Subject: FOIA Request

Date: Tuesday, November 15, 2022 at 2:43:10 PM Eastern Standard Time

From: James McCarver

To: AO Records

Attachments: charged,granted.pdf, Invoice.pdf, MI-LAKE-22-1108.pdf, 1_5107633854965875423.pdf, 1_5107633854965875424.pdf, 1_5107633854965875425.pdf, 3DF19487-6608-46B6-8AB1-6CC8EE35E67B.jpg, American_Project_Michigan_2020_Election_Lawsuit_221026_081503_221028.pdf, American-Project-Michigan-2020-Election-Lawsuit-221026-081503-221028.pdf, attachment.html, Email 1.pdf, Email 2.pdf, Email 3.pdf, Email 4.pdf, Email 5.pdf, Email 6.pdf, Email 7.pdf, Email 8.pdf, Email 9.pdf, Email 10.pdf, O'Halloran_MD_et_al_v_Jocelyn_Benson_et_all_Case_No_22_000162_MZ.pdf, O'Halloran-MD-et-al-v-Jocelyn-Benson-et-all-Case-No-22-000162-MZ.pdf, The Response to the Email.pdf, Wilson v Jocelyn Benson et al Case No 22000097MB.pdf

American Oversight

Attached please see Lake County's response to your recent FOIA request.

Thank you

Jim McCarver
Budget & Grants Coordinator
Lake County Administration
800 Tenth Street
Baldwin, MI 49304

STATE OF MICHIGAN

COURT OF CLAIMS

DONALD D. WILSON,

Plaintiff,

v

JOCELYN BENSON, Secretary of State, JONATHAN BRATER, Director of the BUREAU OF ELECTIONS, NORMAN D. SHINKLE, former Chair of the BOARD OF STATE CANVASSERS, and RUTH JOHNSON, former Secretary of State,

Defendants.
_____/

OPINION AND ORDER

Case No. 22-000097-MB

Hon. Douglas B. Shapiro

Pending before the Court is defendants' MCR 2.116(C)(8) motion for summary disposition in this action under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and for declaratory relief relating to the upcoming November 8, 2022 general election. Having reviewed the briefing, the Court dispenses with oral argument per LCR 2.119(A)(6). For the reasons discussed below, the motion is GRANTED with regard to Counts II and III of the complaint, but DENIED as to Count I of the complaint.

I. BACKGROUND

Plaintiff's lawsuit arises from his challenge to defendants' electronic-voting systems and election-record retention policies, as well as plaintiff's FOIA request for documentation about defendants' certification of electronic voting machines. On September 25, 2021, plaintiff submitted a FOIA request to the Michigan Department of State, requesting "any documentation

concerning the certification of the election machines used in Michigan for the 2020 November election."

On October 18, 2021, the Department of State responded by granting the request, but required a deposit fee of $659.83—half of the Department's good-faith estimate to fulfill the request. The Department of State also estimated that it would take approximately 12 weeks, or by around mid-January 2022, to fulfill the request. Plaintiff paid the deposit fee on November 29, 2021.

As of March 2022, plaintiff had not received responsive documents and on March 24, 2022, he contacted the FOIA coordinator, Adam Fracassi, inquiring about the status. Fracassi responded, "We have received your payment and it was validated at the beginning of December and it is in process. I'll be in touch when we are completed processing and inform you if there is any additional money due." Plaintiff contacted Fracassi again in mid-June 2022, requesting another update on the status of his FOIA request and expressing his frustration with the delay.

After not receiving a response, plaintiff filed a three-count complaint on July 4, 2022. Count I is a FOIA claim requesting production of correspondence relating to the certification of the electronic-voting machines, as well as fees, costs, and disbursements under MCL 15.240(6), and punitive damages under MCL 15.240(7). Count II requests a declaratory judgment regarding "unaccredited electronic voting systems" in violation of the Michigan Election Law, MCL 168.1 *et seq.*, and the Help America Vote Act (HAVA), 52 USC 20901 *et seq*. In essence, plaintiff claims that the electronic-voting systems used in Michigan were not accredited through the proper channels. Count III is a declaratory-judgment claim for violation of 52 USC §§ 20701 and 20705, relating to defendants' electronic-records retention policies.

In Counts II and III, plaintiff requests various forms of declaratory and equitable relief, including: (1) an emergency injunction that prohibits the state from using voting machines in the 2022 general election; (2) an emergency injunction prohibiting use of the data and information from the voting systems and equipment used in the 2020 general elections to be "tampered with" or deleted; (3) an order compelling the Secretary of State to issue a complaint referral, under 42 USC § 20511(2), to the Attorney General's office and the Department of Justice to investigate alleged criminal and fraudulent election activity; (4) an order compelling the Secretary of State to request a temporary restraining order (TRO) or injunction to prevent the use of any electronic voting equipment in the upcoming general election; (5) a final judgment directing Governor Gretchen Whitmer to render elections void because "fraud vitiates everything;" and (6) an emergency TRO for the Secretary of State and Bureau of Elections to preserve all of the 2020 general-election documentation.

Defendants moved for summary disposition on August 8, 2022. On the same day, Fracassi contacted plaintiff to provide responsive records. Defendants' production totaled about 45 pages. Fracassi stated that additional records were available on the United States Election Assistance Commission's website, and provided the website link. He added, "Additional copies of these records are not being provided as they are already available online, and the adjustment to the original fee reflects the online availability of records." Fracassi did *not* suggest that defendants had withheld any responsive documents. Fracassi reminded plaintiff that he had a remaining invoice balance of $8.48 (which plaintiff contends he has paid).

In their motion for summary disposition, defendants argue that plaintiff's FOIA claim lacks merit because defendants never denied plaintiff's FOIA request. Rather, defendants granted plaintiff's request and were not bound by any particular time frame for fulfillment. The lawsuit

was not necessary to fulfill the request because defendants were processing the request when plaintiff filed his complaint. Regarding the declaratory-relief claims, defendants argue that plaintiff lacks standing, and his claims are barred by laches because he sued only a few months before the election. Finally, defendants argue, plaintiff's declaratory claims are "conspiracy theories" and disguised mandamus claims, which fail because none of the laws on which plaintiff relies create a private cause of action or establish a violation of a clearly-established legal right.

Plaintiff responds that he has not, in fact, received all responsive documents. He contends the lawsuit was necessary to produce the documents, which entitles him to reimbursement of his fees, costs, and disbursements, as well as punitive damages. Plaintiff claims to have standing to sue under the Michigan Constitution, as well as under both Michigan and federal law. He contends that laches does not apply because he was waiting to review the FOIA documents before determining whether he had any valid claims. Plaintiff outlines the merits of each of his declaratory-relief claims, but does not directly address defendants' contention that none of the relevant laws establish a private cause of action.

II. ANALYSIS

A. FOIA CLAIM

Defendants argue that plaintiff's FOIA claim fails on the pleadings[1] because the Department of State produced responsive records and was not bound by any specific time frame when doing so. The Court disagrees.

[1] Defendants move for summary disposition on the pleadings under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint. *Ass'n of Home Help Care Agencies v Dep't of Health and Human Servs*, 334 Mich App 674, 684 n 4; 965 NW2d

Under FOIA, a person may make a written request to the FOIA coordinator for a public body asking for public records. MCL 15.235(1). Next, FOIA requires the public body to respond to the request within five business days. MCL 15.235(2) explains:

> Unless otherwise agreed to in writing by the person making the request, a public body shall, subject to subsection (10), respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a written notice to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
>
> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

Defendants assert that because the Department responded to the FOIA request by "granting" the request within the time parameters outlined in FOIA, there was no FOIA violation even though defendants took nearly a year to fulfill the request. They argue that FOIA does not mandate that the public body fulfill the request within the same time frame as is required to respond to the request. Defendants further argue that they have produced all responsive documents. As for the delay, defendants argue the process was time consuming because Michigan's elections are decentralized and carried out by local clerks in the state's 1,520 cities and townships.

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707 (2020). Summary disposition is proper if the plaintiff has failed to state a claim on which relief may be granted. *Id*. The court may only consider the pleadings in the complaint, but all factual allegations are accepted as true. *Id*. " 'The motion should be granted if no factual development could possibly justify recovery.' " *Id*. (citation omitted). Finally, the Court considers the documents that are attached as part of the plaintiff's complaint. See MCR 2.113(C); *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163; 934 NW2d 665 (2019).

While the Court agrees with defendants that FOIA does not require fulfillment of the request within the five-day time frame for the initial response, FOIA does not provide defendants carte blanche to indefinitely delay production. The Court of Appeals has reasoned that courts may look beyond the label the public body placed on the FOIA response to determine whether the FOIA request was, in fact, "granted." *King v Mich State Police Dep't*, 303 Mich App 162, 189; 841 NW2d 914 (2013). For example, in *King*, the Court determined that the public body's "grant" of a FOIA request was really a decision to grant the request in part and deny the request in part. See *id*. at 190.

Here, plaintiff argues that defendants' initial "grant" of his FOIA request became a de facto denial because of the delay in fulfillment. He also disputes whether defendants produced all the requested documents. Plaintiff contends defendants did not produce documentation establishing that the electronic-voting systems used in the 2018 or 2020 elections were lawfully certified. And he points out that defendants took nearly a year to produce only 45 pages of documents in response to his request.

A public body is only required to produce copies of existing responsive documents, and has no obligation to create responsive documents. *Bitterman v Village of Oakley*, 309 Mich App 53, 67; 868 NW2d 642 (2015). When the public body denies the request by claiming that responsive documents do not exist, the public body must certify that the public record does not exist. MCL 15.235(5)(b). Then, if the public body supports that the records do not exist, under MCR 2.116(C)(10), the burden shifts to the plaintiff to counter that evidence. *Coblentz v City of Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006), citing MCR 2.116(G)(4).

While it is true that the Court cannot compel production of documents that do not exist, at the pleadings stage, the Court cannot determine whether all responsive records have been produced, or whether additional documents may exist that are responsive to plaintiff's request. Nor is the Court permitted, under MCR 2.116(C)(8), to look beyond the pleadings to address the question. Therefore, the Court denies summary disposition on plaintiff's FOIA claim to the extent he requests disclosure of all responsive documents. The Court encourages the parties to work cooperatively to determine whether defendants have produced all responsive records.

Moreover, the Court agrees with plaintiff that production of requested documents is not the end of the story in a FOIA action. MCL 15.240(6) allows a FOIA plaintiff to recover attorney fees, costs, and disbursements if they prevail in the lawsuit. Additionally, MCL 15.240(7) provides for punitive damages as follows:

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

In *Amberg v Dearborn*, 497 Mich 28, 33; 859 NW2d 674 (2014), the Michigan Supreme Court clarified that " '[t]he mere fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6).' " (Alteration in original; citation omitted.) Rather, to prevail on a FOIA claim, the plaintiff must establish that " 'the action was reasonably necessary to compel the disclosure [of public records], and [that] the

action had a substantial causative effect on the delivery of the information to the plaintiff.' " *Id*. at 34 (alterations in original), quoting *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002). As far as the rationale behind this rule, the Court of Appeals explained, in *Thomas v City of New Baltimore*, 254 Mich App 196, 205; 657 NW2d 530 (2002), that "[a]n otherwise successful claimant should not assume the expenses of the litigation solely because it has been rendered moot by the unilateral actions of the public body." (Citation omitted.)

Defendants rely on *Cramer v Village of Oakley*, 316 Mich App 60, 66-68; 890 NW2d 895 (2016), vacated in part 500 Mich 964 (2017). In *Cramer*, the Court of Appeals concluded that although a public body is required to respond to a FOIA request within the statutory time frame, a public body does not need to fulfill the FOIA request within that five-day time frame. *Id*. However, in Part III of its opinion, the Court repeated its reasoning from *King* that a public body does not have unlimited authority to avoid production of responsive documents. *Id*. at 68. The Court held, for example, that a plaintiff could sue on the basis that the public body's inordinate delay was an effective denial of the FOIA request, even if the public body had "granted" the request. *Id*., citing MCL 15.240(7).

As it related to attorney fees and costs, in Part IV of the opinion, the Court concluded, consistent with *Amberg*, that to prevail in a FOIA action where documents have already been produced, the plaintiff must establish that "the action was reasonably necessary to compel the disclosure [of public records], and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff." *Cramer*, 316 Mich App at 70-71 (citations omitted; alterations in original).

In 2017, the Michigan Supreme Court vacated as moot Part III of the Court of Appeals' opinion and remanded the case to the circuit court for dismissal of all the plaintiffs' FOIA claims. *Cramer v Village of Oakley*, 500 Mich 964; 892 NW2d 371 (2017). But the Court did *not* vacate Part IV of the Court of Appeals' opinion regarding fees and costs. *Id*. Nor did the Court express disagreement with its prior decision in *Amberg* or the Court of Appeals' opinions in *Scharrett* and *Thomas*. See *id*. Thus, if plaintiff can establish that his FOIA lawsuit was reasonably necessary to prompt defendants' production of documents, under *Amberg, Scharrett*, and *Thomas,* plaintiff has stated a valid claim for reimbursement of his fees and expenses.

The timing of defendants' production—a month after plaintiff filed this lawsuit (on July 4, 2022) and on the same day as its dispositive motion (on August 8, 2022)—suggests that the production was a direct reaction to plaintiff's FOIA lawsuit. Plaintiff sued after waiting nearly a year for a 45-page document production. This case differs significantly from *Cramer*, where the production occurred within days of the public body's decision to grant the request. See *Cramer*, 316 Mich App at 71. And defendants do not explain the delay beyond a cursory argument that the requested documents were located at the local level. Yet defendants produced only around 45 pages of responsive documents. Under these circumstances, the Court concludes that plaintiff has stated a valid claim that the timing of the production was more than mere coincidence. Therefore, accepting plaintiff's allegations as true, plaintiff has stated valid claims for attorney fees and costs, under MCL 15.240(6). As far as punitive damages, accepting the factual allegations as true, plaintiff has stated a valid claim that defendants arbitrarily and capriciously delayed disclosure of the public records. MCL 15.240(7). Therefore, the Court denies defendants' motion as it relates to plaintiff's FOIA claim in Count I of the complaint.

B. DECLARATORY-JUDGMENT CLAIMS

In Count II and Count III of the complaint, plaintiff requests a declaratory judgment under HAVA, the Michigan Election Law, and two federal criminal statutes that address retention and destruction of election records. MCR 2.605 provides, in relevant part, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1).

Regarding HAVA, the Sixth Circuit has concluded that "HAVA does not itself create a private right of action." *Sandusky Co Democratic Party v Blackwell*, 387 F3d 565, 572 (CA 6, 2004). To the extent that HAVA creates a federal right enforceable under 42 USC § 1983, plaintiff does not raise a § 1983 claim in this case.[2] See *id*. (indicating that HAVA may form the basis of a § 1983 claim). Even if he did, the United States Supreme Court has held that state entities and state officials, are *not* "persons" subject to liability under § 1983. *Will v Mich Dep't of State Police*, 491 US 58, 65-71; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Therefore, plaintiff's HAVA claim fails as a matter of law.

As for 52 USC § 20701 and 52 USC § 20705, which relate to retention of federal election records, neither of these statutes authorize a private cause of action. Section 20705 merely outlines which courts have jurisdiction to hear a claim under § 20701 and subsequent statutory provisions. Likewise, § 20701 is a criminal statute that requires election officials to retain and preserve election records. There is no language in the statute authorizing a private cause of action. Several

[2] Plaintiff suggests in his response brief that he has standing to sue under § 1983, but he does not plead any claims under § 1983.

federal courts have confirmed that 52 USC § 20701 does not contain a private right of action and that enforcement of the statute rests with the states. See, e.g., *Ayyadurai v Galvin*, 560 F Supp 3d 406, 409 (D Mass, 2021); *Pirtle v Nago*, unpublished order of the United States District Court for the District of Hawaii, issued August 31, 2022 (Docket No. 22-00381), p 3; *Fox v Lee*, unpublished order of the United States District Court for the Northern District of Florida, issued April 2, 2019 (Docket No. 4:18cv529), p 1.

Finally, in Count II of the complaint, plaintiff cites various provisions of the Michigan Election Law, as outlined in MCL 168.794, MCL 168.795, and MCL 168.795a, all of which relate to use of electronic voting systems.[3] None of these provisions expressly provide a private cause of action. When read generously, plaintiff's complaint is one for mandamus relief because, in each request for declaratory relief, plaintiff asks the Court to compel defendants to perform an alleged legal duty. " 'Mandamus is the appropriate remedy for a party seeking to compel action by election officials.' " *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (citation omitted).

To the extent that plaintiff requests mandamus relief, he has standing to pursue that claim as it relates to the upcoming election. See *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 505-506; 688 NW2d 847 (2004) (holding that ordinary citizens have standing to sue to enforce election laws); *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) (" 'It is generally held, in the absence of a statute to the contrary, that a private person as relator may enforce by mandamus a public right or duty relating to elections without showing a special

[3] Plaintiff also cites "MCL 168.274," but no Michigan statute exists with that citation.

interest distinct from the interest of the public.' ") (Citation omitted.) See also *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 588; 957 NW2d 731 (2020) (holding that *Deleeuw* and *Helmkamp* only apply when there is a "present legal controversy"—*i.e.*, when the plaintiff raises a challenge in the context of an upcoming election). The Court concludes there is no present legal controversy as it relates to the 2018 and 2020 elections and, therefore, plaintiff lacks standing to pursue a claim relating to the prior elections.

> To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. [*Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016) (citation and quotation marks omitted).]

A ministerial act is an act "in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* at 42 (citation and quotation marks omitted).

Taking each claim in turn, plaintiff first requests an emergency injunction that prohibits the state from using voting machines in the 2022 general election. He suggests that the election should be conducted via paper ballots. But, as defendants note, Michigan already uses paper ballots, which are then counted by an electronic system, as prescribed under Michigan's Election Law. See MCL 168.37 (requiring the Secretary of State to select a uniform voting system); MCL 168.795 (outlining the requirements for electronic-voting systems; MCL 168.795a (outlining the process for approval of electronic-voting systems). Plaintiff has not presented the Court with any authority to suggest that the use of electronic-voting systems, in and of themselves, is unlawful or unconstitutional.

As for plaintiff's second request, he asks for an emergency injunction preventing the data and information from the 2020 and 2022 general-election voting systems from being tampered with or deleted. Plaintiff's response brief is difficult to follow but, reading it in as generous a light as possible, he does not raise any specific claim of tampering or deletion. He has not established a clear legal right for this request, nor any clear legal duty on the part of defendants to perform any specific action. And, as noted earlier, plaintiff lacks standing as it relates to the 2020 election.

Next, plaintiff requests that the Court compel the Secretary of State to refer a complaint to the Attorney General's office and the Department of Justice to investigate alleged criminal and fraudulent elections violations. But plaintiff has not alleged any specific criminal or fraudulent election violations. Even if he had, the decision whether to pursue criminal charges is discretionary—not ministerial. Therefore, this Court lacks authority to issue a writ of mandamus compelling the Secretary of State to pursue a criminal complaint.

Plaintiff also requests an order compelling the Secretary of State to seek a TRO or injunction to prevent the use of any voting system or voting-system equipment, because none have been approved via HAVA. But, as discussed earlier, HAVA does not create a private right of action. Even if it did, plaintiff has not met the high bar to establish a clear violation of any legal right based on an alleged HAVA violation. Nor has he established that any technical HAVA violation would warrant an order preventing the use of all electronic voting systems in the upcoming election.

In his fifth request, plaintiff asks the Court to issue an order compelling Governor Whitmer to render unspecified elections void because "fraud vitiates everything." However, plaintiff has not pleaded, with any specificity, the conduct constituting fraud. MCR 2.112(B)(1). Even if he

had, Governor Whitmer is not a party to this lawsuit, and plaintiff cites no law that would provide her with the legal authority to declare elections void.

Plaintiff requests that the Court grant an emergency TRO for the Secretary of State and Bureau of Elections to preserve all documentation from the 2020 general election. But, once again, plaintiff lacks standing in relation to the 2020 election. Even if he had standing, plaintiff has not alleged a violation of the law relating to retention of election documentation. Count II centers on alleged accreditation problems at the federal level, and Count III of the complaint (which relates to retention of records) does not allege that defendants have failed to preserve any election records (or that destruction is imminent). He further acknowledges that the election laws require the *local election clerks* to maintain records—not defendants. So plaintiff has not established a clear legal right to performance of any ministerial function beyond what the election laws already requires. In sum, plaintiff fails to meet the high bar to establish a mandamus claim. Summary disposition is warranted on Count II and Count III of the complaint.[4]

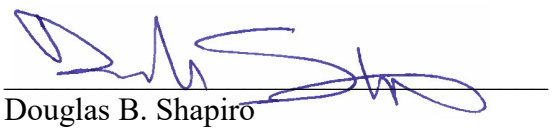
III. CONCLUSION

For the reasons discussed, IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED as to Counts II and III of the complaint, but DENIED as to Count I of the complaint.

[4] Because the Court has determined that plaintiff's declaratory-relief claims lack merit, the Court need not address defendants' argument that the claims are barred by the equitable doctrine of laches.

This is not a final order and does not dismiss the final claim or close the case.

Date: October 4, 2022



Douglas B. Shapiro
Judge, Court of Claims

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN GRAND RAPIDS DIVISION

JASON ICKES, voter

KEN BEYER, voter

MACOMB COUNTY REPUBLICAN PARTY by its officers of the Executive Committee,

DONNA BRANDENBURG, US Tax Payers Candidate for the 2022 Governor of Michigan,

ELECTION INTEGRITY FUND AND FORCE, a Michigan non-profit corporation, AND

SHARON OLSON, in her official capacity as the Clerk of Irving Township Barry County

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as the Governor of Michigan, and

JOCELYN BENSON, in her official capacity as Michigan Secretary of State

Defendants.

Civil Action No. : _____

JURY DEMAND

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VERIFIED COMPLAINT

NOW COMES Plaintiffs and, pursuant to 28 U.S.C. § 2201, 52 U.S.C. § 20705, 42 U.S.C. § 1983, and MCLA § 168.46, and hereby files this Verified Complaint and requests that this Honorable Court declare the rights, status and/or legal relations between the parties, enjoin and/or restrain The State of Michigan from destroying 2020 presidential election evidence, award damages in an amount to be determined by a jury and issue an Order compelling the Michigan Governor and Michigan Secretary of State to decertify the 2020 presidential election and, in support thereof, Plaintiff would show unto the Court the following:

I. PARTIES

1. Plaintiff Jason Ickes is a citizen of Michigan who voted in the 2020 presidential election in Michigan and he is domiciled in Jenison, Ottawa County, Michigan.

2. Plaintiff Ken Beyer is a citizen of Michigan who voted in the 2020 presidential election and is domiciled in Allegan County, Michigan.

3. Plaintiff Macomb County Republican Party is a county political party that elected an executive committee for Macomb County as defined by MCL 168.599 which selected its chair Mark Forton and the officers of Macomb County who join this action in both their official capacity and as voters in the 2020 Presidential Election. They are residents of Macomb County, Michigan.

4. Plaintiff Donna Brandenburg is a candidate for Michigan governor for the US Taxpayers party and on the ballot on November 8, 2022, and was a voter in the 2020 Election

5. Plaintiff Election Integrity Fund and Force is a Michigan non-profit organization that is concerned as a non-partisan community activist organization dedicated to having accurate, honest elections in Michigan.

6. Plaintiff Sharon Olson is the duly elected Clerk for Irving Township, Barry County Michigan, and responsible by statute for conducting the 2020 and 2022 elections.

7. On November 23, 2020, Defendant Gretchen Whitmer was the Governor of the State of Michigan and she unlawfully certified Michigan's 2020 presidential election results. (Michigan's 2020 presidential election certification attached hereto as Exhibit 1).

8. On November 23, 2020, Defendant Jocelyn Benson was the Secretary of State of the State of Michigan and she unlawfully certified Michigan's 2020 presidential election results.

II. JURISDICTION AND VENUE

9. This verified Complaint is filed pursuant to 28 U.S.C. § 1331 and seeks damages pursuant to 42 U.S.C. § 1983 for violations of Plaintiff's constitutional right to vote, as provided for by the Fourteenth Amendment to the Constitution of the United States.

10. This verified Complaint is also filed pursuant to 28 U.S.C. § 2201 *et seq.* to 2201 "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

11. This verified Complaint is also filed pursuant to 52 U.S.C. § 20705 and requests that this Honorable Court issue a temporary restraining order to stop the Defendants from destroying critical evidence from Michigan's 2020 presidential election.

III. FACTUAL ALLEGATIONS

12. On November 3, 2020, Michigan attempted to conduct an election for President of the United States of America.

13. However, as presented *infra*, the Defendants, Gretchen Whitmer and Jocelyn Benson, did not have the legal authority to certify Michigan's 2020 presidential election.

14. Pursuant to the Constitution of the United States, "Each State shall appoint, **in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2 (emphasis added).

A. The Electronic Voting System used in 2020 including the Election Management Software and Hardware (including ALL three (3) types of tabulators and the high-speed scanners (Machines) that were used in the 2020 presidential election in Michigan were not certified or accredited in accordance with to MCL 168.795a

15. Pursuant to Michigan law, "an **electronic voting system SHALL NOT BE USED in an election"** unless it meets certain requirements.

> **168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.**
>
> (1) An electronic voting system **shall not be used** in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and **unless it meets 1 of the following conditions**:
>
> (a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.
>
> (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test

standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

16. Michigan provided the following definition at MCLA 168.704(f)

(f) "Electronic voting system" means a system in which votes are recorded and counted by electronic tabulating equipment.

17. Michigan provided the following definition at MCLA 168.704(e)

(e) "Electronic tabulating equipment" means an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results.

18. After the Electronic voting system is approved any changes to the system especially the software must also be approved pursuant to MCL 168.795a(6)

(6) After an electronic voting system is approved, an improvement or change in the electronic voting system shall be submitted to the board of state canvassers for approval pursuant to this section. This subsection does not apply to the technical capability of a general purpose computer, reader, or printer to electronically record and count votes.

19. On information and belief, the electronic voting system software that was used in the 2020 election was not certified either by an independent testing authority which was accredited by the national association of state electors AND the board of state canvassers

20. On information and belief, the electronic voting system software that was used in the 2020 election was not certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards of the board of state election directors in a manner prescribed by the board of state canvassers.

21. Pursuant to MCL 168.795a, some additional pre-requisites for use in a Michigan election include mandatory compliance with:

a. MCL 168.794 http://legislature.mi.gov/doc.aspx?mcl-168-794

b. MCL 168.795 http://legislature.mi.gov/doc.aspx?mcl-168-795

c. MCL 168.797(c) http://legislature.mi.gov/doc.aspx?mcl-168-797c

B. The Laboratory used to certify the Electronic Voting Systems was not authorized to perform testing and certification by the Help America Vote Act of 2002 as required by Michigan law.

22. Pursuant to Michigan law, "the **Secretary of State is responsible for the coordination of the requirements imposed under** this chapter, the national voter registration act of 1993, and **the Help America Vote Act of 2002**" M.C.L.A. § 168.509n (emphasis added).

23. The requirement in Michigan Law MCLA 168.509n that directs the Michigan Secretary of State to comply with the Help America Vote Act of 2002 was effective on October 29, 2002.

24. The Help America Vote Act of 2002 created "the Election Assistance Commission" and the Election Assistance Commission (EAC) is referred to in the Act as the "Commission." 52 U.S.C. § 20921 (formerly cited as 42 U.S.C. § 15321.

25. The Election Assistance Commission "shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by -- … **(2)** carrying out the duties described in part B of this subchapter (relating to the testing, certification, decertification, and recertification of voting system hardware and software)…." 52 U.S.C. § 20922 (formerly cited as 42 U.S.C. § 15322).

26. The Election Assistance Commission "shall provide for the testing, certification, decertification, and recertification of voting system hardware and software **by accredited laboratories.**" 52 U.S.C. § 20971(a)(1) (formerly cited as 42 U.S.C. § 15371) (emphasis added).

27. Additionally, at "the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software **by the laboratories accredited by the Commission** under this section." 52 U.S.C. § 20971(a)(2) (for Pursuant to the U.S. Election Assistance Commission, there are **only two Voting System Test Laboratories (VSTL) that are accredited** by the Election Assistance Commission: (1) **Pro V&V**; and (2) SLI Compliance. U.S. Election Assistance Commission, VOTING SYSTEM TEST LABORATORIES (VSTL), https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl (last visited June 21, 2022) (emphasis added) merely cited as 42 U.S.C. § 15371) (emphasis added).

28. Michigan has expressly opted into compliance with 52 USC 2097 with MCL 168.509a.

MICHIGAN HAS ELECTRONIC VOTING SYSTEMS IN USE BY COUNTIES THAT ARE NOT CERTIFIED AND SOME OF THESE WERE CERTIFIED BY AN UNACCREDITED LABORATORY.

29. Michigan has 83 counties that all had the option to select the electronic voting system from the three choices provided by the Michigan Secretary of State.

30. A startling twenty-four (24) counties do not have a certified system pursuant to the information presented at https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

31. This is almost 29% of the counties do not use a certified system.

32. Pursuant to the EAC website, eleven (11) Counties used Hart Verity 2.2.2. which was also certified. https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

33. Pursuant to the EAC website, forty-eight (48) counties use Dominion's D-Suite 5.5. https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

34. The Dominion Election Management system was used in more than 57% of the Michigan counties

35. Pursuant to the Michigan Secretary of State, the Dominion election voting systems used in the November 3, 2020 presidential election were "certified" on November 15, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Michigan Secretary of State, Certified Vote Tabulating Equipment as of July 22, 2020.

36. The software version that was certified reports as version 5.5-B while the website indicates that the counties were certified for use in version 5.5.

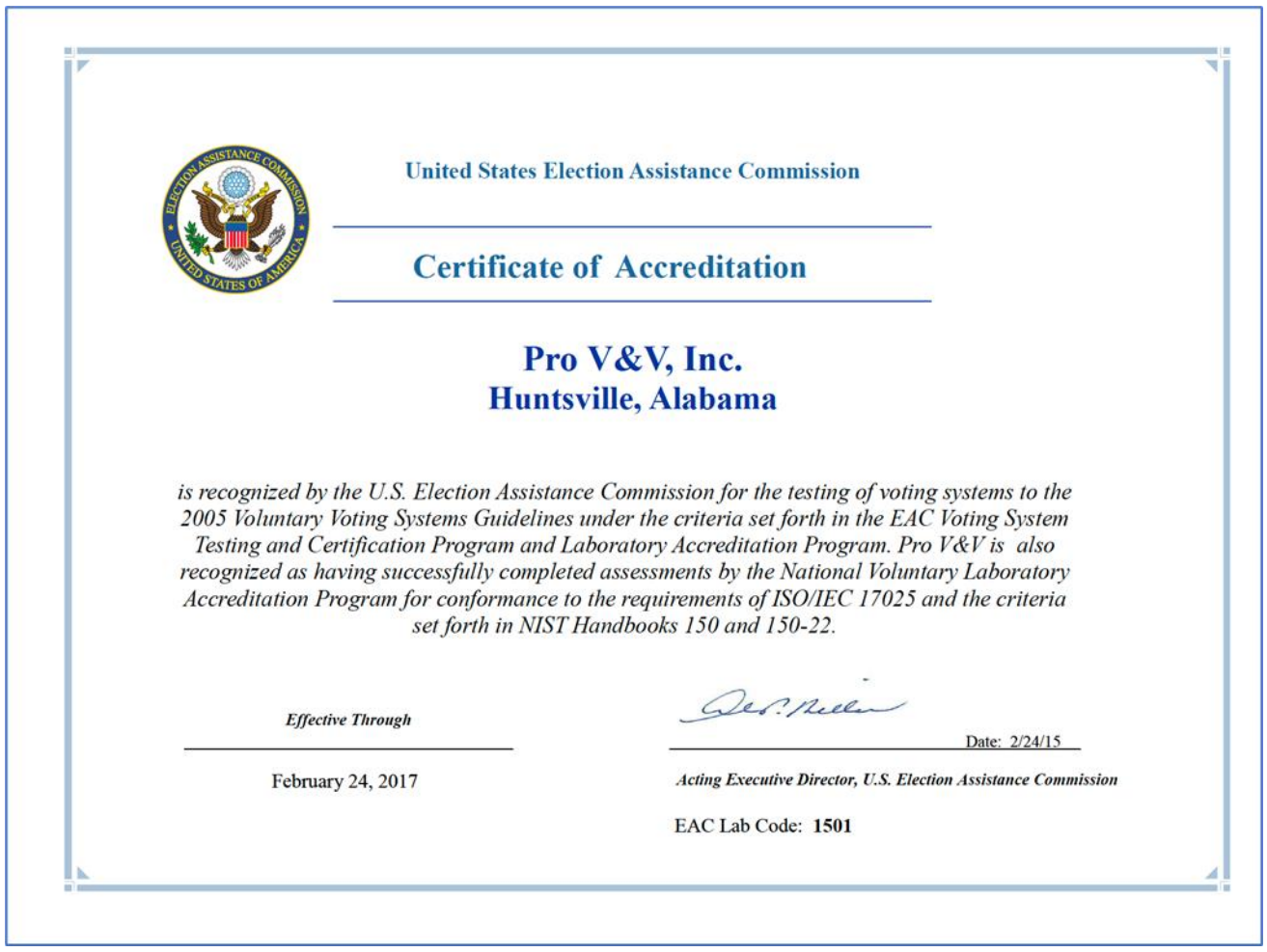
37. Regardless, these forty-eight (48) counties appear to have relied upon the validity of the November 15, 2019 certification and the laboratory that performed the testing.

38. Pursuant to the Michigan Secretary of State, the Dominion election voting systems used in the November 3, 2020 presidential election were "certified" on November 15, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Michigan Secretary of State, Certified Vote Tabulating Equipment as of July 22, 2020.

ACCREDITATION ISSUE

39. Pursuant to the Michigan Secretary of State's website and hyperlink in the above PDF, DVS-DemSuite5.5 is manufactured by Dominion Voting Systems Corp and the Testing Laboratory was Pro V&V. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/democracy-suite-55 (last visited August 29, 2022).

40. Pursuant to the U.S. Election Assistance Commission's website, Pro V&V received a Certificate of Accreditation on February 24, 2015.



United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective Through

February 24, 2017

Date: 2/24/15

Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **1501**

41. There is no evidence of that PRO V and V was recertified.

42. Pursuant to Version 2.0 of the Voting System Test Laboratory Program Manual, which was effective May 31, 2015, "A grant of accreditation is valid for a period **not to exceed two years**." Voting System Test Laboratory Program Manual, p. 39, § 3.8.

43. On November 15, 2019, the Pro V & V Accreditation was lapsed by more than two years.

44. On November 15, 2019, Pro V&V was not accredited by the U.S. Election Assistance Commission. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (last visited August 29, 2022).

45. Pro V&V did not receive another Certificate of Accreditation until **January 27, 2021**, which was after the 2020 presidential election.

46. Since Michigan law expressly requires that the "requirements imposed under… the Help America Vote Act of 2002," the Michigan voting machines or devices must have been tested and approved by a laboratory that was accredited pursuant to the Help America Vote Act of 2002

47. However, Pro V&V was not even accredited on November 3, 2020, as a laboratory in addition to having expired accreditation on the day of November 15, 2019, when they claimed to certify the Dominion system

1. **THE PROBLEM WITH THE ELECTRONIC VOTING SYSTEMS CERTIFICATION**

48. The US Election Assistance Commission certifies electronic voting systems to the federal standards and has issued three versions of the standards for electronic voting systems which are version 1.0; 1.1 and 2.0. Certified Voting Systems | U.S. Election Assistance Commission (eac.gov)

49. The electronic voting systems include the hardware and software that is used as described in the Michigan Election code which includes the three vendors each offering different types of tabulators and the election management system software.

50. The requirement to also comply with the additional requirements of the Help America Vote Act of 2002 was passed into Michigan law on October 29, 2002.

51. The essential components of the electronic voting systems include the election management software that accumulates the precinct votes at the county level and the tabulators that read the ballots and count the votes at a precinct level.

a. TABULATORS

52. On information and belief, none of the counties in Michigan used an electronic voting system that was are properly certified by the US Election Assistance Commission that are in use in Michigan.

53. On information and belief, none of the counties in Michigan used an electronic voting system that was properly certified by the US Election Assistance Commission.

54. On information and belief, all of the counties in Michigan intend to use an electronic voting system that was does not meet or exceed the current standards of the US EAC which is VVSG 2.0 from 2021.

55. On information and belief, many, if not all, of the counties in Michigan electronic voting systems used in the 2020 Michigan Presidential election were not certified to the standards of the US EAC VVSG 1.1 from 2009.

56. On information and belief, many, if not all, of the counties in Michigan electronic voting systems used in the 2020 Michigan Presidential election were not certified to the standards of the US EAC VVSG 1.0 from 2005.

b. ELECTION MANAGEMENT SOFTWARE VVSG 2.0

57. The November 15, 2019 "certification" that was presented above for fifty-nine (59) of the eighty-three (83) counties in Michigan was to the VVSG 1.1 standard from 2009.

58. On information and belief, the current election management software used does not meet the current standards of the US EAC which is VVSG 2.0 from 2021.

59. The scheduled 2022 General Election will therefore use machines that are not certified to the current standards unless this court enforces the law that requires the machines comply.

2. SECURITY PROTECTIONS REQUIRED

60. VVSG 2.0 was "designed to meet the challenges ahead, to replace decade's old voting system standards, to improve the voter experience, and provide necessary safeguards to protect the integrity of the voting process." EAC Testing and Certification Program.

61. The new upgraded requirements in VVSG 2.0 included security features:

a. Software independence is a requirement. A software independent voting system does not rely solely on software and an undetected change or error in its software cannot cause an undetectable change or error in an election outcome. This includes the use of paper ballots, cryptographically verifiable (E2E) ballots, access controls, encryption, physical security, logging, and auditing.

b. Wireless systems are disallowed. Voting systems are not allowed to connect wirelessly to external networks. Unused ports and processes must be removed or disabled. Accessibility is provided for by allowing the use of Bluetooth adapters connected to the voting device's headphone jack as this does not increase the attack surface of the system. The use of firewalls, intrusion prevention, and other means is recommended in the requirements.

c. Physical security includes logically disabling physical ports that are not essential to voting operations. All new connections and disconnections must be logged.

d. Multi-factor authentication is required for all critical operations such as software updates, aggregating and tabulating votes, enabling network functions, changing device states (opening/closing polls), or modifying authentication mechanisms.

e. System integrity requires risk assessment and supply chain risk management strategy, removes non-essential services, requires exploit mitigation (e.g., address space layout randomization (ASLR), data execution prevention) and the system to be free of known vulnerabilities, cryptographic boot validation, and authenticated updates.

f. Data protection requires FIPS 140-2 validated cryptographic modules (except E2E), cryptographic protection of various election artifacts and digitally signed cast vote records and ballot images

62. Compliance with an outdated standard does not provide for a secure safe election.

CONSEQUENCE OF NON-COMPLAINCE

63. Since the electronic voting systems were used in violation of Michigan law, then said election is void *ab initio,* and said 2020 election cannot be certified by any of the Defendants.

64. Since the Dominion Democracy Suite 5.5 has been not tested and approved by a laboratory that is "accredited" pursuant to the Help America Vote act of 2002 to the standards of the VVSG 1.0 or 1.1, the use said voting machine in the 2020 election was illegal. These forty eight counties can not use their electronic tabulators or election management software in the November 8, 2022 election or any further election until they comply with the law

65. The E S and S systems or whatever version is being used in the twenty-four (24) other systems

66. Since NONE of the electronic voting systems used by the counties in Michigan in 2022 are not compliant with the new VVSG 2.0 and tested and approved by a laboratory for use in the 2022 Michigan General Election on November 8, 2022 then the systems MUST not be used.

The 2020 Election cannot be certified.

67. Void *ab initio* is defined as "Having no legal effect from inception." Thompson Reuters Practical Law, definition of "*Void ab initio*" last visited June 21, 2022 (https://1.next.westlaw.com/Glossary/PracticalLaw/I41334c8d07ef11ebbea4f0dc9fb69570?contextData=(sc.Default)&firstPage=true&transitionType=Default)

68. Void *ab initio* means that the action taken is **void**; it is **not voidable**. *See id.*

69. Void *ab initio* means that the action taken "has no legal effect." *Id*.

70. "A void action cannot be ratified or validated [or certified]." *Id*.

71. "An action that is void *ab initio* **never had any legal effect**." *Id* (emphasis added).

72. In order for Michigan to conduct a valid election, the Michigan Secretary of State must comply with the requirements contained in M.C.L. § 168.795 and M.C.L. § 168509n *et seq*. as well as the requirements contained within the Help America Vote act of 2002 which is 52 U.S.C. § 20921.

73. Since the legal requirements contained in M.C.L. § 168.795; M.C.L. § 168509n *et seq*. and the Help America Vote Act of 2002 were not met, then the Michigan Secretary of State and Governor had no authority to use any voting machine or device in violation of said statutes.

74. Since the legal requirements contained in M.C.L. § 168.795; M.C.L. § 168509n *et seq*. and the Help America Vote Act of 2002, then the Michigan Secretary of State and Governor had no authority to certify the results of Michigan's 2020 presidential election and their certification signatures are void *ab initio*.

75. As such, Michigan conducted an **unlawful and illegal** presidential election, which the Michigan Secretary of State and Governor could not lawfully certify.

76. As such, Defendant Gretchen Whitmer's certification of Michigan's 2020 presidential election was/is **void *ab initio*** as she did not have the requisite authority under Michigan law to certify said election.

77. Defendant Jocelyn Benson's certification of Michigan's 2020 presidential election was/is **void *ab initio*** as she did not have the requisite authority under Michigan law to certify said election.

78. As such, it is incumbent upon this Court to issue a writ mandamus ordering Defendant Jocelyn Benson, in her official capacity as the Michigan Secretary of State, and

Defendant Gretchen Whitmer, in her official capacity as the Michigan Governor to decertify Michigan's 2020 presidential election results.

79. It is further incumbent upon this Court to issue a writ of mandamus ordering the Defendants to re-run the 2020 presidential elections *instanter* as the purported election conducted on November 3, 2020, was/is **void *ab initio*** and said election is uncertifiable.

80. Plaintiffs all assert a constitutional right to participate in Michigan's 2020 presidential election. *See* U.S. Const., Amend. 14.

81. Michigan's failure/refusal to comply with M.C.L.A. § 168.795a and 52 U.S.C. § 20901 *et seq*. violates Plaintiff's constitutional right to vote and said actions are actionable pursuant to 42 U.S.C. § 1983.

82. Pursuant to Bush v Gore, 531 US 98 (2000), a voter has an equal protection right to 1) access to the polls 2) to have the vote counted as cast (not altered) and 3) to not be diluted.

83. Pursuant to 52 U.S.C. § 20701, the Defendants are required to retain and preserve all records and papers relating to Michigan's 2020 presidential election.

84. Pursuant to MCL 168.811 certain records are required to be retained for two years or six years.

> **MCL 168.811 Election returns, records, and applications; preservation; destruction; time.**
>
> Sec. 811.
>
> All election returns, *including poll lists*, statements, *tally sheets*, absent voters' return envelopes bearing the statement required by section 761, absent voters' records required by section 760, and other returns made by the inspectors of election of the several precincts *must be carefully preserved and may be destroyed after the expiration of 2 years following the primary or election at which the same were used.*

> All applications executed under section 523, all voter registration applications executed by applicants under section 497(3) and (4), and *all absent voters' applications must be carefully preserved and may be destroyed after the expiration of 6 years following the primary or election at which those applications were executed*.

85. Pursuant to the Federal Prosecution of Election Offenses Seventh Edition May 2007 (Revised August 2007) (justice.gov)The manual called the Federal Prosecution of Election Offenses (8th Edition) the most current edition is found at the link is mislabeled seventh edition above. The manual is from December of 2017:

> The retention requirements of Section 20701 are aimed **specifically at election administrators**. In a parochial sense, these laws place criminally sanctionable duties on election officials. However, in a broader sense, this federal retention law assists election administrators in performing the tasks of managing elections and determining winners of elective contests. It does this by requiring election managers to focus appropriate attention on the types of election records under their supervision and control that may be needed to resolve challenges to the election process, and by requiring that they take appropriate steps to ensure that those records will be preserved intact until such time as they may become needed to resolve legitimate questions that frequently arise involving the election process. [*Fed Prosecution of Election Offenses* at page 89]
>
> Section 20701 does apply to all records generated in connection with the process of registering voters and maintaining current electoral rolls [at page 89]
>
> This statute must be interpreted in keeping with its congressional objective: under Section 20701, *all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained* if the documents or records were **generated** in connection with an election that included one or more federal candidates. [at page 90]

86. Electronic records from the election that were generated include but are not limited to audit logs and security logs as well as electronic files of the cast vote records and ballot images.

87. VVSG 2.0 requires the logging of the "audit trail" and the audit trail is required by MCL 168.794.

88. Attached are some of the requirements from the VVSG 2.0 which was adopted by the Michigan Legislature in MCL 169.609n when it adopted the Help America Vote Act of 2002 and mandate its voluntary standards into the use of electronic voting machine requirements. See Appendix A

89. Pursuant to 52 U.S.C. § 20701, Defendants are only required to preserve the evidence for twenty-two (22) months.

90. 11/03/20 + 22 months = 09/03/22

91. Many records of the 2020 election have yet to be produced despite requests from FOIA, or have been reported lost.

92. There is no requirement in law ever to destroy or delete these records.

93. The Court must enter a preservation order for these records until this case is concluded or further order of the court.

94. Pursuant to 52 U.S.C. § 20705, the United States District Court for the district in which a demand is made pursuant to 52 U.S.C. § 20703 shall have jurisdiction.

95. As such, this Court has jurisdiction over 52 U.S.C. § 20701 *et seq*. and this Court should grant Plaintiff's Emergency Motion for Temporary Restraining Order until it can be determined the extent to which the evidence preserved pursuant to 52 U.S.C. § 20701 will be needed in the present case.

96. The Court Should also grant immediate consideration due to the pending expiration of the federal requirement to retain records.

97. The Court must grant an restraining order, temporary order and a permanent injunction against the use of uncertified machines or the use of machines that are certified by an unaccredited person in ALL future elections.

DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201

98. Plaintiff incorporates by reference all paragraphs above as if fully stated herein.

99. Plaintiff requests a declaratory judgment that the Help America Vote Act of 2002 is constitutional.

VIOLATION OF CONSTITUTIONAL RIGHTS UNDER 42 USC § 1983

100. Plaintiff incorporates all prior allegations…

101. Under 42 USC § 1983 an individual may bring an action against state actors under 42 USC § 1983 for a deprivation of his or her constitutional rights.

102. A cause of action under 42 USC § 1983 must allege deprivation by a governmental entity, governmental official, or a state actor acting as a governmental entity or official, of rights secured by the United States Constitution.

103. The right to vote is the fundamental constitutional right held by each individual citizen of the United States and is preservative of all other rights.

104. Under the First, Ninth, and Fourteenth Amendments, *inter alia*, Plaintiff has a constitutional right to vote for the candidate of his choice, but also the constitutional right not to have his vote diluted, canceled out, and/or nullified by the counting of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent and/or unverifiable votes. *Reynolds v Sims*, 377 U.S. 533, 555 (1964).

105. Under the Equal Protection Clause, Plaintiff has a constitutional right to enjoy equal protection of the law and equal treatment in exercising his right to vote; and the constitutional right not to have his vote diluted, canceled out, and/or nullified by the counting

of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent or unverifiable votes. Cite equal protection clause; Reynolds, supra.

106. Due to the failure on the part of Defendants to have ensured certification or otherwise caused to be certified voting machines used in the state of Michigan in the November 2020 election, Plaintiff's vote was diluted, canceled out, and/or nullified.

107. If the Defendants named herein cause, direct, or otherwise allow the information and data required to be preserved for 22 months under Michigan Law destruction of such will make it impossible to demonstrate that the failure of certification of voting machines, as well as other fraudulent, intentional, grossly negligent, and negligent acts on the part of the Defendants, caused Plaintiff's constitutional rights to be violated as described herein under the stated causes of action available under 42 USC § 1983.

108. The preservation request but any 42 USC § 1983 action and the that defendants' fraudulent, intentional, reckless, grossly negligent, and negligent acts were the proximate cause of deprivation of Plaintiff's constitutional rights as stated herein in the fact that Michigan provides for an audit trail in MCL 168.795k which is a part of the voting franchise and was incorporated into the Michigan Constitution which guaranteed the right of every citizen to request an audit in Article 4 Section H which provides for the "right to have the results of statewide elections audited, in such a manner as prescribed by law , to ensure the accuracy and integrity of elections. This bears directly on the Equal Protection clause which protects against the altering or dilution of votes

109. The attached affidavit in support of the ex parte motion for emergency TRO is incorporated herein and constitutes verification of this complaint.

WHEREFORE, premises considered, the Plaintiff prays as follows:

1. That good and adequate service be had on all Defendants;

2. That this Court grant Plaintiff's Emergency Motion for Temporary Restraining Order to:

   a. prevent the Defendants from tampering with or otherwise adulterating the property and evidence regarding the 2020 elections;

   b. prevent the Defendants from obstructing justice, interfering with and/or destroying all investigatory evidence, confidences and privileges relating to Michigan's 2020 presidential election;

3. That this Court issue a preliminary injunction ordering

   a. the Defendants to remove any/all election equipment for the 2022 elections that is not certified by an accredited voting system test laboratory; and

   b. the Defendants to preserve all 2020 presidential election records (electronic or otherwise) indefinitely as the 2020 presidential election is still being investigated.

4. That this Court issue a writ of mandamus compelling the Michigan Secretary of State and Governor to

   a. decertify the Michigan's 2020 presidential election and to recall Michigan's Joseph R. Biden presidential electors;

   b. order the Defendants to work together to rerun the Michigan 2020 presidential election as soon as possible, by way of a special election, with paper ballots only, on a single election **day**, with the votes being counted

by hand, with members of all political parties present to observe, with a public livestream of all vote counting;

c. An award of damages to be determined by a jury of twelve (12);

d. An award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

e. A permanent injunction on use of electronic voting machines that are not certified by an accredited laboratory in all future elections.

f. Such other relief to which the Plaintiffs may show themselves to be entitled.

Respectfully submitted this 2nd day of September 2022.

/s/Daniel J. Hartman

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APPENDIX A: VVSG Standards for Preserving Generated Electronic Records

10.2.4. B The voting system needs to be constructed so that the security of the system does not rely upon the secrecy of the event logs. It will be considered routine for event logs to be made available to election officials, and possibly even to the public, if election officials so desire. The system will be designed to permit the election officials to access event logs without fear of negative consequences to the security and integrity of the election. For example, cryptographic secret keys or passwords will not be logged in event log records.

11.1 – Access privileges, accounts, activities and authorizations are logged, monitored, and reviewed and modified as needed ensures there are records in case there are errors or incidents that need to be accounted for. The system also prevents logging any voter ID information and prevents the logging capability from becoming disabled or the log entries from being modified. The system provides administrators access to logs, allowing for continuous monitoring and periodic review.

11.1-A – Logging activities and resource access
The voting system must log any access to, and activities performed on, the voting system, including:
1. timestamps for all log entries;
2. all failed and successful attempts to access the voting system; and
3. all events which change the access control system including policies, privileges, accounts, users, groups or roles, and authentication methods.
Discussion
In the event of an error or incident, the user access log can assist in narrowing down the reason for the incident or error.
• Timestamped log entries will allow for easy auditing and review of access to the voting system.
• Access control logging supports accountability of actions by identifying and authenticating users.
• Groups are a collection of users that are assigned a specific set of permissions. Roles are an
identity that is given specific permissions and can be assigned to a user. Any changes to the permissions assigned to groups and roles should be logged to identify updates to a user's privileges.

