—violate the Michigan Constitution and the Michigan Election Law, both of which mandate that election officials verify the identity of absent voters through the statutory signature verification process.

10. The presumption of validity as to absent voter signatures and Rule 168.24 of the Michigan Administrative Code harm the RNC's interests.

11. The RNC has a substantial interest in seeking and winning political office—and doing so in a fair competitive environment in which the Legislature's duly enacted laws governing elections—like the identity verification and signature verification requirements in the Michigan Constitution and the Michigan Election Law—are enforced.

12. Among other activities, the RNC funds and engages in ballot "chase" programs whereby it contacts voters, educates them about the mail-in voting process, informs them of key deadlines and rules, reminds them to return their mail-in ballots in a timely manner, and encourages them to cure any defects as permitted by state law. The voter education component is particularly labor intensive.

13. The RNC also spends significant resources to preserve voter confidence and turnout, which suffer when voters see that election officials accept absent voter ballots without verifying the identity of the voter and their corresponding signature as required under Michigan law.

14. The policies challenged here harm the RNC—and its members and candidates—and also places them at a competitive disadvantage.

15. Democrat voters are more likely than Republicans to vote by absentee ballot. As a result, any failure to verify the identity of absentee voters due to a presumption of validity as to absent voter signatures and/or speculation as to reasons for signature discrepancies under Rule 168.24(1) will result in an inaccurate tally of the lawfully cast votes. And given the higher number of Democrat absentee voters than Republican absentee voters, that inaccurate tally undermines the Republican candidates' rights to a fair and accurate electoral count.

16. By counting votes on absent voter ballots where the signature was reviewed through an initial presumption of validity, or by counting votes on absent voter ballots where the election official speculated as to "possible explanations for discrepancies in signatures" under Rule 168.24(1)—despite the fact that the signature "differs in significant and obvious respects from the elector's signature on file" under MCL 168.766a(2)-(3)—Michigan dilutes the weight of valid votes cast by the RNC's candidates and its members.

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

Alex Latcham

Alex Latcham

Subscribed and sworn to before me this
6th day of May, 2024.

Notary Public, Ingham County, County, Michigan
Acting in Ingham County County
My Commission Expires: 03/14/2029

AMY M CUMBOW
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
MY COMMISSION EXPIRES **MARCH 14, 2029**
ACTING IN THE COUNTY OF Ingham

Notarized remotely online using communication technology via Proof.

EXHIBIT E

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

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Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Attorneys for Defendants

AFFIDAVIT OF JAME ZENN

STATE OF _____)
) SS
COUNTY OF _____)

I, James Zenn, being first duly sworn, state as follows under oath:

1. I am a Regional Political Director of the National Republican Congressional Committee (the "NRCC"). I am over the age of eighteen and I have personal knowledge of the following facts. If called as a witness, I could and would competently testify thereto.

2. The NRCC is a national committee, as defined by 52 U.S.C. § 30101(14), and the Republican Party's congressional campaign committee with its principal place of business at 320 First Street S.E., Washington, D.C. 20003.

3. The NRCC is the only national political party committee exclusively devoted to electing Republican candidates to the U.S. House of Representatives from across the United States, including from Michigan's 13 congressional districts.

4. Each election cycle, including in 2024, the NRCC supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns.

5. The NRCC also undertakes voter education, voter registration, and voter turnout programs, as well as other party-building activities.

6. In November 2024, the NRCC's candidates will appear on the ballot in Michigan for election to the U.S. House of Representatives, including incumbents Rep. John Moolenaar (MI-2), Rep. Tim Walberg (MI-5), Rep. Lisa McClain (MI-9), and Rep. John James (MI-10).

7. The NRCC has vital interests in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Michigan elections. The NRCC is a plaintiff in this case to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its members, affiliated voters, and candidates.

8. The policies challenged in this lawsuit—the presumption of validity as to absent voter signatures, and Rule 168.24 of the Michigan Administrative Code—violate the Michigan Constitution and the Michigan Election Law, both of which mandate that election officials shall verify the identity of absent voters through the statutory signature verification process.

9. The presumption of validity as to absent voter signatures and Rule 168.24 of the Michigan Administrative Code harm NRCC's interests.

10. The NRCC has a substantial interest in seeking and winning political office—and doing so in a fair competitive environment in which the Legislature's duly enacted laws governing elections—like the identity verification and signature verification requirements in the Michigan Constitution and the Michigan Election Law—are enforced.

11. The NRCC also spends significant resources to preserve voter confidence and turnout, which suffer when voters see that election officials accept absent voter ballots without verifying the identity of the voter and their corresponding signature as required under Michigan law.

12. The policies challenged here harm the NRCC—and its members and candidates—and also places them at a competitive disadvantage.

13. Democrat voters are more likely than Republicans to vote by absentee ballot. As a result, any failure to verify the identity of absentee voters due to a presumption of validity as to absent voter signatures and/or speculation as to reasons for signature discrepancies under Rule

168.24(1) will result in an inaccurate tally of the lawfully cast votes. And given the higher number of Democrat absentee voters than Republican absentee voters, that inaccurate tally undermines the Republican candidates' rights to a fair and accurate electoral count.

14. By counting votes on absent voter ballots where the signature was reviewed through an initial presumption of validity, or by counting votes on absent voter ballots where the election official speculated as to "possible explanations for discrepancies in signatures" under Rule 168.24(1)—despite the fact that the signature "differs in significant and obvious respects from the elector's signature on file" under MCL 168.766a(2)-(3)—Michigan dilutes the weight of valid votes cast by the NRCC's candidates and its members.

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

James Zenn

Subscribed and sworn to before me this
6 day of May, 2024.

Caleb James Plott
Notary Public, _____, County, _____
Acting in _____ County
My Commission Expires: _____

District of Columbia
Signed and Sworn to (or affirmed) before me on May 6, 2024 (Date)
by James Zenn
(Name(s) of Individual(s) Making Statement)
Signature of Notarial Officer: Caleb James Plott
Title of Office: Notary Public
My Commission Expires: April 14, 2029

Caleb James Plott NOTARY PUBLIC DISTRICT OF COLUMBIA Exp. - April 14, 2029

EXHIBIT F

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

STATE OF MICHIGAN
IN THE 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

AFFIDAVIT OF PAUL CORDES

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Attorneys for Defendants

/

AFFIDAVIT OF PAUL CORDES

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I, Paul Cordes, being first duly sworn, states as follows under oath:

1. I am a Senior Advisor at the Michigan Republican Party ("MRP"). I am over the age of eighteen and I have personal knowledge of the following facts. If called and sworn as a witness, I could and would competently testify thereto.

2. I am a resident of Michigan and am a registered Michigan voter. I plan to vote in the August 2024 primary election and the November 2024 general election.

3. MRP is a plaintiff in this case and a major political party under Michigan law with its principal place of business and headquarters at 520 Seymour Street, Lansing, Michigan 48912. MRP and its members exercise their federal and state constitutional rights of speech, assembly, petition, and association to develop its statewide political organization, promote the Republican Party platform, and secure the election of all duly nominated Republican candidates.

4. MRP works to elect Republican candidates to federal, state, and local office in Michigan. In November 2024, its candidates will appear on the ballot in Michigan for election to the Presidency, U.S. Senate, U.S. House of Representatives, and the Michigan Legislature—among other elected offices.

5. MRP has substantial interests in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Michigan elections. MRP brings this suit to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its members, affiliated voters, and candidates.

6. MRP will support multiple Republican candidates who will be up for election or reelection in Michigan during the impending August and November elections.

7. The policies challenged in this lawsuit—the presumption of validity as to absent voter signatures, and Rule 168.24 of the Michigan Administrative Code—violate the Michigan Constitution and the Michigan Election Law, both of which mandate that election officials shall verify the identity of absent voters through the statutory signature verification process.

8. The presumption of validity as to absent voter signatures and Rule 168.24 of the Michigan Administrative Code harm MRP's interests.

9. MRP has a substantial interest in seeking and winning political office—and doing so in a fair competitive environment in which the Legislature's duly enacted laws governing elections—like the identity verification and signature verification requirements in the Michigan Constitution and the Michigan Election Law—are enforced.

10. MRP spends resources, including hiring campaign staff in Michigan, recruiting volunteers, and encouraging Michiganders to vote for Republican candidates. MRP spends significant sums of money in Michigan to further those interests.

11. Because it widely known that Democrats are more likely than Republicans to vote by absentee ballot, the policies challenged here place MRP—and its members and candidates—at a competitive disadvantage. This is because any failure to verify the identity of absentee voters due to a presumption of validity as to absent voter signatures and/or speculation as to reasons for signature discrepancies under Rule 168.24(1) will result in an inaccurate tally of the lawfully cast votes. And given the higher number of Democrat absentee voters than Republican absentee voters, that inaccurate tally undermines the Republican candidates' rights to a fair and accurate electoral count.

12. By counting votes on absent voter ballots where the signature was reviewed through an initial presumption of validity, or by counting votes on absent voter ballots where the election official speculated as to "possible explanations for discrepancies in signatures" under Rule 168.24(1)—despite the fact that the signature "differs in significant and obvious respects from the elector's signature on file" under MCL 168.766a(2)-(3)—Michigan dilutes the weight of valid votes, including my own vote and those of MRP's candidates and members.

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

Paul Cordes

Paul Cordes

Subscribed and sworn to before me this
6th day of May, 2024.

Notary Public, Ingham County, County, Michigan
Acting in Ingham County County
My Commission Expires: 03/14/2029

AMY M CUMBOW
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF INGHAM
MY COMMISSION EXPIRES **MARCH 14, 2029**
ACTING IN THE COUNTY OF Ingham

Notarized remotely online using communication technology via Proof.

EXHIBIT G

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

2017 WL 4798638
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

NORTHERN MICHIGAN ENVIRONMENTAL
ACTION COUNCIL and Priscilla Townsend, Appellees,
v.
CITY OF TRAVERSE CITY, Other Party,
and
Pine Street Development One, LLC, Intervening Appellant.

No. 332590
|
October 24, 2017

Grand Traverse Circuit Court, LC No. 2015–031341–AA

Before: Sawyer, P.J., and Murray and Gleicher, JJ.

Opinion

Per Curiam.

***1** Intervening Appellant Pine Street Development One ("Pine Street") appeals from an order of the circuit court vacating a special land use permit issued by the City of Traverse City and remanding the matter to the city's planning commission for further proceedings. We affirm.

Pine Street applied for a special land use permit (SLUP) to construct two 96–foot tall buildings in downtown Traverse City that would include apartments and commercial space. The SLUP was necessary because the building height exceeds 60 feet. Following a public meeting, the planning commission granted the SLUP. Appellees filed suit against the city in circuit court challenging the SLUP. Pine Street intervened because of its interest in the project.

