

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

**REPUBLICAN NATIONAL
COMMITTEE, MICHIGAN
REPUBLICAN PARTY, and CINDY
BERRY,**

Plaintiffs,
v.

Case No. 24-000148-MZ

Hon. Brock A. Swartzle

JOCELYN BENSON, in her official
capacity as the duly elected **SECRETARY
OF STATE**, and **JONATHAN BRATER**, in
his official capacity as the **DIRECTOR OF
ELECTIONS**,

Defendants.

**[09/26/2024] PROPOSED AMICUS
CURIAE BRIEF OF THE
DEMOCRATIC NATIONAL
COMMITTEE**

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STATEMENT OF AMICUS INTEREST¹

The Democratic National Committee (“DNC”), a national political party committee as defined in 52 USC 30101, represents a diverse group of Democrats, including elected officials, candidates for elected office, state committee members, advisory caucuses, affiliate groups, grassroots activists, and voters. Its mission is to elect Democratic Party candidates to positions across the country, including in Michigan, up and down the ticket. The DNC’s organizational purposes and functions also include protecting the legal rights of voters, ensuring that eligible voters can easily and securely cast their votes, including through absent voter ballots, and making sure that voters who wish to vote for Democratic candidates are not unfairly disenfranchised by inconsistent or inequitable application of laws relating to the treatment of absent voter ballots.

The DNC has an interest in preserving and promoting free and fair elections that ensure that all eligible voters can have their votes counted, including voters who vote absentee. Since Michigan voters overwhelmingly approved major voting rights amendments to the state Constitution in 2018 and 2022, millions of Michiganders have used the absentee voting system to cast their votes safely and securely for Democratic candidates, including during the 2020 presidential contest. The DNC anticipates that many voters will do the same during the November 2024 general election. To that end, the DNC has an interest in supporting absent voters in the protection of their fundamental right to vote—specifically, in ensuring that this right applies equally to them as it applies to in-person voters. The DNC also has an interest in helping ensure that voters who vote absentee are not unfairly disenfranchised if they detrimentally rely on the

¹ No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the proposed amicus curiae, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

absent voter ballot tracking system's assurance that their ballot has been accepted for tabulation, which then may be rejected during processing and not reflected in the tracking system. The DNC also supports the Secretary of State's ability to promulgate instructions regarding the processing of absent voter ballots consistent with the Michigan Constitution and Michigan's Election Law.

INTRODUCTION

For years, election workers have processed absent voter ballots for tabulation in a uniform manner following the Michigan Election Law and consistent guidance issued by Secretaries of State from both major political parties. The guidance at issue fills gaps in the Michigan Election Law regarding how to process absent voter ballots and is within the Secretary's authority to issue. And, importantly, the procedures embodied in the guidance effectuate Michigan voters' fundamental right to vote and ensure eligible voters are not unfairly or arbitrarily disenfranchised because of, among other things, simple mistakes where the numbered ballot stub is accidentally torn off or where, for example, two members of the same household return mismatched ballots because of a household or clerical error.

Even though Plaintiffs have been (or should have been) aware of that guidance for years, they waited until the eve of a presidential election to bring this challenge. That fact alone warrants dismissal under the doctrine of laches. Indeed, given the small percentage of ballots likely to be affected by issues with missing stubs or mismatched ballot numbers, it is hard to explain Plaintiffs' undue delay as anything other than a calculated measure to inject uncertainty into the electoral system right before voters begin casting their votes.

Regardless, as explained by Defendants in their brief, and addressed in more detail below, the Secretary's guidance on processing absent voter ballots is consistent with the Michigan Constitution and Election Law. At stake here is Michigan voters' fundamental right to vote.

Plaintiffs have not, and cannot, explain how their alternative, Court-fashioned “opportunity to cure” remedy is workable this close to an election.

For all these reasons, the Court should grant the Secretary’s motion for summary disposition and dismiss Plaintiffs’ Complaint with prejudice.

ARGUMENT

I. The Secretary’s Guidance Does Not Conflict with the Constitution or Michigan Election Law.

The Secretary, as the State’s chief election officer, is given broad authority under the Constitution and Michigan Election Law to ensure that qualified Michigan electors can exercise their fundamental right to vote.

