

STATE OF MICHIGAN  
IN THE COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D.  
BRADEN GIACOBAZZI, ROBERT CUSHMAN,  
PENNY CRIDER, and KENNETH CRIDER

*Plaintiffs*

Case No. 22-000162- MZ

v.

Hon. Brock Swartzle

JOCELYN BENSON, in her official capacity as  
Secretary of State for the State of Michigan and  
JONATHAN BRATER, in his official capacity as  
Director of the Michigan Bureau of Elections

*Defendants*

\_\_\_\_\_  
Counsel of Record:

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**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

Plaintiffs, by their attorney, state the following in support of this Verified Complaint against Michigan's Secretary of State and Director of Elections:

**SUMMARY**

1. Plaintiffs respectfully request this Court order an emergency injunction that compels defendants to rescind their May 2022 ‘directive’ titled “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers” (Exhibit A) and reissue a new ‘directive’ in strict compliance with MCL §168.733 and other relevant statutes. The guidance present in the ‘directive’ is invalid as it conflicts with statutes, and as such effectively issues rules not properly promulgated through the Administrative Procedures Act. The plethora of harms caused by the flawed guidance were not experienced until the August 2<sup>nd</sup> election, where some of the plaintiffs served as poll challengers. Application of these rules resulted in chaos and disruption at the primary, eventually leading to an evening-long harassment and forceful removal of plaintiff Braden Giacobazzi, (twitter video1). After plaintiff’s forceful removal, a police officer is recorded as confirming the removal was not the result of disorderly conduct, (twitter video2). Instead of diffusing the tension, Defendant Benson, just three weeks ago, mounted a media campaign blitz priming the public for violence at the approaching November 08 election. This urgent matter must be addressed to prevent further propagation of improper “guidance” at the forthcoming training of election inspectors and challengers.

### INTRODUCTION

2. In May, 2022, a directive was published, under seal of the State of Michigan and Secretary of State, titled “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers.” (Exhibit A) This action seeks lawful enforcement of the Legislature’s intent as it applies to rights and duties of election challengers, as set forth in Michigan election law.

3. Instead of faithfully adhering to Michigan election law and the Administrative Procedures Act of 1969, Defendants Benson and Brater via the May, 2022 directive, unilaterally

issued fatally flawed “guidance” to local election officials. This “guidance” includes instructions that are either foreign to or in direct conflict with the clear language of MCL §168.733 and other election law provisions. In such instances, the “guidance” is invalid unless and until promulgated in a manner compliant with the Administrative Procedures Act of 1969.

4. In this case, Plaintiffs express concern that Defendants Benson and Brater, by issuing improper “guidance,” may in effect foment election inspectors to unknowingly trample on the rights of their election challenger counterparts. The disagreement of that which constitutes proper and lawful behavior may give rise to improper allegations of disorderly conduct levied against election challengers.
5. Defendant Benson is further intimidating election challengers into acquiescing their rights and responsibilities through public statements depicting them as violent extremists, and is self-prophesying future election day discontent through distribution of training materials maintaining the same tone.
6. A September 04, 2022 ([realclearpolitics.com](https://www.realclearpolitics.com)) summary of the recent CBS/Major Garrett interview titled ‘Michigan Secretary of State Jocelyn Benson Warns of Election Day “Violence and Disruption,”’ ends with “And also speaking clearly to folks who are thinking about interfering with our elections that the law is clear, and we will seek accountability and consequences for anyone who tries to interfere with a citizen’s right to vote and democracy itself.” ([cbsnews.com](https://www.cbsnews.com))

7. On September 6, 2022, Sarah Reinhardt, Director of Special Projects for the Michigan Department of State (MDOS) held a webinar titled: “Protecting Voting in the Face of Political Violence and Extremism” (See Exhibit B attached).
8. In a recent CNN article published on September 8, 2022, titled: “Michigan GOP leaders encourage rule breaking at poll worker training session,” regarding poll worker training in Michigan, and specifically whether poll challengers are allowed to retain possession of their cell phones, states in part: “The mounting efforts to influence poll workers have prompted concerns over election disruptions, **forcing the state to establish a code of conduct for those individuals**”, said Michigan Secretary of State Jocelyn Benson. Poll workers who don't adhere to the **rules** will be removed "by the local clerk, if they violate the law ... or in any way interfere with the administration of fair and secure elections," Benson told CNN.” ([cnn.com](https://www.cnn.com)) [emphasis added]
9. Also on September 8, 2022, Attorney General Dana Nessel tweeted out the same CNN article and stated, in part: “Those who are considering violating our election laws should think twice about it. You will be held accountable.” ([Dana Nessel on Twitter](https://twitter.com/DanaNessel))
10. A few days prior to this, the Huffington Post uploaded a different summary of the previously mentioned CBS *Face the Nation* Major Garret interview with Secretary Benson (supra #6). Author Nick Vesser extracted this quote from Secretary Benson’s remarks “...the ongoing spread of misinformation...which of course fuels the potential for additional threats, harassment and even violence on election day.” ([huffpost.com](https://www.huffpost.com))
11. Secretary Benson’s public comments lead Plaintiffs to believe they share common concerns that ‘false information’ may cause unnecessary discontent prior to and during the election.

