UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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.

No. 1:20-cv-00948

HON. PAUL L. MALONEY

Todd A. Dawson
Baker & Hostetler LLP
Attorney for Plaintiffs
Key Tower, 127 Public Square, Suite 2000
Cleveland, Ohio 44114
216.621.0200
tdawson@bakerlaw.com

David B. Rivkin
Andrew M. Grossman
Richard B. Raile
Baker & Hostetler LLP
Attorneys for Plaintiffs
1050 Connecticut Ave, NW, Suite 1100
Washington, DC 20036

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

DEFENDANT MICHIGAN SECRETARY OF STATE JOCELYN BENSON'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Dana Nessel
Attorney General

Erik A. Grill (P64713)
Heather S. Meingast (P55439)

Assistant Attorneys General
Attorneys for Michigan Secretary of State Jocelyn Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
P64713

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Should Plaintiffs' request for a preliminary injunction be denied because they have not demonstrated a likelihood of success on the merits of their claims or imminent irreparable harm?

COUNTER-STATEMENT OF FACTS

This case, in essence, presents a collateral attack on a state court judgment granting summary disposition and a permanent injunction with respect to several election statutes for the November 3 general election.

In *Michigan Alliance for Retired Americans, et. al. v. Benson, et. al.*, Michigan Court of Claims No. 20-00108, the plaintiffs (Intervenors here) challenged as unconstitutional several provisions of Michigan's Election Law relating to the requirements that mailed absent voter ballots be received by 8 p.m. on election day to count, and a limitation on who may possess and deliver a voter's marked absent voter ballot to the local clerk. Their claims were brought against Michigan Secretary of State Jocelyn Benson and Michigan Attorney General Dana Nessel, in their official capacities.

On September 18, the state trial court granted a narrow preliminary injunction on two grounds. (R. 20-6, 9/18/20 PI Order.) The court made that injunction permanent on September 30 and disposed of the case. (R. 20-17, 9/30/20 Order.)

First, the trial court determined that the statutes requiring absent voter ballots be received by 8:00 p.m. on election day in order to count, unduly burdened the rights of Michigan voters to vote an absent voter ballot and to return that ballot by mail, under article 2, § 4 of the Michigan Constitution. The court did not rule that the statutes were unconstitutional in all instances. Rather, the court held that the statutes could not be applied constitutionally to voters in the face of the ongoing Covid-19 pandemic and documented delays in mail service by the United States

Postal Service. Thus, the court enjoined enforcement of these statutes for the November 3, 2020 general election only and ordered that absent voter ballots postmarked by November 2 and received by the 14th day following the election must be counted.

Second, the court determined that the statutes prohibiting Michigan voters from choosing an unrelated person, like a neighbor or caregiver, to assist the voter in delivering his or her marked absent voter ballot, also violated voters' rights under article 2, § 4 of the Michigan Constitution to vote an absent voter ballot. Again, the trial court did not rule that the statutes were unconstitutional in all instances, but rather that the statutes could not be applied constitutionally to voters in light of the pandemic and current problems with mail service. The court thus enjoined enforcement of these statutes for the November 3 general election only and ordered that voters may select anyone of their choosing to return their marked absent voter ballots between 5:00 p.m. on October 31 and election day.

Secretary Benson and Attorney General Nessel carefully considered the trial court's opinion and determined, as the named defendants and in their Executive capacities, that it was not in the best interests of the State or the People of Michigan to appeal. The case had been filed on June 2 and the request for preliminary injunctive relief had just now been resolved. The November 3 election was and is looming, and the People need finality with respect to what laws will apply in November. Voters were already receiving their absent voter ballots and making decisions as to how and when to return ballots to their local clerks.

Michigan's 1,500+ city and township clerks also need certainty and time to implement necessary guidance regarding their duties under the injunction. Further, having defended the case and lost, Defendants weighed the likelihood of prevailing on appeal and found it wanting. The Michigan Senate and Michigan House of Representatives thereafter moved to intervene in the case in order to appeal the trial court's grant of injunctive and declaratory relief. Secretary Benson and the Attorney General concurred in the Legislature's motion in light of their decision not to appeal. (R. 20-13, 9/28/20 Defs Resp Mtn Intvn.) The trial court granted the Legislature's motion to intervene on September 30, (R. 20-17, 9/30/20 Order), and the Legislature filed a claim of appeal in the Michigan Court of Appeals the next day.

