STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees,

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-Appellants,

Court of Appeals No. 363503

Court of Claims No. 22-000162-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

Emergency relief is requested by 3:00 p.m. on Wednesday, October 26, 2022

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellees,

v

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE, AND JONTHAN BRATER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF ELECTIONS,

Defendants-Appellants.
/

Court of Claims No. 22-000164-MZ

STATE DEFENDANTS' MOTION FOR STAY PENDING APPEAL, MOTION TO WAIVE REQUIREMENTS OF MCR 7.209, AND MOTION FOR IMMEDIATE CONSIDERATION OF MOTIONS

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Defendants-Appellants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater, by their attorneys, Assistant Attorneys General Heather S. Meingast and Erik A. Grill, bring these combined motions pursuant to MCR 7.209(A) and (D), and MCR 7.211(C)(6). Defendants state the following in support of these motions:

1. Despite the November 8 general election being a mere 18 days away, the Court of Claims has ordered Defendants to rescind several instructions concerning the operation of challengers in absent voter counting boards (AVCBs) and in-person polling places. (Ex 1, 10/20/22 Opinion & Order.) These updated instructions were issued to clerks and made publicly available on May 25, 2022, and were effective for the August 4, 2022, primary election. (Ex 2, Defs' MSD Brf, Ex A, Brater Aff, ¶¶ 48-49, Attachment B.)

2. Over the Spring and Summer, the new instructions were incorporated into trainings and training materials provided to the clerks, and included in written, published guidance mailed to the clerks for use at each polling place. (*Id.*, Ex A, ¶¶ 57-58.) Presently, many clerks have begun training their election inspectors, who are principally responsible for ensuring order at polling places and AVCBs, including an orderly challenge process. (*Id.*, ¶¶ 14, 60.)

3. Yet on September 29 and September 30, 2022, the Plaintiffs in these consolidated cases, including the Michigan Republican Party (MRP) and the Republican National Committee (RNC), filed suit—*four months* after the issuance of the instructions—alleging that certain instructions either violated the Michigan

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Election Law or were required to be promulgated as rules under the administrative procedures act (APA), 1969 PA 306, MCL 24.201 *et seq*.

4. These late filings and the subsequent condensed briefing schedule gave Defendants, already busy with election duties, little time to weigh and address the important and complex legal arguments raised by Plaintiffs.

5. The Court of Claims was largely convinced by Plaintiffs' arguments, and in a confusing and inconsistent opinion, the court disregarded factual discrepancies, discounted decades of practice by the Bureau of Elections, rendered statutory powers conferred on the Secretary nugatory, and demonstrated indifference to the importance of a fair and orderly Election Day for voters, challengers, and elections officials across the state.

6. Because the court erred in granting Plaintiffs relief, Defendants have filed a claim of appeal and now move for a stay of the court's order pending appeal.

Stay of Opinion and Order Pending Appeal

7. Defendants request that this Court issue a stay of the court's October 20, 2022, opinion and order pending appeal under MCR 7.209(D).

8. The factors for granting or denying a stay pending appeal are the same as those for granting or denying injunctive relief. Defendants thus have the burden of showing (1) they are likely to prevail on the merits; (2) they will be irreparably harmed if a stay is not issued; (3) the harm to Defendants absent a stay outweighs the harm that the denial would cause Plaintiffs; and (4) there will be no harm to the public interest if a stay is issued. See e.g., *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34 (2008) (addressing factors for granting injunctive relief); MCR

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7.105(G)(describing factors for stays from administrative decisions); *Michigan Coalition of Radioactive Material Users, Inc v Griepentrog*, 945 F2d 150, 153 (CA 6, 1991).

9. For the reasons set forth below, Defendants satisfy these factors, and this Court should grant the motion for stay pending appeal.

Laches

10. As an initial matter, Defendants submit that the Court of Claims erred in granting any relief in this case because the Court should have held Plaintiffs' claims barred by laches.

11. The doctrine of laches "applies to cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252 (2005) (quotation marks and citation omitted).

12. The doctrine is particularly applicable in election matters. See, e.g., *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357 (1972) ("The state has a compelling interest in the orderly process of elections.") See also *Purcell v Gonzalez*, 549 US 1, 5-6 (2006) (per curiam); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). In fact, a "rebuttable presumption of laches" applies to cases brought within 28 days of an election. MCL 691.1031.

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13. In this case, Plaintiffs' lawsuits were filed before the 28th day (albeit only 13 days before that statutory limit), but the court has only just now granted relief, a mere 19 days before the election—clearly contrary to the purpose of the statute of barring court-imposed, last-minute changes to election processes in the month before an election.

14. Regardless, as argued below by Defendants, the facts here plainly demonstrated a lack of diligence on the part of both sets of Plaintiffs in bringing their claims *four months* after the instructions were issued. (Ex 2, Defs' 10/11/22 MSD Brf, p 8-9, Ex A, Brater Aff, ¶¶ 50-54; Ex 3, Defs' 10/17/22 Reply, p 1.)

15. The DeVisser Plaintiffs (Richard DeVisser, the MRP, and the RNC), argued that they only became aware of at least one instruction—the credential form requirement—on the day of the August 2, 2022, primary.

