UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA and MARISSA ACCARDO,

Plaintiffs,

v

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

and

THE MICHIGAN SENATE and THE MICHIGAN HOUSE OF REPRESENTATIVES,

Defendants.

No. 19-13188

HON. ROBERT H. CLELAND

MAG. ANTHONY P. PATTI

__________________________________/

Andrew Nickelhoff (P37990)
Attorney for Plaintiffs
333 W. Fort Street, Suite 1400
Detroit, Michigan 48226
313.496.9515

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Patrick G. Seyferth (P47475)
Michael K. Steinberger (P76702)
Attorneys for Defendants
Senate & House
100 W Big Beaver Rd, Ste 400
Troy, Michigan 48084
248.822.7800

Marc Elias, Uzoma N. Nkwonta,
Jacki Anderson, K'Shaani Smith
700 Thirteenth St, NW, Ste 600
Washington, DC 20005
202.654.6200
Attorneys for Plaintiffs

____/

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs' motion for preliminary injunctive relief should be denied where Plaintiffs have failed to satisfy the requirements for granting such extraordinary relief?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:
Mich. Comp. Laws § 168.761
Mich. Comp. Laws § 168.765a(6)
Mich. Comp. Laws § 168.766
Mich. Comp. Laws § 168.767

Abney v. Amgen, Inc., 443 F.3d 540 (6th Cir. 2006)
Anderson v. Celebrezze, 460 U.S. 780 (1983)
Burdick v. Takushi, 504 U.S. 428 (1992)
Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017 (N.D. Fla. 2018)
Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016)
Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620 (6th Cir. 2000)
Maryland v. King, 133 S. Ct. 1 (2012)
Warf v. Bd. of Elections, 619 F.3d 553 (6th Cir. 2010)

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INTRODUCTION

Plaintiffs ask this Court to enjoin Michigan's process for verifying voter signatures on applications for absent voter ballots and the ballots as well unless voters receive notice that their signatures do not agree; an opportunity to cure the defect; elections officials are directed to provide such a process; and officials receive training as to signature matching. (Doc. 22, Mtn for PI, PgID 3-5). But the State's processes already provide for much of this requested relief, and the State is already formulating additional safeguards. This fact, combined with Plaintiffs' failure to demonstrate a strong likelihood of success on the merits of their constitutional claims, and their failure to sufficiently demonstrate irreparable harm, requires denial of their motion for a preliminary injunction.

STATEMENT OF FACTS

Priorities USA is a 501(c)(4) non-profit advocacy and service organization. (Doc. 15, Am. Complaint, PgID 148, ¶21). It alleges that it engages in activity to "educate, mobilize, and turn out votes" in Michigan, and states that it "expects to" make expenditures and contributions towards those objectives in upcoming Michigan state and federal elections. (Doc. 15, PgID 148, ¶21). Plaintiff Marissa Accardo is a college student whose absent voter (AV) ballot for the November 2018 general election in Michigan was rejected because her signature on the AV ballot return envelope did not sufficiently match her signature in Michigan's

Qualified Voter File (QVF). (*Id.*, PgID 147, ¶ 20.) Plaintiffs challenge Michigan's process for comparing voter signatures on AV ballot applications and AV ballot return envelopes to signatures in the QVF (or on the voter's registration card).

A. Statutory Requirements

As amended by Proposal 3 in 2018, the Michigan Constitution now provides that qualified electors shall have "[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Mich. Const. 1963, art. 2, § 4(1)(g). Section 4 continues to provide, as it has since 1963, that:

> [T]he legislature shall enact laws to regulate the time, place and manner of all . . . elections, *to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise*, and *to provide for a system of . . . absentee voting.* [*Id.*, art. 2, § 4(2)(emphasis added).]

Section 759 of the Michigan Election Law prescribes the process for applying for an AV ballot. In order to receive an AV ballot, a voter must request an application for an AV ballot and submit that application to his or her local clerk. Mich. Comp. Laws § 168.759(1)-(2). Subsection 759(3) provides that an application for an AV ballot may be made in a number of ways, and subsection 759(4) requires that the application be signed, otherwise the clerk "shall not deliver an absent voter ballot to" the applicant. Mich. Comp. Laws § 168.759(3)-(4).

Under § 759(6), the application for an AV ballot must include an "instruction" to the applicant to sign the application. Mich. Comp. Laws § 168.759(6).

