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

Defendants.

No. 22-000162-MZ

HON. BROCK A. SWARTZLE

DEFENDANTS' 10/14/2022 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10) AS TO THE O'HALLORAN AMENDED COMPLAINT

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

JOCELYN BENSON, in her official capacity as Secretary of State, and JONTHAN BRATER, in his official capacity as Director of Elections,

Defendants.

No. 22-000164-MZ

HON. BROCK A. SWARTZLE

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DEFENDANTS' 10/14/2022 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (10) AS TO THE O'HALLORAN PLAINTIFFS' FIRST AMENDED COMPLAINT

1. On October 3, 2022, this Court ordered Defendants to show cause why the Court should not grant relief in both of these cases, and to file their answer by close of business on October 11, 2022. The October 3, 2022 order required that any motions for summary disposition must also be filed on that date.
2. On October 11, 2022, Defendants filed their answer to the order to show cause, and also a motion for summary disposition under MCR 2.116(C)(8) and (10).
3. As part of Defendants' arguments, they raised the issue that the O'Halloran complaint was not signed and verified by the plaintiffs, and so this Court lacked jurisdiction over their complaint. (Defendant's Response/Brief in Support of MSD, p 6-8.)
4. In their combined answer to the show cause and brief in support of their motion for summary disposition, Defendants requested to submit supplemental briefing if Plaintiffs filed an amended complaint. (Defendant's Response/Brief in Support of MSD, p 29-30.)
5. On Thursday, October 13, 2022, the O'Halloran Plaintiffs—citing MCR 2.118(A)(1)—filed an amended complaint that sought to cure the signature and verification deficiency of their original complaint.
6. Under MCR 2.117(A)(4), an amended pleading supersedes the former pleading.
7. Because Defendants' 10/11/2022 motion for summary disposition sought the dismissal of a now-superseded complaint, it is necessary to re-file their motion to address the October 13, 2022 amended complaint.

8. Defendants reassert and incorporate the arguments from their 10/11/2022 brief and briefly address three additional claims that were not addressed in the prior briefing due to the defective status of Plaintiffs' original complaint.
9. Defendants move under MCR 2.116(C)(8) and (10) for the dismissal of Plaintiffs' amended complaint on the grounds that the claims are barred by laches, and the claims fail as a matter of law for the reasons stated in the accompanying brief.
10. In addition, because the O'Halloran amended complaint was filed less than 28 days prior to the date of the election affected, the claims in the amended complaint are subject to the rebuttable presumption of laches under MCL 691.1031.
11. Now that the O'Halloran Plaintiffs have refiled with a signed and verified complaint, Defendants can address the merits of their claims.
12. The claims in the O'Halloran amended complaint fail because the challenged instructions are not contrary to statute and are not "rules" under the APA.

RELIEF REQUESTED

For the reasons stated more fully in the accompanying brief, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Honorable Court grant their motion for summary disposition and dismiss Plaintiffs' amended complaint in its entirety.

Respectfully submitted,

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Dated: October 14, 2022

PROOF OF SERVICE

Erik A. Grill certifies that on October 14, 2022, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

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STATE OF MICHIGAN
COURT OF CLAIMS

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No. 22-000162-MZ

HON. BROCK A. SWARTZLE

DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S BRIEF IN SUPPORT OF 10/14/2022 MOTION FOR SUMMARY DISPOSITION

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

JOCELYN BENSON, in her official capacity as Secretary of State, and JONTHAN BRATER, in his official capacity as Director of Elections,

Defendants.

No. 22-000164-MZ

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DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S BRIEF IN SUPPORT OF 10/14/2022 MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF FACTS

Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater submit the instant brief in support of their renewed motion for summary disposition as to the O'Halloran Plaintiffs' amended complaint.

A. History of the Challenger Guidance and Instructions

There have been several iterations of guidance and instructions issued by the Bureau of Elections concerning election challengers over at least the past 20 years. The Department first issued guidance on election challengers in 2003 or earlier. (DeVisser Compl, Ex A, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," September 2003.) The Bureau revised its guidance multiple times, including in October of 2020. (*Id.*, Ex B, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," October 2020.) After certain issues and disputes surrounding the 2020 election, the Bureau again revised its guidance in May of 2022 (the Challenger Guidance). (*Id.*, Ex C, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," May 2022.) In addition to revising certain instructions, the 2022 version made formatting changes for readability—including larger type size and subject headings and a table of contents. (*Id.*, Ex C.) Notably, the 2020 guidance included instructions restricting the use of video recording devices in polling places and prohibiting smart phones or tablets or laptops in absent voter counting boards (AVCBs). (*Id.*, Ex B, p 3, 6-7.) These were not new to the Challenger Guidance issued in May 2022. (Compare *Id.,* DeVisser Compl, Ex C, p 9, 21.)