However, in diametric opposition to Secretary Benson’s public assertions, Plaintiffs suggest it is the secretary’s flawed “guidance” – further fueled by inflammatory rhetoric – that is in fact the catalyst precipitating the counterproductive friction. Perhaps this concern will be quickly and amicably resolved once this Court compels Defendants to an awareness of the errors in their “guidance” and the resulting deleterious impacts to what should be a peaceful event (i.e., the election).

12. On the other hand, the secretary of state’s past behavior reveals a troubling pattern wherein she disregards requirements established in law and the legislative process – and instead inserts her own rules by fiat. Unfortunately, this case is nothing new or unique. Senior officials are pushing well past norms and legal boundaries to achieve an unlawful end, only to let the matters be slowly litigated – or at least until no meaningful repair of the damage is possible. This case is an unpleasant reminder of the cache of lawsuits filed against Defendants in just the past few years, discussed further below.

13. The recent flurry of harsh bully pulpit comments (magnified by the media) has prompted Plaintiffs to review and carefully re-evaluate the nearly newborn directive’s text and purpose, and subsequently bring forth this complaint. Plaintiffs find it curious that when the directive was released in May, it was posted silently and accompanied by no press releases. Now, as the election draws near, a propaganda offensive aims to manipulate the general public (and election inspectors) to emotionally support the improper provisions of the directive – before pondering their legality. Unfortunately, the only mandatory public review of published election manuals occurs for those identified (voluntarily or otherwise) as rules.

14. One might question whether there is any other mechanism to constrain the *repeated, perhaps serial* overreach by Defendants Benson and Brater. Will it always be necessary that engaged citizens keep constant vigil and initiate court proceedings to remind officials to faithfully observe the law as their oaths require? Although they seem to have been overlooked or perhaps forgotten, existing statutes already provide guard rails to discourage election officials' overreach by assigning penalties for all who violate, or fail to perform actions mandated by election law statutes. MCL §168.931. No explicit exceptions seem to shield the chief election officer from this statute's reach. The act of (or repeated acts of) disseminating guidance, rules, or directives in which the embedded instructions are objectively NOT "*in accordance with the laws of our state*" seems like it remains under the purview of MCL §168.931. To prevent members of the public from having to file cases which are repetitive in nature, this court should order a book audit of all guidelines produced by the State of Michigan, to ensure compliance with our laws.

15. The right to vote "is an implicit 'fundamental political right' that is the 'preservative of all rights.'" *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 17-18; 740 NW2d 444 (2007).

16. Balanced against a citizen's 'right to vote,' however, "are the constitutional commands given by the people of Michigan to the Legislature" in Const 1963, art 2, Section 4. *In re Request*, 479 Mich at 16. Those constitutional commands provide that the "Legislature shall enact laws 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 voter registration and absentee voting." Const 1963, art 2, Section 4.

17. As Michigan's Supreme Court noted in the nineteenth century, "the purpose of a law enacted pursuant to these constitutional directives 'is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. *It is for the purpose of preventing fraudulent voting.*'" *In re Request*, 479 Mich at 17, quoting *Attorney Gen ex re Conely v. Detroit Common Council*, 78 Mich 545, 559 (1889).

18. As noted by the Court of Appeals in *Taylor v Currie*: The Michigan Supreme Court has interpreted the 'purity of elections' clause Const 1963, art 2, Section 4, to embody two concepts: "first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm. The phrase 'purity of elections' requires...fairness and evenhandedness in the election laws of this state." 277 Mich App 85, 96-97; 743 NW2d 571 (2007), citing *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596; 317 NW2d 1 (1982)

19. When drafting the Michigan Election Law's statute MCL §168.733 governing the rights and responsibilities of election challengers, the Legislature set forth a detailed framework. Despite the Legislature's best efforts, Michigan's secretary of state has taken matters into her own hands, yet again, by issuing "guidance" and procedures that either conflict with MCL §168.733, or are substantive extensions of existing statutes that qualify as 'rules' requiring adherence to the APA, before they have any relevance or 'force of law.'