By statute, Michigan’s Legislature has assigned the Secretary of State ultimate responsibility for administering elections in the state. “The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.” MCL 168.21. This responsibility requires the Secretary to fulfill a wide array of duties. For example, the Secretary has the statutory duty and authority to “[a]dvise and direct local election officials as to the proper methods of conducting elections”; “[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots,” among other specifications; and “[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations,” among other duties. MCL 168.31.

Additionally, the Secretary has the statutory duty to provide advice and direction on the proper methods of conducting elections. See MCL 168.31(1)(b). That expressly includes the power to provide binding instructions on the conduct and operation of absent voter counting boards

(“AVCBs”) consistent with the Michigan Election Law: “The secretary of state *shall* develop instructions consistent with this act for the conduct of absent voter counting boards or combined absent voter counting boards.” MCL 168.765a(17) (emphasis added). These instructions *must* be made available “40 days or more” before an election. MCL 168.765a(17) (“The secretary of state shall distribute the instructions developed under this subsection to county, city, and township clerks 40 days or more before a general election in which absent voter counting boards or combined absent voter counting boards will be used.”). As the Michigan Supreme Court recently reaffirmed, where the Legislature’s “statutory provisions are silent” on a particular issue, “nothing in the Michigan Election Law precludes the Secretary from providing instructions” on that issue, and “there is nothing improper” about the Secretary providing such guidance. *O’Halloran v Sec’y of State*, ___ Mich ___, 2024 WL 3976495, at *12 (2024).

As Defendants explain in their motion for summary disposition, by their plain language, the statutes on which Plaintiffs rely in their Complaint (MCL 168.795b and MCL 168.797a) do not apply to AVCBs: Section 795b is simply a formatting requirement, and Section 797a applies to in-person voting. And, to be clear, Plaintiffs cite *no* authority that would require wholesale rejection of absent voter ballots with a missing stub or mismatched number. To the contrary, numerous statutory provisions on processing absent voter ballots provide direction on approving ballots for tabulation that are based on the return envelope; they do not even address, let alone mandate, rejection of these ballots based on missing or mismatched stubs. Acceptance for tabulation is not contingent on the status of the stub. That makes sense because the absent voter’s identity already has been confirmed through signature matching.

The absent voter verification process, as set forth in Section 766, requires local clerks, upon receiving a voted absent voter ballot, to “determine whether the ballot is approved for tabulation

by verifying” that “[t]he elector is a registered elector and has not voted in person in that election” and that “the signature on the absent voter ballot return envelope agrees sufficiently with the elector’s signature on file.” MCL 168.766(1) (emphasis added); see also MCL 168.765(2) (“The city or township clerk shall review each absent voter ballot return envelope to determine whether the absent voter ballot is approved for tabulation in accordance with section 766.”) (emphasis added); MCL 168.765(3) (providing that approval for tabulation for military and overseas voters is the same process as in MCL 168.765(2), even though those voters may have absent voter ballots without stubs). These provisions clearly illustrate the Legislature’s intent, based on the plain language of the statutes, that tabulation is contingent on the elector’s signature on the envelope, *not* on the status of the stub.

If the clerk determines that the “the signatures do not sufficiently agree, or if the voter’s signature on the absent voter ballot application or absent voter ballot envelope is missing, the voter has a right to be notified immediately and afforded due process, including an equitable opportunity to correct the issue with the signature.” Const 1963, art 2 §4(1)(h); see also MCL 168.766(3). Michigan’s new electronic tracking system for absent voter ballots allows voters to be notified only of this issue with the signature on the ballot envelope. MCL 168.764c(2)(f)(ii) (requiring system to provide “[i]nstructions for curing the issue with the elector’s absent voter ballot return envelope, along with the deadline for curing the issue with the elector’s absent voter ballot return envelope”). This tracking system (providing notifications regarding only signature issues) implements the Michigan Constitution’s provision that voters are entitled to opt into a tracker that will “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,” which indicates

that a verified signature of the valid elector on the envelope is the only condition for a timely ballot to be approved for tabulation. Const 1963, art 2 §4(1)(i).

