

**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,

Case No. 24-000041-MZ

Hon. Christopher P. Yates

Plaintiffs,

**ORAL ARGUMENT
REQUESTED**

v

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

Defendants.

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**PLAINTIFFS' 05/09/2024 COMBINED REPLY BRIEF IN SUPPORT OF THEIR
04/22/2024 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(I)(1) AND
DECLARATORY JUDGMENT UNDER MCR 2.605 AND RESPONSE TO AMICI**

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.....	ii
I. The Secretary’s silence as to the mandate under the Constitution requiring election officials to verify the identity of absent voters is both troubling and dispositive.	1
II. Applying a presumption of validity here is like trying to fit a square peg in a round hole.....	5
III. The parade of horrors staged by the Secretary and <i>amici</i> fails to withstand reality.....	7
CONCLUSION.....	12

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INDEX OF AUTHORITIES

Cases

Brightmoore Gardens, LLC v Marijuana Regulatory Agency, 337 Mich App 149 (2021)..... 5

DeVisser v Benson, No. 22-000164-MM, aff'd *O'Halloran v Secretary of State*, Nos. 363503, 363505, --- Mich App ---, 2023 WL 6931928 (Mich Ct App, 2023) 9

Genetski v Benson, No. 20-000216-MM, 2021 WL 1624452 (Mich Ct Cl, 2021) 9

Marbury v Madison, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803)..... 2

People v Eliason, 300 Mich App 293, 316 n 17; 833 NW2d 357 (2013)..... 2

Statutes

MCL 168.476(1) 6

MCL 168.552(13) 6

MCL 168.764c 10

MCL 168.766a 4

MCL 168.961(6) 6

MCL 168.961a(4) 6

Other Authorities

Const 1963, art 2, § 4(1)(b)..... 1, 2, 4, 8,10

Const 1963, art 2, § 4(1)(i)..... 10

Rules

MCR 2.116(G)(1)(a)(iii) 1

MCR 2.116(I)(1).....10

MCR 2.605.....10

Under MCR 2.116(G)(1)(a)(iii) (providing for reply briefs in support of motions for summary disposition) and this Court’s April 17, 2024 Scheduling Order (permitting “replies to Amicus Briefs”), and for the sake of efficiency and convenience, Plaintiffs respectfully submit this Combined Reply in support of their 04/22/2024 Motion for Summary Disposition and for Declaratory Judgment, and Response to two amicus curiae briefs filed in this case—one by the Democratic National Committee (the “DNC”), and another filed jointly by the Michigan Alliance for Retired Americans and the Detroit/Downriver Chapter of the A. Philip Randolph Institute (collectively, the “Institute”).

I. The Secretary’s silence as to the mandate under the Constitution requiring election officials to verify the identity of absent voters is both troubling and dispositive.

Under the Michigan Constitution, “[v]oters shall have the right to prove their identity when applying for or voting an absent voter ballot other than in person by providing their signature to the election official authorized to issue absent voter ballots. Const 1963, art 2, § 4(1)(h) (emphasis added). Likewise, the Constitution expressly requires that “election officials shall: (1) verify the identity of a voter who applies for an absent voter ballot other than in person by comparing the voter’s signature on the absent voter ballot application to the voter’s signature in their registration record,” and shall likewise “(2) verify the identity of a voter who votes an absent voter ballot other than in person by comparing the signature on the absent voter ballot envelope to the signature on the voter’s absent voter ballot application or the signature in the voter’s registration record.” *Id.* (emphasis added).