B. Plaintiffs' Complaints and Procedural History

On September 28, 2022, Plaintiffs Phillip M. O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (the O'Halloran Plaintiffs) filed a complaint against Secretary of State Benson and Director Brater. (O'Halloran Amend Compl, p 1.) Plaintiffs

O'Halloran, Giacobazzi, and Cushman allege that they were each designated to be an election challenger during the August 2022 primary and will be again for the November 2022 election. (*Id.*, ¶23-24.) Plaintiff Penny Crider is a candidate for the House of Representatives in the 17th District. (*Id.*, ¶28.) Kenneth Crider is a candidate for State Senate in the 6th District. (*Id.*, ¶28.)

The O'Halloran Complaint raises two counts. First, they allege a violation of MCL 168.733, based on their contention that the Bureau of Elections' May 2022 Challenger Guidance violates the rights of election challengers. (*Id.*, ¶56.) Second, a violation of the administrative procedures act (APA) of 1969, 1969 PA 306, MCL 24.201 *et seq.*, based on their contention that several so-called "policy changes" included in the Challenger Guidance constituted "rules" that were not promulgated as required by the APA. (*Id.*, ¶75-83.)

Each count appears to be based or focused on the following restrictions they understand to be included in the Challenger Guidance: (1) challengers may not speak with election inspectors who are not the challenger liaison or designee, make repeated impermissible challenges, use a device to make video or audio recordings in a polling place or AVCB, or possess a mobile phone other device capable of sending or receiving information at an AVCB between the opening and closing of polls on Election Day; (2) if a challenger acts in a way prohibited by these instructions or fails to follow a direction given by an election inspector the challenger will be warned or the warning will be waived if the conduct is so egregious that the challenger is immediately ejected. A challenger who repeatedly fails to follow instructions or directions may be ejected; (3) 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 and appeals can only be adjudicated through the judicial process after Election Day; (4) when determining how many challengers each credentialling organization is allowed to have in an AVCB, clerks must balance

the rights of challengers to meaningfully observe the process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility, and clerks may consider the number of processing teams and election inspectors, the number of tables or stations, the physical size and layout of the facility, and the number of rooms and areas used to process ballots within the facility. (*Id.*, ¶44, 53.)

In their motion for emergency declaratory and injunctive relief, the O'Halloran Plaintiffs appear to narrow their challenges to the parts of the guidance concerning ejection of challengers failing to follow the instructions or directions issued by inspectors, speaking to inspectors who are not the designated challenger liaison, balancing how many challengers may be in the AVCB's, and challengers using audio or video recording devices in polling places, clerk's offices, or AVCB's. (O'Halloran 9/28/22 Brf, p 5-6, ¶8a-d.)

In addition, the O'Halloran Plaintiffs make allegations about supposed violations of O'Halloran and Giacobazzi's rights as challengers at the Detroit Huntington Place AVCB during the August 2022 primary. (*Id.*, ¶45-46.) However, the allegations concerning their experiences at the City of Detroit's AVCB do not reference either Defendant. (*Id.*, ¶45-46). Also, as stated in the attached affidavit of Director Brater, the Bureau of Elections issues instructions to clerks and elections officials on the proper method of conducting elections but does *not* hire or directly supervise election inspectors or security personnel. (Defs' 10/11/22 Br, Ex A, Brater Aff ¶13.)

The O'Halloran Plaintiffs request that this Court declare the Challenger Guidance rescinded, declare that the "rules" are invalid because they were not promulgated under the APA, enjoin the Defendants from using the 2022 Challenger Guidance to train challengers or poll watchers, declare that the entirety of MCL 168.733 and 168.734 be added to Defendants' "updated version" of the Challenger Guidance; order that the "amendments and corrections" be

implemented and distributed to all poll challengers and poll workers in advance of the November 8 general election, order that certain passages of the document be "amended" by removing language, and 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." (*Id.*, p 26-27.) The O'Halloran Plaintiffs do not identify any other "election manuals" or documents they wish to be subject to any declaratory or injunctive relief.

