UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

RUTH JOHNSON, TERRI LYNN LAND, and MARIAN SHERIDAN,

Plaintiffs,

v.

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

Defendant,

and

MICHIGAN ALLIANCE FOR RETIRED AMERICANS, et al.,

Intervenor-Defendants.

Civil Action No. 1:20-cv-00948

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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Introduction

This case presents vital questions of federal law that will have to be answered either now or after Election Day. Both the Secretary and Intervenors say their aim is to avoid disenfranchisement of Michigan voters, but disenfranchisement is precisely what the policy they defend will do. When voters rely on that policy to cast ballots that arrive after Election Day, those ballots will be subject to challenge by candidates. And, because the Secretary's policy of counting of such ballots blatantly violates the prescriptions of federal law, those ballots will be disqualified and those voters completely disenfranchised. The lawfulness of the Secretary's policy must be resolved now to prevent that result by making clear what deadline applies for votes to be lawfully counted, to avoid the chaos that will inevitably result when large numbers of untimely ballots are challenged in the short period between Election Day and the federal law "safe harbor" for appointing electors, and to avoid the irreparable harm that Plaintiffs face as candidates and voters.

All of this stems from the simple fact that the Secretary has chosen to conduct the 2020 presidential election in violation of state and federal law. Because the Electors Clause requires that the "Manner" of the election be established by the Michigan Legislature, the Secretary's plan to count ballots that arrive two weeks after the Legislature's bright-line deadline is void in violation of the *federal* Constitution. It is no defense that a state court ordered this violation. A state court is not "the Legislature" of Michigan, and it may not authorize the State or its agents to violate governing federal law. Nor is there any plausible delegation

of legislative power to the Secretary or the courts—if delegation is even permissible—when it is undisputed that neither the Secretary nor the courts play any role in Michigan's lawmaking process.

The Secretary's and Intervenors' resort to a hodgepodge of justiciability and abstention objections is meant to confuse, not clarify, the straightforward federal-law issues the Court must decide. Plaintiffs clearly have standing as candidates for office, who have the right to challenge the rules of counting votes in *their own races*, and as voters, who have the right to challenge dilution of their votes. These are not abstract injuries, but touch Plaintiffs' most concrete, personal, and particularized rights, and they are *Plaintiffs'* injuries, not those of third parties. And the overriding federal interests in this case defeat each and every one of the assorted abstention arguments the Secretary and Intervenors lodge in turn.

Because the Secretary's policy violates federal law, because it inflicts irreparable and ongoing harm to Plaintiffs and the public, and because there is no basis for this Court to decline its unflagging obligation to hear this case, the motion should be granted.

Argument

I. Plaintiffs Are Likely To Prevail on the Merits

A. Plaintiffs Are Likely To Succeed on Count I

The Secretary and Intervenors cannot get past the fact that neither the Secretary nor a Michigan court is "the Legislature" of Michigan. Because Article II "leaves it to the legislature exclusively to define the method" of appointing

electors, *McPherson v. Blacker*, 146 U.S. 1, 27 (1892), the Secretary may not flout bright-line statutory deadlines, with or without a court order. The Michigan Legislature set the ballot-receipt deadline on Election Day, but the Secretary is extending that deadline by *two weeks*. This extension was not enacted by the Legislature and is therefore unconstitutional.

1. The State Constitution Does Not Supersede the Federal Constitution

a. The Secretary lodges the perplexing defense that state officials "are presumed to have 'properly discharged their official duties,'" Secretary of State Opposition, ECF No. 24 PageID.3289 ("State Br."), at 17 (quoting *Barden Detroit Casino LLC v. City of Detroit*, 59 F. Supp. 2d 641, 661 (E.D. Mich. 1999)), but this case does not rise or fall on "evidence rebutting that presumption." *Id.* The Secretary admits that she "issued instructions to local election officials" to implement a November 17 deadline and to depart from the November 3 deadline. *Id.* at 4–5. There is no dispute of fact, and a purely legal question confronts the Court: whether state action in violation of the law enacted by the Michigan Legislature may constitute the "Manner" of appointing presidential electors that "the Legislature thereof" has established. Art. II, § 2, cl. 2. The answer is no.

For this reason, it is no defense that "an order from the state court" supports the Secretary's actions. State Br. 18, PageID.3290. A state-court order is no more the "manner as the Legislature thereof may direct" than is an executive order. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000), held that a state supreme court's application of its state constitution to override statutory law

violates the Electors Clause, *see id.* at 76–77, and *Bush v. Gore*, 531 U.S. 98 (2000), rejected a state supreme court's proposed course of conduct because it amounted to "action in violation of the Florida Election Code" and, hence, the Electors Clause. *Id.* at 111. Nor is there any context in which a state official may plausibly justify violating *federal* law on the ground that a state court ordered it. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("No state legislator or executive *or judicial officer* can war against the Constitution without violating his undertaking to support it." (emphasis added)). "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause" through "injunctive relief to prevent a continuing violation of federal law," *Green v. Mansour*, 474 U.S. 64, 68 (1985), against those with "connection to the enforcement" of that law, *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 996 (6th Cir. 2019) (citation omitted).[1] It does not matter whether those who enforce the law felt constrained to do so. *See, e.g.*, *Brandon v. Guilford Cty. Bd. of Elections*, 921 F.3d 194, 199 (4th Cir. 2019).

b. Intervenors advance a similar argument that "the Legislature cannot regulate presidential elections in a way that violates the Michigan Constitution." Intervenor's Opposition, ECF No. 26 PageID.3418 ("Int's Br."), at 26. But the Supreme Court long ago held that the authority of the Electors Clause "is conferred upon the legislatures of the states by the constitution of the United

[1] In this respect, the Secretary seems to think there is a bad-faith or subjective-intent element in Plaintiffs' allegations or the legal standard. Not so. Plaintiffs do not, and need not, allege that the Secretary acted in bad faith or maliciously. *See Cooper*, 358 U.S. at 15.