20. Under MCL §168.31, 'instructions' consistent with statute may be disseminated by the secretary of state without the need to follow the APA process; only rules require the additional burden of APA adherence prior to their adoption. Defendants are required to

"issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL §24.201 to §24.328, for the conduct of elections and registrations in accordance with the laws of this state." Indeed, Defendants are familiar with the Administrative Procedure Act ("APA") – previously using it to pursue legitimization of other election related rule proposals. And, just a mere months ago, this Court held – twice – the Secretary of State issued rules (similarly disguised as a “guidelines”) in violation of the APA. See *Davis v Benson*, Opinion of the Court of Claims, issued October 27, 2020 (Case No. 20-000207-MZ), and *Genetski v Benson*, Opinion of the Court of Claims, issued March 19, 2021 (Case No. 20-000216-MM).

21. Because Defendants failed to comply with the APA when issuing their directive “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers,” this court should find the rules contained within to be invalid, and require the directive to be amended in a manner strictly compliant with Michigan Election Law.

22. Plaintiffs O’HALLORAN, GIACOBAZZI, CUSHMAN, CRIDER, and CRIDER, now file this Complaint seeking declaratory and injunctive relief to ensure the Defendants’ prematurely disseminated directives are rescinded, and that Michigan’s Constitution, Election Law, and Administrative Procedures Act are enforced.

#### PARTIES

23. PHILIP M. O’HALLORAN, M.D., BRADEN GIACOBAZZI and ROBERT CUSHMAN plaintiffs, were each designated to be an election challenger under MCL §168.730 by a political party to inspect ballots and where appropriate challenge improperly performed election procedures during the August, 2022 primary election in the State of Michigan. Each plaintiff actually served in that role.



24. PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI and ROBERT CUSHMAN have been or imminently will be designated as election challengers under MCL §168.730 by a political party to inspect ballots and where appropriate challenge improperly performed election procedures during the November 8, 2022 general election in the State of Michigan.

25. PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI and ROBERT CUSHMAN, as election challengers, therefore have a special and substantial interest in the subject matter of this suit unique from the citizenry at large.

26. PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI and ROBERT CUSHMAN are entitled to a declaration under MCR 2.605 which declares and protects their legal rights as election challengers under the Michigan Election Law which are being infringed upon as discussed below.

27. PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI and ROBERT CUSHMAN have standing to bring this action. *Lansing Schools Education Association v. Lansing Board of Education*, 487 Mich. 349, 792 NW2d 696 (2010).

28. PENNY CRIDER, a plaintiff, is running for election to the State of Michigan House of Representatives to represent the 17th District. She appears on the ballot for the November 8, 2022 general election. KENNETH CRIDER, a plaintiff, is running for election to the Senate for the State of Michigan, to represent the 6th District. He appears on the ballot for the November 8, 2022 general election.

29. PENNY CRIDER AND KENNETH CRIDER, as candidates in the November 8, 2022 general election, have special and substantial interest in a unique manner from the

citizenry at large in ensuring an open, transparent, and lawful election process, which is in part ensured by poll challengers.

30. Additionally, PENNY CRIDER AND KENNETH CRIDER are entitled to a declaration under MCR 2.605 with attendant injunction relief as the allegations in this complaint establish that an actual – as opposed to hypothetical – controversy exists.

31. PENNY CRIDER AND KENNETH CRIDER have standing to bring this action. *Lansing Schools Education Association v. Lansing Board of Education*, 487 Mich. 349; 792 NW2d 696 (2010).

32. JOCELYN BENSON, a defendant, is the currently elected Secretary of State of the State of Michigan and is being sued in that role. In her role as secretary of state, Benson is and must be the "chief election officer of the state" and has "supervisory control over local election officials in the performance of their duties under the provisions of the [Michigan Election Law]." MCL §168.21.

33. JONATHAN BRATER, a defendant, is the Director of the Michigan Bureau of Elections and is being sued in that role. In his role as the Director of the Michigan Bureau of Elections, Benson has vested Brater with the powers and shall perform the duties under the Secretary's supervision with respect to the supervision and administration of elections laws.

#### JURISDICTION AND VENUE

34.A. This action seeks declaratory relief and the issuance of an injunction against state officers. This Court has "exclusive" jurisdiction to "hear and determine any claim or

demand, statutory or constitutional," or any demand for "equitable or declaratory relief ... against the state or any of its departments or officers." MCL §600.6419(1)(a).

B. In addition, this Court has authority to grant injunctive relief under MCR 3.310.

### LEGAL AND FACTUAL BACKGROUND

35. A general election will be held in the State of Michigan on November 8, 2022.

36. Statutory rights and responsibilities of Election Challengers are as follows:

**MCL §168.733 Challengers; space in polling place; rights; space at counting board; expulsion for cause; protection; threat or intimidation.**

(1) The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:

- (a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.
- (b) Observe the manner in which the duties of the election inspectors are being performed.
- (c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.
- (d) Challenge an election procedure that is not being properly performed.
- (e) Bring to an election inspector's attention any of the following:
  - (i) Improper handling of a ballot by an elector or election inspector.
  - (ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.
  - (iii) Campaigning being performed by an election inspector or other person in violation of section 744.
  - (iv) A violation of election law or other prescribed election procedure.
- (f) Remain during the canvass of votes and until the statement of returns is duly signed and made.
- (g) Examine without handling each ballot as it is being counted.
- (h) Keep records of votes cast and other election procedures as the challenger desires.
- (i) Observe the recording of absent voter ballots on voting machines.