Section 761 provides, in pertinent part, that city or township clerks compare voters' signatures on AV ballot applications to the voters' signatures in the QVF[1] or on the voter's registration card before issuing an AV ballot:

> (1) If the clerk of a city or township receives an application for an absent voter ballot from a person registered to vote in that city or township and *if the signature on the application agrees with the signature for the person contained in the qualified voter file or on the registration card as required in subsection (2)*, the clerk immediately upon receipt of the application . . . shall forward by mail, postage prepaid, or shall deliver personally 1 of the ballots or set of ballots if there is more than 1 kind of ballot to be voted to the applicant. . . .
>
> (2) The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot. *Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on the application for an absent voter ballot to the signature contained on the master card.* [Mich. Comp. Laws § 168.761 (emphasis added.)]

If the signature on the AV ballot application agrees with the signature in QVF or on the registration card, the clerk will issue an AV ballot.

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[1] Digitized or electronic signatures are captured in the QVF through Michigan's driver file when a voter signs a voter registration form electronically at a Secretary of State branch office or at a city or township clerk's office. *See* Mich. Comp. Laws §§ 168.509q(g), 257.307(2). Section 509q(g) requires use of the "most recent digitized signature."

An AV ballot includes instructions to the voter for marking and returning the ballot. *See* Mich. Comp. Laws § 168.764a. Including an instruction to the voter to sign the return envelope "or the ballot will not be counted." (*Id*.)

After the AV ballot is completed and returned to the local clerk's office, it is either delivered to the election inspectors[2] in the voter's precinct, Mich. Comp. Laws § 168.765(2), or to an AV ballot counting board, if the jurisdiction uses a counting board, Mich. Comp. Laws § 168.765a(1), (6). But in either case, the city or township clerk first reviews the voter's return envelope and compares the signature to the signature in the QVF or on the registration card. Section 766(2) provides:

> The qualified voter file must be used to determine the genuineness of a signature on an envelope containing an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on an envelope containing an absent voter ballot to the signature contained on the master card. [Mich. Comp. Laws § 168.766(2).]

In a jurisdiction that uses a counting board, if the clerk determines that the signatures do not agree, the AV ballot is not delivered to the counting board for tabulation and is marked rejected by the clerk and preserved. Mich. Comp. Laws § 168.765a(6) (emphasis added).

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[2] Precinct election inspectors are appointed under Mich. Comp. Laws §§ 168.673a-168.677, and include members from both major political parties.

In jurisdictions without counting boards, if the clerk determines that the signatures do not agree, the clerk completes the statement on the envelope to that effect. And while not entirely plain from the statutes, the clerk generally does not send mismatched signature envelopes to the precinct for review. Rather, the clerk sends only matching AV ballot return envelopes to the precinct along with the corresponding AV ballot applications. Mich. Comp. Laws §§ 168.675(2), 766(2).

Under § 766, the precinct election inspectors must examine the signature on the AV ballot return envelopes received from the clerk "to see that the person has not voted in person, that he or she is a registered voter, *and that the signature on the statement agrees with the signature on the registration record*." Mich. Comp. Laws § 168.766(1)(a) (emphasis added).

If the precinct inspectors determine that the signature on the ballot return envelope ("statement") does not match, the ballot is rejected:

> If upon an examination of the envelope containing an absent voter's ballot or ballots, it is determined that the signature on the envelope does not agree sufficiently with the signature on the registration card or the digitized signature contained in the qualified voter file as provided under section 766 so as to identify the voter . . . *then such vote shall be rejected, and thereupon some member of the board shall, without opening the envelope, mark across the face of such envelope, "rejected as illegal", and the reason therefor. The statement shall be initialed by the chairman of the board of election inspectors.* Said envelope and the ballot or ballots contained therein shall be returned to the city, township or village clerk and retained and preserved in the manner now provided by law for the retention and preservation of

> official ballots voted at such election. [Mich. Comp. Laws § 168.767 (emphasis added).]

Thus, precinct inspectors may re-review signatures on an AV ballot return envelope delivered to them by the clerk for a possible mismatch.

As Plaintiffs observe, none of the relevant statutes expressly provide a process for remedying a signature mismatch on an AV ballot application or return envelope. However, in addition to the above statutory provisions, the Secretary of State provides instruction as to the signature review process for local clerks.

B. Instructional guidance

Under section 21 of the Michigan Election Law, the Secretary of State is "the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." Mich. Comp. Laws § 168.21. Similarly, under section 31, the Secretary of State "shall":

> (a) . . . issue instructions and promulgate rules . . . for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots . . . . [Mich. Comp. Laws § 168.31(a)-(c).]

