STATE OF MICHIGAN
IN THE SUPREME COURT

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.

Supreme Court No. _____

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.

Expedited relief requested – Relief requested no later than 3:00 p.m. on November 1, 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 Appeals No. 363505

Court of Claims No. 22-000164-MZ

DEFENDANTS SECRETARY OF STATE AND DIRECTOR OF ELECTIONS' EMERGENCY APPLICATION FOR LEAVE TO APPEAL UNDER MCR 7.305(C)(1) OR (3) AND REQUEST FOR STAY PENDING APPEAL UNDER MCR 7.315(I)

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STATEMENT OF JURISDICTION

On October 21, 2022, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater filed a claim of appeal in the Court of Appeals from an October 20, 2022, opinion and order by the Court of Claims declaring various instructions issued by the Secretary regarding poll watchers and challengers unlawful and enjoining their enforcement. On the same day, Defendants filed an emergency motion for stay pending appeal of the October 20 opinion and order, along with a motion to waive the requirements of MCR 7.209(D) and a motion for immediate consideration of those motions. Given the impending November 8, 2022, general election, Defendants requested relief from the Court of Appeals on their emergency motions *by 3:00 p.m. on October 26, 2022.*

As of the time of this filing, the Court of Appeals has failed to resolve Defendants' emergency motions, which failure has effectively denied Defendants relief. Defendants maintain that this Court has jurisdiction over this interlocutory emergency appeal pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(3) or under MCR 7.305(C)(1)(a) as a request for bypass. Further, this Court has jurisdiction to issue a stay pending appeal under MCR 7.315(I). The Court of Claims' opinion and order is contained in Defendants Appendix at Appx Vol 1, p 1-29, filed contemporaneously with Defendants' application.

STATEMENT OF QUESTION PRESENTED

1. A stay pending appeal may be granted where the movant satisfies the requisite factors, which parallel those for granting injunctive relief. Did the Court of Appeals err in denying the Secretary of State's and Director of Elections' emergency motion for a stay pending appeal where Defendants demonstrated a likelihood of succeeding on the merits of their appeal, irreparable harm if a stay is not issued, and where the balance of harm and public interest factors weigh in favor of a stay?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

Const 1963, art 2, § 4:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (a) The right, once registered, to vote a secret ballot in all elections.
>
> ***
>
> (2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

MCL 168.21:

> The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.

MCL 168.31:

> (1) The secretary of state shall do all of the following:
>
> (a) Subject to subsection (2), issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations in polling places,

procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.

***

(e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

(j) Establish a curriculum for comprehensive training and accreditation of all county, city, township, and village officials who are responsible for conducting elections.

(k) Establish a continuing election education program for all county, city, township, and village clerks.

(l) Establish and require attendance by all new appointed or elected election officials at an initial course of instruction within 6 months before the date of the election.

(m) Establish a comprehensive training curriculum for all precinct inspectors.

MCL 168.727:

(1) An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book. A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct. An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot.

(2) Upon a challenge being made under subsection (1), an election inspector shall immediately do all of the following:

(a) Identify as provided in sections 745 and 746 a ballot voted by the challenged individual, if any.

(b) Make a written report including all of the following information:

(i) All election disparities or infractions complained of or believed to have occurred.

(ii) The name of the individual making the challenge.

(iii) The time of the challenge.

(iv) The name, telephone number, and address of the challenged individual.

(v) Other information considered appropriate by the election inspector.

(c) Retain the written report created under subdivision (b) and make it a part of the election record.

(d) Inform a challenged elector of his or her rights under section 729.

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

MCL 168.732:

Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

MCL 168.733:

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

(a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.

(b) Observe the manner in which the duties of the election inspectors are being performed.

(c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.

(d) Challenge an election procedure that is not being properly performed.

(e) Bring to an election inspector's attention any of the following:

(i) Improper handling of a ballot by an elector or election inspector.

(ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.

(iii) Campaigning being performed by an election inspector or other person in violation of section 744.

(iv) A violation of election law or other prescribed election procedure.

(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.

(g) Examine without handling each ballot as it is being counted.

(h) Keep records of votes cast and other election procedures as the challenger desires.

(i) Observe the recording of absent voter ballots on voting machines.

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

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

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

MCL 168.765a:

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(9) An election inspector, challenger, or any other person in attendance at an absent voter counting place or combined absent voter counting place at any time after the processing of ballots has begun shall take and sign the following oath that may be administered by the chairperson or a member of the absent voter counting board or combined absent voter counting board:

"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.".

