

**IN THE STATE OF MICHIGAN
COURT OF CLAIMS**

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

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as
the duly elected Secretary of State, and
JONATHAN BRATER, in his official capacity
as DIRECTOR OF ELECTIONS,

Defendants,

and

DETROIT/DOWNRIVER CHAPTER OF THE
A. PHILIP RANDOLPH INSTITUTE,

Proposed Intervenor-Defendant.

RICHARD DEVISSER, MICHIGAN
REPUBLICAN PARTY, and REPUBLICAN
NATIONAL COMMITTEE,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as
the duly elected Secretary of State, and
JONATHAN BRATER, in his official capacity
as DIRECTOR OF ELECTIONS,

Defendants,

and

DETROIT/DOWNRIVER CHAPTER OF THE
A. PHILIP RANDOLPH INSTITUTE,

Proposed Intervenor-Defendant.

Case No. 22-00162-MZ

HON. BROCK A. SWARTZLE

Case No. 22-00164-MZ

HON. BROCK A. SWARTZLE

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**Pro hac vice motion forthcoming*

**DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE
10/13/2022 [PROPOSED] MOTION FOR SUMMARY DISPOSITION**

Proposed Intervenor, by and through its attorneys, moves to dismiss Plaintiffs O’Halloran et al.’s and Plaintiffs DeVisser et al.’s Complaints pursuant to MCR 2.116(C)(8) and (10). Plaintiffs’ claims are barred by laches, and their claims fail as a matter of law for the reasons stated in the accompanying brief.

**DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE’S
BRIEF IN SUPPORT OF ITS 10/13/2022 [PROPOSED] MOTION FOR SUMMARY
DISPOSITION, OR, IN THE ALTERNATIVE, [PROPOSED] AMICUS BRIEF**

INTRODUCTION¹

In the wake of the “crisis” of the November 2020 Election,² the Secretary of State issued *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (the “2022 Manual”). The 2022 Manual is not a novel invention on the Secretary’s part—it simply provides clarity and specific direction where the Michigan Election Law allows, just as its predecessor manuals have done for at least two decades. Plaintiffs, however, purport to be newly affronted by the Manual and ask the Court to rescind the 2022 Manual altogether. Granting Plaintiffs’ requested relief would throw the upcoming general election into even greater chaos than the last.

Proposed Intervenor-Defendant—or, in the alternative, Proposed Amicus Curiae—the Downriver/Detroit Chapter of the A. Philip Randolph Institute (“DAPRI”) is the local chapter of the national 501(c)(3) nonprofit organization the A. Philip Randolph Institute. The A. Philip Randolph Institute, founded in 1965 by A. Philip Randolph and Bayard Rustin, is the senior

¹ This brief was authored by Elias Law Group LLP. Priorities USA intends to fund the preparation and submission of this brief. See MCR 7.212(H)(2).

² The Senate Oversight Committee’s Report on the November 2020 Election in Michigan at 13.

constituency group of the AFL-CIO. DAPRI is a membership organization, and its mission is to fight for human equality and economic justice and to seek structural changes through the American democratic process. DAPRI's members are involved in election protection, voter registration, get-out-the-vote activities, political and community education, legislative action, and labor support activities in the Detroit and Downriver areas of Michigan. Much of DAPRI's work specifically targets voters who are disabled and voters who speak Spanish and Arabic as their first language.

For years, DAPRI has encouraged and recruited its members to serve as poll watchers and election inspectors, which it views as part of advancing its pro-democracy mission. The 2022 Manual protects DAPRI's members who serve in these roles by ensuring against chaos at polling locations and absent voter counting boards. MDP's Amicus Brief at 3. For example, DAPRI's poll watchers are trained to report on challenger-initiated voter intimidation. By setting forth clear and specific instructions for challengers, the 2022 Manual mitigates the risk of such intimidation and, in turn, protects DAPRI's members and constituents, who are often targets of harassment due to their marginalized status. Moreover, the 2022 Manual serves to delineate the differences between challengers and other election personnel, which allows DAPRI's poll watchers and election inspectors to perform their roles without interference and confusion.

