

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

Case No. 24-000041-MZ

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,

Hon. Christopher P. Yates

Defendants.

OPINION AND ORDER GRANTING PARTIAL DECLARATORY RELIEF

The dispute before the Court is not only the latest chapter in a long battle over presumptions of validity of voters' signatures on absentee-ballot applications and submissions, but also a contest about rules promulgated to assist local election officials in the signature-verification process. The Court concludes that any presumption of validity cannot pass muster under Michigan law, but the rules promulgated by the defendants – the Secretary of State and the Director of Elections – can withstand the plaintiffs' challenge under Michigan law.

I. FACTUAL BACKGROUND

In 2020, the Secretary of State provided guidance to local election officials that included a presumption of validity for voters' signatures on absentee-ballot applications and absentee ballots

processed at the local level.¹ Plaintiff Michigan Republican Party and the Allegan County Clerk filed suit to bar the use of a presumption of validity in a guidance document. The Court of Claims ultimately determined that the guidance was impermissible because it did not comport with the requirements set forth in the Administrative Procedures Act (APA), MCL 24.201 *et seq.* *Genetski v Benson*, opinion of the Court of Claims, issued March 9, 2021 (Case No. 20-000126-MM).

The decision in *Genetski* sent the defendants back to the drafting table. In July 2021, the Department of State initiated the process of rulemaking under the APA to promulgate signature-verification standards for absentee-ballot applications and absentee ballots.² That effort yielded a set of rules for “signature matching” on absentee-ballot applications and absentee ballots, see Mich Admin Code, R 168.21-26, which went into effect on December 19, 2022. Those rules include a provision, R 168.22 (Rule 2), entitled “sufficient agreement of voter signature; initial presumption of validity; voter contact by clerk.” Even though the catch line refers to an “initial presumption of validity,” the body of Rule 2 makes no mention of an “initial presumption.” How that came to be is a story in itself. The initial draft of Rule 2 provided that “signatures must be reviewed beginning with the presumption that the voter’s signature is his or her genuine, valid signature.” During the public comment period, however, the negative response to the presumption was so strong that the Secretary of State accepted a proposal from the Legislature’s Joint Committee on Administrative Rules “to strike the instruction in R 168.22(1) that local election officials must begin review of a

¹ The formal term for an absentee ballot is an “absent voter ballot[,]” see, e.g., Const 1963, art 2, § 4(g), but the Court shall instead use the term “absentee ballot” for the sake of simplicity.

² To request an absentee ballot, a voter must request and submit a signed application for an absentee ballot. See MCL 168.759(1)-(3). After a voter has received an absentee ballot, the voter can return the completed ballot to a local clerk’s office in an envelope that must be signed by the voter. The signature-verification process at issue in this case concerns the signatures of voters on applications for absentee ballots and on envelopes in which absentee ballots are submitted.

voter's signature on an absent voter ballot application or an absent voter ballot envelope with a 'presumption' that the signature is valid." Perhaps due to an oversight, the reference in the catch line to an "initial presumption of validity" remained in Rule 2, but the parties appear to agree that the catch line does not control the meaning of Rule 2, so its reference to an "initial presumption of validity" provides no legal authority for a presumption.

Significantly, the rules for signature matching in Mich Admin Code, R 168.21-26 include two provisions – R 168.23 (Rule 3) and R 168.24 (Rule 4) – that furnish guidance on "redeeming qualities" of signatures and "explanations for differences in signatures." By all accounts, both of those rules remain in effect today. Additionally, the Secretary of State issued advice and guidance to local election officials in December 2023 explaining how to conduct signature comparisons on absentee-ballot applications and absentee-ballot envelopes. That document – entitled "Signature Verification, Voter Notification, and Signature Cure" – is at the heart of the parties' dispute in this case.

On March 28, 2024, a collection of plaintiffs filed this action against the Secretary of State and the Director of Elections seeking declaratory and injunctive relief. In five counts, the plaintiffs asked the Court to declare the guidance manual issued in December 2023 as well as Rule 4 invalid under the Michigan Constitution and Michigan statutes. After extensive briefing by the competing parties and amici curiae, the Court heard oral arguments on May 13, 2024.

II. LEGAL ANALYSIS

Both sides have moved for relief on an accelerated basis. The defendants have asked the Court to dismiss the complaint under MCR 2.116(C)(8), and the plaintiffs have requested summary disposition under MCR 2.116(I)(1) as well as declaratory relief pursuant to MCR 2.605. The Court

must first address the defendants' threshold claim that all the plaintiffs lack standing, and then the Court can turn to the merits of the plaintiffs' challenges.

