UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

RUTH JOHNSON, TERRI LYNN LAND, and MARIAN SHERIDAN,

Plaintiffs,

v.

JOCELYN BENSON, Secretary of the State of Michigan, in her official capacity,

Defendant,

MICHIGAN ALLIANCE FOR RETIRED AMERICANS, DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE, CHARLES ROBINSON, GERARD MCMURRAN, and JIM PEDERSEN

Intervenor Defendants.

Case No. 1:20-CV-00948

THE ALLIANCE'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs filed this lawsuit for one purpose: to overturn an injunction issued by the Michigan Court of Claims against a State actor on State law grounds. *See Michigan Alliance for Retired Americans v. Benson*, Mich. Ct. Cl., No. 20-000108-MM, ECF No. 20-6 PageID.1625 (the "*Alliance* Decision"). On September 18, 2020, after reviewing extensive briefing, voluminous documentary evidence, lay and expert testimony, and multiple expert reports, the Michigan Court of Claims held that the deadline set by the Michigan Legislature for receiving absentee ballots, 8:00 p.m. on Election Day (the "Election Day Receipt Deadline"), violated the Michigan Constitution as applied to ballots cast in the November Election. The Court of Claims therefore issued an injunction against Michigan's Secretary of State and Attorney General requiring, in relevant part, that ballots postmarked no later than November 2, 2020, and received within 14 days of November 3, 2020 (the "November Election"), must be eligible to be counted.

Contrary to Plaintiffs' characterization, the change in the absentee ballot receipt deadline for the November Election is not a "policy" enacted by the Secretary. It is a mandatory term of an injunction issued by a Michigan Court of Claims. The Secretary was a defendant before the Court of Claims (the "*Alliance* case") and vigorously opposed the injunction. The Secretary is enforcing the Court of Claims injunction because she must. Moreover, while the Secretary chose not to appeal for the sake of certainty in the weeks leading up to the November Election, Republican legislators have been allowed to intervene and have appealed to the Michigan Court of Appeals, where a decision is expected any day—and after which, one party or the other will likely seek review by the Michigan Supreme Court.

While Plaintiffs may disagree with the Michigan Court of Claims' decision, principles of federalism forbid their impermissible collateral attack against the Court of Claims ruling as well

as their invitation to this Court to intervene while a state court action addressing the same issues remains pending. The U.S. Supreme Court has held that it is "inappropriate" for federal courts to "proceed on an injunctive claim to render [a] state judgment nugatory," and federal courts should generally "avoid[] unnecessary constitutional decisions," particularly where "a decision from [a] state court might avoid" the Constitutional question. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

But even if the Court does not abstain, Plaintiffs are not entitled to a preliminary injunction. They lack standing to bring their claims, both because their parade of horribles regarding the extension of the absentee ballot deadline is entirely speculative, and because they advance only generalized, undifferentiated harms which they share with the general public. Their theories of injury-in-fact, including "vote dilution" and voter uncertainty, have been debunked by several recent decisions across the country. *See, e.g.*, *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); Ex. 14, *Trump for President v. Boockvar*, No. 2:20-cv-966, at *59–*60 (W.D. Pa., Oct. 10, 2020); Ex. 15, *Carson v. Simon*, Case No. 0:20-cv-02030-NEB-TNL at *21 (Oct. 11, 2020). [1]

Plaintiffs' claims are also unsupported by any authority or evidence, and their requested relief would undermine the constitutional rights of the Plaintiffs in the *Alliance* case and the Intervenors here, Michigan Alliance for Retired Americans, Detroit/Downriver Chapter of the A. Philip Randolph Institute, and three individual voters, Charles Robinson, Gerard McMurran, and Jim Pedersen (together, the "Alliance"). Finally, enjoining the Court of Claims' injunction would

[1] All Exhibits are attached to the declaration of Uzoma Nkwonta.

also significantly confuse Michiganders about the applicable deadlines for the November Election less than three weeks before it will take place, and would likely lead to the rejection of validly-cast absentee ballots that are mailed before Election Day based solely on the timeliness of mail delivery—a factor which is largely outside the voter's control. For these reasons, the U.S. Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), also counsels strongly against this federal court issuing the order that Plaintiffs seek.

BACKGROUND

This lawsuit challenges the injunctive relief ordered by the Michigan Court of Claims in the *Alliance* Decision. Eleven days after entry of the *Alliance* Decision, Plaintiffs—who are not parties to the *Alliance* case—brought this collateral attack, seeking to undo the *Alliance* Decision. The Alliance properly sought intervention in this lawsuit on October 2, 2020, ECF No. 9 PageID.151-185, which the Court granted on October 6, 2020. ECF No. 13 PageID.202.

I. The Court of Claims entered an injunction requiring the Secretary of State and Attorney General to implement the relief that Plaintiffs now challenge in this action.

The *Alliance* Decision was the product of substantial litigation. In that case, the Alliance challenged three restrictions on absentee voting, including the restriction at issue here, Mich. Comp. Laws Ann. § 168.764a, which ordinarily requires that absentee ballots received after 8 p.m. on Election Day must be counted rejected, regardless of when the voter completed and ballot and put it in the mail. The Alliance alleged that the Election Day Receipt Deadline violated the Michigan Constitution's voting rights protections as applied in the November election specifically. *See* ECF No. 19-5 PageID.989-990 at ⁋⁋ 6-8. The Alliance presented evidence of the barriers to absentee voting presented by the coronavirus pandemic and recent U.S. Postal Service mail delays, and demonstrated, following several rounds of briefing and an evidentiary hearing, that requiring

rejection of absentee ballots that are postmarked by Election Day but received shortly thereafter would violate Michiganders' right to vote absentee, enshrined in the Michigan Constitution in Article II, § 4. *See* ECF No. 20-6 PageID.1626-1629.

The *Alliance* case was no "friendly scrimmage" between the Alliance and the Secretary. *See* Mot. at 7. The Secretary and Attorney General vigorously defended the lawsuit, asserting that *League of Women Voters, et al v Benson*, No. 353654 (Mich. Ct. App, July 14, 2020) foreclosed the Alliance's requested relief, and filed four briefs opposing the Alliance's request for a preliminary injunction as well as a motion for summary disposition. *See, e.g.*, ECF No. 18-3 PageID.671; *see also* ECF No. 18-18 PageID.747-823, 19-13 PageID.1062-1159, 19-15 PageID.1163-1392, 20-5 PageID.1532. The Secretary and Attorney General also opposed the Alliance's requested injunction during the evidentiary hearing, during which counsel for the Secretary and Attorney General thoroughly cross-examined the Alliance's live witnesses, and requested that the Court of Claims allow for additional briefing on its motion for summary disposition, which the Court of Claims permitted.

