STATE OF MICHIGAN
COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.

No. 24-000041-MZ

HON. CHRISTOPHER P. YATES

Robert L. Avers (P75396)
Joseph A. Vacante (P87036)
Attorneys for Plaintiffs
350 South Main Street, Suite 300
Ann Arbor, Michigan 48104
734.623.1672
ravers@dickinsonwright.com
jvacante@dickinsonwright.com

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

DEFENDANTS' REPLY BRIEF
IN SUPPORT OF THEIR 04/22/2024 MOTION FOR SUMMARY DISPOSITION

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendants
PO Box 30736
Lansing, Michigan 48909
517.335.7659

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I. Plaintiffs fail to explain why their claims are not abstract and hypothetical.

While Plaintiffs' arguments on standing expend considerable attention and effort on the Plaintiffs' identity and their supposed "special interests" in the issues, they make no attempt to ground their claims in any specific signatures or in signature comparisons that have actually occurred. But the problem is not about who the Plaintiffs are, it is about what they are basing their claims upon. Their claim to standing rests on the committees' representation of members and candidates who worry that they may suffer "electoral injuries" in the future, the individual citizens' generalized and abstract anxieties of vote dilution, and vaguely-described uncertainty among "election officials" (presumably, Clerk Berry) about whether the 2023 guidance conflicts with the law or constitution. (Pl's Resp Br, p 7). These arguments simply fail to demonstrate the kind of actual controversy that would establish their standing.

To be clear, Defendants have not argued that a candidate, or political party, or voter, or even a clerk could *never* have standing to seek declaratory relief under MCR 2.605. Instead, the question is whether these Plaintiffs have stated an interest *in this case* that is distinct from the public at large. See *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 (2020). This is precisely the analysis the Court of Appeals undertook in *Mich Republican Party v Donahue*, __ Mich App __, Docket No. 364048 (Mar 7, 2024) (2024 Mich App LEXIS 1732; 2024 WL 995238) (copy attached as Exhibit 3 to Def's MSD), where it concluded that a political party's general interest in "election integrity" was not a sufficient interest to support standing under MCR 2.605 because election integrity is shared by the entire public rather than the political parties specifically. Plaintiffs allege nothing more than that here, and all their alleged worries and fears amount to little more than a generalized concern about election integrity. (See

e.g. Pl's Resp Br, p 11, "As electoral competitors, the Republican Committees and their candidates have a substantial interest in fair elections where all valid election laws are enforced.") Plaintiffs' response attempts to dismiss the *Donahue* opinion on the basis that the decision has been appealed, but that argument is unpersuasive—the existence of an appeal is not the same as an opinion being overturned, and *Donahue* remains a valid published decision of the Court of Appeals unless and until the Michigan Supreme Court holds otherwise.

Pointedly, Plaintiffs have not made any allegations purporting to identify a single occasion where the signature guidance or Rule 168.24 led to the acceptance of a single signature that—but for those instructions—would not have been accepted. And while it is true that a party does not need to suffer an injury before seeking declaratory relief, Plaintiffs' response even fails to describe a plausible circumstance under which the instructions would compel an election official to accept a signature that the official did not believe sufficiently agreed with the signature on file for that voter. Plaintiffs' response instead seeks to raise abstract and hypothetical questions that are not grounded in any imminent decision about any actual signatures.

Indeed, not only do Plaintiffs seek to have the Court assume that an otherwise questionable signature might be accepted as valid on the basis of the challenged instructions, they further ask the Court to assume such an occurrence would operate in favor of a competing political party and thus cause them a "special injury." (See Pl's Resp Br, p 15) (because they allege absentee voting "favors Democrats," they argue the acceptance of any AV ballots that lack sufficiently matching signatures, "reduce the Republican Committees chances of electoral victory.") This is, of course, purely speculative and there is no way of knowing that some future "questionable signature" would not be affixed to a ballot favoring the Plaintiffs' preferred

candidates. For the reasons Defendants have already argued, however, standing cannot be premised upon such unrestrained imagination.

Lastly, Plaintiffs cite the *Genetski* opinion as having held that the plaintiffs there had standing—"particularly plaintiff Genetski, who is a local clerk subject to the guidance at issue." Pl's Resp Br, p 20 (quoting Compl, Ex B.) Plaintiffs—including Plaintiff MRP, which was also a party in *Genetski*—then argue that it "would make no sense" to conclude that Plaintiff Berry lacked standing after previously concluding that Genetski—who was "a county clerk with little responsibility regarding the verification of absent voter signatures"—was an interested party under MCR 2.605. Without any doubt, that was surely not how the plaintiffs represented County Clerk Genetski's responsibilities in their arguments there, as shown by the reference to Genetski's role in the Court's opinion. (Compl, Ex B, p 6.) Regardless, the decision in *Genetski* does not bind this Court, predates the *Donahue* decision, and the 2020 guidance was direct in providing that all signatures should be presumed valid whereas Plaintiffs' claims here are considerably more speculative. In this case, with these allegations, the Plaintiffs have not demonstrated that they have standing to raise any of the claims in the complaint.