11.1-C – Preserving log integrity
The voting system must prevent:
1. the logging capability from being disabled;
2. the log entries from being modified in an undetectable manner; and
3. The deletion of logs; with the exception of log rotation.

Discussion

This requirement promotes the integrity of the information logged by ensuring all activities are logged. Additionally, it prevents these abilities from being an option within the user interface.
This requirement promotes the integrity of the information logged by ensuring all activities are not modifiable.
The removal of logs is only appropriate for log rotation, which is when the stored logs are rotated out to create more space for continuous logging. The voting system should be capable of rotating the event log data to manage log file growth. Log file rotation may involve regular (e.g., hourly, nightly, or weekly) moving of an existing log file to some other file name and/or location and starting fresh with an empty log file. Preserved log files may be compressed to save storage space.

12.2-E – Logging enabled and disabled ports
An event log entry that identifies the name of the affected device must be generated when physical ports are enabled or disabled.
Discussion
Logically disabling ports prevents unused ports from being used as a staging point for an attack on the voting system.
Discussion
Whether a port is disabled or not is security relevant, especially once a security incident has occurred, and this information would be useful when determining cause. 12.2-C – Physical port restriction applies to physical restrictions, whereas 12.2-D – Disabling ports discusses logical disabling of ports.

STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.
_____/

OPINION AND ORDER

Case No. 22-000162-MZ

Hon. Brock A. Swartzle

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

Plaintiffs,

v

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

Defendants.
_____/

Case No. 22-000164-MM

Hon. Brock A. Swartzle

An executive-branch department cannot do by instructional guidance what it must do by promulgated rule. This straightforward legal maxim does most of the work in resolving these two consolidated cases. Similar to the holdings in *Davis v Benson*, unpublished opinion of the Court of Claims, issued October 27, 2020 (Docket Nos. 20-000207-MZ and 20-000208-MZ), and

Genetski v Benson, unpublished opinion of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), this Court concludes that defendants have exceeded their authority with respect to certain provisions in an election manual. With that said, this Court will not grant the entirety of the sweeping relief sought by plaintiffs in Docket Number 22-000162-MZ. Rather, as explained below, the Court will grant more narrow relief with respect to the five specific claims raised by plaintiffs in Docket Number 22-000164-MM.

I. BACKGROUND

Plaintiffs include several election challengers for the November 2022 general election; two candidates for the Michigan Legislature; the Michigan Republican Party; and the Republican National Committee. Section 730 of the Michigan Election Law, MCL 168.1 *et seq.*, permits political parties to designate challengers to be present in the room where the ballot box is kept during the election. MCL 168.730. These consolidated cases relate to a manual that the Michigan Bureau of Elections regularly issues relating to election challengers and poll watchers. By all accounts, the Bureau has issued several iterations of the manual since at least 2003; the one just prior to the current one was issued in October 2020. In May 2022, defendants drafted and published the current version titled, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" ("May 2022 Manual"). The Court attaches the May 2022 Manual to this Opinion and Order as an exhibit for ease of reference.

On September 28, 2022, plaintiffs Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, "O'Halloran Plaintiffs"), sued defendants in this Court in Docket No. 22-000162-MZ. O'Halloran, Giacobazzi, and Cushman are designated election challengers for the November 2022 general election. Penny Crider is a

candidate for the Michigan House of Representatives, and Kenneth Crider is a candidate for the Michigan Senate. The O'Halloran Complaint raises two claims. In Count I, the O'Halloran Plaintiffs allege that the May 2022 Manual violates Section 733 of the Michigan Election Law, MCL 168.733. In Count II, the O'Halloran Plaintiffs assert that the May 2022 Manual was promulgated without the proper notice-and-comment requirements outlined in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

Two days later, plaintiffs Richard DeVisser (another election challenger), the Michigan Republican Party, and the Republican National Committee (collectively, "DeVisser Plaintiffs") sued defendants separately in Docket No. 22-000164-MM. In Count I, the DeVisser Plaintiffs allege that certain provisions of the May 2022 Manual violate the Michigan Election Law. Like the O'Halloran Plaintiffs, the DeVisser Plaintiffs also allege that the May 2022 Manual is a rule promulgated without the required notice-and-comment procedures outlined in the APA.

Both sets of plaintiffs request various forms of expedited declaratory and injunctive relief, including a declaration that the publication is void in toto, or alternatively, that certain passages must be removed before the November 2022 general election. The O'Halloran Plaintiffs have moved for a temporary restraining order ("TRO") and preliminary injunction; similarly, the DeVisser Plaintiffs have sought expedited declaratory relief under MCR 2.605(D).

In the interest of conserving time for expedited appellate review before the November 2022 general election, this Court consolidated the cases on October 3, 2022, and ordered defendants to show cause why the relief requested in the complaints should not be granted. Defendants responded and moved for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10).

Defendants first argue that the O'Halloran Plaintiffs' complaint should be dismissed for lack of jurisdiction because the O'Halloran Plaintiffs failed to verify their complaint, as required under MCL 600.6431. Defendants next argue that plaintiffs' claims are barred by laches because plaintiffs did not sue until September 2022, but the Bureau of Elections issued the manual months earlier. Defendants also assert that the May 2022 Manual did not need to be promulgated through notice-and-comment rulemaking because the Michigan Election Law grants the Secretary of State broad authority to issue instructions, advice, and directives, and the May 2022 Manual fits within these categories. Finally, defendants address each of plaintiffs' specific challenges to the May 2022 Manual, as outlined below.

Both sets of plaintiffs responded to defendants' motion for summary disposition. They reiterate that the May 2022 Manual's language extends beyond the Michigan Election Law and should have been promulgated as a rule in accordance with the APA. On the question of laches, the O'Halloran Plaintiffs argue that they brought their challenges to defendants' attention over the summer, and they maintain that defendants will not suffer any prejudice if the May 2022 Manual is rescinded or revised. The DeVisser Plaintiffs contend that they challenged the May 2022 Manual after learning about the changes during the August 2022 primary election. Finally, the O'Halloran Plaintiffs amended their complaint to include signatures and verifications.

Finally by way of background, the Michigan Democratic Party moved to participate in these cases as amicus curiae and submitted a proposed brief, which this Court has already granted. The Downriver/Detroit Chapter of the A. Philip Randolph Institute ("DAPRI") moved to intervene as a party defendant or, alternatively, to participate as an amicus curiae. As DAPRI appears to acknowledge, however, intervention of a nonstate entity as a party defendant is barred by our Court of Appeals' decision in *Council of Organizations & Others for Ed about Parochiaid v State*, 321

Mich App 456; 909 NW2d 449 (2017). The Court will, however, grant DAPRI's motion to participate as an amicus curiae, and the Court will accept DAPRI's brief as-filed.

II. ANALYSIS

Before the Court are plaintiffs' respective requests for emergency and expedited declaratory and injunctive relief, as well as defendants' motion for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10).

Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* The Court will consider the factual allegations in the complaint as true, but it may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for the plaintiff's claims. See *White v Dep't of Transp*, 334 Mich App 98, 106; 964 NW2d 88 (2020). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* (cleaned up). The Court views the evidence and all reasonable inferences arising from the evidence in the light most favorable to the nonmovant. *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011).

With respect to summary disposition, the court rules also provide, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1). With respect to the nonmovant, the court rules similarly provide, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

A. VERIFICATION AND STANDING

The Court first addresses defendants' motion for summary disposition of the O'Halloran Plaintiffs' complaint under MCR 2.116(C)(4). Defendants argue that the Court lacks subject-matter jurisdiction over the O'Halloran Plaintiffs' complaint because they failed to verify it in accordance with the Court of Claims Act ("COCA"), MCL 600.6401 *et seq.*

The COCA contains notification requirements that a plaintiff must follow to sue in the Court of Claims. Specifically, MCL 600.6431(1) and (2)(d) provide:

> (1) Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.
>
> (2) A claim or notice under subsection (1) must contain all of the following:
>
> * * *
>
> (d) A signature and verification by the claimant before an officer authorized to administer oaths.

Our Supreme Court has held that the requirements outlined in MCL 600.6431 of the COCA constitute "conditions precedent" to filing suit. *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). Along the same vein, MCL 600.6434(2) requires that "[t]he complaint

shall be verified." An unverified complaint does not comply with the requirements of MCL 600.6434(2), and is subject to dismissal. *Progress Mich v Attorney General*, 506 Mich 74, 95; 954 NW2d 475 (2020). The *Progress Mich* Court held that the complaint must contain an oath or affirmation by the plaintiff, consistent with MCR 1.109(D)(3). *Id.* at 92 and n 10. Nevertheless, the *Progress Mich* Court held that allowing the plaintiff to amend its complaint to correct a verification defect does not "subvert the verification requirement of MCL 600.6434." *Id.* at 98.

The O'Halloran Plaintiffs filed an amended complaint that addresses the verification issue. The amended complaint contains a verification by each plaintiff, including a handwritten signature and a notarization by an officer authorized to administer oaths. The verifications meet the requirements of MCL 600.6431 and MCL 600.6434. Because the O'Halloran Plaintiffs have addressed the deficiencies in their complaint, the Court agrees with plaintiffs that they need not re-file their case. See *id.*

With respect to standing, MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." For the reasons stated in their respective pleadings and briefs, the Court agrees with plaintiffs that there is an actual controversy, and they have standing to bring these actions.

B. THE O'HALLORAN PLAINTIFFS' BROAD, SWEEPING CHALLENGE

The O'Halloran Plaintiffs request a TRO and a preliminary injunction for the declaratory relief requested in their complaint. They ask that the Court: (1) declare rescission of the May 2022 Manual; (2) enjoin enforcement of the May 2022 Manual; (3) declare that the entirety of MCL 168.733 and MCL 168.734 of the Michigan Election Law must be included in the May 2022

Manual; (4) enter an order implementing the requested amendments and corrections to the May 2022 Manual; and (5) order that certain passages in the May 2022 Manual be removed.

To the extent that the O'Halloran Plaintiffs raise specific concerns similar to those raised by the DeVisser Plaintiffs, those concerns are addressed subsequently in Part II.C of this Opinion and Order. In the current part, the Court is focused on the more broad, sweeping objections and relief sought by the O'Halloran Plaintiffs.

The legal standard for reviewing a request for a preliminary injunction is the same as the standard governing a request for a TRO, at least when the Court has permitted the nonmoving party to respond. See MCR 3.310(A)(1) and (B)(1). As the staff comment to the 1985 adoption of MCR 3.310 explains, "[MCR 3.310] adopts the terminology used in the federal rule, distinguishing between temporary restraining orders, which are entered without notice, and preliminary injunctions, which are granted with notice and after hearing."

The purpose of a preliminary injunction is to maintain the status quo before a final hearing on the parties' rights. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012). An injunction "is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 633-634; 821 NW2d 896 (2012) (cleaned up). The moving party has the burden to prove that four elements weigh in favor the preliminary injunction. *Hammel*, 297 Mich App at 648. Those elements include:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be

> by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* (cleaned up).]

With that said, because the matters have been sufficiently briefed and ultimately turn on questions of law and undisputed material fact, the Court will reach the merits of plaintiffs' claims. Doing so will permit the parties to seek expedited appellate review of this Court's Opinion and Order. Accordingly, the Court will not issue preliminary relief, and, as a result, it need not address or weigh the relative harms of a TRO or preliminary injunction. See *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 13 n 21; 753 NW2d 595 (2008).

The O'Halloran Plaintiffs raise a broad, sweeping challenge to the Secretary of State's authority to issue the May 2022 Manual as an instructive guide, rather than as a promulgated rule under the APA. The O'Halloran Plaintiffs contend that, at the very least, the May 2022 Manual must include the complete language of MCL 168.733 and MCL 168.734.

The Court begins its analysis with the Michigan Election Law and the APA. The interpretation of a statute, including the authorization provided to a department by our Legislature, is a question of law for this Court to decide, and the Court does not defer to a department's interpretation of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). As explained by the undersigned while sitting on our Court of Appeals: "As I read our caselaw, the directives to give 'respectful consideration' to an agency's interpretation and not depart from it unless there are 'cogent reasons' for doing so are little more than judicial dross." *West Mich Annual Conf of the United Methodist Church v Grand Rapids*, 336 Mich App 132, 159; 969 NW2d 813 (2021) (SWARTZLE, P.J., concurring). This is so because a court owes "respectful consideration" to *each and every party's* interpretation of a statute—not just that of a government official—and a court must not load the interpretive dice in favor of one party over the

other. *Id.* Thus, this Court gives defendants' interpretation of the Michigan Election Law and APA respectful consideration and does not reject that interpretation without a cogent reason, but it likewise gives similar consideration and treatment to the interpretations offered by the parties, the Michigan Democratic Party, and DAPRI. In sum, "[a] court should adopt the best interpretation of a statute, based on a fair reading of the text, using clear, even-handed criteria objectively applied—full stop." *Id.* at 160.

As a state department, the Michigan Department of State must follow the requirements of the APA. Under the APA, only a department's "rule," promulgated by that department through the crucible of public notice-and-comment rulemaking, has the force and effect of law. *Slis v Michigan*, 332 Mich App 312, 346; 956 NW2d 569 (2020). Any other pronouncement by a department *does not* have the force and effect of law unless specifically authorized by our Legislature. *Twp of Hopkins v State Boundary Comm'n*, __ Mich App __; __ NW2d __ (2022) (Docket No. 355195); slip op at 11.

Section 7 of the APA defines the term "rule" to mean "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency." MCL 24.207. Defendants argue that the May 2022 Manual is an instructional manual that provides mere guidance and, therefore, falls under several statutory exceptions to the rulemaking requirement. They cite exceptions to the rulemaking requirement,[1] including for "[a]

[1] Defendants argue that the Secretary of State has permissive statutory authority that allows a directive or instruction to be issued with the force and effect of law outside of the APA rulemaking process. For reasons similar to those set forth by then-Chief Judge MURRAY in *Davis v Benson*

decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected," MCL 24.207(j); "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public," MCL 24.207(g); and "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory," MCL 24.207(h).

MCL 168.31(1)(a) and (b) authorize the Secretary of State to "issue instructions and promulgate rules pursuant to [the APA] for the conduct of elections" and "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(c) adds that the Secretary of State shall

> [p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on 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.

Thus, the Secretary's responsibility for issuing instructions is distinct from the authority to promulgate rules, where the latter has the force and effect of law, but the former does not. Indeed, under the APA, only an instruction of "general applicability," properly promulgated, that implements or applies a law, constitutes a department rule. Finally, MCL 168.31(1)(e) requires the Secretary of State to "[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations."

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cited earlier, the Court rejects defendants' attempts to justify as binding the specific provisions of the May 2022 Manual that are explored in Part II.C of this Opinion and Order.

The Court agrees with defendants that, taken as a whole (though with certain exceptions explored below), the May 2022 Manual is informational in nature and does not, in and of itself, have the force and effect of law. Defendants have specifically acknowledged to this Court the limited reach of the May 2022 Manual: "The [May 2022 Manual] is principally explanatory, *does not have the force and effect of law*, and *does not affect the rights of the public*." Defendants Sec'y of State Jocelyn Benson and Director of Elections Jonathan Brater's Response to Order to Show Cause and Brief in Support of Motion for Summary Disposition, p 19 (emphasis added).

As all parties acknowledge, the May 2022 Manual was not promulgated according to the notice-and-comment rulemaking procedures set forth under the APA. Nor does the Michigan Election Law require the Secretary of State to issue rules on the areas outlined in the May 2022 Manual as it does, for example, in the context of electronic-voting systems. See MCL 168.795a(8). The Michigan Election Law does, however, permit the Secretary of State to issue explanatory instructions and forms.

Moreover, the Michigan Election Law does not provide that any unpromulgated, instructional guidance issued by the Secretary of State is "binding" on anyone—with the sole caveat found in MCL 168.765a ("Absent voter counting board"), where in subsection (13), our Legislature stated that the Secretary of State "*shall* develop instructions consistent with this act for the conduct of absent voter counting boards," and added, "[t]he instructions developed under this subsection are binding upon the operation of an absent voter counting board . . . ." (Emphasis added.) Thus, as our Legislature has made clear, the instructions in the May 2022 Manual are binding only on those who operate the absent voter counting boards (AVCB), per MCL 168.765a(13), and, critically, only to the extent that the instructions are consistent with, and do not add to or omit from, any provision in the Michigan Election Law or properly promulgated rule. In

all other respects, the May 2022 Manual, as mere explanatory instruction, is not binding on any Michigan citizen, including election challengers. There is no basis in law for this Court to prohibit defendants from issuing merely instructional guidance. Accordingly, the Court declines to declare the entirety of the May 2022 Manual unlawful or enjoin any use of an instructional manual for training purposes.

Likewise, the Court disagrees with the O'Halloran Plaintiffs that the May 2022 Manual must include the entire language of MCL 168.733 and MCL 168.734. The O'Halloran Plaintiffs argue that, unless the May 2022 Manual recites the entirety of both statutes, there are bound to be violations of the law.

But plaintiffs do not cite any provision of the Michigan Election Law that would require the language of each statute to appear in the May 2022 Manual. Private citizens and government officials alike are expected to know and follow the law, see *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000), and this Court declines to impose a requirement on defendants to explain each and every aspect of the Michigan Election Law in the May 2022 Manual. This does not preclude, of course, a challenger or poll watcher from bringing a hardcopy or (as explained below) an electronic version of MCL 168.733 or MCL 168.734 (or, indeed, the entire Michigan Election Law) to a particular polling precinct. For these reasons, defendants need not amend the May 2022 Manual to include the complete language of MCL 168.733 or MCL 168.734.

C. PLAINTIFFS' MORE NARROW CLAIMS

Apart from the O'Halloran Plaintiffs' broad, sweeping attacks, both sets of plaintiffs also articulate specific challenges to several provisions of the May 2022 Manual. In essence, they argue

that defendants have not limited themselves to mere instruction or guidance, but have, instead, attempted to impose binding rules on challengers and poll watchers. As explained above, defendants have authority to issue instructional guidance, but they do not have the authority to issue rules with the force and effect of law, apart from those promulgated through notice-and-comment rulemaking. To the extent that defendants have issued an unpromulgated rule in the guise of an "instruction," they have exceeded their lawful authority under the Michigan Election Law and APA.

The DeVisser Plaintiffs articulate these specific challenges most clearly in Paragraph 30 of their complaint, and these can be described as followed: (1) the credential-form requirement; (2) appointment of challengers on election day; (3) communication with election inspectors other than the "challenger liaison"; (4) the prohibition on electronic devices in AVCB facilities, and (5) the prohibition on recording "impermissible challenges." The Court addresses each specific challenge in turn.

1. The Credential-Form Requirement. Our Legislature requires that challengers be credentialed. MCL 168.732. For the first time in recent memory, defendants have issued a specific, uniform form that challengers are purportedly required to use with respect to their credentials. The May 2022 Manual references the form, which is available on the Secretary of State's website, and states, "If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger." This is different from years past, when political parties have issued custom credential forms to their own challengers. The DeVisser Plaintiffs argue that the Michigan Election Law does not grant the Secretary of State the authority to mandate a uniform challenger-credential form.

To be clear, the Court does not take issue with the policy of having a uniform challenger-credential form. There is, in fact, much to commend with such a form, in terms of clarity and administrative efficiency. With that said, our Legislature expressly set out the "evidence" needed to show that a person was properly credentialed as a challenger. In MCL 168.732, a section entitled, "Presence of challenger in room containing ballot box; *evidence of right to be present*," (emphasis added), our Legislature set forth the following three items that evidence a valid challenger: (a) "[a]uthority signed by the recognized chairman or presiding officer" of the organization or committee (here, major political party); (b) the written or printed name of the challenger; and (c) the precinct number for the challenger's assigned precinct. Because our Legislature set forth three specific requirements that a person must satisfy to evidence that the person is a valid challenger, defendants cannot, in the absence of a promulgated rule, add a fourth, i.e., the mandatory use of a particular form issued by the Secretary of State.

The Secretary of State can certainly create a form, under MCL 168.31(1)(e), for the convenience of election challengers. And the Court recognizes the Secretary of State's position, as noted in Director of Elections Jonathan Brater's affidavit, that a uniform authorization form would expedite the credentialing process. But our Legislature has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies with the Michigan Election Law—nothing more is required. The provision in the May 2022 Manual requiring the use of the uniform challenger-credential form violates the Michigan Election Law and APA.

2. Appoint or Credential Challengers on Election Day. Next, the DeVisser Plaintiffs challenge the following language on page 2 of the May 2022 Manual: "Political parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day."

(Emphasis added.) Plaintiffs argue that political parties should be permitted to appoint or credential election challengers *on* Election Day as well. In their response brief, defendants acknowledge that "challengers appointed on Election Day . . . will be accepted." In their reply brief supporting summary disposition, defendants state more directly, that "neither the form nor the guidance will prevent appointing a challenger on Election Day." They explain that the guidance, which is not a rule, is intended to encourage parties to prepare ahead of time and not wait until Election Day to appoint most of their election challengers.

The Court agrees with plaintiffs that MCL 168.730 and MCL 168.731 authorize political parties to appoint and credential challengers on Election Day. The Court also accepts defendants' acknowledgment that the language "until Election Day" is not intended to, and should not, prohibit the appointment and credentialing of election challengers on Election Day. Because changes to the May 2022 Manual are required in any event, the Court will order defendants to clarify this provision (e.g., "… until or on …").

3. Communication Through Only the "Challenger Liaison." Both sets of plaintiffs challenge language in the May 2022 Manual requiring that challengers may only communicate with a particular election inspector, designated as the "challenger liaison." On page 6, the May 2022 Manual states in relevant part (with bold in the original), "**Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff**." The manual adds on the same page, "Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." If the challenger violates these provisions, the challenger is subject to a warning, and repeated violations may lead to ejection of the challenger, according

to the manual. Plaintiffs argue that the manual's limitation on which inspectors the challengers may interact with violates MCL 168.733(1)(e), which provides that a challenger may bring certain issues to "an election inspector's attention" without restriction to a *particular* inspector.

The authority to designate a "challenger liaison" is absent from the Michigan Election Law—in fact, the very label appears nowhere in statute. Defendants have not presented this Court with any statute, common law, case law, or promulgated rule that gives them the authority to restrict with which election inspector a challenger can communicate. Our Legislature provided a challenger the right to communicate to "an" election inspector, and defendants cannot artificially restrict that to a designated inspector. Whether it makes sense to have such a liaison is one thing; it is another thing entirely to require, at the risk of being ejected, a challenger to speak to only the designated liaison. This provision of the May 2022 Manual goes well beyond what is provided in law and impermissibly restricts a challenger's ability to bring certain issues to any inspector's attention. Accordingly, the manual must be revised to make clear that a challenger need not bring an issue to the attention of only a liaison challenger, but instead can bring such issue to the attention of any election inspector at the applicable location.

4. *Electronic Devices in AVCB.* Next, plaintiffs challenge language in the May 2022 Manual restricting the possession of electronic devices, including cell phones, in AVCB facilities. (As an aside, the Court notes that while the October 2020 manual also prohibited electronic devices in AVCB facilities, there is nothing in the record to suggest that the manual was challenged in court on these grounds.)

On this topic, the May 2022 Manual provides: "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." According to the manual, election challengers may possess electronic devices at in-person polling places if the device is not disruptive or used to record activity in the polling place, but election challengers may not similarly possess electronic devices within AVCB facilities until after the polls close.

As a penalty, according to the manual, a challenger who possesses an electronic device is subject to ejection from the AVCB facility, because doing so would purportedly violate the oath that the challengers take upon entering the facility. Page 21 of the May 2022 Manual adds that challengers may not "[u]se a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility." And page 23 of the May 2022 Manual states that poll watchers are subject to the same restrictions as credentialed challengers, and are also subject to ejection for failing to follow the instructions.

The May 2022 Manual is unclear on whether the prohibition applies to everyone in the AVCB facility or just election challengers and poll watchers. On October 14, 2022, the Court ordered the parties to submit letters addressing the scope of the electronic-device prohibition. In their letter of October 18, 2022, defendants represented to the Court, "The exclusion of cell phone and other devices is *not* limited to poll watchers and challengers. Election workers and inspectors are also prohibited from communicating information out of the AVCB and are prohibited from leaving . . . pursuant to MCL 168.765a(9)-(10)." But defendants conflate here their unpromulgated ban on the mere possession of an electronic device with our Legislature's statutory ban on a specific use of an electronic device (i.e., to communicate certain election information before the polls close). In any event, even if the electronic-device ban applies alike to challengers and poll

watchers as well as election workers and inspectors, the penalties outlined in the May 2022 Manual only apply to challengers and poll watchers—not election workers and inspectors.

Defendants have taken the position that the only persons permitted to have electronic devices in the AVCB facility before the polls close are certain "authorized individuals." In its October 14, 2022, Order, this Court asked the parties to identify the "authorized individuals," and explain from where their authority came. In response, defendants cited MCL 168.765a(12).

This statute permits certain individuals to enter and leave the AVCB facility before the polls close, including: the local election official who established the AVCB; the deputy or employee of such an official; a Bureau of Elections employee; a county clerk; a county-clerk employee; and a representative of the voting equipment company. These individuals can enter the AVCB facility only to respond to an inquiry or to provide instructions on AVCB operations. *Id.* But MCL 168.765a(12) is utterly silent with respect to whether these authorized individuals are to be treated different from challengers in terms of their ability to carry electronic devices. Nor does MCL 168.765a(12) provide that election challengers may *not* possess electronic devices in the AVCB facility, or that the election challengers who violate the electronic-device ban should be subject to penalties to which "authorized individuals" are not subject.

Defendants also rely on MCL 168.765a(9) and (10) to support their ban on the possession of electronic devices in the AVCB facility. MCL 168.765a(9) requires election inspectors, challenges, and any other person present in the AVCB facility to take 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.' " MCL 168.765a(10) adds, in relevant part,

that "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." The statute also provides that a person whose conduct causes the polls to close or who discloses an election result is guilty of a felony. *Id.*

Thus, MCL 168.765a(9) and (10), collectively, prohibit a challenger from disclosing information relating to the processing of absentee ballots before the polls close, the disclosure of which is a felony. But MCL 168.765a does *not* categorically prohibit the possession of electronic devices in the AVCB facility or otherwise suggest that physical sequestration includes (or equates to) a prohibition on the possession of electronic devices. In reality, defendants' electronic-device ban is a prophylactic measure designed to prevent potential disclosure of absentee-vote information, which Director Brater appears to acknowledge in ¶47 of his affidavit.

MCL 168.765a was enacted four years ago as a provision in a 2018 update to the Michigan Election Law. See 2018 PA 123. Our Legislature amended the same statute twice in 2020. See 2020 PA 95 and 2020 PA 177. Cell phones and other electronic devices have been prevalent for decades and have long had the capability to record. In the face of the existence of these devices, our Legislature did not see fit to ban them in AVCB facilities when it added section 765a to the Michigan Election Law in 2018 or when it amended the statute twice in 2020. Rather, our Legislature enacted two different prophylactic measures to guard against the communication of election-related information—i.e., first, the taking of an oath, and second, physical sequestration at the AVCB facility—and, for violating either measure or otherwise communicating election-related information, our Legislature imposed the penalty of a felony conviction. See MCL 168.765a(9) and (10). Our Legislature could have added a third prophylactic measure, maybe even the one favored by defendants, but it chose not to do so. When our Legislature enacts a public

policy in one particular way but not another, its choice must be respected and enforced by the other two branches. *Spalding v Swiacki*, 338 Mich App 126, 138; 979 NW2d 338 (2021) ("When the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional.").

The Court is cognizant of, and frankly shares, defendants' concerns about the security of absentee-ballot counting. But there is nothing in the Michigan Election Law that precludes a challenger from merely possessing an electronic device in the AVCB facility. Nor have defendants promulgated a rule through public notice-and-comment rulemaking that might have given them the lawful authority to impose such a ban. Prohibiting electronic devices in the AVCB facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule. The Court declines to read a prophylactic measure into a statute that does not appear in its plain language.

Finally, defendants cite the Sixth Circuit's decision in *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016), a case involving a federal district court's preliminary injunction preventing the state from enforcing a ban on "ballot selfies." *Crookston* involved the question whether a photography ban at the polls was a content-neutral regulation that placed a reasonable restriction on the plaintiff's constitutional rights, or whether it impermissibly impinged on the plaintiff's First-Amendment rights. *Id.* at 400. The court stayed the district court's preliminary injunction, applying the doctrine of laches and concluding that "the tardiness of Crookston's motion for a preliminary injunction alone requires us to reject it." *Id.* at 399.

The court continued its analysis, in what was arguably dicta, and explained that it was "skeptical . . . of the district court's assessment of Crookston's odds of success on the merits." *Id.* at 399-400. The court explained that the photograph ban "seems to be" a content-neutral regulation reasonably protecting the privacy of voters. *Id.* at 400. Ultimately, the court concluded that the state's interest in a stay outweighed any imposition on the plaintiff's First-Amendment rights. *Id.* But the court noted that it was "not clear" whether the selfie ban significantly impinged on the plaintiff's First-Amendment rights. *Id.* The court then stated, "To be clear, we are not resolving the merits of the case," leaving the issue for another day. *Id.* at 401. As defendants note in their brief, the court never addressed the merits because the parties settled.

This Court does not read *Crookston* as granting defendants broad-stroke authority to prohibit the mere possession of electronic devices in the name of voter privacy; the Sixth Circuit never reached that sweeping conclusion (or any conclusion on the merits, for that matter). Because defendants lack any legal basis to prohibit election challengers from possessing electronic devices in the AVCB facility, the May 2022 Manual must be revised accordingly.

To be clear to the parties and any other challenger, poll watcher, election inspector, election official, election worker, or any person in an AVCB facility: Nothing in this Court's Opinion and Order should be read to permit a person to *use* an electronic device in a way that violates the Michigan Election Law. Our Legislature has made it a felony to communicate—*in any way* before the polls close—any information relative to the processing or tallying of votes that may come to the person. One practical way that a person can reduce the risk of being suspected of violating MCL 168.765a would be for that person to leave any electronic device outside the facility. If an election inspector or other official has a reasonable suspicion that a person has used an electronic-

communication device to communicate prohibited information, that person is subject to removal and potential criminal prosecution.

5. *Making a Record of "Impermissible" Election Challenges.* Finally, the DeVisser Plaintiffs challenge language in the May 2022 Manual limiting what types of challenges are recorded in the poll book. The May 2022 Manual states in relevant part, "A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below . . . If the challenge is rejected, the reason for that determination must be recorded in the poll book. . . . An impermissible challenge, as explained below, need not be noted in the poll book." The May 2022 Manual explains that the challenger liaison is responsible for adjudicating each challenge by determining if it is impermissible, rejected, or accepted. The O'Halloran Plaintiffs also take issue with language in the May 2022 Manual preventing the challengers from making "repeated impermissible challenges."

The May 2022 Manual defines an "impermissible challenge" to include "[c]hallenges made to something other than a voter's eligibility or an election process," "[c]hallenges made without a sufficient basis," or "[c]hallenges made for a prohibited reason." The May 2022 Manual makes explicitly clear, "**Election inspectors are not required to record an impermissible challenge in the poll book.**" In his affidavit, Director Brater explains that the Bureau of Elections incorporated this new language because the Bureau received reports of "an increased volume of challenges that were not based on any permitted reason in the Michigan Election Law."

The labels "permissible challenge" and "impermissible challenge" are not found in the Michigan Election Law. Our Legislature has made clear that, when a challenge is made to the voting rights of a person—regardless of who makes the challenge—"an election inspector *shall*

immediately . . . Make a written report [including certain information] . . . [and] Retain the written report . . . and make it a part of the election record." MCL 168.727(2)(b) and (c) (emphasis added). There is no discretion available to the election inspector not to record a so-called "impermissible challenge" to a person's voting rights under MCL 168.727(1). Thus, to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.*

With respect to a challenger's claim that *does not* involve a particular person's right to vote (i.e., a reason other than those listed in MCL 168.727(1) or MCL 168.733(1)(c)), our Legislature does not require that any specific report be generated, and the parties have not pointed this Court to any promulgated rule that would so require. See MCL 168.733. So, for example, if a challenger brings to an election inspector's attention the purported improper handling of a ballot by an election worker, our Legislature does not require that a report of that matter be recorded by the election inspector. See *id.* It certainly seems advisable to make a record of such alleged instances, and our Legislature expressly permits a challenger to "[k]eep records of . . . other election procedures as the challenger desires." MCL 168.733(1)(h). But, defendants have the discretion to adopt a system of recordkeeping for these non-voter's rights challenges, and the one identified in the May 2022 Manual is reasonable, except as otherwise explained here. Defendants will need to revise the May 2022 Manual to make clear that the exception for not recording so-called "impermissible challenges" has no applicability to challenges involving voting rights set forth in MCL 168.727 or MCL 168.733(1)(c).

On the prohibition against making repeated "impermissible challenges," the May 2022 Manual warns challengers (with bold in the original), "**Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**" May 2022 Manual, p 11. The authority for this warning is not apparent. A challenger can be removed for drinking alcohol or disorderly conduct in a polling place or AVCB facility. MCL 168.733(3). The "disorderly conduct" prohibition would necessarily cover someone who commits a felony in an AVCB facility by, for example, divulging certain prohibited information or violating the specific sequestration requirements. Defendants have not pointed this Court to any other part of the Michigan Election Law or a promulgated rule that would permit expulsion merely for several challenges that an election inspector deems to be "impermissible." Only if a challenger's repeated, unfounded challenges rise to the level of "disorderly conduct" does the law permit that challenger's expulsion. The language in the May 2022 Manual must be modified to make this clear.

D. LACHES

The Court lastly turns to defendants' laches argument. "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). The key for laches is not the passage of time alone, but rather, the effect that the delay has had on the defendants. *Id.* at 115. The doctrine is particularly applicable in election matters. See *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972); see also *Purcell v Gonzalez*, 549 US 1, 5-6; 127 US 5; 166 L Ed 2d 1 (2006) (per curiam); *Crookston*, 841 F3d at 398; MCL 691.1031.

The question whether laches applies in these cases is an interesting one. Unlike a challenge to a candidate's eligibility to run for office, there is no potential in this circumstance that a party could lose any specific right, such as the right to vote. But even if laches *could* apply, the Court declines to exercise its equitable authority under the facts presented.

To start, defendants have not demonstrated that plaintiffs failed to act with due diligence. The Bureau of Elections amended the manual in May 2022, but it did not highlight or redline the changes from the October 2020 iteration of the document. The O'Halloran Plaintiffs have presented the Court with evidence that, once they discovered the changes in the revised document, they communicated with defendants about their disagreements as early as July 2022. The DeVisser Plaintiffs allege that they discovered the revisions to the May 2022 Manual on the night of the August 2022 primary election, when those changes were put into practice. The DeVisser Plaintiffs wrote to defendants to address their concerns with the May 2022 Manual shortly thereafter. Since that time, plaintiffs obtained legal counsel to sue on their behalf, and they sued in late September 2022. Thus, plaintiffs did not simply sit on their hands for four months, as defendants argue.

More critically, on the issue of prejudice, the May 2022 Manual is merely instructive—it does not (and cannot) independently create *any* new, mandatory requirement, with the narrow exception of MCL 168.765a(13), not applicable here. Defendants have acknowledged in these proceedings that the May 2022 Manual does not have the force and effect of law. Moreover, these proceedings are not similar to *Davis v Benson*, Court of Claims Docket Nos. 20-000207-MZ and 20-000208-MZ, where this Court applied the doctrine of laches, in part, because of the impending need to print millions of paper ballots, some of which were to be mailed overseas to our military personnel.

Theoretically, the November 2022 general election can take place without any challenger guidance. Alternatively, the Bureau of Elections can revise the May 2022 Manual (or even the October 2020 version) to comply with this Opinion and Order. This Court's several findings are relatively narrow in scope, and there is nothing in the record to suggest that revising the May 2022 Manual to conform with this Court's Opinion and Order would be time consuming or otherwise onerous. The May 2022 Manual resides as a PDF on defendants' website and, in today's world, the manual could be widely disseminated in a matter of minutes, if not seconds. In fact, defendants acknowledge in their brief that they revised and disseminated the prior version of the manual in October 2020—only a month before the November 2020 general election.

Thus, the Court is not persuaded by defendants' and amicus's argument that revising the May 2022 Manual and updating election personnel about the revisions will present an onerous burden. Accordingly, the Court declines to exercise its equitable authority on laches.

III. CONCLUSION

Accordingly, the Court orders as follows:

IT IS ORDERED that the relief sought by the DeVisser Plaintiffs on Counts I and II of their complaint is **GRANTED IN PART** and **DENIED IN PART**. Under MCR 2.116(I) and MCR 2.605, the Court concludes that the DeVisser Plaintiffs' claims set forth in Paragraph 30 of their complaint are well-founded in fact and law, and, as a result, the Court declares that defendants have violated the Michigan Election Law and the APA, as explained in this Opinion and Order. The May 2022 Manual, in and of itself, does not have the force and effect of law and defendants are enjoined from using or otherwise implementing the current version of the May 2022 Manual

to the extent that such enforcement, use, or implementation would be inconsistent with this Opinion and Order.

The DeVisser Plaintiffs also request that this Court order defendants to rescind the current manual and use an earlier one. This Court has not been asked to review the October 2020 version of the manual with respect to the claims raised herein. Instead, **IT IS FURTHER ORDERED** that defendants shall have the discretion either to (1) rescind the May 2022 Manual in its entirety; (2) revise the May 2022 Manual to comply with this Opinion and Order; or (3) revise an earlier iteration of the manual to comply with this Opinion and Order. All other relief sought by the DeVisser Plaintiffs is **DENIED**.

IT IS FURTHER ORDERED that the O'Halloran Plaintiffs' emergency motion for declaratory and injunctive relief is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** to the extent consistent with this Opinion and Order and otherwise **DENIED** in all other respects, as explained in this Opinion and Order.

IT IS FURTHER ORDERED that defendants' motion for summary disposition is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** to the extent that plaintiffs request that this Court strike the May 2022 Manual in its entirety, and it is likewise **GRANTED** to the extent that the O'Halloran Plaintiffs seek relief broader than such relief already ordered herein by this Court. The motion is otherwise **DENIED** in all other respects, as explained in this Opinion and Order.

IT IS FURTHER ORDERED that DAPRI's motion to intervene as a party defendant is **DENIED**. DAPRI's alternative request to participate as an amicus curiae is **GRANTED**, and its brief is accepted as-filed.

IT IS SO ORDERED. This is the final order and closes each of the consolidated cases.

Date: October 20, 2022

Hon. Brock A. Swartzle
Judge, Court of Claims

EXHIBIT TO COURT'S OPINION AND ORDER OF OCTOBER 20, 2022

The Appointment, Rights, and Duties of Election Challengers and Poll Watchers

May 2022

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
(517) 335-3237

I. Introduction

This publication is designed to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan. Election challengers and poll watchers play a constructive role in ensuring elections are conducted in an open, fair, and orderly manner by following these instructions.

Challengers and poll watchers should familiarize themselves with the instructions and directions in this publication governing their conduct, rights, and responsibilities. Election inspectors should likewise familiarize themselves with the instructions and directions in this publication, including their duties to record challenges and their powers to maintain order at the polls.

Any questions or concerns about the procedures laid out in this document may be sent to BOERegulatory@michigan.gov.

II. Challengers

Challenger-Credentialing Organizations

Credentialing organizations are organizations eligible to appoint and credential challengers in Michigan. Credentialing organizations must be one of the following:

- A political party eligible to appear on the ballot in Michigan;
- An organized group of citizens interested in the passage or defeat of a ballot proposal being voted on at that election;
- An organized group of citizens interested in preserving the purity of elections and guarding against the abuse of the elective franchise; or
- An incorporated organization.

A credentialing organization appoints a challenger by giving a person a credential indicating that the person is serving as a challenger on behalf of the organization. This process is known as credentialling. The credential must conform to the standards set out later in this publication.

Candidates, candidate committees, or organizations formed to support or oppose candidates are not eligible to appoint or credential challengers.

Challenger Credentialing By Political Parties

Political parties eligible to appear on the ballot may appoint or credential challengers at any time until Election Day. A challenger is appointed when they are given a credential by a representative of the political party. Political parties do not need to apply for approval by local election officials in the same way that other challenger-credentialing organizations must be approved; however, political parties should notify local clerks of their intention to appoint or credential challengers prior to Election Day.

Challenger Credentialing By Other Qualified Organizations

All other qualified organizations wishing to appoint or credential challengers must file an application to field challengers with the clerk of each county, city, or township in which the organization intends to field challengers. The application must be filed no less than 20 and no more than 30 calendar days prior to Election Day. The application consists of a written statement indicating the organization's intent to field challengers in that jurisdiction, the reason that the organization believes itself to be an organization qualified to field challengers under the criteria set out above, and a copy of a completed *Michigan Challenger Credential Card* form that the organization will distribute to its challengers. The statement must be signed and sworn by an officer of the organization.

Within two business days of receiving an application from an organization wishing to appoint challengers, the clerk must approve or deny the application and notify the group of the approval or denial. The clerk may deny the application if the group or organization fails to demonstrate that it is qualified to appoint challengers under the criteria explained above or if the application is not timely filed. If the application is denied, the organization may appeal the denial to the Secretary of State within two business days of receiving notice of the clerk's decision. Within two business days of receiving the appeal, the Secretary of State will render a decision on the appeal and notify the organization and the local clerk of that decision.

An organization wishing to appoint or credential challengers whose application is approved by a county clerk is qualified to appoint or credential challengers in any jurisdiction within that county, even if the organization has not filed an application with each specific city or township in the county.

Each county clerk must notify the clerk of every city and township within their county of all political parties and other organizations who have been approved to appoint challengers within their county. Each municipal clerk

must notify election inspectors at all precincts in the clerk's jurisdiction of all political parties and other organizations qualified to appoint and credential challengers within that jurisdiction prior to the opening of the polls on Election Day.

Eligibility to Serve as a Challenger

A person may serve as a challenger only if the person is registered to vote in Michigan and only if the person is provided a challenger credential by a credentialing organization. The credential must be specific to the election at which the person is serving as a challenger; a credential issued for a prior election does not entitle a person to serve as a challenger at a future election. A person cannot serve as a challenger if the person is serving as an election inspector during the same election. Additionally, a person cannot serve as a challenger if the person is running for nomination or for office during the same election, with the exception that precinct delegate candidates can serve as challengers so long as they do not serve at the precinct in which they are running for office.

Training of Challengers

Credentialing organizations are responsible for the behavior and actions of challengers that they credential. As such, credentialling organizations are strongly encouraged to provide challengers with training on both the basic aspects of election administration in Michigan and the rights and duties of challengers in Michigan. Providing challengers with a basic understanding of election administration will allow challengers to fully participate in the election process and to make informed challenges without disrupting or delaying election-related activities. Providing challengers with an explanation of their rights and duties will allow them to realize the full benefit of their status without violating the law.

Challengers should be provided training that is specific to the type of election-related location at which the challenger will be serving. For example, a challenger who will be serving at an absent voter ballot processing facility should be trained in how absent voter ballots are processed, while a challenger serving at a polling place where voters are casting ballots on Election Day should be trained on in-person voting processes. Failure to tailor training confuses challengers about which procedures should be followed in different types of locations, which may lead to confusion, ineffective observation, and impermissible challenges.

III. Rights and Duties of Challengers When Observing Election-Related Procedures

Challengers' Obligation to Follow Election Inspector Directions

Election inspectors are empowered and obligated to maintain order and facilitate the peaceful conduct of elections at the polling place or absent voter ballot processing facility in which the election inspector is serving. **Challengers present at a polling place or absent voter ballot processing facility must follow the directions of the election inspectors operating the polling place or absent voter ballot processing facility.** The directions election inspectors may give to challengers include, but are not limited to:

- Directing challengers on where to stand and how to conduct themselves in accordance with these instructions;
- Directing challengers to cease any behavior prohibited by these instructions;
- Directing challengers to cease any behavior that intimidates voters or disrupts the voting process; and
- Directing a challenger who violates these instructions to leave the polling place or absent voter ballot processing facility, or requesting that the local clerk or local law enforcement remove the challenger from the polling place or absent voter ballot processing facility.

Form of Challenger Credential

Under Michigan law, each challenger present at a polling place or an absent voter ballot processing facility must possess an authority signed by the chairman or presiding officer of the organization sponsoring the challenger. This authority, also known as the *Michigan Challenger Credential Card*, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is

invalid and the individual presenting the form cannot serve as a challenger. The credential may not be displayed or shown to voters.

A credential form may be digital and may be presented on a phone or other electronic device. If a challenger uses a digital credential, the credential must include all of the information required on the template credential form promulgated by the Secretary of State. A digital credential should not include any information or graphics that are not included or requested on the template credential form. If a challenger using a digital credential is serving in an absent voter ballot processing facility on Election Day, the challenger must display the credential to the appropriate election official, gain approval to enter the facility, and then store the device in a place outside of the absent voter ballot processing facility. Electronic devices are not permitted within the absent voter ballot processing facility.

Clerks may allow or require challengers serving at a polling place on Election Day or at a clerk's office at any time that voters are present to wear a reasonably sized nametag or badge. The nametag or badge cannot include any text or graphics aside from the challenger's name and the words "election challenger". The nametag must be printed on white paper, and the words "election challenger" must be printed in black ink.

Clerks may allow or require challengers serving in absent voter ballot processing facilities where voters are not present to wear nametags or badges that identify challengers and the organization represented by the challenger.

Challenger Liaison

Every polling place or absent voter ballot processing facility should have an election inspector designated as the challenger liaison. Unless otherwise specified by the local clerk, the challenger liaison at a polling place is the precinct chairperson. The challenger liaison or precinct chairperson may designate one or more additional election inspectors to serve as challenger liaison, or as the challenger liaison's designees, at any time. Unless otherwise specified by the local clerk, the challenger liaison at an absent voter ballot processing facility is the most senior member of the clerk's staff present, or, if no members of the clerk's staff are present, the challenger liaison is the chairperson of the facility. Unless otherwise specified by the local clerk, the challenger liaison at the clerk's office is the most senior member of the clerk's staff present.

Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff.

Challenger Identification Upon Entering Polling Place or Absent Voter Ballot Processing Facility

Upon arriving at a polling place, an absent voter ballot processing facility, or a clerk's office, a challenger must introduce themselves and show their credential to the challenger liaison or their designee. A challenger cannot make challenges or take advantage of any of the other rights afforded to challengers until they have properly made their presence known to the challenger liaison. The challenger's name, the organization which the challenger represents, and the time of the challenger's arrival should be noted in the poll book.

If the challenger leaves a polling place prior to the close of polls, the challenger shall inform the challenger liaison of their departure. A challenger may not leave an absent voting ballot processing facility prior to the close of polls on Election Day. The challenger's departure and time of departure should be noted in the poll book.

Communication with Election Inspectors and Election Officials

Challengers must communicate only with the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers may not communicate with voters.

Challenger liaisons must be readily accessible to communicate with challengers, to answer questions about the voting and tabulating procedures, and to record any challenges made.

Challengers at Clerks' Offices

Each credentialing organization may assign one challenger to observe the issuance and receipt of absent voter ballots at a clerk's office or a satellite location maintained by the clerk. A challenger may be present only in areas of the clerk's office where an absent voter ballot may be requested. A

challenger may be present in the clerk's office only when the office is open for business and during the period prior to an election when voters may request or return an absent voter ballot at the office. A challenger present in a clerk's office may not view the Qualified Voter File.

Challengers at Polling Places

Only two challengers from any political party or other credentialing organization may be present at a precinct conducting in-person voting on Election Day. If two challengers from the same credentialing organization are present, both challengers enjoy the rights afforded to challengers, except that at any given time only one of the two challengers can be designated to make challenges. The challengers must make known to the challenger liaison which of the two challengers is designated to make challenges. The challengers may agree to change which challenger is designated to make challenges at any time, but the challengers must inform the challenger liaison of that change.

Challengers at Absent Voter Ballot Processing Facilities

Challengers have a right to be present at locations where absent voter ballots are removed from envelopes and tabulated. These locations are referred to as absent voter ballot processing facilities in this publication. Absent voter ballot processing facilities do not include a clerk's office or other locations where absent voter ballots are stored, signatures appearing on absent voter ballot envelopes are checked, or other activities are conducted prior to absent voter ballots being removed from absent voter ballot envelopes and prepared for tabulation.

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

counting board or combined absent voter counting board in each of these scenarios.

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

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

The clerk must make publicly available the number of challengers each credentialing organization will be allowed to field in the absent voter ballot processing facility at least seven calendar days prior to the election.

The challenger liaison serving at an absent voter ballot processing facility must administer an oath to any challenger wishing to serve in that facility:

> "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."

A challenger may not enter the absent voter ballot processing facility without taking this oath and signing a document acknowledging the oath. Any person who violates this oath is guilty of a felony.

Once tallying of votes has begun on Election Day, challengers serving at an absent voter ballot processing facility, like all persons present in an absent voter ballot processing facility, are sequestered at the facility and cannot leave until the close of polls at 8 p.m. on Election Day. If absent voter ballot processing or tabulation continues after the close of polls, challengers must be permitted to remain in the absent voter ballot processing facility at any time when absent voter ballots are being processed until processing and tabulation is complete.

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.

A challenger who is ejected from an absent voter ballot processing facility after the tallying has begun but before the close of polls is still bound by their legal obligation to remain sequestered until the close of polls. To avoid breaching that obligation, the challenger liaison or the clerk should direct the challenger to remain in a room or area of the location containing the absent voter ballot processing facility, but which is separated from the area where absent voter ballots are being processed.

A challenger who breaks sequestration by prematurely leaving the location containing an absent ballot processing facility before the close of polls – whether or not due to an ejection from the facility itself – violates the oath they took upon entering the facility.

Excess Challengers at an Election-Related Location

A credentialing organization may field no more than the number of challengers set out in the above sections at any clerk's office, in-person precinct, or absent voter ballot processing facility. If the credentialing organization already has the total number of challengers allowed present in a particular location, additional challengers credentialed by that organization cannot act as challengers in that location. At the clerk or challenger liaison's discretion, additional challengers seeking access to the location may be given the option to serve as poll watchers in that location. Challengers who agree to act as poll watchers have none of the rights specifically afforded to challengers and must adhere to the same standard of conduct and observe the same rules as any other poll watcher. The rights and duties of poll watchers are set out at the end of this document.

Generally, a credentialing organization will be allowed to replace challengers credentialed by that organization with other challengers credentialled by that organization so long as the replacement process does not disrupt the work of election inspectors or clerk staff present in the location. Because of the sequester, credentialing organizations cannot replace challengers present in facilities processing absent voter ballots prior to the close of polls on Election Day, but credentialing organizations may replace challengers in those locations after the close of polls. In no case during the replacement process

may a credentialing organization have more challengers present in a particular location than would be allowed by the other provisions of this document.

Making Challenges

A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below. Assuming the challenge is permissible, the substance of the challenge, the time of the challenge, the name of the challenger, and the resolution of the challenge must be recorded in the poll book. If the challenge is rejected, the reason for that determination must be recorded in the poll book.

An impermissible challenge, as explained below, need not be noted in the poll book.

Adjudicating and Recording Challenges

There are three categories of challenges: impermissible challenges, rejected challenges, and accepted challenges. The challenger liaison is responsible for adjudicating each challenge by categorizing each challenge and determining what, if any, action should be taken in response to the challenge.

Impermissible Challenges

Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:

- Challenges made to something other than a voter's eligibility or an election process;
- Challenges made without a sufficient basis, as explained below; and
- Challenges made for a prohibited reason.