The court delivered an opinion from the bench which focused on Traverse City ordinance standards 1364.02(c) and (d), which require that a special use will be

served adequately by existing public facilities and services and shall not create excessive additional requirements at public cost for facilities and services. The court explained that the city commission incorporated by reference a staff report stating "in conclusory terms that the proposed development will be adequately served by existing public infrastructure and services, but notes that street improvements will be made." The court opined that "[t]he notion that two 9–story buildings can be constructed with 162 residences and related parking and commercial space and not have any marginal impact on infrastructure, facilities, or services is absurd." Although the city commission asserted that "[t]he project will bring additional tax revenue which will provide for additional infrastructure, facilities and services, including through TIF [1] and Brownfield [2] programs[,]" the court held that "[t]he record is bereft of any documents, staff report or commission comment describing the source of the TIF funds, the amounts diverted from general tax revenues annually and the time period the diversion will last." The court expressed that it was "almost unbelievabl[e]" that the staff report adopted by the city commission referenced TIF funds as a source of revenue offsetting the cost of increased municipal services when TIF funds are local tax dollars diverted for the developer's benefit. According to the court, the factual finding that the development would bring in additional tax revenue "other than in an undefined and distant future" was "categorically false," because the tax revenue would be returned to the developer through TIF and Brownfield funds to pay for its costs and to remediate the polluted development site. The court opined that by approving the SLUP, the city commission was either "hopelessly naïve and uninformed" about the source and use of TIF and Brownfield funds, or was "less than candid with the general public."

***2** The circuit court remanded the matter to the city commission, stating in relevant part:

> For all the foregoing reasons, the Court remands this matter to the Traverse City Commission for a cogent analysis of the project's impact on infrastructure, facilities and services, the source of funds to pay for that impact and an intelligent discussion of the perceived benefits that support justifying such extensive public subsidies on the backs of local taxpayers. If the Commission has this discussion and believes it can justify its decision, it will explain why and approve this SLUP once more and with a more robust record. Only at that time would the issue of Section 28 [of the Traverse City Charter] become ripe for consideration.

The court entered a written order vacating the SLUP for the reasons stated on the record in its bench opinion; the matter was remanded to the city commission for further proceedings. Pine Street now appeals.

We first address Pine Street's argument that appellees lack standing to bring this action. "Whether a party has standing is a question of law that is reviewed de novo by this Court." *Coldsprings Twp. v. Kalkaska Co. Zoning Bd. of Appeals*, 279 Mich. App. 25, 28; 755 N.W.2d. 553 (2008).

Under Michigan law,

> 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. [*Lansing Sch. Ed. Ass'n v. Lansing Bd. of. Ed.*, 487 Mich. 349, 372; 792 N.W.2d. 686 (2010) (emphasis added).]

Further, to have standing to challenge a zoning decision a party must be "aggrieved" and have "suffered some special damages not common to other property owners similarly situated." *Unger v. Forest Home Twp.*, 65 Mich. App. 614, 617; 237 N.W.2d. 582 (1975), citing *Joseph v. Grand Blanc Twp.*, 5 Mich. App. 566; 147 N.W.2d. 458 (1967) and *Marcus v. Busch*, 1 Mich. App. 134; 134 N.W.2d. 498 (1965).

Turning first to appellee Townsend, we are satisfied, that she has standing to bring this suit. Townsend does assert some grounds in support of her having standing that do not meet the requirement that she show special damages different from that suffered by the public at large. For example, her claim of increased traffic is the same as that suffered by the public at large. The same can be said for her argument that the project would change the character of the neighborhood. But, we are satisfied with her argument that the project would affect the airflow, sunlight and view from the window of her apartment. It is true that Michigan law does not recognize a legally protected interest

in receiving airflow, sunlight, or a view. See *Krulikowski v. Tide Water Oil Sales Corp.*, 251 Mich. 684, 687; 232 N.W.2d. 233 (1930) ("An easement for light and air may not be acquired by use or by prescription. An adjoining owner may build up to his lot line, unless restricted from doing so, or unless he intends thereby to injure his neighbor or acquire no advantage or benefit to himself."). Nevertheless, the loss of access airflow, sunlight, or a view could be considered a "special injury" to Townsend, even if she has no legal entitlement to those things. This special injury would also affect Townsend differently from the citizenry at large because it would specifically affect her as the resident a building adjacent to the proposed development. Therefore, this special injury would confer standing on Townsend. *Lansing Sch. Ed. Ass'n.*, 487 Mich. at 372. Indeed, such considerations may, at least in part, be some of the city's reasoning in adopting the ordinance that restricts building heights in the first place; if so, then those considerations would be relevant to the decision whether to grant the SLUP.

***3** NMEAC also may have standing to bring this suit; a decision in that regard is premature at this juncture. "A nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse and real interests in the matter being litigated." *Trout Unlimited, Muskegon White River Chapter v. City of White Cloud*, 195 Mich. App. 343, 348; 489 N.W.2d. 188 (1992). Similarly, the United States Supreme Court has declared that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs (TOC), Inc.*, 528 U.S. 167, 183; 120 S Ct 693; 145 L.ed. 2d 610 (2000) (citation omitted). [3]

NMEAC asserted that it is a non-profit organization devoted to protecting the environment and that its members included "individuals who reside in the immediate vicinity of the SLUP that is at issue." NMEAC's complaint asserted that it or its unnamed members would be "uniquely impacted" by the SLUP for three reasons. First, it contended that the city environment, the Boardman River, the surface and subsurface soils, contamination in the soil, glare, solar power access impairment, bird migration, and airflow would all be "impacted and/or degraded." Second, it contended that the SLUP and resulting development project would radically change the character of Traverse City. Third, it contended that the NMEAC members that pay city taxes would suffer an "increased burden" because of the "financial requirements imposed on City residents by the SLUP project." These allegations sufficed to confer standing on NMEAC at the pleading stage. See *Nat'l Wildlife Federation*, 471 Mich. at 631. When a challenge to standing is raised in a motion for summary disposition, the plaintiff has

the obligation to support its standing allegation with evidence. *Id.* As this Court recently explained, "standing to sue ... is a fact-bound concept more amenable to proof rather than to pleading." *Lamkin v. Hamburg Twp. Bd. of Trustees*, 318 Mich. App. 546, 551; 899 N.W.2d. 408 (2017).

Pine Street Development One, LLC first raised the issue of NMEAC's standing in a brief filed in the trial court on March 22, 2016, three days before the trial court conducted oral argument on the merits of the case. The parties did not address the standing issue at the hearing. More significantly, the trial court did not make any findings or a ruling on standing in its March 31, 2016 opinion. When Pine Street claimed an appeal in this Court, its brief included a standing argument. NMEAC attempted to reply by filing with its brief on appeal an affidavit signed by one of its members. This Court struck the affidavit as outside of the record. *NMEAC v. Traverse City*, unpublished order of the Court of Appeals, entered August 15, 2016 (Docket No. 332590). The affidavit was not filed with the trial court because Pine Street's challenge to standing came late in the proceedings and was deemed irrelevant by the circuit court.

***4** NMEAC's standing depends on the resolution of factual questions regarding whether members of NMEAC would have standing. The resolution of those factual questions is the task of the circuit court, if and when this matter returns to that court. We take no further position on this issue.

We now turn to the merits of this case. "This Court reviews de novo a trial court's decision in an appeal from a city's zoning board, while giving great deference to the trial court and zoning board's findings." *Norman Corp. v. City of East Tawas*, 263 Mich. App. 194, 198; 687 N.W.2d. 861 (2004).

> When reviewing a zoning board's decision whether to issue an exception to a zoning ordinance, this Court must review the record and ... [the board's decision] ... to determine whether it (1) comports with the law, (2) was the product of proper procedure, (3) was supported by competent, material, and substantial evidence on the record, and (4) was a proper exercise of reasonable discretion.... [*Whitman v. Galien Twp.*, 288 Mich. App. 672, 678–679; 808 N.W.2d. 9 (2010) (internal quotation marks omitted, alteration in original).]

" 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may

be substantially less than a preponderance." *Hughes v. Almena Twp.*, 284 Mich. App. 50, 60; 771 N.W.2d. 453 (2009). This Court reviews the circuit court's determinations regarding the zoning board of appeals findings for clear error, which occurs where this court is "left with the definite and firm conviction that a mistake has been made." *Hughes*, 284 Mich. App. at 60.

The trial court concluded that the city's determination in granting the SLUP was not supported by competent, material, and substantial evidence. We do not agree in all aspects with the trial court's decision. That is, there are areas in which the trial court determined a lack of support that we conclude were adequately supported. Nonetheless, we do agree in some respects with the trial court's determination and, therefore, with its ultimate conclusion to remand the matter to the city commission with direction that it must provide further support for its decision. Accordingly, we will focus on those areas in which we agree with the trial court that the record was lacking in competent, material, and substantial evidence to support the city's decision.

First, at issue is whether the City Commission's determination that Traverse City Zoning Ordinance 1364.02(c) was met is supported by competent, substantial, and material evidence. Traverse City Zoning Ordinance 1364.02(c) provides as follows:

> Each application for a special land use shall be reviewed for the purpose of determining that the proposed use meets all of the following standards:
>
> * * *
>
> (c) The use shall be served adequately by existing or proposed public infrastructure and services, including but not limited to, streets and highways, police and fire protection, refuse disposal; water, waste water, and storm sewer facilities; electrical service, and schools.

The city commission made the following findings of fact relating to ordinance 1364.02(c):

> 1. Facts and conclusions in the staff report dated October 29, 2015, with regard to this standard are adopted.
>
> 2. Various departments, including the Engineering Department, Police Department, Traverse City Light and Power, and the Fire Department through its Fire Marshal, have found this use to be safe and adequately served by public infrastructure, and services.

***5** 3. Street improvements will be made.

4. As pedestrian and bicycle use increases, motorists will regard the area more as a heavily-traversed area by such users, making it safer.

5. The trip generation manual used by the City Planning Department is considered conservative estimate, which means that the number of vehicle trips may actually be less than otherwise anticipated by the Planning Department by its use of such manual.