(10) The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. 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. Subject to this subsection, the clerk of a city or township may allow the election inspectors appointed to an absent voter counting board in that city or township to work in shifts. A second or subsequent shift of election inspectors appointed for an absent voter counting board may begin that shift at any time on election day as provided by the city or township clerk. However, an election inspector shall not leave the absent voter counting place after the tallying has begun until the polls close. If the election inspectors appointed to an absent voter counting board are authorized to work in shifts, at no time shall there be a gap between shifts and the election

inspectors must never leave the absent voter ballots unattended. At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed. A person who causes the polls to be closed or 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.

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(12) Subject to this subsection, a local election official who has established an absent voter counting board or combined absent voter counting board, the deputy or employee of that local election official, an employee of the state bureau of elections, a county clerk, an employee of a county clerk, or a representative of a voting equipment company may enter and leave an absent voter counting board or combined absent voter counting board after the tally has begun but before the polls close. A person described in this subsection may enter an absent voter counting board or combined absent voter counting board only for the purpose of responding to an inquiry from an election inspector or a challenger or providing instructions on the operation of the counting board. Before entering an absent voter counting board or combined absent voter counting board, a person described in this subsection must take and sign the oath prescribed in subsection (9). The chairperson of the absent voter counting board or combined absent voter counting board shall record in the poll book the name of a person described in this subsection who enters the absent voter counting board or combined absent voter counting board. A person described in this subsection who enters an absent voter counting board or combined absent voter counting board and who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a precinct before the time the polls can be legally closed on election day is guilty of a felony. As used in this subsection, "local election official" means a county, city, or township clerk.

(13) The secretary of state shall develop instructions consistent with this act for the conduct of absent voter counting boards or combined absent voter counting boards. 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.

INTRODUCTION

Despite the November 8 general election being less than three weeks away, the Court of Claims ordered Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater to rescind several instructions concerning the operation of challengers in absent voter counting boards (AVCBs) and in-person polling places. 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.

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. Presently, many clerks have begun training their election inspectors, who are responsible for ensuring order at polling places and AVCBs, including an orderly challenge process.

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 Election Law or were required to be promulgated as rules.

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

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.

Because the Court of Claims erred in granting Plaintiffs relief, Defendants filed a claim of appeal and moved for an emergency stay of the court's order pending appeal, requesting relief on the motion for stay by 3:00 p.m. on October 26, 2022. To date, the Court of Appeals has failed to resolve Defendants' emergency motions, which has the effect of denying Defendants' the relief they seek. The Court of Appeal's failure to act has compounded the error committed by the Court of Claims.

Defendants now seek emergency relief from this Court and request that it grant leave and grant Defendants a stay pending appeal of the Court of Claims' October 20, 2022, opinion and order, so that order and clarity may be restored with respect to the challenge process. *Defendants request this relief before or by 3:00 p.m. on Tuesday, November 1, 2022.*

STATEMENT OF FACTS AND PROCEEDINGS

Given the timing, Defendants repeat the facts as set forth in their filings with the Court of Claims.

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. (Appx Vol 2, p 420-429, 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. (Appx Vol 2, p 430-442, 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). (Appx Vol 2, p 443-470, 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.*). 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). (Appx Vol 2, p 433, 436-437, Ex B, p 3, 6-7). These were not new to the Challenger Guidance issued in May 2022. (Compare *Id.,* Appx Vol 2, p 455, 467, Ex C, p 9, 21).

B. Plaintiffs' Complaints and Procedural History

1. O'Halloran Complaints

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 and an amended complaint on October 13, 2022. (Appx Vol 3, p 619, O'Halloran Amend Compl, p 1.) Plaintiffs O'Halloran, Giacobazzi, and Cushman alleged 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.*, Appx Vol 3, p 628, ¶23-24.) Plaintiff Penny Crider is a candidate for the House of Representatives in the 17th District. (*Id.*, p 629, ¶28.) Kenneth Crider is a candidate for State Senate in the 6th District. (*Id.*)

The O'Halloran Complaint raised two counts. First, they alleged 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.*, Appx Vol 3, p 637, ¶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.*, p 641-644, ¶75-83.)

Each count appeared 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.*, p 634, 636, ¶44, 53.)

In their motion for emergency declaratory and injunctive relief, the O'Halloran Plaintiffs appeared 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. (Appx Vol 3, p 657-659, O'Halloran 9/28/22 Brf, p 5-6, ¶8a-d.)

In addition, the O'Halloran Plaintiffs made allegations about supposed violations of O'Halloran and Giacobazzi's rights as challengers at the Detroit Huntington Place AVCB during the August 2022 primary. (Appx Vol 3, p 635, O'Halloran Amend Compl, ¶45-46.) However, the allegations concerning their experiences at the City of Detroit's AVCB do not reference either Defendant or any action or conduct performed by Defendants. (*Id.*).[1]

The O'Halloran Plaintiffs requested that the Court of Claims 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 644-645, p 26-27.) The O'Halloran

[1] As stated in an 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. (Appx Vol 1, p 192-193, Defs' 10/11/22 Br, Ex A, Brater Aff ¶13.)