States, and cannot be taken from them or modified *by their state constitutions*." *McPherson*, 146 U.S. at 35 (quotation marks omitted) (emphasis added). The Electors Clause therefore establishes "a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.* at 25; *see also Palm Beach*, 531 U.S. at 76 (same); *Bush*, 531 U.S. at 111–12 (Rehnquist, J., concurring)). This limitation forecloses Intervenors' argument that anyone other than the Legislature may, constituent with Article II, rewrite the law on the manner of appointing electors.

Following *McPherson*, courts have consistently held that state constitutional provisions "may not operate to 'circumscribe legislative power' granted by the Constitution of the United States." *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286-87 (Neb. 1948); *see also Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694 (Ky. 1944); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinions of Justices*, 45 N.H. 595, 601–07 (1864); *Chase v. Miller*, 41 Pa. 403, 409 (1862); *PG Pub. Co. v. Aichele*, 902 F. Supp. 2d 724, 748 (W.D. Pa. 2012). To the extent there was any question remaining on that point, *Palm Beach* laid it to rest. 531 U.S. at 76.

c. The Secretary and Intervenors rely on *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015), but it cuts against their position. The holding of *Arizona*, and the decision it applied, *Smiley v. Holm*, 285 U.S. 355 (1932), that the Elections Clause of Article I does not permit a state legislature to "prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution," *Arizona*,

576 U.S. at 817–18, refers to the "lawmaking *process*" established by a state constitution, *id.* at 804 (emphasis added); *see also id.* at 808–13. *Smiley* held that a congressional redistricting plan was not valid under the Elections Clause where the state's governor vetoed the law, consistent with the "*manner*…in which the Constitution of the state has provided that laws shall be enacted." 285 U.S. at 368 (emphasis added). Likewise, *Arizona* held that a redistricting commission, and the ballot initiative that created it, belonged to "the State's prescriptions for lawmaking," 576 U.S. at 808, and therefore fit within the term "Legislature" of the Elections Clause, "which encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves." *Id.* at 793.

Here, the ballot-receipt deadline was enacted through Michigan's lawmaking process: the Michigan Legislature passed the law, and the Governor signed it. And the Secretary's abandonment of the law (at the prompting of a Michigan court) obviously does *not* conform to Michigan's lawmaking prescriptions. The Michigan court issued an order, and the Secretary has agreed to follow it. Laws are enacted in Michigan when the Legislature presents a bill to the Governor and the Governor signs it, *see* Mich. Const. art. IV, § 33, not when a court presents an order to the Secretary and the Secretary agrees to carry it out.

d. Even if *Arizona* somehow prescribed a limited role for "the Legislature" in setting the "Times, Places, and Manner" of congressional elections under the Elections Clause of Article I that could be circumscribed by executive officials and courts, that holding would not reach the Electors Clause. *Arizona*

distinguished various functions the Constitution assigns state legislatures, holding that, when the Constitution assigns the legislature an "electoral" function rather than a "lawmaking" function, the legislature must "perform that function to the exclusion of other participants." 576 U.S. at 807.

The Electors Clause function of state legislatures concerns the power to "appoint." *See McPherson*, 146 U.S. at 28 (observing that "[t]he appointment of delegates was, in fact, made by the legislatures directly" in many states for generations after the founding). It is more akin to the "'ratifying' function for 'proposed amendments to the Constitution under Article V,'" *Arizona*, 576 U.S. at 806-07 (citations omitted), than to the lawmaking function assigned by the Elections Clause of Article I. It is therefore the power of the Legislature alone.[2]

2. There Is No Delegation of Legislative Authority

The Secretary and Intervenors attempt to reframe their arguments as "delegation" arguments, but the Electors Clause cannot be evaded by clever lawyering. Notably, the Secretary and Intervenors advance entirely different theories of what was delegated to the Secretary and how. Neither is persuasive.

a. Intervenors advance the puzzling theory that the Secretary has been delegated legislative authority through a statute authorizing her to "promulgate

[2] Intervenors (at 21 n.5, PageID.3413) cite the dissent of Chief Justice Roberts for the proposition that "the Elections and Electors Clauses play functionally identical roles," but the Chief Justice was arguing from this premise to *attack* the *Arizona* holding and, by necessary consequence, the lesson Intervenors would draw from it. *See* 576 U.S. at 839 (challenging the majority holding based on *McPherson*); *see also id.* at 807–08 (majority opinion disagreeing with the Chief Justice on this point).

rules…for the conduct of elections and registrations." Mich. Comp. Laws § 168.31. But a delegation of rulemaking authority to an executive actor neither transforms the actor into "the Legislature" nor even delegates legislative power. In particular, it does not authorize the *direct contravention* of the legislation the executive actor is bound to administer. *Bush* held as much, rejecting reliance on a state statute conferring remedial power on state courts in favor of clearly expressed legislative intent. 531 U.S. at 110–11.