Additionally, if the elector timely cures the signature issue, their ballot “*must* be accepted and the ballot tabulated.” MCL 168.766(4) (emphasis added); see also MCL 168.766(6) (“The absent voter ballots in these cured absent voter ballot return envelopes *shall be tabulated* by the county clerk...”) (emphasis added). The statute does not address issues relating to a missing or mismatched stub, because the absence (or mismatch) of a stub is no basis to reject an absent voter ballot. See generally MCL 168.766. See also *Stand Up v Sec’y of State*, 492 Mich 588, 598; 822 NW2d 159 (2012) (“Our primary task in construing a statute, is to discern and give effect to the intent of the Legislature.) The most reliable evidence of the Legislature’s intent are the words of the statute, and each word must be given its plain and ordinary meaning. *Id.* (“In interpreting the statute at issues, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.”) (cleaned up).

Section 768 directs the board of election inspectors to “compare the ballot number on the ballot stub with the ballot number on the face of the absent voter ballot return envelope” if the ballots have been approved for processing. MCL 168.768. The statute directs the election inspectors on what to do if the numbers match: “If the ballot numbers match, the board of election inspectors shall detach the perforated numbered stub and prepare the ballot for tabulation, as directed by the secretary of state.” *Id.* But it is silent on what to do if the ballot stub is missing or the numbers do not match; it certainly does not mandate or even contemplate rejection. Furthermore, despite constitutional requirements that a voter be given the tools needed to track the status of their ballot, there is no ability to do so for any issues regarding a missing or mismatched stub, because the Election Law does not address the issue at all. So, an elector tracking their ballot

would see that it has been approved for tabulation but would have no way of later learning that their ballot was ultimately rejected due to an issue with the stub or ballot number, as Plaintiffs suggest. See MCL 168.764c.

The absent voter provisions of the Election Law direct election officials, election workers, and voters on how to address issues relating to the voter's signature on the absent voter ballot return envelope. Once those issues have been cured, the ballot must be approved for tabulation. After that point in the process, the statutes do not mandate or direct that absent voter ballots should be rejected based on missing or mismatched stubs. And, as is clear from comparing those statutes to the provisions cited by Plaintiffs, the Legislature knew how to direct election inspectors to reject ballots that were missing stubs. It did precisely that with respect to in-person ballots in MCL 168.797a(3), which provides that "[a] ballot from which the stub is detached must not be accepted by the election inspector in charge of the ballot box or other approved ballot container." But the Legislature did not make the same choice with respect to absent voter ballots—a choice this Court must respect. "When the Legislature includes a provision in one statute and omits the provision in a related statute, the Court should construe the omission as intentional and should not include an omitted provision where none exists." *Wolverine Power Coop v DEQ*, 285 Mich App 548, 564; 777 NW2d 1 (2009). In sum, the Secretary's guidance is consistent with the Election Law, and Plaintiffs' challenge should be rejected.

II. Plaintiffs' Demands Threaten Absent Voters' Fundamental Rights To Vote and To Equal Protection Under the Law.

The guidance issued by the current Secretary (and several Secretaries of State before her) also protects absent voters' fundamental right to vote. Michigan's Constitution guarantees that "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have ... [t]he fundamental right to vote, including but not limited to the right, once registered, to vote a

secret ballot in all elections,” and that “[n]o person shall ... use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.” Const 1963, art 2 §4(1)(a). And, since the adoption of Proposition 3 by two-thirds of Michigan voters in November 2018, electors in this state have enjoyed broad constitutional rights to absentee voting. Const 1963, art 2 §4(1)(h) (“[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail”). The Constitution makes clear that these voting rights “shall be liberally construed in favor of voters’ rights in order to effectuate [their] purposes.” Const 1963, art 2 §4(1).

Election statutes must be interpreted in light of these constitutional imperatives. If there is any doubt regarding the validity of the Secretary’s instructions here, those doubts must be resolved in a manner that will ensure that no Michigander is unfairly disenfranchised. In this case, that means upholding the Secretary’s guidance governing issues that are not directly covered in the statute. An elector who votes in person has the ability to spoil their ballot if the stub is missing. See MCL 168.797a(3). And, if there is a mismatch in the ballot numbering at an in-person polling place, the elector and an election inspector are both present to determine why any discrepancy has occurred. Accepting Plaintiffs’ position that a missing or mismatched stub requires automatic rejection would countenance a situation where a qualified elector is denied their fundamental right to vote merely because of mistake. That position is inconsistent with the fundamental right to vote and absent voters’ right to equal protection. See Const 1963, art 1 §2.