16. It is undisputed that Michigan RNC staff knew of the instructions in May 2022. (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶¶ 51-53, Attach C.) But MRP and RNC represented to the court that they only became aware of the instructions in August. However, even assuming the MRP and RNC somehow forgot they became aware of the instructions in May 2022 or failed to communicate that knowledge amongst themselves, they made no subsequent effort to check the Secretary's website in May, June or July, or inquire as to whether there were any changes to the challenger instructions. The test for diligence is the timing of their lawsuit. By their admission, they had knowledge of at least the credential form requirement the night of the August 2 primary but then waited 59 days to file their

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lawsuit. These sophisticated parties had the whole summer to read the guidance and file suit; but they sat on their hands.

17. The O'Halloran Plaintiffs (Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider and Kenneth Crider) admitted that Plaintiff O'Halloran knew of the updated instructions in July 2022, and in fact complained to the Secretary of State by email of the instructions on July 20 and July 22. (O'Halloran 10/14/22 Resp Brf, pp 4-5.) They argued they could not find legal counsel until September but did not explain what efforts they made to do so during the 70 or so days they waited to file suit. (*Id.*)

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18. Despite these facts, the Court of Claims concluded that Plaintiffs had been diligent. The court noted that Defendants "did not highlight or redline the changes" to the instructions apparently accepting Plaintiffs suggestion that it was too burdensome to read a 27-page document to discover the updates for themselves. (Ex 1, Opinion & Order, p 26.) The court then focused on the fact that the O'Halloran Plaintiffs provided *notice* to the Secretary of their disagreement with the instructions in July and that the DeVisser Plaintiffs did so, at least with respect to the credential form, in late August. (*Id.*, p 26.)

19. But the test for laches is not whether a plaintiff provided timely "notice" of his or her potential claims, but rather whether a plaintiff has timely "commenced" litigation. *Wayne Co*, 267 Mich App at 252. Here, waiting over *four months* to file these cases a mere 5 ½ weeks before the election at which the challenged

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instructions are to be applied is patently unreasonable. The court erred in concluding otherwise.

20. The court further erred in concluding that Defendants were not prejudiced by Plaintiffs delay. The court determined that because the instructions are not law, do not create any mandatory requirements, and are simply "instructive" there is no prejudice to Defendants. (Ex 1, Opinion & Order, p 27.)

21. But the instructions are binding on local clerks, MCL 168.21, who in turn have the obligation to train all election inspectors on Election Day procedures pursuant to those instructions, including the procedures related to challengers and the challenge process. And, as Defendants pointed out, there has already been significant training and incorporation of the new instructions into written guidance sent to the clerks for use at all precincts and AVCBs, and clerks have already begun training election inspectors. (Ex 2, Defs' 10/11/22 MSD Brf, p 10-11, Ex A, Brater Aff, ¶¶ 56-59; Ex 3, Defs' 10/17/22 Reply, p 1-2.) Even under the incorrect assumption that Defendants' training and direction is not binding on clerks, such training and direction has already been given and cannot reasonably or effectively be reversed under this timetable.

22. The court also stated that "[t]heoretically, the November 2022 general election can take place without any challenger guidance." (Ex 1, Opinion & Order, p 27.) But this statement totally ignores the Legislature's mandate to the Secretary that she "*shall* . . . [*p*]*ublish and furnish* for the use in each election precinct *before each state* . . . *election* a *manual of instructions* that includes . . . procedures . . . for

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processing challenges." MCL 168.31(1)(c). The instructions at issue here were issued pursuant to this mandate. It is certainly a contradiction for the court to demand that Defendants follow with exactness some election statutes, but then conclude that they need not comply with § 31(1)(c).

23. Further, the theoretical possibility of holding elections without any guidance does not mean that the Defendants' ability to conduct an orderly election would not be prejudiced by removing or revising instructions at the last minute before an election.

24. Finally, the court also suggested there was no evidence of prejudice to Defendants because it would not be time consuming or onerous for Defendants to simply post revised guidance in the form of a PDF to the state's website, which could then be "widely disseminated in a matter of minutes, if not seconds." (Ex 1, Opinion & Order, p 27.) Interestingly, although the parties, specifically MRP and the RNC, were not expected to have read the instructions on the website in a timely manner, the court apparently expects that all other impacted individuals will do so.

25. But the Director of Elections attested to the prejudice caused by Plaintiffs' delay. (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶¶ 56-60.) Director Brater expressly stated that while the online document could be changed, "the Bureau of Elections cannot publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date and cannot further provide in-person trainings in this short period before the election," and that "changing training and

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manuals at this late date would also cause significant confusion among clerks and election inspectors." (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶¶ 59-60.)

26. Indeed, it is not just the clerks who would need to be informed and trained, but the thousands of election inspectors that will work on election day, many of whom have already received their training for the upcoming election. Training must also be given to the many organizations and the thousands of challengers who are already lined up to participate on Election Day. It would be impossible to ensure that changes to the process, even going back to the prior guidance, would be implemented uniformly in the thousands of election precincts and AVCBs across the state. (*Id.*)

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27. The court's Opinion and Order did not mention—let alone address—the Director's undisputed affirmation before concluding that there would be no prejudice to the Defendants.

28. The Court of Claims thus erred when it determined that Defendants would not be prejudiced by Plaintiffs' delay in bringing suit. And because Defendants demonstrated both an unreasonable delay by the Plaintiffs in bringing suit and prejudice to Defendants, the Court of Claims erred when it failed to apply laches to bar Plaintiffs' claims.

Defendants have a substantial likelihood of success on the merits.