Plaintiffs did not identify any other "election manuals" or documents they wished to be subject to any declaratory or injunctive relief.

On October 3, 2022, the Court of Claims 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 that Court's order, Defendants responded to the order to show cause and also moved for summary disposition as to both complaints. Among the arguments raised by Defendants in the October 11, 2022 brief and motion was that the O'Halloran complaint was not signed and verified in compliance with the Court of Claims Act and so the Court of Claims lacked jurisdiction under MCR 2.116(C)(4). (Appx Vol 1, p 164-166, Defs' 10/11/22 Defs' MSD Brf.)

As noted above, the O'Halloran Plaintiffs filed an amended complaint, curing those errors, and Defendants filed a motion for summary disposition regarding the amended complaint, incorporating their prior briefing, as well as addressing additional issues. (Defs' 10/14/22 MSD Brf.)

2. DeVisser Complaint

On September 30, 2022, Plaintiffs Richard DeVisser, the Michigan Republican Party (MRP) and the Republican National Committee (RNC) ("the DeVisser Plaintiffs") filed a verified complaint against Secretary Benson and Director Brater. (Appx Vol 2, p 391, DeVisser Compl, p 1.) DeVisser alleged that he is a registered voter and was appointed by MRP as an election challenger for the

August 2022 primary election. (*Id.*, p 394, ¶8). MRP is a "major political party" as defined under MCL 168.16. (*Id.*, p 393-394, ¶7). RNC is a national political party with offices in Washington D.C. and alleges that it supports MRP and has contributed to Republican candidates in Michigan. (*Id.*, p 394, ¶9).

The DeVisser complaint raised two counts. First, they alleged a violation of the Election Law based on their contention that the Challenger Guidance is "directly inconsistent" with the Election Law. (*Id.*, p 409-411, ¶54-60). Second, they alleged a violation of the APA, based on their contention that certain so-called "policy changes" included in the May 2022 guidance document constituted "rules" that were not promulgated as required by the APA. (*Id.*, p 411-412, ¶61-66.)

Each count appeared to be based or focused on the following "changes" in the May 2022 Challenger Guidance: (1) challenger credentials must be on a form provided by the Secretary of State, but Plaintiffs contend that because MCL 168.732 does not specifically allow the Secretary to prescribe a credential form, the Secretary cannot prescribe a form under her authority in MCL 168.31(1)(e) to prescribe election forms; (2) political parties may appoint challengers at any time until Election Day, but Plaintiffs contend that the guidance is not sufficiently clear in affirming that parties can wait until Election Day itself to train challengers and appoint challengers *during* Election Day; (3) challengers must present their challenges to a challenger liaison, but Plaintiffs insist the election law must be read to allow challengers to speak to any poll worker at any time, despite no such language appearing in the statute; (4) no electronic devices capable of sending or

receiving information (phones, laptops, tablets, etc.) are permitted in AVCBs while ballots are being processed, and that challengers who bring such devices into the facility may be ejected—while Plaintiffs insist they must be allowed to possess communication devices even where certain communications outside the facility are prohibited, and must be allowed to use recording devices even where courts have already recognized the need to prevent recording to protect voter privacy; and (5) election inspectors need not record in the pollbook repeated challenges with no basis in law every single time they are made, while Plaintiffs contend that challengers must be given the power to make the same legally unsupported challenge repeatedly, and force election inspectors to record it every single time, even if the challenge is not supported by law or fact. (*Id.*, p 401-405, 410, 412 ¶30(a)-(e), 54, 64.)

The DeVisser Plaintiffs requested that the Court of Claims declare the May 2022 Challenger Guidance to be "inconsistent" with Michigan Election Law and unenforceable, declare that the "rules" are invalid because they were not promulgated under the APA, enjoin the Defendants from implementing the Challenger Guidance in advance of the November general election, and order the Defendants to "reissue" the previous October 2020 guidance document. (*Id.*, p 412-413, p 22-23.)

As noted above, in a consolidated brief, Defendants moved for summary disposition with respect to the DeVisser complaint on October 11, 2022. Defendants

filed a reply brief in support of their motion on October 17, 2022. (Appx Vol 1, p 237-246, Ex 3, Defs' Reply Brf.)

3. The Court of Claims' call for additional briefing, its Opinion and Order, and Defendants' appeal.

On October 14, 2022, the Court of Claims issued an order requesting additional letter briefing with respect to specific questions the court had concerning the instruction regarding electronic devices at AVCBs. (10/14/22 COC Order.) Defendants, along with Plaintiffs, timely filed their letter brief on October 18, 2022, answering the court's questions. (Appx Vol 1, pp 248-360, Defs' 10/18/22 Letter & Attachments.)