Thus, there is presently an appeal pending in the state appellate court challenging the trial court's injunction in the *Michigan Alliance* case. See Michigan Court of Appeals Docket No. 354993. (Ex. 1, Legislature's appeal brf.) That appeal has been expedited by order of the Michigan Supreme Court, and by order of the Chief Judge of the Court of Appeals. (R. 20-10, 9/25/20 MSC order, Ex. 2, 10/2/20 COA Order.) The House and Senate also filed an emergency motion to stay the injunction pending appeal in the trial court on October 6. At the time of filing this brief, that motion remains pending.

On September 24, the Michigan Republican Party and the Republican National Committee filed a declaratory judgment action against Secretary Benson and the Attorney General seeking a declaration that the same statutes the trial

court enjoined are constitutional and can be constitutionally applied this November. See *Republican National Committee, et al. v. Benson, et al.*, Michigan Court of Claims No. 20-000191, attached as Ex. 3. These plaintiffs also filed a motion for emergency declaratory relief in the state court, which motion remains pending.[1]

On September 29, Robert Davis, a frequent litigant against the State, filed a new lawsuit in the Michigan Court of Claims, *Davis v Benson*, No. 20-196, alleging that the instructions the Secretary has provided to local clerks regarding implementation of the injunction are unlawful because the instructions first had to be promulgated as rules. (Ex. 4, Davis Compl., ¶¶ 7-34.)[2] Davis also moved for emergency declaratory relief. At the time of filing this brief, that case remains pending before the trial court.[3]

Also, on September 29, Plaintiffs here, Ruth Johnson and Terri Lynn Land, filed the instant complaint for declaratory and injunctive relief against Secretary Benson. (R. 1, Compl., Page ID # 1.) The next day Plaintiffs filed their motion for a preliminary injunction. (R. 5, Plfs TRO Brf, Page ID # 48.)

In the midst of these proceedings, Secretary Benson issued instructions to local election officials, over whom she exercises supervisory control, Mich. Comp.

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[1] The docket sheet for this case is available at https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=827176.

[2] Davis is also a party in *Davis, et al. v. Benson, et al.*, No, 20-cv-00915, pending before this Court, in which Davis and the other plaintiff amended the complaint to add two counts challenging the state court's injunction under substantive due process and equal protection theories.

[3] The docket sheet for that case is available at https://webinquiry.courts.michigan.gov/WISearchResults/ViewPage1?commoncaseid=827188.

Laws, § 168.21, informing them of the injunction and providing guidance on how late absent voter ballots should be processed under the injunction. (Ex. 5, Guidance documents). The instructions expressly note that the ballots must be postmarked by November 2 in order to be counted. *Id.*

This Court permitted the *Michigan Alliance* plaintiffs to intervene as Defendants on October 6. (R. 13, 10/6/Order.) The Court ordered the parties to respond to Plaintiffs' motion for a preliminary injunction by 5:00 p.m. on October 13. (R. 6, 10/1/20 Order; R. 15, 10/6/20 Order.)

For the reasons set forth below, this Court should deny the motion for a preliminary injunction.

ARGUMENT

I. Plaintiffs' request for a preliminary injunction should be denied because Plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim or imminent irreparable harm.

A. Preliminary injunction factors.

A preliminary injunction is an extraordinary remedy "designed to preserve the relative positions of the parties until a trial on the merits can be held." *Cf. Tennessee Scrap Recyclers Ass'n v. Bredesen,* 556 F.3d 442, 447 (6th Cir. 2009). A court considers "four factors when determining whether to grant a temporary restraining order: '(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of [a TRO] would cause substantial harm to others; and (4) whether the public interest would be served by issuance of [a TRO].' " *Kendall*

Holdings, Ltd. v. Eden Cryogenics LLC, 630 F. Supp.2d 853, 860 (S.D. Ohio 2008) (quoting *Leary v. Daeschner,* 228 F.3d 729, 736 (6th Cir. 2000)). No one factor is dispositive; rather the court must balance all four factors. *In re De Lorean Motor Co.,* 755 F.2d 1223, 1229 (6th Cir. 1985). The burden of persuasion is on the party seeking the injunctive relief. *Stenberg v. Cheker Oil Co.,* 573 F.2d 921, 925 (6th Cir. 1978).

B. Plaintiffs have not demonstrated a strong likelihood of success on the merits of their constitutional and statutory claims.

1. This Court should abstain from exercising jurisdiction over Plaintiffs' claims under the *Colorado River* Abstention Doctrine.