29. The Court of Claims erred in granting, in part, Plaintiffs' requests for declaratory relief and ordering Defendants to rescind, or modify and reissue, the challenger instructions.

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30. The court either ignored the authority the Legislature has expressly conferred on the Secretary to act outside of promulgating rules or construed her authority so narrowly as to render the provisions meaningless.

31. Under § 31(1), the Secretary "shall" (a) "*issue instructions* . . . for the conduct of elections . . . in accordance with the laws of this state," (b) "[*a*]*dvise and direct* local election officials as to the proper methods of conducting elections," (c) "[*p*]*ublish and furnish* for the use in each election precinct before each state . . . election a *manual of instructions* that includes . . . procedures and forms for processing challenges," and (e) "[*p*]*rescribe and require* uniform forms . . . the secretary . . . considers advisable for use in the conduct of elections[.]" Also, under § 765a(13) the Secretary "*shall develop instructions* consistent with this act for the conduct of [AVCBs]," which "are binding upon the operation of" AVCBs. These sections provide overlapping authority for the Secretary's updated instructions.

32. Further, none of these mechanisms are tethered to promulgation under the APA. And when the Secretary utilizes these mechanisms, she is exercising her "permissive statutory power, although private rights or interests are [or may be] affected." MCL 24.207(j). This is a specific exception from rulemaking under the APA.

33. **<u>The credential form</u>**: The updated instructions require that the written "authority" a challenger must have in order to be present at a polling place or AVCB, MCL 168.732, be in the form prescribed by the Secretary. (Ex 1, Opinion & Order, Court's Exhibit, p 4-5.)

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34. The Court of Claims ruled in favor of Plaintiffs' challenge, holding that the Michigan Election Law did not grant the Secretary of State the authority to mandate a uniform challenger-credential form. (Ex 1, Opinion & Order, p 15.)

35. In reaching this conclusion, the lower Court relied entirely on its analysis of MCL 168.732 and concluded that because the Legislature established three criteria for challengers' "evidence of right to be present," the Secretary could not add a "fourth"—the requirement to use a mandated form. (*Id.*).

36. Notably, the Court's analysis on this point only refers to MCL 168.31(1)(e), which provides the Secretary with general authority to, "Prescribe and require uniform forms . . . the secretary of state considers advisable for use in the conduct of elections[,]" (*Id.*).

37. But, although it was cited in Defendant's briefs, (Ex 2, Defs' 10/11/22 MSD Brf, p 13, 21, 24, 29; Ex 3, Defs' 10/17/22 Reply, p 5), the lower Court failed entirely to address the Secretary's separate—and specific—authority to "publish and furnish for the use in each election precinct before each state primary and election *a manual of instructions that includes procedures and forms for processing challenges*" under MCL 168.31(1)(c) (emphasis added).

38. The Legislature plainly and explicitly granted the Secretary the authority to develop and require forms for "for processing challenges," and that readily includes the form of the credential the challengers use to demonstrate their right to be present as a challenger.

39. Conversely, MCL 168.732 makes no explicit provision that parties, organizations, or committees of citizens desiring to authorize challengers have any

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right to make up their own form. Instead, MCL 168.732 merely provides what information must be included in the credential document.

40. The Plaintiffs have never claimed that the form issued by the Secretary failed to comply with those requirements.

41. The Court of Claims' opinion and order failed to even address the Secretary's explicit authority to make forms for processing challenges under MCL 168.31(c)—let alone explain why the Legislature's grant of that authority was insufficient to prevail over Plaintiffs' naked reliance on past practice to support an entitlement to make up their own credentials.

42. Although a uniform credential form had not been issued in the past, there is no support in the Michigan Election Law that the Plaintiffs or their authorizing organizations have an inviolable right to make up their own credentials, or that the Secretary of State is prohibited from mandating the use of a form to facilitate the orderly processing of challenges by authorized challengers.

43. Indeed, the lower court's opinion even recognized that a uniform credential form would expedite the credentialing process and noted that this was attested to in the affidavit of the Director of Elections. The court even went so far as to note that there was "much to commend with such a form, in terms of clarity and administrative efficiency." (Ex 1, Opinion & Order, p 15.)

44. Nonetheless, the lower court dismissed the Defendants' decision that such a credential form was desirable because it believed the Legislature had not provided authority to mandate a form. (*Id.*).

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45. Because MCL 168.31(1)(c) expressly provides the Secretary with the authority to issue forms for processing challenges, the lower court's conclusion was simply wrong.

46. By failing to give effect to the Legislature's grant of authority in § 31(1)(c) and instead considering only the broader general authority for election forms under § 31(1)(e), the Court of Claims improperly rendered § 31(1)(c) nugatory or surplusage. See, e.g., *Hanay v Dep't of Transp*, 497 Mich 45, 57 (2014) (courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.").

47. Indeed, under this logic, notwithstanding the Secretary's explicit authority to develop forms under the Election Law, the Secretary can never implement a uniform (that is, used by all) election form if the Legislature has prescribed *any* elements to be included in that form. It is hard to imagine what form could ever be produced under this standard, since election forms by definition include elements. Essentially the only uniform forms the Secretary could produce would be blank pieces of paper.

48. For these reasons, the Secretary's instruction and prescription for a uniform credential form does not violate the Michigan Election Law and was instead a proper exercise of her authority under § 31(1)(c) or (e) to require a form for processing challenges, that did not need to be promulgated as a rule. See MCL 24.207(j). The Court erred in concluding otherwise, and Defendants are likely to prevail on appeal.