The Secretary must also provide various training and accreditation opportunities for local election officials, including election inspectors. *See* Mich.

Comp. Laws § 168.31(j)-(m). Pursuant to this authority, the Secretary has provided training and guidance with respect to the signature review process, and steps to take following a signature mismatch on an application for an AV ballot and on an AV ballot envelope.

As explained by Director of Elections Jonathan Brater, during accreditation training, which every clerk must attend,[3] the trainer walks clerks through the process for verifying a signature on a voter's AV ballot application and on an AV ballot return envelope, which process is the same for both. (Ex. A, Brater Declaration, ¶¶ 8-11.) With respect to return envelopes, clerks are instructed to review the signature immediately, and are further instructed to make every effort to contact a voter if the signature does not match and advise them as to how to proceed. (*Id.*, ¶ 12).

For verifying signatures, clerks are instructed that the signature on the AV ballot application or envelope does not need to exactly match the QVF. (*Id.*, ¶ 13). Rather, "[c]lerks are told the signatures should have enough similarities between the signatures to verify the voter is the one who signed the application." (*Id.*) Clerks are also told to "start with the presumption that the voter's AV application or envelope signature is his or her genuine signature," and advised that there are

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[3] Mich. Comp. Laws § 168.33(4) ("Each county, city, township, and village clerk is required to attend and complete continuing election education training at least once every 2 years to maintain accreditation as a clerk.")

any number of acceptable reasons as to why a signature may not exactly match and provided examples. (*Id.*, ¶ 14.) They are also instructed to look for any redeeming quality to treat the signature as valid, *id.*, ¶ 15, and are "trained to reject a signature only if the discrepancies are significant and obvious from the signature contained within the QVF and that any questions should be resolved in favor of the voter when possible," *id.*, ¶ 16.

Over the past year, the Bureau of Elections has been developing additional guidance for clerks regarding signature matching standards. (*Id.*, ¶ 18.) On February 27, 2020, the Bureau issued interim additional guidance that was largely based on the process or standards described above. (*Id.*, Ex. 3.) However, this guidance also provides a chart with "concrete examples for clerks on what the Bureau would consider a valid signature versus a questionable signature, and why." (*Id.*, ¶ 19, Ex 3.) The resource also includes a more detailed procedure for providing notice to the voter when the clerk determines a voter's signature on the AV application or AV ballot return envelope are missing or questionable. (*Id.*, ¶ 19, Ex 3.) This process requires the clerk to notify the voter by the close of business on the next business day following receipt (up to the Wednesday before the election) or immediately following receipt (starting Thursday before the election and on election day). (*Id.*)

Secretary Benson and the Bureau anticipate incorporating this guidance and/or additional instructions into the manuals and training materials for clerks and election workers, and will be re-issuing instructions before the August 4, 2020, primary election and the November 3, 2020, general election. Future additional instructions will include post-election procedures for permitting a voter to cure a ballot rejected for mismatched signatures. (*Id.*, ¶ 21.)

ARGUMENT

I. Plaintiffs' motion for preliminary injunctive relief should be denied where they have not shown a likelihood of success on the merits or imminent irreparable harm.

A. Preliminary injunction factors.

Preliminary injunctive relief "is an extraordinary measure that has been characterized as 'one of the most drastic tools in the arsenal of judicial remedies.'" *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001). Courts consider four factors in determining whether to grant a temporary or preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012).

B. Plaintiffs have not shown a strong likelihood of success on the merits.

The Sixth Circuit has long held that in determining whether to grant a preliminary 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). In their Amended Complaint, Plaintiffs bring three counts, in which they allege an undue burden on the right to vote, and equal protection and due process violations. But none of the claims has a strong likelihood of success on the merits.

1. Plaintiffs' First and Fourteenth Amendment claims.

a. Undue burden

Plaintiffs first argue that the signature matching process is unconstitutional because it severely burdens the right to vote in that "it wrongfully denies certain absentee voters the opportunity to cast an effective ballot based on arbitrary and deeply flawed procedures." (Doc. 22, Plfs' P.I. Brf., PgID 260).

The "right to vote in any manner . . . [is not] absolute," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted); the Constitution recognizes the states' clear prerogative to prescribe time, place, and manner restrictions for holding elections. U.S. Const. art. I, § 4, cl. 1. Indeed, there "must be a substantial regulation of elections if they are to be fair and honest and if some sort of order,

rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Federal law thus generally defers to the states' authority to regulate the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (Stevens, J., op.) (recognizing that neutral, nondiscriminatory regulation will not be lightly struck down, despite partisan motivations in some lawmakers, so as to avoid frustrating the intent of the people's elected representatives).