On October 20, 2022, the Court of Claims issued its opinion and order granting in part and denying in part Defendants' motions for summary disposition and granting in part and denying in part Plaintiffs' complaints for declaratory and injunctive relief. (Appx Vol 1, p 1-29, 10/20/22 Opinion & Order.) The court determined that several of the challenged instructions conflicted with the Election Law and/or needed to be promulgated as rules. Specifically, the court concluded that the instruction and the Secretary's prescribed form for challenger credentials violated the election law; that the instruction requiring challengers to communicate with a designated challenger liaison violated the Election Law; that the Secretary's prohibition on the possession of electronic devices by challengers at AVCBs violated the Election Law, and the Secretary's instruction delineating what are permissible

and impermissible challenges at in-person polling places and AVCBs violated the Election Law. (*Id.*)[2]

The court enjoined Defendants from using, implementing, or enforcing the instructions declared unlawful by the court, and ordered Defendants to take steps to rescind or revise its manual consistent with the court's order. (*Id.*) The court's opinion and order constituted a final order closing the two cases. (*Id.*)

On October 21, 2022, Defendants filed their claim of appeal with the Court of Appeals, along with an emergency motion for stay pending appeal and a motion for immediate consideration of that motion. (Appx Vol 1, p 58-250, Appx Vol 2, pp 250-360, Defs' COA Motions.) Defendants requested relief on the motions by 3:00 p.m. on October 26, 2022. As of the time of this filing, the Court of Appeals has failed to resolve Defendants' emergency motions, which failure to timely act has effectively denied Defendants the relief they seek.

Defendants now appeal on an emergency basis to this Court and have moved for immediate consideration contemporaneously with the filing of this application for leave to appeal and request for a stay pending appeal.

STANDARD OF REVIEW

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

[2] The Court of Claims agreed with Defendants' interpretation of its instruction pertaining to the appointment of challengers "until Election Day," and ordered Defendants to simply clarify that instruction. (Appx Vol 1, p 15-16, 10/20/22 Opinion & Order.) Defendants do not appeal as to that part of the order.

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 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 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).

This Court reviews the grant or denial of a stay pending appeal for abuse of discretion. See, e.g., *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146 (2011) (discussing review of grant or denial of a preliminary injunction). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* The factual findings that a court makes in the process of deciding whether to grant an injunction are reviewed for clear error. *Id.* The Court reviews associated issues involving statutory interpretation de novo as questions of law. *Id.* Likewise, the Court reviews de novo the interpretation of a rule or regulation adopted by an agency pursuant to statutory authority. *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202 (2007).

ARGUMENT

I. Defendants are entitled to a stay pending appeal where they have demonstrated a likelihood of succeeding on the merits of their appeal, irreparable harm if a stay is not issued, and where the balance of harm and public interest factors weigh in favor of a stay.

A. Analysis

The Court of Appeals' failure to timely resolve Defendants' emergency motion for a stay pending appeal has the effect of denying Defendants relief and constitutes an abuse of its discretion where Defendants more than satisfied the factors necessary for granting such relief. The Court of Claims' decision disrupted the status quo on the verge of the November general election; Defendants seek only to restore the status quo pending resolution of the complex legal issues presented by their appeal. See, e.g., *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647 (2012) ("[t]he purpose of a preliminary injunction [or stay] is to preserve the status quo pending a final hearing regarding the parties' rights.") (cleaned up). The point of preserving the status quo is so that "upon the final hearing, the rights of the parties may be determined without injury to either." *Gates v Detroit & MR Co*, 151 Mich 548, 551 (1908).

1. The doctrine of laches supports a stay.

As an initial matter, Defendants submit that both the Court of Claims and the Court of Appeals, through its silence, erred in this case by failing to apply the doctrine of laches to bar Plaintiffs' claims.

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). 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 under MCL 691.1031. See also MCL 600.6422(1) ("Practice and procedure in the court of claims shall be in accordance with the statutes . . . prescribing the practice in the circuit courts of this state[.]")

In this case, Plaintiffs' lawsuits were filed before the 28th day (albeit only 13 days before that statutory limit), but the Court of Claims only 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.

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. (Appx Vol 1, p 166-169,

Defs' 10/11/22 MSD Brf, p 8-9; *id.*, pp 199-200, Ex A, Brater Aff, ¶¶ 50-54; *id.*, p 241-242, Ex 3, Defs' 10/17/22 Reply, p 1-2.) Indeed, 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. (*Id.*, p 199, 206-207, Defs' MSD Brf, Ex A, Brater Aff, ¶¶ 48-49, Attach B.)