After reviewing the evidence, which included fact and expert witness testimony detailing the effects of the ongoing pandemic in Michigan, the surge in absentee voting in Michigan, and the impact of mail delays on Michigan's elections, the Court of Claims found that the "unrefuted documentary evidence concerning the effects of the pandemic and mail delays" made the "statutory ballot receipt deadline" an "impermissible restriction on the self-executing right to vote" under the Michigan Constitution. ECF No. 20-6 PageID.1634. Accordingly, the Court of Claims preliminarily enjoined the Secretary and Attorney General from enforcing the Receipt Deadline during the November Election, and ordered that all absentee ballots postmarked on or before ***November 2***, 2020 and received at the county clerk's office on or before November 17, "are

eligible to be counted." *Id*. PageID.1626. On September 30, the Court of Claims issued a permanent injunction with the same terms as the preliminary injunction.[2] *See* ECF No. 20-17 PageID.1772-1778.

The Secretary and the Attorney General subsequently announced that they did not intend to file an appeal because, after "carefully consider[ing] the Court's opinion," they "determined, in their Executive capacities, that it was not in the best interests of the State or the people of Michigan to appeal the Court's preliminary injunction." ECF No. 20-12 PageID.1733. In their Motion, Plaintiffs describe the deadlines set forth in the *Alliance* Decision for mailing and receiving absentee ballots as the Secretary's "policy." *See, e.g.*, Mot. at 15. That is incorrect. Rather, those deadlines are *required terms* of an injunction issued by a court interpreting and applying the Michigan Constitution.

The November Election is presently 21 days away, and the deadlines set in the *Alliance* Decision have been widely publicized to Michigan voters. Exs. 2-13.

II. The *Alliance* case is ongoing and is the subject of another pending state court case.

Although the original Defendants in the *Alliance* case did not appeal the *Alliance* Decision, parties purporting to represent the Michigan State Legislature intervened and filed an emergency appeal, which has since been expedited by the Court of Appeals. Briefing is complete and a decision is expected any day, and, most likely, one party or the other will seek review from the

[2] In issuing the injunction, the Court of Claims joined courts across the country extending or affirming the extension of election-day ballot receipt deadlines for the November Election. *See, e.g.*, *Common Cause of Indiana et al. v. Lawson*, No. 1:20-cv-02007, 2020 WL 5798148, at *17 (S.D. Ind. Sept. 29, 2020); *Democratic National Committee v. Bostelmann*, No. 3:20-cv-00249, ECF No. 538 at 47-51 (W.D. Wisc. Sept. 21, 2020); *Pennsylvania Democratic Party v. Boockvar*, No. 133-MM-2020 at 36-37 (Pa. Sept. 17, 2020).

Michigan Supreme Court. Tellingly, Plaintiffs fail to mention this appeal.

In addition, on September 24, 2020, the Republican National Committee and the Michigan Republican Party filed a separate action before the same Court of Claims that issued the injunction, collaterally attacking the relief the Court of Claims granted in the Alliance case. *See RNC v. Secretary of State, et al.*, Civil Action No. 2020-000191-MM (the "RNC Action"). The plaintiffs in the RNC Action, like the Legislative Intervenors in the *Alliance* case, seek to defend the validity of Michigan's election laws. Ex. 16 at ¶¶ 30-32, 34-35. They assert not only their own interest, but also the interests of their members. Ex 16 at ¶ 13. The RNC plaintiffs also seek to invalidate the injunction entered by the Court of Claims. Ex. 16 at ¶ 42. That lawsuit, like the *Alliance* case, is ongoing.

LEGAL STANDARD

Plaintiffs are not entitled to a preliminary injunction unless they demonstrate (1) "a substantial likelihood of success on the merits," (2) they will "suffer irreparable injury absent injunction," (3) " a preliminary injunction" would not "cause substantial harm to others," and (4) that the "public interest will be served by an injunction." *Flight Options, LLC v. Int'l Bhd. of Teamsters*, Local 1108, 863 F.3d 529, 539–40 (6th Cir. 2017). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *see also Louisiana-Pac. Corp. v. James Hardie Bldg. Prod., Inc.*, 928 F.3d 514, 517 (6th Cir. 2019) ("Courts reserve the extraordinary remedy of a preliminary injunction for those cases where it is necessary to preserve the status quo pending a final determination of the merits.").

"The party seeking the injunction must establish its case by clear and convincing evidence." *Draudt v. Wooster City Sch. Dist. Bd. of Educ.*, 246 F. Supp. 2d 820, 825 (N.D. Ohio 2003). "To meet this burden, the plaintiff's evidence must more than outweigh the evidence opposed to it." *Id.* "The plaintiff's evidence must persuade the court that its claims are highly probable, or create a firm belief or conviction in the facts the plaintiff seeks to establish. *Id.* (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180–81 (1987)).

ARGUMENT

III. This Court should abstain in deference to ongoing state court proceedings.

Plaintiffs' attempt to use a federal court action to bypass a disfavored outcome in an ongoing state court proceeding implicates fundamental principles of federalism. Indeed, collateral attacks on state court proceedings are precisely what federal abstention doctrines seek to avoid, particularly where, as here, Plaintiffs have turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Unsurprisingly, then, Plaintiffs' efforts implicate several abstention doctrines, under any of which this Court should decline jurisdiction.

First, Plaintiffs' claims are precluded under *Pennzoil*. *See* 481 U.S. 1. In *Pennzoil*, the losing party in a state court proceeding sued in federal court to enjoin enforcement of the state court judgment, alleging that the underlying state decision violated the U.S. Constitution. *Id.* at 13. The U.S. Supreme Court, citing "the importance to the States of enforcing the orders and judgments of their courts," held that the federal court could not entertain the suit:

> Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to

> pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Id. at 13–14; *see also Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989) (applying *Pennzoil* to hold "it would be inappropriate for the federal court to proceed on an injunctive claim to render the state judgment nugatory").

Such is the case here. Plaintiffs' federal lawsuit seeks to enjoin the enforcement of the Court of Claims' order and render the Court of Claims' adjudication nugatory. But the *state courts*, not the federal courts, provide the proper forum for Plaintiffs' challenge, and indeed other parties are challenging the injunction on appeal through the state courts. This Court should "defer[] on principles of comity to the pending state proceedings" and abstain from issuing a ruling in this matter. *Pennzoil*, 481 U.S. at 17.