If Plaintiffs' requests for relief are granted, DAPRI's members and voter constituents will face additional challenges on Election Day, and they will be less able to fulfill their mission of ensuring a smooth election.

BACKGROUND

DAPRI incorporates the State Defendants' statement of facts in full and writes separately only to underscore that the 2022 Manual has been available to DAPRI's members and the general public, including Plaintiffs, since May of this year. Although none of the instructions conflicts with the Michigan Election Law or deviates from past practice, DAPRI has recruited its election

protection workers with the understanding that the 2022 Manual will lend clarity and specificity to election procedures which had previously led to chaos, confusion, and tension.

LEGAL STANDARD

DAPRI submits this brief as Proposed Intervenor in support of its proposed motion for summary disposition under MCR 2.116(C)(8) and (10). In ruling on a motion under MCR 2.116(C)(8), a court must accept all factual allegations as true and decide the motion on the pleadings alone. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-60; 934 NW2d 665 (2019) (citing *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5)). “A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint.” *Id.* (citing *Feyz v Mercy Mem’l Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006)). A court may grant a motion under MCR 2.116(C)(8) when a claim is “so clearly unenforceable that no factual development could possibly justify recovery.” *Id.* (citing *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004)).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 205-206; 815 NW2d 412, 415 (2012). “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468, 471 (2003).

Plaintiffs Phillip M. O’Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider, and Plaintiffs Richard DeVisser, the Michigan Republican Party, and the Republican National Committee (collectively “Plaintiffs”) cannot maintain this litigation under either MCR 2.116(C)(8) or (10).

In the alternative, pursuant to MCR 7.212(H), DAPRI submits this brief as proposed amicus curiae to address issues raised in these consolidated cases.

DISCUSSION

Plaintiffs' complaints should be dismissed and their requests for relief should be denied. In particular, Plaintiffs' claims are barred by laches and the 2022 Manual is consistent with both the Michigan Election Law and the Secretary's authority.

I. Plaintiffs' claims are barred by laches.

Both sets of Plaintiffs bring claims too late for this Court to consider. It is well settled that a plaintiff must exercise "reasonable diligence" in seeking relief from the courts. See, e.g., *Henderson v Connolly's Est*, 294 Mich 1, 19; 292 NW 543, 550 (1940). The doctrine of laches may bar a plaintiff's action when the plaintiff has failed to exercise due diligence, resulting in prejudice to the defendant. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297, 300 (1998).

Plaintiffs unreasonably delayed raising their claims before this Court. There is no dispute that the 2022 Manual was published on the Secretary of State's website in May 2022. This timing gave Michigan voters, election inspectors, challengers, and poll watchers three months to become familiar with the Manual before the August primary, and six months before the general election. As State Defendants note, the DeVisser Plaintiffs acknowledged viewing the instructions as early as May 31, 2022. Defs.' Motion at 8-9. Plaintiffs also witnessed the impact of the 2022 Manual during the August primary, as Plaintiffs DeVisser, O'Halloran, Giacobazzi, and Cushman allege that they served as election challengers in the August 2022 primary election. *Id.* at 9. One of the DeVisser Plaintiffs even wrote a letter on August 25, 2022, raising questions about one of the credential instructions. *Id.* Despite their apparent familiarity with the text and impact of the 2022 Manual, Plaintiffs inexplicably waited nearly two months after the primary—fewer than six weeks before the general election—to file their complaints.

DAPRI is prejudiced by Plaintiffs' delay. DAPRI has spent time and resources recruiting and training its members to serve as election protection workers under the 2022 Manual, and its members have already been trained on the 2022 Manual over the past five months. Moreover, poll watchers have already applied the Manual's instructions in the August primary election. The 2022 Manual provides much-needed clarity on the rights and duties of election inspectors, challengers, and poll watchers. The Manual allows DAPRI to uniformly train its members to carry out their duties as poll watchers without interference by unauthorized or untrained challengers. As a result, poll watchers can minimize harassment and intimidation of the communities they represent at the polls, who are primarily voters of color, disabled voters, immigrants, and other marginalized citizens. Election Day is now 28 days away, and absentee voting is already underway. Invalidating or drastically altering the 2022 Manual would cause substantial confusion, error, and disruption.