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49. **<u>The Challenger Liaison</u>:** The updated instructions require that challengers communicate only with the election inspector, clerk staff, or chairperson of an AVCB who has been designated a "challenger liaison," unless instructed otherwise. (Ex 1, Opinion & Order, Court's Exhibit, p 5-6.)

50. Each precinct has a precinct chair, which is typically the most experienced or senior election inspector, and election inspectors perform different tasks and have different levels of experience. (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶43.)

51. The May 2022 challenger manual instructed that the proper method of handling challenges was to direct challengers to a designated liaison, who would be best equipped to answer and respond to challenges correctly and consistently. (*Id.*, ¶44). An election inspector designated as a liaison must respond to the challenge. (*Id.*)

52. The Court of Claims concluded that the Michigan Election Law does not expressly authorize the Secretary to designate election inspectors as "challenger liaisons" and restrict challengers from communicating only to inspectors that are so designated. (Ex 1, Opinion & Order, p 17.)

53. As with the court's holdings regarding the other challenges, it fails to clearly articulate what legal standard is being applied to determine that the challenger liaison instruction instead constitutes a "rule" that required promulgation under the APA.

54. In a footnote, the court cited to the Court of Claims' decision in *Davis v Benson,* Court of Claims Docket Nos. 20-000207-MZ and 20-000208-MZ as a basis

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for dismissing the Defendants' assertion of permissive authority outside of APA rulemaking. (*Id.*, p 10-11.)

55. But the facts and legal authority relied upon by the Secretary in the *Davis* case are readily distinguishable and have no application here. *Davis* concerned an instruction by the Secretary of State restricting firearms at polling places, for which the Secretary cited to her authority under MCL 168.31(1)(a).

56. But here, the Secretary cited to the more specific authority granted to her by the Legislature under MCL 168.31(1)(c) and 168.765a(13).

57. The court observed generally that the Michigan Election Law gives the Secretary authority to issue "explanatory instructions and forms." (Ex 1, Opinion & Order, p 12.)

58. The court concluded—without citing specific authority—that the Secretary may only issue instructions that "are consistent with, and do not add to or omit from, any provision of the Michigan Election Law." (*Id.*).

59. But instructions that merely repeat or rephrase what is already in the statute would be of no use, and proper instructions necessarily require explanation of how statutory requirements are to be applied in practice.

60. Moreover, the court's analysis neglected to consider the authority cited by the Defendants in their briefs that supported the Secretary's authority to issue instructions on the specific topics of processing challenges, MCL 168.31(1)(c), and conducting AVCBs, MCL 168.765a(13).

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61. Although it quoted § 31(1)(c) early on, the opinion never addresses or incorporates that section into its analysis or reasoning. (Ex 1, Opinion & Order, p 11.)

62. As argued earlier, § 31(1)(c) explicitly gives the Secretary the authority to issue instructions setting "procedures and forms for processing challenges." Establishing a designated point of contact for challengers—i.e., a "challenger liaison" falls squarely within the scope of "procedures for processing challenges."

63. Plaintiffs' claims—and the Court of Claims' opinion—relied on MCL 168.733(1)(e), which provides that a challenger may, "[b]ring to an election inspector's attention" certain violations of election law.

64. But a challenger bringing an issue to the attention of "an election inspector" is not the same thing as *any* election inspector at any time.

65. An election inspector designated as a challenger liaison is still "an election inspector" under MCL 168.733(1)(e).

66. The Michigan Election Law does not guarantee challengers the right to bring challenges to any election inspector they choose.

67. The court concluded the Secretary's instruction "restricts a challenger's ability to bring certain issues to *any* inspector's attention." (Ex 1, Opinion & Order, p 17) (Emphasis added.)

68. The court's opinion changed "an inspector" under § 733(1)(e) to "any inspector," and thus added a word to the statute that is not there. Thus, at the same time as the court says that Defendants' ability to issue instructions and directions is limited to repeating the exact words of the Michigan Election Law, the

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court itself invalidates Defendants' instructions and directions on the proper method of handling challenges through the court's own change to the text of the Election Law, replacing the word "an" (challengers must be able to bring their concerns to the attention of an election inspector, i.e., at least one) with the word "any" (challengers can bring to the attention of all election inspectors at all times).

69. The Michigan Supreme Court has held clearly and often that courts may read nothing into an unambiguous statute. See *Halloran v Bhan*, 470 Mich 572, 577 (2004); *Neal v Wilkes,* 470 Mich 661, 670 n 13 (2004)("Plaintiff…is adding words to the act that simply are not there."); *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146 (2002)(judiciary's role includes interpreting statutes, not writing them.")

70. The Court of Claims' insertion of the word "any" into § 733(1)(e) was erroneous and contrary to principles of statutory construction.

71. The court's opinion also failed to recognize any distinction or interplay between the authority to establish procedures for processing challenges, MCL 168.31(1)(c), and the additional specific authority granted to the Secretary by the Legislature in MCL 168.765a(13) to establish instructions for the conduct of AVCBs.

72. The authorities granted to the Secretary under §§ 31(1)(c) and 765a(13) are overlapping, but they are not identical or interchangeable. They each have their own meaning, but the lower court failed to recognize any distinction between the Secretary's authority to issue instructions for "processing challenges" at all precincts and polling places under Section 31(1)(c), and the additional specific authority granted to the Secretary under Section 765a.

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73. MCL 168.765a(130 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.]