Pennzoil applies even though Plaintiffs are not formally parties in the state court action. Under the abstention doctrine from which *Pennzoil* is derived, *Younger v. Harris*, 401 U.S. 37 (1971), "[i]t is not a prerequisite . . . that the federal Plaintiffs also be defendants in the action pending in state court" where, as here, "the interests of the parties seeking relief in federal court are closely related to those of parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings." *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881–82 (8th Cir. 2002) (quoting *Womens Servs., P.C. v. Douglas*, 653 F.2d 355, 358 (8th Cir. 1981)). The Republican-controlled Michigan State Legislature intervened in the *Alliance* case and appealed the Court of Claims' injunction order. ECF No. 20-7 PageID.1646-1718. Plaintiff Johnson's interests are certainly represented in that action, as she is a Republican State Senator. And all three Plaintiffs' interests are represented because the members of the Michigan State Legislature seek to defend the validity of Michigan's election laws, and in doing so, seek the

same relief in that appeal as Plaintiffs seek here: reversal of the *Alliance* Decision and the reinstatement of the Election Day Receipt Deadline. *See* ECF No. 20-7 PageID.1646-1718, 20-17 PageID.1772-1778.

In addition, the RNC and the Republican Party of Michigan have filed a collateral action attacking the *Alliance* Decision in the Court of Claims. *See generally* Ex. 16. Abstention under *Pennzoil* also applies to this matter in favor of the RNC action, which was filed earlier. All three Plaintiffs here, like the plaintiffs in the RNC action, are members of the Republican party. *See* ECF No. 5 PageID.56. Additionally, both Plaintiff Land and Plaintiff Sheridan are currently Republican presidential elector nominees. *Id*. The plaintiffs in the RNC action explicitly seek to further not only their own interests, but also the interests of their members—which includes the Plaintiffs here. Ex. 16 at ¶ 13.

Second, the *Pullman* doctrine also warrants abstention. The *Pullman* doctrine "is built upon the traditional avoidance of unnecessary constitutional decisions and the sovereign respect due to state courts." *Gottfried v. Med. Planning Servs., Inc.*, 142 F.3d 326, 331 (6th Cir. 1998). Under *Pullman*, a federal court "faced with a constitutional challenge to an uncertain state law" must "defer the constitutional question and avoid a direct confrontation" when "a decision from the state court might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Id.*; *see also Gottfried*, 142 F.3d at 331 ("[F]ederal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.").

Finally, even if the Court finds the technical requirements of those abstention doctrines have not been met, the Court should nonetheless abstain in favor of the pending state court cases.

The Supreme Court has warned that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *Pennzoil Co.*, 481 U.S. at 11 n.9. "Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Id*. And when a case "does not precisely fit any of the jurisdictional doctrines . . . even though the policies that typically restrict federal jurisdiction are present," the Sixth Circuit has heeded that warning. *Gottfried*, 142 F.3d at 330. Accordingly, abstention is warranted when "there is a tension between the principles that justify abstention and the technical requirements for each of those doctrines." *Id*. Specifically, the Sixth Circuit does not permit litigants in federal court to "[t]reat[] an injunction like a statute" by filing suit in federal court rather than deferring to the "state judge who has ongoing jurisdiction over the matter." *Id.* Under such circumstances, "equity, comity, and our federalist judicial system" require federal courts to give the state courts the first chance to bring the injunction into compliance with federal law. *Id*. Here, as in *Gottfreid*, the Plaintiffs are not parties to the state court action. *Id*. But nonetheless, the spirit of abstention applies here, as it did there. *Id*. ("[F]ederal courts should abstain and give the state official who is primarily responsible for the enactment the first opportunity to consider the scope of the injunction and its constitutional ramifications."); *see also McKusick v. City of Melbourne, Fla.*, 96 F.3d 478 (11th Cir. 1996) ("This arrangement would thrust the federal court into an unseemly, repetitive, quasi-systematic, supervisory role over administration of the state court injunction, and it would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio."); *Hoover v. Wagner*, 47 F.3d 845 (7th Cir.1995) ("[I]t would be an abuse of discretion, in light of the principles of equity and comity that underlie Younger, to grant the relief sought by the plaintiffs."). Indeed, the spirit of abstention applies with *greater* force here, where the is currently a pending

direct appeal of the injunction at issue. The Court should not permit piecemeal litigation of critical issues of state law in federal court when state court, which alone has the power to modify or narrowly construe the injunction, is *already* addressing these issues. *Id*. at 332.

In sum, Plaintiffs cannot turn to federal court in a transparent effort to relitigate the same claims that failed before the Court of Claims. This blatant "attempt to . . . avoid adverse rulings by the state court . . . weighs strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). If any case demands abstention, it is this one.

IV. Plaintiffs lack standing.

Even if this Court does not abstain, the preliminary injunction should not be granted because Plaintiffs lack both Article III and prudential standing to bring suit. "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

To satisfy the "'irreducible constitutional minimum' of standing," a plaintiff must show that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 659 (6th Cir. 2011) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 351 (1992) (quotation marks omitted)). Additionally, prudential considerations require that "a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of

third parties." *Int'l Union v. Dana Corp.*, 278 F.3d 548, 559 (6th Cir. 2002) quoting *Warth*, 422 U.S. at 499).

"The party invoking federal jurisdiction"—here, Plaintiffs—"bears the burden of establishing [the standing] elements." *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 255, n.3 (6th Cir. 2018) (citing *Lujan*, 504 U.S. at 561). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* "Therefore, where," as here, "a plaintiff moves for a preliminary injunction, the district court [] should normally evaluate standing under the heightened standard for evaluating a motion for summary judgment." *Id.* (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912 (D.C. Cir. 2015)).

A. Plaintiffs have not alleged harms sufficient to satisfy Article III standing.

Plaintiffs lack Article III standing to bring their claims. They identify four purported injuries that they will suffer as a result of the *Alliance* Decision —which they continuously mischaracterize as a "policy" of the Secretary: (1) the value of their votes will be diluted; (2) there will be "uncertainty" about which law governs, the deadlines set by the *Alliance* Decision, or the law enjoined by the Court of Claims setting Election Day at 8 p.m. as the deadline to receive absentee ballots; (3) it creates a danger that Michigan's election results will not be accepted by Congress in determining the winner of the presential election; and (4) it creates a risk that the presidential election results will be resolved too late for Michigan's electoral votes to be counted. Mot. at 17–20.