As a threshold matter, this Court should abstain from exercising jurisdiction at this time. In Count I, Plaintiffs argue that Secretary Benson's instructions to local clerks providing guidance as to how absent voter ballots received after Election Day should be processed under the injunction, violates Article II by violating the Michigan Legislature's statutory deadline. (R. 1, Compl., Page ID # 16-17.) In Count II, Plaintiffs argue that the instructions violate 3 U.S.C. § 1 by permitting Michigan voters to vote after Election Day. *Id.*, Page ID # 17-18. Plaintiffs' claims, however, will be moot if the injunction is overturned on appeal, and the enforceability of the statutes restored. For this reason, this Court should dismiss Plaintiffs' claims or at least abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

In *Colorado River*, the Supreme Court held that federal courts may abstain from hearing a case solely because similar pending state court litigation exists. 424

U.S. 800, 817 (1976); *accord Romine v. Compuserve Corp.*, 160 F.3d 337, 339-41 (6th Cir. 1998). "[D]espite the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them, . . . considerations of judicial economy and federal-state comity may justify abstention in situations involving the contemporaneous exercise of jurisdiction by state and federal courts." *Romine*, 160 F.3d at 339 (quotation removed). To abstain from exercising jurisdiction, a state court action must be "parallel." *Id.* at 340; *accord Baskin v. Bath Tp. Bd. of Zoning Appeals*, 15 F.3d 569, 571-72 (6th Cir. 1994). If state proceedings are parallel, eight factors must weigh in favor of abstention. *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 206-07 (6th Cir. 2001); *accord Great Earth Cos. v. Simons*, 288 F.3d 878, 886 (6th Cir. 2002). "Exact parallelism is not required; it is enough if the two proceedings are substantially similar." *Romine*, 160 F.3d at 340 (quotation removed); *accord Bates v. Van Buren Tp.*, 122 F. App'x 803, 806 (6th Cir. 2004). "Where ... the parties are substantially similar and ... [the claims] are predicated on the same allegations as to the same material facts ... the actions must be considered 'parallel.' " *Romine*, 160 F.3d at 340; *accord Healthcare Co. v. Upward Mobility, Inc.*, 784 F. App'x 390, 394 (6th Cir. 2019).

While Plaintiffs have postured their claims as challenges to the Secretary's instructional guidance or action in implementing the injunction, the claims are really a challenge to the constitutionality or legality of the injunction itself. But the Secretary is presently bound by the injunction. By acting pursuant to and consistent with the terms of the injunction, the Secretary is not violating Article II

or 3 U.S.C. § 1. The source of the purported constitutional and statutory injury is the injunction. And, as set forth above, the validity of the injunction is being assailed in three state-court cases right now. The Legislature's appeal is the most advanced and will be decided soon. Notably, Plaintiff Johnson is a Michigan Senator and her interests are being advanced in the context of that appeal. The Court of Appeals' decision itself will then likely be appealed to the Michigan Supreme Court on an expedited basis. While the other cases do not involve a claim that the injunction violates Article II or a federal statute, the Legislature seeks a complete reversal of the injunction, and that is also the implicit relief sought in the RNC and MRP's case. (Ex 3.) These actions are sufficiently parallel to Plaintiffs' instant claim to warrant abstention under *Colorado River*.

With the two actions being parallel, the court must weigh eight factors to determine if abstention is appropriate:

> (1) whether the state court has assumed jurisdiction over any res or property;
>
> (2) whether the federal forum is less convenient to the parties;
>
> (3) avoidance of piecemeal litigation;
>
> (4) the order in which jurisdiction was obtained;
>
> (5) whether the source of governing law is state or federal;
>
> (6) the adequacy of the state court action to protect the federal plaintiff's rights;
>
> (7) the relative progress of the state and federal proceedings; and
>
> (8) the presence or absence of concurrent jurisdiction.

Cohen, 276 F.3d at 206 (quotation removed). Here, the third, fourth, sixth, and seventh factors weigh in support of abstention.

The third factor, the avoidance of piecemeal litigation, "was paramount in *Colorado River* itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983). "Piecemeal litigation occurs when different courts adjudicate the identical issue, thereby duplicating judicial effort and potentially rendering conflicting results." *Romine*, 160 F.3d at 341. This factor weighs in favor of abstention. By allowing Plaintiffs to litigate their constitutional and statutory claims, and especially if the court were to decide Plaintiffs' motion for a preliminary injunction, the court would potentially duplicate the efforts of the state courts and risk conflicting orders. The Michigan Court of Appeals is currently reviewing the validity of the injunction and may issue an order affirming it or reversing it. There would be no further need for this action if it is reversed, and if not, Plaintiffs could continue this litigation after the state appellate case(s) is complete. Allowing Plaintiffs to continue here while there are appeals in state court, would undermine just adjudication and fairness to Defendant Benson. "The legitimacy of the court system in the eyes of the public and fairness to the individual litigants . . . are endangered by duplicative suits that are the product of gamesmanship or that result in conflicting adjudications." *Romine*, 160 F.3d at 341.