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. But it was undisputed that Michigan RNC staff knew of the instructions in May 2022. (*Id.*, p 199-200, 211, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶¶ 51-53, Attach C.) MRP and RNC, however, represented to the court that they only became aware of the instructions in August. Even assuming the MRP and RNC somehow forgot that they became aware of the instructions in May 2022 or failed to communicate that knowledge amongst themselves, that would not explain why they apparently 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. Nonetheless, by their admission, they had knowledge of at least the credential form requirement the night of the August 2 primary (which ought to have at least provoked further review of the challenger instructions for any other revisions), but then waited 59 days to file their lawsuit. These sophisticated parties had the whole summer to read the guidance and file suit; but they sat on their hands.

The O'Halloran Plaintiffs 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*.)

Despite these facts showing that Plaintiffs were aware of the instructions months ago, 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 all the updates for themselves. (Appx Vol 1, p 26, 10/20/22 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*.)

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 instructions are to be applied is patently unreasonable. The Court of Claims erred in concluding otherwise, and the Court of Appeals erred in failing to so recognize.

The Court of Claims 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. (Appx Vol 1, p 27, 10/20/22 Opinion & Order, p 27.)

But the instructions are binding on local clerks, MCL 168.21, MCL 168.31(1)(a)-(c), 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, MCL 168.31(1)(c), (i), (m). And, as Defendants pointed out below, 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, if not concluded, training election inspectors. (Appx Vol 1, p 168-167, Defs' 10/11/22 MSD Brf, p 10-11; *id.*, pp 200-202, Ex A, Brater Aff, ¶¶ 56-59; *id.*, p 241-242, 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 in time for an orderly Election Day.

The amicus brief submitted by City of Detroit Clerk Janice Winfrey demonstrates this point. In support of her brief, Clerk Winfrey provided the affidavit of former Detroit Elections Director Daniel Baxter, who aptly commented

on the complexity of that City's election processes and the impossibility of providing new training:

> Detroit is unlike any jurisdiction in Michigan with respect to the size of the workforce and number of absent voting counting boards necessary to process and tabulate a uniquely large number of absent voter ballots. There are 130 absent vote counting boards processing ballots from 450 precincts, 14 high-speed tabulators to count the ballots, 10 adjudication stations and 10 duplication stations. There are two shifts with more than 650 inspectors and staff in each of one performing the processing and tabulating of tens of thousands of absent voter ballots. It takes months to train inspectors for an election. At this point all training for the November general election is completed. Any attempt to conduct training of all inspectors will instill more confusion than clarity. *Id.* ¶ 5. [Appx Vol 3, p 696-697, Winfrey Brf, Ex B, Baxter Aff, ¶ 5.]

Mr. Baxter concluded that "[t]o the extent [ ] the October 20, 2022 Opinion and Order requires all of the approximately 1,300 inspectors to be trained to the level necessary to process all types of challenges, this cannot be done during the time remaining before election day." (*Id.*, p 697, ¶ 8.)

The Court of Claims also stated that "[t]heoretically, the November 2022 general election can take place without any challenger guidance." (Appx Vol 1, p 27, 10/20/22 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 *processing challenges*." MCL 168.31(1)(c). The instructions at issue here were issued pursuant to this mandate. 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.

Finally, the Court of Claims 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." (Appx Vol 1, p 27, 10/20/22 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.

But the Director of Elections attested to the prejudice caused by Plaintiffs' delay in filing suit. (Appx Vol 1, p 200-201, 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 manuals at this late date would also cause significant confusion among clerks and election inspectors." (*Id.*)

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. Again, this point is confirmed by Clerk Winfrey's amicus brief. Sponsoring organizations must

also communicate the changes and provide training to 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. (Appx Vol 1, p 200-201, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶¶ 56-60; Appx Vol 3, pp 682-683, 696-699, Winfrey Brf, Ex B, Baxter Aff, ¶ 5, 8, 11.)

The Court of Claims' opinion did not mention—let alone address—the Director's undisputed affirmation before concluding that there would be no prejudice to the Defendants. The court thus erred when it determined that Defendants were not prejudiced by Plaintiffs' delay in bringing suit. And because Defendants demonstrated both an unreasonable delay by Plaintiffs in bringing suit and prejudice to Defendants, the Court of Claims erred when it failed to apply laches to bar Plaintiffs' claims.

The Court of Appeals likewise erred in failing to timely recognize that laches likely barred Plaintiffs' claims and in failing to grant a stay for that reason.