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74. MCL 168.765a(13) specifically and explicitly provides that the Secretary may issue instructions "for the conduct" of AVCBs, and that those instructions are binding on the operation of the boards.

75. So, the Legislature expressly granted the Secretary the authority to issue binding instructions for the operation of AVCB's that is legally distinct from the authority granted under MCL 168.31(1)(c).

76. Establishing a designated election inspector for receiving and responding to challenges is easily within the scope of "the conduct of [AVCBs]" under § 765a(13), and thus readily within the Secretary's authority to issue binding instructions upon the boards.

77. The court's analysis was limited to whether § 733 expressly provided for a "liaison," and after concluding that it did not, the court concluded that there was no authority for such instruction.

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78. But § 733 also does not prohibit the designation of an inspector as a point of contact for election challengers.

79. Similarly, § 733 does not describe or define the manner in which a challenger brings an issue "to an election inspector's attention." Applying the lower court's reasoning that anything not explicitly stated in the statute cannot be part of an instruction, the Secretary would be prohibited from instructing that challengers may not use whistles or air horns to get the inspector's attention.

80. Nonetheless, because the court examined only § 733 and that section only addresses challenger actions, the court's analysis failed to consider the Secretary's authority under § 765a(13) to issue binding instructions to AVCBs that provide for how they should receive and respond to challenges.

81. Simply put, a challenger "may" bring certain issues to "an inspector," but nothing in the Michigan Election Law prohibits an election inspector from directing that challenger to another election inspector who will respond to their challenge.

82. So, even if the Secretary somehow lacked authority under MCL 168.31(1)(c) to instruct that challenger liaisons should be designated at polling places, that is not dispositive as to whether Secretary might nonetheless have the authority to do so for AVCB's under MCL 168.765a(13).

83. The court failed to reconcile the overlapping—but distinct—authorities granted to the Secretary regarding the operation of AVCB's, and so its conclusions are incomplete and legally unsound.

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84. By failing to consider the Secretary's authority to issue instructions either for "processing challenges" under MCL 168.31(1)(c) or for AVCBs under MCL 168.765a(13), the Court of Claims analysis was erroneous.

85. For these reasons, the Secretary's instruction on challenger liaisons does not violate the Michigan Election Law and was instead a proper exercise of her authority under § 31(1)(c) to issue procedures for challenges and under § 765a(13) to issue binding instructions regarding the conduct of AVCBs, that did not need to be promulgated as a rule. See MCL 24.207(j). The court erred in concluding otherwise, and Defendants are likely to prevail on appeal.

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86. **Prohibition on phones in AVCBs:** The updated instructions provide that electronic devices are prohibited at AVCBs during sequestration:

> No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day. A challenger who possesses such an electronic device in an absent voter ballot processing facility between the beginning of tallying and the close of polls may be ejected from the facility. [Ex 1, Opinion & Order, Court's Exhibit, p 9.]

The instructions also provide that challengers may not "[u]se a device to make video or audio recordings in a . . . absent voter ballot processing facility." (*Id.*, p 21.) The only exception to the prohibition is that a challenger may use his or her phone to display credentials but must then secure the phone elsewhere outside the processing area. (*Id.*, p 5.)[1] Previously, and for many years, the guidance prohibited the use of such devices at AVCBs but did not prohibit possession.

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[1] As explained in the Secretary's letter brief filed in response to the court's specific questions, the prohibition applies to election inspectors and other officials, with the

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87. The complete ban inside AVCB facilities is grounded in statutes that prohibit the sharing of information learned at the AVCBs before the polls close. MCL 168.765a(9) requires that a "challenger, or any other person at an" AVCB "at any time after the processing of ballots has begun shall take and sign" the following "oath":

> "I (name of person taking oath) do solemnly swear (or affirm) that *I shall not communicate in any way any information relative to the processing or tallying of votes that may come to me while in this counting place until after the polls are closed*.". [Emphasis added.]

88. And MCL 168.765a(10) thereafter provides, in part:

> Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. . . . *A person . . . who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony*. [Emphasis added.]

89. The oath statute prohibits a challenger from "communicat[ing] in *any way* [for example, by text message, email, video, or an actual phone call] any information relative to the processing or tallying of votes that may come to [the challenger] while in [the] counting place until after the polls are closed." MCL 168.765a(9). And the penalty statute makes it a felony to disclose how any absent voter ballot was voted before the polls close. MCL 168.765a(10).

90. The Court of Claims concluded that the prohibition on possession conflicted with the Michigan Election Law, which does not specifically preclude possession of a

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exception of certain "authorized" individuals not subject to the sequestration requirement. (Ex 4, Defs' 10/14/22 Letter.)

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phone in an AVCB and so the ban was a policy that needed to be promulgated as a rule, or at least be permitted by a promulgated rule. (Ex 1, Opinion & Order, pp 20-21.) The court noted that the Legislature had amended § 765a in 2018 and 2020 and could have implemented a ban on phones and other devices had it wanted to but did not, relying instead on the oath, sequestration, and criminal penalty provisions as sufficient prophylactic measures. (*Id.*, p 20.)

91. But the Court of Claims erred as a matter of law in reaching its conclusion.

92. First, the rights of challengers are generally provided for by statute. See MCL 168.727, 168.730 through 168.734. As the court noted, nowhere in these statutes has the Legislature precluded the possession of a phone at an AVCB. But neither has the Legislature provided that challengers may possess (or use) phones at an AVCB. In other words, challengers have no statutory right to possess (or use) a phone at an AVCB.