Election inspectors are not required to record an impermissible challenge in the poll book. If it is possible to make a note without slowing down the voting or absent voter ballot tabulation process, the election inspector is encouraged to note the content of an impermissible challenge in the poll book, as well as any warning given to the challenger making that impermissible challenge. If the challenger makes multiple impermissible challenges, the election inspector is likewise encouraged to note the general basis of those challenges and the approximate number of challenges, if the election inspector can make that note without slowing down the election

process. In all circumstances, however, the election inspector should prioritize the orderly and regular administration of the election process over noting an impermissible challenge.

Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.

Rejected Challenges

Rejected challenges are challenges which are not impermissible, but which the challenger liaison does not accept. Whether a challenge is permissible but rejected is a context-specific determination that depends on the type of challenge being made. The process for determining whether a challenge to an election process or a voter's eligibility is rejected is set out below in the relevant sections. If a challenge is permissible but rejected, the following information must be included in the poll book:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and
- The reason why the challenge was rejected.

Accepted Challenges

Accepted challenges are challenges which are permissible and which the challenger liaison deems correct. If a challenge is accepted, the following information must be included in the poll book:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and
- The actions taken by the election inspectors in response to the challenge.

Challenges to a Voter's Eligibility

A challenger may make a challenge to a voter's eligibility to cast a ballot only if the challenger has a good reason to believe that the person in question is not a registered voter. There are four reasons that a challenger may challenge a voter's eligibility; **a challenge made for any other reason than those listed below is impermissible**. The four permissible reasons to challenge a voter's eligibility are:

1. The person is not registered to vote;

2. The person is less than 18 years of age;
3. The person is not a United States citizen; or
4. The person has not lived in the city or township in which they are attempting to vote for 30 or more days prior to the election.

The challenger must cite one of the four listed permissible reasons that the challenger believes the person is not a registered voter, and the challenger must **explain the reason the challenger holds that belief**. If the challenger does not cite one of the four permitted reasons to challenge this voter's eligibility, or cannot provide support for the challenge, the challenge is impermissible.

A challenger may challenge a voter's eligibility only by making a challenge to the challenger liaison or the challenger liaison's designee. **The challenger must make the challenge in a discrete manner not intended to embarrass the challenged voter, intimidate other voters, or otherwise disrupt the election process.** An election inspector will warn a challenger who violates any of these prohibitions; if a challenger repeatedly violates any of these prohibitions, the challenger may be ejected from the polling place.

Impermissible Challenge to Voter's Eligibility: Improper Reason for Challenge

A challenger may not challenge a voter's eligibility for any reason other than the four reasons above. Any challenge made for a reason other than those four reasons is impermissible and should not be considered by the challenger liaison or recorded by the election inspectors. Improper reasons for making a challenge to a voter's eligibility include, but are not limited to, the following:

- the voter's race or ethnic background;
- the voter's sexual orientation or gender identity;
- the voter's physical or mental disability;
- the voter's inability to read, write, or speak English;
- the voter's need for assistance in the voting process;
- the voter's manner of dress;
- the voter's support for or opposition to a candidate, political party, or ballot question;
- the appearance or the challenger's impression of any of the above traits; or
- any other characteristic or appearance of a characteristic that is not relevant to a person's qualification to cast a ballot.

Impermissible Challenge to Voter's Eligibility: Non-Specific Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot specify under which of the four permissible reasons the challenger believes the voter to be ineligible to vote, or if the challenger refuses to provide a reason for the challenge to the voter's eligibility.

Impermissible Challenge to Voter's Eligibility: No Explanation for Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot provide a reason for their belief that the voter is ineligible to vote. For example, a challenger cannot simply state that they believe a voter to be ineligible because of their age or citizenship status; the challenger must explain why they believe the voter to be underage or why they believe the voter is not a United States citizen. The challenger liaison may deem the reason for the challenger's belief impermissible if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect.

Impermissible Challenge to Voter's Eligibility: Lack of Photo ID

A voter who signs an *Affidavit of Voter Not In Possession of Picture ID* cannot be challenged on the grounds that the voter is not in possession of photo identification. Any challenge on these grounds must be deemed an impermissible challenge, should not be recorded by the election inspectors, and the challenger must be warned that no such challenge is allowed.

Processing Challenges to a Voter's Eligibility

If a challenge to a voter's eligibility made at an in-person polling location is determined to be permissible, the challenge must be handled using the following process:

1. The voter is sworn in by the precinct chairperson or another election inspector using the following oath:

   "I swear (or affirm) that I will truly answer all questions put to me concerning my qualifications as a voter."

2. The election inspector who administered the oath asks the voter to confirm that they meet the criteria to be eligible to cast a ballot. The election inspector may ask the voter only the questions necessary to confirm that they meet the criteria disputed by the challenger; the election inspector may not ask the voter any other questions.
3. If, after questioning under oath, the voter confirms they are eligible to vote, the challenge is rejected and the voter is permitted to vote a challenged ballot. A challenged ballot is prepared by writing the voter's ballot number on the ballot and then covering the number with tape or a slip of paper. **The voter then completes the ballot and casts the ballot by feeding the ballot into the tabulator in the same manner as an unchallenged voter.**
4. If the voter does not confirm they are eligible to vote after questioning under oath, the challenge is accepted and voter is not allowed to cast a ballot.

The election inspector should take the challenged voter aside to administer the oath and ask the required questions. Election inspectors should administer the oath and ask the required questions in a manner that does not humiliate, degrade, or embarrass the challenged voter. The oath and questioning process should be carried out in a manner that does not unduly delay the challenged voter.

If a voter whose eligibility is permissibly challenged refuses to take the above oath or answer questions designed to verify the voter's eligibility, the challenge is accepted, and the voter cannot cast a ballot.

A challenger cannot appeal a determination that a challenged voter is eligible to vote on Election Day. Outstanding challenges to a voter's eligibility after Election Day may be adjudicated through the judicial process.

Recording a Challenge to a Voter's Eligibility

Permissible challenges to a voter's eligibility are recorded in both the electronic poll book and the paper poll book. When a voter's eligibility is permissibly challenged, the election inspector selects "Challenged Voter" in the electronic poll book, which automatically creates a notation of the challenge and the challenge's outcome. In addition, the election inspector should also record the challenge on the "Challenged Voters" page of the physical poll book. Finally, the election inspector should make a comment in the electronic poll book recording:

- The challenger's name;

- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; **or**
- If the challenge was accepted, the reason the challenge was accepted.

Because the only action taken by an election inspector in response to an accepted challenge to a voter's eligibility is to disallow that person from casting a ballot, and that denial is automatically recorded in in the poll book when the voter is not issued a ballot, the election inspector does not need to record any additional information about an accepted challenge to a voter's eligibility.

Challenges by an Election Inspector to a Voter's Eligibility

An election inspector shall make a challenge to a voter's eligibility if the election inspector knows or has good reason to suspect that the voter is not eligible to cast a ballot. Such a challenge is treated identically to a challenge made by a credentialed challenger as explained above – the election inspector must provide a specific and permissible reason that the election inspector believes the voter is ineligible to cast a ballot, and there must be some explanation for the election inspector's belief. If an election inspector wishes to challenge a voter's eligibility, the election inspector must make that challenge to the challenger liaison. If the election inspector making the challenge is the challenger liaison, the challenger liaison must make the challenge to another election inspector and the local clerk must be notified of the challenge. A challenge made to a voter's eligibility by an election inspector is recorded and resolved using the same process as a challenge made to a voter's eligibility by a credentialed challenger.

Challenges by a Voter to Another Voter's Eligibility

A registered voter of a precinct who is present at that precinct on Election Day may challenge the eligibility of another person to vote in that precinct if the challenging voter either knows or has good reason to suspect that the challenged person is not eligible to cast a ballot in that precinct.

Such a challenge is treated and resolved identically to a challenge made by a credentialed challenger as explained above. If a voter wishes to challenge a person's eligibility to vote under this mechanism, the election inspector must make that challenge to the challenger liaison.

A voter who is not credentialed as a challenger may only challenge the eligibility of persons attempting to vote in the precinct in which the

challenging voter is registered to vote. A voter who is not credentialed as a challenger cannot challenge persons attempting to vote in any other precinct, nor can they challenge the conduct of election processes. A voter making challenges to the eligibility of other voters in their own precinct may not make challenges designed to harass, annoy, or delay voters. A voter making challenges to the eligibility of other voters in their own precinct, like all persons present in the precinct, must follow the directions of the election inspectors assigned to the precinct.

Challenge to an Absent Voter in the Polls

A voter who requested an absent voter ballot may vote in person so long as their local clerk has not received their absent voter ballot by Election Day. In some situations these voters may be subject to challenge as an absent voter in the polling place. **A voter is subject to challenge as an absent voter in the polling place only if the poll book indicates that an absent voter ballot was sent to the voter and only if the voter does not surrender the absent voter ballot at the polling place on Election Day.**

Voters Who Surrender Their Absent Voter Ballot at the Precinct On Election Day

A voter who received an absent voter ballot but who surrenders that absent voter ballot to election inspectors at the polling place on Election Day may vote a regular ballot. **Such a voter is not subject to challenge as an absent voter in the polling place and a challenge on those grounds is impermissible.**

Voters Who Do Not Surrender Their Absent Voter Ballot at the Precinct on Election Day

A voter for whom the poll book indicates an absent voter ballot was sent may not have received the ballot, may have lost or destroyed the ballot, or may have mailed the ballot back to the clerk so close to Election Day that the ballot may not arrive in time to be counted. **In these situations, the election inspector must always call the local clerk to verify that the voter's absent voter ballot has not been returned to the clerk.** Once the clerk verifies to the election inspector that the absent voter ballot was not returned to the clerk, the voter must sign an affidavit of lost or destroyed absentee ballot stating that the voter did not successfully return

the ballot. Absent a challenger issuing a challenge against that voter, the voter is then permitted to cast a regular ballot.

A voter for whom the poll book indicates an absent voter ballot was mailed may be challenged as an absent voter in the polling place even after the clerk verifies the absent voter ballot has not been returned and after the voter signs the affidavit stating that the voter did not return the ballot; if such a voter is challenged, that voter is permitted to cast a challenged ballot. **So long as the clerk confirms that they have not received the voter's absent voter ballot, the voter is permitted to vote in the polling place on Election Day.** A challenged ballot is prepared by writing the voter's ballot number on the ballot, then covering the number with tape or a slip of paper. The voter then completes the ballot and casts the ballot by feeding the ballot into the tabulator in the same manner as an unchallenged voter.

A voter may only be challenged as an absent voter in the polling place if the poll book indicates that the voter was mailed an absent voter ballot. If the poll book does not indicate that the voter was mailed an absent voter ballot, the voter may not be challenged as an absent voter in the polling place.

Voter Eligibility Challenges Are Not Permissible at an Absent Voter Ballot Processing Facility

Challengers at absent voter ballot processing facilities may make challenges to election processes as described below. Permissible challenges at absent voter ballot processing facilities include challenges to ensure that the review of any portion of the absent voter ballot envelope reviewed at the absent voter ballot processing facility is properly completed. City and township clerks review the portion of the absent voter ballot envelope containing the absent voter's signature prior to Election Day, or when the ballot envelope is received by the clerk on Election Day, to ensure that the signature is genuine and the absent voter is eligible to cast a ballot. If the clerk has verified the signature and the absent voter's eligibility prior to the ballot envelope being transmitted to the absent voter ballot processing facility, neither challenges to the voter's signature nor to the voter's eligibility made at the absent ballot processing facility on Election Day are permissible.

Because an absent voter's eligibility is verified by the clerk prior to the absent voter ballot envelope being processed at the absent voter ballot processing facility on Election Day, election inspectors serving at the absent voter ballot processing facility are not responsible for verifying voter eligibility at the facility. Instead, election inspectors serving at the absent

voter ballot processing facility confirm that the clerk has verified the absent voter's eligibility to cast a ballot by confirming that the clerk has reviewed the signature section of the absent voter ballot envelope. Additionally, because the voters are not present at the absent voter ballot processing facility, the oath administration and questioning process set out in the Michigan Election Law and explained above cannot be carried out at an absent voter ballot processing facility and a challenged voter would have no chance to refute the challenge leveled against them. For these reasons, challenges to voter eligibility at absent voter ballot processing facilities are not permissible and need not be recorded.

Individuals who wish to contest the eligibility of an absent voter should raise those concerns with the clerk of the city or township in which the voter is registered to vote prior to Election Day as prescribed by the Michigan Election Law; no information about a particular voter's eligibility would be available to a challenger serving in an absent voter ballot processing facility which would not have also been available to the challenger prior to Election Day.

Challenges to an Election Process

A challenger may challenge a voting process, including the way that election inspectors are operating a polling place or processing absent voter ballots at an absent voter ballot processing facility. A challenge to an election process must **state the specific element or elements of the process that the challenger believes are being improperly performed** and **the basis for the challenger's belief**.

Impermissible Challenge to an Election Process

A challenge to an election process is impermissible and should not be recorded by the election inspectors if the challenger cannot identify a specific element or multiple elements of the process whose performance the challenger believes improper. A challenge to an election process is also impermissible if the challenger cannot adequately explain why the election process is being performed in a manner prohibited by state law. An explanation for a challenge to an election process must include an explanation of the proper performance of the element or elements in question but need not take the form of a direct citation to statute or election administration materials.

Rejecting a Challenge to an Election Process

A permissible challenge to an election process will be rejected if the challenger liaison determines that the specific element or elements of the election process being challenged are being carried out in accordance with state law. A challenger liaison's determination that a challenge to an election process is rejected may be appealed using the process laid out at the end of this document.

Accepting a Challenge to an Election Process

A permissible challenge to an election process will be accepted if the challenger liaison determines that the challenger is correct and that the specific element or elements of the election process being challenged are not being carried out in accordance with state law. The challenger liaison shall inform the relevant election inspectors how to properly carry out the process and take any other remedial action necessary to correct the error.

Recording Challenges to an Election Processes

A permissible challenge to an election process should be recorded in both the remarks section of the electronic poll book and on the "Challenged Procedures" section of the physical poll book. The record should include:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; **or**
- If the challenge was accepted, the reason the challenge was accepted, and any remedial actions taken in response to the challenge.

Challenges to Recurring Election Processes: Blanket Challenges

If a challenger wishes to challenge recurring elements of the election process, the challenger must make a blanket challenge. The blanket challenge shall be treated as a challenge to each occurrence of the process but need only be made and recorded in the poll book once. **A challenger may only challenge recurring processes through a blanket challenge; a challenger may not challenge every occurrence of a recurring process in lieu of making a blanket challenge.**

Rights of Challengers

A challenger who has made themselves known to the challenger liaison and who is in possession of a valid credential has the right to:

- Be present in the polling place;
- Make challenges to the challenger liaison or the challenger liaison's designee as provided in these instructions;
- Be treated with respect by election inspectors;
- Be provided with reasonable assistance in performing their duties as a challenger;
- Inspect applications to vote, registration lists, and other printed materials used to conduct elections, so long as the challenger does not touch or handle any of those materials and so long as the inspection does not impede the voting process;
- Observe election inspectors' preparation of voting equipment at the polling place before the opening of the polls on Election Day, and observe election inspectors' handling of voting equipment after the close of polls on Election Day, so long as the challenger does not touch or handle any of that equipment and so long as that observation does not impede the election inspectors in completion of their duties;
- Observe the election process from a reasonable distance, so long as election inspectors have sufficient room to perform their duties and voters are not impeded in any way;
- If serving in a polling place on Election Day, to use electronic devices, so long as the device is not disruptive and so long as the device is not used to make video or audio recordings of the polling place;
- Observe election-related activities at a polling place on Election Day at any time the polling place is open to the public, including prior to the opening of polls or after the closing of polls;
- Take notes about the election process;
- Notify the challenger liaison of perceived violations of election laws by third parties, including electioneering within 100 feet of the precinct, improper handling of a ballot by a voter, or other issues;
- Remain in the precinct after the close of polls or the end of tabulation and until the election inspectors complete their duties;
- If serving in a polling place where ballots are being issued, stand behind the processing table and close enough to view the poll book as ballots are issued to voters and the voters' names are entered into the poll book, so long as the challenger does not touch or handle the poll book or otherwise interfere with the work of the election inspectors; and
- If serving at an absent voter ballot processing facility, to stand in a location where the tabulation of absent voter ballots can be observed, or to stand in a location where the entry of the names of voters whose ballots are being processed into the poll book can be viewed, so long as the challenger does not touch or handle any election-related materials.

Restrictions on Challengers

Challengers may not:

- Speak with or interact in any way with voters;
- Threaten or intimidate voters or election inspectors, or attempt to threaten or intimidate voters or election inspectors at any stage of the voting process;
- Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff;
- Make repeated impermissible challenges;
- Make a challenge indiscriminately or without good cause, or for the purpose of harassing, delaying, or annoying voters, election inspectors, or any other person;
- Physically touch or interact with ballots, absent voter ballot envelopes, electronic poll books, physical poll books, or any other election materials;
- Stand so close to the poll book or other materials that the challenger's proximity to those materials interferes with the election inspectors' ability to perform their duties;
- Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility;
- Provide or offer to provide assistance to voters;
- Wear any clothing or other apparel relating to any party, candidate, or proposition on the ballot or which disrupts the peace or order of the polling place, unless the challenger is serving at an absent voter ballot processing facility and is given permission or instructed to wear such an identifier;
- Wear clothing or other apparel expressly advocating for or against the election of a candidate or advocating the passage or defeat of a ballot measure;
- Set up a table or other furniture in the polling place;
- If serving at an absent voter ballot processing facility, possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day; or
- Take any actions to disrupt or interfere with voting, ballot tabulation, or any other election process.

Warning and Ejecting Challengers

If a challenger acts in a way prohibited by this instruction set or fails to follow a direction given by an election inspector serving at the location at

which the challenger is present, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected.

A challenger who repeatedly fails to follow any of the instructions or directions set out in this manual or issued by election inspectors may be ejected by any election inspector. A challenger who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may also be ejected by any election inspector. The ejection should be noted in the poll book. If the challenger refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the challenger from the polling place or absent voter ballot processing facility.

As explained above, a challenger who is ejected from an absent voter ballot processing facility before the close of polls and while the challenger is subject to sequestration should, in lieu of being removed from the area containing the facility, be directed to remain in a room or area of the location separate from the area where absent voter ballots are being processed.

Challenger Appeal of Election Inspector Determinations

A challenger may appeal a decision by the challenger liaison or any other election inspector relating to the validity of a challenge, to a challenger's conduct, or to a challenger's ejection to the city or township clerk of the jurisdiction in which the challenger is serving. At the request of a challenger, the challenger liaison must provide the contact information of the city or township clerk. The appeal must be made outside of the hearing of voters. If the challenger is appealing their ejection, the appeal must be made after the challenger has left the polling place or absent voter ballot processing facility. If the city or township clerk rejects the challenger's ejection as improper, the clerk shall inform the challenger liaison and the challenger shall be allowed to reenter the polling place or absent voter ballot processing facility.

The challenger may appeal the decision of the local clerk to the Bureau of Elections.

A challenger may not appeal to the city or township clerk an election inspector's resolution to a challenge to a voter's eligibility to vote. Appeals of an election inspector's resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day.

IV. Poll Watchers

Members of the public who are not credentialed challengers have a right to observe elections. Members of the public wishing to observe elections, often referred to as poll watchers, do not enjoy the same rights as credentialed challengers. A person does not need to be registered to vote in Michigan to serve as a poll watcher in this state, but a candidate for elective office being voted on in the election cannot serve as a poll watcher. There is no particular number of poll watchers that must be admitted to any election-related location, but poll watchers must be permitted to observe the electoral process so long as the total number of poll watchers does not cause the process to be disrupted.

A poll watcher present in an absent voter ballot processing facility prior to the close of polls on Election Day is sequestered and cannot leave the facility between the time ballot tallying begins and the time that the polls close. Such a poll watcher must take the same oath as a challenger serving at the facility.

Rights of Poll Watchers

Poll watchers are allowed to be present in a polling place or an absent voter ballot processing facility. Clerks or challenger liaisons must designate a Public Viewing Area from which poll watchers can observe the electoral process. The Public Viewing Area must be placed in a location that does not interfere in any way with the work of election inspectors present in the location. If the location is a polling place, the Public Viewing Area must be situated so that the presence of poll watchers does not interfere with voters participating in the voting process. If the Public Viewing Area for a particular election location is full and cannot accommodate more poll watchers, and if the Public Viewing Area cannot be enlarged without disrupting election processes, the clerk or challenger liaison may deny entry to additional poll watchers. If the location is an absent voter ballot processing facility, the poll watcher must take the same oath as a challenger present at such a facility

and is bound by all the same restrictions as a challenger present at such a facility.

A poll watcher may request that the challenger liaison allow the poll watcher to view the poll book without handling it, but the challenger liaison may decline that request. A poll watcher may never handle the poll book or other election equipment or materials.

Restrictions on Poll Watchers

Poll watchers are subject to all of the same restrictions as credentialed challengers, including the prohibitions against speaking with voters and against speaking with election inspectors other than the challenger liaison without the challenger liaison's permission. In addition, poll watchers cannot:

- Issue challenges;
- Stand behind the election inspectors as voters are processed; or
- Be present in any part of the polling place, clerk's office, or absent voter ballot processing facility except the designated Public Viewing Area.

Ejection of Poll Watchers

A poll watcher who repeatedly fails to follow any of the above instructions, who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may be ejected by any election inspector. If the poll watcher refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the poll watcher from the polling place or absent voter ballot processing facility.

PS3[off] PS4[off] PS5[off] PSDV[off]
PSDSD[off]
Aug 02/2022 09:54:52 ScanVote
Actual scanning of ballot failed with error
[46022].
Aug 02/2022 09:54:52 ScanVote
Ballot's size exceeds maximum expected
ballot size.
Aug 02/2022 09:54:52 ScanVote
Ballot has been reversed.
Aug 02/2022 09:55:04 ScanVote Warning +
error, top side barcode horizontal level,
slope down: bar9=3045 min=3046 max=3056
gradient=9
Aug 02/2022 09:55:04 ScanVote Warning +
Ballot format or id is unrecognizable.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN GRAND RAPIDS DIVISION

JASON ICKES, voter

KEN BEYER, voter

MACOMB COUNTY REPUBLICAN PARTY by its officers of the Executive Committee,

DONNA BRANDENBURG, US Tax Payers Candidate for the 2022 Governor of Michigan,

ELECTION INTEGRITY FUND AND FORCE, a Michigan non-profit corporation, AND

SHARON OLSON, in her official capacity as the Clerk of Irving Township Barry County

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as the Governor of Michigan, and

JOCELYN BENSON, in her official capacity as Michigan Secretary of State

Defendants.

Civil Action No. : _____

JURY DEMAND

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VERIFIED COMPLAINT

NOW COMES Plaintiffs and, pursuant to 28 U.S.C. § 2201, 52 U.S.C. § 20705, 42 U.S.C. § 1983, and MCLA § 168.46, and hereby files this Verified Complaint and requests that this Honorable Court declare the rights, status and/or legal relations between the parties, enjoin and/or restrain The State of Michigan from destroying 2020 presidential election evidence, award damages in an amount to be determined by a jury and issue an Order compelling the Michigan Governor and Michigan Secretary of State to decertify the 2020 presidential election and, in support thereof, Plaintiff would show unto the Court the following:

I. PARTIES

1. Plaintiff Jason Ickes is a citizen of Michigan who voted in the 2020 presidential election in Michigan and he is domiciled in Jenison, Ottawa County, Michigan.

2. Plaintiff Ken Beyer is a citizen of Michigan who voted in the 2020 presidential election and is domiciled in Allegan County, Michigan.

3. Plaintiff Macomb County Republican Party is a county political party that elected an executive committee for Macomb County as defined by MCL 168.599 which selected its chair Mark Forton and the officers of Macomb County who join this action in both their official capacity and as voters in the 2020 Presidential Election. They are residents of Macomb County, Michigan.

4. Plaintiff Donna Brandenburg is a candidate for Michigan governor for the US Taxpayers party and on the ballot on November 8, 2022, and was a voter in the 2020 Election

5. Plaintiff Election Integrity Fund and Force is a Michigan non-profit organization that is concerned as a non-partisan community activist organization dedicated to having accurate, honest elections in Michigan.

6. Plaintiff Sharon Olson is the duly elected Clerk for Irving Township, Barry County Michigan, and responsible by statute for conducting the 2020 and 2022 elections.

7. On November 23, 2020, Defendant Gretchen Whitmer was the Governor of the State of Michigan and she unlawfully certified Michigan's 2020 presidential election results. (Michigan's 2020 presidential election certification attached hereto as Exhibit 1).

8. On November 23, 2020, Defendant Jocelyn Benson was the Secretary of State of the State of Michigan and she unlawfully certified Michigan's 2020 presidential election results.

II. JURISDICTION AND VENUE

9. This verified Complaint is filed pursuant to 28 U.S.C. § 1331 and seeks damages pursuant to 42 U.S.C. § 1983 for violations of Plaintiff's constitutional right to vote, as provided for by the Fourteenth Amendment to the Constitution of the United States.

10. This verified Complaint is also filed pursuant to 28 U.S.C. § 2201 *et seq.* to 2201 "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

11. This verified Complaint is also filed pursuant to 52 U.S.C. § 20705 and requests that this Honorable Court issue a temporary restraining order to stop the Defendants from destroying critical evidence from Michigan's 2020 presidential election.

III. FACTUAL ALLEGATIONS

12. On November 3, 2020, Michigan attempted to conduct an election for President of the United States of America.

13. However, as presented *infra*, the Defendants, Gretchen Whitmer and Jocelyn Benson, did not have the legal authority to certify Michigan's 2020 presidential election.

14. Pursuant to the Constitution of the United States, "Each State shall appoint, **in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2 (emphasis added).

A. The Electronic Voting System used in 2020 including the Election Management Software and Hardware (including ALL three (3) types of tabulators and the high-speed scanners (Machines) that were used in the 2020 presidential election in Michigan were not certified or accredited in accordance with to MCL 168.795a

15. Pursuant to Michigan law, "an **electronic voting system SHALL NOT BE USED in an election"** unless it meets certain requirements.

> **168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.**
>
> (1) An electronic voting system **shall not be used** in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and **unless it meets 1 of the following conditions**:
>
> (a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.
>
> (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test

standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

16. Michigan provided the following definition at MCLA 168.704(f)

(f) "Electronic voting system" means a system in which votes are recorded and counted by electronic tabulating equipment.

17. Michigan provided the following definition at MCLA 168.704(e)

(e) "Electronic tabulating equipment" means an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results.

18. After the Electronic voting system is approved any changes to the system especially the software must also be approved pursuant to MCL 168.795a(6)

(6) After an electronic voting system is approved, an improvement or change in the electronic voting system shall be submitted to the board of state canvassers for approval pursuant to this section. This subsection does not apply to the technical capability of a general purpose computer, reader, or printer to electronically record and count votes.

19. On information and belief, the electronic voting system software that was used in the 2020 election was not certified either by an independent testing authority which was accredited by the national association of state electors AND the board of state canvassers

20. On information and belief, the electronic voting system software that was used in the 2020 election was not certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards of the board of state election directors in a manner prescribed by the board of state canvassers.

21. Pursuant to MCL 168.795a, some additional pre-requisites for use in a Michigan election include mandatory compliance with:

a. MCL 168.794 http://legislature.mi.gov/doc.aspx?mcl-168-794

b. MCL 168.795 http://legislature.mi.gov/doc.aspx?mcl-168-795

c. MCL 168.797(c) http://legislature.mi.gov/doc.aspx?mcl-168-797c

B. The Laboratory used to certify the Electronic Voting Systems was not authorized to perform testing and certification by the Help America Vote Act of 2002 as required by Michigan law.

22. Pursuant to Michigan law, "the **Secretary of State is responsible for the coordination of the requirements imposed under** this chapter, the national voter registration act of 1993, and **the Help America Vote Act of 2002**" M.C.L.A. § 168.509n (emphasis added).

23. The requirement in Michigan Law MCLA 168.509n that directs the Michigan Secretary of State to comply with the Help America Vote Act of 2002 was effective on October 29, 2002.

24. The Help America Vote Act of 2002 created "the Election Assistance Commission" and the Election Assistance Commission (EAC) is referred to in the Act as the "Commission." 52 U.S.C. § 20921 (formerly cited as 42 U.S.C. § 15321.

25. The Election Assistance Commission "shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by -- … **(2)** carrying out the duties described in part B of this subchapter (relating to the testing, certification, decertification, and recertification of voting system hardware and software)…." 52 U.S.C. § 20922 (formerly cited as 42 U.S.C. § 15322).

26. The Election Assistance Commission "shall provide for the testing, certification, decertification, and recertification of voting system hardware and software **by accredited laboratories.**" 52 U.S.C. § 20971(a)(1) (formerly cited as 42 U.S.C. § 15371) (emphasis added).

27. Additionally, at "the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software **by the laboratories accredited by the Commission** under this section." 52 U.S.C. § 20971(a)(2) (for Pursuant to the U.S. Election Assistance Commission, there are **only two Voting System Test Laboratories (VSTL) that are accredited** by the Election Assistance Commission: (1) **Pro V&V**; and (2) SLI Compliance. U.S. Election Assistance Commission, VOTING SYSTEM TEST LABORATORIES (VSTL), https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl (last visited June 21, 2022) (emphasis added) merely cited as 42 U.S.C. § 15371) (emphasis added).

28. Michigan has expressly opted into compliance with 52 USC 2097 with MCL 168.509a.

MICHIGAN HAS ELECTRONIC VOTING SYSTEMS IN USE BY COUNTIES THAT ARE NOT CERTIFIED AND SOME OF THESE WERE CERTIFIED BY AN UNACCREDITED LABORATORY.

29. Michigan has 83 counties that all had the option to select the electronic voting system from the three choices provided by the Michigan Secretary of State.

30. A startling twenty-four (24) counties do not have a certified system pursuant to the information presented at https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

31. This is almost 29% of the counties do not use a certified system.

32. Pursuant to the EAC website, eleven (11) Counties used Hart Verity 2.2.2. which was also certified. https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

33. Pursuant to the EAC website, forty-eight (48) counties use Dominion's D-Suite 5.5. https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

34. The Dominion Election Management system was used in more than 57% of the Michigan counties

35. Pursuant to the Michigan Secretary of State, the Dominion election voting systems used in the November 3, 2020 presidential election were "certified" on November 15, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Michigan Secretary of State, Certified Vote Tabulating Equipment as of July 22, 2020.

36. The software version that was certified reports as version 5.5-B while the website indicates that the counties were certified for use in version 5.5.

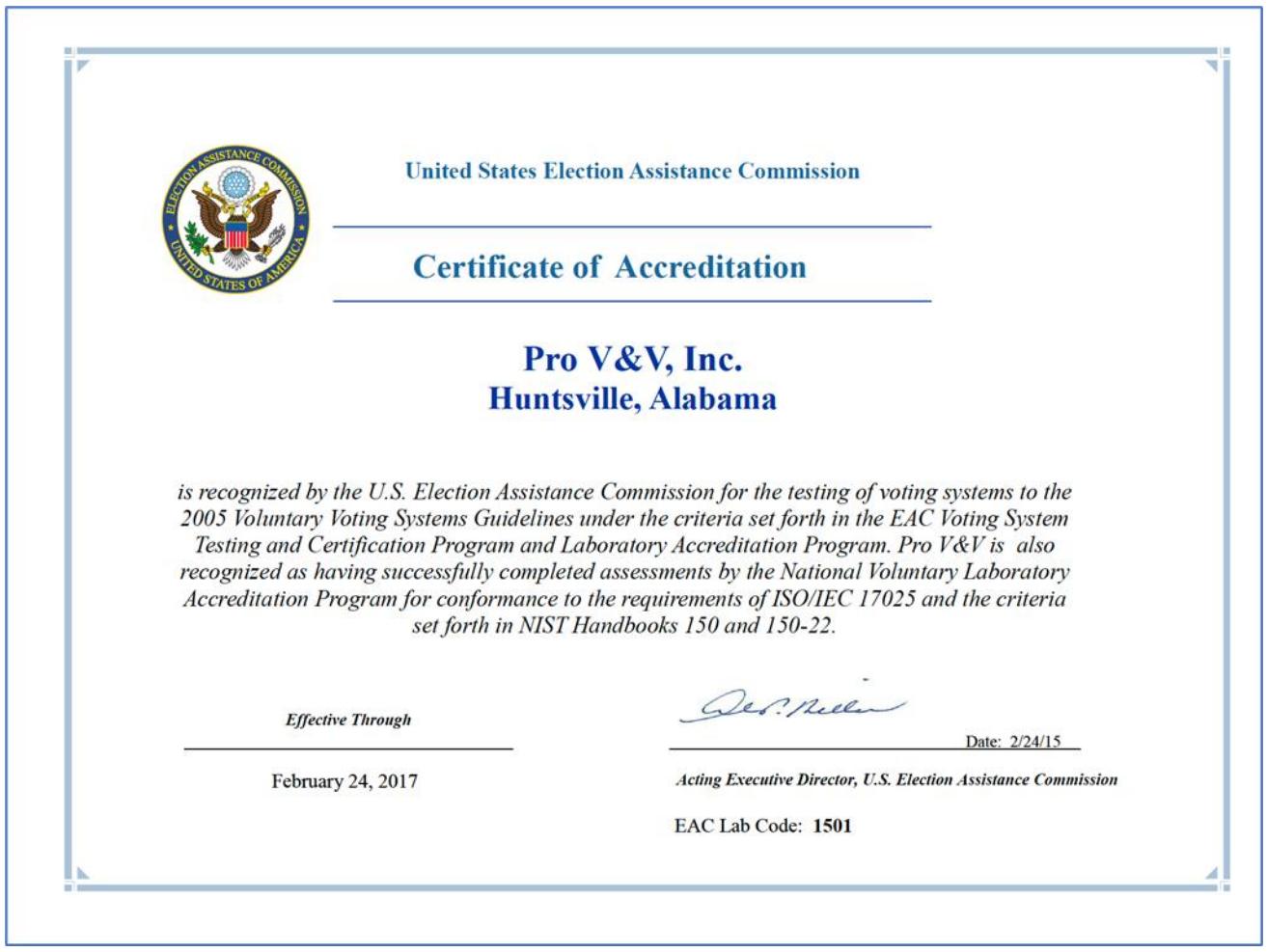
37. Regardless, these forty-eight (48) counties appear to have relied upon the validity of the November 15, 2019 certification and the laboratory that performed the testing.

38. Pursuant to the Michigan Secretary of State, the Dominion election voting systems used in the November 3, 2020 presidential election were "certified" on November 15, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Michigan Secretary of State, Certified Vote Tabulating Equipment as of July 22, 2020.

ACCREDITATION ISSUE

39. Pursuant to the Michigan Secretary of State's website and hyperlink in the above PDF, DVS-DemSuite5.5 is manufactured by Dominion Voting Systems Corp and the Testing Laboratory was Pro V&V. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/democracy-suite-55 (last visited August 29, 2022).

40. Pursuant to the U.S. Election Assistance Commission's website, Pro V&V received a Certificate of Accreditation on February 24, 2015.



United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective Through

February 24, 2017

Date: 2/24/15

Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **1501**

41. There is no evidence of that PRO V and V was recertified.

42. Pursuant to Version 2.0 of the Voting System Test Laboratory Program Manual, which was effective May 31, 2015, "A grant of accreditation is valid for a period **not to exceed two years**." Voting System Test Laboratory Program Manual, p. 39, § 3.8.

43. On November 15, 2019, the Pro V & V Accreditation was lapsed by more than two years.

44. On November 15, 2019, Pro V&V was not accredited by the U.S. Election Assistance Commission. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (last visited August 29, 2022).

45. Pro V&V did not receive another Certificate of Accreditation until **January 27, 2021**, which was after the 2020 presidential election.

46. Since Michigan law expressly requires that the "requirements imposed under… the Help America Vote Act of 2002," the Michigan voting machines or devices must have been tested and approved by a laboratory that was accredited pursuant to the Help America Vote Act of 2002

47. However, Pro V&V was not even accredited on November 3, 2020, as a laboratory in addition to having expired accreditation on the day of November 15, 2019, when they claimed to certify the Dominion system

1. **THE PROBLEM WITH THE ELECTRONIC VOTING SYSTEMS CERTIFICATION**

48. The US Election Assistance Commission certifies electronic voting systems to the federal standards and has issued three versions of the standards for electronic voting systems which are version 1.0; 1.1 and 2.0. Certified Voting Systems | U.S. Election Assistance Commission (eac.gov)

49. The electronic voting systems include the hardware and software that is used as described in the Michigan Election code which includes the three vendors each offering different types of tabulators and the election management system software.

50. The requirement to also comply with the additional requirements of the Help America Vote Act of 2002 was passed into Michigan law on October 29, 2002.

51. The essential components of the electronic voting systems include the election management software that accumulates the precinct votes at the county level and the tabulators that read the ballots and count the votes at a precinct level.

a. TABULATORS

52. On information and belief, none of the counties in Michigan used an electronic voting system that was are properly certified by the US Election Assistance Commission that are in use in Michigan.

53. On information and belief, none of the counties in Michigan used an electronic voting system that was properly certified by the US Election Assistance Commission.

54. On information and belief, all of the counties in Michigan intend to use an electronic voting system that was does not meet or exceed the current standards of the US EAC which is VVSG 2.0 from 2021.

55. On information and belief, many, if not all, of the counties in Michigan electronic voting systems used in the 2020 Michigan Presidential election were not certified to the standards of the US EAC VVSG 1.1 from 2009.

56. On information and belief, many, if not all, of the counties in Michigan electronic voting systems used in the 2020 Michigan Presidential election were not certified to the standards of the US EAC VVSG 1.0 from 2005.

b. ELECTION MANAGEMENT SOFTWARE VVSG 2.0

57. The November 15, 2019 "certification" that was presented above for fifty-nine (59) of the eighty-three (83) counties in Michigan was to the VVSG 1.1 standard from 2009.

58. On information and belief, the current election management software used does not meet the current standards of the US EAC which is VVSG 2.0 from 2021.

59. The scheduled 2022 General Election will therefore use machines that are not certified to the current standards unless this court enforces the law that requires the machines comply.

2. SECURITY PROTECTIONS REQUIRED

60. VVSG 2.0 was "designed to meet the challenges ahead, to replace decade's old voting system standards, to improve the voter experience, and provide necessary safeguards to protect the integrity of the voting process." EAC Testing and Certification Program.

61. The new upgraded requirements in VVSG 2.0 included security features:

a. Software independence is a requirement. A software independent voting system does not rely solely on software and an undetected change or error in its software cannot cause an undetectable change or error in an election outcome. This includes the use of paper ballots, cryptographically verifiable (E2E) ballots, access controls, encryption, physical security, logging, and auditing.

b. Wireless systems are disallowed. Voting systems are not allowed to connect wirelessly to external networks. Unused ports and processes must be removed or disabled. Accessibility is provided for by allowing the use of Bluetooth adapters connected to the voting device's headphone jack as this does not increase the attack surface of the system. The use of firewalls, intrusion prevention, and other means is recommended in the requirements.

c. Physical security includes logically disabling physical ports that are not essential to voting operations. All new connections and disconnections must be logged.

d. Multi-factor authentication is required for all critical operations such as software updates, aggregating and tabulating votes, enabling network functions, changing device states (opening/closing polls), or modifying authentication mechanisms.

e. System integrity requires risk assessment and supply chain risk management strategy, removes non-essential services, requires exploit mitigation (e.g., address space layout randomization (ASLR), data execution prevention) and the system to be free of known vulnerabilities, cryptographic boot validation, and authenticated updates.

f. Data protection requires FIPS 140-2 validated cryptographic modules (except E2E), cryptographic protection of various election artifacts and digitally signed cast vote records and ballot images

62. Compliance with an outdated standard does not provide for a secure safe election.

CONSEQUENCE OF NON-COMPLAINCE

63. Since the electronic voting systems were used in violation of Michigan law, then said election is void *ab initio,* and said 2020 election cannot be certified by any of the Defendants.

64. Since the Dominion Democracy Suite 5.5 has been not tested and approved by a laboratory that is "accredited" pursuant to the Help America Vote act of 2002 to the standards of the VVSG 1.0 or 1.1, the use said voting machine in the 2020 election was illegal. These forty eight counties can not use their electronic tabulators or election management software in the November 8, 2022 election or any further election until they comply with the law

65. The E S and S systems or whatever version is being used in the twenty-four (24) other systems

66. Since NONE of the electronic voting systems used by the counties in Michigan in 2022 are not compliant with the new VVSG 2.0 and tested and approved by a laboratory for use in the 2022 Michigan General Election on November 8, 2022 then the systems MUST not be used.

The 2020 Election cannot be certified.

67. Void *ab initio* is defined as "Having no legal effect from inception." Thompson Reuters Practical Law, definition of "*Void ab initio*" last visited June 21, 2022 (https://1.next.westlaw.com/Glossary/PracticalLaw/I41334c8d07ef11ebbea4f0dc9fb69570?contextData=(sc.Default)&firstPage=true&transitionType=Default)

68. Void *ab initio* means that the action taken is **void**; it is **not voidable**. *See id.*

69. Void *ab initio* means that the action taken "has no legal effect." *Id*.

70. "A void action cannot be ratified or validated [or certified]." *Id*.

71. "An action that is void *ab initio* **never had any legal effect**." *Id* (emphasis added).

72. In order for Michigan to conduct a valid election, the Michigan Secretary of State must comply with the requirements contained in M.C.L. § 168.795 and M.C.L. § 168509n *et seq*. as well as the requirements contained within the Help America Vote act of 2002 which is 52 U.S.C. § 20921.

73. Since the legal requirements contained in M.C.L. § 168.795; M.C.L. § 168509n *et seq*. and the Help America Vote Act of 2002 were not met, then the Michigan Secretary of State and Governor had no authority to use any voting machine or device in violation of said statutes.

74. Since the legal requirements contained in M.C.L. § 168.795; M.C.L. § 168509n *et seq*. and the Help America Vote Act of 2002, then the Michigan Secretary of State and Governor had no authority to certify the results of Michigan's 2020 presidential election and their certification signatures are void *ab initio*.

75. As such, Michigan conducted an **unlawful and illegal** presidential election, which the Michigan Secretary of State and Governor could not lawfully certify.

76. As such, Defendant Gretchen Whitmer's certification of Michigan's 2020 presidential election was/is **void *ab initio*** as she did not have the requisite authority under Michigan law to certify said election.

77. Defendant Jocelyn Benson's certification of Michigan's 2020 presidential election was/is **void *ab initio*** as she did not have the requisite authority under Michigan law to certify said election.

78. As such, it is incumbent upon this Court to issue a writ mandamus ordering Defendant Jocelyn Benson, in her official capacity as the Michigan Secretary of State, and

Defendant Gretchen Whitmer, in her official capacity as the Michigan Governor to decertify Michigan's 2020 presidential election results.

79. It is further incumbent upon this Court to issue a writ of mandamus ordering the Defendants to re-run the 2020 presidential elections *instanter* as the purported election conducted on November 3, 2020, was/is **void *ab initio*** and said election is uncertifiable.

80. Plaintiffs all assert a constitutional right to participate in Michigan's 2020 presidential election. *See* U.S. Const., Amend. 14.

81. Michigan's failure/refusal to comply with M.C.L.A. § 168.795a and 52 U.S.C. § 20901 *et seq*. violates Plaintiff's constitutional right to vote and said actions are actionable pursuant to 42 U.S.C. § 1983.

82. Pursuant to Bush v Gore, 531 US 98 (2000), a voter has an equal protection right to 1) access to the polls 2) to have the vote counted as cast (not altered) and 3) to not be diluted.

83. Pursuant to 52 U.S.C. § 20701, the Defendants are required to retain and preserve all records and papers relating to Michigan's 2020 presidential election.

84. Pursuant to MCL 168.811 certain records are required to be retained for two years or six years.

> **MCL 168.811 Election returns, records, and applications; preservation; destruction; time.**
>
> Sec. 811.
>
> All election returns, *including poll lists*, statements, *tally sheets*, absent voters' return envelopes bearing the statement required by section 761, absent voters' records required by section 760, and other returns made by the inspectors of election of the several precincts *must be carefully preserved and may be destroyed after the expiration of 2 years following the primary or election at which the same were used.*

> All applications executed under section 523, all voter registration applications executed by applicants under section 497(3) and (4), and *all absent voters' applications must be carefully preserved and may be destroyed after the expiration of 6 years following the primary or election at which those applications were executed*.

85. Pursuant to the Federal Prosecution of Election Offenses Seventh Edition May 2007 (Revised August 2007) (justice.gov)The manual called the Federal Prosecution of Election Offenses (8th Edition) the most current edition is found at the link is mislabeled seventh edition above. The manual is from December of 2017:

> The retention requirements of Section 20701 are aimed **specifically at election administrators**. In a parochial sense, these laws place criminally sanctionable duties on election officials. However, in a broader sense, this federal retention law assists election administrators in performing the tasks of managing elections and determining winners of elective contests. It does this by requiring election managers to focus appropriate attention on the types of election records under their supervision and control that may be needed to resolve challenges to the election process, and by requiring that they take appropriate steps to ensure that those records will be preserved intact until such time as they may become needed to resolve legitimate questions that frequently arise involving the election process. [*Fed Prosecution of Election Offenses* at page 89]
>
> Section 20701 does apply to all records generated in connection with the process of registering voters and maintaining current electoral rolls [at page 89]
>
> This statute must be interpreted in keeping with its congressional objective: under Section 20701, *all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained* if the documents or records were **generated** in connection with an election that included one or more federal candidates. [at page 90]

86. Electronic records from the election that were generated include but are not limited to audit logs and security logs as well as electronic files of the cast vote records and ballot images.

87. VVSG 2.0 requires the logging of the "audit trail" and the audit trail is required by MCL 168.794.

88. Attached are some of the requirements from the VVSG 2.0 which was adopted by the Michigan Legislature in MCL 169.609n when it adopted the Help America Vote Act of 2002 and mandate its voluntary standards into the use of electronic voting machine requirements. See Appendix A

89. Pursuant to 52 U.S.C. § 20701, Defendants are only required to preserve the evidence for twenty-two (22) months.

90. 11/03/20 + 22 months = 09/03/22

91. Many records of the 2020 election have yet to be produced despite requests from FOIA, or have been reported lost.

92. There is no requirement in law ever to destroy or delete these records.

93. The Court must enter a preservation order for these records until this case is concluded or further order of the court.

94. Pursuant to 52 U.S.C. § 20705, the United States District Court for the district in which a demand is made pursuant to 52 U.S.C. § 20703 shall have jurisdiction.

95. As such, this Court has jurisdiction over 52 U.S.C. § 20701 *et seq*. and this Court should grant Plaintiff's Emergency Motion for Temporary Restraining Order until it can be determined the extent to which the evidence preserved pursuant to 52 U.S.C. § 20701 will be needed in the present case.

96. The Court Should also grant immediate consideration due to the pending expiration of the federal requirement to retain records.

97. The Court must grant an restraining order, temporary order and a permanent injunction against the use of uncertified machines or the use of machines that are certified by an unaccredited person in ALL future elections.

DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201

98. Plaintiff incorporates by reference all paragraphs above as if fully stated herein.

99. Plaintiff requests a declaratory judgment that the Help America Vote Act of 2002 is constitutional.

VIOLATION OF CONSTITUTIONAL RIGHTS UNDER 42 USC § 1983

100. Plaintiff incorporates all prior allegations…

101. Under 42 USC § 1983 an individual may bring an action against state actors under 42 USC § 1983 for a deprivation of his or her constitutional rights.

102. A cause of action under 42 USC § 1983 must allege deprivation by a governmental entity, governmental official, or a state actor acting as a governmental entity or official, of rights secured by the United States Constitution.

103. The right to vote is the fundamental constitutional right held by each individual citizen of the United States and is preservative of all other rights.

104. Under the First, Ninth, and Fourteenth Amendments, *inter alia*, Plaintiff has a constitutional right to vote for the candidate of his choice, but also the constitutional right not to have his vote diluted, canceled out, and/or nullified by the counting of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent and/or unverifiable votes. *Reynolds v Sims*, 377 U.S. 533, 555 (1964).

105. Under the Equal Protection Clause, Plaintiff has a constitutional right to enjoy equal protection of the law and equal treatment in exercising his right to vote; and the constitutional right not to have his vote diluted, canceled out, and/or nullified by the counting

of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent or unverifiable votes. Cite equal protection clause; Reynolds, supra.

106. Due to the failure on the part of Defendants to have ensured certification or otherwise caused to be certified voting machines used in the state of Michigan in the November 2020 election, Plaintiff's vote was diluted, canceled out, and/or nullified.

107. If the Defendants named herein cause, direct, or otherwise allow the information and data required to be preserved for 22 months under Michigan Law destruction of such will make it impossible to demonstrate that the failure of certification of voting machines, as well as other fraudulent, intentional, grossly negligent, and negligent acts on the part of the Defendants, caused Plaintiff's constitutional rights to be violated as described herein under the stated causes of action available under 42 USC § 1983.

108. The preservation request but any 42 USC § 1983 action and the that defendants' fraudulent, intentional, reckless, grossly negligent, and negligent acts were the proximate cause of deprivation of Plaintiff's constitutional rights as stated herein in the fact that Michigan provides for an audit trail in MCL 168.795k which is a part of the voting franchise and was incorporated into the Michigan Constitution which guaranteed the right of every citizen to request an audit in Article 4 Section H which provides for the "right to have the results of statewide elections audited, in such a manner as prescribed by law , to ensure the accuracy and integrity of elections. This bears directly on the Equal Protection clause which protects against the altering or dilution of votes

109. The attached affidavit in support of the ex parte motion for emergency TRO is incorporated herein and constitutes verification of this complaint.

WHEREFORE, premises considered, the Plaintiff prays as follows:

1. That good and adequate service be had on all Defendants;

2. That this Court grant Plaintiff's Emergency Motion for Temporary Restraining Order to:

   a. prevent the Defendants from tampering with or otherwise adulterating the property and evidence regarding the 2020 elections;

   b. prevent the Defendants from obstructing justice, interfering with and/or destroying all investigatory evidence, confidences and privileges relating to Michigan's 2020 presidential election;

3. That this Court issue a preliminary injunction ordering

   a. the Defendants to remove any/all election equipment for the 2022 elections that is not certified by an accredited voting system test laboratory; and

   b. the Defendants to preserve all 2020 presidential election records (electronic or otherwise) indefinitely as the 2020 presidential election is still being investigated.

4. That this Court issue a writ of mandamus compelling the Michigan Secretary of State and Governor to

   a. decertify the Michigan's 2020 presidential election and to recall Michigan's Joseph R. Biden presidential electors;

   b. order the Defendants to work together to rerun the Michigan 2020 presidential election as soon as possible, by way of a special election, with paper ballots only, on a single election **day**, with the votes being counted

by hand, with members of all political parties present to observe, with a public livestream of all vote counting;

c. An award of damages to be determined by a jury of twelve (12);

d. An award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

e. A permanent injunction on use of electronic voting machines that are not certified by an accredited laboratory in all future elections.

f. Such other relief to which the Plaintiffs may show themselves to be entitled.

Respectfully submitted this 2nd day of September 2022.

/s/Daniel J. Hartman

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APPENDIX A: VVSG Standards for Preserving Generated Electronic Records

10.2.4. B The voting system needs to be constructed so that the security of the system does not rely upon the secrecy of the event logs. It will be considered routine for event logs to be made available to election officials, and possibly even to the public, if election officials so desire. The system will be designed to permit the election officials to access event logs without fear of negative consequences to the security and integrity of the election. For example, cryptographic secret keys or passwords will not be logged in event log records.

11.1 – Access privileges, accounts, activities and authorizations are logged, monitored, and reviewed and modified as needed ensures there are records in case there are errors or incidents that need to be accounted for. The system also prevents logging any voter ID information and prevents the logging capability from becoming disabled or the log entries from being modified. The system provides administrators access to logs, allowing for continuous monitoring and periodic review.