DAPRI also underscores the disruption that would result if this Court were to broadly hold that the Bureau of Elections can never issue binding instructions on clerks without promulgating a rule under the APA. As State Defendants explain, the Bureau has a decades-long practice of issuing, producing, and updating manuals and forms pursuant to its authority under the Election Law, rather than under its separate authority to promulgate rules pursuant to the APA. See MCL 168.31. Reversing this practice less than a month before Election Day would stretch the Bureau's capacity to conduct an orderly election. When an election is imminent and when there is inadequate time to resolve disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016); *Purcell v Gonzalez*, 549 US 1, 5-6 (2006) (per curiam). "That is especially true when a plaintiff has unreasonably delayed bringing his claim." *Crookston*, 841 F3d at 398.

Due to Plaintiffs' unreasonable delay in bringing their claims, the resulting prejudice to Defendants and DAPRI, and the short amount of time until Election Day, Plaintiffs' claims are barred by laches and should be dismissed.

II. The 2022 Manual is consistent with the Michigan Election Law and the Secretary's past instructions.

The Secretary of State, as chief election officer of the state, is broadly responsible for administering elections in Michigan. MCL 168.21. This responsibility includes issuing election administration instructions and supervising local election officials, and the Bureau of Elections has acted on that authority by issuing guidance and instructions concerning election challengers and poll watchers for the last 20 years. *Id.* § 168.31(1)(a), (c). Defs.' MSD at 1. The Bureau of Elections released "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" in 2003 and has since revised the guidance multiple times, including in October 2020. DeVisser Compl, Ex A, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," September 2003; *id.*, Ex B, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," October 2020. The latest revision simply reflects its preparation for the 2022 elections, particularly given the disputes and confusion that arose during the 2020 election.

The 2022 Manual largely involves clarifying language and formatting changes to improve readability. See *id.*, Ex C; Defs.' Motion at 1. Provisions that Plaintiffs claim are new "policy changes" are rooted both in the Michigan Election Law and the October 2020 Manual.

Notably, the DeVisser Plaintiffs ask for a reversion to the October 2020 Manual, even though the 2022 Manual was already used for the August 2022 primary election, while the O'Halloran Plaintiffs seek for the Court to amend and rewrite certain passages of the document as Plaintiffs see fit. A Court-ordered revision of the 2022 Manual would surely be judicial overreach,

and DAPRI will thus focus its analysis below on a comparison of the changes between the October 2020 and May 2022 Manuals and the corresponding statutes in which the Manuals are grounded.

A. The Secretary acted in accordance with the Michigan Election Law when she prescribed and required a uniform credential form.

The Michigan Election Law provides that the Secretary “shall” publish a manual that includes “forms for processing challenges” and “[p]rescribe and require uniform forms” as she “considers advisable.” MCL 168.31(1)(c), (e). The Secretary considered it advisable to prescribe and require a uniform credential form to “ensure uniformity and consistency” and assist election inspectors in clearly identifying challengers who were issued a credential by an authorized entity that reviewed the instructions and provided the required training. See Defs.’ Mot. at 20–21. Just like the dozens of other forms that the Secretary has issued in past decades (e.g., paper voter registration forms), the challenger form does not conflict with MCL 168.732 or any other provision of the Michigan Election Law. *Id.* Furthermore, Plaintiffs suffer no harm from using the uniform credential form rather than their own form; rather, Plaintiffs and other organizations benefit from the uniform credential form, which provides much-needed uniformity and consistency to the challenger credentialing process.

B. The 2022 Manual provision that parties may appoint or credential challengers “until Election Day” is not a departure from current practice.

The Michigan Election Law is silent on when challengers must be appointed and credentialed, while the October 2020 Manual allowed appointments “through” the date of the election. The 2022 Manual instruction “until Election Day” does not conflict with the Michigan Election Law or current practice—“until Election Day” is not “prior to” and does not exclude Election Day itself. See Defs.’ Mot. at 22–23. Requiring the Secretary to undergo rulemaking or obtain judicial approval would contradict and significantly impede the Secretary’s ability to carry out her duties in issuing election administration guidance and instructions.