In turn, the October 29, 2015, staff report adopted by the city commission provided the following analysis and findings relating to zoning ordinance 1364.02(c):

Analysis *The proposed buildings are located on Front and Pine Streets which are both designated as collector streets. Nearby are Division Street and Grandview Parkway which are designated as arterials. Schools should not be significantly impacted by the proposed residential dwellings in this building. There are adequate utilities to serve this building. Overhead electrical lines that run from the Warehouse District across the river south to Hannah Park are planned to be buried in Spring of 2016. The developer will work with Traverse City Light and Power and City Engineering for a plan to have a power supply once the undergrounding takes place. A 12–inch water main is located under Front Street. An 8" sanitary sewer is located under Pine Street. The City Engineer has previously stated that the existing utilities to serve the development are adequate. The Police Department has indicated no concerns with the development.*

The Fire Department has raised concerns of being able to maneuver the 55–foot ladder truck to be adjacent to the riverfront building's long access as required by the Fire Code. The Fire Marshall will need to review the diagram submitted by the developer on October 28, 2015 that indicates a fire truck of this size and type can be in fact positioned along the riverfront building. The access route for the fire truck would be within the parking structure so this parking structure will need to meet the structural specifications to handle the weight of the ladder truck.

Finding Provided the Fire Marshall finds the access routes to the development meet the Fire Code, the use can be served adequately by existing facilities and services.

Appellees argue that the city commission's determination was not supported by competent, substantial, and material evidence. Appellees contend that the analysis and findings in the staff report relied upon by the City are conclusory and lack supporting data and evidence.

Appellees are correct that aspects of the staff report reach conclusions without offering supporting evidence. For example, ordinance 1364.02(c) requires the City to consider whether the use will be adequately served by existing schools and police protection, but the report states, without explanation or evidence, "Schools should not be significantly impacted by the proposed residential dwellings in this building." Regarding police protection, the staff report simply mentions that "[t]he Police Department has indicated no concerns with the development." These statements are not substantial evidence because a reasonable person would not accept a conclusory statement without explanation or supporting data sufficient to justify the conclusion. Assuming that the City could rely on the opinion of an employee in the police department, there was no indication in the report what department employee found the development would be adequately served by police protection nor what evidence supported that conclusion. In other words, the purported approval by the police department, without naming any person making the approval or explaining the reason for it, is a mere "scintilla" of evidence.

***6** Next, Ordinance 1364.02(c) requires the City to consider whether the use will be adequately served by existing streets and highways. Appellees are correct that the staff report devotes minimal analysis to this issue because it merely estimates that the development will generate 1,600 vehicle trips per day according to a "Trip Generation Manual," and minimizes this number by stating that it "may be overly high" because the development is downtown and people might choose to walk, bike, or use public transit. The City commission explicitly agreed, stating that the estimate was "conservative" and that the number of actual vehicle trips might be less than estimated.

Appellees contend that there was no traffic analysis performed or presented as to whether existing streets could accommodate this increase in traffic. Pine Street asserts that a "transportation network functional classification" and traffic count map were submitted below that support the conclusion that existing streets could adequately handle increased traffic. But the "transportation network functional classification" map merely classifies roads in Traverse City by type, i.e., city road, county road, private road, etc., and we are unable to discern what data, if any, the traffic count map provides. A section of the staff report addressing another ordinance subsection concluded that the street system could handle the increase in traffic, but it provided no rationale or data to support that. Thus, the record does not support the conclusion that existing streets and highways could handle additional traffic because the evidence highlighted by Pine Street contains no meaningful data about how the proposed development would affect traffic patterns.

In sum, the conclusion that the development was adequately served by police protection, existing highways and streets, and local schools was not supported competent, material, and substantial evidence because there was a lack of evidence regarding the adequacy of those public services or whether an appropriate city employee made any substantial appraisal of those services.

We now turn to the city commission's determination regarding Traverse City Zoning Ordinance 1364.02(d). Traverse City Zoning Ordinance 1364.02(d) provides:

> Each application for a special land use shall be reviewed for the purpose of determining that the proposed use meets all of the following standards:
>
> * * *
>
> (d) The use shall not create excessive additional requirements for infrastructure, facilities, and services provided at public expense.

The City commission made the following findings of fact relating to ordinance 1364.02(d):

> 1. Facts and conclusions in the staff report dated October 29, 2015, with regard to this standard are adopted.
>
> 2. The project will bring additional tax revenue which will provide additional infrastructure, facilities and services, including through TIF and Brownfield programs.

In turn, the October 29, 2015, staff report adopted by the city commission provided the following analysis and findings relating to zoning ordinance 1364.02(d):

> **Analysis** *The current electrical undergrounding along Pine Street and the pedestrian bridge were planned capital project improvements for the district. The sewer main along the alley will eventually need to be relined with or without this proposed development. Tax Increment Financing will pay for half of the streetscape improvements and the developer will pay for all of the pedestrian bump-outs. Additional tax revenues generated by the development will off-set the increase of municipal service costs required for a growing community.*
>
> **Finding** The building will not create any excessive expenditure with public funds.

***7** Appellees argue that the city commission's determination that zoning ordinance 1364.02(d) was satisfied was not supported by competent, substantial, and material

evidence. Appellees contend that the commission did not determine whether the development required additional infrastructure or services that would be excessive and the public cost to provide upgrades to infrastructure and services. Appellees argue that the staff report is devoid of factual analysis and provides only conclusions unsupported by facts or data. Indeed, the staff report's analysis merely mentioned electrical undergrounding that was already planned and sewer relining that would need to be redone with or without the proposed development. The only specific factual analysis in the report was a conclusion that TIF funds would pay for half of streetscape improvements while the developer would pay for pedestrian "bump-outs." No other infrastructure improvements were discussed.

Further, appellees point out that the staff report and city commission concluded that the development would provide tax revenue to offset the costs of increased services and infrastructure, but TIF funds would be provided to the developer, which would divert the City's tax revenue from the project to the developer. This got the attention of the circuit court, which suggested (in somewhat contemptuous terms) that it was impossible to believe that the tax revenue generated by the development would offset the increased cost of services and infrastructure requirements when TIF funds diverted the City's tax revenue derived from the project to subsidize the developer's expenses. [4]

The city commission's conclusion that the proposed development would create additional tax revenue that offset the increased cost of infrastructure and services is not supported by substantial evidence. Indeed, the city commission merely adopted the staff report's conclusion and repeated it; there was no factual analysis or data to support that conclusion. A mere conclusion without reasoning or factual analysis to support it is not "evidence that a reasonable person would accept as sufficient to support a conclusion." *Hughes*, 284 Mich. App. at 60.

Further, as the circuit court explained, the fact that the development would use TIF and Brownfield funds contradicts the finding that the development's tax revenue would offset increased city costs to the extent that those funding sources divert future tax dollars from the City to the developer. [5] To the extent that only some of the tax revenue generated by the development could go to TIF and Brownfield programs, the relevant section of the staff report contained no data explaining how much, if any, would go to the programs and how much, if any, the City would retain. Thus, the city commission's conclusion was not supported by competent, material, and substantial evidence. Therefore, the circuit court did not clearly err in relation to this determination.

Appellees also assert that the city commission and staff report neglect to analyze evidence relating to increased infrastructure for parking. Appellees criticize the

development's inclusion of only 177 parking spaces to accommodate its 162 residential units and commercial space. But as Pine Street points out, that the staff report does address parking is consistent with its assertion that the zoning district does not require the development to provide parking; nevertheless the plan includes a garage with 177 spaces and bicycle racks.

***8** Appellees assert that the City entered into an option agreement to purchase land across the street from the proposed development to potentially construct a parking structure to accommodate the need for extra parking. The circuit court addressed this issue, holding that constructing a parking garage for Pine Street was "certainly not a public benefit" and that "[n]o portion of this record may be remotely considered as a candid disclosure of the actual public expense let alone an analysis of those costs relative to perceived public benefits." Indeed, the staff report and the city commission did not address whether the City's tentative plan to build a parking garage to support the development would be an excessive expenditure to improve infrastructure with public funds. Therefore, the circuit court did not clearly err in relation to its determination.

In sum, the conclusion that the development would not create excessive expenditures with public funds was not supported by competent, material, and substantial evidence. The commission concluded that the development would generate tax revenue to offset the cost of city infrastructure and services without providing supporting data or reasoning. Further, the assertion that the development would receive TIF and Brownfield funds contradicted the city commission's findings to the extent that those programs divert tax dollars generated from the development and return them to the City. But in any event, those concerns did not address the central question of zoning ordinance 1364.02(d), which is whether the use would create excessive additional requirements for city services and infrastructure. Finally, the city commission did not address the City's tentative plan to construct a parking garage to support the development and whether that would constitute an excessive infrastructure requirement paid for at the public expense.

We next consider Pine Street's argument that the whole of the circuit court's analysis is faulty because it analyzed the entire development project instead of only the special use, the additional 36 feet of height, that was the subject of Pine Street's special land use request. According to Pine Street, the court should have analyzed zoning ordinances 1364.02(c) and (d) only in relation to the additional height and compare its impact with a building Pine Street could construct by right without a special land use permit. We agree with appellee that this argument is irrelevant in analyzing the trial court's decision inasmuch as we agree that there was a lack of competent, substantial and material evidence to support the city's decision. But the argument is relevant to how the city should proceed on remand in analyzing this issue.

Traverse City Zoning Ordinance 1364.02 addresses the standards of approval for special land use permits and provides as follows:

> Each application for a *special land use* shall be reviewed for the purpose of determining that the proposed *use* meets all of the following standards:
>
> (a) *The use* shall be designed, constructed, operated, and maintained so as to be harmonious and compatible in appearance with the intended character of the vicinity.
>
> (b) *The use* shall not be hazardous nor disturbing to existing or planned uses in the vicinity.
>
> (c) *The use* shall be served adequately by existing or proposed public infrastructure and services, including but not limited to, streets and highways, police and fire protection, refuse disposal; water, waste water, and storm sewer facilities; electrical service, and schools.
>
> (d) *The use* shall not create excessive additional requirements for infrastructure, facilities, and services provided at public expense.
>
> (e) *The use* shall not involve any activities, processes, materials, equipment or conditions of operation that would be detrimental to any person or to the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, odors or water runoff.
>
> ***9** (f) Where possible, *the use* shall preserve, renovate, and restore historic buildings or landmarks affected by the development. If the historic structure must be moved from the site, the relocation shall be subject to the standards of this section.
>
> (g) Elements shall relate to the design characteristics of an individual structure or development to existing or planned developments in a harmonious manner, resulting in a coherent overall development pattern and streetscape.
>
> (h) *The use* shall be consistent with the intent and purposes of the zoning district in which it is proposed. [Emphasis added.]

Appellees contend that the court must evaluate the entire use of land, i.e., the whole development because the ordinance mentions "special land use" in its introductory sentence, but refers only to "the use" instead of "the special land use" in its subsections.