(2) The board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable.

(3) Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board. The election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties.

(4) A person shall not threaten or intimidate a challenger while performing an activity allowed under subsection (1). A challenger shall not threaten or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place.

37. Threatening or intimidating an election challenger is a felony, as follows:

**MCL §168.734 Challengers; preventing presence, penalty.**

Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding \$1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

38. Constraints are placed on challengers' conduct per the following:

**MCL §168.727(excerpt):**

(3) A challenger shall not make a challenge indiscriminately and without good cause. A challenger shall not handle the poll books while observing election procedures or the ballots during the counting of the ballots. A challenger shall not interfere with or unduly delay the work of the election inspectors. An individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor.

39. Requirements for handling protected voter data is presented below. By extension, election inspectors are similarly entrusted with disallowing the duplication of protected data from the EPB or QVF supplemental poll list while in their possession.

**MCL §168.509gg(excerpt)**

(1) The information described in this subsection that is contained in a registration record is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246. The secretary of state, a designated voter registration agency, or a county, city, township, or village clerk shall not release a copy of that portion of a registration record that contains any of the following:

(a) The record that a person declined to register to vote.

- (b) The office that received a registered voter's application.
- (c) A registered voter's driver's license or state personal identification card number.
- (d) The month and day of birth of a registered voter.
- (e) The telephone number provided by a registered voter.

40. Counting board instructions are subject to the following:

**MCL §168.765a(excerpt)**

(13) The secretary of state shall develop instructions consistent with this act for the conduct of absent voter counting boards or combined absent voter counting boards. ... A county, city, or township clerk shall make the instructions developed under this subsection available to the public and shall distribute the instructions to each challenger in attendance at an absent voter counting board or combined absent voter counting board. The instructions developed under this subsection are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township.

41. A definition of 'disorderly' conduct is provided in the Michigan Penal Code:

**MCL §750.167(excerpt)**

(1) A person is a disorderly person if the person is any of the following:

...

(e) A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance.

(f) A person who is engaged in indecent or obscene conduct in a public place.

...

(l) A person who is found jostling or roughly crowding people unnecessarily in a public place.

42. Previously promulgated rule clarifying election challenger presence within counting boards and other locations where ballots are received or processed:

**MACR 168.791 Challengers at counting center.**

Rule 21. Challengers designated pursuant to section 730 of the act may be at the counting center and a receiving station, including 1 challenger for each separate receiving, ballot inspection, duplicating, and certifying board and for each computer being used to tabulate the ballots.

History: 1979 AC.

43. On or about May, 2022, Brater, by the power delegated to him by Benson, issued a written directive referenced above to all local election officials outlining lawful conduct expectations in the upcoming elections. The directive is titled: “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers.”
44. Plaintiffs include the following examples where “guidance” in the May 2022 directive contradict statute(s), and as such they are invalid. (Pages 7-8, 21-23)

**Restrictions on Challengers; Challengers may not:**

“Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison’s designee, unless given explicit permission by the challenger liaison or a member of the clerk’s staff.” (P. 21)

“Make repeated impermissible challenges;” (P. 21)

“Use a device to make video or audio recordings in a polling place, clerk’s office, or absent voter ballot processing facility;” (P. 21)

“If serving at an absent voter ballot processing facility, possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day;” (P. 21)

**Warning and Ejecting Challengers**

“If a challenger acts in a way prohibited by this instruction set or fails to follow a direction given by an election inspector serving at the location at which the challenger is present, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected.” (P. 21-22)

“A challenger who repeatedly fails to follow any of the instructions or directions set out in this manual or issued by election inspectors may be ejected by an election inspector.” (P. 23)

**Challenger Appeal of Election Inspector Determinations**

“A challenger may not appeal to the city or township clerk an election inspector’s resolution to a challenge to a voter’s eligibility to vote. Appeals of an election

inspector's resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day." (P.23)

### **Challengers at Absent Voter Ballot Processing Facilities**

"When determining how many challengers each credentialing organization is allowed to have in an absent voter ballot processing facility, clerks must balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility. Clerk considerations in setting the number of challengers each credentialing organization may field in the absent voter ballot processing facility should include:

- The number of processing teams and the number of election inspectors;
- The number of tables or discrete stations at which ballots are processed;
- The physical size and layout of the facility; and
- The number of rooms and areas used to process absent voter ballots within the facility." (P. 7-8)