2. Defendants have demonstrated a likelihood of success on the merits on appeal.

The Court of Claims erred in granting, in part, Plaintiffs' requests for declaratory and injunctive relief and ordering Defendants to rescind, or modify and reissue, the challenger instructions. Indeed, 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. As explained below, Defendants are likely to prevail on appeal. But for purposes of granting a stay, Defendants need not establish a "high probability of success on the merits," rather only " 'serious questions going to the merits,' " where Defendants demonstrate, as they have below, the remaining factors weigh strongly in their favor. See *Michigan Coalition of Radioactive Material Users, Inc*, 945 F2d at 153 (cleaned up).

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). Consistent with that mandate, the Legislature enacted the Michigan Election Law (the Election Law), MCL 168.1 *et seq*. And the Legislature delegated the task of conducting proper elections to the Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9. Further, "[a]s chief elections officer, with constitutional authority to 'perform duties prescribed by law,' the Secretary of State ha[s] the inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established by" article 2, § 4(1) of the Constitution. *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020).

Section 21 of the Michigan Election Law, MCL 168.1 *et seq*., makes the Secretary the "chief election officer" and she "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Under MCL 168.31(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. 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), which is a specific exception from rulemaking.

These sections provide overlapping authority for the Secretary's updated instructions. And in reviewing her interpretation of these sections and the substantive sections of the Election Law, this Court must accord the Secretary's interpretation "respectful consideration." *In re Complaint of Rovas*, 482 Mich 90, 103 (2008) (cleaned up). There must be cogent reasons for overruling an agency's interpretation of a statute. *Id.* (cleaned up). Further, "when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent." *Id.*

a. The credential form

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. (Appx Vol 1, p 37-38, 10/20/22 Opinion & Order, Court's Exhibit, p 4-5.) The Court of Claims ruled in favor of Plaintiffs' challenge, holding that the Election Law did not grant the Secretary of State the authority to mandate a uniform challenger-credential form. (*Id.*, p 15, 10/20/22 Opinion & Order, p 15.)

In reaching this conclusion, the Court of Claims 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.*). Notably, the court's analysis on this point only refers to MCL 168.31(1)(c), 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.*).

But although it was cited in Defendant's briefs (Appx Vol 1, p 171, 179, 182, 187, Defs' 10/11/22 MSD Brf, p 13, 21, 24, 29; *id.*, p 245, Ex 3, Defs' 10/17/22 Reply, p 5), the 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).

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. Conversely, MCL 168.732 makes no explicit provision that

parties, organizations, or committees of citizens desiring to authorize challengers have any right to make up their own form. Instead, § 732 merely provides what information must be included in the credential document. Plaintiffs never claimed that the form issued by the Secretary failed to comply with those requirements.

The Court of Claims' opinion failed to even address the Secretary's explicit authority to make forms for processing challenges under § 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.

Although a uniform credential form had not been issued in the past, there is no support in the 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.

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." (Appx Vol 1, p 15, 10/20/22 Opinion & Order, p 15.) Nonetheless, the Court of Claims 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.*).

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. 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.").

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.

For these reasons, the Secretary's instruction and prescription for a uniform credential form does not violate the 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.

b. The challenger liaison

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. (Appx Vol 1, p 38-39, 10/20/22 Opinion & Order, Court's Exhibit, p 5-6.)

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. (Appx Vol 1, p 198, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶43.) 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.*)

The Court of Claims concluded that the 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. (Appx Vol 1, p 17, 10/20/22 Opinion & Order, p 17.)

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.

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

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

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 principally to her general authority under MCL 168.31(1)(a) to issue instructions. 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).

The court observed generally that the Michigan Election Law gives the Secretary authority to issue "explanatory instructions and forms." (Appx Vol 1, p 12, 10/20/22 Opinion & Order, p 12.) 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.*).

But instructions that merely repeat or rephrase what is already in the statute would be of no use to elections officials or challengers, and proper instructions necessarily require explanation of how statutory requirements are to be applied in practice. 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). Although it quoted § 31(1)(c) early on, the opinion never addresses or incorporates that section into its analysis or reasoning. (Appx Vol 1, p 11, 10/20/22 Opinion & Order, p 11.)

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."

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. 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. An election inspector designated as a challenger liaison is still "an election inspector" under MCL 168.733(1)(e). The Michigan Election Law does not guarantee challengers the right to bring challenges to any election inspector they choose.

The court concluded the Secretary's instruction "restricts a challenger's ability to bring certain issues to *any* inspector's attention." (Appx Vol 1, p 17, Opinion & Order, p 17) (emphasis added.) But 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 the court opines that Defendants' ability to issue instructions and directions is limited to repeating the exact words of the Election Law, the court itself invalidates Defendants' instructions 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).

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

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.

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 § 31(1)(c), and the additional specific authority granted to the Secretary under § 765a.

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.]

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. 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). 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.

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

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. 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.