Michigan law also rejects Intervenors' theory. "Although agencies are authorized to interpret the statutes they are charged with administering and enforcing, agencies may not do so by promulgating rules that conflict with the statutes they purport to interpret." *Chrisdiana v. Dep't of Cmty. Health*, 754 N.W.2d 533, 536 (Mich. Ct. App. 2008). If the statute and regulation conflict, "the statute necessarily controls." *Grass Lake Imp. Bd. v. Dep't Of Envtl. Quality*, 891 N.W.2d 884, 890 (Mich. Ct. App. 2016). The Eastern District of Michigan has applied this principle to Section 168.31 itself and rejected the contention that it authorizes the Secretary to promulgate rules in violation of election statutes. *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 1002 (E.D. Mich. 2012) ("While Defendant does have authority to '[p]rescribe and require uniform forms' pursuant to § 168.31(1)(e), she cannot alter the requirements of ballot applications, which are specifically provided by law under §§ 523 and 759(5).").

Accordingly, Intervenors' delegation theory falls flat. To even colorably qualify as a delegation, Section 168.31 would need to engraft the Secretary (or the state court) into Michigan's "lawmaking process." *Arizona*, 576 U.S. at 804.

As noted, the paradigmatic example is a state constitution's inclusion of the governor in the lawmaking process through a veto power. *Smiley*, 285 U.S. at 368. But the Michigan Constitution does not give the Secretary a veto power, nor does it give the Secretary power to promulgate the laws of Michigan, as the Arizona Constitution authorized the Arizona Independent Redistricting Commission to do. *See Arizona*, 576 U.S. at 796–97. The Secretary's executive authority is *subservient* to legislation enacted by the Michigan Legislature, and the Secretary cannot credibly claim to play any role in passing bills into law.

b. Nor does the Secretary claim such a role—a telling omission. Instead, she seeks (at 19, PageID.3291) to analogize the initiative process that produced Michigan's right to vote by mail with the initiative process in Arizona that produced the Independent Redistricting Commission.

The initial problem with this theory is that the Michigan initiative process did not engraft the Secretary or the Michigan courts into the lawmaking process as the Arizona initiative engrafted the Independent Redistricting Commission into its lawmaking process—giving that Commission the power to enact the *law* of Arizona. The *Arizona* decision reasoned that "the people themselves are the originating source of all the powers of government" and that they therefore "may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do." 576 U.S. at 813–14. By operation of the Arizona Constitution, the Independent Redistricting Commission *was* the legislature.

But the Michigan initiative that produced the right to mail voting did not even purport to vest legislative power in any legislative body. Rather, it simply created the "right, once registered, to vote an absent voter ballot." Mich. Const. art. II, § 4(g). The provision does not create a lawmaking process or otherwise define "the Legislature" of Michigan as any body other than the Michigan Legislature. Accordingly, this is the type of constitutional provision that, under *McPherson* and *Palm Beach*, cannot supersede acts of "the Legislature" under the Electors Clause.

A second problem with the Secretary's theory is that this constitutional provision says nothing of a 14-day extension of the Legislature's ballot-receipt deadline. Even assuming that the people voting in the initiative process operated as the "Michigan Legislature" for purposes of the Electors Clause (a dubious assumption), they were "not acting solely under the authority given" under the Michigan Constitution, "but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Palm Beach*, 531 U.S. at 76. Accordingly, this Court "necessarily must examine the law of the State" for itself. *Bush*, 531 U.S. at 114 (Rehnquist, J., concurring).

Here, the law of Michigan is clear. Voters have the right to vote by mail "during the forty (40) days *before* an election." Mich. Const. art. II, § 4(g) (emphasis added). The ballot-receipt deadline of Election Day plainly preserves the right to vote *before* the election. It eliminates the right to vote *after* Election Day, but the Michigan Constitution guarantees no such right. "Before" does not mean "after"; these are antonyms, not synonyms. Michigan courts look to "the plain

language" of initiatives to ascertain their meaning, *People v. Hartwick*, 870 N.W.2d 37, 47 (Mich. 2015), and "before" cannot mean "after" in any plausible lexicon. So even if some degree of "deference" is appropriate, State Br. 20, PageID.3292, the completely atextual view that the right to vote before an election encompasses the right to vote after 8:00pm on Election Day is meritless.[3]

c. All that aside, the Secretary and Intervenors are incorrect that anyone other than the Michigan Legislature—whether the voting public or a government actor with "delegated" authority—is permitted under the Electors Clause to establish the "Manner" of presidential elections in Michigan. They rely primarily on *Arizona*, but, as discussed, that decisions rested on the proposition that "the meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed." *Arizona*, 576 U.S. at 808 (quotation and edit marks omitted). The appointing function of the Electors Clause of Article II differs materially from the lawmaking function under the Election Clause of Article I, which explains why the *Arizona* majority did not so much as cite *McPherson*. Because *McPherson* holds that the authority of the Electors Clause "is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified *by their state constitutions*." 146 U.S. 1, 35 (1892) (quotation marks

[3] None of the materials provided to voters informed them that the initiative would give them until two weeks after Election Day to return their ballots. *See Official Ballot Wording approved by Board of State Canvassers*, September 7, 2018, Proposal 18-3, Michigan.gov, *available at* https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-3_632053_7.pdf.

omitted) (emphasis added), delegation is not a tenable theory. *See also Palm Beach*, 531 U.S. at 78 (vacating state-court order on that basis).[4]

B. Plaintiffs Are Likely To Succeed on Count II

Plaintiffs are also likely to succeed in establishing that the Secretary's actions conflict with Congress's establishment of November 3 as *the* Election Day. The Secretary contends that her policy of accepting ballots for two weeks *after* Election Day is consistent with this law because "[p]olls will still close at 8 p.m. on election day" and "absent voter ballots must be postmarked by November 2."[5] But that policy changes the date of the election.