While Plaintiffs have raised this clear and express duty to verify the identity of absent voters throughout this lawsuit—beginning with the very first paragraph in their Verified Complaint—the Secretary has never explained how her instruction requiring election officials to review absent voter signatures through a lens of presumed validity is consistent with the above-

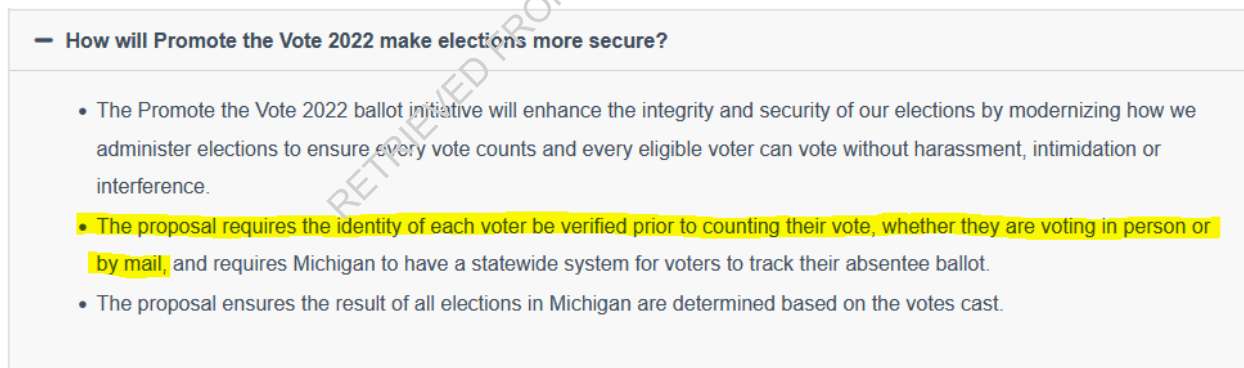
referenced verification mandates. Nor has the Secretary explained how Rule 168.24 of the Michigan Administrative Code, which requires election officials to approve some signatures with discrepancies based on mere speculation, complies with those same constitutional mandates. This, alone, is dispositive as to Counts I and IV of Plaintiffs Verified Complaint. See Pls' Compl, Count I (Violations of the Michigan Constitution – Presumption of Validity); Count IV (Violations of the Michigan Constitution – Rule 168.24). See also *People v Eliason*, 300 Mich App 293, 316 n 17; 833 NW2d 357 (2013) (“No one questions the principle that the Michigan Constitution trumps an inconsistent statute, or that the judiciary is empowered to declare when such a conflict exists.”), quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803).

For its part, the Institute—in its role as *amici*—claims that Plaintiffs' interpretation of the term “verify” as used in the Constitution “relies entirely on an idiosyncratic understanding of the bare word ‘verify,’ stripped from its constitutional and statutory context[.]” Institute’s Amici Br, at 7. As the Institute would have it, the term “verify” takes on a different meaning based on the signature verification framework set out in the Michigan Election Law. The Institute’s interpretation, however, does not comport with the realities of Ballot Proposal 2-22.

Less than two years ago, Michiganders overwhelmingly voted to approve an omnibus voting rights and election law reform that enshrined many election-related policies in our Constitution. Known as Ballot Proposal 2-22 (“Prop 2-22”), this amendment to the Constitution added—among many other rights and policies—the above-referenced mandates requiring local election officials to “verify the identity” of voters who apply for and vote by absent voter ballot. Const 1963, art 2, § 4(1)(h). See also Institute’s Amici Br, at 3; Secy’s Mot for Summ Disp, at 2-3. This where the Institute’s definition of “verify” runs into some problems.

While election reform policies tend to be highly contentious, the requirement that voters prove their identity before casting a ballot is overwhelmingly popular. See, e.g., Pls’ Compl, ¶ 36 (citing Detroit Regional Chamber, *Statewide Poll Reveals Opinions on Political Landscape* (June 7, 2021) <https://www.detroitchamber.com/statewide-poll-reveals-opinions-on-political-landscape-covid-19-and-vaccination-perceptions-ongoing-labor-shortage-and-voting-rights/> (last visited March 25, 2024) (finding that 79.7% of respondents in statewide poll support requiring “every voter coming to the polls present a government-issued identification to cast their ballot”). It comes as no surprise, then, that an organization known as Promote the Vote—which sponsored Prop 2-22—made it abundantly clear to the voting public that its ballot proposal would require that the identity of *each* voter be verified before that person could vote—even if they vote by mail.