The order in which jurisdiction was obtained, the fourth factor of *Colorado River* analysis, also supports abstention. The *Michigan Alliance* case, the principal case, was filed in June 2020, and proceeded through significant briefing and

hearings before the trial court entered its injunction on September 18 and, as of October 1, is now on its second trip through the Court of Appeals, where the parties' briefing is complete. Plaintiffs filed their complaint and motion on September 29 and September 30, respectively. While the appeal technically may have been filed a day or two after Plaintiffs' complaint here, the case has spent significant time in the state courts. And the Court of Appeals is prepared to rule in short order. Given that the general election will be held in 21 days, this factor weighs in favor of abstention.

The Michigan courts are also capable of protecting Plaintiffs' rights, the sixth *Colorado River* factor. Plaintiffs' claims here are predicated on the continuing enforceability of the injunction. But if the injunction is reversed, as sought by the Legislature, that would essentially provide Plaintiffs with the relief they seek here, which is a federal injunction enjoining the Secretary from enforcing the state-court injunction. This factor weighs in favor abstention.

Last, the progress of the proceedings, factor number seven, also weighs in favor of abstention. No discovery has taken place in this case; the court has not reviewed the merits of the claims or Plaintiffs' motion for preliminary injunction. In state court, the validity of the injunction is already under appellate court review. The state court litigation has thus advanced further than this action.

While abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River*, 424 U.S. at 813. Abstention is warranted because the driving principle of *Colorado*

River abstention is "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River*, 424 U.S. at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)). Where sufficient relief may be provided in the state proceeding that was filed first and is farther along than this federal proceeding, declining to abstain would contravene the spirit of the *Colorado River* doctrine. Thus, this Court should abstain from adjudicating Plaintiffs' substantive due process claim, and exercise its discretion to dismiss it, rather than simply stay the claim. *E.g., White v. Morris*, 972 F.2d 350 (Table), at *2 (6th Cir. Aug. 6, 1992); *Preston v. Eriksen*, 106 F.3d 401 (Table), at *4 (Jan. 14, 1997).

2. Alternatively, this Court should abstain from exercising jurisdiction over Plaintiffs' constitutional and statutory claims under *Gottfried v Medical Planning Services.*

Should this Court determine that abstention is not warranted under *Colorado River*, it should abstain under the principles articulated by the Sixth Circuit in *Gottfried v. Med. Planning Servs.*, 142 F.3d 326 (6th Cir. 1998). In *Gottfried*, the Sixth Circuit recognized that under certain circumstances, a federal district court should refrain from exercising its jurisdiction based on considerations of "equity, comity, and our federalist judicial system" even though the case might not "precisely fit any of the jurisdictional doctrines normally applicable." *Id.* at 330.

The plaintiff in *Gottfried* wanted to picket outside the home, office, and abortion clinic of a doctor. But the doctor had obtained a state-court injunction years earlier restricting picketing at those locations that remained in effect. *Id.* at 328. Concerned she would be arrested if the injunction were to be enforced against

her, the plaintiff filed suit asking that the federal court declare the injunction unconstitutional and enjoin the city from enforcing it against her. *Id.* The Sixth Circuit determined that none of the recognized abstention doctrines applied, as the plaintiff had not been a party to the injunction and there was no ongoing state action. *Id.* at 329-30. Nevertheless, the Court held that "equity, comity, and our federalist judicial system require the federal court to give the state judge the first chance to bring the injunction into compliance with constitutional law." *Id.* at 330.

In so holding, the Sixth Court relied on the rationale underlying the *Pullman* abstention doctrine, which "requires a federal court, faced with a constitutional challenge to an uncertain state law, to defer the constitutional question and avoid a direct confrontation if a decision from the state court 'might avoid in whole or in part the necessity for federal constitutional adjudication.' " *Id.* at 331 (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)). Based on this principle of constitutional avoidance, the *Gottfried* Court held that "a federal court should abstain when a nonparty to a state court injunction brings a First Amendment challenge to the injunction in federal court before requesting relief from the state court." *Id.* at 332. The Court further reasoned that this approach would be more efficient, as it would permit the state court to take into consideration changes in the law that had occurred and to reassess the continuing need for the injunction and its scope. *Id.* Doing so also afforded the state court the respect due as an equal in the federalist judicial system. *Id.* at 332-333.

For all the same reasons articulated above in support of *Colorado River* abstention, abstention is warranted under *Gottfried*. As the Court observed there:

> Treating an injunction like a statute, those who want to exercise their speech rights but do not wish to violate the injunction often file suit in federal court against a host of state and local officials for every imaginable constitutional violation, rather than simply asking the state judge who has ongoing jurisdiction over the matter for relief. This has become the pattern in today's litigious era, and it causes a host of problems that only multiply where, as here, the law has changed in the interim and a new state judge has inherited a permanent injunction drafted by a predecessor.
>
> Under these circumstances, we believe equity, comity, and our federalist judicial system require the federal court to give the state judge the first chance to bring the injunction into compliance with constitutional law. [*Id*. at 330.]