These harms are all entirely speculative. Plaintiffs face no imminent injury caused by the *Alliance* Decision. To the extent they can articulate any harm, it is not particularized to them. And at least some of the harm they describe would be caused by *this* action not the *Alliance* Decision. None of these alleged harms withstands even the slightest scrutiny, and they certainly do not satisfy the "heightened" burden Plaintiffs must meet to establish standing here. *See Waskul*, 900 F.3d at 255, n.3.

1. Vote Dilution

Vote dilution is a viable basis for federal claims in only specific contexts—typically in equal protection challenges to laws crafted to structurally devalue one community's or group of people's votes over another's. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 563–64 (1964); *Rep. Party of Penn. v. Cortés*, 218 F. Supp. 3d 396, 406–07 (E.D. Pa. 2016) ("Vote dilution is certainly a viable equal protection theory in certain contexts. Such claims can allege that a state has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities.'") (citation omitted). That is, of course, not the context asserted here. Plaintiffs instead base their purported injury by way of "vote dilution" on an unsupported theory that "illegally cast" votes will be counted as a result of the *Alliance* Decision. Mot. at 18.

The theory that the Plaintiffs proceed on here has been repeatedly rejected by federal courts across the country as a viable basis for standing. And for good reason. Any purported vote dilution somehow caused by the *Alliance* Decision would affect *all* Michigan voters, not merely Plaintiffs and *their* votes, and is therefore a generalized grievance and cannot support standing. *See, e.g.*, Ex. 15, *Carson v. Simon*, Case No. 0:20-cv-02030-NEB-TNL at *21 ("The Electors allege that their votes will be diluted, but *such dilution affects all Minnesota voters equally, giving no disadvantage to the Electors*. Indeed, the Electors' claim of vote dilution is a paradigmatic generalized grievance

that cannot support standing.") (emphasis added); *Donald J. Trump for President, Inc. v. Cegavske*, No. 220CV1445JCMVCF, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("*Trump for President*") ("Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not. As with other '[g]enerally available grievance[s] about the government,' Plaintiffs seek relief on behalf of their member voters that 'no more directly and tangibly benefits [them] than it does the public at large.'") (quoting *Lujan*, 504 U.S. at 573–74)); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F.Supp.3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (same); Ex. 14, *Boockvar*, No. 2:20-cv-966, at *59–*60 (finding that "Plaintiffs' theory of vote dilution," was "too speculative" and not sufficiently "concrete"; the "problem" with plaintiffs' "theory of harm is that this fraud hasn't yet occurred, and there is insufficient evidence that the harm is "certainly impending."); *Paher v. Cegavske* ("*Paher I*"), No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (citations omitted) (finding vote dilution "due to ostensible election fraud" was not an injury in fact: "This is not a pioneering finding. Other courts have similarly found the absence of an injury-in-fact based on claimed vote dilution."); *Paher v. Cegavske* ("*Paher II*"), No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020) (same). Such is the case here.

Any vote-dilution injury Plaintiffs claim on the basis that Plaintiffs Land and Sheridan "are not only voters, but also candidates for office," Mot. at 18, does not save their lack of standing. The vote dilution theory pushed in this case is a particularly poor fit for the particular question at issue here. The injunction issued by the Alliance court simply requires that ballots lawfully cast before election day—as evidenced by a postmark on or before November 2—be counted. Those

are not votes of illegal voters, nor could counting such votes plausibly be viewed as countenancing voter "fraud," in even the most expansive sense of the term. They are votes of lawful voters who voted their ballots and tendered them to USPS before election day. As the evidence demonstrated, these voters, despite having done everything right, are at unjustifiable risk of being disenfranchised as a result of the Deadline in this election.

To the extent Plaintiffs assert that absentee ballots postmarked after November 2 will be counted, that concern is entirely speculative and in fact would be contrary to the Alliance court's decision, which is what is challenged here.[3] Plaintiffs present no evidence that these votes will be counted, let alone evidence of widespread counting of illegal votes that would affect the election. Further, Plaintiffs cannot and do not offer any logical theory as to why any unlawful voting that *may* occur would exclusively benefit their opponents and only cause harm to them. It is just as likely under Plaintiffs' scant reasoning that their electoral positions would be *improved*, not undermined, by illegal voting. *See Trump for President*, 2020 WL 5626974, at *7 (finding that "alleged harm is too speculative" where Plaintiffs failed to show that enjoining challenged law would "improve the odds for plaintiffs' candidates").

Plaintiffs also fail to sufficiently establish causation. To satisfy Article III, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (alterations

[3] Plaintiffs contend that ballots received after Election Day "not bearing postmarks" may be counted, Mot. at 17, but as noted, the *Alliance* Decision mandates that only those ballots "postmarked" by November 2, 2020 or earlier may be counted. There is no threat of un-postmarked absentee ballots being counted.

in original). Yet there is an unbridgeable gap in the causal chain between the *Alliance* Decision and any potential vote dilution that may occur. *See Corman v. Torres*, 287 F.Supp.3d 558, 571 (M.D. Pa. 2018) (per curiam). Plaintiffs do not explain how the *Alliance* Decision will result in *illegal* voting. Instead, the notion that Plaintiffs' votes will be diluted by widespread counting of illegal votes relies on the actions of independent third parties—either fraudsters who knowingly mail absentee ballots after November 2 or lawful citizens who accidentally mail late ballots—the existence of whom is never explained by Plaintiffs. These tardy ballots would then need to pass through the postal system *without* receiving a postmark, and still be counted by election administrators, in contravention of the law—a wholly improbable scenario.

This daisy-chain of hypothetical occurrences, unsupported by even a shred of persuasive explanation, is simply too speculative to constitute a concrete injury-in-fact. *See Trump for President*, No. 220CV1445JCMVCF, 2020 WL 5626974, at *5 (concluding that "injuries are too speculative to establish standing" where plaintiffs "offer a patchwork theory of harm that does not rely on" the challenged law but instead on entities "out of defendant's control"); Ex. 14 *Boockvar*, No. 2:20-cv-966, at *60 (finding no standing in a vote dilution case where plaintiffs' dilution theory rested upon a "chain of theoretical events").

2. Uncertainty

Plaintiffs' claims of uncertainty about the rules governing the November Election fare no better. The *Alliance* Decision has not caused any uncertainty on Plaintiffs' part—they clearly understand that the *Alliance* Decision governs the election, so much so that they are challenging its validity before this Court.