There is no "presumption against preemption" in cases under the Electors Clause or the Elections Clause. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 13 (2013). When Congress exercises this authority "it *necessarily* displaces some element of a pre-existing legal regime erected by the States," *id.* at 14, not to mention non-pre-existing regimes contrived by state executive officials. "[T]here is no compelling reason not to read Elections Clause [or Electors Clause] legislation simply to mean what it says." *Id.* at 15.

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[4] Intervenors (at 24, PageID.3416) cite language from *McPherson* for the proposition that it endorses delegation, but the language they cite says that the legislature by "joint ballot or concurrence of the two houses, or according to such mode as designated," 146 U.S. at 25, which means merely that the legislature may determine for itself how to exercise its authority *within* itself.

[5] The Secretary's assurance that an *affirmative* postmark will be required of all ballots arriving after November 3—and thus that a ballot arriving after November 3 with *no* postmark will not be counted—is a step in the right direction. Based on this representation, the Court can reasonably hold the Secretary to this assurance and take appropriate action if it is not implemented.

The federal statute at issue here says that electors "shall be appointed…on the Tuesday next after the first Monday in November." 3 U.S.C. § 1. Election Day is November 3. "When the federal statutes speak of 'the election'…, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder." *Foster v. Love*, 522 U.S. 67, 71 (1997). Thus, "voting must end[] on federal election day." *Lamone v. Capozzi*, 912 A.2d 674, 692 (Md. 2006). This means "the combined action of voters and officials to make a final selection of an officeholder." *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001) (quoting *Foster*, 522 U.S. at 71–72).

It is therefore the arrival of the ballot, not its mailing, that marks the "'consummation' of the process of selecting an official." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Voters do not "appoint[]" electors by handing paper to a postal worker, but by casting a ballot at a polling place. 3 U.S.C. § 1; *Foster*, 522 U.S. at 71. The "combined action" occurs when the transfer of the ballot to the possession of the election officials is accomplished. *Millsaps*, 259 F.3d at 547. The Michigan Legislature and the Secretary understand this: the State's law and regulations are unequivocal that it is the arrival that counts, not the mailing. Mich. Comp. Laws § 168.764a ("The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted."); Mich. Comp. Laws § 168.759b ("To be valid, ballots must be returned to the clerk in time to be delivered to the polls prior to 8 p.m. on election day."); *see also*

Election Officials' Manual, Chapter 6, at 7 (last updated November 2019) ("Absentee ballots must be returned to the clerk by 8:00 p.m. on Election Day.").

The Secretary's policy of treating the *mailing* as the consummation of the process does not meaningfully tie the deadline to "combined" action. The Secretary does not confront this problem, but proceeds (at 21–22, PageID.3293-3294) through the false dichotomy that "[t]o conclude that the counting of already-mailed ballots violates federal law would necessarily require a similar conclusion anytime the counting of ballots is not completed by 11:59 p.m. on election day." *See also* Int's Br. 26, PageID.3418. But Plaintiffs are not contending that the *counting* must be completed on Election Day, but that the *combined* action required to select officeholders must be completed then. The ballot must be filled out and reduced to the possession of the election officials for there to be "combined" action. The Secretary and Intervenors have no response to this point.

II. Plaintiffs Have Standing Because the Secretary's Actions Threaten Their Concrete Interests as Candidates and Voters

Plaintiffs' standing, as both candidates for office and voters, to challenge the validity of the Secretary's policy under federal law is secure.

A. Plaintiffs Land and Sheridan have standing as candidates for the office of presidential elector, *see* Mich. Comp. Laws § 168.42 (providing for the election of "presidential electors"), and the Secretary does not dispute it. As candidates, they have a direct and personal stake in the conduct of their election consistent with governing federal law—in particular, Article II's Electors

Clause. Practically every major case enforcing the Electors Clause has been brought by candidates. That includes *McPherson*, *supra*, a pre-election suit by elector candidates challenging a state's manner of appointing electors as inconsistent with the Electors Clause. More recently, the Supreme Court adjudicated similar claims by candidates in *Palm Beach*, *supra*, and then *Bush*, *supra*. As in those latter cases, Land and Sheridan will be injured as candidates by the tallying of votes in violation of federal law. Challenges by candidates to the rules of ballot eligibility, as well as the qualification of particular ballots, are routine and are always brought, as in *Bush* and *Palm Beach*, before any challenged ballots are tallied. Neither the Secretary nor Intervenors disputes that Land and Sheridan could bring this same challenge on or after Election Day, and they have no explanation why Land and Sheridan cannot bring it now, when the Secretary's policy of counting late-received ballots is set and the equities favor resolving the rules of ballot eligibility before voting ends.