11.1-A – Logging activities and resource access
The voting system must log any access to, and activities performed on, the voting system, including:
1. timestamps for all log entries;
2. all failed and successful attempts to access the voting system; and
3. all events which change the access control system including policies, privileges, accounts, users, groups or roles, and authentication methods.
Discussion
In the event of an error or incident, the user access log can assist in narrowing down the reason for the incident or error.
• Timestamped log entries will allow for easy auditing and review of access to the voting system.
• Access control logging supports accountability of actions by identifying and authenticating users.
• Groups are a collection of users that are assigned a specific set of permissions. Roles are an
identity that is given specific permissions and can be assigned to a user. Any changes to the permissions assigned to groups and roles should be logged to identify updates to a user's privileges.

11.1-C – Preserving log integrity
The voting system must prevent:
1. the logging capability from being disabled;
2. the log entries from being modified in an undetectable manner; and
3. The deletion of logs; with the exception of log rotation.

Discussion

This requirement promotes the integrity of the information logged by ensuring all activities are logged. Additionally, it prevents these abilities from being an option within the user interface.
This requirement promotes the integrity of the information logged by ensuring all activities are not modifiable.
The removal of logs is only appropriate for log rotation, which is when the stored logs are rotated out to create more space for continuous logging. The voting system should be capable of rotating the event log data to manage log file growth. Log file rotation may involve regular (e.g., hourly, nightly, or weekly) moving of an existing log file to some other file name and/or location and starting fresh with an empty log file. Preserved log files may be compressed to save storage space.

12.2-E – Logging enabled and disabled ports
An event log entry that identifies the name of the affected device must be generated when physical ports are enabled or disabled.
Discussion
Logically disabling ports prevents unused ports from being used as a staging point for an attack on the voting system.
Discussion
Whether a port is disabled or not is security relevant, especially once a security incident has occurred, and this information would be useful when determining cause. 12.2-C – Physical port restriction applies to physical restrictions, whereas 12.2-D – Disabling ports discusses logical disabling of ports.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN GRAND RAPIDS DIVISION

JASON ICKES, voter

KEN BEYER, voter

MACOMB COUNTY REPUBLICAN PARTY by its officers of the Executive Committee,

DONNA BRANDENBURG, US Tax Payers Candidate for the 2022 Governor of Michigan,

ELECTION INTEGRITY FUND AND FORCE, a Michigan non-profit corporation, AND

SHARON OLSON, in her official capacity as the Clerk of Irving Township Barry County

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as the Governor of Michigan, and

JOCELYN BENSON, in her official capacity as Michigan Secretary of State

Defendants.

Civil Action No. : _____

JURY DEMAND

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VERIFIED COMPLAINT

NOW COMES Plaintiffs and, pursuant to 28 U.S.C. § 2201, 52 U.S.C. § 20705, 42 U.S.C. § 1983, and MCLA § 168.46, and hereby files this Verified Complaint and requests that this Honorable Court declare the rights, status and/or legal relations between the parties, enjoin and/or restrain The State of Michigan from destroying 2020 presidential election evidence, award damages in an amount to be determined by a jury and issue an Order compelling the Michigan Governor and Michigan Secretary of State to decertify the 2020 presidential election and, in support thereof, Plaintiff would show unto the Court the following:

I. PARTIES

1. Plaintiff Jason Ickes is a citizen of Michigan who voted in the 2020 presidential election in Michigan and he is domiciled in Jenison, Ottawa County, Michigan.

2. Plaintiff Ken Beyer is a citizen of Michigan who voted in the 2020 presidential election and is domiciled in Allegan County, Michigan.

3. Plaintiff Macomb County Republican Party is a county political party that elected an executive committee for Macomb County as defined by MCL 168.599 which selected its chair Mark Forton and the officers of Macomb County who join this action in both their official capacity and as voters in the 2020 Presidential Election. They are residents of Macomb County, Michigan.

4. Plaintiff Donna Brandenburg is a candidate for Michigan governor for the US Taxpayers party and on the ballot on November 8, 2022, and was a voter in the 2020 Election

5. Plaintiff Election Integrity Fund and Force is a Michigan non-profit organization that is concerned as a non-partisan community activist organization dedicated to having accurate, honest elections in Michigan.

6. Plaintiff Sharon Olson is the duly elected Clerk for Irving Township, Barry County Michigan, and responsible by statute for conducting the 2020 and 2022 elections.

7. On November 23, 2020, Defendant Gretchen Whitmer was the Governor of the State of Michigan and she unlawfully certified Michigan's 2020 presidential election results. (Michigan's 2020 presidential election certification attached hereto as Exhibit 1).

8. On November 23, 2020, Defendant Jocelyn Benson was the Secretary of State of the State of Michigan and she unlawfully certified Michigan's 2020 presidential election results.

II. JURISDICTION AND VENUE

9. This verified Complaint is filed pursuant to 28 U.S.C. § 1331 and seeks damages pursuant to 42 U.S.C. § 1983 for violations of Plaintiff's constitutional right to vote, as provided for by the Fourteenth Amendment to the Constitution of the United States.

10. This verified Complaint is also filed pursuant to 28 U.S.C. § 2201 *et seq.* to 2201 "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

11. This verified Complaint is also filed pursuant to 52 U.S.C. § 20705 and requests that this Honorable Court issue a temporary restraining order to stop the Defendants from destroying critical evidence from Michigan's 2020 presidential election.

III. FACTUAL ALLEGATIONS

12. On November 3, 2020, Michigan attempted to conduct an election for President of the United States of America.

13. However, as presented *infra*, the Defendants, Gretchen Whitmer and Jocelyn Benson, did not have the legal authority to certify Michigan's 2020 presidential election.

14. Pursuant to the Constitution of the United States, "Each State shall appoint, **in such Manner as the Legislature thereof may direct, a Number of Electors**, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2 (emphasis added).

A. The Electronic Voting System used in 2020 including the Election Management Software and Hardware (including ALL three (3) types of tabulators and the high-speed scanners (Machines) that were used in the 2020 presidential election in Michigan were not certified or accredited in accordance with to MCL 168.795a

15. Pursuant to Michigan law, "an **electronic voting system SHALL NOT BE USED in an election"** unless it meets certain requirements.

> **168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.**
>
> (1) An electronic voting system **shall not be used** in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and **unless it meets 1 of the following conditions**:
>
> (a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.
>
> (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test

standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

16. Michigan provided the following definition at MCLA 168.704(f)

(f) "Electronic voting system" means a system in which votes are recorded and counted by electronic tabulating equipment.

17. Michigan provided the following definition at MCLA 168.704(e)

(e) "Electronic tabulating equipment" means an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results.

18. After the Electronic voting system is approved any changes to the system especially the software must also be approved pursuant to MCL 168.795a(6)

(6) After an electronic voting system is approved, an improvement or change in the electronic voting system shall be submitted to the board of state canvassers for approval pursuant to this section. This subsection does not apply to the technical capability of a general purpose computer, reader, or printer to electronically record and count votes.

19. On information and belief, the electronic voting system software that was used in the 2020 election was not certified either by an independent testing authority which was accredited by the national association of state electors AND the board of state canvassers

20. On information and belief, the electronic voting system software that was used in the 2020 election was not certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards of the board of state election directors in a manner prescribed by the board of state canvassers.

21. Pursuant to MCL 168.795a, some additional pre-requisites for use in a Michigan election include mandatory compliance with:

a. MCL 168.794 http://legislature.mi.gov/doc.aspx?mcl-168-794

b. MCL 168.795 http://legislature.mi.gov/doc.aspx?mcl-168-795

c. MCL 168.797(c) http://legislature.mi.gov/doc.aspx?mcl-168-797c

B. The Laboratory used to certify the Electronic Voting Systems was not authorized to perform testing and certification by the Help America Vote Act of 2002 as required by Michigan law.

22. Pursuant to Michigan law, "the **Secretary of State is responsible for the coordination of the requirements imposed under** this chapter, the national voter registration act of 1993, and **the Help America Vote Act of 2002**" M.C.L.A. § 168.509n (emphasis added).

23. The requirement in Michigan Law MCLA 168.509n that directs the Michigan Secretary of State to comply with the Help America Vote Act of 2002 was effective on October 29, 2002.

24. The Help America Vote Act of 2002 created "the Election Assistance Commission" and the Election Assistance Commission (EAC) is referred to in the Act as the "Commission." 52 U.S.C. § 20921 (formerly cited as 42 U.S.C. § 15321.

25. The Election Assistance Commission "shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by -- … **(2)** carrying out the duties described in part B of this subchapter (relating to the testing, certification, decertification, and recertification of voting system hardware and software)…." 52 U.S.C. § 20922 (formerly cited as 42 U.S.C. § 15322).

26. The Election Assistance Commission "shall provide for the testing, certification, decertification, and recertification of voting system hardware and software **by accredited laboratories.**" 52 U.S.C. § 20971(a)(1) (formerly cited as 42 U.S.C. § 15371) (emphasis added).

27. Additionally, at "the option of a State, the State may provide for the testing, certification, decertification, or recertification of its voting system hardware and software **by the laboratories accredited by the Commission** under this section." 52 U.S.C. § 20971(a)(2) (for Pursuant to the U.S. Election Assistance Commission, there are **only two Voting System Test Laboratories (VSTL) that are accredited** by the Election Assistance Commission: (1) **Pro V&V**; and (2) SLI Compliance. U.S. Election Assistance Commission, VOTING SYSTEM TEST LABORATORIES (VSTL), https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl (last visited June 21, 2022) (emphasis added) merely cited as 42 U.S.C. § 15371) (emphasis added).

28. Michigan has expressly opted into compliance with 52 USC 2097 with MCL 168.509a.

MICHIGAN HAS ELECTRONIC VOTING SYSTEMS IN USE BY COUNTIES THAT ARE NOT CERTIFIED AND SOME OF THESE WERE CERTIFIED BY AN UNACCREDITED LABORATORY.

29. Michigan has 83 counties that all had the option to select the electronic voting system from the three choices provided by the Michigan Secretary of State.

30. A startling twenty-four (24) counties do not have a certified system pursuant to the information presented at https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

31. This is almost 29% of the counties do not use a certified system.

32. Pursuant to the EAC website, eleven (11) Counties used Hart Verity 2.2.2. which was also certified. https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

33. Pursuant to the EAC website, forty-eight (48) counties use Dominion's D-Suite 5.5. https://www.eac.gov/voting-equipment/system-certification-process (last visited August 31, 2022).

34. The Dominion Election Management system was used in more than 57% of the Michigan counties

35. Pursuant to the Michigan Secretary of State, the Dominion election voting systems used in the November 3, 2020 presidential election were "certified" on November 15, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Michigan Secretary of State, Certified Vote Tabulating Equipment as of July 22, 2020.

36. The software version that was certified reports as version 5.5-B while the website indicates that the counties were certified for use in version 5.5.

37. Regardless, these forty-eight (48) counties appear to have relied upon the validity of the November 15, 2019 certification and the laboratory that performed the testing.

38. Pursuant to the Michigan Secretary of State, the Dominion election voting systems used in the November 3, 2020 presidential election were "certified" on November 15, 2019, with an EAC System ID # as follows: DVS-DemSuite5.5-B. Michigan Secretary of State, Certified Vote Tabulating Equipment as of July 22, 2020.

ACCREDITATION ISSUE

39. Pursuant to the Michigan Secretary of State's website and hyperlink in the above PDF, DVS-DemSuite5.5 is manufactured by Dominion Voting Systems Corp and the Testing Laboratory was Pro V&V. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/democracy-suite-55 (last visited August 29, 2022).

40. Pursuant to the U.S. Election Assistance Commission's website, Pro V&V received a Certificate of Accreditation on February 24, 2015.

United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective Through

February 24, 2017

Date: 2/24/15

Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **1501**

41. There is no evidence of that PRO V and V was recertified.

42. Pursuant to Version 2.0 of the Voting System Test Laboratory Program Manual, which was effective May 31, 2015, "A grant of accreditation is valid for a period **not to exceed two years**." Voting System Test Laboratory Program Manual, p. 39, § 3.8.

43. On November 15, 2019, the Pro V & V Accreditation was lapsed by more than two years.

44. On November 15, 2019, Pro V&V was not accredited by the U.S. Election Assistance Commission. U.S. Election Assistance Commission, https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl/pro-vv (last visited August 29, 2022).

45. Pro V&V did not receive another Certificate of Accreditation until **January 27, 2021**, which was after the 2020 presidential election.

46. Since Michigan law expressly requires that the "requirements imposed under… the Help America Vote Act of 2002," the Michigan voting machines or devices must have been tested and approved by a laboratory that was accredited pursuant to the Help America Vote Act of 2002

47. However, Pro V&V was not even accredited on November 3, 2020, as a laboratory in addition to having expired accreditation on the day of November 15, 2019, when they claimed to certify the Dominion system

1. **THE PROBLEM WITH THE ELECTRONIC VOTING SYSTEMS CERTIFICATION**

48. The US Election Assistance Commission certifies electronic voting systems to the federal standards and has issued three versions of the standards for electronic voting systems which are version 1.0; 1.1 and 2.0. Certified Voting Systems | U.S. Election Assistance Commission (eac.gov)

49. The electronic voting systems include the hardware and software that is used as described in the Michigan Election code which includes the three vendors each offering different types of tabulators and the election management system software.

50. The requirement to also comply with the additional requirements of the Help America Vote Act of 2002 was passed into Michigan law on October 29, 2002.

51. The essential components of the electronic voting systems include the election management software that accumulates the precinct votes at the county level and the tabulators that read the ballots and count the votes at a precinct level.

a. TABULATORS

52. On information and belief, none of the counties in Michigan used an electronic voting system that was are properly certified by the US Election Assistance Commission that are in use in Michigan.

53. On information and belief, none of the counties in Michigan used an electronic voting system that was properly certified by the US Election Assistance Commission.

54. On information and belief, all of the counties in Michigan intend to use an electronic voting system that was does not meet or exceed the current standards of the US EAC which is VVSG 2.0 from 2021.

55. On information and belief, many, if not all, of the counties in Michigan electronic voting systems used in the 2020 Michigan Presidential election were not certified to the standards of the US EAC VVSG 1.1 from 2009.

56. On information and belief, many, if not all, of the counties in Michigan electronic voting systems used in the 2020 Michigan Presidential election were not certified to the standards of the US EAC VVSG 1.0 from 2005.

b. ELECTION MANAGEMENT SOFTWARE VVSG 2.0

57. The November 15, 2019 "certification" that was presented above for fifty-nine (59) of the eighty-three (83) counties in Michigan was to the VVSG 1.1 standard from 2009.

58. On information and belief, the current election management software used does not meet the current standards of the US EAC which is VVSG 2.0 from 2021.

59. The scheduled 2022 General Election will therefore use machines that are not certified to the current standards unless this court enforces the law that requires the machines comply.

2. SECURITY PROTECTIONS REQUIRED

60. VVSG 2.0 was "designed to meet the challenges ahead, to replace decade's old voting system standards, to improve the voter experience, and provide necessary safeguards to protect the integrity of the voting process." EAC Testing and Certification Program.

61. The new upgraded requirements in VVSG 2.0 included security features:

a. Software independence is a requirement. A software independent voting system does not rely solely on software and an undetected change or error in its software cannot cause an undetectable change or error in an election outcome. This includes the use of paper ballots, cryptographically verifiable (E2E) ballots, access controls, encryption, physical security, logging, and auditing.

b. Wireless systems are disallowed. Voting systems are not allowed to connect wirelessly to external networks. Unused ports and processes must be removed or disabled. Accessibility is provided for by allowing the use of Bluetooth adapters connected to the voting device's headphone jack as this does not increase the attack surface of the system. The use of firewalls, intrusion prevention, and other means is recommended in the requirements.

c. Physical security includes logically disabling physical ports that are not essential to voting operations. All new connections and disconnections must be logged.

d. Multi-factor authentication is required for all critical operations such as software updates, aggregating and tabulating votes, enabling network functions, changing device states (opening/closing polls), or modifying authentication mechanisms.

e. System integrity requires risk assessment and supply chain risk management strategy, removes non-essential services, requires exploit mitigation (e.g., address space layout randomization (ASLR), data execution prevention) and the system to be free of known vulnerabilities, cryptographic boot validation, and authenticated updates.

f. Data protection requires FIPS 140-2 validated cryptographic modules (except E2E), cryptographic protection of various election artifacts and digitally signed cast vote records and ballot images

62. Compliance with an outdated standard does not provide for a secure safe election.

CONSEQUENCE OF NON-COMPLAINCE

63. Since the electronic voting systems were used in violation of Michigan law, then said election is void *ab initio,* and said 2020 election cannot be certified by any of the Defendants.

64. Since the Dominion Democracy Suite 5.5 has been not tested and approved by a laboratory that is "accredited" pursuant to the Help America Vote act of 2002 to the standards of the VVSG 1.0 or 1.1, the use said voting machine in the 2020 election was illegal. These forty eight counties can not use their electronic tabulators or election management software in the November 8, 2022 election or any further election until they comply with the law

65. The E S and S systems or whatever version is being used in the twenty-four (24) other systems

66. Since NONE of the electronic voting systems used by the counties in Michigan in 2022 are not compliant with the new VVSG 2.0 and tested and approved by a laboratory for use in the 2022 Michigan General Election on November 8, 2022 then the systems MUST not be used.

The 2020 Election cannot be certified.

67. Void *ab initio* is defined as "Having no legal effect from inception." Thompson Reuters Practical Law, definition of "*Void ab initio*" last visited June 21, 2022 (https://1.next.westlaw.com/Glossary/PracticalLaw/I41334c8d07ef11ebbea4f0dc9fb69570?contextData=(sc.Default)&firstPage=true&transitionType=Default)

68. Void *ab initio* means that the action taken is **void**; it is **not voidable**. *See id.*

69. Void *ab initio* means that the action taken "has no legal effect." *Id*.

70. "A void action cannot be ratified or validated [or certified]." *Id*.

71. "An action that is void *ab initio* **never had any legal effect**." *Id* (emphasis added).

72. In order for Michigan to conduct a valid election, the Michigan Secretary of State must comply with the requirements contained in M.C.L. § 168.795 and M.C.L. § 168509n *et seq*. as well as the requirements contained within the Help America Vote act of 2002 which is 52 U.S.C. § 20921.

73. Since the legal requirements contained in M.C.L. § 168.795; M.C.L. § 168509n *et seq*. and the Help America Vote Act of 2002 were not met, then the Michigan Secretary of State and Governor had no authority to use any voting machine or device in violation of said statutes.

74. Since the legal requirements contained in M.C.L. § 168.795; M.C.L. § 168509n *et seq*. and the Help America Vote Act of 2002, then the Michigan Secretary of State and Governor had no authority to certify the results of Michigan's 2020 presidential election and their certification signatures are void *ab initio*.

75. As such, Michigan conducted an **unlawful and illegal** presidential election, which the Michigan Secretary of State and Governor could not lawfully certify.

76. As such, Defendant Gretchen Whitmer's certification of Michigan's 2020 presidential election was/is **void *ab initio*** as she did not have the requisite authority under Michigan law to certify said election.

77. Defendant Jocelyn Benson's certification of Michigan's 2020 presidential election was/is **void *ab initio*** as she did not have the requisite authority under Michigan law to certify said election.

78. As such, it is incumbent upon this Court to issue a writ mandamus ordering Defendant Jocelyn Benson, in her official capacity as the Michigan Secretary of State, and

Defendant Gretchen Whitmer, in her official capacity as the Michigan Governor to decertify Michigan's 2020 presidential election results.

79. It is further incumbent upon this Court to issue a writ of mandamus ordering the Defendants to re-run the 2020 presidential elections *instanter* as the purported election conducted on November 3, 2020, was/is **void *ab initio*** and said election is uncertifiable.

80. Plaintiffs all assert a constitutional right to participate in Michigan's 2020 presidential election. *See* U.S. Const., Amend. 14.

81. Michigan's failure/refusal to comply with M.C.L.A. § 168.795a and 52 U.S.C. § 20901 *et seq*. violates Plaintiff's constitutional right to vote and said actions are actionable pursuant to 42 U.S.C. § 1983.

82. Pursuant to Bush v Gore, 531 US 98 (2000), a voter has an equal protection right to 1) access to the polls 2) to have the vote counted as cast (not altered) and 3) to not be diluted.

83. Pursuant to 52 U.S.C. § 20701, the Defendants are required to retain and preserve all records and papers relating to Michigan's 2020 presidential election.

84. Pursuant to MCL 168.811 certain records are required to be retained for two years or six years.

> **MCL 168.811 Election returns, records, and applications; preservation; destruction; time.**
>
> Sec. 811.
>
> All election returns, *including poll lists*, statements, *tally sheets*, absent voters' return envelopes bearing the statement required by section 761, absent voters' records required by section 760, and other returns made by the inspectors of election of the several precincts *must be carefully preserved and may be destroyed after the expiration of 2 years following the primary or election at which the same were used.*

> All applications executed under section 523, all voter registration applications executed by applicants under section 497(3) and (4), and *all absent voters' applications must be carefully preserved and may be destroyed after the expiration of 6 years following the primary or election at which those applications were executed*.

85. Pursuant to the Federal Prosecution of Election Offenses Seventh Edition May 2007 (Revised August 2007) (justice.gov)The manual called the Federal Prosecution of Election Offenses (8th Edition) the most current edition is found at the link is mislabeled seventh edition above. The manual is from December of 2017:

> The retention requirements of Section 20701 are aimed **specifically at election administrators**. In a parochial sense, these laws place criminally sanctionable duties on election officials. However, in a broader sense, this federal retention law assists election administrators in performing the tasks of managing elections and determining winners of elective contests. It does this by requiring election managers to focus appropriate attention on the types of election records under their supervision and control that may be needed to resolve challenges to the election process, and by requiring that they take appropriate steps to ensure that those records will be preserved intact until such time as they may become needed to resolve legitimate questions that frequently arise involving the election process. [*Fed Prosecution of Election Offenses* at page 89]
>
> Section 20701 does apply to all records generated in connection with the process of registering voters and maintaining current electoral rolls [at page 89]
>
> This statute must be interpreted in keeping with its congressional objective: under Section 20701, *all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained* if the documents or records were **generated** in connection with an election that included one or more federal candidates. [at page 90]

86. Electronic records from the election that were generated include but are not limited to audit logs and security logs as well as electronic files of the cast vote records and ballot images.

87. VVSG 2.0 requires the logging of the "audit trail" and the audit trail is required by MCL 168.794.

88. Attached are some of the requirements from the VVSG 2.0 which was adopted by the Michigan Legislature in MCL 169.609n when it adopted the Help America Vote Act of 2002 and mandate its voluntary standards into the use of electronic voting machine requirements. See Appendix A

89. Pursuant to 52 U.S.C. § 20701, Defendants are only required to preserve the evidence for twenty-two (22) months.

90. 11/03/20 + 22 months = 09/03/22

91. Many records of the 2020 election have yet to be produced despite requests from FOIA, or have been reported lost.

92. There is no requirement in law ever to destroy or delete these records.

93. The Court must enter a preservation order for these records until this case is concluded or further order of the court.

94. Pursuant to 52 U.S.C. § 20705, the United States District Court for the district in which a demand is made pursuant to 52 U.S.C. § 20703 shall have jurisdiction.

95. As such, this Court has jurisdiction over 52 U.S.C. § 20701 *et seq*. and this Court should grant Plaintiff's Emergency Motion for Temporary Restraining Order until it can be determined the extent to which the evidence preserved pursuant to 52 U.S.C. § 20701 will be needed in the present case.

96. The Court Should also grant immediate consideration due to the pending expiration of the federal requirement to retain records.

97. The Court must grant an restraining order, temporary order and a permanent injunction against the use of uncertified machines or the use of machines that are certified by an unaccredited person in ALL future elections.

DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201

98. Plaintiff incorporates by reference all paragraphs above as if fully stated herein.

99. Plaintiff requests a declaratory judgment that the Help America Vote Act of 2002 is constitutional.

VIOLATION OF CONSTITUTIONAL RIGHTS UNDER 42 USC § 1983

100. Plaintiff incorporates all prior allegations…

101. Under 42 USC § 1983 an individual may bring an action against state actors under 42 USC § 1983 for a deprivation of his or her constitutional rights.

102. A cause of action under 42 USC § 1983 must allege deprivation by a governmental entity, governmental official, or a state actor acting as a governmental entity or official, of rights secured by the United States Constitution.

103. The right to vote is the fundamental constitutional right held by each individual citizen of the United States and is preservative of all other rights.

104. Under the First, Ninth, and Fourteenth Amendments, *inter alia*, Plaintiff has a constitutional right to vote for the candidate of his choice, but also the constitutional right not to have his vote diluted, canceled out, and/or nullified by the counting of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent and/or unverifiable votes. *Reynolds v Sims*, 377 U.S. 533, 555 (1964).

105. Under the Equal Protection Clause, Plaintiff has a constitutional right to enjoy equal protection of the law and equal treatment in exercising his right to vote; and the constitutional right not to have his vote diluted, canceled out, and/or nullified by the counting

of illegal or false or fraudulent votes and/or by the failure to count legal votes, and or by the certification of fraudulent or unverifiable votes. Cite equal protection clause; Reynolds, supra.

106. Due to the failure on the part of Defendants to have ensured certification or otherwise caused to be certified voting machines used in the state of Michigan in the November 2020 election, Plaintiff's vote was diluted, canceled out, and/or nullified.

107. If the Defendants named herein cause, direct, or otherwise allow the information and data required to be preserved for 22 months under Michigan Law destruction of such will make it impossible to demonstrate that the failure of certification of voting machines, as well as other fraudulent, intentional, grossly negligent, and negligent acts on the part of the Defendants, caused Plaintiff's constitutional rights to be violated as described herein under the stated causes of action available under 42 USC § 1983.

108. The preservation request but any 42 USC § 1983 action and the that defendants' fraudulent, intentional, reckless, grossly negligent, and negligent acts were the proximate cause of deprivation of Plaintiff's constitutional rights as stated herein in the fact that Michigan provides for an audit trail in MCL 168.795k which is a part of the voting franchise and was incorporated into the Michigan Constitution which guaranteed the right of every citizen to request an audit in Article 4 Section H which provides for the "right to have the results of statewide elections audited, in such a manner as prescribed by law , to ensure the accuracy and integrity of elections. This bears directly on the Equal Protection clause which protects against the altering or dilution of votes

109. The attached affidavit in support of the ex parte motion for emergency TRO is incorporated herein and constitutes verification of this complaint.

WHEREFORE, premises considered, the Plaintiff prays as follows:

1. That good and adequate service be had on all Defendants;

2. That this Court grant Plaintiff's Emergency Motion for Temporary Restraining Order to:

   a. prevent the Defendants from tampering with or otherwise adulterating the property and evidence regarding the 2020 elections;

   b. prevent the Defendants from obstructing justice, interfering with and/or destroying all investigatory evidence, confidences and privileges relating to Michigan's 2020 presidential election;

3. That this Court issue a preliminary injunction ordering

   a. the Defendants to remove any/all election equipment for the 2022 elections that is not certified by an accredited voting system test laboratory; and

   b. the Defendants to preserve all 2020 presidential election records (electronic or otherwise) indefinitely as the 2020 presidential election is still being investigated.

4. That this Court issue a writ of mandamus compelling the Michigan Secretary of State and Governor to

   a. decertify the Michigan's 2020 presidential election and to recall Michigan's Joseph R. Biden presidential electors;

   b. order the Defendants to work together to rerun the Michigan 2020 presidential election as soon as possible, by way of a special election, with paper ballots only, on a single election **day**, with the votes being counted

by hand, with members of all political parties present to observe, with a public livestream of all vote counting;

c. An award of damages to be determined by a jury of twelve (12);

d. An award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

e. A permanent injunction on use of electronic voting machines that are not certified by an accredited laboratory in all future elections.

f. Such other relief to which the Plaintiffs may show themselves to be entitled.

Respectfully submitted this 2nd day of September 2022.

/s/Daniel J. Hartman

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*Application to Western District Forthcoming

APPENDIX A: VVSG Standards for Preserving Generated Electronic Records

10.2.4. B The voting system needs to be constructed so that the security of the system does not rely upon the secrecy of the event logs. It will be considered routine for event logs to be made available to election officials, and possibly even to the public, if election officials so desire. The system will be designed to permit the election officials to access event logs without fear of negative consequences to the security and integrity of the election. For example, cryptographic secret keys or passwords will not be logged in event log records.

11.1 – Access privileges, accounts, activities and authorizations are logged, monitored, and reviewed and modified as needed ensures there are records in case there are errors or incidents that need to be accounted for. The system also prevents logging any voter ID information and prevents the logging capability from becoming disabled or the log entries from being modified. The system provides administrators access to logs, allowing for continuous monitoring and periodic review.

11.1-A – Logging activities and resource access
The voting system must log any access to, and activities performed on, the voting system, including:
1. timestamps for all log entries;
2. all failed and successful attempts to access the voting system; and
3. all events which change the access control system including policies, privileges, accounts, users, groups or roles, and authentication methods.
Discussion
In the event of an error or incident, the user access log can assist in narrowing down the reason for the incident or error.
• Timestamped log entries will allow for easy auditing and review of access to the voting system.
• Access control logging supports accountability of actions by identifying and authenticating users.
• Groups are a collection of users that are assigned a specific set of permissions. Roles are an
identity that is given specific permissions and can be assigned to a user. Any changes to the permissions assigned to groups and roles should be logged to identify updates to a user's privileges.

11.1-C – Preserving log integrity
The voting system must prevent:
1. the logging capability from being disabled;
2. the log entries from being modified in an undetectable manner; and
3. The deletion of logs; with the exception of log rotation.

Discussion

This requirement promotes the integrity of the information logged by ensuring all activities are logged. Additionally, it prevents these abilities from being an option within the user interface.
This requirement promotes the integrity of the information logged by ensuring all activities are not modifiable.
The removal of logs is only appropriate for log rotation, which is when the stored logs are rotated out to create more space for continuous logging. The voting system should be capable of rotating the event log data to manage log file growth. Log file rotation may involve regular (e.g., hourly, nightly, or weekly) moving of an existing log file to some other file name and/or location and starting fresh with an empty log file. Preserved log files may be compressed to save storage space.

12.2-E – Logging enabled and disabled ports
An event log entry that identifies the name of the affected device must be generated when physical ports are enabled or disabled.
Discussion
Logically disabling ports prevents unused ports from being used as a staging point for an attack on the voting system.
Discussion
Whether a port is disabled or not is security relevant, especially once a security incident has occurred, and this information would be useful when determining cause. 12.2-C – Physical port restriction applies to physical restrictions, whereas 12.2-D – Disabling ports discusses logical disabling of ports.

November 15, 2022

American Oversight
1030 15th Street SW, Suite B255
Washington, DC 20005

records@americanoversight.org

Re: Your Recent FOIA Request to Lake County

Please be advised that we granted your request for the following:

Emails between Sheriff Rich Martin and the external individuals listed.

I have attached the invoice of the total fees that were incurred for processing this FOIA in the amount of $102.57, Please make a check payable to Lake County, 800 Tenth Street, Suite 100, Baldwin MI 49304.

In the event that you are not satisfied with this response, I want to advise you of your rights. You have the right to submit a written appeal to the Chair of the Lake County Board of Commissioners, Howard Lodholtz, that specifically states the word "appeal" and identifies the reason for your appeal.

Sincerely,
Tobi G. Lake
FOIA Coordinator

Lake County's FOIA Policy can be found on the county website at

www.lakecounty-michigan.com

James McCarver

From: sheriff-l-request@list.emich.edu on behalf of Dar Leaf <DLeaf@barrycounty.org>
Sent: Monday, August 29, 2022 3:36 PM
To: sheriff-l@list.emich.edu
Subject: [[Sheriff-l]] FW: Do Not Delete Our Democracy (Final)
Attachments: 01C0B47B-32B5-462C-BE92-CF9CC7534AB8.jpg; 0E608233-93E3-40A9-9414-0C3A84841090.jpg; 3DF19487-6608-46B6-8AB1-6CC8EE35E67B.jpg; The Response to the Email.pdf

Sheriff's
I believe this was sent out to all clerks in Michigan. It is accurate and you may be getting some calls. I hope you can review this before the calls come in.

Sheriff Dar Leaf
Barry County Sheriff's Office
(269) 948-4805
(269) 948-4831 fax
"A great leader knows when to lead and when to get out of the way."

From: MILawyerDanhartman <MILawyerDanhartman@proton.me>
Sent: Friday, August 26, 2022 7:08 PM
To: Jo La <itsalovelydayonthelake@gmail.com>; Geri BoBo <geebs63@protonmail.com>; Joanne Bakale <joanne.electioninfo@gmail.com>; Sandy Kiesel <goldenbayinc@gmail.com>; Dar Leaf <DLeaf@barrycounty.org>; Mark Noteboom <MNoteboom@barrycounty.org>
Subject: Do Not Delete Our Democracy (Final)

Enclosed please find a memo in response to the Secretary of State Director of Election instructing you to ignore me as a citizen from communicating with you

Also I have attached three photos from some log files so that you may understand exactly what you are being asked to delete

Thank you

Sent from Proton Mail for iOS
✓EXTERNAL SENDER

James McCarver

From: Rita Zielinski <scissorhappy11@yahoo.com>
Sent: Sunday, October 30, 2022 5:23 PM
To: casprosecutor@ingham.org; seller@alcona-county.net; mfroberg@algercounty.gov; bgenetski@allegancounty.org; bertrandk@alpenacounty.org; guys@antrimcounty.org; nselle@arenaccountymi.org; goodreauw@baragacounty.org; ppalmer@barryco.org; zanottik@baycounty.net; tbowers@benzieco.net; styler@berriencounty.org; tkubakiak@countyofbranch.com; kahinkley@calhouncountymi.gov; monicam@cassco.org; drostj@charlevoixcounty.org; clerk@cheboygancounty.net; cmaleport@chippewacountymi.gov; martinl@clareco.net; zukerd@clinton-county.org; smoore@crawfordco.org; clerk@deltacountymi.org; clerkcarol@dickinsoncountymi.gov; dbosworth@eatoncounty.org; skanine@emmetcounty.org; jgleason@co.genesee.mi.us; countyclerk@gladwincounty-mi.gov; rcollins@gogebiccountymi.gov; bscheele@grandtraverse.org; gratiotcountyclerk@yahoo.com; mkast@co.hillsdale.mi.us; countyclerk@houghtoncounty.net; neall@co.huron.mi.us; bbyrum@ingham.org; ggeiger@ioniacounty.org; nhuebel@ioscocounty.org; jkezerle@ironmi.org; mlux@isabellacounty.org; akirkpatrick@co.jackson.mi.us; mxplac@kalcounty.com; dhill@kalkaskacourt.org; lisa.lyons@kentcountymi.gov; keweenawclerk@pasty.net; Patti Pacola; tspencer@lapeercounty.org; mcrocker@co.leelanau.mi.us; ehundley@livgov.com; lucoclrk@lighthouse.net; macclerk@lighthouse.net; clerksoffice@macombgov.org; imarquardt@manisteecountymi.gov; ltalsma@mqtco.org; cakelly@masoncounty.net; mpurcell@co.mecosta.mi.us; mkleiman@menomineecountymi.gov; Ann Manary; clerk@missaukee.org; annamarie_osment@monroemi.org; kmillard@montcalm.us; cneilsen@montcounty.org; watersna@co.muskegon.mi.us; jasonv@co.newaygo.mi.us; brownlr@oakgov.com; aanderson@oceana.mi.us; gildnerb@ocmi.us; spreiss@ontonagoncounty.org; oscclerk1@osceolacountymi.com; agalbraith@oscodacountymi.com; sdefeyter@otsegocountymi.gov; jroebuck@miottawa.org; piclerk@picounty.org; stevensonm@roscommoncounty.net; vguerra@saginawcounty.com; countyclerk@sanilaccounty.net; clerk@schoolcraftcounty.us; cwilson@shiawassee.net; jdeboyer@stclaircounty.org; oswaldl@stjosephcountymi.org; jfetting@tuscolacounty.org; roehms@vbco.org; kestenbauml@ewashtenaw.org; cgarrett@co.wayne.mi.us; clerk@wexfordcounty.org; sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@lapeercounty.org; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org; sheriff@masoncounty.net;

To: bmiller@mecostacounty.org; sheriff@missaukee.org; a.kearns@missaukeesheriff.net; troy_goodnough@monroemi.org; jeff_pauli@monroemi.org; mcsheriff@montcalm.us; sheriff@montmorencysheriff.com; craneb@montmorencysherriff.com; sheriff.no-reply@muskegonsheriff.com; sheriff@osceolacountymi.com; sheriff@oscodacountymi.com; sheriffs.office@miottawa.org; sheriff@roscommoncounty.net; loweb@roscommoncounty.net; bbegole@shiawassee.net; sheriffinfo@washtenaw.org; ptaszekm@washtenaw.org; info@sheriffconnect.com; abrahamaiyash@house.mi.gov; ThomasAlbert@house.mi.gov; JulieAlexander@house.mi.gov; SueAllor@house.mi.gov; SarahAnthony@house.mi.gov; AndrewBeeler@house.mi.gov; JosephBellino@house.mi.gov; RyanBerman@house.mi.gov; TimothyBeson@house.mi.gov; robertbezotte@house.mi.gov; KyraBolden@house.mi.gov; AnnBollin@house.mi.gov; KenBorton@house.mi.gov; FeliciaBrabec@house.mi.gov; TommyBrann@house.mi.gov; kellybreen@house.mi.gov; JulieBrixie@house.mi.gov; JulieCalley@house.mi.gov; SaraCambensy@house.mi.gov; DarrinCamilleri@house.mi.gov; SteveCarra@house.mi.gov; BrendaCarter@house.mi.gov; TyroneCarter@house.mi.gov; marycavanagh@house.mi.gov; JohnCherry@house.mi.gov; CaraClemente@house.mi.gov; TCClements@house.mi.gov; KevinColeman@house.mi.gov; JohnDamoose@house.mi.gov; GaryEisen@house.mi.gov; JimEllison@house.mi.gov; DianaFarrington@house.mi.gov; GrahamFiller@house.mi.gov; AndrewFink@house.mi.gov; BenFrederick@house.mi.gov; AlexGarza@house.mi.gov; AnnetteGlenn@house.mi.gov; RepPhilGreen@house.mi.gov; BethGriffin@house.mi.gov; JimHaadsma@house.mi.gov; MattHall@house.mi.gov; district015@house.mi.gov; RogerHauck@house.mi.gov; KevinHertel@house.mi.gov; MicheleHoitenga@house.mi.gov; RachelHood@house.mi.gov; KaraHope@house.mi.gov; PamelaHornberger@house.mi.gov; garyhowell@house.mi.gov; district074 @house.mi.gov; CynthiaAJohnson@house.mi.gov; StevenJohnson@house.mi.gov; JewellJones@house.mi.gov; BronnaKahle@house.mi.gov; MattKoleszar@house.mi.gov; PadmaKuppa@house.mi.gov; BeauLaFave@house.mi.gov; davidlagrand@house.mi.gov; donnalasinski@house.mi.gov; tullioliberati@house.mi.gov; SarahLightner@house.mi.gov; jimlilly@house.mi.gov; MattMaddock@house.mi.gov; MariManoogian@house.mi.gov; stevemarino@house.mi.gov; GregMarkkanen@house.mi.gov; davidmartin@house.mi.gov; lukemeerman@house.mi.gov; ChristineMorse@house.mi.gov; mikemueller@house.mi.gov; cynthianeeley@house.mi.gov; jackomalley@house.mi.gov; AmosOneal@house.mi.gov; PatOutman@house.mi.gov; bradpaquette@house.mi.gov; ronniepeterson@house.mi.gov; lauriepohutsky@house.mi.gov; BryanPosthumus@house.mi.gov; ranjeevpuri@house.mi.gov; yousefrabhi@house.mi.gov; johnreilly@house.mi.gov; dairerendon@house.mi.gov; JulieRogers@house.mi.gov; JohnRoth@house.mi.gov; terrysabo@house.mi.gov; district043@house.mi.gov; helenascott@house.mi.gov; nateshannon@house.mi.gov; BradleySlagh@house.mi.gov; timsneller@house.mi.gov; williamsowerby@house.mi.gov; samanthasteckloff@house.mi.gov; richardsteenland@house.mi.gov; LoriStone@house.mi.gov; JoeTate@house.mi.gov; ShriThanedar@house.mi.gov; marktisdel@house.mi.gov; scottvansingel@house.mi.gov; GregVanWoerkom@house.mi.gov; RodneyWakeman@house.mi.gov; reginaweiss@house.mi.gov; PaulineWendzel@house.mi.gov; jasonwentworth@house.mi.gov; marywhiteford@house.mi.gov; KarenWhitsett@house.mi.gov; AngelaWitwer@house.mi.gov; district036@house.mi.gov; tenishayancey@house.mi.gov; Rep. Jeff Yaroch (District 33); stephanieyoung@house.mi.gov; AnnetteGlenn98@gmail.com; senbalexander@senate.michigan.gov; senjananich@senate.michigan.gov; sentbarrett@senate.michigan.gov; senrbayer@senate.michigan.gov;

To: senjbizon@senate.michigan.gov; senwbrinks@senate.michigan.gov; senmbullock@senate.michigan.gov; senjbumstead@senate.michigan.gov; senschang@senate.michigan.gov; senkdaley@senate.michigan.gov; senegeiss@senate.michigan.gov; senchertel@senate.michigan.gov; senahollier@senate.michigan.gov; senkhorn@senate.michigan.gov; SenMHuizenga@senate.michigan.gov; SenDWozniak@senate.michigan.gov; senjirwin@senate.michigan.gov; senrjohnson@senate.michigan.gov; senklasata@senate.michigan.gov; sendlauwers@senate.michigan.gov; senmmacdonald@senate.michigan.gov; senemcbroom@senate.michigan.gov; sensmccann@senate.michigan.gov; senmmcmorrow@senate.michigan.gov; senmshirkey@senate.michigan.gov; senjmoss@senate.michigan.gov; senanesbitt@senate.michigan.gov; senroutman@senate.michigan.gov; sendpolehanki@senate.michigan.gov; senjrunestad@senate.michigan.gov; senssantana@senate.michigan.gov; senwschmidt@senate.michigan.gov; senjstamas@senate.michigan.gov; senltheis@senate.michigan.gov; sencvanderwall@senate.michigan.gov; senrvictory@senate.michigan.gov; senpwojno@senate.michigan.gov; sendzorn@senate.michigan.gov; pozzi Kristi; clerkforlini@gmail.com

Subject: URGENT! - IMMEDIATE ACTION REQUIRED!!!

Attachments: Wilson v Jocelyn Benson et al Case No 22000097MB.pdf; attachment.html; American_Project_Michigan_2020_Election_Lawsuit_221026_081503_221028.pdf; attachment.html; O'Halloran_MD_et_al_v_Jocelyn_Benson_et_all_Case_No_22_000162_MZ.pdf; attachment.html

Dear Elected Officials,

On Wednesday, July 27, 2022 you received the e-mail I am attaching below.

As a follow up to that email we would like to provide you information on a couple of cases that have been filed regarding this issue.

On July 4, 2022, Court of Claims Case No. 22-000097-MB wherein the Plaintiff filed Pro Se as he had FOIA'd the machine certifications and any information related to the certification of the machines on September 25, 2021, and the Secretary of State and Bureau of Elections granted his FOIA, charged him an excessive amount of money which he paid, yet over a year later he still has not received these records. Why?! Because they do not exist! The Court has decided the Plaintiff didn't have standing to bring the claims regarding the Electronic Voting Sysyems or preservation of Election records and materials as an average every day citizen, however all of you Clerks DO HAVE STANDING as you have previously run elections under false pretenses and the command of the Secretary of State and Bureau of Elections and are expected to run the upcoming elections in the same manner. (Opinion & Order Attached)

Additionally, a similar suit was filed on September 2, 2022, Case No. 1:22-cv-00817 by Donna Brandenburg and the American Project. I have attached a copy of their case filing as well as this video that better explains the certification issues in an way that is easier to understand.

https://rumble.com/v1pnvjv-election-crime-in-michigan.html

On October 20th, 2022, Court of Claims Case No. 22-000162-MZ, Judge Brock Swartzle ruled that Michigan Secretary of State, Jocelyn Benson, exceeded her authority when she created certain provisions in an election manual guide for election challengers and poll watchers. The Judge ruled for Michigan Secretary of State Jocelyn Benson and State Elections Director, Jonathan Brater to rescind the manual and/or revise it to comply with Michigan election law. (Opinion & Order Attached)
https://www.wilx.com/2022/10/23/judge-michigan-election-challenger-manual-cant-be-used/

On October 28th, 2022 Secretary of State, Jocelyn Benson filed an Emergency Application for Leave of Appeal in order to skip the Court Appeals and seek a ruling directly from the Michigan Supreme Court. She is seeking relief from the October 20th, 2022 order demanding her office update the Poll Challenger Manual to comply with Michigan Election Law.
Dear Elected Officials,

This is another issue that should be of great concern to all Clerks statewide. As concerned citizens, we ask you to also speak with your counsel and consider intervening in this matter as well as the previously referenced cases to further ensure the integrity of Michigan elections and protect the right to free and fair elections for all Michiganders.

As we have previously stated, we understand that we are without remedy as you are required by Michigan Election Law to use Electronic Voting System, however, our votes are our voice and if our voice is compromised then not only is it a violation of every citizen's Constitutional Rights and as elected officials, you have taken an Oath to uphold those same Constitutional Rights.

Again, we only ask that you have your local counsel review these cases and information and work together, consider intervening in these cases, and also demand the legislators repeal the law requiring the use of these machines as well as any other necessary legal remedy.

So the question everyone should be asking is, technology is supposed to make things efficient? Do our elections require Efficiency or efficacy? That means, you know, actual, concrete results? The ONLY choice when it comes to something as important as our vote is efficacy, using paper ballots counted by hand tabulation under close video surveillance where the public can watch the counting via live streaming for full public transparency, maybe even on clear tables with several sets of eyes on the process for full transparency and security of our elections.

Please stand by your oath and be a part of the solution to ensuring the integrity of our most sacred process of protecting our beautiful Constitutional Republic. Considering the gravity of the situation, time is of the essence!

God Bless!
~Citizens for Free & Fair Elections

James McCarver

From: Rita Zielinski <scissorhappy11@yahoo.com>
Sent: Sunday, October 30, 2022 5:23 PM
To: casprosecutor@ingham.org; seller@alcona-county.net; mfroberg@algercounty.gov; bgenetski@allegancounty.org; bertrandk@alpenacounty.org; guys@antrimcounty.org; nselle@arenaccountymi.org; goodreauw@baragacounty.org; ppalmer@barryco.org; zanottik@baycounty.net; tbowers@benzieco.net; styler@berriencounty.org; tkubakiak@countyofbranch.com; kahinkley@calhouncountymi.gov; monicam@cassco.org; drostj@charlevoixcounty.org; clerk@cheboygancounty.net; cmaleport@chippewacountymi.gov; martinl@clareco.net; zukerd@clinton-county.org; smoore@crawfordco.org; clerk@deltacountymi.org; clerkcarol@dickinsoncountymi.gov; dbosworth@eatoncounty.org; skanine@emmetcounty.org; jgleason@co.genesee.mi.us; countyclerk@gladwincounty-mi.gov; rcollins@gogebiccountymi.gov; bscheele@grandtraverse.org; gratiotcountyclerk@yahoo.com; mkast@co.hillsdale.mi.us; countyclerk@houghtoncounty.net; neall@co.huron.mi.us; bbyrum@ingham.org; ggeiger@ioniacounty.org; nhuebel@ioscocounty.org; jkezerle@ironmi.org; mlux@isabellacounty.org; akirkpatrick@co.jackson.mi.us; mxplac@kalcounty.com; dhill@kalkaskacourt.org; lisa.lyons@kentcountymi.gov; keweenawclerk@pasty.net; Patti Pacola; tspencer@lapeercounty.org; mcrocker@co.leelanau.mi.us; ehundley@livgov.com; lucoclrk@lighthouse.net; macclerk@lighthouse.net; clerksoffice@macombgov.org; imarquardt@manisteecountymi.gov; ltalsma@mqtco.org; cakelly@masoncounty.net; mpurcell@co.mecosta.mi.us; mkleiman@menomineecountymi.gov; Ann Manary; clerk@missaukee.org; annamarie_osment@monroemi.org; kmillard@montcalm.us; cneilsen@montcounty.org; watersna@co.muskegon.mi.us; jasonv@co.newaygo.mi.us; brownlr@oakgov.com; aanderson@oceana.mi.us; gildnerb@ocmi.us; spreiss@ontonagoncounty.org; oscclerk1@osceolacountymi.com; agalbraith@oscodacountymi.com; sdefeyter@otsegocountymi.gov; jroebuck@miottawa.org; piclerk@picounty.org; stevensonm@roscommoncounty.net; vguerra@saginawcounty.com; countyclerk@sanilaccounty.net; clerk@schoolcraftcounty.us; cwilson@shiawassee.net; jdeboyer@stclaircounty.org; oswaldl@stjosephcountymi.org; jfetting@tuscolacounty.org; roehms@vbco.org; kestenbauml@ewashtenaw.org; cgarrett@co.wayne.mi.us; clerk@wexfordcounty.org; sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@lapeercounty.org; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org; sheriff@masoncounty.net;

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Subject: URGENT! - IMMEDIATE ACTION REQUIRED!!!

Attachments: Wilson v Jocelyn Benson et al Case No 22000097MB.pdf; attachment.html; American_Project_Michigan_2020_Election_Lawsuit_221026_081503_221028.pdf; attachment.html; O'Halloran_MD_et_al_v_Jocelyn_Benson_et_all_Case_No_22_000162_MZ.pdf; attachment.html

Dear Elected Officials,

On Wednesday, July 27, 2022 you received the e-mail I am attaching below.

As a follow up to that email we would like to provide you information on a couple of cases that have been filed regarding this issue.

On July 4, 2022, Court of Claims Case No. 22-000097-MB wherein the Plaintiff filed Pro Se as he had FOIA'd the machine certifications and any information related to the certification of the machines on September 25, 2021, and the Secretary of State and Bureau of Elections granted his FOIA, charged him an excessive amount of money which he paid, yet over a year later he still has not received these records. Why?! Because they do not exist! The Court has decided the Plaintiff didn't have standing to bring the claims regarding the Electronic Voting Sysyems or preservation of Election records and materials as an average every day citizen, however all of you Clerks DO HAVE STANDING as you have previously run elections under false pretenses and the command of the Secretary of State and Bureau of Elections and are expected to run the upcoming elections in the same manner. (Opinion & Order Attached)

Additionally, a similar suit was filed on September 2, 2022, Case No. 1:22-cv-00817 by Donna Brandenburg and the American Project. I have attached a copy of their case filing as well as this video that better explains the certification issues in an way that is easier to understand.

https://rumble.com/v1pnvjv-election-crime-in-michigan.html

On October 20th, 2022, Court of Claims Case No. 22-000162-MZ, Judge Brock Swartzle ruled that Michigan Secretary of State, Jocelyn Benson, exceeded her authority when she created certain provisions in an election manual guide for election challengers and poll watchers. The Judge ruled for Michigan Secretary of State Jocelyn Benson and State Elections Director, Jonathan Brater to rescind the manual and/or revise it to comply with Michigan election law. (Opinion & Order Attached)
https://www.wilx.com/2022/10/23/judge-michigan-election-challenger-manual-cant-be-used/

On October 28th, 2022 Secretary of State, Jocelyn Benson filed an Emergency Application for Leave of Appeal in order to skip the Court Appeals and seek a ruling directly from the Michigan Supreme Court. She is seeking relief from the October 20th, 2022 order demanding her office update the Poll Challenger Manual to comply with Michigan Election Law.
Dear Elected Officials,

This is another issue that should be of great concern to all Clerks statewide. As concerned citizens, we ask you to also speak with your counsel and consider intervening in this matter as well as the previously referenced cases to further ensure the integrity of Michigan elections and protect the right to free and fair elections for all Michiganders.