45. Plaintiff Philip O'Halloran, M.D. has already attested (See Exhibit C attached) to the following violation of his rights as an election challenger at the Aug. 02, 2022 election while serving at the Detroit Huntington Place AVCB (Absent Voter Counting Board):

- 1) Plaintiff was prevented meaningful observation of absentee ballot return envelope markings even after noting that several of these envelopes were being unlawfully altered while being processed by election inspectors.
- 2) Plaintiff was repeatedly bullied into maintaining a minimum 6-foot separation from election inspectors
- 3) Plaintiff was prevented from access to an area where votes were being counted.
- 4) Plaintiff witnessed one of his fellow poll challengers get dragged out of the room, despite not being drunk or disorderly.

46. Plaintiff Braden Giacobazzi has already attested (See Exhibit D attached) to the following violation of his rights as an election challenger at the Aug. 02, 2022 election while serving at the Detroit Huntington Place AVCB (Absent Voter Counting Board):

- 1) Plaintiff was forced to stand in certain places and was denied access to where votes were being counted. He was told he had to stand 6-feet away from poll workers, despite citing a previous ruling from a judge that allows poll workers to approach within 6 feet in order to do their job.

- 2) Plaintiff was repeatedly told by men dressed in black that they don't care what the law is and the only thing that matters is what they tell him to do.
- 3) Plaintiff was routinely harassed and bullied into producing his credentials, but the men with ICU shirts wouldn't disclose their own names.
- 4) Plaintiff had to escalate a challenge through three people to have someone disconnect an e-poll book from the internet.
- 5) Plaintiff was forcefully removed despite not being drunk or disorderly.

### COUNT I - VIOLATION OF MCL §168.733

47. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully stated herein.

48. Benson is the "chief election officer of the state" and has "supervisory control over local election officials in the performance of their duties under the provisions of the Michigan Election Law." MCL §168.21.

49. In that role, it is her mandatory duty to "advise and direct local election officials as to the proper methods of conducting elections" so that the entirety of the provisions contained in the Michigan Election Law, MCL §168.1 et seq, are followed.

50. Additionally, in that role, the instructions disseminated for conduct at counting boards is "*binding upon the operation of an absent voter counting board.*" However, such instructions must first remain "*consistent with this act.*" MCL §168.765a(13).

51. The rights of election challengers, as set forth in MCL §168.733 supra, are within the Michigan Election Law.

52. Benson, and Brater inasmuch as Benson has delegated her election supervisory powers and responsibilities to him, therefore must advise and direct local election officials to not impede any election challenger from conducting his or her statutory duties.



53. Directly contrary to that duty, Benson and/or Brater have directed that local election officials can impede upon election challengers as a condition of entry and performance of their duties in their May, 2022 written directive. Number 44 supra delineated examples of those impediments.

54. Defendants' directive includes no statement affirming election challenger's lawful expectation that "*election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties.*" MCL §168.733(2). Nor does the directive explain that this expectation is supported with serious consequences to violators per "*Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding \$1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.*" MCL §168.734.

Electronic device conveniences are available to election inspectors, so the same sort of efficiency conveniences have to be available to election challengers for their role to have any meaning.

55. Therefore, election challengers may remain ignorant of such expectations and rights unless obtained through other means including review of Legislature enacted laws posted at polling places.

56. Similarly, election inspectors and other election officials may remain ignorant of their legal obligation to protect election challengers in the lawful discharge of their duties, The

felony penalty associated with violation of this obligation is important enough to prominently remind both election inspectors and challengers.

57. This Court is empowered to “declare the rights and other legal relations of an interested party seeking a declaratory judgment.” MCR 2.605.

58. Where an election challenger is appointed and approved in conformity with MCL §168.730, the rights of said challenger are provided and described at MCL §168.733 supra.

59. This Court has previously ruled against Defendants for the same pattern of behavior where improper “guidance” is inserted into official election administration procedures, either due to direct and/or blatant conflict with statute text or through circumvention of the APA. Plaintiffs cite portions of the recently posted document “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers” that suffer the same tainting with unlawful instructions. Similar disposition may apply to other parts of this document, and other documents that have not yet been subject to the same level of scrutiny.

60. In *Carra v. Benson*, (Case No. 20-000211-MZ), Benson issued “guidance” that election challengers must strictly follow social distancing guidelines, by remaining 6-feet away from the corresponding election inspectors. Such instruction negated election challengers’ ability to inspect ballots in a meaningful way, and carry out their lawful duties. Plaintiffs challenged this directive as a violation of MCL §168.733. A stipulated order was agreed upon between the parties that the election challengers’ rights regarding proximity to documents and election officials would be unencumbered when actively observing or issuing a challenge.