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). 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. 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.

For these reasons, the Secretary's instruction on challenger liaisons does not violate the 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.

c. Prohibition on electronic devices 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. [Appx Vol 1, p 42, 10/20/22 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.)[3] Previously, and for many years, the guidance prohibited the use of such devices at AVCBs but did not prohibit possession.

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

[3] 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 exception of certain "authorized" individuals not subject to the sequestration requirement. (Appx Vol 1, p 248-250, Defs' 10/14/22 Letter.)

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.]

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.]

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).

The Court of Claims concluded that the prohibition on possession conflicted with the Michigan Election Law, which does not specifically preclude possession of a 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. (Appx Vol 1, pp 20-21, 10/20/22 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.)

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

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 or other electronic device 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.

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). 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).

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.

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." (Appx Vol 1, p 22, 10/20/22 Opinion & Order, p 22) (emphasis added.) Here again the court read words into a statute that do not appear. Nevertheless, it is completely unrealistic to burden election inspectors with the responsibility of determining what circumstances will support a "reasonable suspicion"—whatever that means in this context. 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.

The Secretary clearly had the authority to adopt the prohibition on phones and other devices. This 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. 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").

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(1)(a)-(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.

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.

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 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.

d. 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. (Appx Vol 1, p 43, 10/20/22 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 43-46.) The instructions also provide that if a challenger makes repeated "impermissible" challenges, he or she may be removed. (*Id.*, p 44.) These instructions were implemented due to an increase in the volume of indiscriminate or impermissible challenges. (Appx Vol 1, p 197, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶ 41.)

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

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

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. (Appx Vol 1, p 23, 10/20/22 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.

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. (*Id.*, 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.*)

But the court erred in so concluding. 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. (Appx Vol 1, p 44-45, 10/20/22 Opinion & Order, Court's Exhibit, p 11-12.) See also Const 1963, art 2, § 1; MCL 168.10; MCL 168.492.

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). 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. Such as, "I challenge Mr. Smith's eligibility to vote because I have knowledge that he has not resided in the city for 30 days." 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.

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). Further, a challenger may not "intimidate an elector while the elector is . . . applying to vote[.]" MCL 168.733(3). "Indiscriminate" challenges and those without "good cause" have the potential to intimidate voters and thereby violate a voter's fundamental right to vote.

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. (Appx Vol 1, p 197-198, 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.

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. 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.

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. (Appx Vol 1, p 24, 10/20/22 Opinion & Order, 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.

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

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.

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. 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.

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.

3. Defendants will suffer irreparable harm if a stay is not issued.

For the same reasons discussed earlier with respect to laches and the prejudice Defendants have suffered due to Plaintiffs' unreasonable delay in filing suit, the Defendants will be irreparably harmed if the lower court's order is not stayed pending a full appeal on the merits.

The November 8, 2022 general election is now 12 days away. 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 less than 2 weeks. As attested by Director Brater in the affidavit submitted with Defendants' briefing below, such changes will "cause significant confusion among clerks and election inspectors." (Appx Vol 1, p 201, 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. (Appx Vol 1, p 27, 10/20/22 Opinion & Order, p 27.)

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." (*Id.*, p 28.) The Defendants are thus left to

interpret the court's opinion and make revisions based on their understanding of the court's conclusions.

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. This would invariably lead to additional "emergency" motions and possible subsequent orders requiring revisions with even *less* time to train clerks and inspectors.

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

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

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

The harm to others and public interest factors decidedly weigh in favor of granting a stay.

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 at both AVCBs and in-person polling places. Plaintiffs will not be harmed in any way—let alone irreparably—by any of the instructions in the May 2022 guidance. Again, the same instructions Plaintiffs sought to challenge in this case were in place *and applied* during the August 2 primary. Plaintiffs have not demonstrated that they were irreparably harmed by any of the challenged instructions during the August primary, and there is little reason to expect that harm will suddenly arise if the same instructions are used for the November election.

Plaintiffs have never explained how using a credential form prescribed by the Secretary of State, as opposed to their own template, harms them. Further, 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. 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. Lastly, Plaintiffs will suffer little or no harm by not possessing phones or electronic devices in AVCBs when they are required by MCL 168.765a(9) and (10) to be sequestered anyway. Especially where there is nothing in the Election Law that expressly provides the challengers with the right to possess or use such devices at an AVCB.

Further, even under the terms of the court's opinion, challengers are subject to removal from AVCBs 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 were *used* improperly and exposes Plaintiffs or their challengers to removal from the AVCB. This point was made abundantly clear in the amicus brief filed by Clerk Winfrey, to which she attached the affidavit of Christopher Thomas, former Director of Elections and now Senior Advisor to Clerk Winfrey.