Appellees justify this conclusion by raising the legal maxim *expressio unius est. exclusio alterius* ("the express mention in a statute of one thing implies the exclusion of other similar things." *AFSCME Council 25 v. Detroit*, 267 Mich. App. 255, 260; 704 N.W.2d. 712 (2005)). However, this precept is an aid to statutory interpretation that cannot control if its application would defeat the clear legislative intent. *Id.*

The introductory clause of the ordinance clearly establishes the contextual relationship of the terms "special land use" and "use.' Again, that passage provides:

> Each application for a special land use shall be reviewed for the purpose of determining that the proposed use meets all of the following standards:

The passage actually ties the two terms together. The "use" spoken of is function of the property underlying the "special land use" permit. The passage provides that the listed standards will be employed to consider whether the "use" proposed is in keeping with identified land uses encouraged by the ordinance within a given zoning district.

Interpreting the statute in the way appellee suggests would defeat the clear intent of the City. The City explains that the purpose of ordinance chapter 1364 is to "permit and provide for a special review process for unique uses and activities in zoning districts where they would not otherwise be permitted, provided these uses and activities are made compatible with permitted uses in these districts by following the standards in this Chapter."[6] The fact that this entire ordinance chapter addresses special uses belies appellee's argument that the phrase "the use" in zoning ordinance 1364.02 *necessarily* means the general or overall use of the development rather than the particular special land use that the City is reviewing. Further, certain special uses contemplated by the ordinance implicate only partial use for a special purpose, such as for communication antennas under zoning ordinance 1364.01(c)(2).

Nevertheless, in most situations a special land use encompasses all aspects of the proposed land use, e.g., in the case of a school or correctional facility, which require a SLUP in certain zoning districts under zoning ordinance 1364.01(b)(6) and (11). Likewise, Pine Street's application for a SLUP to build a "Taller building"[7] in accordance with zoning ordinance 1364.01(b)(13) implicates the entirety of the land use because the land would be occupied by two 96–foot-tall buildings. Thus, in reference to the instant case, the "use" referred to throughout 1364.02 refers to the special land

use of constructing a "Taller building," which encompasses the entirety of the land use, not just the extra 36 feet of height requested by Pine Street.

***10** In conclusion, certain aspects of the city commission's decision regarding zoning ordinance 1364.02(c) were not supported by competent, material, and substantial evidence. Likewise, the city commission's decision with respect to zoning ordinance 1364.02(d) was not supported by competent, material, and substantial evidence. Accordingly, we agree with the trial court's determination that this matter must be remanded to the city commission for further action. As for the trial court's determination that section 28 of the city charter might require a public vote on any construction in which public funds are potentially used, that determination is premature. Indeed, the trial court did not actually hold that a public vote was required; rather, it merely observed that it might be. As the trial court determined, the issue is not yet ripe until there is a final resolution of this matter by the city. Any comments made by the trial court are merely dicta and do not constitute a holding. The trial court may determine this issue if and when it becomes ripe for decision.

The decision of the trial court to remand this matter to the city for further proceedings is affirmed. Appellees may tax costs.

Sawyer, P.J. (concurring in part and dissenting in part).
I agree with the majority's decision, except for the conclusion regarding NMEAC's standing.

First, I would acknowledge that it is somewhat irrelevant to determine whether NMEAC has standing inasmuch as we all agree that Townsend does have standing and, therefore, all of the substantive issues are addressed through her claims. Nonetheless, I write separately because I believe that NMEAC has had an adequate opportunity to establish standing and has failed to do so.

Turning to this issue, I see no basis to find that NMEAC has standing to bring this suit. "A nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse and real interests in the matter being litigated." *Trout Unlimited, Muskegon White River Chapter v. City of White Cloud*, 195 Mich. App. 343, 348; 489 N.W.2d. 188 (1992). But the litigant must have a special injury or right that will affected in a way different from the public at large. *Lansing Sch. Ed. Ass'n. v. Lansing Bd. of Ed.*, 487 Mich. 349, 372; 792 N.W.2d. 686 (2010). NMEAC asserts that it has three bases for standing:

environmental concerns, changing the character of the area, and tax concerns. But these are all interests that are presumably shared by the public. Thus, they are not interests capable of conferring standing on the NMEAC members because the interests are not "detrimentally affected in a manner different from the citizenry at large ...." *Lansing Sch. Ed. Ass'n.*, 487 Mich. at 372. Thus, because the unidentified NMEAC members have not shown that they have standing, NMEAC also lacks standing. *Trout Unlimited*, 195 Mich. App. at 348.

Moreover, even if we were to consider the disputed affidavit of William Scharf, a member of the NMEAC board, we reach the same conclusion. NMEAC contends that it establishes standing for NMEAC because the development will affect bird populations. Scharf avers that he is a professor of biology and studies bird populations, and that the SLUP allowing a nine-story building will endanger birds because they "fail to perceive glass as a barrier" and will suffer injury or death from collisions with the building. While Scharf's professional study of birds distinguishes him from the citizenry at large, it is unclear how the potential effect of the development on birds will personally inflict a special injury on him or affect a substantial interest he has. Indeed, Scharf did not aver that he personally studied birds on or near the proposed development site, or that the development would adversely affect any specific study or activity he carries out in connection with his study of bird populations. Thus, he failed to allege facts conferring standing because he failed to demonstrate a special injury or substantial right detrimentally affected by the SLUP. That is, his affidavit serves more as an expert opinion of the effect of the project on birds than it does to establish his own special injury arising from the project. While this might suggest that the birds have standing, it does not establish Professor Scharf's standing. Because Scharf lacks standing, the NMEAC also lacks standing because as a non-profit organization it has standing only to the extent that its members do. *Trout Unlimited*, 195 Mich. App. at 348.

***11** Accordingly, I would conclude that NMEAC has failed to establish standing.

All Citations

Not Reported in N.W. Rptr., 2017 WL 4798638

Footnotes

1 TIF stands for "tax increment financing," which the court explained was "simply the use of the developer's local property tax dollars to support the developer's own project in derogation of a contribution to local jurisdictions' general funds."

2 The Brownfield Redevelopment Financing Act, MCL 125.2651 *et. seq.* The court explained that "[t]o the degree that Brownfield funds intercept city and county general fund dollars to eradicate environmental contamination those funds benefit the environment, but not the general fund of the city." The court also stated that to the extent Brownfield funds were used to combat "so-called blight, they are simply a disguised form of tax increment financing or another vehicle by which developers do not support the general fund, but use their tax revenues to pay for their own project."

3 Michigan's standing doctrine meaningfully differs from that of the federal courts, in that unlike the United States Constitution, Michigan's Constitution "does not inherently incorporate the federal case-or-controversy requirement, and, in fact, importing this requirement is inconsistent with this Court's historical view of its own powers and the scope of the standing doctrine[.]" *Lansing Sch.*, 487 Mich. at 366. That difference is inconsequential in this case. The general standing principles applicable to nonprofit organizations in the federal courts remain helpful in analyzing the standing of nonprofit corporations in Michigan.

4 The circuit court made the following remark about the apparently contradictory findings made by the staff report and commission: "One cannot help but recall the Queen's comment to Alice on the practice of believing impossible things, 'Why, she said, sometimes I've believed as many as six impossible things before breakfast!' So it must be with City staff."

5 The circuit court explained that TIF and Brownfield funds represent local property tax funds from the development that would have otherwise gone to the City's general fund but instead pay the developer's costs.

6 This quote is not in a provision of the ordinance, but it is the preamble to Traverse City's "Special Land Use Regulations" Ordinance Chapter 1364. See <http://www.traversecitymi.gov/downloads/1364.pdf> (accessed March 24, 2017).

7 Zoning ordinance 1364.08(m) defines "Taller buildings" as those over 60 feet in height, such as the proposed 96–foot-tall development at issue in this case.

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EXHIBIT H

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

2020 WL 2615504
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

PRIORITIES USA, et al., Plaintiffs,
v.
Dana NESSEL, Defendant.

Case No. 19-13341
|
Signed 05/22/2020

Attorneys and Law Firms

Amanda Beane, Kevin J. Hamilton, Perkins Coie LLP, Seattle, WA, Christopher J. Bryant, Courtney Elgart, Marc E. Elias, Perkins Coie LLP, Washington, DC, Sarah Prescott, Salvatore Prescott, PLLC, Northville, MI, for Plaintiff Priorities USA.

Amanda Beane, Perkins Coie LLP, Seattle, WA, Christopher J. Bryant, Courtney Elgart, Marc E. Elias, Perkins Coie LLP, Washington, DC, for Plaintiffs Rise, Inc., Detroit/Downriver Chapter of the A. Philip Randolph Institute.

Erik A. Grill, Heather S. Meingast, Michigan Department of Attorney General, Lansing, MI, for Defendant.

OPINION AND ORDER GRANTING MOTIONS TO INTERVENE (ECF Nos. 33, 39)

Stephanie Dawkins Davis, United States District Judge

***1** This case involves constitutional challenges to Michigan's absentee voter law, Mich. Comp. Laws § 168.759, and voter transportation law, Mich. Comp. Laws § 168.931, filed by plaintiffs Priorities USA (Priorities), Rise, Inc. (Rise), and Detroit/Downriver Chapter of the A. Philip Randolph Institute (DAPRI).[1] The Michigan Republican Party (MRP) and the Republican National Committee (RNC) (ECF No. 33) as well as the Michigan Senate and Michigan House of Representatives ("the Legislature") (ECF No. 39) move to intervene in this case as of right or for permissive intervention pursuant to Federal Rule of Civil Procedure 24. The plaintiffs oppose the MRP's, the RNC's, and the Legislature's intervention in this case (ECF Nos. 43, 48);

Nessel opposes the MRP's and the RNC's intervention (ECF No. 42) but remained silent concerning the Legislature's proposed intervention. The MRP, the RNC, and the Legislature have filed reply briefs in support of their motions. (ECF Nos. 46, 49). The Court conducted a hearing regarding the instant motions to intervene on Friday, May 8, 2020, at 11:00 a.m.

I. GOVERNING LAW

Intervention as of right is governed by Federal Rule of Civil Procedure 24(a), which provides, in relevant part, that on timely motion, a court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Sixth Circuit has interpreted this language "to require an applicant to show that: 1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)).

Rule 24(b) governs permissive intervention and provides that a court may, on timely motion, permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Stated differently, "a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (citing *Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)). "Once these two requirements are established, the district court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Id.*

***2** Because the Court finds that the proposed intervenors meet the requirements for permissive intervention, it need not address whether they are entitled to intervene as of right. *See League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018); *Priorities USA v. Benson*, No. 19-13188, 2020 WL 1433852, at *9 (E.D. Mich. Mar. 24, 2020); *Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18cv357, 2018 WL 8805953, at *1 (S.D. Ohio Aug. 16, 2018).