Additional injuries to these elector candidates of an election conducted other than in the "Manner" authorized by federal law are obvious and acute. The most daunting is the prospect that the Secretary's policies will be held to violate the "safe harbor" provision of 3 U.S.C. § 5—because they were not validly "enacted prior to the day fixed for the appointment of the electors"—thereby jeopardizing Michigan's participation in the Electoral College, as well as Land and Sheridan's ability to serve effectively as electors. *See generally Palm Beach*, 531 U.S. at 77–78. This injury arises directly by operation of law: if the Secretary's actions are invalid because they were not enacted by the Legislature, then

Michigan will be ineligible for the safe harbor. It was to avoid *that precise result* that the Supreme Court terminated Florida's 2000 recount, and Plaintiffs' interest here as candidates is identical. *Bush*, 531 U.S. at 110; *see also Palm Beach*, 531 U.S. at 77.[6]

Another injury is the inevitable last-minute litigation over ballot eligibility, and chaos, that will inevitably occur in the absence of a clear determination as to what rules govern under federal law in advance of Election Day. *See, e.g.*, *Bush*, *supra*. Not only will that force all candidates to incur significant expense, but it will also risk extended litigation that may push resolution of the contest past the safe harbor deadline—after all, if ballots are still coming in (under the Secretary's policies) on November 17, there is every likelihood that controversies and contests over those votes will continue straight through the December 8 deadline and perhaps even through the Electoral College's vote on December 14. 3 U.S.C. § 7. These injuries are more than sufficient to support standing, and they counsel in favor of resolving this dispute now, rather than after Election Day when the likelihood of serious, irremediable injury is even greater.

Intervenors primarily argue (at 17-19, PageID.3409-3411) that Michigan's safe-harbor compliance is not at risk because (in their view) the Secretary's policy was validly "enacted" and therefore satisfies the safe harbor—essentially the merits presented in this litigation. Crucially, Intervenors do not dispute that, if

[6] As the Supreme Court petitioner, Candidate Bush was required to possess standing to obtain relief under the Electors Clause. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Asarco Inc. v. Kadish*, 490 U.S. 605, 619 (1989).

the Secretary's policy was not validly "enacted" because it violates Article II, serious cognizable injury will follow. Nor does the Secretary dispute the point, and the Minnesota district court decision cited by Intervenors does not address it. *See Carson v. Simon*, 20-CV-2030, 2020 WL 6018957, at *10–11 (D. Minn. Oct. 12, 2020). And while Intervenors contend that extending the ballot-receipt deadline will not itself threaten safe-harbor compliance by delaying the selection of electors, their argument (at 18, PageID.3410) consists entirely of a recitation of statutory deadlines, unmoored from the well-known realities of drawn-out post-election litigation. *See, e.g.*, *Bush*, *supra*. Given the far larger-than-usual numbers of absentee ballots expected this year, the Secretary's actions will only exacerbate the already serious problem of timely certification of the vote. That is especially so given the lack of any dispute by the Secretary or Intervenors that the issues presented in this case will have to be decided for this election; if not now, it will be after Election Day through numerous challenges to particular late-received ballots, increasing the chaos and likelihood of disaster.

B. All Plaintiffs have standing as voters facing the dilution of their votes by ballots cast and counted in violation of federal law. "The right to vote is individual and personal in nature, and voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018) (quotation marks and citations omitted). The Secretary's policy requires counting ballots that federal law holds to be ineligible, and that will necessarily dilute Plaintiffs' lawfully cast votes.

Since at least *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court has recognized that plausible allegations of vote dilution confer standing. *Id.* at 207-09. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a *stuffing of the ballot box*." *Id.* at 208 (citations omitted) (emphasis added). The Court's landmark decision *Reynolds v Sims* repeated this observation, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (citations omitted)).

The Secretary concedes (at 14, PageID.3286) that vote dilution is a cognizable injury in fact and does not dispute that it can be remedied by injunction. Instead she contends (at 14, PageID.3286) that counting votes that federal law holds to be ineligible works no dilution at all, leaving Plaintiffs' claims a "generalized grievance." First, the premise of this objection is wrong. Those whose votes are received after the statutory deadline *benefit* from the Secretary's policy at the expense of those whose votes are timely: only the latter suffer dilution. This is no different from districting schemes that over-populate and under-populate districts, injuring only those in over-populated districts, whose standing to sue is well-established. *See Baker*, 369 U.S. at 207–08.

Second, the Secretary's focus (at 15, PageID.3287) on the sheer number of voters who will be injured conflicts with the individualized nature of vote-dilution injuries. This basis of standing is "premised on the understanding that

the injuries giving rise to those claims were 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (quoting *Reynolds*, 377 U.S. at 561). It does not follow that vote dilution inflicted on many individuals is insufficiently particularized to confer standing. "The fact that other citizens or groups of citizens might make the same complaint…does not lessen [the] asserted injury." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989). Indeed, the D.C. Circuit upheld voters' standing to challenge a congressional rule change that diluted the votes of *all voters in all states*. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). "That all voters in the states suffer this injury, along with the appellants, does not make it an 'abstract' one." *Id.*

Third, the Secretary's (at 15, PageID.3287) and Intervenors' (at 14, PageID.3406) citation of several recent cases like *Paher v. Cegavske*, No. 3:20-cv00243, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020), involving claims of vote dilution through the potential for future voter fraud conflates the questionable possibility of fraud in those cases with the *certainty* here that ballots will be counted in alleged violation of federal law. While the claim that a state is not adequately enforcing laws like those against vote fraud is a classic generalized grievance, a challenge to an unlawful policy that directly impairs an individual's voting rights through dilution is anything but that. Indeed, the entire basis for altering the ballot-receipt deadline was that large numbers of ballots will be received after Election Day. ECF No. 20-6 PageID.1627-1628, at 3–4. The Secretary intends to count them and thereby markedly increase the pool of votes counted, necessarily diluting Plaintiffs' votes. That injury is concrete, and it is

caused by the Secretary's policy of counting votes that federal law holds to be ineligible.[7]

Finally, as voters, Plaintiffs also face the prospect of complete disenfranchisement through the State's failure to comply with the safe harbor, as discussed above. While the Secretary and Intervenors dispute the premise, they do not deny that this would be a cognizable injury sufficient to support standing.