61. In *Johnson vs. Benson*, (Case No. 1:20-cv-948) the secretary of state was sued for issuing “guidance” that certain absentee ballot collection and acceptance statutory requirements must be suspended due to ‘expected’ delays in mail delivery – that could impact timely election mail distribution and collection – during the first several months of the Covid19 pandemic. Although an early ruling of this Court was favorable to Secretary Benson, a subsequent ruling by the Court of Appeals resulted in a stipulated agreement whereby Secretary Benson agreed to rescind the entirety of the improper “guidance.”

62. This directive violates MCL §168.733 and other provisions of election law. By statute, a qualified and appointed election challenger may only be denied entry to or expelled from a polling location in two specific circumstances: (1) if there is evidence that the election challenger is drinking alcoholic beverages; or (2) is engaging in disorderly conduct. MCL §168.733(3). ‘Disorderly’ conduct, as defined MCL §750.167 of the Michigan penal code, is presented in 41, supra as it applies to public spaces for this matter.

63. MCL §168.733 therefore does not permit a qualified election challenger to be denied entry to or expelled from a polling location for any of the reasons set forth in Number 44, supra.

64. This directive further violates MCL §168.733 by strictly prohibiting election challengers’ possession of cell phones or other recording devices while present at a counting board.

65. Such a constraint is not found in statute. To the contrary, MCL §168.733(1)(g) provides that election challengers may “*Keep records of votes cast and other election procedures as the challenger desires.*” This must reasonably be interpreted to indicate both that it is completely at the discretion of the election challenger whether or not to create records, and how to create those records. [Emphasis added]

66. Further, MCL §168.733 simultaneously requires that an election challenger has rights to “*Examine without handling each ballot as it is being counted*” and “*Keep records of votes cast and other election procedures as the challenger desires.*” It is not just that “*some votes*” that are to be “*recorded*” at the discretion of the election challenger; it is all votes on “*each ballot as it is being counted*” by the election inspectors. The intent is that the challenger has the same ability to count and accumulate votes as afforded to the election inspectors, if so desired. As electronic tools are now available to election inspectors, so must they be available for election challengers for these rights to have any meaning.

67. As such, the improper ban of cell phone possession (or other recording devices) must be rescinded. Prohibitions for the duplication of protected voter data per MCL §168.509gg remain enforceable for all election officials and election challengers exposed to such information at any location.

68. The directive further violates MCL §168.733 by strictly requiring election challengers to interact with a single designated election inspector or other appointed election official acting as a ‘liaison.’

69. Instructions to this effect are inconsistent with the totality of relevant statute text. MCL §168.733 contains several passages of the text “*an election inspector*” as a general reference to indicate *any* election inspector (i.e., subsections (1)(a), (1)(b), (1)(e), (1)(e)(i), and (1)(e)(iii)). The instance of this passage in subsection (1)(e) “*Bring to an election inspector’s attention any of the following.*” cannot be interpreted to have a unique meaning that differs from the other instances. In this light, this subsection gives election challengers the authority to directly inform *any* election inspector of an issue that has been legitimately

challenged. Immediate resolution of challenges is sometimes critical – especially if an election official is completely unaware of a procedural violation they may be committing. The election challengers’ role is not ceremonial. They are there to actively identify problems so errors are immediately corrected and not allowed to fester long enough to taint election results. This is particularly important at locations where the clerk (occasionally or habitually) fails to recruit the legally required equal numbers of opposing party election inspectors needed to provide the critical net party ‘neutrality’ in the direct election administration roles.

70. Due to this misapplication of statute requirements, the directive’s “guidance” limiting election challenger-initiated communication to appointed ‘liaisons’ must be rescinded and replaced with a statement(s) affirming election challengers’ right to communicate with any election inspector in their vicinity.

71. With some measure of irony, Defendants’ directive also manages to contradict existing rules that were legitimately promulgated in adherence to the APA. Page 7 of the directive states the following: “... *clerks must balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk’s responsibility to ensure safety and maintain orderly movement within the facility ...*” (44, supra)

72. Such instruction conflict with R 168.791 (42, supra) “*Rule 21. Challengers designated pursuant to section 730 of the act may be at the counting center and a receiving station, including 1 challenger for each separate receiving, ballot inspection, duplicating, and certifying board and for each computer being used to tabulate the ballots.*” The election

challenger rights clarified by this legitimate rule cannot be artificially constrained through choice of venues that are 'too small' to accommodate their legally established presence.

73. In addition, requiring an election challenger to comply with these rules as written significantly impedes, frustrates, and potentially makes it impossible for a poll challenger to fully exercise their statutory rights and duties.