93. The Legislature has, however, clearly prohibited the communication in "any way" of prohibited information from within an AVCB during sequestration. MCL 168.765a(9)-(10).

94. The Legislature has also authorized the Secretary to "[p]ublish and furnish for the use in each election precinct before each state . . . election a manual of instructions that includes . . . procedures . . . for processing challenges[.]" MCL 168.31(1)(c). And the Secretary "shall develop instructions consistent with this act for the conduct of [AVCBs]," which "are binding upon the operation of" AVCBs. MCL 168.765a(13).

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95. Because electronic devices like cell phones make it easy to communicate information from within an AVCB, they pose a threat to the security of the information present at AVCBs, most significantly in what direction absent voter ballots may be trending. MCL 168.765a(10). And because it would be impossible for election inspectors to police what challengers may be texting or emailing from their electronic devices, the Secretary determined, pursuant to her authority under §§ 31(1)(c) and 765a(13), that an additional proper method of enforcing the statutes is to prohibit these devices to help ensure that no unlawful communications are made.

96. The court suggested in its opinion that "[i]f an election inspector or other official has a *reasonable suspicion* that a person has used [a device] to communicate prohibited information, that person is subject to removal and potential criminal prosecution." (Ex 1, Opinion & Order, p 22) (emphasis added.) But it is completely unrealistic to burden election inspectors with the responsibility of determining what circumstances will support a "reasonable suspicion"—whatever that means here. Further, in busy AVCBs it will be impossible for inspectors to spend time "policing" challengers with phones. The court's suggested remedy invites chaos, rather than order.

97. The Secretary clearly had the space to adopt the prohibition on phones and other devices. Our Supreme Court has recognized, a "legislature legislates by legislating, not by doing nothing, not by keeping silent." *McCahan v Brennan*, 492 Mich 730, 749 (2012) (cleaned up). And with respect to a right to possess phones or other devices at an AVCB, the Legislature has not created such a right generally.

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The Legislature's inaction is significant in that it certainly did not foreclose the Secretary's exercise of her authority. See, e.g., *Zivotofsky ex rel. Zivotofsky v Kerry*, 576 US 1, 10 (2015) (explaining that "in absence of either a [legislative] grant or denial of authority," legislative inaction may "invite the exercise of executive power").

98. The prohibition on phones is further justified under the Secretary's authority to direct clerks on the proper method (in this case prohibiting phones) of conducting elections (in this case ensuring improper communication does not occur). MCL 168.31(b). The court criticizes this as a "prophylactic" measure, but such critique could apply equally to *any* method of conducting an election if the method directed is not merely restating the exact words of the Michigan Election Law.

99. For example, the Bureau instructs clerks that other individuals must keep their distance and may not look over the shoulder of a voter while the voter completes a ballot or places a ballot in a tabulator. The Michigan Election Law does not expressly say "an individual cannot look over a voter's shoulder when that individual completes the ballot" but it is an obviously necessary method of ensuring secrecy of the ballot, see Const 1963, art 2, § 4(1)(a), and ensuring a voter is not intimidated. Under the court's logic, the Bureau must instruct clerks that individuals must be allowed to look over a voter's shoulder as long as they promise to close their eyes or look to the side.

100. For these reasons, the Secretary's prohibition on electronic devices such as phones does not violate the Michigan Election Law and was instead a proper exercise of her authority under § 31(1)(b) and (c) and § 765a(13), that did not need

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to be promulgated as a rule. See MCL 24.207(j). The court erred in concluding otherwise, and Defendants are likely to prevail on appeal.

101. **Impermissible Challenges:** The updated instructions provide that the challenger liaison will determine if a challenge is "permissible" and if it is a permissible challenge, the challenge will be recorded. If the challenger liaison determines the challenge is "impermissible" the challenge need not be recorded. (Ex 1, Opinion & Order, Court's Exhibit, p 10.) An "impermissible" challenge is a "challenge made on improper grounds," including a challenge to something other than a voter's eligibility or to an election process, a challenge made with sufficient basis, or a challenge made for a prohibited reason. (*Id.*) This process is explained in great detail in the instructions. (*Id.*, pp 10-13.) The instructions also provide that if a challenger makes repeated "impermissible" challenges, he or she may be removed. (*Id.*, p 11.) These instructions were implemented due to an increase in the volume of indiscriminate or impermissible challenges. (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff. ¶ 41.)

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102. The Michigan Election Law only permits (1) challenges of a voter's status as a qualified and registered elector of the precinct or if a challenge appears in the poll book as to a voter, (2) that an election procedure is not being properly performed, whether at a polling place or an AVCB, or (3) to a voter attempting to vote who previously applied for an absent voter ballot. MCL 168.733(1)(c)-(d), MCL 168.727(1). Section 727(2) only requires an election inspector to make a written report of a challenge to a voter's registration status under § 727(1). MCL 168.727(2)(a)-(c). And the law prohibits challengers from making a "challenge

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indiscriminately and without good cause," and from "interfere[ing] with and unduly" delaying the work of the election inspectors. MCL 168.727(3).

103. The Court of Claims quibbled with the Secretary's use of the terms "permissible" and "impermissible" challenges because the Election Law does not use those terms. (Ex 1, Opinion & Order, p 23.) But those terms are simply used as a convenience to refer to challenges that the law permits and to those it does not.