II. ANALYSIS

A. Timeliness

The first inquiry is whether the motions to intervene are timely. Courts evaluate five factors in determining the timeliness of an application to intervene:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall v. Glickman, 226 F.3d 467, 473 (6th Cir. 2000) (quoting *Jansen v. City of Cincinnati,* 904 F.2d 336, 340 (6th Cir. 1990)). "No single factor is determinative; instead, timeliness 'should be evaluated in the context of all relevant circumstances.' " *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL 10350992, at *1 (6th Cir. Mar. 27, 2017) (quoting *Stupak-Thrall*, 226 F.3d at 472-73).

Priorities filed its complaint on November 12, 2019. (ECF No. 1). After a stipulated two-week extension, Nessel filed a motion to dismiss the complaint on December 20, 2019, based in part on a lack of standing. (ECF Nos. 6, 10). On December 23, 2019, District Judge Mark A. Goldsmith entered an order regarding the motion to dismiss, permitting Priorities to file an amended complaint to correct the deficiencies alleged by defendant within 21 days or otherwise respond to the motion to dismiss in due course. (ECF No. 13). That time was twice extended via stipulation and order, and on January 27, 2020, Priorities filed an amended complaint, adding Rise and DAPRI as plaintiffs. (ECF Nos. 15, 16, 17). The plaintiffs filed a motion for a preliminary and permanent injunction and a motion to expedite this case the next day. (ECF Nos. 22, 23). Nessel filed a motion to dismiss the amended complaint on February 10, 2020. (ECF No. 27). On February 11, 2020, the Court denied the plaintiffs' motion to expedite without prejudice and set an abbreviated briefing schedule for Nessel's motion to dismiss, requiring a response by February 24, 2020, and a reply by February 28, 2020. (ECF No. 29). The MRP and the

RNC filed their motion to intervene on February 19, 2020, and the Legislature filed its motion to intervene on February 27, 2020. (ECF Nos. 33, 39).

Given the trajectory of the case thus far, the Court finds that the motions to intervene are timely. The MRP, the RNC, and the Legislature moved to intervene in this case within a month of the filing of the amended complaint, and just weeks after Nessel filed her second motion to dismiss. Additionally, the Court has not issued a scheduling order or held a Rule 26(f) conference in this matter, and little to no discovery has taken place.

***3** The MRP, the RNC, and the Legislature move to intervene as party defendants and for permission to file responsive pleadings to the amended complaint and/or to respond to Nessel's motion to dismiss. They filed their motions to intervene while this case was still in its pleading stages, before the briefing on the plaintiffs' motion for a preliminary and permanent injunction and Nessel's motion to dismiss was complete, and before the Court began considering the merits of those motions. Thus, the MRP, the RNC, and the Legislature have moved to intervene at an appropriate juncture in this case to achieve their purposes.

There is some indication that the MRP, the RNC, and the Legislature knew of this litigation at or around its outset. (*See* ECF No. 43, PageID.833 (citing https://detroit.cbslocal.com/2019/11/13/suit-seeks-to-block-michigan-restrictions-on-helping-voters/); ECF No. 48, PageID.898 (citing *Priorities USA v. Benson*, Case No. 19-13188, ECF No. 7, PageID.43 (E.D. Mich. Nov. 27, 2019))). The proposed intervenors do not dispute this. When asked at the hearing why they did not move to intervene sooner, the MRP and the RNC explained that their interest in intervening heightened upon the filing of the amended complaint – when Rise and DAPRI joined in this action as plaintiffs. The Legislature explained a more strategic approach, first moving to intervene in *Priorities USA v. Benson*, Case No. 19-13188 (E.D. Mich. 2019), the first of three close-in-time cases filed by Priorities relating to Michigan's election laws, before moving to intervene in this case. These stated reasons tend to dispel suggestions of bad faith or intentional delay on the part of the proposed intervenors.[2] In light of these reasons and the rapidly changing procedural posture of this case prior to the filing of the instant motions, the Court does not find the proposed intervenors' failure to move sooner to be so unreasonable as to weigh against the timeliness of the motions.

In arguing that the MRP's and the RNC's motion to intervene is untimely, Nessel does not assert any specific prejudice resulting from the timing of their motion. Rather, she expresses concern about having her pending motion to dismiss heard and resolved as efficiently as possible without unnecessary delay. (ECF No. 42, PageID.810). This

concern is resolved by the Court's contemporaneous ruling on the motion to dismiss. The bulk of the prejudice asserted by the plaintiffs, *i.e.*, complication and further delay of the proceedings, primarily results not from the delay in filing the instant motions but from the intervention itself. This asserted prejudice will be fully addressed below.

Finally, the Court finds no unusual circumstances in terms of timeliness that militate against or in favor of intervention. For this and the reasons discussed above, the Court finds that the MRP, the RNC, and the Legislature have timely moved to intervene in this case.

B. Common Question of Law or Fact

Having determined that the motions to intervene are timely, the Court now turns to the question of whether the MRP's, the RNC's, and the Legislature's claims and defenses allege at least one common question of law or fact. They do. The motions to intervene and the proposed responsive pleadings filed by the MRP, the RNC, and the Legislature demonstrate that they seek to defend the constitutionality of Michigan's voter transportation and absentee voter laws, the same laws which the plaintiffs allege are unconstitutional.[3] (*See* ECF Nos. 33, 35, 39, 39-1). *See also* *Miller*, 103 F.3d at 1248 (Chamber of Commerce's claim that amendments to Michigan's Campaign Finance Act were valid presented a question of law common to the main action challenging the constitutionality of those amendments). Neither the plaintiffs nor Nessel dispute that this factor is met.

C. Undue Delay or Prejudice

***4** The plaintiffs argue that allowing the MRP, the RNC, and the Legislature to intervene will prejudice them and the public at large by delaying and complicating these proceedings while providing no meaningful benefit to the Court, the existing parties, or the interests of justice. The plaintiffs assert in this regard that they have a critical need in the speedy resolution of this case, and allowing intervention by the MRP, the RNC, and the Legislature will create an "intractable procedural mess" resulting from additional briefing, discovery, and litigation strategies, and will diminish the likelihood that this case will be resolved before the November 2020 election. (ECF No. 43, PageID.834-835, 836-837; ECF No. 48, PageID.899, 900). In support, the plaintiffs cite *League of Women Voters of Michigan v. Johnson*, No. 2:17-cv-14148, 2018 WL 3861731, at *2 (E.D. Mich. Aug. 14, 2018) (finding that potential conflicts in litigation strategy could be prejudicial to the original parties) and *Serv. Emps. Int'l Union Local 1 v. Husted*, 515 F. App'x 539, 542 (6th Cir. 2013) (finding denial of permissive intervention appropriate where motion was filed weeks after pleadings and preliminary injunction

briefing because delay would pose "a significant risk of upsetting the expedited schedule necessitated by the upcoming election").

The MRP and the RNC assert that they do not seek to cause any delay or reopen settled issues, their defenses are unlikely to require discovery or an evidentiary hearing, and they will submit all filings in accordance with any briefing schedule imposed by the Court. (ECF No. 33, PageID.511, 523).

The Court acknowledges the plaintiffs' sense of urgency and interest in reaching a prompt resolution prior to the November 2020 election. The Court also recognizes that permitting intervention by the MRP, the RNC, and the Legislature will compound these proceedings and cause some delay and prejudice to the original parties. However, a "district court [has] broad discretion in setting the precise scope of intervention," *Buck v. Gordon*, No. 19-1959, 2020 WL 2316677, at *6 (6th Cir. May 11, 2020) (quoting *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013)), and in controlling its own docket, *In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996) ("Matters of docket control and conduct of discovery are committed to the sound discretion of the district court."). And the Court finds that the plaintiffs' concerns of delay and prejudice can be addressed through proper limitation and docket control such that any delay and prejudice caused by the MRP's, the RNC's, and the Legislature's intervention will not be undue. *See* *United States v. Detroit*, 712 F.3d at 932.

D. Other Relevant Factors

The proposed intervenors' legal interests in this case are relevant to the Court's consideration of permissive intervention. *See* *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007); *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018) ("District courts can consider [mandatory intervention] factors when evaluating permissive intervention motions.").

The MRP and the RNC move to intervene to protect their "competitive interests in defending the constitutional election laws in Michigan in order to preserve a fair playing field and prevent change to Michigan's competitive environment in the upcoming 2020 elections." (ECF No. 33, PageID.499). The Legislature says that it has a compelling interest in the defense of duly enacted statutes and preserving the integrity of Michigan's elections through the same. (ECF No. 39, PageID.700, 707).

The Legislature's interest in this case is sound as it stems from its constitutional mandate to "enact laws ... to preserve the purity of elections." 1963 Mich. Const., Art. II, § 4(2).

This weighs in favor of granting the Legislature permissive intervention. The MRP's and RNC's competitive interests are not as salient, but because this case involves the integrity of Michigan's election laws, the Court views it as worthwhile to receive input from all interested parties to reach the correct determination. The Court will therefore permit the MRP, the RNC, and the Legislature to intervene in this case, subject to the limits proscribed below.

III. CONCLUSION

***5** For the reasons stated, the Michigan Republican Party's, the Republican National Committee's, and the Michigan Legislature's motions to intervene (ECF Nos. 33, 39) are **GRANTED**.

The MRP, the RNC, and the Legislature must answer or otherwise respond to the amended complaint within ten (10) days of this opinion and order. To the extent that the responses come in the form of dispositive motions, the motions are limited to issues not already addressed and resolved through the Court's opinion and order regarding Nessel's motion to dismiss.

The MRP, the RNC, and the Legislature must file any response to the plaintiffs' motion for a preliminary and permanent injunction within fourteen (14) days of this opinion and order. The plaintiffs may file reply briefs within seven (7) days of the response(s).

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2020 WL 2615504

Footnotes

1 The Court summarized the factual background of this case in a contemporaneous opinion and order regarding defendant Dana Nessel's motion to dismiss, and in lieu of restating the same, relies on the recitation contained therein for purposes of the instant motions. (*See* ECF No. 59).

2 The Court expresses no opinion as to the underlying merit of the proposed intervenors' reasons for not moving to intervene sooner.

3 The MRP and the RNC improperly filed their proposed answer to the amended complaint on the docket (ECF No. 35) rather than as an exhibit to their motion to intervene, and it will be stricken accordingly.

End of Document

EXHIBIT I

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

STATE OF MICHIGAN
IN THE 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

AFFIDAVIT OF CINDY BERRY

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Dickinson Wright PLLC
350 S. Main Street, Ste 300
Ann Arbor, MI 48104
(734) 623-1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

Charles R. Spies (P83260)
Dickinson Wright PLLC
1825 Eye Street N.W., Suite 900
Washington, D.C. 20006
202-466-5964
cspies@dickinsonwright.com

Attorneys for Plaintiffs

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Attorneys for Defendants

/

AFFIDAVIT OF CINDY BERRY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Cindy Berry, being first duly sworn, states as follows under oath:

1. I am over the age of eighteen and I have personal knowledge of the following facts. If called and sworn as a witness, I could and would competently testify thereto.