For example, this screenshot—taken from the Promote the Vote website—reflects the actual context through which the sponsor of Prop 2-22 advocated for and secured the passage of its ballot proposal amending the Constitution:



Promote the Vote 2022, Frequently Asked Questions, *How will Promote the Vote 2022 make elections more secure?* <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed May 8, 2024) (highlights added). See also Promote the Vote 2022, Frequently Asked Questions, *How will Promote the Vote 2022 ensure identity verification of each voter?* <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed May 8, 2024)

(“Promote the Vote 2022 ensures voters verify their identity prior to their vote being counted, whether they vote by mail or in person.”)

Nancy Wang, “the executive director of the nonpartisan group Voters Not Politicians (VNP), a leading partner in the Promote the Vote 2022 coalition,” claimed that Prop 2-22 would “make voting more secure and accessible for all eligible Michiganders.” King, *How Proposal 2 would change voting and elections in Michigan*, Michigan Advance (October 31, 2022) <https://michiganadvance.com/2022/10/31/how-proposal-2-would-change-voting-and-elections-in-michigan/> (accessed May 9, 2024). Indeed, as Ms. Wang explained it, “Proposal 2 increases election security by enshrining Michigan’s current effective voter ID law into our state Constitution, and will ensure that voters verify their identity before their vote is counted, whether voting in person or by absentee ballot.” *Id.* “In fact, Proposal 2 requires local clerks to verify the identity of an absentee voter twice: First, on the application for an absentee ballot or to join the mail voter list, and second on each and every absentee ballot.” *Id.*

So, with all due respect to the Institute, no; the term “verify” as used in the Constitution should not be interpreted against the backdrop of the statutes or rules that comprise the current signature verification scheme. See, e.g., Institute’s Amici Br., at 7-9. MCL 168.766a, for example, did not even exist when voters approved of Prop 2-22. As shown above, Prop 2-22 and its use of the term “verify” in article 2 section 4(1)(h) were presented to Michigan voters as an equivalent to “Michigan’s current voter ID law” and as a way to “ensure that voters verify their identity” without regard for the manner by which they choose to cast their ballot. See King, *How Proposal 2 would change voting and elections in Michigan*. The Institute’s invitation to change the meaning of “verify” in Const 1963, art 2, § 4(1)(h)—*after* Michiganders approved its adoption—to fit with

subsequently enacted statutes in such a way as to lower the standard to something less than what was presented to those voters by the amendment's sponsor is patently undemocratic.

Plaintiffs' claims here are narrow and straightforward. When, as here, the Constitution and Michigan Election Law expressly mandate that election officials shall verify the identity of absent voters through a signature verification process, the Secretary may not change that standard to something less than verification by instructing election officials to review those signatures through a lens of presumed validity. See *Brightmoore Gardens, LLC v Marijuana Regulatory Agency*, 337 Mich App 149, 161; 975 NW2d 52 (2021) (“[A]n [administrative] agency is not empowered to change law enacted by the Legislature. . . .When an administrative rule conflicts with a statute, the statute controls”). And to be clear, Plaintiffs are not advocating here for a presumption of *invalidity*, or arguing that Michigan law currently requires signatures to match exactly. But the Constitution and the law require that the signature verification process *must* begin from a place of neutrality. Anything less is both an unauthorized thumb on the scale in favor of a signature's validity, and an affront to the 2,586,269 Michiganders that approved Prop 2-22¹ not based on legalese in statutes and rules that were not even on the books yet, but based on the plain and ordinary meaning of the word “verify.”