October 3, 2022, this Court entered an order consolidating the O'Halloran case with *DeVisser, et al v Benson,* COC Docket No. 22-MZ-164, and directing Defendants to show cause why the Court should not grant relief to the Plaintiffs—and to file any motions for summary disposition—by October 11, 2022. On October 11, 2022, pursuant to this Court's order, Defendants answered the order to show cause and also moved for summary disposition. Among the arguments raised by Defendants in the October 11, 2022 answer and motion was that the O'Halloran complaint was not signed and verified in compliance with the Court of Claims Act and so this Court lacked jurisdiction under MCR 2.116(C)(4). In their combined answer to the show cause and brief in support of their motion for summary disposition, Defendants also made a request to submit supplemental briefing if the O'Halloran Plaintiffs filed an amended complaint. (Defendant's Response/Brief in Support of MSD, p 29-30.)

On October 13, 2022, the O'Halloran Plaintiffs filed an amended complaint, which stated that the only change was to include signed and notarized verifications by the individual plaintiffs. (Amend Compl, p 2-3.) The paragraph numbers and allegations for the amended complaint appear otherwise consistent with the original complaint.

STANDARD OF REVIEW

The decision to grant a request for declaratory relief is within a court's discretion presuming an actual controversy exists. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*,

270 Mich App 110, 126 (2006) ("The language of MCR 2.605 is permissive rather than mandatory[.]")

Summary disposition is proper under MCR 2.116(C)(8) if the plaintiff has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co,* 473 Mich 63, 71 (2005). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332 (2001).

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 (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 (2003).

I. Plaintiffs' claims are barred by laches.

For the convenience of the Court, Defendants adopt and incorporate by reference the arguments on laches included in their 10/11/2022 brief on pages 8-11, as if fully restated here.

But in light of the passage of time since Plaintiff's original September 28, 2022 complaint, Defendants additionally assert that Plaintiffs' claims are further barred by operation of MCL 691.1031, which provides:

> In all civil actions brought in any circuit court of this state affecting elections, dates of elections, candidates, qualifications of candidates, ballots or questions on ballots, there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected. This section shall not apply to actions brought after the date of the affected election.

The date of the general election is November 8, 2022. So, Plaintiffs' October 13, 2022 amended complaint was filed 26 days before the election. Plaintiffs' claims are therefore barred by the presumption of laches under MCL 691.1031.

II. The challenger instructions are lawful and did not need to be promulgated as a rule.

Defendants adopt and incorporate by reference the arguments included in Argument III of their 10/11/2022 brief on pages 11-29, as if fully restated here.

Further, Defendants offer the following responses to specific challenges in the O'Halloran amended complaint that were not previously addressed in the Defendants' earlier brief in light of the defective complaint.

A. Ejection of Challengers

Under the Michigan Election Law, "[a]ny evidence of drinking of alcoholic beverage or disorderly conduct is ***sufficient cause*** for the expulsion of a challenger from the polling place or the counting board." MCL 168.733(3) (emphasis added). The statute, however, does not *limit* the grounds for expulsion to these two types of misconduct. Rather, consistent with the Michigan Election Law, any challenger who repeatedly violates his or her duties to "not make a challenge indiscriminately and without good cause" or to "not interfere with or unduly delay the work of the election inspectors" may be removed. MCL 168.727(3). This was already provided for under the 2020 version of the instructions, and the only difference now is that an election inspector may eject challengers directly instead of only asking that they leave and relying on the precinct chairperson or law enforcement to remove them. By permitting election inspectors to eject challengers when they violate the Michigan Election Law, the instructions facilitate the inspectors' authority to maintain peace, regularity and order, and to enforce the inspectors' lawful commands. MCL 168.678 ("Each board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any primary or election and during the canvass of the votes after the poll is closed.")

Simply put, instructing election challengers that they may be ejected for violating the Michigan Election Law does not contradict the statute—it merely warns election challengers that there are consequences for violating the Election Law and ignoring the warning issued by election inspectors.

Moreover, the May 2022 guidance merely states that "[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." (*DeVisser Complaint,* Exhibit C, May 2022 Guidance, p 22) (emphasis added). This phrase vests authority and discretion in local election inspectors to make determinations based on the specific facts and circumstances at hand. But because it does not obligate local election officials to undertake any specific course of action, the Manual does not have the force of law. It therefore falls within the exception to the definition of "rule" under MCL 24.207(h) (A "rule" does not include"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.")