The Secretary reiterates the expectation that political parties “will prepare ahead of time and not wait until the actual day of the election to train and appoint their challengers” because training is “critical to prevent challengers from mistaking routine election procedures as apparent acts of fraud or conspiracy,” which occurred multiple times during the November 2020 general election. *Id.* at 22.

C. The 2022 Manual provision concerning the challenger liaison interprets, explains, and streamlines the process of making a challenge and does not conflict with the Michigan Election Law.

The Michigan Election Law provides that a challenger may bring certain issues “to an election inspector’s attention,” which does not guarantee a right that a challenger may bring issues to any and all inspectors at any time. MCL 168.733(1)(e). See Defs.’ Mot. at 23. The 2022 Manual serves to clarify the process of raising a challenge and identifies a point of contact for challengers so that issues can be resolved correctly and consistently, while ensuring that election inspectors are able to continue their other duties of assisting voters and tabulating ballots. In fact, while the October 2022 Manual assigned the responsibility of responding to challenges to the precinct chairperson, the 2022 Manual offers more clarity and flexibility because multiple challenger liaisons may be designated.

D. The 2022 Manual’s restrictions on electronic devices in absent voter counting boards and polling places merely reinforces the long-standing prohibition on the use of electronic devices.

The Michigan Election Law is clear and consistent that challengers may not disclose information on the processing or tallying of votes until polls are closed, a prohibition that in some cases may result in the poll watcher or challenger being found guilty of a misdemeanor or felony. MCL 168.765a(9)-(10), *id.* § 168.931(1)(h). To this end, the Secretary has consistently prohibited the use of phones, laptops, tablets, or other electronic devices in an absent voter counting board—both in previous versions of the manual and in the 2022 Manual. To further protect voters’ privacy,

the 2022 Manual clarifies that these devices are prohibited from absent voter counting boards because it would be impossible for election officials to monitor what challengers may be texting or emailing from their electronic devices. See Defs.’ Mot. at 26. The Secretary’s guidance protects the privacy of voters, deters possible voter intimidation, and curbs disruption and chaos at the polls—all pro-democracy goals that DAPRI values and advances—and is well within the Secretary’s authority to issue instructions for absent voter counting boards and polling places. See Defs.’ Mot. at 26–27.

E. The 2022 Manual’s guidance around the recording of impermissible challenges is consistent with Michigan Election Law and responds to a concerning increase in the volume of indiscriminate or impermissible challenges.

The 2022 Manual requires permissible challenges in line with the Michigan Election Law to be recorded—even if the challenge is rejected—and implements requirements for a written report on certain permissible challenges and a clear prohibition on indiscriminate challenges and challenges without good cause rooted in the Michigan Election Law. See MCL 168.733(1)(c)-(d); *id.* § 168.727(1); *id.* § 168.727(2)(a)-(c); *id.* § 168.727(3); see Defs.’ Mot. 28–29. It is not clear what benefit Plaintiffs pursue in the ability to make an unlimited number of unsupported challenges. The 2022 Manual clarification implements the prohibition on interference without unduly delaying the work of election inspectors and thus decreases chaos at polling centers. MCL 168.727(3).

F. The 2022 Manual’s grounds under which local election inspectors may eject challengers interprets and implements the Michigan Election Law.

In November 2020 and in subsequent elections, multiple credential challengers deliberately interfered with and unduly delayed the work of election inspectors. The 2022 Manual interprets and implements the Michigan Election Law’s prohibition on challengers who repeatedly violate their duties by making challenges indiscriminately and without good cause and the prohibition on

interfering with or unduly delaying the work of election inspectors. MCL 168.727(3). The 2022 Manual permits local election inspectors to eject challengers on grounds that align with the Michigan Election Law to better divert resources to assisting voters and addressing permissible challenges at the polling location.

G. The 2022 Manual’s factors for clerks to determine the number of challengers at each absent voter ballot processing facility prevents a misreading of the Michigan Election Law.

The 2022 Manual merely prevents a misinterpretation of the Michigan Election Law, which contains an ambiguity about what comprises a “counting board,” which is used in multiple different ways. MCL 168.730(1). See MDP’s Amicus Brief at 19. The 2022 Manual not only guards against local election officials accidentally denying challengers sufficient access, but also provides consistency and uniformity in interpreting the Michigan Election Law.