C. Intervenors, but not the Secretary, contend (at 19–21, PageID.3411-3413) that Plaintiffs lack prudential standing because they assert the rights of third parties. But Plaintiffs are asserting their own interests, and no third-party standing issue is even implicated. Both counts are ordinary preemption claims contending that the Secretary's policy conflicts with federal law—the Electors Clause and 3 U.S.C. § 1. A party injured by state law that she claims is preempted does not assert the rights of Congress or the state legislature. Instead, it is well established that "private parties can litigate the constitutionality or validity of state statutes, with or without the state's participation, so long as each party has a sufficient personal stake in the outcome of the controversy…." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 430 (6th Cir. 2008); *see, e.g.*, *Bryant v. Yellen*, 447 U.S. 352, 367–68 (1980). Doing so is not an assertion of the rights of others like the Michigan Legislature.

[7] While Intervenors contend (at 16, PageID.3408) that this injury arises from the speculative "actions of independent third parties," they argued and presented evidence in the state-court proceedings that thousands of ballots will be received after Election Day, a conclusion the state court accepted. *See* ECF No. 18-1 PageID.433, at 5.

Moreover, the Electors Clause and Election Day Clause of Article II are among the Constitution's federalism provisions that serve to "protect[] the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, 564 U.S. 211, 222 (2011). *Bond* held that individuals "can assert injury from governmental action taken in excess of the authority that federalism defines." *Id.* at 220. An individual's "rights in that regard do not belong to a State," *id.*, a point that carries the day equally under Article III and "prudential standing rules," *id.* at 225. That is so in this context: a contrary rule would have barred each of the Electors Clause cases discussed above, including *McPherson* and *Palm Beach*. *See also Foster*, 522 U.S. at 67 (voter challenge under Article I's Elections Clause). Intervenors' claim (at 20, PageID.3412) that *Lance v. Coffman*, 549 U.S. at 437 (2007), held otherwise is wrong; while *Lance* rejected standing for a claim by voters that a state constitutional provision "depriv[ed] the state legislature of its responsibility to draw congressional districts," it specifically juxtaposed that claimed injury against vote dilution, which it recognized to be a firm basis for standing, *id.* at 441–42 (citing *Baker v. Carr*, 369 U.S. 186 (1962)). The asserted injury in *Lance* was nothing more than "that the law…has not been followed," a "generalized grievance about the conduct of government." *Id.* By contrast, Plaintiffs' injuries here are recognized by decisions like *Baker*, *Bush*, and *Palm Beach* to be their own.[8]

[8] The line on standing to enforce the Elections Clause that Intervenors quote (at 20, PageID.3412) from *Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018),

III. There Is No Basis for the Court To Abstain

It speaks volumes that the Secretary's and Intervenors' principal argument is that the Court should abstain from reaching the merits of this action and that they diverge on why exactly the Court should so. But there is no basis for the Court to defer to state-court proceedings that, because of the actions of the parties demanding abstention here, do not involve anything like Plaintiffs' claims.

A. The Secretary's argument (not joined by Intervenors) that abstention is warranted under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), is squarely foreclosed by *Heitmanis v. Austin*, 899 F.2d 521 (6th Cir. 1990). *Heitmanis* reversed a district court's decision to abstain on the basis that the relevant state-court litigation addressed only state-law law claims concerning an election law, whereas the federal case "challenge[d] the constitutionality of that law." *Id.* at 528. That alone compelled the Sixth Circuit to hold "that the district court should not have abstained under the *Colorado River* doctrine." *Id.* This case is indistinguishable: as litigated by the Secretary and Intervenors, the *Michigan Alliance* case's ballot-deadline claim implicates only matters of state law, with no party having interposed any federal issue, let alone the specific claims that extending the deadline through non-legislative means violates the Electors Clause and 3 U.S.C. § 1. Having limited the scope of that litigation by declining to raise these issues, the Secretary and Intervenors should not be

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does not mean what Intervenors suggest; in context, the court's point was that individual state legislators in their official capacity as such, as opposed to the legislature as a whole, lacked standing.

permitted now to preclude injured third parties like Plaintiffs from raising them. Under *Colorado River*, "courts are to look at the claims that have actually been raised, rather than whether they could legitimately be raised in the future." *Acuity Insurance Company v. Pro Services, Inc.*, No. 12-cv-478, 2013 WL 12109426, at *3 (W.D. Mich. Sept 6, 2016) (Maloney, J.). When they have not been, as here, that "destroys any chance of abstention." *Id.*[9]

Moreover, abstention would be at odds with the underlying purpose of the *Colorado River* doctrine. The doctrine's whole point is to advance the purposes of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817 (quotation marks omitted). Those purposes would be undermined by deferring to state-court proceedings that excluded important federal-law issues and that offer the federal plaintiffs raising those issues no real ability to obtain relief on them—given the facts that they were not parties, the state-court order is already on appeal, and Election Day looms. In this case abstention would not advance judicial or party economy, but serve only to bar Plaintiffs from vindicating their rights that have gone unrepresented to date.