Here, Plaintiffs could have filed their constitutional and statutory claims in a challenge to the permanent injunction in state court, instead of attempting to disguise the nature of their claim and asking this Court in a roundabout way to enjoin the injunction. And regardless, there is already pending an appeal that may result in the reversal of the injunction, which will resolve Plaintiffs' concerns without the need for this Court's intervention and the threat of possibly conflicting decisions. Waiting for the state court decisions preserves principles of comity as well. This Court should thus abstain from resolving Plaintiffs' constitutional and statutory claims.

3. Plaintiffs lack standing to bring this claim on a theory of vote-dilution.

Plaintiffs allege that the Secretary's compliance with the state court's injunction "increases the pool of total votes cast and dilutes the weight of Plaintiffs' votes." (R. 1, Cmplt, ¶ 66, Page ID # 14; R. 2, Plfs TRO Brf, Page ID # 49, 64-65.) In

some cases, vote dilution can be a cognizable injury that confers standing. *e.g.*, *United States v. Hays*, 515 U.S. 737, 744-45 (1995). But it does not necessarily follow that all forms of vote dilution give rise to standing. Plaintiffs have not explained, for instance, why the principles underlying standing in racial gerrymandering cases (where a state legislature or redistricting committee takes affirmative action that dilutes or restricts the votes of a specific minority population) should apply here, where the official action (i.e. compliance with the state court's injunction) has the effect of *expanding* voting rights for all voters in the state.

In *Gill v. Whitford*, the Supreme Court recognized that plaintiffs in past vote-dilution cases had standing when their claimed injuries were "individual and personal in nature," and the plaintiffs had alleged "facts showing disadvantage to themselves as individuals." 138 S. Ct. 1916, 1929-30 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964), and *Baker v. Carr*, 369 U.S. 186, 206 (1962)). This case is different. Plaintiffs broadly allege that their votes will be diluted, but they fail to explain why their votes would be "diluted" at all. Simply put—diluted by whom? The alleged "dilution" would affect all Michigan voters equally, giving no particular advantage to one group or disadvantage to the Plaintiffs.

Rather, the Plaintiffs' attempted claim of vote dilution is a generalized grievance based on their discontent with the state court's decision. But, that cannot support standing. In short, the prospect of hypothetical unlawful votes in the upcoming presidential election is not a harm unique to the Plaintiffs. Other federal

courts hearing challenges to state election laws leading to the November election have rejected similar vote dilution theories. In *Carson v. Simon,* No. 20-CV-2030, 2020 U.S. Dist. LEXIS 188454, *23-24 (D. Minn Oct. 11, 2020), the court—in its analysis rejecting the plaintiffs' standing based on vote-dilution—succinctly summarized the recent cases rejecting "vote dilution" standing:

> Illustrating this principle, in the many challenges to state election laws leading to the November election, other courts have rejected *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-cv-1445JCMVCF, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (determining that plaintiffs' vote dilution theory was a generalized grievance and too speculative to confer standing); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (concluding that plaintiffs' vote dilution theory amounted to a generalized grievance); *Paher v. Cegavske*, No. 3:20-cv-00243MMDWGC, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020) (determining that plaintiffs' claim that their votes would be diluted as a result of an election conducted exclusively by vote-by-mail was too generalized); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) (upholding a magistrate judge's conclusion that plaintiff's vote dilution claim was speculative and a generalized grievance as not clearly erroneous).

In particular, the Court noted that in *Paher*, this alleged injury was held to be too generalized to confer standing because the claims were "materially grounded on ostensible election fraud that may be conceivably raised *by any Nevada voter*." *Paher* at *4 (emphasis in original). There, just as here, the plaintiffs alleged that the votes are unlawful, whether by fraud or by arriving "late" pursuant to the state court's injunction. The Court in *Carson* held that this was a generalized grievance, affecting all Minnesota voters in the same way. *Carson*, at *25. This Court should reach the same conclusion: allegations of vote dilution due to the counting of

hypothetical, allegedly unlawful ballots is a generalized grievance that does not confer standing.

4. Plaintiffs are not likely to succeed on the merits of their constitutional and statutory claims.

The Sixth Circuit has long held that in determining whether to grant an injunction, the movant must show a "strong likelihood of success on the merits." *See e.g. Ohio Republican Party v. Brunner,* 543 F.3d 357, 361 (6th Cir. 2008); *NEOCH v. Blackwell,* 467 F.3d 999, 1009 (6th Cir. 2006); *Summit County Democratic Cent. & Exec Comm. v. Blackwell,* 388 F.3d 547, 550 (6th Cir. 2004).