II. Applying a presumption of validity here is like trying to fit a square peg in a round hole.

The Legislature has shown it knows full well how to include a presumption as to the validity or invalidity of signatures when it intends to do so. See Pls' 05/06/2024 Response in Opp'n to Secy's 04/22/2024 Mot for Summ Disp, at 22-24. To that end, the use of the term “presumption”

¹ 2022 Michigan Election Results, Dep't of State (November 8, 2022, updated December 22, 2022) https://mielections.us/election/results/2022GEN_CENR.html (accessed May 8, 2024).

makes complete sense in those contexts where the Legislature has exercised its sole authority to include such language when reviewing the signatures of voters.

Take, for example, MCL 168.961(6), which pertains to voters' signatures on recall petitions, and provides that "[i]f 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). That is a sound application of a presumption in the context of signature verification, and here's why: "Presume is used when someone is making an informed guess based on reasonable evidence." See "The Difference Between Assume and Presume," Merriam-Webster.com Dictionary, Merriam-Webster, available at <<https://www.merriam-webster.com/dictionary/presume>> (accessed May 8, 2024). Thus, a presumption makes sense when reviewing signatures under MCL 168.961(6) because there's reasonable evidence—i.e., if the voter's name is not in the qualified voter file (that being the evidence), then that means the voter is likely not registered, which is a precondition to signing those petitions in the first place. Cf. MCL 168.961(6).

The same goes for MCL 168.961a(4) (elector signatures on recall petitions), MCL 168.476(1) (elector signatures on initiative and referendum petitions), and MCL 168.552(13) (elector signatures on candidate nominating petitions)—each of which includes an express presumption of invalidity that only applies in the presence of *evidence*, i.e., the indication in the qualified voter file that the elector was not registered to vote when they signed the petition, despite that being a legal prerequisite to signing those petitions to begin with. Cf. MCL 168.961a(4); MCL 168.476(1); MCL 168.552(13) (each indicating that lack of a voter's signature in the QVF gives rise to the presumption of invalidity). Each of those are sound applications of a "presumption."

That brings us to this case. Here, the Secretary claims that her “‘initial presumption of validity’ is nothing more than a starting point for the statutorily-mandated review.” Secy’s Br in Response to Pls’ 04/22/2024 Mot for Summ Disp, at 14. But a presumption based on what evidence? The term “presumption” just doesn’t work in this statutory context from a semantic point of view (setting aside that neither the Constitution nor the law expressly provide for such a “starting point” for the signature verification process). Rather, it seems the Secretary is actually advocating for an *assumption* of validity as to absent voter signatures—but that isn’t the law, either. See “Are ‘Assume’ and ‘Presume’ Synonyms?,” Merriam-Webster.com Dictionary, Merriam-Webster, available at <<https://www.merriam-webster.com/grammar/assume-vs-presume>> (accessed May 8, 2024) (“*Assume* and *presume* both mean ‘to take something for granted’ or ‘to take something as true.’ . . . If he or she is making an informed guess based on reasonable evidence, *presume* is the word to use; if a guess is made based on little or no evidence, *assume* is usually used.”) (emphasis in original).

This is precisely why “presumption” is not just a bad fit here—it would be a dangerous one, too. As explained in Garner’s *Modern English Usage*, the meaning of “presume” is “to take for granted or without proof.” Garner, *Garner’s Modern English Usage* (5th ed, Oxford University Press, 2022), p 96 (“Assume; presume”). The idea of local election officials reviewing absent voter signatures using a lens through which the genuineness and authenticity of the signature is taken for granted falls far short of what’s required under the Constitution and the law.

III. The parade of horrors staged by the Secretary and amici fails to withstand reality.

The Secretary and *amici* go to great lengths to mischaracterize the claims alleged and relief sought by Plaintiffs in this case. Plaintiffs do not, for example, claim that the Secretary’s instructions stand for the proposition that all absent voter signatures are presumed valid without further review. To be sure, the Secretary’s instructions mean what they say: the Secretary has

directed local election officials to review absent voter signatures through a lens of presumed validity. But that is not the process under Michigan law. The review of absent voter signatures clearly starts from a place of neutrality; had the Legislature—or even the proponents of Prop 2-22—meant for the review to occur through a prism of presumed validity, then they would have expressly said so.