When a constitutional challenge to an election regulation requires courts to resolve a dispute concerning these competing interests, courts apply the *Anderson-Burdick* analysis from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick*, *supra*. *See Green Party of Tenn. v. Hargett (Hargett II)*, 791 F.3d 684, 693 (6th Cir. 2015)(internal quotation marks and citations omitted). If a state imposes "severe restrictions" on a plaintiff's constitutional right to vote, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at

434). Regulations falling somewhere in between—"i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

Applying this framework here, Plaintiffs' asserted injury is the future deprivation of the right to vote based on an alleged standardless determination made by untrained election officials that the signature on a voters' application for an AV ballot or on the AV ballot return envelope does not match the signature in the QVF or on the master card on file with the local clerk.

Notably, Plaintiffs have identified only two individuals, Ms. Accardo and Mr. Turner, that had their AV ballots rejected for a signature mismatch, both in 2018 and in different jurisdictions. (Doc. 22, Plfs' P.I. Brf., Ex. B, Accardo Dec, PgID 304-307; Ex. D, Turner Dec, PgID 314-316). And of the two, Plaintiffs only attach images of Mr. Turner's AV ballot application, which he signed, and his return envelope, on which he printed his name. (*Id*., Doc. 22, Plfs' P.I. Brf, Nkwonta Dec, Ex. 2, PgID 322-324). Without images, it is unknown whether Ms. Accardo's signature was rightly questioned. Plaintiffs also cite a letter from the City Clerk of Hamtramck in which he notes that one, unidentified AV ballot was rejected for a mismatch in the 2016 presidential election, and no ballots were

rejected for mismatches in the 2018 general election. (*Id*., Doc. 22, Plfs' P.I. Brf, Nkwonta Dec, Ex. 3, PgID 325-327). The clerk further observes that in local city elections, he receives "dozens of applications and some ballots" with "missing or non-matching signatures." (*Id*.) This is often because the voters may be first-time voters who do not sign their names the same as on their driver's license or state identification card. (*Id*.) However, the clerk's office sends such voters letters explaining the problem and requests that that they come in to update their signatures. (*Id*.) This evidence certainly does not demonstrate widespread failures in the so-called "signature matching regime."

Plaintiffs further observe that data from 2018 reveals that Michigan election officials statewide "rejected approximately 300 absentee ballots cast by Michigan voters . . . for alleged signature mismatches," and then speculate that "untold numbers of absentee ballot applications" were also rejected for mismatches. (*Id*., Doc. 22, Plfs' P.I. Brf, PgID 257). Setting aside the fact that Plaintiffs do not explain how they extrapolated their data, *see id*., PgID 250-251 & n. 1, 257, they further do not explain why it should be assumed that these 300 AV ballots were wrongly rejected rather than rightly rejected.[4] Again, this evidence does not demonstrate widespread failures in the so-called "signature matching regime."

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[4] This same data shows that 1,055,822 AV ballots were counted in Michigan in the 2018 general election. *See* Election Administration and Voting Survey, Appendix

Nevertheless, Plaintiffs have shown that Ms. Accardo's and Mr. Turner's 2018 AV ballots were rejected based on nonmatching signatures, and that they were not advised of this rejection or offered an opportunity to cure or rebut the defect and have their ballots counted. Were this to happen again in the future, a court would likely conclude that it constituted a "substantial burden" on their right to vote. *See, e.g. Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018) (applying *Anderson-Burdick* balancing test to Florida's signature-matching process and concluding that "[d]isenfranchisement of approximately 5,000 voters based on signature mismatch is a substantial burden.").

But balanced against this burden is the State's important regulatory interest in protecting the integrity and security of the AV ballot process. Michigan's Constitution expressly provides that the Legislature "shall enact laws . . . to preserve the purity of elections," and to "guard against abuses of the elective franchise[.]" Mich. Const. 1963, art. 2, § 4(2). The U.S. Supreme Court has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* 460 U.S. at 788, n. 9 (1983). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the

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A, Table 2, at https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

election process. *See Crawford*, 553 U.S. at 225 ("There is no denying the abstract importance, the compelling nature, of combating voter fraud."); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (states have a legitimate interest "in protecting the integrity, fairness, and efficiency of their ballots and election process as means for electing public officials"); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