Plaintiffs claim that the Secretary of State's compliance with the injunction issued by the state court conflicts with Article II of the Constitution and with a federal statute setting the date of the presidential election. (R. 1, Cmplt. ¶73-88, Page ID # 16-18). But Plaintiffs' arguments are simply incorrect and fail to demonstrate a substantial likelihood of success of their merits.

a. Plaintiffs are unlikely to prevail on their claim that the Secretary's compliance with the injunction violates the Electors Clause under Article II of the U.S. Constitution.

Count I of Plaintiffs' Complaint contends that, because Congress has set a date for the presidential election and the Michigan Legislature has set a deadline of 8 p.m. on election day for the receipt of absent voter ballots, the Secretary of State acted *ultra vires* by "acceding to a policy" that accepts ballots after that date. (R. 1, Compl., ¶75-76, Page ID # 16). In their brief in support of the motion for preliminary injunction, Plaintiffs cite to *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S. 70, 76 (2000) for the principle that state legislatures enacting laws

governing the selection of presidential electors are acting under a grant of authority under Article II, § 1, cl. 2 of the U.S. Constitution. Plaintiffs also quote U.S. Supreme Court decisions holding that the power to define the method of selecting presidential electors is exclusive to the state legislature, *McPherson v. Blacker,* 146 U.S. 1, 27 (1892), and cannot be "taken or modified" even by the state constitutions. *Bush v. Gore,* 531 U.S. 98, 112-13 (2000)(C.J. Rehnquist, concurring). Then, Plaintiffs argue that it "necessarily follows" that neither the Secretary nor the state courts have authority to review such enactments. (R. 5, Plfs TRO Brf, Page ID # 59-60).

The principal problem with Plaintiffs' argument, of course, is that the Secretary of State has done nothing of the sort. The Eastern District of Michigan has held that public officials are presumed to have "properly discharged their official duties" and that the burden falls on the party asserting an *ultra vires* act to show otherwise. *Barden Detroit Casino L.L.C. v. City of Detroit,* 59 F. Supp. 2d 641, 661 (E.D. Mich. 1999)(citing *Bracy v. Gramley,* 520 U.S. 899, 909 (1997)). Here, Plaintiffs have failed to offer evidence rebutting that presumption. The Secretary of State, in fact, defended the constitutionality of Mich. Comp. Laws §§ 168.759b and 168.764a before the state court prior to the issuance of the injunction. It is disingenuous of the Plaintiffs to describe the Secretary's compliance with an injunction that *she opposed* as being a "policy" of her own. Likewise, the Secretary's decision not to appeal the injunction—in the waning days before the election—does not make a judicial injunction an exercise of executive power, and

Plaintiffs offer no legal authority supporting that conclusion. Indeed, Plaintiffs also offer no authority purporting to allow the Secretary of State to disregard an order from the state court. The Secretary of State has not, therefore, acted *ultra vires*.

Moreover, Plaintiffs' arguments are also premised upon an incomplete analysis of what constitutes the determination of the "Legislature." Plaintiffs' argument relies on *McPherson,* 146 U.S. at 27 and *Bush v. Gore,* 531 U.S. at 112-13 where those opinions discuss the power of the "state legislature" to define the methods of appointing presidential electors. But Plaintiffs err by ignoring the import of *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015). In that case, the Arizona Legislature argued that because Art. I, §4, cl. 1 of the Constitution states that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State **by the Legislature thereof**," that meant that only the Legislature could accomplish redistricting. (Emphasis added). In this case, Plaintiffs similarly argue that only "the Legislature" has the ability to define the manner in which presidential electors are chosen because Art. II, §1, cl. 2 provides that "Each State shall appoint, in such Manner as **the Legislature thereof** may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress…." (Emphasis added).

But the U.S. Supreme Court disagreed, holding that the lawmaking power includes the initiative process. *Arizona State Legis.*, 576 U.S. at 793. The Supreme Court noted that direct lawmaking by the people was unknown at the time the

Constitution was drafted. *Id.* The Court also held that the Arizona state constitution—much like Michigan's—established the electorate as a coordinate source of legislation. *Id.* at 795. The Court concluded that the Elections Clause, "was not adopted to diminish a State's authority to determine its own lawmaking processes." *Id.* at 824.