A. STANDING

Although this action was filed by a constellation of plaintiffs in a variety of circumstances with respect to the guidance and rules challenged in the complaint, the defendants claim that not a single plaintiff has standing to pursue declaratory and injunctive relief in this case. "A motion for summary disposition premised on the doctrine of standing as a defense may be proper pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10) contingent upon the pleadings or other circumstances of the particular case." *Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 494-495 n 2; 948 NW2d 452 (2019). If the Court must consider "documentary evidence outside the pleadings" to resolve a standing challenge, the Court must treat the motion as a request for summary disposition under MCR 2.116(C)(10). *Id.* A motion under MCR 2.116(C)(8) can only be granted if "a claim is so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). In contrast, a motion for summary disposition under MCR 2.116(C)(10) can only be granted if "there is no genuine issue of material fact." *Id.* The standing issue appears to involve no factual dispute at all, so the Court can resolve the defendants' motion for summary disposition on the existing record.

The plaintiffs request declaratory relief under MCR 2.605, which permits the Court "[i]n a case of actual controversy within its jurisdiction" to "declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]" MCR 2.605(A)(1). If "a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Generally, an "actual controversy" giving rise to standing "under MCR 2.605(A)(1) exists when a declaratory

judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights.” *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). As our Supreme Court has explained, “the bar for standing is lower when a case concerns election law.” *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 587; 957 NW2d 751 (2020). Therefore, the plaintiffs do not have to clear a high bar to establish standing.

One of the plaintiffs – Cindy Berry – serves as the Clerk for the Township of Chesterfield. Both the guidance manual issued by the Secretary of State in December 2023 and Rule 4 furnish instructions to clerks such as Cindy Berry, who must verify voters' signatures on absentee-ballot applications and envelopes. The Court cannot imagine anyone more in need of a ruling in the form of a declaratory judgment on the guidance manual and Rule 4 than a local clerk like Cindy Berry. Indeed, if she does not have standing to seek declaratory relief as a clerk, then nobody has standing to challenge the guidance manual and Rule 4. The Court of Claims previously took up a challenge to similar guidance in *Genetski*, a case brought by the Allegan County Clerk. There, the Secretary of State did not challenge the clerk's standing, presumably because such a challenge would have been fatuous. The same can be said of the defendants' objection to Cindy Berry's standing in this case. Consequently, the Court denies the defendants' request for summary disposition based on a purported lack of standing. This case must be decided on the merits.

B. THE GUIDANCE MANUAL

The guidance manual issued by the Secretary of State in December 2023 to assist clerks in dealing with “signature verification, voter notification, and signature cure” for absentee ballots and absentee-ballot applications states that “[v]oter signatures are entitled to an *initial* presumption of validity.” The plaintiffs contend that such an initial presumption of validity is impermissible under the Michigan Constitution and Michigan statutes. The Court agrees.

Under Const 1963, art 2, § 4(1)(h), “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 (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 absent voter’s absent voter ballot application or the signature in the voter’s registration record.” Thus, our Constitution calls for a signature comparison without making any presumption for or against validity. Similarly, the language in Michigan statutes precludes the application of a presumption of validity. Pursuant to MCL 168.765(2), a “city or township clerk shall review each absent voter ballot return envelope” by “verifying the signature on each absent voter ballot return envelope in accordance with section 766a[.],” i.e., MCL 168.766a. The language of MCL 168.766a makes no mention of a presumption. Instead, in clear terms, MCL 168.766a(2) states:

An elector’s signature is invalid only if it differs in significant and obvious respects from the elector’s signature on file. Slight dissimilarities must be resolved in favor of the elector. Exact signature matches are not required to determine that a signature agrees sufficiently with the signature on file.

Those three sentences, which do not prescribe or even suggest a presumption of validity, provide election officials with directives they must follow in verifying voters’ signatures on absentee-ballot applications and envelopes.

In response to the plaintiffs’ reliance upon the pellucid statutory language, the defendants take the position that the guidance manual does not prescribe a presumption. Instead, it calls for a more modest “*initial* presumption.” With apologies to Gertrude Stein, however, a presumption is a presumption. Whether the guidance manual includes a gentle nudge instead of a hip check, it’s still a foul under Michigan law. Indeed, the defendants’ decision to initially insert,

but later withdraw, the presumption language in Rule 2 speaks volumes about their understanding of what Michigan law will – and will not – allow. Accordingly, the Court shall award a declaratory judgment describing as impermissible all presumption language contained in the guidance manual for dealing with absentee-ballot applications and envelopes.³

C. THE SET OF RULES, INCLUDING RULE 4

The plaintiffs concede that the set of rules in Mich Admin Code, R 168.21-26 were adopted in compliance with the APA, but the plaintiffs nonetheless assert that the catch line in Rule 2 and the guidance in Rule 4 must be discarded as incompatible with Michigan law. The easier decision concerns the catch line in Rule 2, which refers to an “initial presumption of validity[.]” Based on the Court’s analysis of the presumption language in the guidance manual, the portion of the catch line in Rule 2 that refers to an “initial presumption of validity” must be excised. The excision of that language from the catch line will not have any appreciable effect because “the catch line of a statute is not part of the statute itself, and should not be used to construe the section more broadly or narrowly than the text of the section would indicate.” *People v Mitchell*, 301 Mich App 282, 292; 835 NW2d 615 (2013), citing MCL 8.4b. “Rather, the catch line is ‘inserted for purposes of convenience to persons using publications of the statute.’” *Id.*, quoting MCL 8.4b. That principle presumably applies with equal force to rules, but in an abundance of caution, the Court shall order that the presumption language must be excised from the catch line of Rule 2.