That’s not the only misconception levied in this suit, and while many are not worthy of a response, Plaintiffs briefly address a few here. For example, the DNC’s claim that “Plaintiffs’ lawsuit is just the latest installment of a now years-long campaign by Republicans to undermine public confidence in elections,” DNC’s Amicus Br at 8, is quite difficult to square with their own arguments. As with the Secretary’s papers, the DNC fails to address the mandate under the Constitution and the Michigan Election Law requiring election officials to “verify the identity” of absent voters. See, e.g., Const 1963, art 2, § 4(1)(h). In fact, the DNC goes so far as to insinuate that local election officials have better things to do than fulfill their duties under the law and the Constitution to ensure that each absent voter application and absent voter ballot originated from, and was completed by, the intended voter. DNC’s Amicus Br at 8 (claiming that the Secretary’s instruction to review absent voter signatures through a lens of presumed validity “free[s] up time for clerks to attend to their myriad other election duties.”) And the DNC’s Orwellian idea that verifying the identity of each elector before issuing them an absent voter ballot or tabulating their ballot somehow results in *less* transparency and *less* confidence in elections, *id.* at 2, 8, 11, is precisely the type of misinformation that would best remain outside the courthouse doors. Indeed, it is difficult to imagine a more effective way to undermine public confidence in elections than watering down important and popular safeguards that exist to protect the security of absent voting.

Nor is there any basis for the DNC's alarmist argument that "Plaintiffs' true aim is to whittle down to nothing the Secretary's ability to provide any type of practical or useful guidance about election administration to local clerks and election officials." *Id.* at 8. As clearly explained in Plaintiffs' Verified Complaint and corresponding dispositive motion papers, the Secretary maintains on her website a publicly-available guidance document entitled, "Election Officials' Manual, Chapter 6: Michigan's Absent Voter Process," which provides instructions regarding the process for verifying signatures on absent voter ballot applications and ballot return envelopes. See Pls' Compl, Ex H at 12 ("VIII. Absent voter ballot application signature verification requirement"); *id.* at 18-19 ("XVI Ballot verification requirement"). But Plaintiffs don't challenge those instructions. Rather, Plaintiffs challenge only limited aspects of the Signature Verification Instructions, which—aside from being protected from public scrutiny and not publicly available, unlike the scores of other guidance documents available on the Secretary's website—just so happens to include provisions that violate the APA, the Michigan Election law, and the Constitution. See Pls' Compl at ¶¶ 65-72.

This same, tired argument that complying with the APA somehow renders useless the Secretary's policymaking power has been rejected several times in just the last few years—see, e.g., *Genetski v Benson*, No. 20-000216-MM, 2021 WL 1624452, at *6 (Mich Ct Cl, 2021)—and most recently in *DeVisser v Benson*, No. 22-000164-MM, *aff'd O'Halloran v Secretary of State*, Nos. 363503, 363505, --- Mich App ---, 2023 WL 6931928 (Mich Ct App, 2023), application for leave to appeal, Docketed Nos. 166424-25 (Mich, 2023). Despite those courts having concluded that the Secretary violated the APA by, for example, issuing rules in the form of instructions, the Secretary still maintains scores of guidance documents on her website. So, no, the sky is not falling, and the Secretary can certainly issue instructions and promulgate rules, she just has to do so in

compliance with the Michigan Election Law and the APA. See MCL 168.31(1)(a) (“The [Secretary] 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).