Here, Michigan's electorate similarly adopted—through initiative—an amendment to the state constitution providing a new right to vote an absent ballot and submit it by mail. Mich. Const. 1963, Art II, §4. Consistent with *Arizona State Legis.*, the adoption of this initiative must be seen as just as much an act of "the Legislature" as an enactment passed by the Michigan House and Senate. As a result, the right—under Mich. Const. 1963, art II, §4—to submit a ballot by mail is now just as much a part of the legislative scheme by which presidential electors are chosen as the ballot-receipt deadline under Mich. Comp. Laws §§ 168.759b and 168.764a.

Whatever criticisms one may have with the state court's decision, it is without question that the court was confronted with the issue of whether a conflict existed between the ballot-receipt deadline and the right to vote an absent ballot by mail as applied in the circumstances arising from the COVID-19 pandemic. After finding that there was such a conflict, the court's order attempted to resolve the conflict by enjoining—only for this election—the strict enforcement of the ballot-receipt deadline and allowing for ballots to be counted as long as they were

postmarked by November 2 and received before the deadline for certification of the election results (November 17).

In *Bush v. Gore*, Justice Rhenquist observed that federal courts' review of state court decisions affecting presidential electors under Article II was still deferential:

> In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law -- see, e.g., *Mullaney v. Wilbur*, 421 U.S. 684 [ ] (1975) -- there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

Bush, 531 U.S. at 114. Here, the state court's decision did not "infringe" upon the authority "the Legislature"—it sought to give effect to it, including the part that was passed through initiative. In this respect, the court's opinion on the interpretation of state law should still be accorded deference by this Court.

Plaintiffs have failed to demonstrate a substantial likelihood of success on the merits of Count I of their complaint. The Secretary has not exceeded her authority and has only informed local election officials about the injunction issued by the state court and provided guidance for implementing it according to its terms. Further, the Plaintiffs have failed to demonstrate that the state court's injunction infringed on the state's authority under the Electors Clause because they have failed to address—let alone refute—the exercise of legislative power by the people through their enactment of an initiative providing for a right to vote an absent ballot by mail. As a result, they have necessarily failed to address the validity of

the state court's injunction as an interpretation of state law, and cannot—therefore—establish a substantial likelihood of success.

b. Plaintiffs are unlikely to prevail on the merits of their claim that the Secretary's compliance with the injunction violates federal law.

In Count II of their Complaint, Plaintiffs argue that the Secretary of State's compliance with the state court's injunction violates 3 U.S.C. § 1, which provides that electors of president and vice-president shall be appointed, in each state, on the Tuesday next after the first Monday in November. (R. 1, Compl., ¶83-86, Page ID # 17). This year, that date falls on November 3. Plaintiffs contend that the injunction—which requires the counting of ballots postmarked by November 2 and received before election results are certified by the counties 14 days later—violates this federal law.

As to the timing for counting ballots and certifying the results the canvass of the votes at the precinct level must, by statute, commence immediately after the polls close. Mich. Comp. Laws § 168.801. The boards of county canvassers must meet on the Thursday immediately following any election to commence the canvass of the counties' returns of votes, and the county canvass must be completed by the 14th day after an election, which is November 17 for this election cycle. Mich. Comp. Laws §§ 168.821, 168.822.

Under Mich. Comp. Laws § 168.842(1), the Board of State Canvassers must meet on or before the twentieth day after the election to certify the results but must complete the canvas no later than the fortieth day. The twentieth day for this election cycle is November 23, and the fortieth day is December 13. Under Mich.

Comp. Laws § 168.46, "[a]s soon as practicable after the state board of canvassers has" certified the results the Governor must certify the list of presidential electors to the U.S. Secretary of the Senate. See also 3 U.S.C. § 6. And § 47 provides that the presidential electors "shall convene" in the State's capitol "on the first Monday after the second Wednesday in December following their election," which is December 14 for this election cycle. Mich. Comp. Laws § 168.47; 3 U.S.C. § 7.

Neither the state court's injunction nor any act of the Secretary of State has changed the date of the election. Polls will still close at 8 p.m. on election day, and—by the terms of the injunction—absent voter ballots must be postmarked by November 2. In other words, no additional votes will occur after November 3. Instead, all that will happen is the receipt and counting of already-made votes.

Plaintiffs' reliance on *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001) is misplaced. Indeed, *Millsaps* expressly recognized that the definition of "election" under federal law meant "the combined action of voters and officials to make a final selection of an officeholder." *Id.* at 547 (quoting *Foster v. Love*, 522 U.S. 67, 71-72 (1997)). So long as no combined action occurs on any other day than the federal election day, a state has complied with federal law. *Id.* Here, there is no "combined action" after November 3, and the voters' actions must necessarily be completed by November 3. Simply put, voters must have voted and mailed their voted ballots before election day for them to be counted, and so there cannot be any "combined action" after election day. To 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.