To the extent Plaintiffs claim that *other* voters will be confused, and this may affect the outcome of Plaintiffs' election prospects, this concern is entirely conjectural because Plaintiffs do

not identify any actual basis for this purported confusion. *See Trump for President*, 2020 WL 5626974, at *5 ("Outside of stating 'confus[ion]' and 'discourage[ment]' in a conclusory manner, Plaintiffs make no indication of how" the challenged law "will discourage their member voters from voting.") (alterations in original). After the *Alliance* Decision was issued, the law became clear: absentee ballots postmarked on or before November 2 that reach the elections office before the deadline to certify election results will be counted. No other absentee votes will be counted. *See* ECF No. 20-6 PageID.1626.

The *only* source muddying these untroubled waters and introducing confusion and uncertainty *is this litigation itself*, and courts have routinely held that such self-inflicted wounds are insufficient for standing. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (concluding that "self-inflicted injuries [] not fairly traceable to the Government's purported activities . . . do[] not give rise to standing"). Plaintiffs cannot cast doubt on the propriety of the *Alliance* Decision and then claim that the resulting confusion causes them injury. In fact, the relief Plaintiffs seek would *create*, not redress, any uncertainty, since the Postmark Deadline has already been widely publicized. *See, e.g.*, Exs. 2-13; *see also Common Cause R.I.*, 2020 WL 4680151, at *1 ("The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief."); *Townley v. Miller*, 722 F.3d 1128, 1133–35 (9th Cir. 2013) (finding no standing where the relief plaintiffs sought would increase rather than decrease their asserted harm).

3. Safe Harbor and Congressional Deadlines

The third and fourth harms identified by Plaintiffs boil down to the same grievance: the *Alliance* Decision purportedly runs afoul of Congress's mechanisms for determining the winners of presidential contests, both because it is inherently unlawful and because it will not comply with

necessary deadlines. Both harms are ultimately too hypothetical to constitute a legally-cognizable injury in fact. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016); *Air Traffic Controllers*, 654 F.3d 654, 659 (6th Cir. 2011).

There is simply no logic to Plaintiffs' assertion that "the Secretary's election deadlines risk placing the resolution of the contest past dates Congress has set for both the safe harbor [deadline to decide any intrastate election disputes, 3 U.S.C. § 5] and the actual vote of the Electoral College [on December 14]." Mot. at 10. Their only basis for this alleged harm is that "it will remain unknown who wins the state's vote for at least fourteen days after Election Day, and any contest about the ultimate result is unlikely to reach a conclusion before the safe-harbor deadline or even before the vote of the Electoral College." *Id*. But a review of the relevant demonstrates just how outlandish this assertion is. Again, county canvassing boards have until November 17 to complete the canvass of the General Election (i.e., certify the election results); they must then forward chronology the results to the Secretary of state within 24 hours. MCL 168.822, 828. The Board of State Canvassers must meet by November 23 to canvass the General Election. MCL 168.842. There is no plausible reason why the *Alliance* Decision will cause the election results to be unknown past November 17, let alone December 14. In fact, other states' ballot receipt deadlines match or even exceed the provisions of the *Alliance* Decision. *See, e.g.*, 10 Ill. Comp. Stat. 5/19-8, 5/18A-15 (ballot must be received within 14 days of election); Cal. Election Code § 3020.1(d). There is no indication that these states have difficulty, regularly or even occasionally, meeting

applicable deadlines.[4]

A Minnesota federal district court recently addressed a similar challenge to a court order concerning applicable election deadlines for the 2020 November Election, and found that concerns about running afoul of the safe harbor deadline were far too speculative to serve as a basis for standing. Ex. 15, *Carson*, Case No. 0:20-cv-02030-NEB-TNL at *30. The *Carson* court found that such concerns relied upon "an attenuated and speculative chain of causation," whereby "someone with standing would have to file a lawsuit challenging the election results" "the litigation would have to extend past the safe harbor deadline of December 8"; "[t]hen, as mentioned above, even if [the] election results were not certified by the safe harbor deadline, both Houses of Congress would have to affirmatively decide to disregard [Michigan's] electoral votes on one of two narrow bases, something which has . . . happened in only one election since the United States' first presidential election approximately 230 years ago." *See id*. Such an unlikely scenario "cannot be the basis for standing." *Id*.

B. Plaintiffs' Electors' Clause claim rests on injuries of third parties.

Plaintiffs also lack prudential standing to bring Count I. "Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights." *Virginia*

[4]And even if a challenge to the election results does go beyond the safe harbor deadline, that does not mean Michigan's electors will not be seated or its electoral votes will not be counted. As the Court in *Carson* noted: "even if a state fails to meet the safe harbor deadline, Congress is not simply free to disregard the state's election results at will. The safe harbor provision imposes no requirements on the states; rather, it offers their election results protection. Although meeting the safe harbor deadline effectively ensures that Congress will count a state's electoral votes, the inverse is not necessarily true . . . the [Safe-Harbor] Act contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State." Ex. 15, Case No. 0:20-cv-02030-NEB-TNL at *29.

v. Am. Booksellers Ass'n, 484 U.S. 383, 392 (1988). Plaintiffs' claims, by contrast, "rest . . . on the legal rights or interests of third parties.'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499).

Count I is predicated solely on *the Michigan Legislature's* purported rights under the Electors Clause—and no one else's. Plaintiffs have no standing to assert the Michigan Legislature's rights, nor is there a need for them to do so, because the Michigan Legislature is *already appealing* the *Alliance* Decision.

Plaintiffs assert that the *Alliance* Decision contravenes the Michigan Legislature's "bright-line dead-line of 8:00 p.m. on November 3, 2020, for mail-in ballots to arrive at polling places," and therefore violates Article II of the Constitution, which "mandates that the rules governing presidential elections be set by Congress or the 'Legislature.'" Mot. at 1-2. Their Motion is replete with references to the Michigan Legislature and the alleged usurpation of its authority. *See, e.g.*, Mot. at 5 ("The Michigan Legislature has exercised its constitutional duty to establish rules governing the manner of presidential elections."); *id.* at 13 ("[O]nly the Michigan Legislature, not the Secretary or state courts, may establish regulations governing the time and manner of presidential elections"). Plaintiffs, however, have no authority or standing to assert the rights of the Michigan Legislature. The Supreme Court has squarely held that a private citizen does not have standing to bring an Elections Clause challenge. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam); *cf. Corman*, 287 F.Supp.3d at 573 ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General

Assembly.").[5]

Plaintiffs are not the Michigan Legislature, and they have identified no "'hindrance' to the [Legislature's] ability to protect [its] own interests."[6] *Kowalski*, 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); *see also Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016) (third-party standing requires "'a close relationship with the person who possesses the right' *and* 'a hindrance to the possessor's ability to protect [her] own interests'") (alteration in original, emphasis added) (quoting *Kowalski*, 543 U.S. at 130)). "Absent a 'hindrance' to the third-party's ability to defend its own rights, this prudential limitation on standing cannot be excused." *Corman*, 287 F.Supp.3d at 572 (quoting *Kowalski*, 543 U.S. at 130).[7] Accordingly, applying the "usual rule" of prudential standing, *Am. Booksellers*, 484 U.S. at 392, Plaintiffs "do[] not have third-party standing" to assert claims on the Legislature's behalf, which is fully capable of representing its own interests, and indeed is doing so in the Court of Claims appeal. *Hughes*, 840 F.3d at 992; *see also Corman*, 287 F.Supp.3d at 571–73.