As we have previously stated, we understand that we are without remedy as you are required by Michigan Election Law to use Electronic Voting System, however, our votes are our voice and if our voice is compromised then not only is it a violation of every citizen's Constitutional Rights and as elected officials, you have taken an Oath to uphold those same Constitutional Rights.

Again, we only ask that you have your local counsel review these cases and information and work together, consider intervening in these cases, and also demand the legislators repeal the law requiring the use of these machines as well as any other necessary legal remedy.

So the question everyone should be asking is, technology is supposed to make things efficient? Do our elections require Efficiency or efficacy? That means, you know, actual, concrete results? The ONLY choice when it comes to something as important as our vote is efficacy, using paper ballots counted by hand tabulation under close video surveillance where the public can watch the counting via live streaming for full public transparency, maybe even on clear tables with several sets of eyes on the process for full transparency and security of our elections.

Please stand by your oath and be a part of the solution to ensuring the integrity of our most sacred process of protecting our beautiful Constitutional Republic. Considering the gravity of the situation, time is of the essence!

God Bless!
~Citizens for Free & Fair Elections

James McCarver

From: GK11 <wewonbigly@gmail.com>
Sent: Monday, October 31, 2022 4:00 PM
To: seller@alcona-county.net; mfroberg@algercounty.gov; bgenetski@allegancounty.org; bertrandk@alpenacounty.org; guys@antrimcounty.org; nselle@arenaccountymi.org; goodreauw@baragacounty.org; ppalmer@barryco.org; zanottik@baycounty.net; tbowers@benzieco.net; styler@berriencounty.org; tkubakiak@countyofbranch.com; kahinkley@calhouncountymi.gov; monicam@cassco.org; drostj@charlevoixcounty.org; clerk@cheboygancounty.net; cmaleport@chippewacountymi.gov; martinl@clareco.net; zukerd@clinton-county.org; smoore@crawfordco.org; clerk@deltacountymi.org; clerkcarol@dickinsoncountymi.gov; dbosworth@eatoncounty.org; skanine@emmetcounty.org; jgleason@co.genesee.mi.us; countyclerk@gladwincounty-mi.gov; rcollins@gogebiccountymi.gov; bscheele@grandtraverse.org; gratiotcountyclerk@yahoo.com; mkast@co.hillsdale.mi.us; countyclerk@houghtoncounty.net; neall@co.huron.mi.us; bbyrum@ingham.org; ggeiger@ioniacounty.org; nhuebel@ioscocounty.org; jkezerle@ironmi.org; Minde Lux; akirkpatrick@co.jackson.mi.us; mxplac@kalcounty.com; dhill@kalkaskacourt.org; lisa.lyons@kentcountymi.gov; keweenawclerk@pasty.net; Patti Pacola; tspencer@lapeercounty.org; mcrocker@co.leelanau.mi.us; ehundley@livgov.com; lucoclrk@lighthouse.net; macclerk@lighthouse.net; clerksoffice@macombgov.org; imarquardt@manisteecountymi.gov; ltalsma@mqtco.org; cakelly@masoncounty.net; mpurcell@co.mecosta.mi.us; mkleiman@menomineecountymi.gov; amanary@co.midland.mi.us; clerk@missaukee.org; annamarie_osment@monroemi.org; kmillard@montcalm.us; cneilsen@montcounty.org; watersna@co.muskegon.mi.us; jasonv@co.newaygo.mi.us; brownlr@oakgov.com; aanderson@oceana.mi.us; gildnerb@ocmi.us; spreiss@ontonagoncounty.org; oscclerk1@osceolacountymi.com; agalbraith@oscodacountymi.com; sdefeyter@otsegocountymi.gov; jroebuck@miottawa.org; piclerk@picounty.org; stevensonm@roscommoncounty.net; vguerra@saginawcounty.com; countyclerk@sanilaccounty.net; clerk@schoolcraftcounty.us; cwilson@shiawassee.net; jdeboyer@stclaircounty.org; oswaldl@stjosephcountymi.org; jfetting@tuscolacounty.org; roehms@vbco.org; kestenbauml@ewashtenaw.org; cgarrett@co.wayne.mi.us; clerk@wexfordcounty.org; sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@lapeercounty.org; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org; sheriff@masoncounty.net; bmiller@mecostacounty.org; sheriff@missaukee.org; a.kearns@missaukeesheriff.net;

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As we have previously stated, we understand that we are without remedy as you are required by Michigan Election Law to use Electronic Voting System, however, our votes are our voice and if our voice is compromised then not only is it a violation of every citizen's Constitutional Rights and as elected officials, you have taken an Oath to uphold those same Constitutional Rights.

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So the question everyone should be asking is, technology is supposed to make things efficient? Do our elections require Efficiency or efficacy? That means, you know, actual, concrete results? The ONLY choice when it comes to something as important as our vote is efficacy, using paper ballots counted by hand tabulation under close video surveillance where the public can watch the counting via live streaming for full public transparency, maybe even on clear tables with several sets of eyes on the process for full transparency and security of our elections.

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~Citizens for Free & Fair Elections

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Today, I am bringing you another large and indisputable piece of evidence that no one is talking about and notifying you of the crimes that were unknowingly committed since 2017.

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Now you will know as I have laid it out for you.

To start, The Michigan Department of Technology, Management and Budget entered Michigan into a contractual agreement with Dominion Voting Systems Inc. (Contract NO. 071B7700117), Election Systems and Software LLC (Contract NO. 071B7700120) and Hart InterCivic Inc (Contract NO. 071B7700128), for the purchase and implementation of the contractors voting system hardware, firmware, software, and services. All three vendor contracts have an effective date of March 1, 2017 and an expiration date of February 28, 2027.

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Requirements states:
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In summary, the agreed upon terms of the contract included State and Federal Testing/ Certification Requirements requiring the contractor to have their systems tested and successfully complete all certification steps required by the U.S Election Assistance Commission (EAC) before they will be approved for implementation in Michigan.

There is a breach in all three contracts due to Dominion Voting Systems Inc., Election Systems and Software LLC and Hart InterCivic Inc not meeting their contractual obligations to have their machines federally tested in compliance with
the EAC.

Voting systems in Michigan must be EAC certified according to the Michigan Election laws:
1. MCL 168.794(f)
2. MCL 168.795(1) and (k)
3. MCL 168.795a(1) and (a), 2(b) and (c), and (4)
4. MCL 168.37a (a) and (b)

In order for the vendor’s systems to be in compliance and properly certified to Federal/EAC standards, they needed to be certified by an accredited voting system testing laboratory (VSTL). The two VSTL’s, in theory, that would have
certified the vendor equipment are PRO V&V and SLI Compliance.

The Voting System Testing Laboratories, PRO V&V and SLI Compliance were not accredited test labs according to The Help America Vote Act of 2002 (HAVA), the Voluntary Voting System Guidelines (VVSG), The Voting System Test Laboratory Program Manual and the EAC Testing and Certification Program.

Here is why:

1) To meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the proposed information collection, the EAC Voting System Test Laboratory Accreditation Program Manual.

Although participation in the program is voluntary, adherence to the program's procedural requirements is mandatory for participants. The procedural requirements of this Manual will supersede any prior laboratory accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's Voting System Testing and Certification Program Manual.

2) Per the (VSTL) Voting System Test Laboratory Program Manual ver. 2.0 effective May 31, 2015, page 38, Sec 3.6.1. Certificate of Accreditation: A Certificate of Accreditation shall be issued to each laboratory by vote of the Commissioners. The certificate shall be signed by the CHAIR of the Commission and state:

a. 3.6.1.3. The effective date of the certification, which shall not exceed a period of two (2) years."

b. So not just the date is important but the signature on the Lab Certification of Accreditation is very crucial.

c. Commission Chairman only serve one (1) year, but their signature is good on these certificates for two (2) years.

3) Both Donald Palmer AND Benjamin Hovland were appointed by President Trump and confirmed in the senate on Feb. 4, 2019, as EAC Commissioners but not Chairman. Donald Palmer was elected Commission Chairman Feb. 24, 2021. Benjamin Hovland was appointed Commission Chairman Feb. 2020. Neither Donald Palmer nor Benjamin Hovland could be valid signatures on the Laboratory Certificates of Accreditation since none were issued in 2020.

4) Christy McCormick was elected as Commission Chairwoman on Feb. 24, 2019. For the 2020 General Election, Christy McCormick signature should be on ALL EAC Laboratory Certificates of Accreditation.

5) The (VSTL) program requires certified laboratories to submit an application package to the Program Director, consistent with the procedures of Section 3.4, no earlier than 60 days before the accreditation expiration date and no later than 30 days before their accreditation expire. Pro V&V and SLI Compliance did not apply prior to the expiration date in 2015 and 2017 respectfully. The EAC and the Program Director were remiss in their duties in acknowledging the expiration of certification. What is confirmed is that Pro V& V and SLI Compliance were not accredited (VSTL). (Version 2.0 Section 3.8)

6) ProV&V EAC Certification, Original Issued February 24, 2015, Effective through February 24, 2017.

a. ProV&V EAC Certification, Original Issued February 24, 2015, Dated February 21, 2021. (Exceeding, more than two (2) years).

b. Pro V&V from the EAC-Memo date January 21, 2021, stating Covid-19 circumstances. According to (VSTL) Version 2.0 Section 3.8; the application package would have been submitted at the latest date of January 2017- "PRE" Covid-19 pandemic.

7) SLI Compliance Certification Issued January 10, 2018, Effective January 10, 2021. (Exceeding more than two (2) years.a. SLI Compliance Certification Original Issued February 28, 2007, Dated February 1, 2021. (Exceeding) more than two (2) years).

b. SLI Compliance from EAC-Memo date January 27, 2021, stating Covid-19 circumstances. According to (VSTL) Version 2.0 Section 3.8; the application package would have been submitted at the latest date of January 2020- “PRE” Covid-19 pandemic.

8) The Affidavit of Terpesehore Maras attesting the 2017 elections is null and void due to lack of Election Assistance Commission (EAC) certifications of Voting Systems and the Voting System Test Laboratories ((VSTL)) used to certify the Voting Systems in violation of the HAVA Act.
What is the remedy? Elections have been invalid and likely illegal since 2017 due to the purchase and implementation of these voting systems hardware, firmware, software, and services. This type of situation has not happened before and the question is, how do we move forward from here?

Immediately, we should cease the use
of these machines and voting equipment. The Board of Canvassers have the authority per Michigan Election Law to recall the equipment.

In the interim, elections should be held like they were prior to the implementation of the electronic voting systems and equipment which would be by hand vote and hand tabulation with an audit proceeding each of the elections to ensure accuracy and as a good faith effort for transparency.

It cannot be stressed enough that this is an urgent matter and needs immediate attention. The information brought forward has been laid out, cited, and has references for you to do your own due diligence. Do not trust my word but look at the facts and information.

You have now been put on notice and you can no longer have a claim of plausible deniability to these crimes. Should you move forward and hold 2022 primary or general elections using this voting equipment you are knowingly and willingly committing these crimes and you will be held accountable.

Thank you for your time and immediate action.

A Citizen of the State of Michigan

Geri Klingenberg

James McCarver

From: Julie Boelstler <jaboelstler@comcast.net>
Sent: Monday, October 31, 2022 9:32 PM
To: Julie Boelstler
Subject: EAC Certifications
Attachments: Wilson v Jocelyn Benson et al Case No 22000097MB.pdf; attachment.html; O'Halloran_MD_et_al_v_Jocelyn_Benson_et_all_Case_No_22_000162_MZ.pdf; attachment.html; American_Project_Michigan_2020_Election_Lawsuit_221026_081503_221028.pdf; attachment.html

Importance: High

Julie Boelstler
jaboelstler@comcast.net

James McCarver

From: Elizabeth Sommerville <elizabethsommerville@yahoo.com>
Sent: Tuesday, November 1, 2022 12:01 AM
To: casprosecutor@ingham.org; seller@alcona-county.net; mfroberg@algercounty.gov; bgenetski@allegancounty.org; bertrandk@alpenacounty.org; guys@antrimcounty.org; nselle@arenaccountymi.org; goodreauw@baragacounty.org; ppalmer@barryco.org; zanottik@baycounty.net; tbowers@benzieco.net; styler@berriencounty.org; tkubakiak@countyofbranch.com; kahinkley@calhouncountymi.gov; monicam@cassco.org; drostj@charlevoixcounty.org; clerk@cheboygancounty.net; cmaleport@chippewacountymi.gov; martinl@clareco.net; zukerd@clinton-county.org; smoore@crawfordco.org; clerk@deltacountymi.org; clerkcarol@dickinsoncountymi.gov; dbosworth@eatoncounty.org; skanine@emmetcounty.org; jgleason@co.genesee.mi.us; countyclerk@gladwincounty-mi.gov; rcollins@gogebiccountymi.gov; bscheele@grandtraverse.org; gratiotcountyclerk@yahoo.com; mkast@co.hillsdale.mi.us; countyclerk@houghtoncounty.net; neall@co.huron.mi.us; bbyrum@ingham.org; ggeiger@ioniacounty.org; nhuebel@ioscocounty.org; jkezerle@ironmi.org; mlux@isabellacounty.org; akirkpatrick@co.jackson.mi.us; mxplac@kalcounty.com; dhill@kalkaskacourt.org; lisa.lyons@kentcountymi.gov; keweenawclerk@pasty.net; Patti Pacola; tspencer@lapeercounty.org; mcrocker@co.leelanau.mi.us; ehundley@livgov.com; lucoclrk@lighthouse.net; macclerk@lighthouse.net; clerksoffice@macombgov.org; imarquardt@manisteecountymi.gov; ltalsma@mqtco.org; cakelly@masoncounty.net; mpurcell@co.mecosta.mi.us; mkleiman@menomineecountymi.gov; Ann Manary; clerk@missaukee.org; annamarie_osment@monroemi.org; kmillard@montcalm.us; cneilsen@montcounty.org; watersna@co.muskegon.mi.us; jasonv@co.newaygo.mi.us; brownlr@oakgov.com; aanderson@oceana.mi.us; gildnerb@ocmi.us; spreiss@ontonagoncounty.org; oscclerk1@osceolacountymi.com; agalbraith@oscodacountymi.com; sdefeyter@otsegocountymi.gov; jroebuck@miottawa.org; piclerk@picounty.org; stevensonm@roscommoncounty.net; vguerra@saginawcounty.com; countyclerk@sanilaccounty.net; clerk@schoolcraftcounty.us; cwilson@shiawassee.net; jdeboyer@stclaircounty.org; oswaldl@stjosephcountymi.org; jfetting@tuscolacounty.org; roehms@vbco.org; kestenbauml@ewashtenaw.org; cgarrett@co.wayne.mi.us; clerk@wexfordcounty.org; sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@LAPEERCOUNTY.ORG; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org;

To: sheriff@masoncounty.net; bmiller@mecostacounty.org; sheriff@missaukee.org; a.kearns@missaukeesheriff.net; troy_goodnough@monroemi.org; jeff_pauli@monroemi.org; mcsheriff@montcalm.us; sheriff@montmorencysheriff.com; craneb@montmorencysherriff.com; sheriff.no-reply@muskegonsheriff.com; sheriff@osceolacountymi.com; sheriff@oscodacountymi.com; sheriffs.office@miottawa.org; sheriff@roscommoncounty.net; loweb@roscommoncounty.net; bbegole@shiawassee.net; sheriffinfo@washtenaw.org; ptaszekm@washtenaw.org; info@sheriffconnect.com; abrahamaiyash@house.mi.gov; ThomasAlbert@house.mi.gov; JulieAlexander@house.mi.gov; SueAllor@house.mi.gov; SarahAnthony@house.mi.gov; AndrewBeeler@house.mi.gov; JosephBellino@house.mi.gov; RyanBerman@house.mi.gov; TimothyBeson@house.mi.gov; robertbezotte@house.mi.gov; KyraBolden@house.mi.gov; AnnBollin@house.mi.gov; KenBorton@house.mi.gov; FeliciaBrabec@house.mi.gov; TommyBrann@house.mi.gov; kellybreen@house.mi.gov; JulieBrixie@house.mi.gov; JulieCalley@house.mi.gov; SaraCambensy@house.mi.gov; DarrinCamilleri@house.mi.gov; SteveCarra@house.mi.gov; BrendaCarter@house.mi.gov; TyroneCarter@house.mi.gov; marycavanagh@house.mi.gov; JohnCherry@house.mi.gov; CaraClemente@house.mi.gov; TCClements@house.mi.gov; KevinColeman@house.mi.gov; JohnDamoose@house.mi.gov; GaryEisen@house.mi.gov; JimEllison@house.mi.gov; DianaFarrington@house.mi.gov; GrahamFiller@house.mi.gov; AndrewFink@house.mi.gov; BenFrederick@house.mi.gov; AlexGarza@house.mi.gov; AnnetteGlenn@house.mi.gov; RepPhilGreen@house.mi.gov; BethGriffin@house.mi.gov; JimHaadsma@house.mi.gov; MattHall@house.mi.gov; district015@house.mi.gov; RogerHauck@house.mi.gov; KevinHertel@house.mi.gov; MicheleHoitenga@house.mi.gov; RachelHood@house.mi.gov; KaraHope@house.mi.gov; PamelaHornberger@house.mi.gov; garyhowell@house.mi.gov; district074 @house.mi.gov; CynthiaAJohnson@house.mi.gov; StevenJohnson@house.mi.gov; JewellJones@house.mi.gov; BronnaKahle@house.mi.gov; MattKoleszar@house.mi.gov; PadmaKuppa@house.mi.gov; BeauLaFave@house.mi.gov; davidlagrand@house.mi.gov; donnalasinski@house.mi.gov; tullioliberati@house.mi.gov; SarahLightner@house.mi.gov; jimlilly@house.mi.gov; MattMaddock@house.mi.gov; MariManoogian@house.mi.gov; stevemarino@house.mi.gov; GregMarkkanen@house.mi.gov; davidmartin@house.mi.gov; lukemeerman@house.mi.gov; ChristineMorse@house.mi.gov; mikemueller@house.mi.gov; cynthianeeley@house.mi.gov; jackomalley@house.mi.gov; AmosOneal@house.mi.gov; PatOutman@house.mi.gov; bradpaquette@house.mi.gov; ronniepeterson@house.mi.gov; lauriepohutsky@house.mi.gov; BryanPosthumus@house.mi.gov; ranjeevpuri@house.mi.gov; yousefrabhi@house.mi.gov; johnreilly@house.mi.gov; dairerendon@house.mi.gov; JulieRogers@house.mi.gov; JohnRoth@house.mi.gov; terrysabo@house.mi.gov; district043@house.mi.gov; helenascott@house.mi.gov; nateshannon@house.mi.gov; BradleySlagh@house.mi.gov; timsneller@house.mi.gov; williamsowerby@house.mi.gov; samanthasteckloff@house.mi.gov; richardsteenland@house.mi.gov; LoriStone@house.mi.gov; JoeTate@house.mi.gov; ShriThanedar@house.mi.gov; marktisdel@house.mi.gov; scottvansingel@house.mi.gov; GregVanWoerkom@house.mi.gov; RodneyWakeman@house.mi.gov; reginaweiss@house.mi.gov; PaulineWendzel@house.mi.gov; jasonwentworth@house.mi.gov; marywhiteford@house.mi.gov; KarenWhitsett@house.mi.gov; AngelaWitwer@house.mi.gov; district036@house.mi.gov; tenishayancey@house.mi.gov; jeffyaroch@house.mi.gov; stephanieyoung@house.mi.gov; AnnetteGlenn98@gmail.com; senbalexander@senate.michigan.gov; senjananich@senate.michigan.gov; sentbarrett@senate.michigan.gov; senrbayer@senate.michigan.gov;

To: senjbizon@senate.michigan.gov; senwbrinks@senate.michigan.gov; senmbullock@senate.michigan.gov; senjbumstead@senate.michigan.gov; senschang@senate.michigan.gov; senkdaley@senate.michigan.gov; senegeiss@senate.michigan.gov; senchertel@senate.michigan.gov; senahollier@senate.michigan.gov; senkhorn@senate.michigan.gov; SenMHuizenga@senate.michigan.gov; SenDWozniak@senate.michigan.gov; senjirwin@senate.michigan.gov; senrjohnson@senate.michigan.gov; senklasata@senate.michigan.gov; sendlauwers@senate.michigan.gov; senmmacdonald@senate.michigan.gov; senemcbroom@senate.michigan.gov; sensmccann@senate.michigan.gov; senmmcmorrow@senate.michigan.gov; senmshirkey@senate.michigan.gov; senjmoss@senate.michigan.gov; senanesbitt@senate.michigan.gov; senroutman@senate.michigan.gov; sendpolehanki@senate.michigan.gov; senjrunestad@senate.michigan.gov; senssantana@senate.michigan.gov; senwschmidt@senate.michigan.gov; senjstamas@senate.michigan.gov; senltheis@senate.michigan.gov; sencvanderwall@senate.michigan.gov; senrvictory@senate.michigan.gov; senpwojno@senate.michigan.gov; sendzorn@senate.michigan.gov

Subject: Time Sensitive - Please Read Immediately!!!

Attachments: 1_5107633854965875423.pdf; 1_5107633854965875424.pdf; 1_5107633854965875425.pdf

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Please stand by your oath and be a part of the solution to ensuring the integrity of our most sacred process of protecting our beautiful Constitutional Republic. Considering the gravity of the situation, time is of the essence!

God Bless!
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2. MCL 168.795(1) and (k)
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Although participation in the program is voluntary, adherence to the program's procedural requirements is mandatory for participants. The procedural requirements of this Manual will
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a. 3.6.1.3. The effective date of the certification, which shall not exceed a period of two (2) years."

b. So not just the date is important but the signature on the Lab Certification of Accreditation is very crucial.

c. Commission Chairman only serve one (1) year, but their signature is good on these certificates for two (2) years.

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What is the remedy? Elections have been invalid and likely illegal since 2017 due to the purchase and implementation of these voting systems hardware, firmware, software, and services. This type of situation has not happened before and the question is, how do we move forward from here?

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It cannot be stressed enough that this is an urgent matter and needs immediate attention. The information brought forward has been laid out, cited, and has references for you to do your own due diligence. Do not trust my word but look at the facts and information.

You have now been put on notice and you can no longer have a claim of plausible deniability to these crimes. Should you move forward and hold 2022 primary or general elections using this voting equipment you are knowingly and willingly committing these crimes and you will be held accountable.

Thank you for your time and immediate action.

Elizabeth Sommerville
A Citizen of the State of Michigan

James McCarver

From: Elizabeth Sommerville <elizabethsommerville@yahoo.com>
Sent: Tuesday, November 1, 2022 12:01 AM
To: casprosecutor@ingham.org; seller@alcona-county.net; mfroberg@algercounty.gov; bgenetski@allegancounty.org; bertrandk@alpenacounty.org; guys@antrimcounty.org; nselle@arenaccountymi.org; goodreauw@baragacounty.org; ppalmer@barryco.org; zanottik@baycounty.net; tbowers@benzieco.net; styler@berriencounty.org; tkubakiak@countyofbranch.com; kahinkley@calhouncountymi.gov; monicam@cassco.org; drostj@charlevoixcounty.org; clerk@cheboygancounty.net; cmaleport@chippewacountymi.gov; martinl@clareco.net; zukerd@clinton-county.org; smoore@crawfordco.org; clerk@deltacountymi.org; clerkcarol@dickinsoncountymi.gov; dbosworth@eatoncounty.org; skanine@emmetcounty.org; jgleason@co.genesee.mi.us; countyclerk@gladwincounty-mi.gov; rcollins@gogebiccountymi.gov; bscheele@grandtraverse.org; gratiotcountyclerk@yahoo.com; mkast@co.hillsdale.mi.us; countyclerk@houghtoncounty.net; neall@co.huron.mi.us; bbyrum@ingham.org; ggeiger@ioniacounty.org; nhuebel@ioscocounty.org; jkezerle@ironmi.org; mlux@isabellacounty.org; akirkpatrick@co.jackson.mi.us; mxplac@kalcounty.com; dhill@kalkaskacourt.org; lisa.lyons@kentcountymi.gov; keweenawclerk@pasty.net; Patti Pacola; tspencer@lapeercounty.org; mcrocker@co.leelanau.mi.us; ehundley@livgov.com; lucoclrk@lighthouse.net; macclerk@lighthouse.net; clerksoffice@macombgov.org; imarquardt@manisteecountymi.gov; ltalsma@mqtco.org; cakelly@masoncounty.net; mpurcell@co.mecosta.mi.us; mkleiman@menomineecountymi.gov; Ann Manary; clerk@missaukee.org; annamarie_osment@monroemi.org; kmillard@montcalm.us; cneilsen@montcounty.org; watersna@co.muskegon.mi.us; jasonv@co.newaygo.mi.us; brownlr@oakgov.com; aanderson@oceana.mi.us; gildnerb@ocmi.us; spreiss@ontonagoncounty.org; oscclerk1@osceolacountymi.com; agalbraith@oscodacountymi.com; sdefeyter@otsegocountymi.gov; jroebuck@miottawa.org; piclerk@picounty.org; stevensonm@roscommoncounty.net; vguerra@saginawcounty.com; countyclerk@sanilaccounty.net; clerk@schoolcraftcounty.us; cwilson@shiawassee.net; jdeboyer@stclaircounty.org; oswaldl@stjosephcountymi.org; jfetting@tuscolacounty.org; roehms@vbco.org; kestenbauml@ewashtenaw.org; cgarrett@co.wayne.mi.us; clerk@wexfordcounty.org; sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@LAPEERCOUNTY.ORG; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org;

To: sheriff@masoncounty.net; bmiller@mecostacounty.org; sheriff@missaukee.org; a.kearns@missaukeesheriff.net; troy_goodnough@monroemi.org; jeff_pauli@monroemi.org; mcsheriff@montcalm.us; sheriff@montmorencysheriff.com; craneb@montmorencysherriff.com; sheriff.no-reply@muskegonsheriff.com; sheriff@osceolacountymi.com; sheriff@oscodacountymi.com; sheriffs.office@miottawa.org; sheriff@roscommoncounty.net; loweb@roscommoncounty.net; bbegole@shiawassee.net; sheriffinfo@washtenaw.org; ptaszekm@washtenaw.org; info@sheriffconnect.com; abrahamaiyash@house.mi.gov; ThomasAlbert@house.mi.gov; JulieAlexander@house.mi.gov; SueAllor@house.mi.gov; SarahAnthony@house.mi.gov; AndrewBeeler@house.mi.gov; JosephBellino@house.mi.gov; RyanBerman@house.mi.gov; TimothyBeson@house.mi.gov; robertbezotte@house.mi.gov; KyraBolden@house.mi.gov; AnnBollin@house.mi.gov; KenBorton@house.mi.gov; FeliciaBrabec@house.mi.gov; TommyBrann@house.mi.gov; kellybreen@house.mi.gov; JulieBrixie@house.mi.gov; JulieCalley@house.mi.gov; SaraCambensy@house.mi.gov; DarrinCamilleri@house.mi.gov; SteveCarra@house.mi.gov; BrendaCarter@house.mi.gov; TyroneCarter@house.mi.gov; marycavanagh@house.mi.gov; JohnCherry@house.mi.gov; CaraClemente@house.mi.gov; TCClements@house.mi.gov; KevinColeman@house.mi.gov; JohnDamoose@house.mi.gov; GaryEisen@house.mi.gov; JimEllison@house.mi.gov; DianaFarrington@house.mi.gov; GrahamFiller@house.mi.gov; AndrewFink@house.mi.gov; BenFrederick@house.mi.gov; AlexGarza@house.mi.gov; AnnetteGlenn@house.mi.gov; RepPhilGreen@house.mi.gov; BethGriffin@house.mi.gov; JimHaadsma@house.mi.gov; MattHall@house.mi.gov; district015@house.mi.gov; RogerHauck@house.mi.gov; KevinHertel@house.mi.gov; MicheleHoitenga@house.mi.gov; RachelHood@house.mi.gov; KaraHope@house.mi.gov; PamelaHornberger@house.mi.gov; garyhowell@house.mi.gov; district074 @house.mi.gov; CynthiaAJohnson@house.mi.gov; StevenJohnson@house.mi.gov; JewellJones@house.mi.gov; BronnaKahle@house.mi.gov; MattKoleszar@house.mi.gov; PadmaKuppa@house.mi.gov; BeauLaFave@house.mi.gov; davidlagrand@house.mi.gov; donnalasinski@house.mi.gov; tullioliberati@house.mi.gov; SarahLightner@house.mi.gov; jimlilly@house.mi.gov; MattMaddock@house.mi.gov; MariManoogian@house.mi.gov; stevemarino@house.mi.gov; GregMarkkanen@house.mi.gov; davidmartin@house.mi.gov; lukemeerman@house.mi.gov; ChristineMorse@house.mi.gov; mikemueller@house.mi.gov; cynthianeeley@house.mi.gov; jackomalley@house.mi.gov; AmosOneal@house.mi.gov; PatOutman@house.mi.gov; bradpaquette@house.mi.gov; ronniepeterson@house.mi.gov; lauriepohutsky@house.mi.gov; BryanPosthumus@house.mi.gov; ranjeevpuri@house.mi.gov; yousefrabhi@house.mi.gov; johnreilly@house.mi.gov; dairerendon@house.mi.gov; JulieRogers@house.mi.gov; JohnRoth@house.mi.gov; terrysabo@house.mi.gov; district043@house.mi.gov; helenascott@house.mi.gov; nateshannon@house.mi.gov; BradleySlagh@house.mi.gov; timsneller@house.mi.gov; williamsowerby@house.mi.gov; samanthasteckloff@house.mi.gov; richardsteenland@house.mi.gov; LoriStone@house.mi.gov; JoeTate@house.mi.gov; ShriThanedar@house.mi.gov; marktisdel@house.mi.gov; scottvansingel@house.mi.gov; GregVanWoerkom@house.mi.gov; RodneyWakeman@house.mi.gov; reginaweiss@house.mi.gov; PaulineWendzel@house.mi.gov; jasonwentworth@house.mi.gov; marywhiteford@house.mi.gov; KarenWhitsett@house.mi.gov; AngelaWitwer@house.mi.gov; district036@house.mi.gov; tenishayancey@house.mi.gov; jeffyaroch@house.mi.gov; stephanieyoung@house.mi.gov; AnnetteGlenn98@gmail.com; senbalexander@senate.michigan.gov; senjananich@senate.michigan.gov; sentbarrett@senate.michigan.gov; senrbayer@senate.michigan.gov;

To: senjbizon@senate.michigan.gov; senwbrinks@senate.michigan.gov; senmbullock@senate.michigan.gov; senjbumstead@senate.michigan.gov; senschang@senate.michigan.gov; senkdaley@senate.michigan.gov; senegeiss@senate.michigan.gov; senchertel@senate.michigan.gov; senahollier@senate.michigan.gov; senkhorn@senate.michigan.gov; SenMHuizenga@senate.michigan.gov; SenDWozniak@senate.michigan.gov; senjirwin@senate.michigan.gov; senrjohnson@senate.michigan.gov; senklasata@senate.michigan.gov; sendlauwers@senate.michigan.gov; senmmacdonald@senate.michigan.gov; senemcbroom@senate.michigan.gov; sensmccann@senate.michigan.gov; senmmcmorrow@senate.michigan.gov; senmshirkey@senate.michigan.gov; senjmoss@senate.michigan.gov; senanesbitt@senate.michigan.gov; senroutman@senate.michigan.gov; sendpolehanki@senate.michigan.gov; senjrunestad@senate.michigan.gov; senssantana@senate.michigan.gov; senwschmidt@senate.michigan.gov; senjstamas@senate.michigan.gov; senltheis@senate.michigan.gov; sencvanderwall@senate.michigan.gov; senrvictory@senate.michigan.gov; senpwojno@senate.michigan.gov; sendzorn@senate.michigan.gov

Subject: Time Sensitive - Please Read Immediately!!!

Attachments: 1_5107633854965875423.pdf; 1_5107633854965875424.pdf; 1_5107633854965875425.pdf

Dear Elected Officials,

On Wednesday, July 27, 2022 you received the e-mail I am attaching below.

As a follow up to that email we would like to provide you information on a couple of cases that have been filed regarding this issue.

On July 4, 2022, Court of Claims Case No. 22-000097-MB wherein the Plaintiff filed Pro Se as he had FOIA'd the machine certifications and any information related to the certification of the machines on September 25, 2021, and the Secretary of State and Bureau of Elections granted his FOIA, charged him an excessive amount of money which he paid, yet over a year later he still has not received these records. Why?! Because they do not exist! The Court has decided the Plaintiff didn't have standing to bring the claims regarding the Electronic Voting Sysyems or preservation of Election records and materials as an average every day citizen, however all of you Clerks DO HAVE STANDING as you have previously run elections under false pretenses and the command of the Secretary of State and Bureau of Elections and are expected to run the upcoming elections in the same manner. (Opinion & Order Attached)

Additionally, a similar suit was filed on September 2, 2022, Case No. 1:22-cv-00817 by Donna Brandenburg and the American Project. I have attached a copy of their case filing as well as this video that better explains the certification issues in an way that is easier to understand.

https://rumble.com/v1pnvjv-election-crime-in-michigan.html

On October 20th, 2022, Court of Claims Case No. 22-000162-MZ, Judge Brock Swartzle ruled that Michigan Secretary of State, Jocelyn Benson, exceeded her authority when she created certain provisions in an election manual guide for election challengers and poll watchers. The Judge ruled for Michigan Secretary of State Jocelyn Benson and State Elections Director, Jonathan Brater to rescind the manual and/or revise it to comply with Michigan election law. (Opinion & Order Attached)
https://www.wilx.com/2022/10/23/judge-michigan-election-challenger-manual-cant-be-used/

On October 28th, 2022 Secretary of State, Jocelyn Benson filed an Emergency Application for Leave of Appeal in order to skip the Court Appeals and seek a ruling directly from the Michigan Supreme Court. She is

seeking relief from the October 20th, 2022 order demanding her office update the Poll Challenger Manual to comply with Michigan Election Law.
Dear Elected Officials,

This is another issue that should be of great concern to all Clerks statewide. As concerned citizens, we ask you to also speak with your counsel and consider intervening in this matter as well as the previously referenced cases to further ensure the integrity of Michigan elections and protect the right to free and fair elections for all Michiganders.

As we have previously stated, we understand that we are without remedy as you are required by Michigan Election Law to use Electronic Voting System, however, our votes are our voice and if our voice is compromised then not only is it a violation of every citizen's Constitutional Rights and as elected officials, you have taken an Oath to uphold those same Constitutional Rights.

Again, we only ask that you have your local counsel review these cases and information and work together, consider intervening in these cases, and also demand the legislators repeal the law requiring the use of these machines as well as any other necessary legal remedy.

So the question everyone should be asking is, technology is supposed to make things efficient? Do our elections require Efficiency or efficacy? That means, you know, actual, concrete results? The ONLY choice when it comes to something as important as our vote is efficacy, using paper ballots counted by hand tabulation under close video surveillance where the public can watch the counting via live streaming for full public transparency, maybe even on clear tables with several sets of eyes on the process for full transparency and security of our elections.

Please stand by your oath and be a part of the solution to ensuring the integrity of our most sacred process of protecting our beautiful Constitutional Republic. Considering the gravity of the situation, time is of the essence!

God Bless!
~Citizens for Free & Fair Elections

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Sent: Wednesday, July 27, 2022 11:42 AM

Dear Elected Officials,

I am extending a line of communication with you to bring an urgent matter to your attention. Over the past year or so, you have heard and have been contacted with concerns regarding our elections based on a plethora of data, forensic audits, testimonies, etc.

Today, I am bringing you another large and indisputable piece of evidence that no one is talking about and notifying you of the crimes that were unknowingly committed since 2017.

No longer will the excuse; “I didn’t know,” be acceptable moving forward. The information, the law and the data that is brought forth in this email is clear and concise and needs immediate attention and action from you. It is your responsibility to do your due diligence because you can no longer have a claim of plausible deniability to these crimes that were likely unknowingly committed since 2017.

Now you will know as I have laid it out for you.

To start, The Michigan Department of Technology, Management and Budget entered Michigan into a contractual agreement with Dominion Voting Systems Inc. (Contract NO. 071B7700117), Election Systems and Software LLC (Contract NO. 071B7700120) and Hart InterCivic Inc (Contract NO. 071B7700128), for the

purchase and implementation of the contractors voting system hardware, firmware, software, and services. All three vendor contracts have an effective date of March 1, 2017 and an expiration date of February 28, 2027.

In the contracts, Schedule A: Statement of Work describes the activities, scope, implementation timelines and detailed specifications. Under section 1. Specifications, part 1.5 State and Federal Testing/ Certification.

Requirements states:
"Contractor's system shall have been tested and successfully completed all certification steps required by the U.S. Election Assistance Commission (EAC) before the system will be approved for implementation in Michigan... For systems still in the process of obtaining EAC certification, the Contractor shall provide a copy of the EAC certification prior to final State certification and prior to a Purchase Order being placed for the system in any county."

In summary, the agreed upon terms of the contract included State and Federal Testing/ Certification Requirements requiring the contractor to have their systems tested and successfully complete all certification steps required by the U.S Election Assistance Commission (EAC) before they will be approved for implementation in Michigan.

There is a breach in all three contracts due to Dominion Voting Systems Inc., Election Systems and Software LLC and Hart InterCivic Inc not meeting their contractual obligations to have their machines federally tested in compliance with
the EAC.

Voting systems in Michigan must be EAC certified according to the Michigan Election laws:
1. MCL 168.794(f)
2. MCL 168.795(1) and (k)
3. MCL 168.795a(1) and (a), 2(b) and (c), and (4)
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The Voting System Testing Laboratories, PRO V&V and SLI Compliance were not accredited test labs according to The Help America Vote Act of 2002 (HAVA), the Voluntary Voting System Guidelines (VVSG), The Voting System Test Laboratory Program Manual and the EAC Testing and Certification Program.

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1) To meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the proposed information collection, the EAC Voting System Test Laboratory Accreditation Program Manual.

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a. 3.6.1.3. The effective date of the certification, which shall not exceed a period of two (2) years."

b. So not just the date is important but the signature on the Lab Certification of Accreditation is very crucial.

c. Commission Chairman only serve one (1) year, but their signature is good on these certificates for two (2) years.

3) Both Donald Palmer AND Benjamin Hovland were appointed by President Trump and confirmed in the senate on Feb. 4, 2019, as EAC Commissioners but not Chairman. Donald Palmer was elected Commission Chairman Feb. 24, 2021. Benjamin Hovland was appointed Commission Chairman Feb. 2020. Neither Donald Palmer nor Benjamin Hovland could be valid signatures on the Laboratory Certificates of Accreditation since none were issued in 2020.

4) Christy McCormick was elected as Commission Chairwoman on Feb. 24, 2019. For the 2020 General Election, Christy McCormick signature should be on ALL EAC Laboratory Certificates of Accreditation.

5) The (VSTL) program requires certified laboratories to submit an application package to the Program Director, consistent with the procedures of Section 3.4, no earlier than 60 days before the accreditation expiration date and no later than 30 days before their accreditation expire. Pro V&V and SLI Compliance did not apply prior to the expiration date in 2015 and 2017 respectfully. The EAC and the Program Director were remiss in their duties in acknowledging the expiration of certification. What is confirmed is that Pro V& V and SLI Compliance were not accredited (VSTL). (Version 2.0 Section 3.8)

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What is the remedy? Elections have been invalid and likely illegal since 2017 due to the purchase and implementation of these voting systems hardware, firmware, software, and services. This type of situation has not happened before and the question is, how do we move forward from here?

Immediately, we should cease the use of these machines and voting equipment. The Board of Canvassers have the authority per Michigan Election Law to recall the equipment.

In the interim, elections should be held like they were prior to the implementation of the electronic voting systems and equipment which would be by hand vote and hand tabulation with an audit proceeding each of the elections to ensure accuracy and as a good faith effort for transparency.

It cannot be stressed enough that this is an urgent matter and needs immediate attention. The information brought forward has been laid out, cited, and has references for you to do your own due diligence. Do not trust my word but look at the facts and information.

You have now been put on notice and you can no longer have a claim of plausible deniability to these crimes. Should you move forward and hold 2022 primary or general elections using this voting equipment you are knowingly and willingly committing these crimes and you will be held accountable.

Thank you for your time and immediate action.

Elizabeth Sommerville
A Citizen of the State of Michigan

James McCarver

From: Elizabeth Sommerville <elizabethsommerville@yahoo.com>
Sent: Tuesday, November 1, 2022 12:06 AM
To: sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@LAPEERCOUNTY.ORG; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org; sheriff@masoncounty.net; bmiller@mecostacounty.org; sheriff@missaukee.org; a.kearns@missaukeesheriff.net; troy_goodnough@monroemi.org; jeff_pauli@monroemi.org; mcsheriff@montcalm.us; sheriff@montmorencysheriff.com; craneb@montmorencysherriff.com; sheriff.no-reply@muskegonsheriff.com; sheriff@osceolacountymi.com; sheriff@oscodacountymi.com; sheriffs.office@miottawa.org; sheriff@roscommoncounty.net; loweb@roscommoncounty.net; bbegole@shiawassee.net; sheriffinfo@washtenaw.org; ptaszekm@washtenaw.org; info@sheriffconnect.com
Subject: Time Sensitive - Please Read Immediately!!!
Attachments: 1_5107633854965875423.pdf; 1_5107633854965875424.pdf; 1_5107633854965875425.pdf

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Again, we only ask that you have your local counsel review these cases and information and work together, consider intervening in these cases, and also demand the legislators repeal the law requiring the use of these machines as well as any other necessary legal remedy.

So the question everyone should be asking is, technology is supposed to make things efficient? Do our elections require Efficiency or efficacy? That means, you know, actual, concrete results? The ONLY choice when it comes to something as important as our vote is efficacy, using paper ballots counted by hand tabulation under close video surveillance where the public can watch the counting via live streaming for full public transparency, maybe even on clear tables with several sets of eyes on the process for full transparency and security of our elections.

Please stand by your oath and be a part of the solution to ensuring the integrity of our most sacred process of protecting our beautiful Constitutional Republic. Considering the gravity of the situation, time is of the essence!

God Bless!
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To start, The Michigan Department of Technology, Management and Budget entered Michigan into a contractual agreement with Dominion Voting Systems Inc. (Contract NO. 071B7700117), Election Systems and Software LLC (Contract NO. 071B7700120) and Hart InterCivic Inc (Contract NO. 071B7700128), for the purchase and implementation of the contractors voting system hardware, firmware, software, and services. All three vendor contracts have an effective date of March 1, 2017 and an expiration date of February 28, 2027.

In the contracts, Schedule A: Statement of Work describes the activities, scope, implementation timelines and detailed specifications. Under section 1. Specifications, part 1.5 State and Federal Testing/ Certification.

Requirements states:
“Contractor’s system shall have been tested and successfully completed all certification steps required by the U.S. Election Assistance Commission (EAC) before the system will be approved for implementation in Michigan... For systems still in the process of obtaining EAC certification, the Contractor shall provide a copy of the EAC certification prior to final State certification and prior to a Purchase Order being placed for the system in any county.”

In summary, the agreed upon terms of the contract included State and Federal Testing/ Certification Requirements requiring the contractor to have their systems tested and successfully complete all certification steps required by the U.S Election Assistance Commission (EAC) before they will be approved for implementation in Michigan.

There is a breach in all three contracts due to Dominion Voting Systems Inc., Election Systems and Software LLC and Hart InterCivic Inc not meeting their contractual obligations to have their machines federally tested in compliance with
the EAC.

Voting systems in Michigan must be EAC certified according to the Michigan Election laws:
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In order for the vendor’s systems to be in compliance and properly certified to Federal/EAC standards, they needed to be certified by an accredited voting system testing laboratory (VSTL). The two VSTL’s, in theory, that would have
certified the vendor equipment are PRO V&V and SLI Compliance.

The Voting System Testing Laboratories, PRO V&V and SLI Compliance were not accredited test labs according to The Help America Vote Act of 2002 (HAVA), the Voluntary Voting System Guidelines (VVSG), The Voting System Test Laboratory Program Manual and the EAC Testing and Certification Program.

Here is why:

1) To meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the proposed information collection, the EAC Voting System Test Laboratory Accreditation Program Manual.

Although participation in the program is voluntary, adherence to the program's procedural requirements is mandatory for participants. The procedural requirements of this Manual will supersede any prior laboratory accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's Voting System Testing and Certification Program Manual.

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A Citizen of the State of Michigan

James McCarver

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Sent: Tuesday, November 1, 2022 11:16 AM
To: undisclosed-recipients
Subject: Follow up to July 27, 2022
Attachments: Wilson v Jocelyn Benson et al Case No 22000097MB.pdf; American-Project-Michigan-2020-Election-Lawsuit-221026-081503-221028.pdf; O'Halloran-MD-et-al-v-Jocelyn-Benson-et-all-Case-No-22-000162-MZ.pdf

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From: M W <mwall7987@gmail.com>
Sent: Friday, November 4, 2022 9:18 PM
To: casprosecutor@ingham.org; seller@alcona-county.net; mfroberg@algercounty.gov; bgenetski@allegancounty.org; bertrandk@alpenacounty.org; guys@antrimcounty.org; nselle@arenaccountymi.org; goodreauw@baragacounty.org; ppalmer@barryco.org; zanottik@baycounty.net; tbowers@benzieco.net; styler@berriencounty.org; tkubakiak@countyofbranch.com; kahinkley@calhouncountymi.gov; monicam@cassco.org; drostj@charlevoixcounty.org; clerk@cheboygancounty.net; cmaleport@chippewacountymi.gov; martinl@clareco.net; zukerd@clinton-county.org; smoore@crawfordco.org; clerk@deltacountymi.org; clerkcarol@dickinsoncountymi.gov; dbosworth@eatoncounty.org; skanine@emmetcounty.org; jgleason@co.genesee.mi.us; countyclerk@gladwincounty-mi.gov; rcollins@gogebiccountymi.gov; bscheele@grandtraverse.org; gratiotcountyclerk@yahoo.com; mkast@co.hillsdale.mi.us; countyclerk@houghtoncounty.net; neall@co.huron.mi.us; bbyrum@ingham.org; ggeiger@ioniacounty.org; nhuebel@ioscocounty.org; jkezerle@ironmi.org; mlux@isabellacounty.org; akirkpatrick@co.jackson.mi.us; mxplac@kalcounty.com; dhill@kalkaskacourt.org; lisa.lyons@kentcountymi.gov; keweenawclerk@pasty.net; Patti Pacola; tspencer@lapeercounty.org; mcrocker@co.leelanau.mi.us; ehundley@livgov.com; lucoclrk@lighthouse.net; macclerk@lighthouse.net; clerksoffice@macombgov.org; imarquardt@manisteecountymi.gov; ltalsma@mqtco.org; cakelly@masoncounty.net; mpurcell@co.mecosta.mi.us; mkleiman@menomineecountymi.gov; Ann Manary; clerk@missaukee.org; annamarie_osment@monroemi.org; kmillard@montcalm.us; cneilsen@montcounty.org; watersna@co.muskegon.mi.us; jasonv@co.newaygo.mi.us; brownlr@oakgov.com; aanderson@oceana.mi.us; gildnerb@ocmi.us; spreiss@ontonagoncounty.org; oscclerk1@osceolacountymi.com; agalbraith@oscodacountymi.com; sdefeyter@otsegocountymi.gov; jroebuck@miottawa.org; piclerk@picounty.org; stevensonm@roscommoncounty.net; vguerra@saginawcounty.com; countyclerk@sanilaccounty.net; clerk@schoolcraftcounty.us; cwilson@shiawassee.net; jdeboyer@stclaircounty.org; oswaldl@stjosephcountymi.org; jfetting@tuscolacounty.org; roehms@vbco.org; kestenbauml@ewashtenaw.org; cgarrett@co.wayne.mi.us; clerk@wexfordcounty.org; sstephenson@alcona-county.net; kmyers@alcona-county.net; AlgerSheriff@algercounty.gov; SHERIFF@allegancounty.org; sheriff@alpenacounty.org; sheriff@antrimcounty.org; jmosciski@arenaccountymi.gov; broganj@baragacounty.org; krosa@benzieco.net; Pbailey@berriencounty.org; cheit@berriencounty.org; Sheriffbc@countyofbranch.com; vondrac@charlevoixcounty.org; sheriff@cheboygancounty.net; tcook@cheboygancounty.net; sheriff@claresheriff.org; sheriff@clinton-county.org; skraycs@crawfordsheriff.org; rherman@crawfordsheriff.org; srutter@dickinsoncountymi.gov; treich@eatoncounty.org; rsolberg@gogebiccountymi.gov; info@gtsheriff.org; sheriff@houghtonsheriff.com; kcoppo@houghtonsheriff.com; hansonk@co.huron.mi.us; millerd@co.huron.mi.us; swriggelsworth@ingham.org; cnoll@ioniacounty.org; abucholtz@ioniacounty.org; sfrank@ioscocounty.org; rboudreau@ioscocounty.org; mvalesano@ironmi.org; isabellasheriff@isabellacounty.org; tburns@isabellacounty.org; gschuette@mijackson.org; csimpson@mijackson.org; contact@kalso.org; sheriff@keweenawcountymi.gov; undersheriff@keweenawcountymi.gov; Rich Martin; SMCKENNA@lapeercounty.org; jhowe@lapeercounty.org; mborkovich@leelanau.gov; jkiessel@leelanau.gov; troy.bevier@lenawee.mi.us; sheriff@livgov.com; sheriff@macombsheriff.com; sennett@mqtco.org; sheriff@masoncounty.net;

To: bmiller@mecostacounty.org; sheriff@missaukee.org; a.kearns@missaukeesheriff.net; troy_goodnough@monroemi.org; jeff_pauli@monroemi.org; mcsheriff@montcalm.us; sheriff@montmorencysheriff.com; craneb@montmorencysherriff.com; sheriff.no-reply@muskegonsheriff.com; sheriff@osceolacountymi.com; sheriff@oscodacountymi.com; sheriffs.office@miottawa.org; sheriff@roscommoncounty.net; loweb@roscommoncounty.net; bbegole@shiawassee.net; sheriffinfo@washtenaw.org; ptaszekm@washtenaw.org; info@sheriffconnect.com; Abraham Aiyash; ThomasAlbert@house.mi.gov; JulieAlexander@house.mi.gov; SueAllor@house.mi.gov; SarahAnthony@house.mi.gov; AndrewBeeler@house.mi.gov; JosephBellino@house.mi.gov; RyanBerman@house.mi.gov; TimothyBeson@house.mi.gov; robertbezotte@house.mi.gov; KyraBolden@house.mi.gov; AnnBollin@house.mi.gov; KenBorton@house.mi.gov; FeliciaBrabec@house.mi.gov; TommyBrann@house.mi.gov; kellybreen@house.mi.gov; JulieBrixie@house.mi.gov; JulieCalley@house.mi.gov; SaraCambensy@house.mi.gov; DarrinCamilleri@house.mi.gov; SteveCarra@house.mi.gov; BrendaCarter@house.mi.gov; TyroneCarter@house.mi.gov; marycavanagh@house.mi.gov; JohnCherry@house.mi.gov; CaraClemente@house.mi.gov; TCClements@house.mi.gov; KevinColeman@house.mi.gov; JohnDamoose@house.mi.gov; GaryEisen@house.mi.gov; JimEllison@house.mi.gov; DianaFarrington@house.mi.gov; GrahamFiller@house.mi.gov; AndrewFink@house.mi.gov; BenFrederick@house.mi.gov; Alex Garza; AnnetteGlenn@house.mi.gov; RepPhilGreen@house.mi.gov; BethGriffin@house.mi.gov; JimHaadsma@house.mi.gov; MattHall@house.mi.gov; district015@house.mi.gov; RogerHauck@house.mi.gov; KevinHertel@house.mi.gov; MicheleHoitenga@house.mi.gov; RachelHood@house.mi.gov; KaraHope@house.mi.gov; PamelaHornberger@house.mi.gov; garyhowell@house.mi.gov; district074 @house.mi.gov; CynthiaAJohnson@house.mi.gov; StevenJohnson@house.mi.gov; JewellJones@house.mi.gov; BronnaKahle@house.mi.gov; MattKoleszar@house.mi.gov; PadmaKuppa@house.mi.gov; BeauLaFave@house.mi.gov; davidlagrand@house.mi.gov; donnalasinski@house.mi.gov; tullioliberati@house.mi.gov; SarahLightner@house.mi.gov; jimlilly@house.mi.gov; MattMaddock@house.mi.gov; MariManoogian@house.mi.gov; stevemarino@house.mi.gov; GregMarkkanen@house.mi.gov; davidmartin@house.mi.gov; lukemeerman@house.mi.gov; ChristineMorse@house.mi.gov; mikemueller@house.mi.gov; cynthianeeley@house.mi.gov; jackomalley@house.mi.gov; Amos Oneal; PatOutman@house.mi.gov; bradpaquette@house.mi.gov; ronniepeterson@house.mi.gov; lauriepohutsky@house.mi.gov; BryanPosthumus@house.mi.gov; ranjeevpuri@house.mi.gov; yousefrabhi@house.mi.gov; johnreilly@house.mi.gov; dairerendon@house.mi.gov; JulieRogers@house.mi.gov; JohnRoth@house.mi.gov; terrysabo@house.mi.gov; district043@house.mi.gov; helenascott@house.mi.gov; nateshannon@house.mi.gov; BradleySlagh@house.mi.gov; timsneller@house.mi.gov; williamsowerby@house.mi.gov; samanthasteckloff@house.mi.gov; richardsteenland@house.mi.gov; LoriStone@house.mi.gov; JoeTate@house.mi.gov; ShriThanedar@house.mi.gov; marktisdel@house.mi.gov; scottvansingel@house.mi.gov; GregVanWoerkom@house.mi.gov; RodneyWakeman@house.mi.gov; reginaweiss@house.mi.gov; PaulineWendzel@house.mi.gov; jasonwentworth@house.mi.gov; marywhiteford@house.mi.gov; KarenWhitsett@house.mi.gov; AngelaWitwer@house.mi.gov; district036@house.mi.gov; tenishayancey@house.mi.gov; jeffyaroch@house.mi.gov; stephanieyoung@house.mi.gov; AnnetteGlenn98@gmail.com; senbalexander@senate.michigan.gov; senjananich@senate.michigan.gov; sentbarrett@senate.michigan.gov; senrbayer@senate.michigan.gov;

To: senjbizon@senate.michigan.gov; senwbrinks@senate.michigan.gov; senmbullock@senate.michigan.gov; senjbumstead@senate.michigan.gov; senschang@senate.michigan.gov; senkdaley@senate.michigan.gov; senegeiss@senate.michigan.gov; senchertel@senate.michigan.gov; senahollier@senate.michigan.gov; senkhorn@senate.michigan.gov; SenMHuizenga@senate.michigan.gov; SenDWozniak@senate.michigan.gov; senjirwin@senate.michigan.gov; senrjohnson@senate.michigan.gov; senklasata@senate.michigan.gov; sendlauwers@senate.michigan.gov; senmmacdonald@senate.michigan.gov; senemcbroom@senate.michigan.gov; sensmccann@senate.michigan.gov; senmmcmorrow@senate.michigan.gov; senmshirkey@senate.michigan.gov; senjmoss@senate.michigan.gov; senanesbitt@senate.michigan.gov; senroutman@senate.michigan.gov; sendpolehanki@senate.michigan.gov; senjrunestad@senate.michigan.gov; senssantana@senate.michigan.gov; senwschmidt@senate.michigan.gov; senjstamas@senate.michigan.gov; senltheis@senate.michigan.gov; sencvanderwall@senate.michigan.gov; senrvictory@senate.michigan.gov; senpwojno@senate.michigan.gov; sendzorn@senate.michigan.gov

Subject: URGENT! - IMMEDIATE ACTION REQUIRED!!!