B. Number of challengers at a counting facility

The May 2022 guidance sets forth factors that clerks should consider when determining the number of challengers each credentialing organization may field in an absent voter ballot processing facility (AVCB). This is not a limitation that goes beyond Rule 168.791, as the O'Halloran Plaintiffs suggest. Rather, it is an aid to the understanding of the Michigan Election law, arising out of statutory ambiguity. The Election law provides that each credentialing organization "may designate not more than 1 challenger to serve at each counting board." MCL 168.730(1). As the May 2022 guidance explains, this is ambiguous because the term "counting board" is used in multiple different ways in the Election Law:

> The Michigan Election Law uses the term 'absent voter counting board' simultaneously to refer to a single absent voter counting board corresponding to an individual in-person precinct; a station within a facility processing absent voter ballots for multiple in-person precincts; the entire facility at which all absent voter ballots are processed for a jurisdiction; and an entire facility at which combined absent voter ballots are processed for multiple jurisdictions in a county. The Michigan Election Law does not expressly state how many challengers may be present at an absent voter counting board or combined absent voter counting board in each of these scenarios.

(*DeVisser* Complaint, Ex C, p 7-8.) In other words, the May 2022 guidance is designed to *prevent* a misreading of the Michigan Election Law that could allow local election officials to deny challengers sufficient access by claiming only one challenger is permitted per facility (or "board") in a larger or combined precinct.

To avoid this, the May 2022 guidance provides that "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." (*DeVisser* Complaint, Ex C, p 8.) The May 2022 guidance thereby expressly recognizes—and requires clerks to consider—a challenger's right to meaningfully observe the process.

Further, both this challenge and the Plaintiffs' arguments about electronic devices in AVCB's overlook distinct authority granted to the Secretary of State regarding instructions for AVCB's. MCL 168.765a(13) provides:

> **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.** The secretary of state shall distribute the instructions developed under this subsection to county, city, and township clerks 40 days or more before a general election in which absent voter counting boards or combined absent voter counting boards will be used. 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.

(Emphasis added). So—within the Michigan Election Law—the legislature has explicitly granted the Secretary the authority make exactly the kind of instructions Plaintiffs seek to challenge here. Because the Secretary has exercised her authority granted to her under the law to issue instructions for AVCB's, Plaintiffs' challenge is unfounded and must be dismissed.

To whatever extent the O'Halloran amended complaint bases this challenge on allegations that clerks "conceivably could" limit challengers by choosing venues too small to allow a single challenger, or venues "ludicrously filled with tables," such claims are entirely hypothetical, speculative, and unsupported by any allegation of any such events ever occurring or even likely to occur in the venues already chosen for counting facilities. *See Perry v Perry,* 299 Mich App 525, 531 (2013) (holding that "courts should not decide hypothetical issues; rather, declaratory relief is only appropriate where the plaintiff has alleged an actual justiciable controversy.")

C. Challenger Appeals of Inspector Determination.

Paragraph 44 of O'Halloran Amended Complaint refers to a section of the May 2022 guidance pertaining to appeal of election of inspector determinations, they have never developed any argument articulating the basis of their challenge to this instruction. On page 23 of the May 2022 guidance, it states:

> 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.

The O'Halloran Plaintiffs have requested that the Court strike this instruction. (Am Cmplt, ¶84(e), p 28.) But Plaintiffs do not allege that this section conflicts with any specific provision of the Michigan Election Law, and they do not make any substantive argument about why this instruction should not be permitted. In essence, the O'Halloran Plaintiffs have left the

Defendants and this Court to guess as to the legal basis for their claims. This is contrary to the Michigan Court Rules requirements for pleadings. MCR 2.111(B)(1). The deficiency of Plaintiffs' allegations essentially requires the Defendants to prove a negative—that the instruction was legal—rather than meeting their burden to allege that it is not.

The absence of any allegations supporting this claim is even more glaring in light of the total absence of any mention in the Michigan Election Law of appealing inspector determinations. MCL 168.727(2) provides for inspectors to resolve challenges, but does not mention or refer to appeals, or any process for challengers to do so. Accordingly, Plaintiffs' challenge here appears unfounded in fact or law.

The amended complaint therefore fails to state a claim for which relief may be granted, and summary disposition is appropriate under MCR 2.116(C)(8).

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Secretary of State Benson and Director Brater respectfully request that this Honorable Court deny Plaintiffs' requested relief and grant Defendants' motion for summary disposition, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

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/s/Heather S. Meingast
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