2. I am a resident of Chesterfield Township, Michigan, and a registered Michigan voter.

3. I cast a ballot for the February 2024 presidential primary election through Michigan's early voting process, but intend to vote by absentee ballot in the August 2024 primary election and the November 2024 general election.

4. I am the Clerk for the Township of Chesterfield, Michigan. As the Clerk, I am responsible for running the Township's elections, which includes hiring and training election inspectors (also known as poll workers), preparing absent voter ballots for distribution, compiling precinct results on Election Day, and certifying election results.

5. As Township Clerk, I am also responsible for ensuring that the identity of all absentee voters is verified through the absent voter signature verification process as required by the Michigan Constitution and the Michigan Election Law.

6. For example, the Constitution mandates that the election officials such as myself must "verify the identity of a voter who applies for an absent voter ballot other than in person by comparing the voter's signature on the absent voter ballot application to the voter's signature in their registration record." Const 1963, art 2, § 4(1)(h). So, too does the Michigan Election Law. See, e.g., MCL 168.761.

7. This verification process also applies to absent voter ballots. Const 1963, art 2, § 4(1)(h) (mandating that election officials "verify the identity of a voter who votes an absent voter ballot . . . by comparing the signature on the absent voter ballot envelope to the signature on the voter's absent voter ballot application or the signature in the voter's registration record."). See also MCL 168.765(2); MCL 168.766(1).

8. Despite those duties under the Constitution and the Michigan Election Law to *verify* absent voter signatures, Secretary of State Jocelyn Benson instructed local officials to *presume* the validity of signatures on absent voter applications and absent ballot return envelopes through her instructions entitled "Signature Verification, Voter Notification, and Signature Cure." Those instructions, which are attached as Exhibit A to the Verified Complaint filed in this case, is referenced here as the "Signature Verification Instructions."

9. Likewise, the Secretary's policy requiring election officials to consider "possible explanations for discrepancies in signatures" under Rule 168.24(1) of the Michigan Administrative Code is also inconsistent with the Constitution and the Michigan Election Law.

10. Under Rule 168.24, election officials are required to consider as "possible explanations" for "discrepancies in signatures" the notions that, among other things, a "voter's signature style may have changed slightly over time," the voter's "signature may have been written in haste," or the voter may have signed their absent voter application or ballot return envelope on a surface that was "rough, soft, uneven, or unstable." See Mich Admin Code R 168.24(1). This invitation for speculation, however, is inconsistent with both the Constitution and the Michigan Election Law, both of which mandate the verification of absent voter signatures for the purpose of verifying the identity of absent voters.

11. Rule 168.24 is also inconsistent with the Michigan Election Law because, when a clerk determines that the signature on an absent voter ballot application or absent voter ballot return envelope is missing or does not agree sufficiently with the signature on file, then that application or ballot must be rejected. See MCL 168.766a(3); MCL 168.761(2) (regarding applications); MCL 168.765(2) (regarding ballots); and MCL 168.766(2) (regarding ballots). I am not aware of any provision in the Constitution or Michigan Election Law that permits an election official to—as embodied in Rule 168.24—identify "discrepancies in signatures" that do not satisfy the signature verification standards under MCL 168.766a but accept the signatures anyway because it appears that a "signature *may* have been written in haste," or the absent voter *may* have signed their application or ballot return envelope on a "rough, soft, uneven, or unstable" surface.

12. Rather, if an absent voter's signature "differs in significant and obvious respects from the elector's signature on file" due to the types of discrepancies described in Rule 168.24(1), then the signature must be rejected. MCL 168.766a(2)-(3). Of course, when an application or ballot return envelope is rejected, then election officials have a duty to notify that voter that their application or ballot was rejected so that the voter has an opportunity to correct the issue with the signature. But the Secretary's policy mandating that election officials speculate as to "possible explanations for discrepancies in signatures" under Rule 168.24(1) is inconsistent with the Constitution and the Michigan Election Law.

13. As a local clerk, I am subject to the Secretary's Signature Verification Instructions as well as Rule 168.24.

14. As a public official, however, I swore an oath to support the Michigan Constitution and to faithfully discharge the duties of my office.

15. While I have attempted to reconcile both Rule 168.24(1) and the presumption of validity found in the Secretary's Signature Verification Instructions against the text of the Michigan Constitution and the Michigan Election Law, both seem incompatible with the identity verification and signature verification mandates under the Constitution and the law.

16. Given that Michigan law empowers the Secretary to investigate, or cause to be investigated by local authorities, the administration of election laws, and to report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution, see MCL 168.31(h), it seems possible to me that I could face penalty or even removal from my position as Clerk if I apply rules or guidance such as those challenged here that are inconsistent with the law or Constitution. And in today's hyper-political climate, it also seems possible to me that I could face removal from my position as Clerk if I do not apply rules or guidance to which I am subject as a local clerk.

17. As a result, while I plan to conduct the Chesterfield Township elections in accordance with the Constitution and Michigan Election Law just as I always do, I seek a judicial declaration in this lawsuit as to whether I am and will continue to be subject to Rule 168.24(1) and the presumption of validity found in Secretary's Signature Verification Instructions, as both appear to be inconsistent with the Constitution or the Michigan Election Law.

18. I also seek a declaration in this case to vindicate my own rights as a Michigan voter.

19. It is well-known among election officials that absentee voting is one of the major sources of election fraud.

20. It is also highly publicized and widely known that Democrats are more likely to vote by absentee ballot in Michigan than are Republicans.

21. As a result, when election officials fail to verify the identity of absentee voters because they apply an initial presumption of validity to absent voter signatures and/or speculate as to reasons for signature discrepancies under Rule 168.24(1), the resulting inaccurate tallies undermine my right to a fair and accurate electoral count, and it undermines my confidence in the election.

22. By counting votes on absent voter ballots where the signature was reviewed through an initial presumption of validity, Michigan dilutes the weight of valid votes, including my own vote—especially given that I tend to vote for and support candidates affiliated with the Republican Party.

23. Likewise, by counting votes on absent voter ballots where the election official speculated as to "possible explanations for discrepancies in signatures" under Rule 168.24(1)—despite the fact that the signature "differs in significant and obvious respects from the elector's signature on file" under MCL 168.766a(2)-(3)—Michigan again dilutes the weight of valid votes, including my own.

FURTHER AFFIANT SAYETH NOT.

I declare that the above statements are true and correct to the best of my information, knowledge and belief.

Cindy Berry

Subscribed and sworn to before me this
6th day of May, 2024.

Notary Public, Macomb, County, Michigan
Acting in Macomb County
My Commission Expires: 04/11/2029

DAN RUTLEDGE
Notary Public, State of Michigan
County of Macomb
My Commission Expires 04-11-2029
Acting in the County of Macomb

EXHIBIT J

As indicated in the corresponding brief, and for the sake of consistency and ease of reference, Plaintiffs' exhibits are labeled in consecutive fashion with those exhibits attached to Plaintiffs' 04/22/2024 Motion for Summary Disposition, which included Exhibits A, B, & C

2005 WL 659654
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

In re: PUBLIC ACT 619 OF THE PUBLIC ACTS OF 2002, MCL 333.22201, et seq.
BOTSFORD GENERAL HOSPITAL, a Michigan nonprofit corporation; Trinity Health-Michigan, a Michigan nonprofit corporation; Covenant Medical Center, Inc., a Michigan nonprofit corporation; William Beaumont Hospital, a Michigan nonprofit corporation; Mount Clemens General Hospital, Inc, a Michigan nonprofit corporation; Marianne Simancek, Judith Lee O'Connor, and Margaret Ann Reihmer, in their individual capacities, Plaintiff-Appellants,
v.
STATE of Michigan; Michigan Department of Community Health; Michigan Department of Consumer & Industry Services; Departments of the Executive Branch of the Government of the State of Michigan; Henry Ford Health Systems, d/b/a Henry Ford Medical Center-West Bloomfield, a Michigan nonprofit corporation; Providence Hospital and Medical Centers, Inc., a Michigan nonprofit corporation; and St. John Health, a Michigan nonprofit corporation, Defendant-Appellees.

No. 257500.
|
March 22, 2005.

Before: TALBOT, P.J., and GAGE and MURRAY, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs Botsford General Hospital, Trinity-Health-Michigan, Covenant Medical Center, Inc., William Beaumont Hospital, Inc., Mount Clemens General Hospital, Inc., Marianne Simancek, Judith Lee O'Connor, and Margaret Ann Reihmer appeal as of right from an order of the circuit court dismissing their claims on the ground that plaintiffs lack standing. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arose out the Department of Community Health's approval of defendant Henry Ford Health System's (HFHS) application to relocate two hundred [1] licensed hospital beds to its freestanding surgical outpatient facility (FSOF) in West Bloomfield and defendant Providence Hospital and Medical Centers, Inc., and St. John Health's (St.John/Providence) [2] application to relocate two hundred licensed hospital beds to its FSOF in Novi. Pursuant to MCL 333.22209(3)(b) the Department of Community Health approved defendants' applications without requiring either of them to first obtain a certificate of need (CON).

Plaintiffs Botsford General Hospital, Trinity-Health-Michigan, Covenant Medical Center, Inc., William Beaumont Hospital, Inc., and Mount Clemens General Hospital, Inc. ("hospital plaintiffs"), three of which had submitted applications for a CON to provide additional hospital beds in the same health service area as the hospital defendants at the time MCL 333.22209(3)(b) was passed, claim that MCL 333.22209(3)(b) is an unconstitutional delegation of legislative authority that deprived them of their statutory right to a comparative review of their CON applications. The hospital plaintiffs further claim that permitting the hospital defendants to relocate hospital beds without a CON, pursuant to MCL 333.22209(3)(b), will harm them economically. Marianne Simancek, Judith Lee O'Connor, and Margaret Ann Reihmer ("individual plaintiffs") joined in this suit, claiming that MCL 333.22209(3)(b) violates Const 1963, art IV, § 29, because it is special legislation that was passed without a two-thirds majority in each house of the Legislature and was not approved by voters in the districts affected.