In addressing a challenge to Florida's signature-matching statutes, the district court recognized that Florida's asserted interests – "to prevent fraud, to efficiently and quickly report election results, and to promote faith and certainty in election results" – were "all compelling interests." *Democratic Exec. Comm. of Fla.*, 347 F. Supp. 3d at 1030 (citations omitted). The same is true here. Michigan's statutes are likewise designed to protect the integrity of the AV ballot process by ensuring that the person requesting and casting an AV ballot is the same voter. As stated by Director Brater, "[m]atching a signature is the primary and most reliable way of protecting the voter's right to vote by ensuring that he or she, and not another individual, was actually the person who signed an absent voter ballot application or ballot return envelope in the voter's name." (Ex A, Brater Dec, ¶ 17). Plaintiffs suggest a signature-matching process is not necessary to protect against fraud where there are potential criminal penalties available, yet do

not explain how it would be possible to detect potential cases of fraud if the signature-matching requirement is eliminated. (Doc. 22, Plfs' P.I. Brf, PgID 266). But for those intent on perpetrating a fraud, the threat of a post-election criminal prosecution is unlikely to curtail their bad behavior. While "[s]ignature matching is a questionable practice, [ ] it is hard to think of another way for [election officials] to confirm vote-by-mail voters' identities." *Democratic Exec. Comm. of Fla.*, 347 F. Supp. 3d at 1030. Here, Michigan has and is in the process of implementing additional procedural safeguards to protect voters from potential disenfranchisement.

As discussed above, election officials are instructed through regular trainings that a voter's signature is to be presumed genuine. And the guidance issued in February 2020, which will be re-issued and incorporated into training and educational materials, provides elections officials with standards for reviewing signatures. And, should a mismatch be found, clerks will be instructed to reach out to voters as quickly as possible through election day to cure the error. Finally, Secretary Benson and the Bureau of Elections are in the process of formulating a procedure for curing a ballot rejected for mismatched signatures after an election.

Any substantial burden on the right to vote implicated by the signature-matching process is outweighed by the State's compelling reasons for the practice.

Thus, this process does not unconstitutionally burden the fundamental right of Plaintiffs or Michigan voters to vote and have their votes counted.

b. Arbitrary treatment

Citing *Bush v. Gore*, 531 U.S. 98 (2000), Plaintiffs also argue that Michigan's signature matching process "violates voters' constitutional rights by subjecting their ballots to arbitrary and differential treatment." (Doc. 22, Plfs' P.I. Brf, PgID 263). They allege that voters will be subjected to arbitrary signature matching procedures because every election official will be subjective and apply their own criteria for matching signatures. (*Id.*, PgID 263-264.) But as discussed above, all clerks have and will be provided the same training and instructions for performing signature reviews. While a small element of subjectivity may remain, it is outweighed by the instruction that signatures are presumed genuine, and the subsequent opportunity to rebut or cure a questionable signature both before and after an election. Michigan's process withstands equal protection review.

2. Plaintiffs' due process claims

Plaintiffs argue that Michigan's failure to provide "any pre- or post-deprivation process violates the procedural due process rights of voters whose absentee ballots or applications are rejected solely due to a signature mismatch." (Doc. 22, Plfs' P.I. Brf, PgID 267).

The Due Process Clause is implicated in "exceptional" cases where a state's voting system is "fundamentally unfair." *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010) (quoting *League of Women Voters of Ohio*, 548 F.3d at 478). "Fundamental unfairness may occur, for example, if a state uses non-uniform procedures that result in significant disenfranchisement and vote dilution." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 637 (6th Cir. 2016) (citing *League of Women Voters of Ohio*, 548 F.3d at 478.) "But 'garden variety election irregularities,' do not prove fundamental unfairness." (*Id*.) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1076, 1078–79 (1st Cir. 1978).)

As discussed above, clerks and election officials have always been instructed through training to attempt to contact voters and offer them an opportunity to correct or cure a signature mismatch before an election. Specific written instructions to that effect were issued on February 27, 2020, and those instructions in addition to additional instructions regarding a post-election remedy will be issued going forward. All clerks and local election officials will be subject to the same uniform procedures and expected to follow these instructions. *See* Mich. Comp. Laws § 168.31. The only potential non-uniformity, as discussed in the context of equal protection above, would be the clerk's application of the signature matching standards. But again, this concern would be resolved through the opportunities to cure or rebut the mismatched signature and does not implicate due

process. *See Ne. Ohio Coal. for the Homeless*, 837 F.3d at 637 ("[S]tandards, discrepancies at the margins in how local boards of elections apply statewide provisions is not unusual. Those predictable divergences impact a small number of voters and do not amount to a fundamentally unfair voting system.") Thus, Michigan's process withstands review under the Due Process Clause.