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[5] Although *Corman* specifically concerned the Elections Clause, the Elections and Electors Clauses play functionally identical roles, with the former setting the terms for congressional elections and the latter implicating presidential elections. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"). Accordingly, cases interpreting "the Legislature" in the context of the Elections Clause inform application of the Electors Clause. *See, e.g.*, *Castañon v. United States*, 444 F.Supp.3d 118, 140–41 (D.D.C. 2020); *De La Fuente v. Simon*, 940 N.W.2d 477, 493 n.15 (Minn. 2020).

[6] Plaintiff Johnson serves as a member of the Michigan State Senate, Mot. at 6, but does not purport to represent the Michigan Legislature. Nor could she; in her individual capacity, she cannot assert that body's institutional injuries, *see, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–15 (10th Cir. 2016).

[7] The opinion of the three-judge panel in *Corman* is highly instructive. There, as here, third parties brought in federal court a collateral attack on a state court judgment. *See* 287 F.Supp.3d at 561. The panel concluded that these third parties lacked both Article III and prudential standing. *See id.* at 573–74.

V. Plaintiffs' claims are not likely to succeed on the merits.

A. The Electors Clause does not preclude Michigan from delegating authority to the Secretary of State, as Michigan has, nor does it permit the Michigan Legislature to regulate elections in a manner that violates the Michigan Constitution.

Even if Plaintiffs had standing to raise a claim under the Electors Clause, Plaintiffs are unlikely to succeed on the merits of that claim. Plaintiffs allege that the Secretary's "decision to implement" a postmark deadline contravenes the Electors Clause of the U.S. Constitution, art. II, § 1, cl. 2. That allegation fails on the facts and the law. As to the facts, Plaintiffs again misrepresent the *Alliance* Decision, which found the Election Day Receipt Deadline violated the Michigan Constitution, as the "Secretary's policy." *See* Mot. at 15. That characterization is blatantly wrong—the Postmark Deadline is not a policy devised by the Secretary. It is a term of an injunction in which the Court of Claims found that existing Michigan law violated the Michigan Constitution. Abiding by the terms of this injunction, as the Secretary must, does not contravene federal election laws.

In any event, the Michigan Legislature has delegated authority to regulate elections to the Secretary, and the Electors Clause poses no obstacle to that delegation. The U.S. Supreme Court has held that state legislatures can delegate their authority to state officials like the Secretary. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the State has prescribed for legislative enactments") (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932)); *Corman*, 287 F.Supp.3d at 573 ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state.") (quoting *Ariz. State Legislature*, 576 U.S. at 816); *see also* Ex.

15, *Carson*, Case No. 0:20-cv-02030-NEB-TNL at *29 ("The legislature may (1) delegate the authority to select electors to the public at large, (2) delegate the authority to the executive, or (3) prescribe a different procedure entirely.") (citing *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (citing U.S. Const. art. II, § 1, cl. 2)).[8] Indeed, such delegation must be permitted; if Plaintiffs were correct that "any 'manner' regulation not promulgated by the Michigan Legislature is beyond the very authority of Michigan, as a sovereign, to regulate in this arena," Mot. at 13, then *any* discretion exercised by *any* non-legislative entity in *any* state—from a local clerk's decision on polling-place locations to a secretary of state's guidance on how to word ballot instructions—would be unconstitutional.

Accordingly, the *Alliance* Decision mandating that the Secretary implement the Postmark Deadline constitutes a plausible violation of the Electors Clause *only if* the deadline causes the Secretary to exceed the authority granted to her by the Michigan Legislature. It does not. The Legislature delegated to the Secretary the authority to "promulgate rules . . . for the conduct of elections and registrations."[9] MCL 168.31, *et seq*. In abiding by the terms of the injunction, the Secretary is merely following the directive of the Court of Claims; Plaintiffs do not assert that Michigan law requires the Secretary to ignore the requirements of a court order, and indeed nothing in the state's law requires such an absurd result. Thus, by implementing the Postmark Deadline as prescribed by the *Alliance* Decision, the Secretary is simply not "choosing to abandon the enforcement of statutes enacted by the Michigan Legislature in favor of her own policies." Mot.

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[8] As discussed in note 6 *supra*, the Electors and Elections Clauses are textually and legally analogous.

[9] Plaintiffs themselves highlight some of the discretionary responsibilities lawfully conveyed by the Michigan Legislature to the Secretary and local officials. *See* Mot. at 6–7 & n.2.

at 8. She is instead acting within the authority delegated to her by the Legislature in a manner required by the Michigan Constitution as determined by the Court of Claims.

The Electors Clause poses no bar to such conduct. Indeed, although the Electors Clause vests authority in "the Legislature" of each state to regulate presidential elections, U.S. Const. art. II, § 1, cl. 2, the Legislature cannot regulate presidential elections in a way that violates the Michigan Constitution. *See Ariz. State Legislature*, 576 U.S. at 817–18 ("Nothing in [the Elections] Clause instructs, nor has th[e] [U.S. Supreme] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."). Here, the Court of Claims found that, as applied to the November Election, the Election Day Receipt Deadline violates Michigan's constitutional right to vote absentee. Such a holding does not offend the Electors Clause.

Plaintiffs cite no authority that suggests otherwise. Plaintiffs claim that *McPherson* requires state legislatures *alone* to prescribe the manner of elections. *McPherson*, 146 U.S. at 1, 27. Even setting aside the 128 years of intervening Supreme Court cases limiting the plenary power of state legislatures, *McPherson* itself explains that legislatures may delegate their authority under the Electors Clause. *See* 146 U.S. at 25 (noting that state legislatures may exercise authority under the Electors Clause by "joint ballot or concurrence of the two houses, or according to such mode as designated"). Although the power delegated to state legislatures by the Electors Clause "cannot be taken from" those legislatures, it is undoubtedly "competent for the legislature to authorize the governor, or the supreme court of the state, or any other agent of its will" to satisfy its duties under the it. *Id*. at 34-35. *Bush v. Gore*, 531 U.S. 98 (2000), and *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), merely note the same. When the legislature itself delegates the authority to regulate elections to "any other agent of its will"—as the Michigan legislature delegated to the

Michigan Secretary of State in 1954—that agent is not acting beyond its authority in doing so.