Mr. Thomas first described past conflict with persons attempting to use cell phones at the City of Detroit's AVCB during the November 2020 general election:

> On November 4, 2020, I observed several incidents involving challengers harassing election inspectors who were processing absent voter ballots. In nearly every case, cellphones were being used to record interactions in a manner that election inspectors found intimidating and objected to. The cellphones were positioned very close to the inspectors' faces at the same time as challengers were loudly,

> and at times crudely, objecting to the inspectors' performance of regular duties processing absent voter ballots.
>
> On November 4, 2020, I stepped into several incidents between challengers and election inspectors to reduce tensions and remind challengers of the prohibition on using cellphones as cameras to record videos or to take pictures. Based on the 2020 experience, I believe that allowing challengers to have cellphones and other electronic devices with them will result in those devices being used for photography and video and audio recording which will create flash points that could lead to violence. [Appx Vol 3, p 677-678, 690, Winfrey Br, p 3-4, Ex A, Thomas Aff ¶¶ 12-13.]

Conflicts arising from the use of cell phones was not limited to election day—Mr. Thomas also described his investigations conducted as part of a report by the Brennan Center for Justice and the Bipartisan Policy Center on threats to election workers:

> I interviewed several election officials in battle ground states, including Michigan, who related chilling accounts of harassment, intimidation, and threats to their lives. The prime avenue for these unwarranted assaults is social media where the officials' names, pictures and home addresses were often published along with threats of violent harm.
>
> Based on my research with the Bipartisan Policy Center, I believe election inspectors at Huntington Place have a reasonable fear of being photographed while performing their duties on election day. While election challengers may not directly threaten election inspectors, their videos and photos will be placed into circulation on social media platforms for others with criminal intent to threaten election inspectors and their families. [*Id*., p 691, Ex A, Thomas Aff ¶¶ 14-15.]

Mr. Thomas' affidavit also pointedly frames the scope of the problem invited by the Court of Claims' order:

> If challengers are allowed to use cellphones throughout election day, there is no conceivable manner of curtailing the distribution of information concerning the processing and tabulation of absent voter ballots: imagine the enforcement barrier in Huntington Place Hall A, nearly the size of a football field, with 130 separate absent voter

> counting boards,14 high speed tabulators and 18 adjudication stations, staffed by more than 650 inspectors in two shifts processing ballots from 450 precincts, being watched by upwards of 400 challengers. No election official in the hall could possibly know whether any to the 400 challengers on their phones are ordering lunch, talking to their families, or relaying information to political operatives about what is going on in the hall. [*Id.*, p 692, Ex A, Thomas Aff ¶ 18.]

Notably, Mr. Thomas' concerns are not merely theoretical—his affidavit refers to a press conference held by former State Senator Patrick Colbeck just after the Court of Claims' decision encouraging people to use cell phones to make recordings:

> I already observed the disruptive impact of this ruling when I watched an October 21, 2022 press conference at which former State Senator Patrick Colbeck stated: "One of the key tenets of this ruling that came from [the court] is the ability to go off and use electronic, devices to go off and record what is happening at these polls." That is, Mr. Colbeck claims the Judge's Opinion provides an unfettered right for any challenger to make audio and video recordings and to photograph the processing and tabulation of ballots at absent voter counting boards. Mr. Colbeck made clear that the challengers he is affiliated with will be trained to record with electronic devices on election day. Mr. Colbeck went on to state: "Remember, let everybody know, all the election officials, all the people at the polls, poll workers, poll challengers, Jocelyn Benson's rules are not the law and she was found to be breaking the law. Now we're going to go off and make sure we execute the law." [*Id.*, p 689-690, Ex A, Thomas Aff, ¶11.][4]

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. And for the reasons already stated, failing to grant a stay will harm Defendants, who have a

[4] Defendants recognize the Court of Claims' opinion did not specifically address the Secretary's instructions regarding devices at in-person polling places, and it did not expressly conclude that electronic devices could be used to record or take pictures at AVCBs. But the opinion is not clear in these respects, and it is plain the opinion is being interpreted to allow such actions.

duty to ensure a fair and orderly election, and nonparties like the City of Detroit and other large jurisdictions, who will have little to no time to adapt to changed procedures. Finally, the public interest is best served by staying the Court of Claims' opinion because the public itself has an interest in a free, fair, and orderly election.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater request that this Court grant leave and issue a stay of the Court of Claims' October 20, 2022 opinion and order pending resolution of Defendants' appeal in the Michigan Court of Appeals. Because the general election is less than two weeks away, *Defendants request this relief before or by 3:00 p.m. on November 1, 2022.*

Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, excluding the part of the document exempted, this **application for leave to appeal** contains no more than 16,000 words. This document contains 12,719 words.

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