Plaintiffs make a point of emphasizing *Maddox v. Board of State Cavanssers*, 149 P.2d 112 (Mont. 1944), but their enthusiasm for this decision betrays the paucity of authority supporting their position. Of course, a 1944 decision of the Montana Supreme Court is not binding on this Court's review of Michigan law, and even if were, the Sixth Circuit's 2001 decision in *Millsaps* would supersede it. Also, *Maddox's* conception of a ballot being "cast" at the time it is deposited with elections officials is out of harmony with the Supreme Court's 1997 decision in *Foster*, which recognized that elections require "combined action" of voters and officials. *Compare Maddox,* 149 P.2d at 115 and *Foster*, 522 U.S. at 71.

Lastly, Plaintiffs, citing to a Postal Service handbook, argue in their brief that ballots will be counted even if they are not postmarked. (R. 5, Plfs TRO Brf., Page ID # 64). But it is unclear what pertinence that handbook has to the counting of ballots. Regardless, the trial court's injunction—and the guidance issued by the Secretary of State—expressly state that, in order to be counted after November 3, ballots must be postmarked no later than November 2.

Plaintiffs have failed to demonstrate that any "combined action" between voters and officials after November 3, and so there is no conflict between 3 U.S.C. § 1 and the Secretary's compliance with the state court's injunction. Plaintiffs have failed to show a substantial likelihood of success as to Count II of their Complaint.

C. Plaintiffs cannot show an irreparable injury absent an injunction.

In considering issuing an injunction, courts must consider whether the plaintiff will suffer irreparable injury without the injunction. *Certified Restoration Dry Cleaning Network v. Tenke Corp.,* 511 F.3d 535, 550 (6th Cir. 2007). "To demonstrate irreparable harm, the plaintiffs must show that . . . they will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated." *Abney v. Amgen, Inc.,* 443 F.3d 540, 552 (6th Cir. 2006). Irreparable harm may also exist where a plaintiff can demonstrate a substantial likelihood of success on the merits of the plaintiff's claim that his or her constitutional right has or will imminently be violated. *Elrod v. Burns,* 427 U.S. 347, 373-74 (1976).

But here, Plaintiffs' claims of harm are speculative because the state appellate court is presently considering a request that it reverse the trial court's injunction regarding the 8 p.m. ballot receipt deadline. If the injunction is reversed, Plaintiffs' alleged Article II and statutory claims, along with their concerns over vote dilution and status as presidential electors, will be moot. Thus, Plaintiffs cannot demonstrate a sufficient actual and imminent injury for purposes of showing irreparable harm. Furthermore, as discussed above, Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their constitutional and statutory claims. *Elrod*, 427 U.S. at 373-374. Because Plaintiffs have not demonstrated irreparable harm, their motion for injunctive relief must be denied.

D. The balance of harms and the public interest weigh against granting the injunction.

Here, the balance of harms and public interest factors weigh in Defendant's favor. These factors "merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009). Although couched as a request to enjoin the Secretary from giving instructions to local clerks as to how to comply with the injunction, Plaintiffs effectively seek to enjoin the state court's injunction of the statutes. But "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); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,* 274 F.3d 377, 400 (6th Cir.2001). Indeed, "[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).

Here, the state court concluded that the injunction of the ballot receipt deadline statutes was required to prevent the violation of voters' constitutional rights to vote an absent voter ballot under the Michigan Constitution. Whether the injunction was rightly or wrongly entered, this Court should reject Plaintiffs' invitation that it stand in review of the state court's opinion. First, because doing so could potentially result in conflicting or unnecessary opinions, and second because doing so will violate principles of federalism and comity and would thus contravene the public's interest. As the Court explained in *Gottfried*, "permanent injunctions are similar to legislation, we should proceed with caution, cognizant

that 'federal 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.' " 142 F.3d at 331 (internal citations omitted). Indeed, "it would be an abuse of discretion for [the] federal district court to enjoin the enforcement of a state court injunction or to declare it unconstitutional in light of the principles of comity that animate our federalist judicial system." *Id.* (citing *Hoover v. Wagner*, 47 F.3d 845, 851 (7th Cir. 1995).)

As discussed above, the Michigan Court of Appeals is reviewing the injunction. Declining Plaintiffs' request for injunctive relief under these circumstances is in the public's interest.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant Secretary of State Jocelyn Benson respectfully requests that this Court deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

DANA NESSEL
Attorney General

s/Erik A. Grill
Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
P64713

Dated: October 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

s/Erik A. Grill
Erik A. Grill (P64713)
Assistant Attorney General
Attorney for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: gtrille@michigan.gov
P64713