Attachments: Wilson v Jocelyn Benson et al Case No 22000097MB.pdf; American_Project_Michigan_2020_Election_Lawsuit_221026_081503_221028.pdf; O'Halloran_MD_et_al_v_Jocelyn_Benson_et_all_Case_No_22_000162_MZ.pdf

Dear Elected Officials,

On Wednesday, July 27, 2022 you received the e-mail I am attaching below.

As a follow up to that email we would like to provide you information on a couple of cases that have been filed regarding this issue.

On July 4, 2022, Court of Claims Case No. 22-000097-MB wherein the Plaintiff filed Pro Se as he had FOIA'd the machine certifications and any information related to the certification of the machines on September 25, 2021, and the Secretary of State and Bureau of Elections granted his FOIA, charged him an excessive amount of money which he paid, yet over a year later he still has not received these records. Why?! Because they do not exist! The Court has decided the Plaintiff didn't have standing to bring the claims regarding the Electronic Voting Sysyems or preservation of Election records and materials as an average every day citizen, however all of you Clerks DO HAVE STANDING as you have previously run elections under false pretenses and the command of the Secretary of State and Bureau of Elections and are expected to run the upcoming elections in the same manner. (Opinion & Order Attached)

Additionally, a similar suit was filed on September 2, 2022, Case No. 1:22-cv-00817 by Donna Brandenburg and the American Project. I have attached a copy of their case filing as well as this video that better explains the certification issues in an way that is easier to understand.

https://rumble.com/v1pnvjv-election-crime-in-michigan.html

On October 20th, 2022, Court of Claims Case No. 22-000162-MZ, Judge Brock Swartzle ruled that Michigan Secretary of State, Jocelyn Benson, exceeded her authority when she created certain provisions in an election manual guide for election challengers and poll watchers. The Judge ruled for Michigan Secretary of State Jocelyn Benson and State Elections Director, Jonathan Brater to rescind the manual and/or revise it to comply with Michigan election law. (Opinion & Order Attached)

https://www.wilx.com/2022/10/23/judge-michigan-election-challenger-manual-cant-be-used/

On October 28th, 2022 Secretary of State, Jocelyn Benson filed an Emergency Application for Leave of Appeal in order to skip the Court Appeals and seek a ruling directly from the Michigan Supreme Court. She is seeking relief from the October 20th, 2022 order demanding her office update the Poll Challenger Manual to comply with Michigan Election Law.
Dear Elected Officials,

This is another issue that should be of great concern to all Clerks statewide. As concerned citizens, we ask you to also speak with your counsel and consider intervening in this matter as well as the previously referenced cases to further ensure the integrity of Michigan elections and protect the right to free and fair elections for all Michiganders.

As we have previously stated, we understand that we are without remedy as you are required by Michigan Election Law to use Electronic Voting System, however, our votes are our voice and if our voice is compromised then not only is it a violation of every citizen's Constitutional Rights and as elected officials, you have taken an Oath to uphold those same Constitutional Rights.

Again, we only ask that you have your local counsel review these cases and information and work together, consider intervening in these cases, and also demand the legislators repeal the law requiring the use of these machines as well as any other necessary legal remedy.

So the question everyone should be asking is, technology is supposed to make things efficient? Do our elections require Efficiency or efficacy? That means, you know, actual, concrete results? The ONLY choice when it comes to something as important as our vote is efficacy, using paper ballots counted by hand tabulation under close video surveillance where the public can watch the counting via live streaming for full public transparency, maybe even on clear tables with several sets of eyes on the process for full transparency and security of our elections.

Please stand by your oath and be a part of the solution to ensuring the integrity of our most sacred process of protecting our beautiful Constitutional Republic. Considering the gravity of the situation, time is of the essence!

God Bless!
~Citizens for Free & Fair Elections

****
Sent: Wednesday, July 27, 2022 11:42 AM

Dear Elected Officials,

I am extending a line of communication with you to bring an urgent matter to your attention. Over the past year or so, you have heard and have been contacted with concerns regarding our elections based on a plethora of data, forensic audits, testimonies, etc.

Today, I am bringing you another large and indisputable piece of evidence that no one is talking about and notifying you of the crimes that were unknowingly committed since 2017.

No longer will the excuse; “I didn’t know,” be acceptable moving forward. The information, the law and the data that is brought forth in this email is clear and concise and needs immediate attention and action from you. It is your responsibility to do your due diligence because you can no longer have a claim of plausible deniability to these crimes that were likely unknowingly committed since 2017.

Now you will know as I have laid it out for you.

To start, The Michigan Department of Technology, Management and Budget entered Michigan into a contractual agreement with Dominion Voting Systems Inc. (Contract NO. 071B7700117), Election Systems and Software LLC (Contract NO. 071B7700120) and Hart InterCivic Inc (Contract NO. 071B7700128), for the purchase and implementation of the contractors voting system hardware, firmware, software, and services. All three vendor contracts have an effective date of March 1, 2017 and an expiration date of February 28, 2027.

In the contracts, Schedule A: Statement of Work describes the activities, scope, implementation timelines and detailed specifications. Under section 1. Specifications, part 1.5 State and Federal Testing/ Certification.

Requirements states:
“Contractor’s system shall have been tested and successfully completed all certification steps required by the U.S. Election Assistance Commission (EAC) before the system will be approved for implementation in Michigan... For systems still in the process of obtaining EAC certification, the Contractor shall provide a copy of the EAC certification prior to final State certification and prior to a Purchase Order being placed for the system in any county.”

In summary, the agreed upon terms of the contract included State and Federal Testing/ Certification Requirements requiring the contractor to have their systems tested and successfully complete all certification steps required by the U.S Election Assistance Commission (EAC) before they will be approved for implementation in Michigan.

There is a breach in all three contracts due to Dominion Voting Systems Inc., Election Systems and Software LLC and Hart InterCivic Inc not meeting their contractual obligations to have their machines federally tested in compliance with
the EAC.

Voting systems in Michigan must be EAC certified according to the Michigan Election laws:
1. MCL 168.794(f)
2. MCL 168.795(1) and (k)
3. MCL 168.795a(1) and (a), 2(b) and (c), and (4)
4. MCL 168.37a (a) and (b)

In order for the vendor’s systems to be in compliance and properly certified to Federal/EAC standards, they needed to be certified by an accredited voting system testing laboratory (VSTL). The two VSTL’s, in theory, that would have
certified the vendor equipment are PRO V&V and SLI Compliance.

The Voting System Testing Laboratories, PRO V&V and SLI Compliance were not accredited test labs according to The Help America Vote Act of 2002 (HAVA), the Voluntary Voting System Guidelines (VVSG), The Voting System Test Laboratory Program Manual and the EAC Testing and Certification Program.

Here is why:
1) To meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the proposed information collection, the EAC Voting System Test Laboratory Accreditation Program Manual.

Although participation in the program is voluntary, adherence to the program's procedural requirements is mandatory for participants. The procedural requirements of this Manual will
supersede any prior laboratory accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's Voting System Testing and Certification Program Manual.

2) Per the (VSTL) Voting System Test Laboratory Program Manual ver. 2.0 effective May 31, 2015, page 38, Sec 3.6.1. Certificate of Accreditation: A Certificate of Accreditation shall be issued to each laboratory by vote of the Commissioners. The certificate shall be signed by the CHAIR of the Commission and state:

a. 3.6.1.3. The effective date of the certification, which shall not exceed a period of two (2) years."

b. So not just the date is important but the signature on the Lab Certification of Accreditation is very crucial.

c. Commission Chairman only serve one (1) year, but their signature is good on these certificates for two (2) years.

3) Both Donald Palmer AND Benjamin Hovland were appointed by President Trump and confirmed in the senate on Feb. 4, 2019, as EAC Commissioners but not Chairman. Donald Palmer was elected Commission Chairman Feb. 24, 2021. Benjamin Hovland was appointed Commission Chairman Feb. 2020. Neither Donald Palmer nor Benjamin Hovland could be valid signatures on the Laboratory Certificates of Accreditation since none were issued in 2020.

4) Christy McCormick was elected as Commission Chairwoman on Feb. 24, 2019. For the 2020 General Election, Christy McCormick signature should be on ALL EAC Laboratory Certificates of Accreditation.

5) The (VSTL) program requires certified laboratories to submit an application package to the Program Director, consistent with the procedures of Section 3.4, no earlier than 60 days before the accreditation expiration date and no later than 30 days before their accreditation expire. Pro V&V and SLI Compliance did not apply prior to the expiration date in 2015 and 2017 respectfully. The EAC and the Program Director were remiss in their duties in acknowledging the expiration of certification. What is confirmed is that Pro V& V and SLI Compliance were not accredited (VSTL). (Version 2.0 Section 3.8)

6) ProV&V EAC Certification, Original Issued February 24, 2015, Effective through February 24, 2017.

a. ProV&V EAC Certification, Original Issued February 24, 2015, Dated February 21, 2021. (Exceeding, more than two (2) years).

b. Pro V&V from the EAC-Memo date January 21, 2021, stating Covid-19 circumstances. According to (VSTL) Version 2.0 Section 3.8; the application package would have been submitted at the latest date of January 2017- "PRE" Covid-19 pandemic.

7) SLI Compliance Certification Issued January 10, 2018, Effective January 10, 2021. (Exceeding more than two (2) years.

a. SLI Compliance Certification Original Issued February 28, 2007, Dated February 1, 2021. (Exceeding) more than two (2) years).

b. SLI Compliance from EAC-Memo date January 27, 2021, stating Covid-19 circumstances. According to (VSTL) Version 2.0 Section 3.8; the application package would have been submitted at the latest date of January 2020- “PRE” Covid-19 pandemic.

8) The Affidavit of Terpesehore Maras attesting the 2017 elections is null and void due to lack of Election Assistance Commission (EAC) certifications of Voting Systems and the Voting System Test Laboratories ((VSTL)) used to certify the Voting Systems in violation of the HAVA Act.
What is the remedy? Elections have been invalid and likely illegal since 2017 due to the purchase and implementation of these voting systems hardware, firmware, software, and services. This type of situation has not happened before and the question is, how do we move forward from here?

Immediately, we should cease the use
of these machines and voting equipment. The Board of Canvassers have the authority per Michigan Election Law to recall the equipment.

In the interim, elections should be held like they were prior to the implementation of the electronic voting systems and equipment which would be by hand vote and hand tabulation with an audit proceeding each of the elections to ensure accuracy and as a good faith effort for transparency.

It cannot be stressed enough that this is an urgent matter and needs immediate attention. The information brought forward has been laid out, cited, and has references for you to do your own due diligence. Do not trust my word but look at the facts and information.

You have now been put on notice and you can no longer have a claim of plausible deniability to these crimes. Should you move forward and hold 2022 primary or general elections using this voting equipment you are knowingly and willingly committing these crimes and you will be held accountable.

Thank you for your time and immediate action.

A Citizen of the State of Michigan

STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.
_____/

OPINION AND ORDER

Case No. 22-000162-MZ

Hon. Brock A. Swartzle

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

Plaintiffs,

v

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

Defendants.
_____/

Case No. 22-000164-MM

Hon. Brock A. Swartzle

An executive-branch department cannot do by instructional guidance what it must do by promulgated rule. This straightforward legal maxim does most of the work in resolving these two consolidated cases. Similar to the holdings in *Davis v Benson*, unpublished opinion of the Court of Claims, issued October 27, 2020 (Docket Nos. 20-000207-MZ and 20-000208-MZ), and

Genetski v Benson, unpublished opinion of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), this Court concludes that defendants have exceeded their authority with respect to certain provisions in an election manual. With that said, this Court will not grant the entirety of the sweeping relief sought by plaintiffs in Docket Number 22-000162-MZ. Rather, as explained below, the Court will grant more narrow relief with respect to the five specific claims raised by plaintiffs in Docket Number 22-000164-MM.

I. BACKGROUND

Plaintiffs include several election challengers for the November 2022 general election; two candidates for the Michigan Legislature; the Michigan Republican Party; and the Republican National Committee. Section 730 of the Michigan Election Law, MCL 168.1 *et seq.*, permits political parties to designate challengers to be present in the room where the ballot box is kept during the election. MCL 168.730. These consolidated cases relate to a manual that the Michigan Bureau of Elections regularly issues relating to election challengers and poll watchers. By all accounts, the Bureau has issued several iterations of the manual since at least 2003; the one just prior to the current one was issued in October 2020. In May 2022, defendants drafted and published the current version titled, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" ("May 2022 Manual"). The Court attaches the May 2022 Manual to this Opinion and Order as an exhibit for ease of reference.

On September 28, 2022, plaintiffs Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, "O'Halloran Plaintiffs"), sued defendants in this Court in Docket No. 22-000162-MZ. O'Halloran, Giacobazzi, and Cushman are designated election challengers for the November 2022 general election. Penny Crider is a

candidate for the Michigan House of Representatives, and Kenneth Crider is a candidate for the Michigan Senate. The O'Halloran Complaint raises two claims. In Count I, the O'Halloran Plaintiffs allege that the May 2022 Manual violates Section 733 of the Michigan Election Law, MCL 168.733. In Count II, the O'Halloran Plaintiffs assert that the May 2022 Manual was promulgated without the proper notice-and-comment requirements outlined in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

Two days later, plaintiffs Richard DeVisser (another election challenger), the Michigan Republican Party, and the Republican National Committee (collectively, "DeVisser Plaintiffs") sued defendants separately in Docket No. 22-000164-MM. In Count I, the DeVisser Plaintiffs allege that certain provisions of the May 2022 Manual violate the Michigan Election Law. Like the O'Halloran Plaintiffs, the DeVisser Plaintiffs also allege that the May 2022 Manual is a rule promulgated without the required notice-and-comment procedures outlined in the APA.

Both sets of plaintiffs request various forms of expedited declaratory and injunctive relief, including a declaration that the publication is void in toto, or alternatively, that certain passages must be removed before the November 2022 general election. The O'Halloran Plaintiffs have moved for a temporary restraining order ("TRO") and preliminary injunction; similarly, the DeVisser Plaintiffs have sought expedited declaratory relief under MCR 2.605(D).

In the interest of conserving time for expedited appellate review before the November 2022 general election, this Court consolidated the cases on October 3, 2022, and ordered defendants to show cause why the relief requested in the complaints should not be granted. Defendants responded and moved for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10).

Defendants first argue that the O'Halloran Plaintiffs' complaint should be dismissed for lack of jurisdiction because the O'Halloran Plaintiffs failed to verify their complaint, as required under MCL 600.6431. Defendants next argue that plaintiffs' claims are barred by laches because plaintiffs did not sue until September 2022, but the Bureau of Elections issued the manual months earlier. Defendants also assert that the May 2022 Manual did not need to be promulgated through notice-and-comment rulemaking because the Michigan Election Law grants the Secretary of State broad authority to issue instructions, advice, and directives, and the May 2022 Manual fits within these categories. Finally, defendants address each of plaintiffs' specific challenges to the May 2022 Manual, as outlined below.

Both sets of plaintiffs responded to defendants' motion for summary disposition. They reiterate that the May 2022 Manual's language extends beyond the Michigan Election Law and should have been promulgated as a rule in accordance with the APA. On the question of laches, the O'Halloran Plaintiffs argue that they brought their challenges to defendants' attention over the summer, and they maintain that defendants will not suffer any prejudice if the May 2022 Manual is rescinded or revised. The DeVisser Plaintiffs contend that they challenged the May 2022 Manual after learning about the changes during the August 2022 primary election. Finally, the O'Halloran Plaintiffs amended their complaint to include signatures and verifications.

Finally by way of background, the Michigan Democratic Party moved to participate in these cases as amicus curiae and submitted a proposed brief, which this Court has already granted. The Downriver/Detroit Chapter of the A. Philip Randolph Institute ("DAPRI") moved to intervene as a party defendant or, alternatively, to participate as an amicus curiae. As DAPRI appears to acknowledge, however, intervention of a nonstate entity as a party defendant is barred by our Court of Appeals' decision in *Council of Organizations & Others for Ed about Parochiaid v State*, 321

Mich App 456; 909 NW2d 449 (2017). The Court will, however, grant DAPRI's motion to participate as an amicus curiae, and the Court will accept DAPRI's brief as-filed.

II. ANALYSIS

Before the Court are plaintiffs' respective requests for emergency and expedited declaratory and injunctive relief, as well as defendants' motion for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10).

Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* The Court will consider the factual allegations in the complaint as true, but it may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for the plaintiff's claims. See *White v Dep't of Transp*, 334 Mich App 98, 106; 964 NW2d 88 (2020). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* (cleaned up). The Court views the evidence and all reasonable inferences arising from the evidence in the light most favorable to the nonmovant. *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011).

With respect to summary disposition, the court rules also provide, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1). With respect to the nonmovant, the court rules similarly provide, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

A. VERIFICATION AND STANDING

The Court first addresses defendants' motion for summary disposition of the O'Halloran Plaintiffs' complaint under MCR 2.116(C)(4). Defendants argue that the Court lacks subject-matter jurisdiction over the O'Halloran Plaintiffs' complaint because they failed to verify it in accordance with the Court of Claims Act ("COCA"), MCL 600.6401 *et seq.*

The COCA contains notification requirements that a plaintiff must follow to sue in the Court of Claims. Specifically, MCL 600.6431(1) and (2)(d) provide:

> (1) Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.
>
> (2) A claim or notice under subsection (1) must contain all of the following:
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> * * *
>
> (d) A signature and verification by the claimant before an officer authorized to administer oaths.

Our Supreme Court has held that the requirements outlined in MCL 600.6431 of the COCA constitute "conditions precedent" to filing suit. *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). Along the same vein, MCL 600.6434(2) requires that "[t]he complaint

shall be verified." An unverified complaint does not comply with the requirements of MCL 600.6434(2), and is subject to dismissal. *Progress Mich v Attorney General*, 506 Mich 74, 95; 954 NW2d 475 (2020). The *Progress Mich* Court held that the complaint must contain an oath or affirmation by the plaintiff, consistent with MCR 1.109(D)(3). *Id.* at 92 and n 10. Nevertheless, the *Progress Mich* Court held that allowing the plaintiff to amend its complaint to correct a verification defect does not "subvert the verification requirement of MCL 600.6434." *Id.* at 98.

The O'Halloran Plaintiffs filed an amended complaint that addresses the verification issue. The amended complaint contains a verification by each plaintiff, including a handwritten signature and a notarization by an officer authorized to administer oaths. The verifications meet the requirements of MCL 600.6431 and MCL 600.6434. Because the O'Halloran Plaintiffs have addressed the deficiencies in their complaint, the Court agrees with plaintiffs that they need not re-file their case. See *id.*

With respect to standing, MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." For the reasons stated in their respective pleadings and briefs, the Court agrees with plaintiffs that there is an actual controversy, and they have standing to bring these actions.

B. THE O'HALLORAN PLAINTIFFS' BROAD, SWEEPING CHALLENGE

The O'Halloran Plaintiffs request a TRO and a preliminary injunction for the declaratory relief requested in their complaint. They ask that the Court: (1) declare rescission of the May 2022 Manual; (2) enjoin enforcement of the May 2022 Manual; (3) declare that the entirety of MCL 168.733 and MCL 168.734 of the Michigan Election Law must be included in the May 2022

Manual; (4) enter an order implementing the requested amendments and corrections to the May 2022 Manual; and (5) order that certain passages in the May 2022 Manual be removed.

To the extent that the O'Halloran Plaintiffs raise specific concerns similar to those raised by the DeVisser Plaintiffs, those concerns are addressed subsequently in Part II.C of this Opinion and Order. In the current part, the Court is focused on the more broad, sweeping objections and relief sought by the O'Halloran Plaintiffs.

The legal standard for reviewing a request for a preliminary injunction is the same as the standard governing a request for a TRO, at least when the Court has permitted the nonmoving party to respond. See MCR 3.310(A)(1) and (B)(1). As the staff comment to the 1985 adoption of MCR 3.310 explains, "[MCR 3.310] adopts the terminology used in the federal rule, distinguishing between temporary restraining orders, which are entered without notice, and preliminary injunctions, which are granted with notice and after hearing."

The purpose of a preliminary injunction is to maintain the status quo before a final hearing on the parties' rights. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012). An injunction "is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 633-634; 821 NW2d 896 (2012) (cleaned up). The moving party has the burden to prove that four elements weigh in favor the preliminary injunction. *Hammel*, 297 Mich App at 648. Those elements include:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be

> by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* (cleaned up).]

With that said, because the matters have been sufficiently briefed and ultimately turn on questions of law and undisputed material fact, the Court will reach the merits of plaintiffs' claims. Doing so will permit the parties to seek expedited appellate review of this Court's Opinion and Order. Accordingly, the Court will not issue preliminary relief, and, as a result, it need not address or weigh the relative harms of a TRO or preliminary injunction. See *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 13 n 21; 753 NW2d 595 (2008).

The O'Halloran Plaintiffs raise a broad, sweeping challenge to the Secretary of State's authority to issue the May 2022 Manual as an instructive guide, rather than as a promulgated rule under the APA. The O'Halloran Plaintiffs contend that, at the very least, the May 2022 Manual must include the complete language of MCL 168.733 and MCL 168.734.

The Court begins its analysis with the Michigan Election Law and the APA. The interpretation of a statute, including the authorization provided to a department by our Legislature, is a question of law for this Court to decide, and the Court does not defer to a department's interpretation of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). As explained by the undersigned while sitting on our Court of Appeals: "As I read our caselaw, the directives to give 'respectful consideration' to an agency's interpretation and not depart from it unless there are 'cogent reasons' for doing so are little more than judicial dross." *West Mich Annual Conf of the United Methodist Church v Grand Rapids*, 336 Mich App 132, 159; 969 NW2d 813 (2021) (SWARTZLE, P.J., concurring). This is so because a court owes "respectful consideration" to *each and every party's* interpretation of a statute—not just that of a government official—and a court must not load the interpretive dice in favor of one party over the

other. *Id.* Thus, this Court gives defendants' interpretation of the Michigan Election Law and APA respectful consideration and does not reject that interpretation without a cogent reason, but it likewise gives similar consideration and treatment to the interpretations offered by the parties, the Michigan Democratic Party, and DAPRI. In sum, "[a] court should adopt the best interpretation of a statute, based on a fair reading of the text, using clear, even-handed criteria objectively applied—full stop." *Id.* at 160.

As a state department, the Michigan Department of State must follow the requirements of the APA. Under the APA, only a department's "rule," promulgated by that department through the crucible of public notice-and-comment rulemaking, has the force and effect of law. *Slis v Michigan*, 332 Mich App 312, 346; 956 NW2d 569 (2020). Any other pronouncement by a department *does not* have the force and effect of law unless specifically authorized by our Legislature. *Twp of Hopkins v State Boundary Comm'n*, __ Mich App __; __ NW2d __ (2022) (Docket No. 355195); slip op at 11.

Section 7 of the APA defines the term "rule" to mean "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency." MCL 24.207. Defendants argue that the May 2022 Manual is an instructional manual that provides mere guidance and, therefore, falls under several statutory exceptions to the rulemaking requirement. They cite exceptions to the rulemaking requirement,[1] including for "[a]

[1] Defendants argue that the Secretary of State has permissive statutory authority that allows a directive or instruction to be issued with the force and effect of law outside of the APA rulemaking process. For reasons similar to those set forth by then-Chief Judge MURRAY in *Davis v Benson*

decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected," MCL 24.207(j); "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public," MCL 24.207(g); and "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory," MCL 24.207(h).

MCL 168.31(1)(a) and (b) authorize the Secretary of State to "issue instructions and promulgate rules pursuant to [the APA] for the conduct of elections" and "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(c) adds that the Secretary of State shall

> [p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on 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.

Thus, the Secretary's responsibility for issuing instructions is distinct from the authority to promulgate rules, where the latter has the force and effect of law, but the former does not. Indeed, under the APA, only an instruction of "general applicability," properly promulgated, that implements or applies a law, constitutes a department rule. Finally, MCL 168.31(1)(e) requires the Secretary of State to "[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations."

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cited earlier, the Court rejects defendants' attempts to justify as binding the specific provisions of the May 2022 Manual that are explored in Part II.C of this Opinion and Order.

The Court agrees with defendants that, taken as a whole (though with certain exceptions explored below), the May 2022 Manual is informational in nature and does not, in and of itself, have the force and effect of law. Defendants have specifically acknowledged to this Court the limited reach of the May 2022 Manual: "The [May 2022 Manual] is principally explanatory, *does not have the force and effect of law*, and *does not affect the rights of the public*." Defendants Sec'y of State Jocelyn Benson and Director of Elections Jonathan Brater's Response to Order to Show Cause and Brief in Support of Motion for Summary Disposition, p 19 (emphasis added).

As all parties acknowledge, the May 2022 Manual was not promulgated according to the notice-and-comment rulemaking procedures set forth under the APA. Nor does the Michigan Election Law require the Secretary of State to issue rules on the areas outlined in the May 2022 Manual as it does, for example, in the context of electronic-voting systems. See MCL 168.795a(8). The Michigan Election Law does, however, permit the Secretary of State to issue explanatory instructions and forms.

Moreover, the Michigan Election Law does not provide that any unpromulgated, instructional guidance issued by the Secretary of State is "binding" on anyone—with the sole caveat found in MCL 168.765a ("Absent voter counting board"), where in subsection (13), our Legislature stated that the Secretary of State "*shall* develop instructions consistent with this act for the conduct of absent voter counting boards," and added, "[t]he instructions developed under this subsection are binding upon the operation of an absent voter counting board . . . ." (Emphasis added.) Thus, as our Legislature has made clear, the instructions in the May 2022 Manual are binding only on those who operate the absent voter counting boards (AVCB), per MCL 168.765a(13), and, critically, only to the extent that the instructions are consistent with, and do not add to or omit from, any provision in the Michigan Election Law or properly promulgated rule. In

all other respects, the May 2022 Manual, as mere explanatory instruction, is not binding on any Michigan citizen, including election challengers. There is no basis in law for this Court to prohibit defendants from issuing merely instructional guidance. Accordingly, the Court declines to declare the entirety of the May 2022 Manual unlawful or enjoin any use of an instructional manual for training purposes.

Likewise, the Court disagrees with the O'Halloran Plaintiffs that the May 2022 Manual must include the entire language of MCL 168.733 and MCL 168.734. The O'Halloran Plaintiffs argue that, unless the May 2022 Manual recites the entirety of both statutes, there are bound to be violations of the law.

But plaintiffs do not cite any provision of the Michigan Election Law that would require the language of each statute to appear in the May 2022 Manual. Private citizens and government officials alike are expected to know and follow the law, see *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000), and this Court declines to impose a requirement on defendants to explain each and every aspect of the Michigan Election Law in the May 2022 Manual. This does not preclude, of course, a challenger or poll watcher from bringing a hardcopy or (as explained below) an electronic version of MCL 168.733 or MCL 168.734 (or, indeed, the entire Michigan Election Law) to a particular polling precinct. For these reasons, defendants need not amend the May 2022 Manual to include the complete language of MCL 168.733 or MCL 168.734.

C. PLAINTIFFS' MORE NARROW CLAIMS

Apart from the O'Halloran Plaintiffs' broad, sweeping attacks, both sets of plaintiffs also articulate specific challenges to several provisions of the May 2022 Manual. In essence, they argue

that defendants have not limited themselves to mere instruction or guidance, but have, instead, attempted to impose binding rules on challengers and poll watchers. As explained above, defendants have authority to issue instructional guidance, but they do not have the authority to issue rules with the force and effect of law, apart from those promulgated through notice-and-comment rulemaking. To the extent that defendants have issued an unpromulgated rule in the guise of an "instruction," they have exceeded their lawful authority under the Michigan Election Law and APA.

The DeVisser Plaintiffs articulate these specific challenges most clearly in Paragraph 30 of their complaint, and these can be described as followed: (1) the credential-form requirement; (2) appointment of challengers on election day; (3) communication with election inspectors other than the "challenger liaison"; (4) the prohibition on electronic devices in AVCB facilities, and (5) the prohibition on recording "impermissible challenges." The Court addresses each specific challenge in turn.

1. The Credential-Form Requirement. Our Legislature requires that challengers be credentialed. MCL 168.732. For the first time in recent memory, defendants have issued a specific, uniform form that challengers are purportedly required to use with respect to their credentials. The May 2022 Manual references the form, which is available on the Secretary of State's website, and states, "If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger." This is different from years past, when political parties have issued custom credential forms to their own challengers. The DeVisser Plaintiffs argue that the Michigan Election Law does not grant the Secretary of State the authority to mandate a uniform challenger-credential form.

To be clear, the Court does not take issue with the policy of having a uniform challenger-credential form. There is, in fact, much to commend with such a form, in terms of clarity and administrative efficiency. With that said, our Legislature expressly set out the "evidence" needed to show that a person was properly credentialed as a challenger. In MCL 168.732, a section entitled, "Presence of challenger in room containing ballot box; *evidence of right to be present*," (emphasis added), our Legislature set forth the following three items that evidence a valid challenger: (a) "[a]uthority signed by the recognized chairman or presiding officer" of the organization or committee (here, major political party); (b) the written or printed name of the challenger; and (c) the precinct number for the challenger's assigned precinct. Because our Legislature set forth three specific requirements that a person must satisfy to evidence that the person is a valid challenger, defendants cannot, in the absence of a promulgated rule, add a fourth, i.e., the mandatory use of a particular form issued by the Secretary of State.

The Secretary of State can certainly create a form, under MCL 168.31(1)(e), for the convenience of election challengers. And the Court recognizes the Secretary of State's position, as noted in Director of Elections Jonathan Brater's affidavit, that a uniform authorization form would expedite the credentialing process. But our Legislature has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies with the Michigan Election Law—nothing more is required. The provision in the May 2022 Manual requiring the use of the uniform challenger-credential form violates the Michigan Election Law and APA.

2. Appoint or Credential Challengers on Election Day. Next, the DeVisser Plaintiffs challenge the following language on page 2 of the May 2022 Manual: "Political parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day."

(Emphasis added.) Plaintiffs argue that political parties should be permitted to appoint or credential election challengers *on* Election Day as well. In their response brief, defendants acknowledge that "challengers appointed on Election Day . . . will be accepted." In their reply brief supporting summary disposition, defendants state more directly, that "neither the form nor the guidance will prevent appointing a challenger on Election Day." They explain that the guidance, which is not a rule, is intended to encourage parties to prepare ahead of time and not wait until Election Day to appoint most of their election challengers.

The Court agrees with plaintiffs that MCL 168.730 and MCL 168.731 authorize political parties to appoint and credential challengers on Election Day. The Court also accepts defendants' acknowledgment that the language "until Election Day" is not intended to, and should not, prohibit the appointment and credentialing of election challengers on Election Day. Because changes to the May 2022 Manual are required in any event, the Court will order defendants to clarify this provision (e.g., "… until or on …").

3. Communication Through Only the "Challenger Liaison." Both sets of plaintiffs challenge language in the May 2022 Manual requiring that challengers may only communicate with a particular election inspector, designated as the "challenger liaison." On page 6, the May 2022 Manual states in relevant part (with bold in the original), "**Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff**." The manual adds on the same page, "Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." If the challenger violates these provisions, the challenger is subject to a warning, and repeated violations may lead to ejection of the challenger, according

to the manual. Plaintiffs argue that the manual's limitation on which inspectors the challengers may interact with violates MCL 168.733(1)(e), which provides that a challenger may bring certain issues to "an election inspector's attention" without restriction to a *particular* inspector.

The authority to designate a "challenger liaison" is absent from the Michigan Election Law—in fact, the very label appears nowhere in statute. Defendants have not presented this Court with any statute, common law, case law, or promulgated rule that gives them the authority to restrict with which election inspector a challenger can communicate. Our Legislature provided a challenger the right to communicate to "an" election inspector, and defendants cannot artificially restrict that to a designated inspector. Whether it makes sense to have such a liaison is one thing; it is another thing entirely to require, at the risk of being ejected, a challenger to speak to only the designated liaison. This provision of the May 2022 Manual goes well beyond what is provided in law and impermissibly restricts a challenger's ability to bring certain issues to any inspector's attention. Accordingly, the manual must be revised to make clear that a challenger need not bring an issue to the attention of only a liaison challenger, but instead can bring such issue to the attention of any election inspector at the applicable location.

4. *Electronic Devices in AVCB.* Next, plaintiffs challenge language in the May 2022 Manual restricting the possession of electronic devices, including cell phones, in AVCB facilities. (As an aside, the Court notes that while the October 2020 manual also prohibited electronic devices in AVCB facilities, there is nothing in the record to suggest that the manual was challenged in court on these grounds.)

On this topic, the May 2022 Manual provides: "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." According to the manual, election challengers may possess electronic devices at in-person polling places if the device is not disruptive or used to record activity in the polling place, but election challengers may not similarly possess electronic devices within AVCB facilities until after the polls close.

As a penalty, according to the manual, a challenger who possesses an electronic device is subject to ejection from the AVCB facility, because doing so would purportedly violate the oath that the challengers take upon entering the facility. Page 21 of the May 2022 Manual adds that challengers may not "[u]se a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility." And page 23 of the May 2022 Manual states that poll watchers are subject to the same restrictions as credentialed challengers, and are also subject to ejection for failing to follow the instructions.

The May 2022 Manual is unclear on whether the prohibition applies to everyone in the AVCB facility or just election challengers and poll watchers. On October 14, 2022, the Court ordered the parties to submit letters addressing the scope of the electronic-device prohibition. In their letter of October 18, 2022, defendants represented to the Court, "The exclusion of cell phone and other devices is *not* limited to poll watchers and challengers. Election workers and inspectors are also prohibited from communicating information out of the AVCB and are prohibited from leaving . . . pursuant to MCL 168.765a(9)-(10)." But defendants conflate here their unpromulgated ban on the mere possession of an electronic device with our Legislature's statutory ban on a specific use of an electronic device (i.e., to communicate certain election information before the polls close). In any event, even if the electronic-device ban applies alike to challengers and poll

watchers as well as election workers and inspectors, the penalties outlined in the May 2022 Manual only apply to challengers and poll watchers—not election workers and inspectors.

Defendants have taken the position that the only persons permitted to have electronic devices in the AVCB facility before the polls close are certain "authorized individuals." In its October 14, 2022, Order, this Court asked the parties to identify the "authorized individuals," and explain from where their authority came. In response, defendants cited MCL 168.765a(12).

This statute permits certain individuals to enter and leave the AVCB facility before the polls close, including: the local election official who established the AVCB; the deputy or employee of such an official; a Bureau of Elections employee; a county clerk; a county-clerk employee; and a representative of the voting equipment company. These individuals can enter the AVCB facility only to respond to an inquiry or to provide instructions on AVCB operations. *Id.* But MCL 168.765a(12) is utterly silent with respect to whether these authorized individuals are to be treated different from challengers in terms of their ability to carry electronic devices. Nor does MCL 168.765a(12) provide that election challengers may *not* possess electronic devices in the AVCB facility, or that the election challengers who violate the electronic-device ban should be subject to penalties to which "authorized individuals" are not subject.

Defendants also rely on MCL 168.765a(9) and (10) to support their ban on the possession of electronic devices in the AVCB facility. MCL 168.765a(9) requires election inspectors, challenges, and any other person present in the AVCB facility to take 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.' " MCL 168.765a(10) adds, in relevant part,

that "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." The statute also provides that a person whose conduct causes the polls to close or who discloses an election result is guilty of a felony. *Id.*

Thus, MCL 168.765a(9) and (10), collectively, prohibit a challenger from disclosing information relating to the processing of absentee ballots before the polls close, the disclosure of which is a felony. But MCL 168.765a does *not* categorically prohibit the possession of electronic devices in the AVCB facility or otherwise suggest that physical sequestration includes (or equates to) a prohibition on the possession of electronic devices. In reality, defendants' electronic-device ban is a prophylactic measure designed to prevent potential disclosure of absentee-vote information, which Director Brater appears to acknowledge in ¶47 of his affidavit.

MCL 168.765a was enacted four years ago as a provision in a 2018 update to the Michigan Election Law. See 2018 PA 123. Our Legislature amended the same statute twice in 2020. See 2020 PA 95 and 2020 PA 177. Cell phones and other electronic devices have been prevalent for decades and have long had the capability to record. In the face of the existence of these devices, our Legislature did not see fit to ban them in AVCB facilities when it added section 765a to the Michigan Election Law in 2018 or when it amended the statute twice in 2020. Rather, our Legislature enacted two different prophylactic measures to guard against the communication of election-related information—i.e., first, the taking of an oath, and second, physical sequestration at the AVCB facility—and, for violating either measure or otherwise communicating election-related information, our Legislature imposed the penalty of a felony conviction. See MCL 168.765a(9) and (10). Our Legislature could have added a third prophylactic measure, maybe even the one favored by defendants, but it chose not to do so. When our Legislature enacts a public

policy in one particular way but not another, its choice must be respected and enforced by the other two branches. *Spalding v Swiacki*, 338 Mich App 126, 138; 979 NW2d 338 (2021) ("When the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional.").

The Court is cognizant of, and frankly shares, defendants' concerns about the security of absentee-ballot counting. But there is nothing in the Michigan Election Law that precludes a challenger from merely possessing an electronic device in the AVCB facility. Nor have defendants promulgated a rule through public notice-and-comment rulemaking that might have given them the lawful authority to impose such a ban. Prohibiting electronic devices in the AVCB facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule. The Court declines to read a prophylactic measure into a statute that does not appear in its plain language.

Finally, defendants cite the Sixth Circuit's decision in *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016), a case involving a federal district court's preliminary injunction preventing the state from enforcing a ban on "ballot selfies." *Crookston* involved the question whether a photography ban at the polls was a content-neutral regulation that placed a reasonable restriction on the plaintiff's constitutional rights, or whether it impermissibly impinged on the plaintiff's First-Amendment rights. *Id.* at 400. The court stayed the district court's preliminary injunction, applying the doctrine of laches and concluding that "the tardiness of Crookston's motion for a preliminary injunction alone requires us to reject it." *Id.* at 399.

The court continued its analysis, in what was arguably dicta, and explained that it was "skeptical . . . of the district court's assessment of Crookston's odds of success on the merits." *Id.* at 399-400. The court explained that the photograph ban "seems to be" a content-neutral regulation reasonably protecting the privacy of voters. *Id.* at 400. Ultimately, the court concluded that the state's interest in a stay outweighed any imposition on the plaintiff's First-Amendment rights. *Id.* But the court noted that it was "not clear" whether the selfie ban significantly impinged on the plaintiff's First-Amendment rights. *Id.* The court then stated, "To be clear, we are not resolving the merits of the case," leaving the issue for another day. *Id.* at 401. As defendants note in their brief, the court never addressed the merits because the parties settled.

This Court does not read *Crookston* as granting defendants broad-stroke authority to prohibit the mere possession of electronic devices in the name of voter privacy; the Sixth Circuit never reached that sweeping conclusion (or any conclusion on the merits, for that matter). Because defendants lack any legal basis to prohibit election challengers from possessing electronic devices in the AVCB facility, the May 2022 Manual must be revised accordingly.

To be clear to the parties and any other challenger, poll watcher, election inspector, election official, election worker, or any person in an AVCB facility: Nothing in this Court's Opinion and Order should be read to permit a person to *use* an electronic device in a way that violates the Michigan Election Law. Our Legislature has made it a felony to communicate—*in any way* before the polls close—any information relative to the processing or tallying of votes that may come to the person. One practical way that a person can reduce the risk of being suspected of violating MCL 168.765a would be for that person to leave any electronic device outside the facility. If an election inspector or other official has a reasonable suspicion that a person has used an electronic-

communication device to communicate prohibited information, that person is subject to removal and potential criminal prosecution.

5. *Making a Record of "Impermissible" Election Challenges.* Finally, the DeVisser Plaintiffs challenge language in the May 2022 Manual limiting what types of challenges are recorded in the poll book. The May 2022 Manual states in relevant part, "A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below . . . If the challenge is rejected, the reason for that determination must be recorded in the poll book. . . . An impermissible challenge, as explained below, need not be noted in the poll book." The May 2022 Manual explains that the challenger liaison is responsible for adjudicating each challenge by determining if it is impermissible, rejected, or accepted. The O'Halloran Plaintiffs also take issue with language in the May 2022 Manual preventing the challengers from making "repeated impermissible challenges."

The May 2022 Manual defines an "impermissible challenge" to include "[c]hallenges made to something other than a voter's eligibility or an election process," "[c]hallenges made without a sufficient basis," or "[c]hallenges made for a prohibited reason." The May 2022 Manual makes explicitly clear, "**Election inspectors are not required to record an impermissible challenge in the poll book.**" In his affidavit, Director Brater explains that the Bureau of Elections incorporated this new language because the Bureau received reports of "an increased volume of challenges that were not based on any permitted reason in the Michigan Election Law."

The labels "permissible challenge" and "impermissible challenge" are not found in the Michigan Election Law. Our Legislature has made clear that, when a challenge is made to the voting rights of a person—regardless of who makes the challenge—"an election inspector *shall*

immediately . . . Make a written report [including certain information] . . . [and] Retain the written report . . . and make it a part of the election record." MCL 168.727(2)(b) and (c) (emphasis added). There is no discretion available to the election inspector not to record a so-called "impermissible challenge" to a person's voting rights under MCL 168.727(1). Thus, to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.*

With respect to a challenger's claim that *does not* involve a particular person's right to vote (i.e., a reason other than those listed in MCL 168.727(1) or MCL 168.733(1)(c)), our Legislature does not require that any specific report be generated, and the parties have not pointed this Court to any promulgated rule that would so require. See MCL 168.733. So, for example, if a challenger brings to an election inspector's attention the purported improper handling of a ballot by an election worker, our Legislature does not require that a report of that matter be recorded by the election inspector. See *id.* It certainly seems advisable to make a record of such alleged instances, and our Legislature expressly permits a challenger to "[k]eep records of . . . other election procedures as the challenger desires." MCL 168.733(1)(h). But, defendants have the discretion to adopt a system of recordkeeping for these non-voter's rights challenges, and the one identified in the May 2022 Manual is reasonable, except as otherwise explained here. Defendants will need to revise the May 2022 Manual to make clear that the exception for not recording so-called "impermissible challenges" has no applicability to challenges involving voting rights set forth in MCL 168.727 or MCL 168.733(1)(c).

On the prohibition against making repeated "impermissible challenges," the May 2022 Manual warns challengers (with bold in the original), "**Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**" May 2022 Manual, p 11. The authority for this warning is not apparent. A challenger can be removed for drinking alcohol or disorderly conduct in a polling place or AVCB facility. MCL 168.733(3). The "disorderly conduct" prohibition would necessarily cover someone who commits a felony in an AVCB facility by, for example, divulging certain prohibited information or violating the specific sequestration requirements. Defendants have not pointed this Court to any other part of the Michigan Election Law or a promulgated rule that would permit expulsion merely for several challenges that an election inspector deems to be "impermissible." Only if a challenger's repeated, unfounded challenges rise to the level of "disorderly conduct" does the law permit that challenger's expulsion. The language in the May 2022 Manual must be modified to make this clear.

D. LACHES

The Court lastly turns to defendants' laches argument. "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). The key for laches is not the passage of time alone, but rather, the effect that the delay has had on the defendants. *Id.* at 115. The doctrine is particularly applicable in election matters. See *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972); see also *Purcell v Gonzalez*, 549 US 1, 5-6; 127 US 5; 166 L Ed 2d 1 (2006) (per curiam); *Crookston*, 841 F3d at 398; MCL 691.1031.

The question whether laches applies in these cases is an interesting one. Unlike a challenge to a candidate's eligibility to run for office, there is no potential in this circumstance that a party could lose any specific right, such as the right to vote. But even if laches *could* apply, the Court declines to exercise its equitable authority under the facts presented.

To start, defendants have not demonstrated that plaintiffs failed to act with due diligence. The Bureau of Elections amended the manual in May 2022, but it did not highlight or redline the changes from the October 2020 iteration of the document. The O'Halloran Plaintiffs have presented the Court with evidence that, once they discovered the changes in the revised document, they communicated with defendants about their disagreements as early as July 2022. The DeVisser Plaintiffs allege that they discovered the revisions to the May 2022 Manual on the night of the August 2022 primary election, when those changes were put into practice. The DeVisser Plaintiffs wrote to defendants to address their concerns with the May 2022 Manual shortly thereafter. Since that time, plaintiffs obtained legal counsel to sue on their behalf, and they sued in late September 2022. Thus, plaintiffs did not simply sit on their hands for four months, as defendants argue.

More critically, on the issue of prejudice, the May 2022 Manual is merely instructive—it does not (and cannot) independently create *any* new, mandatory requirement, with the narrow exception of MCL 168.765a(13), not applicable here. Defendants have acknowledged in these proceedings that the May 2022 Manual does not have the force and effect of law. Moreover, these proceedings are not similar to *Davis v Benson*, Court of Claims Docket Nos. 20-000207-MZ and 20-000208-MZ, where this Court applied the doctrine of laches, in part, because of the impending need to print millions of paper ballots, some of which were to be mailed overseas to our military personnel.

Theoretically, the November 2022 general election can take place without any challenger guidance. Alternatively, the Bureau of Elections can revise the May 2022 Manual (or even the October 2020 version) to comply with this Opinion and Order. This Court's several findings are relatively narrow in scope, and there is nothing in the record to suggest that revising the May 2022 Manual to conform with this Court's Opinion and Order would be time consuming or otherwise onerous. The May 2022 Manual resides as a PDF on defendants' website and, in today's world, the manual could be widely disseminated in a matter of minutes, if not seconds. In fact, defendants acknowledge in their brief that they revised and disseminated the prior version of the manual in October 2020—only a month before the November 2020 general election.

Thus, the Court is not persuaded by defendants' and amicus's argument that revising the May 2022 Manual and updating election personnel about the revisions will present an onerous burden. Accordingly, the Court declines to exercise its equitable authority on laches.

III. CONCLUSION

Accordingly, the Court orders as follows:

IT IS ORDERED that the relief sought by the DeVisser Plaintiffs on Counts I and II of their complaint is **GRANTED IN PART** and **DENIED IN PART**. Under MCR 2.116(I) and MCR 2.605, the Court concludes that the DeVisser Plaintiffs' claims set forth in Paragraph 30 of their complaint are well-founded in fact and law, and, as a result, the Court declares that defendants have violated the Michigan Election Law and the APA, as explained in this Opinion and Order. The May 2022 Manual, in and of itself, does not have the force and effect of law and defendants are enjoined from using or otherwise implementing the current version of the May 2022 Manual

to the extent that such enforcement, use, or implementation would be inconsistent with this Opinion and Order.

The DeVisser Plaintiffs also request that this Court order defendants to rescind the current manual and use an earlier one. This Court has not been asked to review the October 2020 version of the manual with respect to the claims raised herein. Instead, **IT IS FURTHER ORDERED** that defendants shall have the discretion either to (1) rescind the May 2022 Manual in its entirety; (2) revise the May 2022 Manual to comply with this Opinion and Order; or (3) revise an earlier iteration of the manual to comply with this Opinion and Order. All other relief sought by the DeVisser Plaintiffs is **DENIED**.

IT IS FURTHER ORDERED that the O'Halloran Plaintiffs' emergency motion for declaratory and injunctive relief is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** to the extent consistent with this Opinion and Order and otherwise **DENIED** in all other respects, as explained in this Opinion and Order.