III. Issuance of the 2022 Manual was within the Secretary of State’s authority.

The Secretary was not required to adhere to the APA’s procedures before issuing the 2022 Manual. The Secretary has broad statutory authority to issue instructions and publish manuals for the conduct of elections, and the 2022 Manual falls squarely within prescribed exceptions to an APA “rule.”

A. The Secretary has broad authority to conduct elections.

The Legislature provided the Secretary broad authority to ensure the orderly conduct of elections. The Michigan Election Law provides that the Secretary “shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.” MCL 168.21. And the Secretary “shall . . . issue instructions and promulgate rules . . . for the conduct of elections . . . in accordance with the laws of this state,” and “[a]dvice and direct local election officials as to the proper methods of conducting elections.” *Id.* § 168.31(1)(a)-(b). The Secretary is also required by law to “[p]ublish and furnish for the use in each election precinct

before each state primary and election a manual of instructions that includes specific instructions on . . . procedures and forms for processing challenges” and “[p]rescribe and require uniform forms . . . the secretary of state considers advisable for use in the conduct of elections[.]” *Id.* § 168.31(1)(c), (e).

For decades, Michigan Secretaries of State have issued instructions, advice, and directives to local election officials pursuant to this statutory authority. The 2022 Manual is no deviation from this decades-long practice.

B. The Secretary specifically has power to issue instructions without APA rulemaking.

The Legislature granted the Secretary authority to issue instructions without promulgating them as a rule. Under MCL 168.31(1)(a), the Secretary “shall . . . issue instructions *and* promulgate rules pursuant to [the APA] . . . for the conduct of elections” (emphasis added). This plain language indicates a difference between issuing instructions and promulgating rules and suggests that instructions are not subject to the APA’s rulemaking procedures. As State Defendants note, this interpretation avoids rendering the word “instructions” meaningless. Defs.’ Motion at 17. Additionally, the Secretary is required to “[p]ublish . . . a manual of instructions that includes specific instructions on . . . procedures and forms for processing challenges.” MCL 168.31(1)(c). That is exactly what the Secretary did. The 2022 Manual was properly issued as a manual of instructions pursuant to this authority and was not required to be promulgated as a rule.

C. The challenger instructions are not rules and are exempt under MCL 24.207(g) and (h).

Moreover, the 2022 Manual is explicitly not a rule. Under MCL 24.207(g), a “rule” under the APA does not include an “intergovernmental . . . memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.” As State Defendants note, the 2022 Manual does not affect the rights of the public because it is only binding

on clerks under the Secretary's authority as Chief Election Officer to instruct clerks on the proper methods of conducting elections. Defs.' Motion at 19-20. Even if the instructions were binding on challengers and poll watchers, those individuals "perform[] a dual function on Election Day," part of which is "a state responsibility" in protecting the integrity of elections. See *Tiryak v Jordan*, 472 F Supp 822, 824 (ED Pa 1979). The 2022 Manual therefore only applies to clerks and individuals who are performing a state responsibility. It does not "affect the rights of, or procedures and practices available to, the public." MCL 24.207(g).

MCL 24.207(h) also excludes from the definition of a "rule" "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." The 2022 Manual squarely falls within this exception. The Manual summarizes the rights and duties of election inspectors, challengers, and poll watchers and explains the process for issuing and recording challenges. See e.g., *Faircloth v Fa. Indep Agency*, 232 Mich App 391, 404, 591 NW2d 314, 320 (1998) (explaining that agency policies that interpret or explain a statute or rule do not require promulgation under the APA because they are not "rules"). The 2022 Manual simply provides clarity and specific direction where the Michigan Election Law allows, just as its predecessor manuals have done for at least two decades.

CONCLUSION

For the foregoing reasons, the Court should grant Detroit/Downriver Chapter of the A. Philip Randolph Institute [proposed] motion for summary disposition and dismiss Plaintiffs' complaints in their entirety.

Dated: October 13, 2022

Respectfully submitted,

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**Pro hac vice motion forthcoming*

PROOF OF SERVICE

Sarah S. Prescott certifies that on the 13th day of October 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ Sarah S. Prescott
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