**COUNT II – VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT**

74. Plaintiffs incorporate the allegations of the foregoing paragraphs as if full stated herein.

75. In summary, Defendants, Benson and/or Brater have directed local election officials to condition the presence of election challengers upon rules set forth in the directive titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers." Under MCL §168.31, Defendants are required to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL §24.201 to §24.328, for the conduct of elections and registrations in accordance with the laws of this state." Indeed, Defendants, under the powers conferred to them by Michigan's Administrative Procedure Act ("APA"), are certainly familiar with its provisions. And, as this Court recently held, the Secretary of State just months ago issued a rule in violation of the APA. See *Davis v Benson*, Opinion of the Court of Claims, issued October 27, 2020 (Case No. 20-000207-MZ), *Genetski v. Benson*, Opinion of the Court of Claims, issued March 9, 2021 (Case No. 20-000216-MM).

76. As it has done in very similar cases in the past, the Court must recognize that Defendants Benson and Brater have once again issued a rule in violation of the APA within the

embodiment of “The Appointment, Rights, and Duties of Election Challengers and Poll Watchers.”

77. In *Genetski v. Benson*, (Case No. 20-000216-MM), Judge Christopher M. Murray’s opinion and order states “in sum, the standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements amounted to a “rule” that should have been promulgated in accordance with the APA. And absent compliance with the APA, the “rule” is invalid.”

78. Judge Murray arrived at this conclusion with the following explanation: “An agency must utilize formal APA rulemaking procedures when establishing policies that “do not merely interpret or explain the statute or rules from which the agency derives its authority,” but rather “establish the substantive standards implementing the program.” *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). “[I]n order to reflect the APA’s preference for policy determinations pursuant to rules, the definition of ‘rule’ is to be broadly construed, while the exceptions are to be narrowly construed.” *AFSCME v Dep’t of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).”

79. Judge Murray continued with “As for whether the guidance or directive at issue is a “rule” subject to the APA, the Court must look beyond the labels used by the agency and make an independent determination of whether the action taken by the agency was permissible

or whether it was an impermissible rule that evaded the APA's requirements. *AFSCME*, 452 Mich at 9.”

80. In the same opinion, Judge Murray provided more insight into how to distinguish between properly implemented “guidance,” and that which is really a ‘rule.’ He made the following observation when pondering the question of whether or not Secretary Benson’s prior directive requiring clerks to “to apply a presumption of validity to all signatures on absent voter ballot applications and on absent voter ballots” was in fact a ‘rule’: “That this presumption is mandatory convinces the Court that it is not merely guidance, but instead is a generally applied standard that implements this state’s signature-matching laws. See MCL 24.207 (defining “rule”); *AFSCME*, 451 Mich at 8 (describing what constitutes a “rule” under the APA); *Spear v Mich Rehab Servs*, 202 Mich App 1, 5; 507 NW2d 761 (1993) (focusing on the mandatory nature of policies in support of the conclusion that the same constituted a “rule” under the APA).”

81. In this case, the same lines of reasoning apply. The facts lend themselves to an even more linear thought process as the rules presently under contemplation clearly “*do not merely interpret or explain the statute*”; they are in conflict with the statute(s).

82. In *Davis v. Benson*, (Case No. 20-000207-MZ) Judge Murray similarly ruled that another one of Secretary Benson’s directives was a rule that should have been promulgated under the Administrative Procedures Act. This case even more closely mirrors the current matter. Not only were the rules found to be disguised as “guidelines,” they were also providing direction (partially) in conflict with statute instructions. Present Plaintiffs’ case goes one step further by exposing rules in clear opposition to statute text. A key point from



Judge Murray's decision states "A directive that is inconsistent with the law is not a directive but a rule requiring promulgation under the APA. *Jordan v Dep't of Corrections*, 165 Mich App at 27 ("A policy directive cannot be considered an 'interpretive statement' of a rule if it is in fact inconsistent with the rule or contains provisions which go beyond the scope of the rule."). And, compliance with the APA is no mere procedural nicety. Instead, our appellate courts have repeatedly emphasized the importance of the democratic principles embodied in the APA, which requires notice and an opportunity to be heard on the subject under consideration. See *AFSCME*, 452 Mich at 14-15. Thus, the directive is a rule which defendant intends to have enforced as a law, and was required to be promulgated through the procedures of the APA."

83. Defendants' directive "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" must be found illegitimate and rescinded or amended as it was prematurely promulgated prior to completion of all applicable APA requirements.

**PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF**

84. For the reasons set forth in this Complaint, plaintiffs pray for the following declaratory and injunctive relief from this Honorable Court:

- a. That the Court declare that the May, 2022 guidance titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" be rescinded;
- b. That defendants be enjoined from using the May, 2022 guidance to train Election Challengers and Poll Watchers until it complies with Michigan Election Law.