B. The *Alliance* Decision does not conflict with federal laws setting the Election Day.

Plaintiffs are also unlikely to succeed on the merits of Count II, which alleges that the *Alliance* Decision "violates federal law yet again insofar as it directly conflicts with Acts of Congress setting the Election Day." Mot. at 15. The *Alliance* Decision does no such thing.

"[A] state's discretion and flexibility in establishing the time, place and manner of" federal elections—presidential elections included—has one, and *only* one, "limitation: the state system cannot directly conflict with federal election laws on the subject." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000). But while "Congress has the authority to compel states to hold [federal] elections on the dates it specifies," *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001)—specifically, "the Tuesday next after the first Monday in November," 3 U.S.C. § 1—nothing in the *Alliance* Decision alters the timing of Michigan's election to a date other than that prescribed by Congress. Contrary to Plaintiffs' assertions, the *Alliance* Decision does not "treat November 3 as . . . merely [the] *beginning*" of Election Day or permit "holding votes for the presidency *after* November 3." Mot. at 2, 3 (emphasis in original).

The Elections Clause—and, by extension, the Electors Clause, *see supra* note 6—"is a default provision; it invests the States with responsibility for the mechanics of [federal] elections, *but only so far as Congress declines to preempt state legislative choices*." *Foster v. Love*, 522 U.S. 67, 69 (1997) (emphasis added; citation omitted). The Alliance is not aware of, and Plaintiffs have not pointed to, any law by Congress dictating to states how to determine the final date to receive absentee ballots postmarked before Election Day. *See* Ex. 1, *Donald J. Trump for President v. Way*, Case No. Case 3:20-cv-10753-MAS-ZNQ, at *24 (D.N.J. Oct. 6, 2020) (denying preliminary

relief in a case challenging the state's authority to accept ballots that are not postmarked if they arrive within 48 hours of Election Day, because "no federal law regulat[es] method of determining the timeliness of mail-in ballots or requir[es] that mail-in ballots be postmarked."). Because Congress has not codified a ballot receipt deadline presumption that competes with the deadline set forth in the *Alliance* Decision, "compliance with both [the Court of Claims injunction] and the federal election day statutes does not present 'a physical impossibility.'" *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (citation omitted) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)); *See also* Ex. 1, *Way*, Case 3:20-cv-10753-MAS-ZNQ, at *24 (finding no direct conflict between the state law and Federal Election Day statutes). In fact, Michigan election officials are already required and frequently called upon to count ballots submitted or finalized well after Election Day: Michigan voters who submit provisional ballots may provide supporting documentation up to six days after the election to have their ballots counted, *see* MCL 168.523a, 168.813, and military and overseas voters may receive even longer extensions to submit ballots if the clerk does not issue their absentee ballot at least 45 days before the election. *See* MCL 168.759a(16).

This case is therefore readily distinguishable from the two primary cases upon which Plaintiffs rely, *Foster v. Love* and *Maddox v. Bd. Of State Canvassers*. In *Maddox*, 149 P.2d 112 (Mont. 1944), the Montana legislature passed a law during World War II permitting overseas ballots that arrived in December to be counted in the presidential election. The Montana Supreme Court found the act unconstitutional because permitting voting to extend into late December would not allow Montana's presidential electors to be appointed or elected: "[t]he chief objection made to the postponement of the final determination of election results to late in December is that under both the federal and state Acts . . . the presidential electors must meet on the first Monday after the

second Wednesday in December following their election, and that the delay would deprive Montana of representation in the electoral college." *Id*. at 114. By contrast, here, for reasons explained *supra*, Argument Part II(A), any risk that Michigan's electors will not be seated by December 8 is entirely speculative, and would not be caused by the *Alliance* Decision.

In *Foster*, 522 U.S. 67 (1997), the U.S. Supreme Court overturned Louisiana's open primary statute, which provided an opportunity for U.S. House and Senate elections to take place entirely in the month before Election Day, "without any action to be taken on federal election day." *Id*. at 68–69. The Court concluded that this system "runs afoul of the federal statute" because it permitted federal elections to take place entirely before the statutorily-mandated Election Day. *Id.* at 69, 72. This is not the case here. The *Alliance* Decision does not set a competing Election Day, and does not permit absentee votes cast after Election Day to be counted. Courts have consistently held that the procedures and standards established by states to facilitate the federal election do not alter the date prescribed by Congress. *See, e.g.*, *Millsaps*, 259 F.3d at 549 ("[T]here is no reason to think that simply because Congress established a federal election day it displaced all State regulation of the times for holding federal elections."); *Keisling*, 259 F.3d at 1175 (emphasizing that *Foster* did not "present the question whether a State must always employ the conventional mechanics of an election").

Maddox and *Foster* stand for the unremarkable proposition that voting must be available on Election Day and that ballots must be counted in time for presidential electors to be appointed or elected. But, as one post-*Foster* appellate court decision concluded, "we cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote." *Bomer*, 199 F.3d at 777; *accord Millsaps*, 259 F.3d at 545 ("[A]ll courts that have considered the issue have viewed statutes that facilitate the exercise of the

fundamental right of voting as compatible with the federal statutes."). The *Alliance* Decision "further[s] the important federal objective of reducing the burden on citizens to exercise their right to vote . . . without thwarting other federal concerns," *Bomer*, 199 F.3d at 777, by ensuring that voters who cast absentee ballots on or before November 2 are not arbitrarily disenfranchised simply because the postal system, through no fault of the voter, fails to deliver ballots to the local clerk's office on Election Day. The deadline November 17 deadline to receive ballots prescribed in the *Alliance* Decision is not preempted, and Plaintiffs are unlikely to prevail on Count II.

VI. Plaintiffs will suffer no injury, let alone irreparable harm, absent an injunction.

Even if Plaintiffs could succeed on the merits of their claims, and they cannot, the equities strongly weigh against injunctive relief.

To satisfy the irreparable harm requirement, the harm must be "*likely* in the absence of an injunction"; a mere "possibility" of irreparable injury is not sufficient. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22–23 (2008) (emphasis added). Plaintiffs fall far short of this burden; they fail to demonstrate *any* imminent or even plausible injury, let alone one that is likely.