The hospital plaintiffs and the individual plaintiffs jointly filed a complaint against the State of Michigan, the Michigan Department of Community Health, and the Michigan Department of Consumer and Industry Services ("state defendants"), and against the hospital defendants, seeking a declaratory judgment that MCL 333 .22209(3)(b) is unconstitutional and injunctive relief permanently enjoining HFHS from taking any action pursuant to MCL 333.22209(3)(b). Plaintiffs now appeal as of right from an order of the trial court granting summary disposition in favor of all defendants on the ground that plaintiffs lack standing to bring their claims.

In 1972, the Legislature enacted 1972 PA 256, which established the CON program to deal with the uneven distribution of hospital services throughout the state and to improve access to health care services for Michigan citizens. The CON program was designed to control the costs of health care by requiring that any health care provider planning to construct new health facilities or add new beds to an existing facility first demonstrate a need for those new services in the targeted service area. *West Bloomfield Hosp v. Certificate of Need Bd,* 452 Mich. 515, 520; 550 NW2d 223 (1996). Under the CON program, certain proposals for new health care facilities are subject to comparative review, whereby applicants seeking to add new beds to a service area must submit applications to the CON Commission by a given date, the Commission compares the applications against each other, and issues a CON to the successful bidder. See MCL 333.22225; MCL 333.22229.

***2** Supporting affidavits of defendants' pleadings indicate that the economics of providing health care services within the City of Detroit have proven increasingly difficult over the last twenty years, as evidenced by the fact that over twenty hospitals in Detroit have closed during that time. This is due in large part to the fact that over half of the patients in Detroit are either underinsured or completely uninsured. St. John/ Providence and HFHS are two of the remaining few health care systems providing hospital services in the City of Detroit. Currently, St. John/Providence and HFHS each provide over $100 million in uncompensated health services in Detroit annually. The hospital defendants argue that the relocation of beds to western Oakland County, where the great majority of patients are insured, is necessary to defray the costs of providing services to uninsured patients and to keep their facilities in Detroit operating.

Defendants' pleadings further indicate that St. John/Providence operates a FSOF in Novi and HFHS operates a FSOF in West Bloomfield. A FSOF is, in essence, a “hospital without beds” because it already provides twenty-four hour emergency services and at least four other CON-approved services. HFHS has tried for a number of years to relocate some of its existing licensed hospital beds from Detroit to its FSOF in western Oakland County. However, the relocation of licensed hospital beds under the then-existing law required a CON. The Department of Community Health could not issue HFHS a CON because, under the standards developed by the Commission, the proposed relocations did not satisfy the bed-need regulations.

According to affidavits submitted with the hospital defendant's pleadings, in June 2002, HFHS learned that the CON Commission was considering rules that would allow plaintiff Beaumont to add beds to its hospital in Oakland County, which is in the same service area as the hospital defendants' Detroit hospitals and Oakland County FSOFs. HFHS petitioned the CON Commission to approve standards that

would allow it to relocate existing beds to its FSOF in West Bloomfield, but the CON Commission declined. In the fall of 2002, the hospital defendants and others approached the Legislature, requesting that it address this issue to allow the hospital defendants to relocate existing beds to Oakland County. The legislature responded by passing 2002 PA 619, which was signed into law by the governor on December 27, 2002, and later codified at MCL 333.22209, to amend certain provisions of the CON program. Specifically, MCL 333.22209(3)(b) authorizes the CON Commission to approve the relocation of existing hospital beds from a hospital to a FSOF without a CON if certain conditions are met.

II. THE HOSPITAL PLAINTIFFS' STANDING

The hospital plaintiffs argue that MCL 333.22209(3)(b) is an unconstitutional delegation of legislative authority that deprived them of their statutory right to comparative review when applying for a certificate of need (CON) to provide additional hospital beds and, as a result, they have been injured economically. They further claim that these injuries are concrete and particularized enough to support standing to sue. We disagree.

***3** This Court reviews the issue of whether a party has standing de novo. *Nat'l Wildlife Federation v. Cleveland Cliffs Iron Co,* 471 Mich. 608, 612; 684 NW2d 800 (2004). Interpretation and application of a statute is reviewed de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich. 29, 32; 658 NW2d 139 (2003). Constitutional issues, like questions of statutory construction, are reviewed de novo. *County of Wayne v. Hathcock,* 471 Mich. 445, 455; 684 NW2d 765 (2004). This Court also reviews a trial court's decision on summary disposition de novo. *DeShambo v. Anderson,* 471 Mich. 27, 31; 684 NW2d 332 (2004).

To satisfy the standing requirements, plaintiffs must have, at a minimum,
suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [*Lee v. Macomb Co Bd of*

Comm'rs, 464 Mich. 726, 739; 629 NW2d 900 (2001), quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561; 112 S Ct 2130; 119 L.Ed.2d 351 (1992).]

The Court emphasized that the concept of standing arises from "concern with maintaining the separation of powers" and, specifically, "preventing the judiciary from usurping the powers of the political branches." *Id.* at 737.

The portions of MCL 333.22209 at issue here are subsections (3)(b) and (9), the text of which is as follows:
(3) Subject to subsection (9) and if the relocation does not result in an increase of licensed beds within that health service area, a certificate of need is not required for any of the following:

(b) Subject to subsections (7) and (8), the physical relocation of licensed beds from a hospital licensed under part 215 to a freestanding surgical outpatient facility licensed under part 208 if that freestanding surgical outpatient facility satisfies each of the following criteria on December 2, 2002:

(i) Is owned by, is under common control of, or has as a common parent the hospital seeking to relocate its licensed beds.

(ii) Was licensed prior to January 1, 2002.

(iii) Provides 24-hour emergency care at that site.

(iv) Provides at least 4 different covered clinical services at that site.

(9) No licensed beds shall be physically relocated under subsection (3) if 7 or more members of the commission, after appointment and confirmation of the 6 additional commission members under section 22211 but before June 15, 2003, determine that relocation of licensed beds under subsection (3) may cause great harm and detriment to the access and delivery of health care to the public and the relocation of beds should not occur without a certificate of need. [MCL 333.22209(3)(b), (9).]

***4** Subsection (3)(b), therefore, allowed defendants St. John/Providence and HFHS to relocate their existing hospital beds from their Detroit hospitals to their FSOFs in

Novi and West Bloomfield, respectively, without a CON. Subsection (9) permitted the CON Commission to negate the subsection (3)(b) CON exemption if the following two conditions were met: (1) the six new CON Commission positions created by section 22211 all had to be appointed and confirmed, and (2) the thus fully constituted Commission had to have taken action under subsection (9) before June 15, 2003. One of the commissioners appointed under section 22211, however, could not be confirmed until after June 15, 2003, and therefore, the CON Commission could never take any official action under subsection (9).

The substance of the hospital plaintiffs' claim is that, in making subsection (3)(b) subject to the CON Commission's executive veto authorized by subsection (9), the Legislature unconstitutionally delegated legislative authority to the Commission. Before we may address the merits of plaintiffs' claim, however, plaintiffs must first satisfy the requirements of standing to challenge the constitutionality of the statute.

First, the hospital plaintiffs argue that subsection (3)(b) deprives them of their statutory "right" to comparative review, thereby creating a concrete and particularized injury to a protected interest. Yet, the hospital plaintiffs have not pointed to any statutory language expressly granting such a right. Rather, the hospital plaintiffs argue that MCL 333.22229(1) implicitly creates a statutory right to comparative review in health care providers that submit competing applications for a CON in a given service area. The text of MCL 333.22229(1) is as follows:

(1) The following proposed projects are subject to comparative review:

(a) Proposed projects specified as subject to comparative review in a certificate of need review standard.

(b) New beds in a health facility that is a hospital, hospital long-term care unit, or nursing home if there are multiple applications to meet the same need for projects that when combined, exceed the need of the planning area as determined by the applicable certificate of need review standards.

Although the hospital plaintiffs point out that the Michigan Department of Community Health's CON review standards for hospital beds, Section 1(1)(b), applies to "physically relocating hospital beds from one licensed site to another geographic location," 2004 MR 12, p 187, the Department's review standards do not vest any statutory right to comparative review in a health care provider that has submitted an application for a CON. Thus, the CON statute subjects certain projects to comparative review, but nowhere in the statute are hospitals with pending CON applications expressly granted

any protected interest in comparative review. "This Court will read 'nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." ' *City of Warren v. Detroit,* 261 Mich.App 165, 169; 680 NW2d 57 (2004) (citation omitted). There is simply no language in the statute to support the hospital plaintiffs' argument that the statue grants them a protected right to comparative review.

***5** On the contrary, the Michigan Supreme Court recognized that the manifest intent of the Legislature in enacting the CON program is to "contain health care costs by eliminating the proliferation of unnecessary medical treatment facilities," *West Bloomfield Hosp, supra* at 520, not, as plaintiffs argue, to "encourage regulated competition." We agree with the trial court when it stated, "It is plain that the certificate of need (CON) program is intended to benefit the public, not any particular hospital, health facility[,] or individual voter." *Botsford General Hospital v. Dep't of Community Health,* unpublished opinion of the Ingham Circuit Court, issued July 20, 2004, p 4 (Docket No. 03-1045-CZ). The hospital plaintiffs, therefore, have no legally protected interest in comparative review.

Second, with regard to the hospital plaintiffs' claim that subsection (3)(b) has injured them economically, this injury is too speculative to support standing. The hospital plaintiffs' argument assumes that all of the patients who would use the relocated hospital beds in western Oakland County would otherwise use plaintiffs' hospital beds, as opposed to using hospital beds in other areas like Ann Arbor, where many western Oakland County patients currently go for treatment. The hospital plaintiffs' argument also ignores the fact that patients choose hospitals based on the quality of care they provide as well as geographic proximity. Under the CON statute, the hospital defendants are simply relocating existing beds from one part of the health care service area to another, not creating a net addition of beds. Thus, the hospital defendants' relocation of hospital beds under subsection (3)(b) would not create more competition for the hospital defendants, but rather, as the trial court determined, "fine tun[e] the geographical distribution of existing beds." The resultant cost to the hospital plaintiffs of allowing the hospital defendants to relocate hospital beds is, therefore, too speculative to support standing to sue.

Third, even if the hospital plaintiffs could point to an injury that is sufficiently concrete to support standing, such injury would not be "fairly traceable" to any of the named defendants. Rather, the injury would be the result of the Legislature's passage of MCL 333.22209(3)(b). In bringing this claim before the courts, the hospital plaintiffs, in essence, are asking the judiciary to overturn the Legislature's policy determination that the subsection (3)(b) CON exemption is an appropriate way of providing access to health

care in both western Oakland County and in Detroit. In such instances, the standing requirements properly bar plaintiffs from bringing suit to "prevent[ ] the judiciary from usurping the powers of the political branches." *Lee, supra* at 737. The trial court did not err in determining that the hospital plaintiffs lack standing to sue.