The more difficult question concerns the validity of Rule 4 under Michigan law. That rule, entitled “[e]xplanations for differences in signatures[.]” mandates that “[e]lections officials shall

³ The Court’s resolution on the merits of the challenge to the guidance manual’s initial presumption language renders unnecessary a decision on the plaintiffs’ APA challenge to the guidance manual.

consider the following as possible explanations for the discrepancies in signatures” and lists five “possible explanations” as follows:

(a) Evidence of trembling or shaking in a signature could be health-related or the result of aging.

(b) The voter may have used a diminutive of their full legal name, including, but not limited to, the use of initials, or the rearrangement of components of their full legal name, such as a reversal of first and last names, use of a middle name in place of a first name, or omitting a second last name.

(c) The voter’s signature style may have changed slightly over time.

(d) The signature may have been written in haste.

(e) The surface of the location where the signature was made may have been rough, soft, uneven, or unstable.

R 168.24(1). In separate language that is permissive, Rule 4(2) explains that “the elections official may also consider factors applicable to a particular voter, such as the age of the voter, the age of the signature or signatures contained in the voter’s record, the possibility that the voter is disabled, the voter’s primary language, and the quality of any digitized signature or signatures contained in the voter’s record, and any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature.” R 168.24(2). The plaintiffs insist that both subsections of Rule 4, i.e., R 168.24(1) and (2), should be declared invalid as incompatible with the Michigan Constitution and the language of MCL 168.766a(2). The Court disagrees.

The Secretary of State and the Director of Elections possess powers and duties concerning election procedures, but their powers do not extend to the promulgation of rules that conflict with the Michigan Constitution or statutes enacted by our Legislature. See *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 225-226; 801 NW2d 35 (2011). Here, the plaintiffs’ most

cogent argument is that Rule 4 conflicts with the language on verification of signatures set forth in MCL 168.766a(2), which states:

An elector's signature is invalid only if it differs in significant and obvious respects from the elector's signature on file. Slight dissimilarities must be resolved in favor of the elector. Exact signature matches are not required to determine that a signature agrees sufficiently with the signature on file.

The defendants characterize Rule 4 as nothing more than a permissible interstitial interpretation of that statutory language, whereas the plaintiffs describe Rule 4 as a usurpation of our Legislature's power to define how signature verification must proceed. The defendants have the more accurate view of Rule 4.

Without question, MCL 168.766a(2) requires a generous approach to verification of voters' signatures on absentee-ballot applications and envelopes. The principles of verification allow for disqualification only if "[a]n elector's signature . . . differs in significant and obvious respects from the elector's signature on file" and mandate that "[s]light dissimilarities must be resolved in favor of the elector." Rule 4 does nothing more than offer guidance to election officials in applying the remarkably forgiving standards defined in MCL 168.766a(2). Rule 4(1) lists five commonsense reasons for differences in signatures, and Rule 4(2) permits (but does not require) election officials to consider the effects of aging, disability, and other realities of life in verifying a voter's signature that may have been provided many years after the comparison signature. Nothing in Rule 4(1) or Rule 4(2) puts a thumb on the scales in the analysis of a voter's signature. Instead, Rule 4 modestly offers real-world explanations consistent with the generous approach to signature verification that our Legislature has prescribed. If Rule 4 dictated the outcome of an election official's verification or even skewed that analysis in any significant manner, the Court would strike down the rule, just as the Court declared the "initial presumption" impermissible. But Rule 4 does not go that far. As

a result, the Court must deny declaratory relief to the plaintiffs on their claims in Counts IV and V of the complaint that R 168.24 fatally conflicts with the Michigan Constitution and Michigan law in the form of MCL 168.766a and other related provisions of the Michigan Election Law.

III. CONCLUSION

For all the reasons set forth in this opinion, the Court declares that the “initial presumption” of validity in signature verification of absentee-ballot applications and envelopes mandated by the December 2023 guidance manual issued by defendants is incompatible with the Constitution and laws of the State of Michigan. For similar reasons, the Court declares that the catch line referring to an “initial presumption of validity” in R 168.22 is incompatible with the Constitution and laws of the State of Michigan. Accordingly, those provisions must be excised from the guidance manual and the catch line in R 168.22. In contrast, the Court concludes that R 168.24 is permissible under the Michigan Constitution and the law of the State of Michigan in all respects, so the Court shall deny the plaintiffs’ request for declaratory relief with respect to Rule 4. Finally, because the Court has ruled in the plaintiffs’ favor on the merits in addressing the guidance manual, the Court need not consider whether the guidance manual was promulgated in violation of the APA. The Court hereby invites the plaintiffs to submit a proposed judgment under MCR 2.602(B)(3) memorializing the Court’s rulings and, if appropriate, closing the case.

IT IS SO ORDERED.

Date: June 12, 2024



Christopher P. Yates
Judge, Court of Claims