IT IS FURTHER ORDERED that defendants' motion for summary disposition is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** to the extent that plaintiffs request that this Court strike the May 2022 Manual in its entirety, and it is likewise **GRANTED** to the extent that the O'Halloran Plaintiffs seek relief broader than such relief already ordered herein by this Court. The motion is otherwise **DENIED** in all other respects, as explained in this Opinion and Order.

IT IS FURTHER ORDERED that DAPRI's motion to intervene as a party defendant is **DENIED**. DAPRI's alternative request to participate as an amicus curiae is **GRANTED**, and its brief is accepted as-filed.

IT IS SO ORDERED. This is the final order and closes each of the consolidated cases.

Date: October 20, 2022

Hon. Brock A. Swartzle
Judge, Court of Claims

EXHIBIT TO COURT'S OPINION AND ORDER OF OCTOBER 20, 2022

The Appointment, Rights, and Duties of Election Challengers and Poll Watchers

May 2022

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
(517) 335-3237

I. Introduction

This publication is designed to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan. Election challengers and poll watchers play a constructive role in ensuring elections are conducted in an open, fair, and orderly manner by following these instructions.

Challengers and poll watchers should familiarize themselves with the instructions and directions in this publication governing their conduct, rights, and responsibilities. Election inspectors should likewise familiarize themselves with the instructions and directions in this publication, including their duties to record challenges and their powers to maintain order at the polls.

Any questions or concerns about the procedures laid out in this document may be sent to BOERegulatory@michigan.gov.

II. Challengers

Challenger-Credentialing Organizations

Credentialing organizations are organizations eligible to appoint and credential challengers in Michigan. Credentialing organizations must be one of the following:

- A political party eligible to appear on the ballot in Michigan;
- An organized group of citizens interested in the passage or defeat of a ballot proposal being voted on at that election;
- An organized group of citizens interested in preserving the purity of elections and guarding against the abuse of the elective franchise; or
- An incorporated organization.

A credentialing organization appoints a challenger by giving a person a credential indicating that the person is serving as a challenger on behalf of the organization. This process is known as credentialling. The credential must conform to the standards set out later in this publication.

Candidates, candidate committees, or organizations formed to support or oppose candidates are not eligible to appoint or credential challengers.

Challenger Credentialing By Political Parties

Political parties eligible to appear on the ballot may appoint or credential challengers at any time until Election Day. A challenger is appointed when they are given a credential by a representative of the political party. Political parties do not need to apply for approval by local election officials in the same way that other challenger-credentialing organizations must be approved; however, political parties should notify local clerks of their intention to appoint or credential challengers prior to Election Day.

Challenger Credentialing By Other Qualified Organizations

All other qualified organizations wishing to appoint or credential challengers must file an application to field challengers with the clerk of each county, city, or township in which the organization intends to field challengers. The application must be filed no less than 20 and no more than 30 calendar days prior to Election Day. The application consists of a written statement indicating the organization's intent to field challengers in that jurisdiction, the reason that the organization believes itself to be an organization qualified to field challengers under the criteria set out above, and a copy of a completed *Michigan Challenger Credential Card* form that the organization will distribute to its challengers. The statement must be signed and sworn by an officer of the organization.

Within two business days of receiving an application from an organization wishing to appoint challengers, the clerk must approve or deny the application and notify the group of the approval or denial. The clerk may deny the application if the group or organization fails to demonstrate that it is qualified to appoint challengers under the criteria explained above or if the application is not timely filed. If the application is denied, the organization may appeal the denial to the Secretary of State within two business days of receiving notice of the clerk's decision. Within two business days of receiving the appeal, the Secretary of State will render a decision on the appeal and notify the organization and the local clerk of that decision.

An organization wishing to appoint or credential challengers whose application is approved by a county clerk is qualified to appoint or credential challengers in any jurisdiction within that county, even if the organization has not filed an application with each specific city or township in the county.

Each county clerk must notify the clerk of every city and township within their county of all political parties and other organizations who have been approved to appoint challengers within their county. Each municipal clerk

must notify election inspectors at all precincts in the clerk's jurisdiction of all political parties and other organizations qualified to appoint and credential challengers within that jurisdiction prior to the opening of the polls on Election Day.

Eligibility to Serve as a Challenger

A person may serve as a challenger only if the person is registered to vote in Michigan and only if the person is provided a challenger credential by a credentialing organization. The credential must be specific to the election at which the person is serving as a challenger; a credential issued for a prior election does not entitle a person to serve as a challenger at a future election. A person cannot serve as a challenger if the person is serving as an election inspector during the same election. Additionally, a person cannot serve as a challenger if the person is running for nomination or for office during the same election, with the exception that precinct delegate candidates can serve as challengers so long as they do not serve at the precinct in which they are running for office.

Training of Challengers

Credentialing organizations are responsible for the behavior and actions of challengers that they credential. As such, credentialling organizations are strongly encouraged to provide challengers with training on both the basic aspects of election administration in Michigan and the rights and duties of challengers in Michigan. Providing challengers with a basic understanding of election administration will allow challengers to fully participate in the election process and to make informed challenges without disrupting or delaying election-related activities. Providing challengers with an explanation of their rights and duties will allow them to realize the full benefit of their status without violating the law.

Challengers should be provided training that is specific to the type of election-related location at which the challenger will be serving. For example, a challenger who will be serving at an absent voter ballot processing facility should be trained in how absent voter ballots are processed, while a challenger serving at a polling place where voters are casting ballots on Election Day should be trained on in-person voting processes. Failure to tailor training confuses challengers about which procedures should be followed in different types of locations, which may lead to confusion, ineffective observation, and impermissible challenges.

III. Rights and Duties of Challengers When Observing Election-Related Procedures

Challengers' Obligation to Follow Election Inspector Directions

Election inspectors are empowered and obligated to maintain order and facilitate the peaceful conduct of elections at the polling place or absent voter ballot processing facility in which the election inspector is serving. **Challengers present at a polling place or absent voter ballot processing facility must follow the directions of the election inspectors operating the polling place or absent voter ballot processing facility.** The directions election inspectors may give to challengers include, but are not limited to:

- Directing challengers on where to stand and how to conduct themselves in accordance with these instructions;
- Directing challengers to cease any behavior prohibited by these instructions;
- Directing challengers to cease any behavior that intimidates voters or disrupts the voting process; and
- Directing a challenger who violates these instructions to leave the polling place or absent voter ballot processing facility, or requesting that the local clerk or local law enforcement remove the challenger from the polling place or absent voter ballot processing facility.

Form of Challenger Credential

Under Michigan law, each challenger present at a polling place or an absent voter ballot processing facility must possess an authority signed by the chairman or presiding officer of the organization sponsoring the challenger. This authority, also known as the *Michigan Challenger Credential Card*, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is

invalid and the individual presenting the form cannot serve as a challenger. The credential may not be displayed or shown to voters.

A credential form may be digital and may be presented on a phone or other electronic device. If a challenger uses a digital credential, the credential must include all of the information required on the template credential form promulgated by the Secretary of State. A digital credential should not include any information or graphics that are not included or requested on the template credential form. If a challenger using a digital credential is serving in an absent voter ballot processing facility on Election Day, the challenger must display the credential to the appropriate election official, gain approval to enter the facility, and then store the device in a place outside of the absent voter ballot processing facility. Electronic devices are not permitted within the absent voter ballot processing facility.

Clerks may allow or require challengers serving at a polling place on Election Day or at a clerk's office at any time that voters are present to wear a reasonably sized nametag or badge. The nametag or badge cannot include any text or graphics aside from the challenger's name and the words "election challenger". The nametag must be printed on white paper, and the words "election challenger" must be printed in black ink.

Clerks may allow or require challengers serving in absent voter ballot processing facilities where voters are not present to wear nametags or badges that identify challengers and the organization represented by the challenger.

Challenger Liaison

Every polling place or absent voter ballot processing facility should have an election inspector designated as the challenger liaison. Unless otherwise specified by the local clerk, the challenger liaison at a polling place is the precinct chairperson. The challenger liaison or precinct chairperson may designate one or more additional election inspectors to serve as challenger liaison, or as the challenger liaison's designees, at any time. Unless otherwise specified by the local clerk, the challenger liaison at an absent voter ballot processing facility is the most senior member of the clerk's staff present, or, if no members of the clerk's staff are present, the challenger liaison is the chairperson of the facility. Unless otherwise specified by the local clerk, the challenger liaison at the clerk's office is the most senior member of the clerk's staff present.

Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff.

Challenger Identification Upon Entering Polling Place or Absent Voter Ballot Processing Facility

Upon arriving at a polling place, an absent voter ballot processing facility, or a clerk's office, a challenger must introduce themselves and show their credential to the challenger liaison or their designee. A challenger cannot make challenges or take advantage of any of the other rights afforded to challengers until they have properly made their presence known to the challenger liaison. The challenger's name, the organization which the challenger represents, and the time of the challenger's arrival should be noted in the poll book.

If the challenger leaves a polling place prior to the close of polls, the challenger shall inform the challenger liaison of their departure. A challenger may not leave an absent voting ballot processing facility prior to the close of polls on Election Day. The challenger's departure and time of departure should be noted in the poll book.

Communication with Election Inspectors and Election Officials

Challengers must communicate only with the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers may not communicate with voters.

Challenger liaisons must be readily accessible to communicate with challengers, to answer questions about the voting and tabulating procedures, and to record any challenges made.

Challengers at Clerks' Offices

Each credentialing organization may assign one challenger to observe the issuance and receipt of absent voter ballots at a clerk's office or a satellite location maintained by the clerk. A challenger may be present only in areas of the clerk's office where an absent voter ballot may be requested. A

challenger may be present in the clerk's office only when the office is open for business and during the period prior to an election when voters may request or return an absent voter ballot at the office. A challenger present in a clerk's office may not view the Qualified Voter File.

Challengers at Polling Places

Only two challengers from any political party or other credentialing organization may be present at a precinct conducting in-person voting on Election Day. If two challengers from the same credentialing organization are present, both challengers enjoy the rights afforded to challengers, except that at any given time only one of the two challengers can be designated to make challenges. The challengers must make known to the challenger liaison which of the two challengers is designated to make challenges. The challengers may agree to change which challenger is designated to make challenges at any time, but the challengers must inform the challenger liaison of that change.

Challengers at Absent Voter Ballot Processing Facilities

Challengers have a right to be present at locations where absent voter ballots are removed from envelopes and tabulated. These locations are referred to as absent voter ballot processing facilities in this publication. Absent voter ballot processing facilities do not include a clerk's office or other locations where absent voter ballots are stored, signatures appearing on absent voter ballot envelopes are checked, or other activities are conducted prior to absent voter ballots being removed from absent voter ballot envelopes and prepared for tabulation.

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

counting board or combined absent voter counting board in each of these scenarios.

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

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

The clerk must make publicly available the number of challengers each credentialing organization will be allowed to field in the absent voter ballot processing facility at least seven calendar days prior to the election.

The challenger liaison serving at an absent voter ballot processing facility must administer an oath to any challenger wishing to serve in that facility:

> "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."

A challenger may not enter the absent voter ballot processing facility without taking this oath and signing a document acknowledging the oath. Any person who violates this oath is guilty of a felony.

Once tallying of votes has begun on Election Day, challengers serving at an absent voter ballot processing facility, like all persons present in an absent voter ballot processing facility, are sequestered at the facility and cannot leave until the close of polls at 8 p.m. on Election Day. If absent voter ballot processing or tabulation continues after the close of polls, challengers must be permitted to remain in the absent voter ballot processing facility at any time when absent voter ballots are being processed until processing and tabulation is complete.

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.

A challenger who is ejected from an absent voter ballot processing facility after the tallying has begun but before the close of polls is still bound by their legal obligation to remain sequestered until the close of polls. To avoid breaching that obligation, the challenger liaison or the clerk should direct the challenger to remain in a room or area of the location containing the absent voter ballot processing facility, but which is separated from the area where absent voter ballots are being processed.

A challenger who breaks sequestration by prematurely leaving the location containing an absent ballot processing facility before the close of polls – whether or not due to an ejection from the facility itself – violates the oath they took upon entering the facility.

Excess Challengers at an Election-Related Location

A credentialing organization may field no more than the number of challengers set out in the above sections at any clerk's office, in-person precinct, or absent voter ballot processing facility. If the credentialing organization already has the total number of challengers allowed present in a particular location, additional challengers credentialed by that organization cannot act as challengers in that location. At the clerk or challenger liaison's discretion, additional challengers seeking access to the location may be given the option to serve as poll watchers in that location. Challengers who agree to act as poll watchers have none of the rights specifically afforded to challengers and must adhere to the same standard of conduct and observe the same rules as any other poll watcher. The rights and duties of poll watchers are set out at the end of this document.

Generally, a credentialing organization will be allowed to replace challengers credentialed by that organization with other challengers credentialled by that organization so long as the replacement process does not disrupt the work of election inspectors or clerk staff present in the location. Because of the sequester, credentialing organizations cannot replace challengers present in facilities processing absent voter ballots prior to the close of polls on Election Day, but credentialing organizations may replace challengers in those locations after the close of polls. In no case during the replacement process

may a credentialing organization have more challengers present in a particular location than would be allowed by the other provisions of this document.

Making Challenges

A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below. Assuming the challenge is permissible, the substance of the challenge, the time of the challenge, the name of the challenger, and the resolution of the challenge must be recorded in the poll book. If the challenge is rejected, the reason for that determination must be recorded in the poll book.

An impermissible challenge, as explained below, need not be noted in the poll book.

Adjudicating and Recording Challenges

There are three categories of challenges: impermissible challenges, rejected challenges, and accepted challenges. The challenger liaison is responsible for adjudicating each challenge by categorizing each challenge and determining what, if any, action should be taken in response to the challenge.

Impermissible Challenges

Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:

- Challenges made to something other than a voter's eligibility or an election process;
- Challenges made without a sufficient basis, as explained below; and
- Challenges made for a prohibited reason.

Election inspectors are not required to record an impermissible challenge in the poll book. If it is possible to make a note without slowing down the voting or absent voter ballot tabulation process, the election inspector is encouraged to note the content of an impermissible challenge in the poll book, as well as any warning given to the challenger making that impermissible challenge. If the challenger makes multiple impermissible challenges, the election inspector is likewise encouraged to note the general basis of those challenges and the approximate number of challenges, if the election inspector can make that note without slowing down the election

process. In all circumstances, however, the election inspector should prioritize the orderly and regular administration of the election process over noting an impermissible challenge.

Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.

Rejected Challenges

Rejected challenges are challenges which are not impermissible, but which the challenger liaison does not accept. Whether a challenge is permissible but rejected is a context-specific determination that depends on the type of challenge being made. The process for determining whether a challenge to an election process or a voter's eligibility is rejected is set out below in the relevant sections. If a challenge is permissible but rejected, the following information must be included in the poll book:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and
- The reason why the challenge was rejected.

Accepted Challenges

Accepted challenges are challenges which are permissible and which the challenger liaison deems correct. If a challenge is accepted, the following information must be included in the poll book:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and
- The actions taken by the election inspectors in response to the challenge.

Challenges to a Voter's Eligibility

A challenger may make a challenge to a voter's eligibility to cast a ballot only if the challenger has a good reason to believe that the person in question is not a registered voter. There are four reasons that a challenger may challenge a voter's eligibility; **a challenge made for any other reason than those listed below is impermissible**. The four permissible reasons to challenge a voter's eligibility are:

1. The person is not registered to vote;

2. The person is less than 18 years of age;
3. The person is not a United States citizen; or
4. The person has not lived in the city or township in which they are attempting to vote for 30 or more days prior to the election.

The challenger must cite one of the four listed permissible reasons that the challenger believes the person is not a registered voter, and the challenger must **explain the reason the challenger holds that belief**. If the challenger does not cite one of the four permitted reasons to challenge this voter's eligibility, or cannot provide support for the challenge, the challenge is impermissible.

A challenger may challenge a voter's eligibility only by making a challenge to the challenger liaison or the challenger liaison's designee. **The challenger must make the challenge in a discrete manner not intended to embarrass the challenged voter, intimidate other voters, or otherwise disrupt the election process.** An election inspector will warn a challenger who violates any of these prohibitions; if a challenger repeatedly violates any of these prohibitions, the challenger may be ejected from the polling place.

Impermissible Challenge to Voter's Eligibility: Improper Reason for Challenge

A challenger may not challenge a voter's eligibility for any reason other than the four reasons above. Any challenge made for a reason other than those four reasons is impermissible and should not be considered by the challenger liaison or recorded by the election inspectors. Improper reasons for making a challenge to a voter's eligibility include, but are not limited to, the following:

- the voter's race or ethnic background;
- the voter's sexual orientation or gender identity;
- the voter's physical or mental disability;
- the voter's inability to read, write, or speak English;
- the voter's need for assistance in the voting process;
- the voter's manner of dress;
- the voter's support for or opposition to a candidate, political party, or ballot question;
- the appearance or the challenger's impression of any of the above traits; or
- any other characteristic or appearance of a characteristic that is not relevant to a person's qualification to cast a ballot.

Impermissible Challenge to Voter's Eligibility: Non-Specific Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot specify under which of the four permissible reasons the challenger believes the voter to be ineligible to vote, or if the challenger refuses to provide a reason for the challenge to the voter's eligibility.

Impermissible Challenge to Voter's Eligibility: No Explanation for Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot provide a reason for their belief that the voter is ineligible to vote. For example, a challenger cannot simply state that they believe a voter to be ineligible because of their age or citizenship status; the challenger must explain why they believe the voter to be underage or why they believe the voter is not a United States citizen. The challenger liaison may deem the reason for the challenger's belief impermissible if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect.

Impermissible Challenge to Voter's Eligibility: Lack of Photo ID

A voter who signs an *Affidavit of Voter Not In Possession of Picture ID* cannot be challenged on the grounds that the voter is not in possession of photo identification. Any challenge on these grounds must be deemed an impermissible challenge, should not be recorded by the election inspectors, and the challenger must be warned that no such challenge is allowed.

Processing Challenges to a Voter's Eligibility

If a challenge to a voter's eligibility made at an in-person polling location is determined to be permissible, the challenge must be handled using the following process:

1. The voter is sworn in by the precinct chairperson or another election inspector using the following oath:

   "I swear (or affirm) that I will truly answer all questions put to me concerning my qualifications as a voter."

2. The election inspector who administered the oath asks the voter to confirm that they meet the criteria to be eligible to cast a ballot. The election inspector may ask the voter only the questions necessary to confirm that they meet the criteria disputed by the challenger; the election inspector may not ask the voter any other questions.
3. If, after questioning under oath, the voter confirms they are eligible to vote, the challenge is rejected and the voter is permitted to vote a challenged ballot. A challenged ballot is prepared by writing the voter's ballot number on the ballot and then covering the number with tape or a slip of paper. **The voter then completes the ballot and casts the ballot by feeding the ballot into the tabulator in the same manner as an unchallenged voter.**
4. If the voter does not confirm they are eligible to vote after questioning under oath, the challenge is accepted and voter is not allowed to cast a ballot.

The election inspector should take the challenged voter aside to administer the oath and ask the required questions. Election inspectors should administer the oath and ask the required questions in a manner that does not humiliate, degrade, or embarrass the challenged voter. The oath and questioning process should be carried out in a manner that does not unduly delay the challenged voter.

If a voter whose eligibility is permissibly challenged refuses to take the above oath or answer questions designed to verify the voter's eligibility, the challenge is accepted, and the voter cannot cast a ballot.

A challenger cannot appeal a determination that a challenged voter is eligible to vote on Election Day. Outstanding challenges to a voter's eligibility after Election Day may be adjudicated through the judicial process.

Recording a Challenge to a Voter's Eligibility

Permissible challenges to a voter's eligibility are recorded in both the electronic poll book and the paper poll book. When a voter's eligibility is permissibly challenged, the election inspector selects "Challenged Voter" in the electronic poll book, which automatically creates a notation of the challenge and the challenge's outcome. In addition, the election inspector should also record the challenge on the "Challenged Voters" page of the physical poll book. Finally, the election inspector should make a comment in the electronic poll book recording:

- The challenger's name;

- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; **or**
- If the challenge was accepted, the reason the challenge was accepted.

Because the only action taken by an election inspector in response to an accepted challenge to a voter's eligibility is to disallow that person from casting a ballot, and that denial is automatically recorded in in the poll book when the voter is not issued a ballot, the election inspector does not need to record any additional information about an accepted challenge to a voter's eligibility.

Challenges by an Election Inspector to a Voter's Eligibility

An election inspector shall make a challenge to a voter's eligibility if the election inspector knows or has good reason to suspect that the voter is not eligible to cast a ballot. Such a challenge is treated identically to a challenge made by a credentialed challenger as explained above – the election inspector must provide a specific and permissible reason that the election inspector believes the voter is ineligible to cast a ballot, and there must be some explanation for the election inspector's belief. If an election inspector wishes to challenge a voter's eligibility, the election inspector must make that challenge to the challenger liaison. If the election inspector making the challenge is the challenger liaison, the challenger liaison must make the challenge to another election inspector and the local clerk must be notified of the challenge. A challenge made to a voter's eligibility by an election inspector is recorded and resolved using the same process as a challenge made to a voter's eligibility by a credentialed challenger.

Challenges by a Voter to Another Voter's Eligibility

A registered voter of a precinct who is present at that precinct on Election Day may challenge the eligibility of another person to vote in that precinct if the challenging voter either knows or has good reason to suspect that the challenged person is not eligible to cast a ballot in that precinct.

Such a challenge is treated and resolved identically to a challenge made by a credentialed challenger as explained above. If a voter wishes to challenge a person's eligibility to vote under this mechanism, the election inspector must make that challenge to the challenger liaison.

A voter who is not credentialed as a challenger may only challenge the eligibility of persons attempting to vote in the precinct in which the

challenging voter is registered to vote. A voter who is not credentialed as a challenger cannot challenge persons attempting to vote in any other precinct, nor can they challenge the conduct of election processes. A voter making challenges to the eligibility of other voters in their own precinct may not make challenges designed to harass, annoy, or delay voters. A voter making challenges to the eligibility of other voters in their own precinct, like all persons present in the precinct, must follow the directions of the election inspectors assigned to the precinct.

Challenge to an Absent Voter in the Polls

A voter who requested an absent voter ballot may vote in person so long as their local clerk has not received their absent voter ballot by Election Day. In some situations these voters may be subject to challenge as an absent voter in the polling place. **A voter is subject to challenge as an absent voter in the polling place only if the poll book indicates that an absent voter ballot was sent to the voter and only if the voter does not surrender the absent voter ballot at the polling place on Election Day.**

Voters Who Surrender Their Absent Voter Ballot at the Precinct On Election Day

A voter who received an absent voter ballot but who surrenders that absent voter ballot to election inspectors at the polling place on Election Day may vote a regular ballot. **Such a voter is not subject to challenge as an absent voter in the polling place and a challenge on those grounds is impermissible.**

Voters Who Do Not Surrender Their Absent Voter Ballot at the Precinct on Election Day

A voter for whom the poll book indicates an absent voter ballot was sent may not have received the ballot, may have lost or destroyed the ballot, or may have mailed the ballot back to the clerk so close to Election Day that the ballot may not arrive in time to be counted. **In these situations, the election inspector must always call the local clerk to verify that the voter's absent voter ballot has not been returned to the clerk.** Once the clerk verifies to the election inspector that the absent voter ballot was not returned to the clerk, the voter must sign an affidavit of lost or destroyed absentee ballot stating that the voter did not successfully return

the ballot. Absent a challenger issuing a challenge against that voter, the voter is then permitted to cast a regular ballot.

A voter for whom the poll book indicates an absent voter ballot was mailed may be challenged as an absent voter in the polling place even after the clerk verifies the absent voter ballot has not been returned and after the voter signs the affidavit stating that the voter did not return the ballot; if such a voter is challenged, that voter is permitted to cast a challenged ballot. **So long as the clerk confirms that they have not received the voter's absent voter ballot, the voter is permitted to vote in the polling place on Election Day.** A challenged ballot is prepared by writing the voter's ballot number on the ballot, then covering the number with tape or a slip of paper. The voter then completes the ballot and casts the ballot by feeding the ballot into the tabulator in the same manner as an unchallenged voter.

A voter may only be challenged as an absent voter in the polling place if the poll book indicates that the voter was mailed an absent voter ballot. If the poll book does not indicate that the voter was mailed an absent voter ballot, the voter may not be challenged as an absent voter in the polling place.

Voter Eligibility Challenges Are Not Permissible at an Absent Voter Ballot Processing Facility

Challengers at absent voter ballot processing facilities may make challenges to election processes as described below. Permissible challenges at absent voter ballot processing facilities include challenges to ensure that the review of any portion of the absent voter ballot envelope reviewed at the absent voter ballot processing facility is properly completed. City and township clerks review the portion of the absent voter ballot envelope containing the absent voter's signature prior to Election Day, or when the ballot envelope is received by the clerk on Election Day, to ensure that the signature is genuine and the absent voter is eligible to cast a ballot. If the clerk has verified the signature and the absent voter's eligibility prior to the ballot envelope being transmitted to the absent voter ballot processing facility, neither challenges to the voter's signature nor to the voter's eligibility made at the absent ballot processing facility on Election Day are permissible.

Because an absent voter's eligibility is verified by the clerk prior to the absent voter ballot envelope being processed at the absent voter ballot processing facility on Election Day, election inspectors serving at the absent voter ballot processing facility are not responsible for verifying voter eligibility at the facility. Instead, election inspectors serving at the absent

voter ballot processing facility confirm that the clerk has verified the absent voter's eligibility to cast a ballot by confirming that the clerk has reviewed the signature section of the absent voter ballot envelope. Additionally, because the voters are not present at the absent voter ballot processing facility, the oath administration and questioning process set out in the Michigan Election Law and explained above cannot be carried out at an absent voter ballot processing facility and a challenged voter would have no chance to refute the challenge leveled against them. For these reasons, challenges to voter eligibility at absent voter ballot processing facilities are not permissible and need not be recorded.

Individuals who wish to contest the eligibility of an absent voter should raise those concerns with the clerk of the city or township in which the voter is registered to vote prior to Election Day as prescribed by the Michigan Election Law; no information about a particular voter's eligibility would be available to a challenger serving in an absent voter ballot processing facility which would not have also been available to the challenger prior to Election Day.

Challenges to an Election Process

A challenger may challenge a voting process, including the way that election inspectors are operating a polling place or processing absent voter ballots at an absent voter ballot processing facility. A challenge to an election process must **state the specific element or elements of the process that the challenger believes are being improperly performed** and **the basis for the challenger's belief**.

Impermissible Challenge to an Election Process

A challenge to an election process is impermissible and should not be recorded by the election inspectors if the challenger cannot identify a specific element or multiple elements of the process whose performance the challenger believes improper. A challenge to an election process is also impermissible if the challenger cannot adequately explain why the election process is being performed in a manner prohibited by state law. An explanation for a challenge to an election process must include an explanation of the proper performance of the element or elements in question but need not take the form of a direct citation to statute or election administration materials.

Rejecting a Challenge to an Election Process

A permissible challenge to an election process will be rejected if the challenger liaison determines that the specific element or elements of the election process being challenged are being carried out in accordance with state law. A challenger liaison's determination that a challenge to an election process is rejected may be appealed using the process laid out at the end of this document.

Accepting a Challenge to an Election Process

A permissible challenge to an election process will be accepted if the challenger liaison determines that the challenger is correct and that the specific element or elements of the election process being challenged are not being carried out in accordance with state law. The challenger liaison shall inform the relevant election inspectors how to properly carry out the process and take any other remedial action necessary to correct the error.

Recording Challenges to an Election Processes

A permissible challenge to an election process should be recorded in both the remarks section of the electronic poll book and on the "Challenged Procedures" section of the physical poll book. The record should include:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; **or**
- If the challenge was accepted, the reason the challenge was accepted, and any remedial actions taken in response to the challenge.

Challenges to Recurring Election Processes: Blanket Challenges

If a challenger wishes to challenge recurring elements of the election process, the challenger must make a blanket challenge. The blanket challenge shall be treated as a challenge to each occurrence of the process but need only be made and recorded in the poll book once. **A challenger may only challenge recurring processes through a blanket challenge; a challenger may not challenge every occurrence of a recurring process in lieu of making a blanket challenge.**

Rights of Challengers

A challenger who has made themselves known to the challenger liaison and who is in possession of a valid credential has the right to:

- Be present in the polling place;
- Make challenges to the challenger liaison or the challenger liaison's designee as provided in these instructions;
- Be treated with respect by election inspectors;
- Be provided with reasonable assistance in performing their duties as a challenger;
- Inspect applications to vote, registration lists, and other printed materials used to conduct elections, so long as the challenger does not touch or handle any of those materials and so long as the inspection does not impede the voting process;
- Observe election inspectors' preparation of voting equipment at the polling place before the opening of the polls on Election Day, and observe election inspectors' handling of voting equipment after the close of polls on Election Day, so long as the challenger does not touch or handle any of that equipment and so long as that observation does not impede the election inspectors in completion of their duties;
- Observe the election process from a reasonable distance, so long as election inspectors have sufficient room to perform their duties and voters are not impeded in any way;
- If serving in a polling place on Election Day, to use electronic devices, so long as the device is not disruptive and so long as the device is not used to make video or audio recordings of the polling place;
- Observe election-related activities at a polling place on Election Day at any time the polling place is open to the public, including prior to the opening of polls or after the closing of polls;
- Take notes about the election process;
- Notify the challenger liaison of perceived violations of election laws by third parties, including electioneering within 100 feet of the precinct, improper handling of a ballot by a voter, or other issues;
- Remain in the precinct after the close of polls or the end of tabulation and until the election inspectors complete their duties;
- If serving in a polling place where ballots are being issued, stand behind the processing table and close enough to view the poll book as ballots are issued to voters and the voters' names are entered into the poll book, so long as the challenger does not touch or handle the poll book or otherwise interfere with the work of the election inspectors; and
- If serving at an absent voter ballot processing facility, to stand in a location where the tabulation of absent voter ballots can be observed, or to stand in a location where the entry of the names of voters whose ballots are being processed into the poll book can be viewed, so long as the challenger does not touch or handle any election-related materials.

Restrictions on Challengers

Challengers may not:

- Speak with or interact in any way with voters;
- Threaten or intimidate voters or election inspectors, or attempt to threaten or intimidate voters or election inspectors at any stage of the voting process;
- Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff;
- Make repeated impermissible challenges;
- Make a challenge indiscriminately or without good cause, or for the purpose of harassing, delaying, or annoying voters, election inspectors, or any other person;
- Physically touch or interact with ballots, absent voter ballot envelopes, electronic poll books, physical poll books, or any other election materials;
- Stand so close to the poll book or other materials that the challenger's proximity to those materials interferes with the election inspectors' ability to perform their duties;
- Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility;
- Provide or offer to provide assistance to voters;
- Wear any clothing or other apparel relating to any party, candidate, or proposition on the ballot or which disrupts the peace or order of the polling place, unless the challenger is serving at an absent voter ballot processing facility and is given permission or instructed to wear such an identifier;
- Wear clothing or other apparel expressly advocating for or against the election of a candidate or advocating the passage or defeat of a ballot measure;
- Set up a table or other furniture in the polling place;
- If serving at an absent voter ballot processing facility, possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day; or
- Take any actions to disrupt or interfere with voting, ballot tabulation, or any other election process.

Warning and Ejecting Challengers

If a challenger acts in a way prohibited by this instruction set or fails to follow a direction given by an election inspector serving at the location at

which the challenger is present, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected.

A challenger who repeatedly fails to follow any of the instructions or directions set out in this manual or issued by election inspectors may be ejected by any election inspector. A challenger who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may also be ejected by any election inspector. The ejection should be noted in the poll book. If the challenger refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the challenger from the polling place or absent voter ballot processing facility.

As explained above, a challenger who is ejected from an absent voter ballot processing facility before the close of polls and while the challenger is subject to sequestration should, in lieu of being removed from the area containing the facility, be directed to remain in a room or area of the location separate from the area where absent voter ballots are being processed.

Challenger Appeal of Election Inspector Determinations

A challenger may appeal a decision by the challenger liaison or any other election inspector relating to the validity of a challenge, to a challenger's conduct, or to a challenger's ejection to the city or township clerk of the jurisdiction in which the challenger is serving. At the request of a challenger, the challenger liaison must provide the contact information of the city or township clerk. The appeal must be made outside of the hearing of voters. If the challenger is appealing their ejection, the appeal must be made after the challenger has left the polling place or absent voter ballot processing facility. If the city or township clerk rejects the challenger's ejection as improper, the clerk shall inform the challenger liaison and the challenger shall be allowed to reenter the polling place or absent voter ballot processing facility.

The challenger may appeal the decision of the local clerk to the Bureau of Elections.

A challenger may not appeal to the city or township clerk an election inspector's resolution to a challenge to a voter's eligibility to vote. Appeals of an election inspector's resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day.

IV. Poll Watchers

Members of the public who are not credentialed challengers have a right to observe elections. Members of the public wishing to observe elections, often referred to as poll watchers, do not enjoy the same rights as credentialed challengers. A person does not need to be registered to vote in Michigan to serve as a poll watcher in this state, but a candidate for elective office being voted on in the election cannot serve as a poll watcher. There is no particular number of poll watchers that must be admitted to any election-related location, but poll watchers must be permitted to observe the electoral process so long as the total number of poll watchers does not cause the process to be disrupted.

A poll watcher present in an absent voter ballot processing facility prior to the close of polls on Election Day is sequestered and cannot leave the facility between the time ballot tallying begins and the time that the polls close. Such a poll watcher must take the same oath as a challenger serving at the facility.

Rights of Poll Watchers

Poll watchers are allowed to be present in a polling place or an absent voter ballot processing facility. Clerks or challenger liaisons must designate a Public Viewing Area from which poll watchers can observe the electoral process. The Public Viewing Area must be placed in a location that does not interfere in any way with the work of election inspectors present in the location. If the location is a polling place, the Public Viewing Area must be situated so that the presence of poll watchers does not interfere with voters participating in the voting process. If the Public Viewing Area for a particular election location is full and cannot accommodate more poll watchers, and if the Public Viewing Area cannot be enlarged without disrupting election processes, the clerk or challenger liaison may deny entry to additional poll watchers. If the location is an absent voter ballot processing facility, the poll watcher must take the same oath as a challenger present at such a facility

and is bound by all the same restrictions as a challenger present at such a facility.

A poll watcher may request that the challenger liaison allow the poll watcher to view the poll book without handling it, but the challenger liaison may decline that request. A poll watcher may never handle the poll book or other election equipment or materials.

Restrictions on Poll Watchers

Poll watchers are subject to all of the same restrictions as credentialed challengers, including the prohibitions against speaking with voters and against speaking with election inspectors other than the challenger liaison without the challenger liaison's permission. In addition, poll watchers cannot:

- Issue challenges;
- Stand behind the election inspectors as voters are processed; or
- Be present in any part of the polling place, clerk's office, or absent voter ballot processing facility except the designated Public Viewing Area.

Ejection of Poll Watchers

A poll watcher who repeatedly fails to follow any of the above instructions, who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may be ejected by any election inspector. If the poll watcher refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the poll watcher from the polling place or absent voter ballot processing facility.

STATE OF MICHIGAN

COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.
_____/

OPINION AND ORDER

Case No. 22-000162-MZ

Hon. Brock A. Swartzle

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

Plaintiffs,

v

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

Defendants.
_____/

Case No. 22-000164-MM

Hon. Brock A. Swartzle

An executive-branch department cannot do by instructional guidance what it must do by promulgated rule. This straightforward legal maxim does most of the work in resolving these two consolidated cases. Similar to the holdings in *Davis v Benson*, unpublished opinion of the Court of Claims, issued October 27, 2020 (Docket Nos. 20-000207-MZ and 20-000208-MZ), and

Genetski v Benson, unpublished opinion of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), this Court concludes that defendants have exceeded their authority with respect to certain provisions in an election manual. With that said, this Court will not grant the entirety of the sweeping relief sought by plaintiffs in Docket Number 22-000162-MZ. Rather, as explained below, the Court will grant more narrow relief with respect to the five specific claims raised by plaintiffs in Docket Number 22-000164-MM.

I. BACKGROUND

Plaintiffs include several election challengers for the November 2022 general election; two candidates for the Michigan Legislature; the Michigan Republican Party; and the Republican National Committee. Section 730 of the Michigan Election Law, MCL 168.1 *et seq.*, permits political parties to designate challengers to be present in the room where the ballot box is kept during the election. MCL 168.730. These consolidated cases relate to a manual that the Michigan Bureau of Elections regularly issues relating to election challengers and poll watchers. By all accounts, the Bureau has issued several iterations of the manual since at least 2003; the one just prior to the current one was issued in October 2020. In May 2022, defendants drafted and published the current version titled, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" ("May 2022 Manual"). The Court attaches the May 2022 Manual to this Opinion and Order as an exhibit for ease of reference.

On September 28, 2022, plaintiffs Philip O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (collectively, "O'Halloran Plaintiffs"), sued defendants in this Court in Docket No. 22-000162-MZ. O'Halloran, Giacobazzi, and Cushman are designated election challengers for the November 2022 general election. Penny Crider is a

candidate for the Michigan House of Representatives, and Kenneth Crider is a candidate for the Michigan Senate. The O'Halloran Complaint raises two claims. In Count I, the O'Halloran Plaintiffs allege that the May 2022 Manual violates Section 733 of the Michigan Election Law, MCL 168.733. In Count II, the O'Halloran Plaintiffs assert that the May 2022 Manual was promulgated without the proper notice-and-comment requirements outlined in the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.*

Two days later, plaintiffs Richard DeVisser (another election challenger), the Michigan Republican Party, and the Republican National Committee (collectively, "DeVisser Plaintiffs") sued defendants separately in Docket No. 22-000164-MM. In Count I, the DeVisser Plaintiffs allege that certain provisions of the May 2022 Manual violate the Michigan Election Law. Like the O'Halloran Plaintiffs, the DeVisser Plaintiffs also allege that the May 2022 Manual is a rule promulgated without the required notice-and-comment procedures outlined in the APA.

Both sets of plaintiffs request various forms of expedited declaratory and injunctive relief, including a declaration that the publication is void in toto, or alternatively, that certain passages must be removed before the November 2022 general election. The O'Halloran Plaintiffs have moved for a temporary restraining order ("TRO") and preliminary injunction; similarly, the DeVisser Plaintiffs have sought expedited declaratory relief under MCR 2.605(D).

In the interest of conserving time for expedited appellate review before the November 2022 general election, this Court consolidated the cases on October 3, 2022, and ordered defendants to show cause why the relief requested in the complaints should not be granted. Defendants responded and moved for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10).

Defendants first argue that the O'Halloran Plaintiffs' complaint should be dismissed for lack of jurisdiction because the O'Halloran Plaintiffs failed to verify their complaint, as required under MCL 600.6431. Defendants next argue that plaintiffs' claims are barred by laches because plaintiffs did not sue until September 2022, but the Bureau of Elections issued the manual months earlier. Defendants also assert that the May 2022 Manual did not need to be promulgated through notice-and-comment rulemaking because the Michigan Election Law grants the Secretary of State broad authority to issue instructions, advice, and directives, and the May 2022 Manual fits within these categories. Finally, defendants address each of plaintiffs' specific challenges to the May 2022 Manual, as outlined below.

Both sets of plaintiffs responded to defendants' motion for summary disposition. They reiterate that the May 2022 Manual's language extends beyond the Michigan Election Law and should have been promulgated as a rule in accordance with the APA. On the question of laches, the O'Halloran Plaintiffs argue that they brought their challenges to defendants' attention over the summer, and they maintain that defendants will not suffer any prejudice if the May 2022 Manual is rescinded or revised. The DeVisser Plaintiffs contend that they challenged the May 2022 Manual after learning about the changes during the August 2022 primary election. Finally, the O'Halloran Plaintiffs amended their complaint to include signatures and verifications.

Finally by way of background, the Michigan Democratic Party moved to participate in these cases as amicus curiae and submitted a proposed brief, which this Court has already granted. The Downriver/Detroit Chapter of the A. Philip Randolph Institute ("DAPRI") moved to intervene as a party defendant or, alternatively, to participate as an amicus curiae. As DAPRI appears to acknowledge, however, intervention of a nonstate entity as a party defendant is barred by our Court of Appeals' decision in *Council of Organizations & Others for Ed about Parochiaid v State*, 321

Mich App 456; 909 NW2d 449 (2017). The Court will, however, grant DAPRI's motion to participate as an amicus curiae, and the Court will accept DAPRI's brief as-filed.

II. ANALYSIS

Before the Court are plaintiffs' respective requests for emergency and expedited declaratory and injunctive relief, as well as defendants' motion for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10).

Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.* The Court will consider the factual allegations in the complaint as true, but it may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for the plaintiff's claims. See *White v Dep't of Transp*, 334 Mich App 98, 106; 964 NW2d 88 (2020). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* (cleaned up). The Court views the evidence and all reasonable inferences arising from the evidence in the light most favorable to the nonmovant. *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011).

With respect to summary disposition, the court rules also provide, "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." MCR 2.116(I)(1). With respect to the nonmovant, the court rules similarly provide, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

A. VERIFICATION AND STANDING

The Court first addresses defendants' motion for summary disposition of the O'Halloran Plaintiffs' complaint under MCR 2.116(C)(4). Defendants argue that the Court lacks subject-matter jurisdiction over the O'Halloran Plaintiffs' complaint because they failed to verify it in accordance with the Court of Claims Act ("COCA"), MCL 600.6401 *et seq.*

The COCA contains notification requirements that a plaintiff must follow to sue in the Court of Claims. Specifically, MCL 600.6431(1) and (2)(d) provide:

> (1) Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies.
>
> (2) A claim or notice under subsection (1) must contain all of the following:
>
> * * *
>
> (d) A signature and verification by the claimant before an officer authorized to administer oaths.

Our Supreme Court has held that the requirements outlined in MCL 600.6431 of the COCA constitute "conditions precedent" to filing suit. *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). Along the same vein, MCL 600.6434(2) requires that "[t]he complaint

shall be verified." An unverified complaint does not comply with the requirements of MCL 600.6434(2), and is subject to dismissal. *Progress Mich v Attorney General*, 506 Mich 74, 95; 954 NW2d 475 (2020). The *Progress Mich* Court held that the complaint must contain an oath or affirmation by the plaintiff, consistent with MCR 1.109(D)(3). *Id.* at 92 and n 10. Nevertheless, the *Progress Mich* Court held that allowing the plaintiff to amend its complaint to correct a verification defect does not "subvert the verification requirement of MCL 600.6434." *Id.* at 98.

The O'Halloran Plaintiffs filed an amended complaint that addresses the verification issue. The amended complaint contains a verification by each plaintiff, including a handwritten signature and a notarization by an officer authorized to administer oaths. The verifications meet the requirements of MCL 600.6431 and MCL 600.6434. Because the O'Halloran Plaintiffs have addressed the deficiencies in their complaint, the Court agrees with plaintiffs that they need not re-file their case. See *id.*

With respect to standing, MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." For the reasons stated in their respective pleadings and briefs, the Court agrees with plaintiffs that there is an actual controversy, and they have standing to bring these actions.

B. THE O'HALLORAN PLAINTIFFS' BROAD, SWEEPING CHALLENGE

The O'Halloran Plaintiffs request a TRO and a preliminary injunction for the declaratory relief requested in their complaint. They ask that the Court: (1) declare rescission of the May 2022 Manual; (2) enjoin enforcement of the May 2022 Manual; (3) declare that the entirety of MCL 168.733 and MCL 168.734 of the Michigan Election Law must be included in the May 2022

Manual; (4) enter an order implementing the requested amendments and corrections to the May 2022 Manual; and (5) order that certain passages in the May 2022 Manual be removed.

To the extent that the O'Halloran Plaintiffs raise specific concerns similar to those raised by the DeVisser Plaintiffs, those concerns are addressed subsequently in Part II.C of this Opinion and Order. In the current part, the Court is focused on the more broad, sweeping objections and relief sought by the O'Halloran Plaintiffs.

The legal standard for reviewing a request for a preliminary injunction is the same as the standard governing a request for a TRO, at least when the Court has permitted the nonmoving party to respond. See MCR 3.310(A)(1) and (B)(1). As the staff comment to the 1985 adoption of MCR 3.310 explains, "[MCR 3.310] adopts the terminology used in the federal rule, distinguishing between temporary restraining orders, which are entered without notice, and preliminary injunctions, which are granted with notice and after hearing."

The purpose of a preliminary injunction is to maintain the status quo before a final hearing on the parties' rights. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647; 825 NW2d 616 (2012). An injunction "is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 633-634; 821 NW2d 896 (2012) (cleaned up). The moving party has the burden to prove that four elements weigh in favor the preliminary injunction. *Hammel*, 297 Mich App at 648. Those elements include:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be

> by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* (cleaned up).]

With that said, because the matters have been sufficiently briefed and ultimately turn on questions of law and undisputed material fact, the Court will reach the merits of plaintiffs' claims. Doing so will permit the parties to seek expedited appellate review of this Court's Opinion and Order. Accordingly, the Court will not issue preliminary relief, and, as a result, it need not address or weigh the relative harms of a TRO or preliminary injunction. See *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 13 n 21; 753 NW2d 595 (2008).

The O'Halloran Plaintiffs raise a broad, sweeping challenge to the Secretary of State's authority to issue the May 2022 Manual as an instructive guide, rather than as a promulgated rule under the APA. The O'Halloran Plaintiffs contend that, at the very least, the May 2022 Manual must include the complete language of MCL 168.733 and MCL 168.734.

The Court begins its analysis with the Michigan Election Law and the APA. The interpretation of a statute, including the authorization provided to a department by our Legislature, is a question of law for this Court to decide, and the Court does not defer to a department's interpretation of the statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). As explained by the undersigned while sitting on our Court of Appeals: "As I read our caselaw, the directives to give 'respectful consideration' to an agency's interpretation and not depart from it unless there are 'cogent reasons' for doing so are little more than judicial dross." *West Mich Annual Conf of the United Methodist Church v Grand Rapids*, 336 Mich App 132, 159; 969 NW2d 813 (2021) (SWARTZLE, P.J., concurring). This is so because a court owes "respectful consideration" to *each and every party's* interpretation of a statute—not just that of a government official—and a court must not load the interpretive dice in favor of one party over the

other. *Id.* Thus, this Court gives defendants' interpretation of the Michigan Election Law and APA respectful consideration and does not reject that interpretation without a cogent reason, but it likewise gives similar consideration and treatment to the interpretations offered by the parties, the Michigan Democratic Party, and DAPRI. In sum, "[a] court should adopt the best interpretation of a statute, based on a fair reading of the text, using clear, even-handed criteria objectively applied—full stop." *Id.* at 160.

As a state department, the Michigan Department of State must follow the requirements of the APA. Under the APA, only a department's "rule," promulgated by that department through the crucible of public notice-and-comment rulemaking, has the force and effect of law. *Slis v Michigan*, 332 Mich App 312, 346; 956 NW2d 569 (2020). Any other pronouncement by a department *does not* have the force and effect of law unless specifically authorized by our Legislature. *Twp of Hopkins v State Boundary Comm'n*, __ Mich App __; __ NW2d __ (2022) (Docket No. 355195); slip op at 11.

Section 7 of the APA defines the term "rule" to mean "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency." MCL 24.207. Defendants argue that the May 2022 Manual is an instructional manual that provides mere guidance and, therefore, falls under several statutory exceptions to the rulemaking requirement. They cite exceptions to the rulemaking requirement,[1] including for "[a]

[1] Defendants argue that the Secretary of State has permissive statutory authority that allows a directive or instruction to be issued with the force and effect of law outside of the APA rulemaking process. For reasons similar to those set forth by then-Chief Judge MURRAY in *Davis v Benson*

decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected," MCL 24.207(j); "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public," MCL 24.207(g); and "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory," MCL 24.207(h).

MCL 168.31(1)(a) and (b) authorize the Secretary of State to "issue instructions and promulgate rules pursuant to [the APA] for the conduct of elections" and "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(c) adds that the Secretary of State shall

> [p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on 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.

Thus, the Secretary's responsibility for issuing instructions is distinct from the authority to promulgate rules, where the latter has the force and effect of law, but the former does not. Indeed, under the APA, only an instruction of "general applicability," properly promulgated, that implements or applies a law, constitutes a department rule. Finally, MCL 168.31(1)(e) requires the Secretary of State to "[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations."

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cited earlier, the Court rejects defendants' attempts to justify as binding the specific provisions of the May 2022 Manual that are explored in Part II.C of this Opinion and Order.

The Court agrees with defendants that, taken as a whole (though with certain exceptions explored below), the May 2022 Manual is informational in nature and does not, in and of itself, have the force and effect of law. Defendants have specifically acknowledged to this Court the limited reach of the May 2022 Manual: "The [May 2022 Manual] is principally explanatory, *does not have the force and effect of law*, and *does not affect the rights of the public*." Defendants Sec'y of State Jocelyn Benson and Director of Elections Jonathan Brater's Response to Order to Show Cause and Brief in Support of Motion for Summary Disposition, p 19 (emphasis added).

As all parties acknowledge, the May 2022 Manual was not promulgated according to the notice-and-comment rulemaking procedures set forth under the APA. Nor does the Michigan Election Law require the Secretary of State to issue rules on the areas outlined in the May 2022 Manual as it does, for example, in the context of electronic-voting systems. See MCL 168.795a(8). The Michigan Election Law does, however, permit the Secretary of State to issue explanatory instructions and forms.

Moreover, the Michigan Election Law does not provide that any unpromulgated, instructional guidance issued by the Secretary of State is "binding" on anyone—with the sole caveat found in MCL 168.765a ("Absent voter counting board"), where in subsection (13), our Legislature stated that the Secretary of State "*shall* develop instructions consistent with this act for the conduct of absent voter counting boards," and added, "[t]he instructions developed under this subsection are binding upon the operation of an absent voter counting board . . . ." (Emphasis added.) Thus, as our Legislature has made clear, the instructions in the May 2022 Manual are binding only on those who operate the absent voter counting boards (AVCB), per MCL 168.765a(13), and, critically, only to the extent that the instructions are consistent with, and do not add to or omit from, any provision in the Michigan Election Law or properly promulgated rule. In

all other respects, the May 2022 Manual, as mere explanatory instruction, is not binding on any Michigan citizen, including election challengers. There is no basis in law for this Court to prohibit defendants from issuing merely instructional guidance. Accordingly, the Court declines to declare the entirety of the May 2022 Manual unlawful or enjoin any use of an instructional manual for training purposes.

Likewise, the Court disagrees with the O'Halloran Plaintiffs that the May 2022 Manual must include the entire language of MCL 168.733 and MCL 168.734. The O'Halloran Plaintiffs argue that, unless the May 2022 Manual recites the entirety of both statutes, there are bound to be violations of the law.

But plaintiffs do not cite any provision of the Michigan Election Law that would require the language of each statute to appear in the May 2022 Manual. Private citizens and government officials alike are expected to know and follow the law, see *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000), and this Court declines to impose a requirement on defendants to explain each and every aspect of the Michigan Election Law in the May 2022 Manual. This does not preclude, of course, a challenger or poll watcher from bringing a hardcopy or (as explained below) an electronic version of MCL 168.733 or MCL 168.734 (or, indeed, the entire Michigan Election Law) to a particular polling precinct. For these reasons, defendants need not amend the May 2022 Manual to include the complete language of MCL 168.733 or MCL 168.734.

C. PLAINTIFFS' MORE NARROW CLAIMS

Apart from the O'Halloran Plaintiffs' broad, sweeping attacks, both sets of plaintiffs also articulate specific challenges to several provisions of the May 2022 Manual. In essence, they argue

that defendants have not limited themselves to mere instruction or guidance, but have, instead, attempted to impose binding rules on challengers and poll watchers. As explained above, defendants have authority to issue instructional guidance, but they do not have the authority to issue rules with the force and effect of law, apart from those promulgated through notice-and-comment rulemaking. To the extent that defendants have issued an unpromulgated rule in the guise of an "instruction," they have exceeded their lawful authority under the Michigan Election Law and APA.