Further, Michigan voters are also guaranteed the constitutional right to track their submitted absent voter ballots, to opt into receiving electronic notifications regarding their ballot’s status, to be informed of any deficiency, and to be provided with instructions for addressing any

such deficiency. Const 1963, art 2 §4(1)(i). The Legislature has implemented this provision through MCL 168.764c, which provides that the tracking system shall indicate “[i]f the elector’s absent voter ballot return envelope was accepted,” and if so, “the date of the acceptance.” MCL 168.764c(2)(f). Moreover, “if the elector’s absent voter ballot return envelope was rejected,” the tracking system must provide “[a] brief statement of the reason for the rejection[]” and “[i]nstructions for curing the issue with the elector’s absent voter ballot return envelope, along with the deadline for curing the issue with the elector’s absent voter ballot return envelope.” MCL *Id.* The tracker does *not* indicate what happens to a ballot after it is accepted for tabulation. Thus, if Plaintiffs prevail, an absent voter relying on this tracker would believe that their ballot was accepted, processed, and counted, even if it were ultimately rejected for a missing or mismatched stub. For any absent voter in this situation, adopting Plaintiffs’ position would gut these constitutional and statutory protections.

The Secretary is also tasked with ensuring that actions are consistent with the “purity of elections” clause found in Article II Section 4 of the Michigan Constitution.² “The phrase ‘purity of elections’ is one of large dimensions. It has no single, precise meaning.” *Wells v Kent Cnty Bd of Election Comm’rs*, 382 Mich 112, 123; 168 NW2d 222 (1969). It is clear, however, that it demands “fairness and evenhandedness in the election laws of the state.” *Socialist Workers Party v Sec’y of State*, 412 Mich 571, 598; 317 NW2d 1 (1982). Applying this clause, the Michigan Supreme Court has held that “everything reasonably necessary to be done by election officials to accomplish the purpose of the amendment is fairly within its purview,” and “it is the clear duty of

² As amended by Proposal 3 in 2018, Article II, Section 4(2) states in relevant part: “[T]he legislature shall enact laws ... to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.”

election officials, when reasonably possible, to prepare ballots in such a manner as will most effectively comply with the constitutional mandate touching the preservation of the purity of elections.” *Elliott v Sec’y of State*, 295 Mich 245, 249-250; 294 NW 171 (1940). Nothing could be fairer or more evenhanded than trying to ensure that absent voters are not disenfranchised for what could be a simple mistake or clerical error, especially when in-person voters are granted that right.

III. Granting Plaintiffs’ Request for a Judge-Made Remedy Would Impose Unworkable and Immense Administrative Burdens, Particularly This Close to an Election.

Plaintiffs claim that any disenfranchisement of voters can be tempered by the three-day cure provision in MCL 168.766(4). But this provision does not apply to missing or mismatched stubs. Rather, it applies only to issues discovered on the return envelopes before the clerk marks the envelope as accepted for tabulation. What Plaintiffs actually seek is a Court-created remedy not found in the Constitution or Election Law. And Plaintiffs offer no guidance on the contours of such a remedy. For example, would this cure period require absent voters to spoil their old ballots and recast new ones? Would a telephone call confirming that the voter removed their stub or placed their ballot in their spouse’s envelope suffice? Plaintiffs fail to say.

What is abundantly clear, as Defendants describe in their brief, is that any change at this stage will impose unworkable, untested, and unnecessary administrative burdens on election administrators who are already responsible for countless tasks in the run-up to a presidential election. That imminent harm only underscores Plaintiffs’ unjustifiable delay in bringing this lawsuit. See *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013), citing *Lothian v City of Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982) (“If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches.”).

CONCLUSION

For the reasons explained by Defendants and the additional reasons herein, the Court should dismiss Plaintiffs' Complaint in full with prejudice.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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Dated: September 26, 2024

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I electronically filed the foregoing document with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record.

By: /s/Scott R. Eldridge
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