104. The court interpreted § 727(2), which requires an election inspector to record challenges to a voter's status under § 727(1), as requiring an election inspector to record any challenge to a voter's registration status. (Ex 1, Opinion & Order, p 24.) The court concluded an inspector has no discretion to determine whether a challenge is permissible or impermissible, "even if the challenge is determined to be without a basis in law or fact, if the challenge is made, it must be recorded." (*Id.*)

105. Defendants disagree. A challenger may challenge a voter's eligibility to vote in the precinct in which the voter applies to vote. MCL 168.727(1). But such a challenge only encompasses four grounds: that the voter is not registered, the voter is less than 18 years-old, the voter is not a US citizen, or the person has not lived in the city or township in which they are offering to vote for at least 30 days. (Ex 1, Opinion & Order, Court's Exhibit, p 11-12.) See also Const 1963, art 2, § 1; MCL 168.10; MCL 168.492.

106. Thus, a challenge to a voter's eligibility must be based on one or more of these grounds, and the challenger must specify which ground(s) because a challenger cannot "challenge indiscriminately and without good cause." MCL 168.727(3).

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107. Accordingly, a challenger cannot simply say "I challenge Mr. Smith's eligibility to vote" without specifying the ground and offering some support for the assertion. Likewise, a challenger could not challenge Mr. Smith's "eligibility to vote" because the challenger states he or she "knows there are no African Americans in this precinct." That would be a challenge "without good cause" because race is unrelated to a voter's eligibility to vote.

108. These are types of "impermissible" challenges that election inspectors should not be required to record and process. Unsupported or illegitimate challenges like these have the potential for interfering with the work of inspectors and causing delay in polling places. Indeed, recording every unsupported and illegitimate challenge will slow down the processing of voters; how much will depend on the precinct. The law specifically provides that challengers "shall not interfere with or unduly delay the work of the election inspectors." MCL 168.727(3). The court seems to assume that the explanatory term "impermissible" to refer to challenges that are not based on a reason allowed under the Election Law will suddenly cause election inspectors to reject or fail to record valid challenges, even though the instructions expressly require them to do so, and the Director's Affidavit further clarifies that they must do so. (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶ 40-42.) In reality, the explanation will simply help election workers understand what type of challenge is being made and how to respond to it appropriately.

109. Further, a challenger may not "intimidate an elector while the elector is . . . applying to vote[.]" MCL 168.733(3). "Indiscriminate" challenges and those without

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"good cause" have the potential to intimidate voters and thereby violate a voter's fundamental right to vote.

110. The Secretary's updated instructions are designed to implement and support these statutes so that election inspectors, challengers, and voters can perform their duties and exercise their rights freely, fairly, and consistently across the state.

111. And contrary to the court's conclusion that there was no statutory support for the instructions, § 31(1)(c) mandates that the Secretary "shall" "[p]*ublish and furnish* for the use in each election precinct before each state . . . election a *manual of instructions* that includes . . . procedures . . . for processing challenges." The Secretary's instructions for processing "permissible" and "impermissible" challenges—again just useful terminology—fall squarely within that statute.

112. The court further concluded that challenges to *election procedures*, § 733(1)(d), need not be recorded by law, but that the Secretary's instructions providing for the recording of such challenges was reasonable. (*Id.*, p 24.) While Defendants appreciate that ruling, it demonstrates the court's inconsistency with its other rulings that the Secretary cannot issue an instruction without a specific statute providing specific grounds for doing so.

113. With respect to the instruction that making repeated "impermissible" challenges may lead to the removal of a challenger, the court concluded that there is no authority to remove a challenger based on challenges an inspector deems "impermissible." (*Id.*, p 25.) The court noted that the Election Law permits removal only for "disorderly conduct." (*Id.*) See also MCL 168.733(3) ("Any evidence of . . .

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disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board.")

114. But the court then concluded that "only if a challenger's repeated, unfounded challenges rise to the level of 'disorderly conduct' does the law permit the challenger's expulsion." (*Id.*) In other words, there *is* support in the law for removing a challenger for making "unfounded," which Defendants equate with "impermissible," repeated challenges.

115. The Secretary's instruction on "repeated impermissible challenges" is grounded in all the statutes discussed above, including § 733(3) identified by the court. Indeed, what may rise to "disorderly conduct" is informed by the permissions and restrictions on challenges and challengers described in these statutes.

116. And like the instructions on "permissible" and "impermissible" challenges, the instruction on "repeated impermissible challenges" falls well within the Secretary's authority under § 31(1)(c) to issue instructions for processing challenges.

117. For these reasons, the Secretary's instructions regarding "permissible" and "impermissible" challenges and repeated "impermissible challenges," do not violate the Michigan Election Law and are instead a proper exercise of her authority under § 31(1)(c) that did not need to be promulgated as a rule. See MCL 24.207(j). The Court erred in concluding otherwise, and Defendants are likely to prevail on appeal.

Defendants will suffer irreparable harm if a stay is not issued

118. For the same reasons discussed earlier with respect to laches and the prejudice Defendants have suffered as a result of Plaintiffs' unreasonable delay, the

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Defendants will be irreparably harmed if the lower court's order is not stayed pending a full appeal on the merits.

119. The November 8, 2022 general election is now 18 days away.

120. The Court of Claims' Opinion and Order requires the Defendants to revise, publish, and distribute a new version of its challenger instructions—and train clerks and inspectors in slightly more than 2 weeks.