II. Plaintiffs continue to rely upon a "presumption of validity" that does not exist.

Plaintiffs' response first accuses the Defendants of "downplaying" the presumption of validity. (Pl's Resp Br, p 22.) It would be more accurate, however, to state that the Defendants have directly refuted the existence of a presumption of validity. Indeed, Defendants have consistently emphasized that the sentence following the "initial presumption of validity" in the 2023 guidance pointedly states that signatures are *not* presumed valid without further review. Clerks are then directed to perform the statutorily-required review of all signatures. Plaintiffs' response, however, makes no attempt to reconcile its arguments—or the claims in the complaint—with the language of the guidance that directly contradicts their claims.

Instead, the response disputes whether a clerk can even start their review with the notion that a signature is that of a voter, and they ask rhetorically what part of MCL 168.766a permits even an initial belief that a signature may be valid. But Plaintiffs' response fails to address the statutory directives quoted in Defendants' brief from MCL 168.766a(1) and MCL 168.766a(2). The statute cautions that signatures can only be determined invalid after review is completed, provides that slight differences "be resolved in favor of the voter," and that "exact matches" are not required. In short, the statute clearly tilts in favor of the voter's signature being valid, and that is all the Defendants' guidance seeks to convey.

Plaintiffs then suggest that they have "never claimed" that signatures should be presumed to be invalid, and they are only seeking signatures to be reviewed from a position of neutrality. (Pl's Resp Br, p 22). This argument, however, is in considerable tension with Plaintiffs' earlier arguments regarding standing, where they contended that absentee voting is a partisan policy that only operates to advantage the Plaintiffs' election rivals, and is something the Plaintiffs have a special interest in opposing. (See e.g. Pl's Resp Br, p 15.) Regardless, the Defendants' guidance accurately explains the law as it was written. MCL 168.766a(1) and (2) are not "neutral" on the subject of signature validity—these sections clearly err on the side of the voter by forgiving slight differences and rejecting signatures only where they differ in "significant and obvious respects." The Defendants' guidance expresses the same lenience in favor of signature validity because that is what the statute requires.

III. Plaintiffs fail to rebut Defendants' argument that Rule 168.24 is consistent with Michigan Election Law and the state constitution.

Plaintiffs' response selectively reads MCL 168.766a as requiring that signatures be rejected if they differ in "significant and obvious respects" from the signature on file, but it again fails to address language that contradicts the Plaintiffs' position. MCL 168.766a also provides

that exact matches are not required, and that slight differences must be resolved in favor of the voter. Rule 168.24 does not require any particular conclusion, and the clerk is still responsible for making their own determination based on the circumstances before them at the time of their review. The Rule simply suggests factors that may be considered within the statutory framework.

Lastly, Plaintiffs insist that Michigan Election Law does not permit clerks to follow up with voters. (Pl's Resp Br, p 27-28). However, Plaintiffs cite to no law prohibiting contact between a clerk and a voter regarding their AV ballot, and Defendants' motion cited to MCL 168.766a(6), which provides that the Secretary, "may issue instructions to clerks to provide electors with other options, other than by providing a signature under subsection (5), to cure the deficiency." Here, the Secretary did not just "issue instructions," they promulgated a formal rule that provides other means for curing a deficiency in a voter's signatures. Plaintiffs' response argues that "other means" of curing was somehow limited to their preferred methods, such as a voter's ID. While that is one means of verification, it is not the only one, and a clerk following up directly with the voter is also a rational approach that is within the scope of the statute. Plaintiffs cite to nothing in MCL 168.766a—or anywhere else in the election law—that prohibits the approach taken in Rule 168.24. Plaintiffs are entitled to their opinion on how elections ought to be administered, but their opinion is not binding on the Secretary.

CONCLUSION AND RELIEF REQUESTED

For these reasons, and the reasons stated in their April 22, 2024 brief, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Court grant their motion for summary disposition.

Respectfully submitted,

/s/Erik A. Grill

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendants
PO Box 30736
Lansing, Michigan 48909
517.335.7659

Dated: May 9, 2024

PROOF OF SERVICE

Erik A. Grill certifies that on May 9, 2024, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Erik A. Grill
Erik A. Grill