- c. That the Court declare the entirety of MCL 168.733 and MCL168.734 be added to Defendants' updated version of "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers"
- d. That the amendments and corrections be implemented and distributed to all poll challengers, workers and polling places, well in advance of the Nov. 08, 2022 general election, with a Proof of Service filed in this case.
- e. That the following improper passages in "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" are amended as set forth below to attain strict compliance with Michigan Law:

**Restrictions on Challengers; Challengers may not:**

~~"Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff;"~~ (P. 21)

~~"Make repeated impermissible challenges; Make a challenge indiscriminately and without good cause, or interfere with or unduly delay the work of the election inspectors;"~~ (P. 21)

~~"Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility that duplicates or attempts to duplicate protected voter information contained within the ePB (electronic Poll Book) or QVF supplemental sheets (i.e., license numbers or complete birth dates), or captures any images of a voter exercising his or her right to vote;"~~ (P. 21)

~~"If serving at an absent voter ballot processing facility, possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day election challengers will be asked to place all devices capable of network communications into "airplane mode" to eliminate the possibility of incidental communications in violation of their oath of service;"~~ (P. 21)

**Warning and Ejecting Challengers**

~~"If a challenger acts in a way prohibited by this instruction set or fails to follow a direction given by an election inspector serving at the location at which the challenger is present law, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual~~

and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected.” (P. 21-22)

“A challenger who repeatedly fails to follow any of the **lawful** instructions or directions set out in this manual or issued by election inspectors may be ejected by an election inspector.” (P. 23)

### **Challenger Appeal of Election Inspector Determinations**

~~“A challenger may not appeal to the city or township clerk an election inspector’s resolution to a challenge to a voter’s eligibility to vote. Appeals of an election inspector’s resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day.” (P.23)~~

### **Challengers at Absent Voter Ballot Processing Facilities**

“When determining how many challengers each credentialing organization is allowed to have in an absent voter ballot processing facility, clerks must **provide for 1 challenger for each separate receiving, ballot inspection, duplicating, and certifying board and for each computer being used to tabulate the ballots.** ~~balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk’s responsibility to ensure safety and maintain orderly movement within the facility. Clerk considerations in setting the number of challengers each credentialing organization may field in the absent voter ballot processing facility should include:~~

- ~~• The number of processing teams and the number of election inspectors;~~
- ~~• The number of tables or discrete stations at which ballots are processed;~~
- ~~• The physical size and layout of the facility; and~~
- ~~• The number of rooms and areas used to process absent voter ballots within the facility.” (P. 7-8)~~

- f. That the remainder of the document and other published election manuals be similarly audited and amended to attain strict compliance with lawful rule and statute instructions.

RESPECTFULLY SUBMITTED BY COUNSEL:

September 28, 2022

/s/Ann M. Howard  
Ann M. Howard (P49379)  
Attorney for Plaintiffs

SO VERIFIED:

I declare under the penalties of perjury that this Complaint has been examined by me and that its contents are true to the best of my information, knowledge and belief:

September 28, 2022

/s/PHILIP M. O'HALLORAN, M.D.  
PHILIP M. O'HALLORAN,

/s/BRADEN GIACOBAZZI  
BRADEN GIACOBAZZI

/s/ROBERT CUSHMAN  
ROBERT CUSHMAN

/s/PENNY CRIDER  
PENNY CRIDER

/s/KENNETH CRIDER  
KENNETH CRIDER

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<b>Lower Court:</b>	<b>L Ct No.:</b>	<b>COC No.:</b> TEMP-Z3RHM601
<b>Case Title:</b> PHILIP M O'HALLORAN v. JOCELYN BENSON		
<b>Priority:</b> NONE	<b>Filing Option:</b> File Only	

*Filer Information*

<u>Filer</u> Ann Howard 26100 American Drive, Suite 607 Southfield, MI 48034  ahoward@annhowardlaw.com	<u>Attorney</u> Ann Howard, 49379(MI) 26100 American Drive, Suite 607 Southfield, MI 48034  ahoward@annhowardlaw.com
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*Filing Summary*

Filing Type	Filing Name	Fee
Summons and Complaint	Summons	\$150.00
CONNECTED FILING		
Other	Complaint	\$0.00
Other	Exhibit A Secretary of State Guidance May 2022	\$0.00
Other	Exhibit B Violence Training	\$0.00
Other	Exhibit C Affidavit of Philip M. O'Halloran, M.D.	\$0.00
Other	Exhibit D Affidavit of Plaintiff Braden Giacobazzi	\$0.00
Motion (filed with another document requiring a fee)	motion for emergency injunction	\$0.00
Proposed Order/Judgment	proposed order	\$0.00
	NON-REFUNDABLE Automated Payment Service Fee:	\$5.25
	<b>Total:</b>	<b>\$180.25</b>

Alternate Payment Reason: None

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