Because we agree with the trial court's determination that the hospital plaintiffs lack standing to challenge the constitutionality of MCL 333.22209(3)(b), we do not address the merits of their claim that subsection (3)(b) unconstitutionally delegates legislative authority to the CON Commission through subsection (9). We do, however, note that because the Commission never took any action pursuant to subsection (9) and, because of the subsection's date restriction, never will, the allegedly unconstitutional delegation of legislative authority under subsection (3)(b) can never occur. The hospital plaintiffs' claim that subsection (3)(b) is an unconstitutional delegation of legislative authority is, therefore, moot. *City of Warren, supra* at 166 n 1 ("An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.").

III. THE INDIVIDUAL PLAINTIFFS' STANDING

***6** The individual plaintiffs argue that MCL 333.22209(3)(b) constitutes "special," or local, legislation that was passed in violation of Const 1963, art IV, § 29, because it passed without a two-thirds majority in each house of the Legislature and approval of the voters in the districts affected. As registered voters in the districts where the hospital beds at issue are currently located or where those beds are proposed to be moved to, the individual plaintiffs claim that loss of the right to approve MCL 333.22209(3)(b) by local referendum constitutes a concrete and particularized harm sufficient to support standing to sue. We disagree.

The individual plaintiffs' standing hinges, as a threshold matter, on whether MCL 333.22209(3)(b) constitutes general or special legislation. The Michigan Constitution, in relevant part, requires that "[n]o local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected." Const 1963, art IV, § 29. In support of their argument that subsection (3)(b) is special legislation, plaintiffs cite *Michigan v. Wayne Co Clerk,* 466 Mich. 640; 648 NW2d 202 (2002), and *Mulloy v. Wayne Co Bd of Supervisors,* 246 Mich. 632, 635; 225 NW 615 (1929). In both cases, the Court determined that statutes that applied only to cities or counties that attained a

specified population before a given date constitute special legislation because the class becomes closed after the deadline and the law does not continue to apply to all cities or counties as they grow to meet the statute's population requirement. *Wayne Co Clerk, supra* at 643; *Mulloy, supra* at 639-640. Analogously, plaintiffs argue that because the subsection (3)(b) CON exemption only applies to hospitals that owned a FSOF that met all the subsection's criteria as of December 2, 2002, the subsection closed the class that is permitted to benefit from the CON exemption, and therefore, constitutes special legislation.

The legislation in the present case is distinguishable from the special or local legislation at issue in the cases relied upon by plaintiffs. In *Wayne Co Clerk, supra,* for example, the Court held that 2002 PA 432 was a local act because it could only, and did only, affect one city on one occasion. *Wayne Co Clerk, supra* at 643. The situation in the present case is to the contrary. Indeed, plaintiffs concede that the statute applies to at least one other entity not involved in this case, St. Mary's-Saginaw Inc., in addition to the defendants. Thus, the law was not passed for the exclusive situation of one entity, as in *Wayne Co Clerk.* Additionally, the relocation of hospital beds to western Oakland County would benefit patients in many areas, both in and outside of Oakland County.

Although "special" legislation has never been clearly defined either by the Michigan Constitution or by case law, the Supreme Court has given some insight regarding this determination. The Court has held, "We must consider 'the purposes sought to be accomplished by the law.' If we find 'those purposes are public purposes, if the work of the entity is a public work' then we should find [the statute] to be 'a constitutional exercise of legislative power' insofar as art 4, § 29 applies." *W A Foote Mem Hosp, Inc, v. Kelley,* 390 Mich. 193, 212; 211 NW2d 649 (1973) (citation omitted). Additionally, whether a statute is general or special legislation "does not depend upon the number of persons within the class it purports to regulate or upon the number without that class. It is a general act if it applies uniform rules of conduct for all those persons within the scope of its application." *Rohan v. Detroit Racing Ass'n,* 314 Mich. 326, 351; 22 NW2d 433, 442 (1946).

***7** Furthermore, the Supreme Court has held that "matter[s] of health" are "question[s] of state-wide concern and in which the legislature has a large area of discretion." *Foote, supra* at 212, quoting *Ecorse v Peoples Community Hosp Auth,* 336 Mich. 490, 502-503; 58 NW2d 159 (1953). In so holding, the Court echoed its century-old decision in *Davock v. Moore,* 105 Mich. 120; 63 NW 424 (1895), in which the Court stated, "The preservation of the public health is not a local purpose, and the consent of the locality is not material, where the function is a general or a public one." *Id.* at 133.

The subsection (3)(b) CON exemption serves the public purpose of ensuring access to health care for Michigan's citizens, which is a matter of statewide concern, and it applies uniformly to the class it purports to regulate-any hospital that met its criteria as of December 2, 2002. Construing subsection (3)(b) as "special" legislation would impinge on the legislature's policy determination of what is the best way of ensuring continued health care in the City of Detroit and providing increased health care access to western Oakland County, and therefore, should be disfavored.

Even if subsection (3)(b) is special legislation, it does not follow that the individual plaintiffs' alleged loss of their right to vote on the act is necessarily sufficient to confer standing to challenge it. Plaintiffs cite *Baker v. Carr,* 369 U.S. 186; 82 S Ct 691; 7 L.Ed.2d 663 (1962), and *Fed Election Comm v. Atkins,* 524 U.S. 11; 118 S Ct 1777; 141 L.Ed.2d 10 (1998), for the proposition that voters generally have standing to challenge the constitutionality of a statute to the extent that legislative action affects their constitutional right to vote, even though the injury may be abstract and widely shared. These cases, however, do not stand for the proposition that voters have standing in the absence of some particularized harm. *Baker* involved a claim that a representative appointment scheme gave voters in certain counties a disproportionately less weighted vote than voters in irrationally favored counties. *Baker, supra* at 207-208. By its very terms, such a claim alleges that the voters in the affected counties had an interest more particularized than voters across the rest of the state. *Atkins,* on the other hand, involved a portion of the Federal Election Campaign Act (FECA) that gave standing to anyone who believed a violation of the act occurred. The plaintiffs' standing in *Atkins* was based on the fact that they had requested information from the Federal Election Commission (FEC), which the FEC denied in alleged violation of the FECA, rather than on the plaintiffs' status as voters. *Atkins, supra* at 21.

Plaintiffs also cite *Kuhn v. Secretary of State,* 228 Mich.App 319; 579 NW2d 101 (1998), as the only Michigan precedent addressing voter standing when a constitutional right to vote is infringed. In *Kuhn,* this Court held that an Oakland County judge had no standing to challenge a state statute that consolidated the Detroit Recorder's Court into the Wayne County Circuit Court, allegedly depriving the electorate of the opportunity to vote for the twenty-nine judicial seats in the Wayne Circuit Court in violation of Const 1963, art 6, § 12. *Id.* at 333. Plaintiffs point out that the Court's rationale for its holding was that Judge Kuhn was "neither a Wayne County resident, a voter registered in Wayne County, nor a potential candidate for one of those twenty-nine newly created judgeships." *Id.* Plaintiffs argue that this language implies that Judge Kuhn would have had standing if he were a registered voter in Wayne County, and by analogy, the individual plaintiffs in the present case should also have standing. Plaintiffs'

argument, however, is undercut by *Anthony v. Michigan,* 35 F Supp 2d 989, 1003 (ED Mich.1999), which held that voters did not have standing to challenge the exact law at issue in *Kuhn.*

***8** Nothing in Const 1963, art 4, § 29, confers standing on voters who have not suffered a concrete and particularized injury. In other words, there is no suggestion that the rules of standing do not apply with equal force to claims of government infringement on the right to vote as they do to any other claim. The individual plaintiffs have not alleged that the power of their votes has been diminished vis-à-vis other voters throughout the state, as did the plaintiffs in *Baker, supra.* Nor did the individual plaintiffs point to a statutorily provided cause of action, as did the plaintiffs in *Atkins, supra.* The individual plaintiffs have not even alleged that the relocation of hospital beds under subsection (3)(b) will harm them in any way at all. Because the individual plaintiffs have not suffered any concrete and particularized harm, they lack standing even if subsection (3)(b) is "special" legislation.

IV. PLAINTIFFS' EQUAL PROTECTION CLAIM

Both the hospital plaintiffs and the individual plaintiffs argue that the trial court erred in dismissing the Equal Protection claim brought in Count III of their complaint despite the fact that plaintiffs only moved for summary disposition on Counts I and II. We disagree.

As explained in II and III, supra, plaintiffs do not have standing to bring their claims because they have not suffered any concrete and particularized injury; however, plaintiffs' Equal Protection claim would fail even if they had standing. First, this Court notes that plaintiffs bring this claim under the Equal Protection Clause of the Michigan Constitution. Const 1963, art 1, § 2. The Michigan Equal Protection Clause, however, provides no remedy itself, but rather, "expressly assigns the responsibility of implementation to the Legislature." *Lewis v. State,* 464 Mich. 781, 786; 629 NW2d 868 (2001). This means that plaintiffs had to cite some statute passed pursuant to the Equal Protection Clause (e.g., the Elliot-Larsen Civil Rights Act) to state a cause of action, not the Equal Protection Clause itself. Plaintiffs admit that defendant HFHS's motion for summary disposition tested their Equal Protection claim. Therefore, even if plaintiffs had standing, the trial court could have properly dismissed this claim under MCR 2 .116(C)(8) (failure to state a claim on which relief can be granted).

Furthermore, plaintiffs' Equal Protection claim is without merit. Plaintiffs have failed to identify any suspect classification or fundamental right involved; therefore, subsection (3)(b) is subject to rational basis scrutiny, which requires only that the statute be

rationally related to a legitimate government purpose. *Phillips v. Mirac, Inc,* 470 Mich. 415, 432-433; 685 NW2d 174 (2004). The distinction between requiring a CON for *adding* licensed hospital beds to a service area and not requiring a CON for merely *relocating* beds within the same service area is rationally related to the legitimate government purpose of "contain[ing] health care costs by eliminating the proliferation of unnecessary treatment facilities." *West Bloomfield Hosp, supra* at 520. Therefore, subsection (3)(b) passes Equal Protection Clause scrutiny.

IV. CONCLUSION

***9** Neither the hospital plaintiffs nor the individual plaintiffs have alleged concrete and particularized harm sufficient to support standing to sue. The trial court did not err in determining that MCL 333.22209(3)(b) is not special legislation or in dismissing plaintiffs' Equal Protection claim.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 659654

Footnotes

1 HFHS requested to relocate three hundred beds, but the Department of Community Health "determined that a maximum of 200 licensed hospital beds can be relocated under MCL 333.22209(3)(b) without a certificate of need."

2 Defendants HFHS and St. John/Providence will be collectively referred to as "the hospital defendants."