C. Plaintiffs have not shown they will suffer irreparable harm 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). Harm is irreparable if it cannot be fully compensated by monetary damages. *Overstreet v. Lexington–Fayette Urban County Gov't,* 305 F.3d 566, 578 (6th Cir. 2002).

Plaintiffs seek an injunction to protect against future harm. Plaintiff Arrcado states she intends to vote an AV ballot at the general election in November 2020, and she is concerned that her AV ballot may again be rejected for a signature mismatch. (Doc. 22, Plfs' P.I. Brf., Ex. B, Accardo Dec, PgID 304-307.) But a rejection of her ballot in November for a signature mismatch is purely hypothetical at this point. And importantly, such speculation is unwarranted since Secretary

Benson and the Bureau of Elections have now instructed officials as to standards for reviewing signatures, and required officials to contact voters if a mismatch occurs and to advise voters as to how they can cure their application or return envelope. (Ex A, Brater Dec, Ex 3). Under this guidance, even in the unlikely circumstance that Plaintiff Arrcado's return envelope signature is again deemed a mismatch, she will be contacted by her local clerk and advised as to how to correct the deficiency. Thus, a future disenfranchisement is certainly not imminent. Furthermore, the Secretary and the Bureau of Elections intend to issue instructions for the post-election curing of a rejected AV ballot based on a signature mismatch. (Ex A, Brater Dec, ¶21). This instruction will make disenfranchisement based on a signature mismatch even more remote. Under these circumstances, Plaintiff Arrcado has failed to demonstrate a sufficient irreparable injury.

Plaintiff Priorities USA, through its chairman, argues it will be irreparably harmed absent an injunction because its mission to educate and mobilize voters in Michigan will be undermined to the extent it has to expend and divert additional resources to educate voters about the "pitfalls of signature matching." (Doc. 22, Plfs' P.I. Brf., Ex. C, Cecil Dec, PgID 308-313.) But that is not an "irreparable" injury. The Supreme Court has held that

> [t]he key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available

> at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974). Here, Plaintiff Priorities USA's claims rest principally upon allegations of injuries in terms of money, time, and energy. But as argued above, there is no imminent risk of harm through voter disenfranchisement based on the State's signature review process and a preliminary injunction is premature and unnecessary. Priorities USA has not demonstrated an irreparable injury.

Even if Plaintiffs could demonstrate irreparable harm, as argued above Plaintiffs have not demonstrated a *strong* or *substantial* likelihood of success on the merits of their constitutional claims. As the Sixth Circuit has held, "a finding that there is simply no likelihood of success on the merits is usually fatal" to a request for injunctive relief. *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000).

D. The balance of harms weighs in Secretary Benson's favor, and a preliminary injunction is contrary to the public interest.

The remaining factors, "harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken v. Holder,* 556 U.S. 418, 435 (2009). While there will be no irreparable harm to the Plaintiffs without an injunction, the issuance of an injunction will irreparably harm the State and its citizens. The Supreme Court has recognized that "anytime a State is

enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, *3 (2012) (C.J. Roberts in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977). The election laws challenged here were duly enacted by the Michigan Legislature, and they serve an important governmental interest—protecting and enhancing the integrity of Michigan's AV ballot process. The Supreme Court has recognized such interests as compelling. The people of Michigan have a strong interest in having the State's election laws effectuated. *See Maryland*, 567 U.S. at *3.

Moreover, Plaintiffs' request for injunctive relief is unnecessary or at best premature. As Director Brater stated, the Bureau of Elections had already been working with other stakeholders to formulate additional procedural safeguards regarding this process. (Ex A, Brater Dec, ¶¶ 18, 22). Had Plaintiffs, particularly Priorities USA, reached out to Secretary Benson or the Bureau, their concerns could have been heard and likely addressed outside the courtroom. But instead they filed suit. The equities here plainly weigh in favor of Secretary Benson and the public interest will be best served by denying the request for injunctive relief.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendant Michigan Secretary of State Jocelyn Benson respectfully requests that this Honorable Court enter an order denying

Plaintiffs' motion for preliminary injunction, together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

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

Dated: April 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 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/Heather S. Meingast
Heather S. Meingast (P55439)
Assistant Attorney General
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
P64713