Finally, the Institute’s argument that the relief sought here would disenfranchise voters based on an increase in the number of rejected absent voter ballots fails to account for Michigan-specific realities. See generally, Institute’s Br, at 15-20. Indeed, the same omnibus voting rights and election law reform that enshrined the identification verification mandate in our Constitution also expressly extended voters the right to be promptly notified and afforded “an equitable opportunity to correct [their] signature” if that signature is rejected through the verification process, Const 1963, art 2, § 4(1)(h), *and* expressly mandates that the Secretary maintain an electronic system for tracking absent voter applications and ballots to ensure voters are aware of the status of their application and ballot. See Const 1963, art 2, § 4(1)(i) (“The system shall permit voters to elect to receive electronic notifications regarding the status of the voter’s submitted absent voter ballot application and absent voter ballot, inform voters of any deficiency with the voter’s submitted absent voter ballot application or absent voter ballot, and provide instructions for addressing any such deficiency.”). See also MCL 168.764c (Electronic tracking system for tracking absent voter ballots)

Of course, that ballot tracking system is more recent than the studies referenced in the Institute’s papers—most of which pertain to states *other than Michigan*. See Institute’s Br, at 15-20. Perhaps those states, too, would benefit from such a ballot tracking system, which was much celebrated when Prop 2-22 passed with overwhelming public support in November 2022. See Mich League of Conservation Voters, *We passed expanded voting rights in 2022. Here’s how proposal 2 is improving voting in Michigan.* [https://michiganlcv.org/we-passed-expanded-voting-rights-in-](https://michiganlcv.org/we-passed-expanded-voting-rights-in-2-is-improving-voting-in-michigan)

[2022-how-proposal-2-is-improving-voting-in-michigan/](#) (posted June 14, 2023) (accessed May 8, 2024) (celebrating the passage of Prop 2-22, and explaining that the constitutional amendment will, among other things, “[i]mprove ballot tracking systems to allow voters to track and receive improved updates about their absentee ballot and ballot application,” *and* “[i]nform voters of any issues with their absentee ballot via the new tracking system. **Voters will get a chance to correct any signature-related issues with their ballot, which will make sure everyone’s voice is heard!**”) (emphasis added).

It’s difficult to square the Institute’s argument with the reality on the ground, especially given that “[s]tarting this year, voters can sign up for email or text alerts to track the status of their ballots once they’re submitted,” and this “more stringent tracking system also requires election officials to notify voters if their absentee application or ballot was rejected, along with the reason for doing so and how to resolve any issues.” Gibbons, *What’s new in Michigan 2024 election? Early voting, ballot tracking on list* (February 5, 2024) <https://www.bridgemi.com/michigan-government/whats-new-michigan-2024-election-early-voting-ballot-tracking-list> (accessed May 8, 2024). See also Frost, *Secretary of State Jocelyn Benson says ballot tracking could be in place by August*, WWMT News Channel 3 (April 9, 2020) <https://wwmt.com/news/state/secretary-of-state-jocelyn-benson-says-ballot-tracking-could-be-in-place-by-august> (accessed May 8, 2024).

And while the electronic notification aspect of the ballot tracker was not available for the February 2024 presidential primary, it “will be in place for the August primary and November general elections, according to the Secretary of State’s Office.” Hendrickson, *How to check whether your absentee ballot for the presidential primary arrived on time*, Detroit Free Press (February 24, 2024, updated February 26, 2024) <https://www.freep.com/story/news/politics/2024/02/24/michigan-voters-can-check-status-of-their-absentee-ballot/72583800007/>.

Thus, the concern highlighted by the Institute has already been addressed by Prop 2-22, the Legislature, and the Secretary. As Plaintiffs alleged from the outset, our Constitution and laws “create a framework that (a) 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, while also (b) ensuring that those absentee voters whose identities could not be verified as a result of missing or mismatched signatures have an opportunity to cure their deficient application or ballot such that the signature verification process does not prevent any qualified elector from voting.” Pls’ Compl at 5. And because that balance is paramount to the electoral process, this Court should grant summary disposition and enter a declaratory judgment for Plaintiffs.

CONCLUSION

Plaintiffs respectfully request that this Court grant summary disposition under MCR 2.116(I)(1), enter a declaratory judgment under MCR 2.605, and award the relief sought in Plaintiffs’ Verified Complaint.

Dated: May 9, 2024

Respectfully submitted,

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