Plaintiffs have not demonstrated they will be harmed *at all* by the injunction. They are not uncertain about the terms of the injunction. *Accord Martel*, 2020 WL 5755289, at *5 (finding that voters will not be confused by a secretary of state directive mailing ballots to every active Vermont voter: "These are sophisticated voters who have gone to considerable lengths to obtain counsel skilled in election law and to file a lawsuit in federal court. Of all people likely to be confused about how to vote, these five plaintiffs must be last on the list."). Nor have they explained how the *Alliance* Decision could result in widespread uncertainty about the rules governing the election that could influence the outcome of their candidacies for office. There is no dispute that voters who believe the deadline set by the Michigan Legislature governs will still have their votes counted

under the *Alliance* Decision. Such voters are not harmed by the *Alliance* Decision. And voters who have received the widespread information about the extended deadlines set by the *Alliance* Decision will also have their votes counted (so long as they follow the publicized requirements). *See, e.g.*, Exs. 2-13. Voters, however, who received information about the *Alliance* Decision could ultimately be confused and even disenfranchised if an injunction is issued here.

Plaintiffs also will not suffer irreparable injury in the form of "vote dilution," a theory of harm that is not even properly invoked in this context, since the *Alliance* Decision does not devalue Plaintiffs' votes in relation another group's votes. Plaintiffs' attempt to couch their concern as illegal voting, but the *Alliance* Decision does not permit illegal votes. It merely sets certain deadlines for votes to be legally cast and counted, which the Court of Claims found were required under the Michigan Constitution.

Finally, Plaintiffs' speculative concerns about the *Alliance* Decision jeopardizing the legitimacy of the November Election and resulting in Michigan's votes not being counted are incredibly far-fetched; there is no reason to believe that Congress will, for the first time since 1873, reject a state's electoral votes, *particularly since* Michigan law requires all votes to be counted and certified well before the date the Electoral College will vote, and nothing in the *Alliance* Decision disturbs that law. *Accord* Ex. 15, *Carson*, Case No. 0:20-cv-02030-NEB-TNL at *30. Such unlikely concerns certainly do not warrant the "extraordinary" relief of imposing a preliminary injunction. *Accord Winter*, 555 U.S. at 22–23; *Overstreet*, 305 F.3d at 573.

At bottom, Plaintiffs' concerns about the applicable deadlines are imaginary. There is simply no indication that the *Alliance* Decision will result in harm to Plaintiffs or any other voters.

VII. The balance of harms weighs strongly against injunctive relief.

While Plaintiffs have not demonstrated any likely injury, enjoining the *Alliance* Decision at this late stage would have a devastating impact on the Alliance and Michigan voters. Plaintiffs suggest that "the harm of an erroneous ruling at this stage would be non-existent: the Secretary would simply be compelled to conduct this election the way every Michigan Secretary of State has conducted elections for generations." Mot. at 21. This assertion does not reflect the hardships that would be imposed on both election officials and voters—including the Alliance—if the *Alliance* Decision were enjoined.

Officials and the voters they serve have already planned for the terms of the *Alliance* Decision to govern the November Election. *See, e.g.*, Exs. 2-4. Reversing the *Alliance* Decision now is likely to cause the confusion and corresponding disenfranchisement that the Supreme Court sought to prevent in *Purcell v. Gonzales*, 549 U.S. 1 (2006). Requiring corrective efforts at this point—such as distributing new guidance and instructions directly to voters and providing new guidelines to local election officials—would be administratively infeasible. *See Cook Cty. Republican Party v. Pritzker*, No. 20-CV-4676, 2020 WL 5573059, at *10 (N.D. Ill. Sept. 17, 2020) (denying preliminary injunction where "enjoining the [challenged election law] approximately six weeks before the election would introduce even greater challenges into what already is an exceedingly difficult election to administer"). Further, a last-minute change to the deadline for absentee ballots to be counted could lead to widespread voter confusion and even disenfranchisement because it would change the publicized deadlines, and runs the risk that some voters will never learn about the correct deadline. If this occurs, many voters will be disenfranchised because their ballots will not reach their local clerk's office on time. *See Serv. Emps. Int'l Union, Local 1 v. Husted*, 906 F.Supp.2d 745, 750 (S.D. Ohio 2012) ("To

disenfranchise a single voter is a matter for grave concern."). *Purcell* counsels against such a change, especially when driven by conflicting court orders. *See Purcell*, 549 U.S. at 4.

For these reasons, while enjoining the *Alliance* Decision would not prevent any harms to Plaintiffs—their supposed harms are ultimately imaginary—it would indisputably confuse the Alliance and all Michigan voters about the applicable deadlines, and could lead to their ballots not being counted, through no fault of their own.

VIII. The public interest would not be served by an injunction.

An injunction reversing the *Alliance* Decision will cause significant public harm, because it would permit a federal court to impose upon a state court ruling by enjoining the *Alliance* Decision, *while that case is still ongoing*. The precedent set by such a move would mean parties could stop ongoing state court actions in their tracks by seeking redress in federal court. Such a result is certainly not in the public interest.

And, as stated, an injunction would also lead to widespread public confusion about when absentee ballots must be postmarked and whether ballots that reach the county clerk's office after Election Day will be counted. This confusion could lead to voters mailing their ballots, for example, on November 2, thinking they are within the deadline, but the county clerk rejecting the ballot because it does not make it through the mail by 8:00 p.m. on November 3. This risk of disenfranchisement is a significant concern; "[b]y definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible.'" *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012); *Purcell*, 549 U.S. at 4. The public interest is not served by the widespread uncertainty that would ensue if this Court enjoins the *Alliance* Decision.

CONCLUSION

Plaintiffs seek the extraordinary remedy of a preliminary injunction to dismantle a pending state court case that is presently on appeal. Such a result runs contrary to principles of comity and federalism, and would also cause widespread voter confusion about which order governs an election that is less than a month away. Plaintiffs do not have standing to bring their case in this forum, and they ultimately fail to demonstrate a likelihood of success on the merits of their claims. Because they have not met their "burden of proving that the circumstances clearly demand" the "extraordinary remedy" of enjoining another court's order, *see Overstreet*, 305 F.3d at 573, this Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

DATED: October 13, 2020

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CERTIFICATE OF SERVICE

Uzoma N. Nkwonta certifies that on the 13th day of October 2020, I served a copy of the above document in this matter on all counsel of record and parties via ECF filing.

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