121. As attested by Director Brater in the affidavit submitted with Defendants' brief, such changes will "cause significant confusion among clerks and election inspectors." (Ex 2, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶ 59.) While the court's opinion stated that it was "not persuaded" that revising the manual would present an onerous burden, its rationale was based on its own conclusions about what revising the manual would require. The court's conclusions were at odds with the undisputed attestation of Director Brater. (Ex 1, Opinion & Order, Court's Exhibit, p 27.)

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122. Further, it warrants particular notice that the Court of Claims' order did not specify particular language to be changed, or direct how the instructions were to be revised "to comply with this order." (Ex 1, Opinion & Order, Court's Exhibit, p 28.)

123. The Defendants are thus left to interpret the court's opinion and make revisions based on their understanding of the court's conclusions.

124. It is entirely possible—if not likely—that the Plaintiffs may disagree with the Defendants' revisions and assert that they somehow do not comply with the court's Opinion and Order. This would invariably lead to additional "emergency" motions

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and possible subsequent orders requiring revisions with even *less* time to train clerks and inspectors.

125. This uncertainty is compounded by the court's contradictory mandates for Defendants. On the one hand, the court proclaims that the Defendants cannot include any direction to clerks or election inspectors unless that language appears verbatim in the Michigan Election Law. This leaves Defendants no meaningful way to draft a comprehensible and effective manual with instructions and directions to clerks and election inspectors. At the same time, the court also informs Defendants that it can now instruct election inspectors that they may apply new standards not found anywhere in the Election Law, such as the ability to eject challengers if election inspectors have a "reasonable suspicion" that the challengers is using a device to improperly communicate. But even if Defendants are allowed to use the term "reasonable suspicion", they have no way of instructing clerks or election inspectors as to what that term means because the court has also forbidden them from using any terminology that is not found verbatim in the Michigan Election Law.

126. As a result, it is uncertain when a "final" version of the challenger guidance will be completed.

127. The only way to avoid disputes over the revisions would be to accept the Court of Claims' first option, which was to "strike the May 2022 Manual it its entirety." (Ex 1, Opinion & Order, Court's Exhibit, p 28.)

128. Whether the Defendants choose to gamble on their understanding of the court's opinion or to test the "theoretical" possibility of holding an election without

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any instructions, the Defendants will suffer irreparable harm to their ability to hold orderly elections that comply with the Michigan Election Law.

The harm to Defendants absent a stay outweighs any harm to Plaintiffs and the public interest weighs in favor of a stay

129. "[H]arm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party." *Nken v Holder,* 556 US 418, 435 (2009).

130. If a stay is granted, Plaintiffs will still be able to appoint election challengers who will be able to make any challenges allowed under the law.

131. Plaintiffs will not be harmed in any way—let alone irreparably—by any of the instructions in the May 2022 guidance.

132. Plaintiffs have never explained how using a credential form prescribed by the Secretary of State, as opposed to their own template, harms them.

133. Plaintiffs will suffer no discernable harm by making challenges to a designated election inspector who has the experience and knowledge necessary to respond to their issues.

134. It is likewise difficult to ascertain what harm Plaintiffs will suffer if they are not permitted to require election inspectors to deviate from assisting voters and tabulating ballots to record a potentially unlimited number of challenges that have no basis in law or fact.

135. Lastly, Plaintiffs will suffer little or no harm by not possessing phones or electronic devices in AVCB's when they are required by MCL 168.765a(9) and (10) to be sequestered anyway. Furthermore, there is nothing in the Michigan Election

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Law that expressly provides the challengers with the right to possess or use such devices at an AVCB.

136. Even under the terms of the court's Opinion and Order, challengers are subject to removal from AVCB's if an election inspector or official has "reasonable suspicion" that the challenger used the device to communicate prohibited information. So, the possession of such devices only invites disputes about whether the devices was *used* improperly and exposes Plaintiffs or their challenges to removal from the AVCB. The risk of removal over disputes about challengers' use of devices poses a greater risk of harm to the Plaintiffs than staying the court's order.

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Motion to Waive Requirements of MCR 7.209

137. Defendants move to waive the requirements of MCR 7.209(A), which generally requires that a motion for stay be presented first to the trial court. Given the time sensitivities of these election cases, Defendants respectfully submit that it would not be expedient to seek a stay in the Court of Claims. Further, given the court's strong opinion, Defendants believe that it would be futile to ask the lower court for a stay pending appeal.

Motion for Immediate Consideration

138. Finally, and for the reasons already discussed above, Defendants' request immediate consideration of their motions under MCR 7.211(C)(6). The November 8, 2022, general election is only 18 days away. Local clerks are already training election inspectors on Election Day procedures, including the challenge process, and they are training the inspectors in accordance with the updated instructions.

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Further, organizations should also be in the process of training their challengers as well. The legality of the Secretary's updated instructions must be resolved as soon as practicable so that all affected parties can be informed to proceed as expected or be notified and trained on any new or revised instructions issued under the Court of Claims' order. Defendants therefore request that this Court grant relief by 3:00 p.m. on October 26, 2022.

RELIEF REQUESTED

For the reasons set forth above, Defendants respectfully request that this Court grant Defendants' motions for a stay pending appeal, to waive the requirements of MCR 7.209(A), and for immediate consideration, and issue an order in conformity with that request by Noon on October 26, 2022.

Respectfully submitted,

<u>/s/Heather S. Meingast</u>

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Dated: October 21, 2022

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