B. Intervenors (but not the Secretary) contend that the Court should abstain under *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). But *Pennzoil* was

[9] The Michigan Legislature, which was permitted to intervene only *after* the trial court entered the injunction, also has not raised these federal issues in its appeal, nor could it. *See* ECF No. 24-2 PageID.3302 (Legislature's appeal brief); *Walters v. Nadell*, 751 N.W.2d 431, 437 (Mich. 2008) (issues not raised in the trial court are ordinarily deemed waived).

just an application of *Younger* abstention, *id*. at 17, and the state-court proceeding here "does not fall within any of the three exceptional categories" to which *Younger* applies, *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013). It is not an "ongoing state criminal prosecution," not any kind of "civil enforcement proceeding[]," and not (as in *Pennzoil*) a "pending civil proceeding involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id*. at 78 (quotation marks and alterations omitted). That last category includes things like a "civil contempt order" or "requirement for posting bond pending appeal." *Id*. at 79. It does not reach civil proceedings that involve run-of-the-mill injunction orders, which instead are subject instead to the general rule that "a federal court's obligation to hear and decide a case is virtually unflagging" and that "[p]arallel state-court proceedings do not detract from that obligation." *Id*. at 77 (quotation marks omitted). As the Supreme Court instructed in *Sprint*, "abstention from the exercise of federal jurisdiction is the exception, not the rule," and "*Younger* extends to the three 'exceptional circumstances' identified [above], but no further." *Id*. at 82.

In any instance, *Younger*'s requirements are unmet. First, this is not "a parallel case between the same parties" *Bates v. Van Buren Tp.*, 122 F. App'x. 803, 805 (6th Cir. 2004) (per curiam). Second, because of the way that *Michigan Alliance* proceeded, Plaintiffs had and have no opportunity to present their federal claims. *Pennzoil*, 481 U.S. at 14. Plaintiffs were not parties to those proceedings, and the state trial court barred even the Michigan Legislature from intervening until after it had issued its injunction. *See* ECF No. 20-17 PageID.1772,

at 1. Even if Plaintiffs could intervene in the appeal of that injunction, they cannot raise entirely new claims on appeal. *See Walters*, *supra*. What Intervenors seek here is not deference to state-court proceedings, but blocking Plaintiffs' federal claims from being heard at all.

C. Intervenors (but not the Secretary) claim that abstention is warranted under *Railroad Commission v. Pullman Co*., 312 U.S. 496 (1941), but this case involves no "ambiguous state statute," *Fowler v. Benson*, 924 F.3d 247, 255 (6th Cir. 2019). No one disputes that the state statute here is clear, *see* Mich. Comp. Laws § 168.764a, as is the Secretary's policy to contravene it. Anyway, "*Pullman* 'abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim.'" *Fowler*, 924 F.3d at 255 (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 (1967)).

D. Finally, both the Secretary and Intervenors urge the Court to abstain even if no abstention doctrine applies to further considerations of "equity, comity, and our federalist judicial system," as discussed in *Gottfried v. Med. Planning Servs*., 142 F.3d 326 (6th Cir. 1998). None of those considerations, however, would be advanced by declining to address important federal issues that were not presented in the state-court proceedings and cannot be before Election Day, thereby permitting the litigation choices of the Secretary and Intervenors to trump the supremacy of the federal Constitution. *Gottfried*'s doctrine is not implicated at all "by adjudicating questions which the state court has never had occasion to consider and could not possibly have considered prior to issuance of its injunction." *United States v. County of Muskegon*, 298 F.3d 569 (6th Cir. 2002).

IV. The Equities Weigh in Favor of an Injunction

The balance of equities favors an injunction. The Secretary's actions threaten post-election chaos over issues that can and should be resolved now. Neither response brief addresses the injury Plaintiffs bear as candidates for office when invalid votes are counted. That injury will have to be redressed either now or in the future, and every equity favors doing so now, so as to avoid myriad acute harms to Plaintiffs and to give Michigan voters the opportunity to avoid disenfranchisement by acting to ensure that their ballots are timely received.

A. The *Purcell* Principle Does Not Apply

To begin with, Intervenors' reliance on *Purcell v. Gonzales*, 549 U.S. 1 (2006), is misplaced. *Purcell* requires federal courts to entertain "considerations specific to election cases and its own institutional procedures" before altering the administration of an election. *Id.* at 4–5. But the question here, relating to which ballots are validly cast, can be, and often is, litigated *after* the election. That type of issue was litigated in 2000 until December 12, a full five weeks after Election Day. *See Bush v. Gore*, 531 U.S. at 106–11. In fact, a case related to *Bush v. Gore* concerning the timeliness of absentee ballots and rules governing post-marking was decided on December 8. *See Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000). This is not a case involving something like a redistricting plan, a voter-identification law, or the names printed on the face of a ballot. Challenges to those features of an election concern what happens *before* the election, but this challenge concerns what happens *after* it—i.e., which ballots will be deemed late or early. Other than announce that Michigan law

means what it *already says*, the Secretary will not need to change any element of the election process.

"[I]t is important to remember that the Supreme Court in *Purcell* did not set forth a per se prohibition against enjoining voting laws on the eve of an election." *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016). Intervenors do not explain why it is better to obtain federal-court resolution of these issues later rather than sooner. It would be far better for voters to know *now* what the rules are then find out after they voted when their ballots may be disqualified. This is a case where concerns related to "voter confusion," *Purcell*, 549 U.S. at 4–5, weigh in favor of an injunction rather than against it.

Additionally, the *Purcell* principle limits courts' discretion "to grant an injunction to alter a State's *established* election procedures," *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (emphasis added), but there is nothing established about the Secretary's policy of counting ballots received and even mailed after Election Day. *Feldman*, 843 F.3d at 368 ("[T]he concern in *Purcell* and *Southwest Voter* was that a federal court injunction would disrupt long standing state procedures."). Michigan statutory law has never followed that policy, and the established policy is the one Plaintiffs ask to be applied. *Compare id.* at 369 ("Here, the injunction preserves the status quo" as "[e]very other election cycle in Arizona has permitted the collection of legitimate ballots by third parties to election officials."). All of this may explain why the Secretary does not rely on *Purcell*.

B. Plaintiffs Will Suffer Irreparable Harm Without an Injunction

So far as Plaintiffs' injury is concerned, Intervenors respond (at 29, PageID.3421) with their repackaged standing argument that the Secretary's policy of counting unlawful ballots "does not devalue Plaintiffs' votes in relation another group's votes." The argument fails for the same reason their standing argument fails. To include unlawfully cast ballots among the counted ballots dilutes the value of lawfully cast votes. And the "counting of votes that are of questionable legality…threaten[s] irreparable harm."[10] *See Bush v. Gore*, 531 U.S. at 1047 (Scalia, J., concurring in order issuing stay pending appeal). Intervenors are also wrong (at 29, PageID.3421) that "the *Alliance* Decision does not permit illegal votes." To the contrary, Michigan law, in cold, black print provides: "An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." Mich. Comp. Laws § 168.764a. The Secretary has decided to count these votes anyway, and, as explained, neither the state court nor the Secretary have the power to "set[] certain deadlines" in *contravention* of state law "for votes to be legally cast and counted."[11] Int's Br. 29, PageID.3421.

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[10] The Secretary's response (at 24, PageID.3296) that the Michigan Court of Appeals may reverse the state-court injunction speculates on that result, which is unknowable, and ignores that the Secretary is not even asking the Michigan Court of Appeals for reversal. The Secretary cites no precedent for the proposition that the chance of this *deus ex machina* ending negates an otherwise valid showing of irreparable harm.

[11] Intervenors begin their subsection on this topic (at 28, PageID.3420) by asserting that their arguments apply "[e]ven if Plaintiffs could succeed on the merits of their claims," yet they persistently assume that Plaintiffs' claims lack merit.

C. An Injunction Is Necessary To Protect the Voting Public From Irreparable Harm

On the public interest, the true irony of Intervenors' argument is that it is *their* position that threatens harm to "voters who have received the widespread information about the extended deadlines," Int's Br. 29, PageID.3421, because *false* information harms the person who relies on it. It is harmful to instruct a ticket-holder that today's ballgame starts at 7:00pm when the game is actually at 2:00pm; a ticket-holder who relies on that instruction will miss the game. To instruct voters they have until November 17 for receipt of their ballots, when the law actually requires that they be received by November 3, is similarly damaging, and it will lead to disenfranchisement when late-received ballots are disqualified through post-election challenges advancing the same federal-law arguments as this case. Accordingly, it is the Secretary's policy, not this suit, that "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." Int's Br. 31, PageID.3423.

An injunction is therefore vital to the public interest in maximizing participation in the election on *lawful* terms and minimizing the number of votes discarded as untimely. Intervenors contend (at 30, PageID.3422) that the injunction "could lead to widespread voter confusion and even disenfranchisement because it would change the publicized deadlines," but this misapprehends the nature of deadlines, which are codified in Michigan law, backed by federal law,

and do not disappear on wishful thinking. Intervenors' effort to blame Plaintiffs for the harm of disenfranchisement nonsensically blames the messenger. Plaintiffs did not mislead Michiganders that votes cast in violation of state and federal law will be counted, and pretending that those votes are lawfully cast does not make them so. A vote that violates the law can and will be rejected if a candidate decides to challenge it, and in an election as polarized and hotly contested as the current one, challenges are all but certain.

D. An Injunction Will Not Harm the Secretary

An order compelling the Secretary to do what Michigan law requires of the Secretary does not inflict any meaningful injury on the Secretary. The Secretary contends (at 25, PageID.3297) that Michigan law violates the Michigan Constitution, but, as explained, the *federal* Constitution preempts the Michigan Constitution as applied in this case. Thus, the principle that "[i]t is always in the public interest to prevent the violation of a party's constitutional rights," *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994), cuts *against* the Secretary. It is true that "no substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004). The Secretary's policy is unconstitutional.

Intervenors' citation of harms from "distributing new guidance and instructions directly to voters and providing new guidelines to local election officials"—harms the Secretary tellingly does not assert in her own right—does not outweigh the duty incumbent on the Secretary to tell voters the truth about what

they need to do to cast lawful votes. "There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by Secretary [of State]'s office and other state and local offices involved in elections." *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016); *United States v. Berks Cty.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (recognizing that "administrative expenses…are far outweighed by the fundamental right at issue.").

* * *

In short, an injunction is all benefit and no harm, and irreparable harm is virtually certain without one—to a potentially staggering degree. In addition to the dangerously false security the Secretary's policy imposes, the Secretary's actions threaten the statewide vote by departing from "laws enacted" by the Legislature and leave canvassing boards 14 fewer days to complete their results, calling into doubt the State's ability to complete the process in time for the Electoral College to do its work. The die is cast for disaster.

Conclusion

The motion should be granted.

Date: October 15, 2020

Respectfully submitted,

/s/ Todd A. Dawson
TODD A. DAWSON
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 621-0200
Fax: (216) 696-0740
tdawson@bakerlaw.com

DAVID B. RIVKIN
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed on October 15, 2020, via the CM/ECF system, which will serve all counsel of record.

Date: October 15, 2020

/s/ Todd A. Dawson
TODD A. DAWSON
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 621-0200
Fax: (216) 696-0740
tdawson@bakerlaw.com

Attorney for Plaintiffs