The DeVisser Plaintiffs articulate these specific challenges most clearly in Paragraph 30 of their complaint, and these can be described as followed: (1) the credential-form requirement; (2) appointment of challengers on election day; (3) communication with election inspectors other than the "challenger liaison"; (4) the prohibition on electronic devices in AVCB facilities, and (5) the prohibition on recording "impermissible challenges." The Court addresses each specific challenge in turn.

1. The Credential-Form Requirement. Our Legislature requires that challengers be credentialed. MCL 168.732. For the first time in recent memory, defendants have issued a specific, uniform form that challengers are purportedly required to use with respect to their credentials. The May 2022 Manual references the form, which is available on the Secretary of State's website, and states, "If the entire form is not completed, the credential is invalid and the individual presenting the form cannot serve as a challenger." This is different from years past, when political parties have issued custom credential forms to their own challengers. The DeVisser Plaintiffs argue that the Michigan Election Law does not grant the Secretary of State the authority to mandate a uniform challenger-credential form.

To be clear, the Court does not take issue with the policy of having a uniform challenger-credential form. There is, in fact, much to commend with such a form, in terms of clarity and administrative efficiency. With that said, our Legislature expressly set out the "evidence" needed to show that a person was properly credentialed as a challenger. In MCL 168.732, a section entitled, "Presence of challenger in room containing ballot box; *evidence of right to be present*," (emphasis added), our Legislature set forth the following three items that evidence a valid challenger: (a) "[a]uthority signed by the recognized chairman or presiding officer" of the organization or committee (here, major political party); (b) the written or printed name of the challenger; and (c) the precinct number for the challenger's assigned precinct. Because our Legislature set forth three specific requirements that a person must satisfy to evidence that the person is a valid challenger, defendants cannot, in the absence of a promulgated rule, add a fourth, i.e., the mandatory use of a particular form issued by the Secretary of State.

The Secretary of State can certainly create a form, under MCL 168.31(1)(e), for the convenience of election challengers. And the Court recognizes the Secretary of State's position, as noted in Director of Elections Jonathan Brater's affidavit, that a uniform authorization form would expedite the credentialing process. But our Legislature has set forth the exhaustive list of evidence for validating a credential, and if a purported credential includes the three items in MCL 168.732, then that purported credential fully complies with the Michigan Election Law—nothing more is required. The provision in the May 2022 Manual requiring the use of the uniform challenger-credential form violates the Michigan Election Law and APA.

2. Appoint or Credential Challengers on Election Day. Next, the DeVisser Plaintiffs challenge the following language on page 2 of the May 2022 Manual: "Political parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day."

(Emphasis added.) Plaintiffs argue that political parties should be permitted to appoint or credential election challengers *on* Election Day as well. In their response brief, defendants acknowledge that "challengers appointed on Election Day . . . will be accepted." In their reply brief supporting summary disposition, defendants state more directly, that "neither the form nor the guidance will prevent appointing a challenger on Election Day." They explain that the guidance, which is not a rule, is intended to encourage parties to prepare ahead of time and not wait until Election Day to appoint most of their election challengers.

The Court agrees with plaintiffs that MCL 168.730 and MCL 168.731 authorize political parties to appoint and credential challengers on Election Day. The Court also accepts defendants' acknowledgment that the language "until Election Day" is not intended to, and should not, prohibit the appointment and credentialing of election challengers on Election Day. Because changes to the May 2022 Manual are required in any event, the Court will order defendants to clarify this provision (e.g., "… until or on …").

3. Communication Through Only the "Challenger Liaison." Both sets of plaintiffs challenge language in the May 2022 Manual requiring that challengers may only communicate with a particular election inspector, designated as the "challenger liaison." On page 6, the May 2022 Manual states in relevant part (with bold in the original), "**Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff**." The manual adds on the same page, "Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff." If the challenger violates these provisions, the challenger is subject to a warning, and repeated violations may lead to ejection of the challenger, according

to the manual. Plaintiffs argue that the manual's limitation on which inspectors the challengers may interact with violates MCL 168.733(1)(e), which provides that a challenger may bring certain issues to "an election inspector's attention" without restriction to a *particular* inspector.

The authority to designate a "challenger liaison" is absent from the Michigan Election Law—in fact, the very label appears nowhere in statute. Defendants have not presented this Court with any statute, common law, case law, or promulgated rule that gives them the authority to restrict with which election inspector a challenger can communicate. Our Legislature provided a challenger the right to communicate to "an" election inspector, and defendants cannot artificially restrict that to a designated inspector. Whether it makes sense to have such a liaison is one thing; it is another thing entirely to require, at the risk of being ejected, a challenger to speak to only the designated liaison. This provision of the May 2022 Manual goes well beyond what is provided in law and impermissibly restricts a challenger's ability to bring certain issues to any inspector's attention. Accordingly, the manual must be revised to make clear that a challenger need not bring an issue to the attention of only a liaison challenger, but instead can bring such issue to the attention of any election inspector at the applicable location.

4. *Electronic Devices in AVCB.* Next, plaintiffs challenge language in the May 2022 Manual restricting the possession of electronic devices, including cell phones, in AVCB facilities. (As an aside, the Court notes that while the October 2020 manual also prohibited electronic devices in AVCB facilities, there is nothing in the record to suggest that the manual was challenged in court on these grounds.)

On this topic, the May 2022 Manual provides: "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." According to the manual, election challengers may possess electronic devices at in-person polling places if the device is not disruptive or used to record activity in the polling place, but election challengers may not similarly possess electronic devices within AVCB facilities until after the polls close.

As a penalty, according to the manual, a challenger who possesses an electronic device is subject to ejection from the AVCB facility, because doing so would purportedly violate the oath that the challengers take upon entering the facility. Page 21 of the May 2022 Manual adds that challengers may not "[u]se a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility." And page 23 of the May 2022 Manual states that poll watchers are subject to the same restrictions as credentialed challengers, and are also subject to ejection for failing to follow the instructions.

The May 2022 Manual is unclear on whether the prohibition applies to everyone in the AVCB facility or just election challengers and poll watchers. On October 14, 2022, the Court ordered the parties to submit letters addressing the scope of the electronic-device prohibition. In their letter of October 18, 2022, defendants represented to the Court, "The exclusion of cell phone and other devices is *not* limited to poll watchers and challengers. Election workers and inspectors are also prohibited from communicating information out of the AVCB and are prohibited from leaving . . . pursuant to MCL 168.765a(9)-(10)." But defendants conflate here their unpromulgated ban on the mere possession of an electronic device with our Legislature's statutory ban on a specific use of an electronic device (i.e., to communicate certain election information before the polls close). In any event, even if the electronic-device ban applies alike to challengers and poll

watchers as well as election workers and inspectors, the penalties outlined in the May 2022 Manual only apply to challengers and poll watchers—not election workers and inspectors.

Defendants have taken the position that the only persons permitted to have electronic devices in the AVCB facility before the polls close are certain "authorized individuals." In its October 14, 2022, Order, this Court asked the parties to identify the "authorized individuals," and explain from where their authority came. In response, defendants cited MCL 168.765a(12).

This statute permits certain individuals to enter and leave the AVCB facility before the polls close, including: the local election official who established the AVCB; the deputy or employee of such an official; a Bureau of Elections employee; a county clerk; a county-clerk employee; and a representative of the voting equipment company. These individuals can enter the AVCB facility only to respond to an inquiry or to provide instructions on AVCB operations. *Id.* But MCL 168.765a(12) is utterly silent with respect to whether these authorized individuals are to be treated different from challengers in terms of their ability to carry electronic devices. Nor does MCL 168.765a(12) provide that election challengers may *not* possess electronic devices in the AVCB facility, or that the election challengers who violate the electronic-device ban should be subject to penalties to which "authorized individuals" are not subject.

Defendants also rely on MCL 168.765a(9) and (10) to support their ban on the possession of electronic devices in the AVCB facility. MCL 168.765a(9) requires election inspectors, challenges, and any other person present in the AVCB facility to take 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.' " MCL 168.765a(10) adds, in relevant part,

that "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." The statute also provides that a person whose conduct causes the polls to close or who discloses an election result is guilty of a felony. *Id.*

Thus, MCL 168.765a(9) and (10), collectively, prohibit a challenger from disclosing information relating to the processing of absentee ballots before the polls close, the disclosure of which is a felony. But MCL 168.765a does *not* categorically prohibit the possession of electronic devices in the AVCB facility or otherwise suggest that physical sequestration includes (or equates to) a prohibition on the possession of electronic devices. In reality, defendants' electronic-device ban is a prophylactic measure designed to prevent potential disclosure of absentee-vote information, which Director Brater appears to acknowledge in ¶47 of his affidavit.

MCL 168.765a was enacted four years ago as a provision in a 2018 update to the Michigan Election Law. See 2018 PA 123. Our Legislature amended the same statute twice in 2020. See 2020 PA 95 and 2020 PA 177. Cell phones and other electronic devices have been prevalent for decades and have long had the capability to record. In the face of the existence of these devices, our Legislature did not see fit to ban them in AVCB facilities when it added section 765a to the Michigan Election Law in 2018 or when it amended the statute twice in 2020. Rather, our Legislature enacted two different prophylactic measures to guard against the communication of election-related information—i.e., first, the taking of an oath, and second, physical sequestration at the AVCB facility—and, for violating either measure or otherwise communicating election-related information, our Legislature imposed the penalty of a felony conviction. See MCL 168.765a(9) and (10). Our Legislature could have added a third prophylactic measure, maybe even the one favored by defendants, but it chose not to do so. When our Legislature enacts a public

policy in one particular way but not another, its choice must be respected and enforced by the other two branches. *Spalding v Swiacki*, 338 Mich App 126, 138; 979 NW2d 338 (2021) ("When the Legislature expressly sets a particular standard in one section of a statute but not in another, we presume that the Legislature intended for different standards to apply to the different sections—i.e., the Legislature's word choice was intentional.").

The Court is cognizant of, and frankly shares, defendants' concerns about the security of absentee-ballot counting. But there is nothing in the Michigan Election Law that precludes a challenger from merely possessing an electronic device in the AVCB facility. Nor have defendants promulgated a rule through public notice-and-comment rulemaking that might have given them the lawful authority to impose such a ban. Prohibiting electronic devices in the AVCB facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule. The Court declines to read a prophylactic measure into a statute that does not appear in its plain language.

Finally, defendants cite the Sixth Circuit's decision in *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016), a case involving a federal district court's preliminary injunction preventing the state from enforcing a ban on "ballot selfies." *Crookston* involved the question whether a photography ban at the polls was a content-neutral regulation that placed a reasonable restriction on the plaintiff's constitutional rights, or whether it impermissibly impinged on the plaintiff's First-Amendment rights. *Id.* at 400. The court stayed the district court's preliminary injunction, applying the doctrine of laches and concluding that "the tardiness of Crookston's motion for a preliminary injunction alone requires us to reject it." *Id.* at 399.

The court continued its analysis, in what was arguably dicta, and explained that it was "skeptical . . . of the district court's assessment of Crookston's odds of success on the merits." *Id.* at 399-400. The court explained that the photograph ban "seems to be" a content-neutral regulation reasonably protecting the privacy of voters. *Id.* at 400. Ultimately, the court concluded that the state's interest in a stay outweighed any imposition on the plaintiff's First-Amendment rights. *Id.* But the court noted that it was "not clear" whether the selfie ban significantly impinged on the plaintiff's First-Amendment rights. *Id.* The court then stated, "To be clear, we are not resolving the merits of the case," leaving the issue for another day. *Id.* at 401. As defendants note in their brief, the court never addressed the merits because the parties settled.

This Court does not read *Crookston* as granting defendants broad-stroke authority to prohibit the mere possession of electronic devices in the name of voter privacy; the Sixth Circuit never reached that sweeping conclusion (or any conclusion on the merits, for that matter). Because defendants lack any legal basis to prohibit election challengers from possessing electronic devices in the AVCB facility, the May 2022 Manual must be revised accordingly.

To be clear to the parties and any other challenger, poll watcher, election inspector, election official, election worker, or any person in an AVCB facility: Nothing in this Court's Opinion and Order should be read to permit a person to *use* an electronic device in a way that violates the Michigan Election Law. Our Legislature has made it a felony to communicate—*in any way* before the polls close—any information relative to the processing or tallying of votes that may come to the person. One practical way that a person can reduce the risk of being suspected of violating MCL 168.765a would be for that person to leave any electronic device outside the facility. If an election inspector or other official has a reasonable suspicion that a person has used an electronic-

communication device to communicate prohibited information, that person is subject to removal and potential criminal prosecution.

5. *Making a Record of "Impermissible" Election Challenges.* Finally, the DeVisser Plaintiffs challenge language in the May 2022 Manual limiting what types of challenges are recorded in the poll book. The May 2022 Manual states in relevant part, "A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below . . . If the challenge is rejected, the reason for that determination must be recorded in the poll book. . . . An impermissible challenge, as explained below, need not be noted in the poll book." The May 2022 Manual explains that the challenger liaison is responsible for adjudicating each challenge by determining if it is impermissible, rejected, or accepted. The O'Halloran Plaintiffs also take issue with language in the May 2022 Manual preventing the challengers from making "repeated impermissible challenges."

The May 2022 Manual defines an "impermissible challenge" to include "[c]hallenges made to something other than a voter's eligibility or an election process," "[c]hallenges made without a sufficient basis," or "[c]hallenges made for a prohibited reason." The May 2022 Manual makes explicitly clear, "**Election inspectors are not required to record an impermissible challenge in the poll book.**" In his affidavit, Director Brater explains that the Bureau of Elections incorporated this new language because the Bureau received reports of "an increased volume of challenges that were not based on any permitted reason in the Michigan Election Law."

The labels "permissible challenge" and "impermissible challenge" are not found in the Michigan Election Law. Our Legislature has made clear that, when a challenge is made to the voting rights of a person—regardless of who makes the challenge—"an election inspector *shall*

immediately . . . Make a written report [including certain information] . . . [and] Retain the written report . . . and make it a part of the election record." MCL 168.727(2)(b) and (c) (emphasis added). There is no discretion available to the election inspector not to record a so-called "impermissible challenge" to a person's voting rights under MCL 168.727(1). Thus, to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.*

With respect to a challenger's claim that *does not* involve a particular person's right to vote (i.e., a reason other than those listed in MCL 168.727(1) or MCL 168.733(1)(c)), our Legislature does not require that any specific report be generated, and the parties have not pointed this Court to any promulgated rule that would so require. See MCL 168.733. So, for example, if a challenger brings to an election inspector's attention the purported improper handling of a ballot by an election worker, our Legislature does not require that a report of that matter be recorded by the election inspector. See *id.* It certainly seems advisable to make a record of such alleged instances, and our Legislature expressly permits a challenger to "[k]eep records of . . . other election procedures as the challenger desires." MCL 168.733(1)(h). But, defendants have the discretion to adopt a system of recordkeeping for these non-voter's rights challenges, and the one identified in the May 2022 Manual is reasonable, except as otherwise explained here. Defendants will need to revise the May 2022 Manual to make clear that the exception for not recording so-called "impermissible challenges" has no applicability to challenges involving voting rights set forth in MCL 168.727 or MCL 168.733(1)(c).

On the prohibition against making repeated "impermissible challenges," the May 2022 Manual warns challengers (with bold in the original), "**Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.**" May 2022 Manual, p 11. The authority for this warning is not apparent. A challenger can be removed for drinking alcohol or disorderly conduct in a polling place or AVCB facility. MCL 168.733(3). The "disorderly conduct" prohibition would necessarily cover someone who commits a felony in an AVCB facility by, for example, divulging certain prohibited information or violating the specific sequestration requirements. Defendants have not pointed this Court to any other part of the Michigan Election Law or a promulgated rule that would permit expulsion merely for several challenges that an election inspector deems to be "impermissible." Only if a challenger's repeated, unfounded challenges rise to the level of "disorderly conduct" does the law permit that challenger's expulsion. The language in the May 2022 Manual must be modified to make this clear.

D. LACHES

The Court lastly turns to defendants' laches argument. "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). The key for laches is not the passage of time alone, but rather, the effect that the delay has had on the defendants. *Id.* at 115. The doctrine is particularly applicable in election matters. See *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972); see also *Purcell v Gonzalez*, 549 US 1, 5-6; 127 US 5; 166 L Ed 2d 1 (2006) (per curiam); *Crookston*, 841 F3d at 398; MCL 691.1031.

The question whether laches applies in these cases is an interesting one. Unlike a challenge to a candidate's eligibility to run for office, there is no potential in this circumstance that a party could lose any specific right, such as the right to vote. But even if laches *could* apply, the Court declines to exercise its equitable authority under the facts presented.

To start, defendants have not demonstrated that plaintiffs failed to act with due diligence. The Bureau of Elections amended the manual in May 2022, but it did not highlight or redline the changes from the October 2020 iteration of the document. The O'Halloran Plaintiffs have presented the Court with evidence that, once they discovered the changes in the revised document, they communicated with defendants about their disagreements as early as July 2022. The DeVisser Plaintiffs allege that they discovered the revisions to the May 2022 Manual on the night of the August 2022 primary election, when those changes were put into practice. The DeVisser Plaintiffs wrote to defendants to address their concerns with the May 2022 Manual shortly thereafter. Since that time, plaintiffs obtained legal counsel to sue on their behalf, and they sued in late September 2022. Thus, plaintiffs did not simply sit on their hands for four months, as defendants argue.

More critically, on the issue of prejudice, the May 2022 Manual is merely instructive—it does not (and cannot) independently create *any* new, mandatory requirement, with the narrow exception of MCL 168.765a(13), not applicable here. Defendants have acknowledged in these proceedings that the May 2022 Manual does not have the force and effect of law. Moreover, these proceedings are not similar to *Davis v Benson*, Court of Claims Docket Nos. 20-000207-MZ and 20-000208-MZ, where this Court applied the doctrine of laches, in part, because of the impending need to print millions of paper ballots, some of which were to be mailed overseas to our military personnel.

Theoretically, the November 2022 general election can take place without any challenger guidance. Alternatively, the Bureau of Elections can revise the May 2022 Manual (or even the October 2020 version) to comply with this Opinion and Order. This Court's several findings are relatively narrow in scope, and there is nothing in the record to suggest that revising the May 2022 Manual to conform with this Court's Opinion and Order would be time consuming or otherwise onerous. The May 2022 Manual resides as a PDF on defendants' website and, in today's world, the manual could be widely disseminated in a matter of minutes, if not seconds. In fact, defendants acknowledge in their brief that they revised and disseminated the prior version of the manual in October 2020—only a month before the November 2020 general election.

Thus, the Court is not persuaded by defendants' and amicus's argument that revising the May 2022 Manual and updating election personnel about the revisions will present an onerous burden. Accordingly, the Court declines to exercise its equitable authority on laches.

III. CONCLUSION

Accordingly, the Court orders as follows:

IT IS ORDERED that the relief sought by the DeVisser Plaintiffs on Counts I and II of their complaint is **GRANTED IN PART** and **DENIED IN PART**. Under MCR 2.116(I) and MCR 2.605, the Court concludes that the DeVisser Plaintiffs' claims set forth in Paragraph 30 of their complaint are well-founded in fact and law, and, as a result, the Court declares that defendants have violated the Michigan Election Law and the APA, as explained in this Opinion and Order. The May 2022 Manual, in and of itself, does not have the force and effect of law and defendants are enjoined from using or otherwise implementing the current version of the May 2022 Manual

to the extent that such enforcement, use, or implementation would be inconsistent with this Opinion and Order.

The DeVisser Plaintiffs also request that this Court order defendants to rescind the current manual and use an earlier one. This Court has not been asked to review the October 2020 version of the manual with respect to the claims raised herein. Instead, **IT IS FURTHER ORDERED** that defendants shall have the discretion either to (1) rescind the May 2022 Manual in its entirety; (2) revise the May 2022 Manual to comply with this Opinion and Order; or (3) revise an earlier iteration of the manual to comply with this Opinion and Order. All other relief sought by the DeVisser Plaintiffs is **DENIED**.

IT IS FURTHER ORDERED that the O'Halloran Plaintiffs' emergency motion for declaratory and injunctive relief is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** to the extent consistent with this Opinion and Order and otherwise **DENIED** in all other respects, as explained in this Opinion and Order.

IT IS FURTHER ORDERED that defendants' motion for summary disposition is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** to the extent that plaintiffs request that this Court strike the May 2022 Manual in its entirety, and it is likewise **GRANTED** to the extent that the O'Halloran Plaintiffs seek relief broader than such relief already ordered herein by this Court. The motion is otherwise **DENIED** in all other respects, as explained in this Opinion and Order.

IT IS FURTHER ORDERED that DAPRI's motion to intervene as a party defendant is **DENIED**. DAPRI's alternative request to participate as an amicus curiae is **GRANTED**, and its brief is accepted as-filed.

IT IS SO ORDERED. This is the final order and closes each of the consolidated cases.

Date: October 20, 2022

Hon. Brock A. Swartzle
Judge, Court of Claims

EXHIBIT TO COURT'S OPINION AND ORDER OF OCTOBER 20, 2022

The Appointment, Rights, and Duties of Election Challengers and Poll Watchers

May 2022

INSTRUCTIONS PROVIDED BY THE MICHIGAN BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
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I. Introduction

This publication is designed to familiarize election challengers, poll watchers, election inspectors, and members of the public with the rights and duties of election challengers and poll watchers in Michigan. Election challengers and poll watchers play a constructive role in ensuring elections are conducted in an open, fair, and orderly manner by following these instructions.

Challengers and poll watchers should familiarize themselves with the instructions and directions in this publication governing their conduct, rights, and responsibilities. Election inspectors should likewise familiarize themselves with the instructions and directions in this publication, including their duties to record challenges and their powers to maintain order at the polls.

Any questions or concerns about the procedures laid out in this document may be sent to BOERegulatory@michigan.gov.

II. Challengers

Challenger-Credentialing Organizations

Credentialing organizations are organizations eligible to appoint and credential challengers in Michigan. Credentialing organizations must be one of the following:

- A political party eligible to appear on the ballot in Michigan;
- An organized group of citizens interested in the passage or defeat of a ballot proposal being voted on at that election;
- An organized group of citizens interested in preserving the purity of elections and guarding against the abuse of the elective franchise; or
- An incorporated organization.

A credentialing organization appoints a challenger by giving a person a credential indicating that the person is serving as a challenger on behalf of the organization. This process is known as credentialling. The credential must conform to the standards set out later in this publication.

Candidates, candidate committees, or organizations formed to support or oppose candidates are not eligible to appoint or credential challengers.

Challenger Credentialing By Political Parties

Political parties eligible to appear on the ballot may appoint or credential challengers at any time until Election Day. A challenger is appointed when they are given a credential by a representative of the political party. Political parties do not need to apply for approval by local election officials in the same way that other challenger-credentialing organizations must be approved; however, political parties should notify local clerks of their intention to appoint or credential challengers prior to Election Day.

Challenger Credentialing By Other Qualified Organizations

All other qualified organizations wishing to appoint or credential challengers must file an application to field challengers with the clerk of each county, city, or township in which the organization intends to field challengers. The application must be filed no less than 20 and no more than 30 calendar days prior to Election Day. The application consists of a written statement indicating the organization's intent to field challengers in that jurisdiction, the reason that the organization believes itself to be an organization qualified to field challengers under the criteria set out above, and a copy of a completed *Michigan Challenger Credential Card* form that the organization will distribute to its challengers. The statement must be signed and sworn by an officer of the organization.

Within two business days of receiving an application from an organization wishing to appoint challengers, the clerk must approve or deny the application and notify the group of the approval or denial. The clerk may deny the application if the group or organization fails to demonstrate that it is qualified to appoint challengers under the criteria explained above or if the application is not timely filed. If the application is denied, the organization may appeal the denial to the Secretary of State within two business days of receiving notice of the clerk's decision. Within two business days of receiving the appeal, the Secretary of State will render a decision on the appeal and notify the organization and the local clerk of that decision.

An organization wishing to appoint or credential challengers whose application is approved by a county clerk is qualified to appoint or credential challengers in any jurisdiction within that county, even if the organization has not filed an application with each specific city or township in the county.

Each county clerk must notify the clerk of every city and township within their county of all political parties and other organizations who have been approved to appoint challengers within their county. Each municipal clerk

must notify election inspectors at all precincts in the clerk's jurisdiction of all political parties and other organizations qualified to appoint and credential challengers within that jurisdiction prior to the opening of the polls on Election Day.

Eligibility to Serve as a Challenger

A person may serve as a challenger only if the person is registered to vote in Michigan and only if the person is provided a challenger credential by a credentialing organization. The credential must be specific to the election at which the person is serving as a challenger; a credential issued for a prior election does not entitle a person to serve as a challenger at a future election. A person cannot serve as a challenger if the person is serving as an election inspector during the same election. Additionally, a person cannot serve as a challenger if the person is running for nomination or for office during the same election, with the exception that precinct delegate candidates can serve as challengers so long as they do not serve at the precinct in which they are running for office.

Training of Challengers

Credentialing organizations are responsible for the behavior and actions of challengers that they credential. As such, credentialling organizations are strongly encouraged to provide challengers with training on both the basic aspects of election administration in Michigan and the rights and duties of challengers in Michigan. Providing challengers with a basic understanding of election administration will allow challengers to fully participate in the election process and to make informed challenges without disrupting or delaying election-related activities. Providing challengers with an explanation of their rights and duties will allow them to realize the full benefit of their status without violating the law.

Challengers should be provided training that is specific to the type of election-related location at which the challenger will be serving. For example, a challenger who will be serving at an absent voter ballot processing facility should be trained in how absent voter ballots are processed, while a challenger serving at a polling place where voters are casting ballots on Election Day should be trained on in-person voting processes. Failure to tailor training confuses challengers about which procedures should be followed in different types of locations, which may lead to confusion, ineffective observation, and impermissible challenges.

III. Rights and Duties of Challengers When Observing Election-Related Procedures

Challengers' Obligation to Follow Election Inspector Directions

Election inspectors are empowered and obligated to maintain order and facilitate the peaceful conduct of elections at the polling place or absent voter ballot processing facility in which the election inspector is serving. **Challengers present at a polling place or absent voter ballot processing facility must follow the directions of the election inspectors operating the polling place or absent voter ballot processing facility.** The directions election inspectors may give to challengers include, but are not limited to:

- Directing challengers on where to stand and how to conduct themselves in accordance with these instructions;
- Directing challengers to cease any behavior prohibited by these instructions;
- Directing challengers to cease any behavior that intimidates voters or disrupts the voting process; and
- Directing a challenger who violates these instructions to leave the polling place or absent voter ballot processing facility, or requesting that the local clerk or local law enforcement remove the challenger from the polling place or absent voter ballot processing facility.

Form of Challenger Credential

Under Michigan law, each challenger present at a polling place or an absent voter ballot processing facility must possess an authority signed by the chairman or presiding officer of the organization sponsoring the challenger. This authority, also known as the *Michigan Challenger Credential Card*, must be on a form promulgated by the Secretary of State. The blank template credential form is available on the Secretary of State's website. The entire credential form, including the challenger's name, the date of the election at which the challenger is credentialed to serve, and the signature of the chairman or presiding officer of the organization appointing the challenger, must be completed. If the entire form is not completed, the credential is

invalid and the individual presenting the form cannot serve as a challenger. The credential may not be displayed or shown to voters.

A credential form may be digital and may be presented on a phone or other electronic device. If a challenger uses a digital credential, the credential must include all of the information required on the template credential form promulgated by the Secretary of State. A digital credential should not include any information or graphics that are not included or requested on the template credential form. If a challenger using a digital credential is serving in an absent voter ballot processing facility on Election Day, the challenger must display the credential to the appropriate election official, gain approval to enter the facility, and then store the device in a place outside of the absent voter ballot processing facility. Electronic devices are not permitted within the absent voter ballot processing facility.

Clerks may allow or require challengers serving at a polling place on Election Day or at a clerk's office at any time that voters are present to wear a reasonably sized nametag or badge. The nametag or badge cannot include any text or graphics aside from the challenger's name and the words "election challenger". The nametag must be printed on white paper, and the words "election challenger" must be printed in black ink.

Clerks may allow or require challengers serving in absent voter ballot processing facilities where voters are not present to wear nametags or badges that identify challengers and the organization represented by the challenger.

Challenger Liaison

Every polling place or absent voter ballot processing facility should have an election inspector designated as the challenger liaison. Unless otherwise specified by the local clerk, the challenger liaison at a polling place is the precinct chairperson. The challenger liaison or precinct chairperson may designate one or more additional election inspectors to serve as challenger liaison, or as the challenger liaison's designees, at any time. Unless otherwise specified by the local clerk, the challenger liaison at an absent voter ballot processing facility is the most senior member of the clerk's staff present, or, if no members of the clerk's staff are present, the challenger liaison is the chairperson of the facility. Unless otherwise specified by the local clerk, the challenger liaison at the clerk's office is the most senior member of the clerk's staff present.

Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff.

Challenger Identification Upon Entering Polling Place or Absent Voter Ballot Processing Facility

Upon arriving at a polling place, an absent voter ballot processing facility, or a clerk's office, a challenger must introduce themselves and show their credential to the challenger liaison or their designee. A challenger cannot make challenges or take advantage of any of the other rights afforded to challengers until they have properly made their presence known to the challenger liaison. The challenger's name, the organization which the challenger represents, and the time of the challenger's arrival should be noted in the poll book.

If the challenger leaves a polling place prior to the close of polls, the challenger shall inform the challenger liaison of their departure. A challenger may not leave an absent voting ballot processing facility prior to the close of polls on Election Day. The challenger's departure and time of departure should be noted in the poll book.

Communication with Election Inspectors and Election Officials

Challengers must communicate only with the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers must not communicate with election inspectors who are not the challenger liaison unless otherwise instructed by the challenger liaison or a member of the clerk's staff. Challengers may not communicate with voters.

Challenger liaisons must be readily accessible to communicate with challengers, to answer questions about the voting and tabulating procedures, and to record any challenges made.

Challengers at Clerks' Offices

Each credentialing organization may assign one challenger to observe the issuance and receipt of absent voter ballots at a clerk's office or a satellite location maintained by the clerk. A challenger may be present only in areas of the clerk's office where an absent voter ballot may be requested. A

challenger may be present in the clerk's office only when the office is open for business and during the period prior to an election when voters may request or return an absent voter ballot at the office. A challenger present in a clerk's office may not view the Qualified Voter File.

Challengers at Polling Places

Only two challengers from any political party or other credentialing organization may be present at a precinct conducting in-person voting on Election Day. If two challengers from the same credentialing organization are present, both challengers enjoy the rights afforded to challengers, except that at any given time only one of the two challengers can be designated to make challenges. The challengers must make known to the challenger liaison which of the two challengers is designated to make challenges. The challengers may agree to change which challenger is designated to make challenges at any time, but the challengers must inform the challenger liaison of that change.

Challengers at Absent Voter Ballot Processing Facilities

Challengers have a right to be present at locations where absent voter ballots are removed from envelopes and tabulated. These locations are referred to as absent voter ballot processing facilities in this publication. Absent voter ballot processing facilities do not include a clerk's office or other locations where absent voter ballots are stored, signatures appearing on absent voter ballot envelopes are checked, or other activities are conducted prior to absent voter ballots being removed from absent voter ballot envelopes and prepared for tabulation.

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

counting board or combined absent voter counting board in each of these scenarios.

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

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

The clerk must make publicly available the number of challengers each credentialing organization will be allowed to field in the absent voter ballot processing facility at least seven calendar days prior to the election.

The challenger liaison serving at an absent voter ballot processing facility must administer an oath to any challenger wishing to serve in that facility:

> "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."

A challenger may not enter the absent voter ballot processing facility without taking this oath and signing a document acknowledging the oath. Any person who violates this oath is guilty of a felony.

Once tallying of votes has begun on Election Day, challengers serving at an absent voter ballot processing facility, like all persons present in an absent voter ballot processing facility, are sequestered at the facility and cannot leave until the close of polls at 8 p.m. on Election Day. If absent voter ballot processing or tabulation continues after the close of polls, challengers must be permitted to remain in the absent voter ballot processing facility at any time when absent voter ballots are being processed until processing and tabulation is complete.

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.

A challenger who is ejected from an absent voter ballot processing facility after the tallying has begun but before the close of polls is still bound by their legal obligation to remain sequestered until the close of polls. To avoid breaching that obligation, the challenger liaison or the clerk should direct the challenger to remain in a room or area of the location containing the absent voter ballot processing facility, but which is separated from the area where absent voter ballots are being processed.

A challenger who breaks sequestration by prematurely leaving the location containing an absent ballot processing facility before the close of polls – whether or not due to an ejection from the facility itself – violates the oath they took upon entering the facility.

Excess Challengers at an Election-Related Location

A credentialing organization may field no more than the number of challengers set out in the above sections at any clerk's office, in-person precinct, or absent voter ballot processing facility. If the credentialing organization already has the total number of challengers allowed present in a particular location, additional challengers credentialed by that organization cannot act as challengers in that location. At the clerk or challenger liaison's discretion, additional challengers seeking access to the location may be given the option to serve as poll watchers in that location. Challengers who agree to act as poll watchers have none of the rights specifically afforded to challengers and must adhere to the same standard of conduct and observe the same rules as any other poll watcher. The rights and duties of poll watchers are set out at the end of this document.

Generally, a credentialing organization will be allowed to replace challengers credentialed by that organization with other challengers credentialled by that organization so long as the replacement process does not disrupt the work of election inspectors or clerk staff present in the location. Because of the sequester, credentialing organizations cannot replace challengers present in facilities processing absent voter ballots prior to the close of polls on Election Day, but credentialing organizations may replace challengers in those locations after the close of polls. In no case during the replacement process

may a credentialing organization have more challengers present in a particular location than would be allowed by the other provisions of this document.

Making Challenges

A challenge must be made to a challenger liaison. The challenger liaison will determine if the challenge is permissible as explained below. Assuming the challenge is permissible, the substance of the challenge, the time of the challenge, the name of the challenger, and the resolution of the challenge must be recorded in the poll book. If the challenge is rejected, the reason for that determination must be recorded in the poll book.

An impermissible challenge, as explained below, need not be noted in the poll book.

Adjudicating and Recording Challenges

There are three categories of challenges: impermissible challenges, rejected challenges, and accepted challenges. The challenger liaison is responsible for adjudicating each challenge by categorizing each challenge and determining what, if any, action should be taken in response to the challenge.

Impermissible Challenges

Impermissible challenges are challenges that are made on improper grounds. Because the challenge is impermissible, the challenger liaison does not evaluate the challenge to accept it or reject it. Impermissible challenges are:

- Challenges made to something other than a voter's eligibility or an election process;
- Challenges made without a sufficient basis, as explained below; and
- Challenges made for a prohibited reason.

Election inspectors are not required to record an impermissible challenge in the poll book. If it is possible to make a note without slowing down the voting or absent voter ballot tabulation process, the election inspector is encouraged to note the content of an impermissible challenge in the poll book, as well as any warning given to the challenger making that impermissible challenge. If the challenger makes multiple impermissible challenges, the election inspector is likewise encouraged to note the general basis of those challenges and the approximate number of challenges, if the election inspector can make that note without slowing down the election

process. In all circumstances, however, the election inspector should prioritize the orderly and regular administration of the election process over noting an impermissible challenge.

Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility.

Rejected Challenges

Rejected challenges are challenges which are not impermissible, but which the challenger liaison does not accept. Whether a challenge is permissible but rejected is a context-specific determination that depends on the type of challenge being made. The process for determining whether a challenge to an election process or a voter's eligibility is rejected is set out below in the relevant sections. If a challenge is permissible but rejected, the following information must be included in the poll book:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and
- The reason why the challenge was rejected.

Accepted Challenges

Accepted challenges are challenges which are permissible and which the challenger liaison deems correct. If a challenge is accepted, the following information must be included in the poll book:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and
- The actions taken by the election inspectors in response to the challenge.

Challenges to a Voter's Eligibility

A challenger may make a challenge to a voter's eligibility to cast a ballot only if the challenger has a good reason to believe that the person in question is not a registered voter. There are four reasons that a challenger may challenge a voter's eligibility; **a challenge made for any other reason than those listed below is impermissible**. The four permissible reasons to challenge a voter's eligibility are:

1. The person is not registered to vote;

2. The person is less than 18 years of age;
3. The person is not a United States citizen; or
4. The person has not lived in the city or township in which they are attempting to vote for 30 or more days prior to the election.

The challenger must cite one of the four listed permissible reasons that the challenger believes the person is not a registered voter, and the challenger must **explain the reason the challenger holds that belief**. If the challenger does not cite one of the four permitted reasons to challenge this voter's eligibility, or cannot provide support for the challenge, the challenge is impermissible.

A challenger may challenge a voter's eligibility only by making a challenge to the challenger liaison or the challenger liaison's designee. **The challenger must make the challenge in a discrete manner not intended to embarrass the challenged voter, intimidate other voters, or otherwise disrupt the election process.** An election inspector will warn a challenger who violates any of these prohibitions; if a challenger repeatedly violates any of these prohibitions, the challenger may be ejected from the polling place.

Impermissible Challenge to Voter's Eligibility: Improper Reason for Challenge

A challenger may not challenge a voter's eligibility for any reason other than the four reasons above. Any challenge made for a reason other than those four reasons is impermissible and should not be considered by the challenger liaison or recorded by the election inspectors. Improper reasons for making a challenge to a voter's eligibility include, but are not limited to, the following:

- the voter's race or ethnic background;
- the voter's sexual orientation or gender identity;
- the voter's physical or mental disability;
- the voter's inability to read, write, or speak English;
- the voter's need for assistance in the voting process;
- the voter's manner of dress;
- the voter's support for or opposition to a candidate, political party, or ballot question;
- the appearance or the challenger's impression of any of the above traits; or
- any other characteristic or appearance of a characteristic that is not relevant to a person's qualification to cast a ballot.

Impermissible Challenge to Voter's Eligibility: Non-Specific Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot specify under which of the four permissible reasons the challenger believes the voter to be ineligible to vote, or if the challenger refuses to provide a reason for the challenge to the voter's eligibility.

Impermissible Challenge to Voter's Eligibility: No Explanation for Challenge

A challenge to a voter's eligibility is impermissible and should not be recorded by the election inspectors if the challenger cannot provide a reason for their belief that the voter is ineligible to vote. For example, a challenger cannot simply state that they believe a voter to be ineligible because of their age or citizenship status; the challenger must explain why they believe the voter to be underage or why they believe the voter is not a United States citizen. The challenger liaison may deem the reason for the challenger's belief impermissible if the reason provided bears no relation to criteria cited by the challenger, or if the provided reason is obviously inapplicable or incorrect.

Impermissible Challenge to Voter's Eligibility: Lack of Photo ID

A voter who signs an *Affidavit of Voter Not In Possession of Picture ID* cannot be challenged on the grounds that the voter is not in possession of photo identification. Any challenge on these grounds must be deemed an impermissible challenge, should not be recorded by the election inspectors, and the challenger must be warned that no such challenge is allowed.

Processing Challenges to a Voter's Eligibility

If a challenge to a voter's eligibility made at an in-person polling location is determined to be permissible, the challenge must be handled using the following process:

1. The voter is sworn in by the precinct chairperson or another election inspector using the following oath:

   "I swear (or affirm) that I will truly answer all questions put to me concerning my qualifications as a voter."

2. The election inspector who administered the oath asks the voter to confirm that they meet the criteria to be eligible to cast a ballot. The election inspector may ask the voter only the questions necessary to confirm that they meet the criteria disputed by the challenger; the election inspector may not ask the voter any other questions.
3. If, after questioning under oath, the voter confirms they are eligible to vote, the challenge is rejected and the voter is permitted to vote a challenged ballot. A challenged ballot is prepared by writing the voter's ballot number on the ballot and then covering the number with tape or a slip of paper. **The voter then completes the ballot and casts the ballot by feeding the ballot into the tabulator in the same manner as an unchallenged voter.**
4. If the voter does not confirm they are eligible to vote after questioning under oath, the challenge is accepted and voter is not allowed to cast a ballot.

The election inspector should take the challenged voter aside to administer the oath and ask the required questions. Election inspectors should administer the oath and ask the required questions in a manner that does not humiliate, degrade, or embarrass the challenged voter. The oath and questioning process should be carried out in a manner that does not unduly delay the challenged voter.

If a voter whose eligibility is permissibly challenged refuses to take the above oath or answer questions designed to verify the voter's eligibility, the challenge is accepted, and the voter cannot cast a ballot.

A challenger cannot appeal a determination that a challenged voter is eligible to vote on Election Day. Outstanding challenges to a voter's eligibility after Election Day may be adjudicated through the judicial process.

Recording a Challenge to a Voter's Eligibility

Permissible challenges to a voter's eligibility are recorded in both the electronic poll book and the paper poll book. When a voter's eligibility is permissibly challenged, the election inspector selects "Challenged Voter" in the electronic poll book, which automatically creates a notation of the challenge and the challenge's outcome. In addition, the election inspector should also record the challenge on the "Challenged Voters" page of the physical poll book. Finally, the election inspector should make a comment in the electronic poll book recording:

- The challenger's name;

- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; **or**
- If the challenge was accepted, the reason the challenge was accepted.

Because the only action taken by an election inspector in response to an accepted challenge to a voter's eligibility is to disallow that person from casting a ballot, and that denial is automatically recorded in in the poll book when the voter is not issued a ballot, the election inspector does not need to record any additional information about an accepted challenge to a voter's eligibility.

Challenges by an Election Inspector to a Voter's Eligibility

An election inspector shall make a challenge to a voter's eligibility if the election inspector knows or has good reason to suspect that the voter is not eligible to cast a ballot. Such a challenge is treated identically to a challenge made by a credentialed challenger as explained above – the election inspector must provide a specific and permissible reason that the election inspector believes the voter is ineligible to cast a ballot, and there must be some explanation for the election inspector's belief. If an election inspector wishes to challenge a voter's eligibility, the election inspector must make that challenge to the challenger liaison. If the election inspector making the challenge is the challenger liaison, the challenger liaison must make the challenge to another election inspector and the local clerk must be notified of the challenge. A challenge made to a voter's eligibility by an election inspector is recorded and resolved using the same process as a challenge made to a voter's eligibility by a credentialed challenger.

Challenges by a Voter to Another Voter's Eligibility

A registered voter of a precinct who is present at that precinct on Election Day may challenge the eligibility of another person to vote in that precinct if the challenging voter either knows or has good reason to suspect that the challenged person is not eligible to cast a ballot in that precinct.

Such a challenge is treated and resolved identically to a challenge made by a credentialed challenger as explained above. If a voter wishes to challenge a person's eligibility to vote under this mechanism, the election inspector must make that challenge to the challenger liaison.

A voter who is not credentialed as a challenger may only challenge the eligibility of persons attempting to vote in the precinct in which the

challenging voter is registered to vote. A voter who is not credentialed as a challenger cannot challenge persons attempting to vote in any other precinct, nor can they challenge the conduct of election processes. A voter making challenges to the eligibility of other voters in their own precinct may not make challenges designed to harass, annoy, or delay voters. A voter making challenges to the eligibility of other voters in their own precinct, like all persons present in the precinct, must follow the directions of the election inspectors assigned to the precinct.

Challenge to an Absent Voter in the Polls

A voter who requested an absent voter ballot may vote in person so long as their local clerk has not received their absent voter ballot by Election Day. In some situations these voters may be subject to challenge as an absent voter in the polling place. **A voter is subject to challenge as an absent voter in the polling place only if the poll book indicates that an absent voter ballot was sent to the voter and only if the voter does not surrender the absent voter ballot at the polling place on Election Day.**

Voters Who Surrender Their Absent Voter Ballot at the Precinct On Election Day

A voter who received an absent voter ballot but who surrenders that absent voter ballot to election inspectors at the polling place on Election Day may vote a regular ballot. **Such a voter is not subject to challenge as an absent voter in the polling place and a challenge on those grounds is impermissible.**

Voters Who Do Not Surrender Their Absent Voter Ballot at the Precinct on Election Day

A voter for whom the poll book indicates an absent voter ballot was sent may not have received the ballot, may have lost or destroyed the ballot, or may have mailed the ballot back to the clerk so close to Election Day that the ballot may not arrive in time to be counted. **In these situations, the election inspector must always call the local clerk to verify that the voter's absent voter ballot has not been returned to the clerk.** Once the clerk verifies to the election inspector that the absent voter ballot was not returned to the clerk, the voter must sign an affidavit of lost or destroyed absentee ballot stating that the voter did not successfully return

the ballot. Absent a challenger issuing a challenge against that voter, the voter is then permitted to cast a regular ballot.

A voter for whom the poll book indicates an absent voter ballot was mailed may be challenged as an absent voter in the polling place even after the clerk verifies the absent voter ballot has not been returned and after the voter signs the affidavit stating that the voter did not return the ballot; if such a voter is challenged, that voter is permitted to cast a challenged ballot. **So long as the clerk confirms that they have not received the voter's absent voter ballot, the voter is permitted to vote in the polling place on Election Day.** A challenged ballot is prepared by writing the voter's ballot number on the ballot, then covering the number with tape or a slip of paper. The voter then completes the ballot and casts the ballot by feeding the ballot into the tabulator in the same manner as an unchallenged voter.

A voter may only be challenged as an absent voter in the polling place if the poll book indicates that the voter was mailed an absent voter ballot. If the poll book does not indicate that the voter was mailed an absent voter ballot, the voter may not be challenged as an absent voter in the polling place.

Voter Eligibility Challenges Are Not Permissible at an Absent Voter Ballot Processing Facility

Challengers at absent voter ballot processing facilities may make challenges to election processes as described below. Permissible challenges at absent voter ballot processing facilities include challenges to ensure that the review of any portion of the absent voter ballot envelope reviewed at the absent voter ballot processing facility is properly completed. City and township clerks review the portion of the absent voter ballot envelope containing the absent voter's signature prior to Election Day, or when the ballot envelope is received by the clerk on Election Day, to ensure that the signature is genuine and the absent voter is eligible to cast a ballot. If the clerk has verified the signature and the absent voter's eligibility prior to the ballot envelope being transmitted to the absent voter ballot processing facility, neither challenges to the voter's signature nor to the voter's eligibility made at the absent ballot processing facility on Election Day are permissible.

Because an absent voter's eligibility is verified by the clerk prior to the absent voter ballot envelope being processed at the absent voter ballot processing facility on Election Day, election inspectors serving at the absent voter ballot processing facility are not responsible for verifying voter eligibility at the facility. Instead, election inspectors serving at the absent

voter ballot processing facility confirm that the clerk has verified the absent voter's eligibility to cast a ballot by confirming that the clerk has reviewed the signature section of the absent voter ballot envelope. Additionally, because the voters are not present at the absent voter ballot processing facility, the oath administration and questioning process set out in the Michigan Election Law and explained above cannot be carried out at an absent voter ballot processing facility and a challenged voter would have no chance to refute the challenge leveled against them. For these reasons, challenges to voter eligibility at absent voter ballot processing facilities are not permissible and need not be recorded.

Individuals who wish to contest the eligibility of an absent voter should raise those concerns with the clerk of the city or township in which the voter is registered to vote prior to Election Day as prescribed by the Michigan Election Law; no information about a particular voter's eligibility would be available to a challenger serving in an absent voter ballot processing facility which would not have also been available to the challenger prior to Election Day.

Challenges to an Election Process

A challenger may challenge a voting process, including the way that election inspectors are operating a polling place or processing absent voter ballots at an absent voter ballot processing facility. A challenge to an election process must **state the specific element or elements of the process that the challenger believes are being improperly performed** and **the basis for the challenger's belief**.

Impermissible Challenge to an Election Process

A challenge to an election process is impermissible and should not be recorded by the election inspectors if the challenger cannot identify a specific element or multiple elements of the process whose performance the challenger believes improper. A challenge to an election process is also impermissible if the challenger cannot adequately explain why the election process is being performed in a manner prohibited by state law. An explanation for a challenge to an election process must include an explanation of the proper performance of the element or elements in question but need not take the form of a direct citation to statute or election administration materials.

Rejecting a Challenge to an Election Process

A permissible challenge to an election process will be rejected if the challenger liaison determines that the specific element or elements of the election process being challenged are being carried out in accordance with state law. A challenger liaison's determination that a challenge to an election process is rejected may be appealed using the process laid out at the end of this document.

Accepting a Challenge to an Election Process

A permissible challenge to an election process will be accepted if the challenger liaison determines that the challenger is correct and that the specific element or elements of the election process being challenged are not being carried out in accordance with state law. The challenger liaison shall inform the relevant election inspectors how to properly carry out the process and take any other remedial action necessary to correct the error.

Recording Challenges to an Election Processes

A permissible challenge to an election process should be recorded in both the remarks section of the electronic poll book and on the "Challenged Procedures" section of the physical poll book. The record should include:

- The challenger's name;
- The time of the challenge;
- The substance of the challenge; and either
- If the challenge was rejected, the reason why the challenge was rejected; **or**
- If the challenge was accepted, the reason the challenge was accepted, and any remedial actions taken in response to the challenge.

Challenges to Recurring Election Processes: Blanket Challenges

If a challenger wishes to challenge recurring elements of the election process, the challenger must make a blanket challenge. The blanket challenge shall be treated as a challenge to each occurrence of the process but need only be made and recorded in the poll book once. **A challenger may only challenge recurring processes through a blanket challenge; a challenger may not challenge every occurrence of a recurring process in lieu of making a blanket challenge.**

Rights of Challengers

A challenger who has made themselves known to the challenger liaison and who is in possession of a valid credential has the right to:

- Be present in the polling place;
- Make challenges to the challenger liaison or the challenger liaison's designee as provided in these instructions;
- Be treated with respect by election inspectors;
- Be provided with reasonable assistance in performing their duties as a challenger;
- Inspect applications to vote, registration lists, and other printed materials used to conduct elections, so long as the challenger does not touch or handle any of those materials and so long as the inspection does not impede the voting process;
- Observe election inspectors' preparation of voting equipment at the polling place before the opening of the polls on Election Day, and observe election inspectors' handling of voting equipment after the close of polls on Election Day, so long as the challenger does not touch or handle any of that equipment and so long as that observation does not impede the election inspectors in completion of their duties;
- Observe the election process from a reasonable distance, so long as election inspectors have sufficient room to perform their duties and voters are not impeded in any way;
- If serving in a polling place on Election Day, to use electronic devices, so long as the device is not disruptive and so long as the device is not used to make video or audio recordings of the polling place;
- Observe election-related activities at a polling place on Election Day at any time the polling place is open to the public, including prior to the opening of polls or after the closing of polls;
- Take notes about the election process;
- Notify the challenger liaison of perceived violations of election laws by third parties, including electioneering within 100 feet of the precinct, improper handling of a ballot by a voter, or other issues;
- Remain in the precinct after the close of polls or the end of tabulation and until the election inspectors complete their duties;
- If serving in a polling place where ballots are being issued, stand behind the processing table and close enough to view the poll book as ballots are issued to voters and the voters' names are entered into the poll book, so long as the challenger does not touch or handle the poll book or otherwise interfere with the work of the election inspectors; and
- If serving at an absent voter ballot processing facility, to stand in a location where the tabulation of absent voter ballots can be observed, or to stand in a location where the entry of the names of voters whose ballots are being processed into the poll book can be viewed, so long as the challenger does not touch or handle any election-related materials.

Restrictions on Challengers

Challengers may not:

- Speak with or interact in any way with voters;
- Threaten or intimidate voters or election inspectors, or attempt to threaten or intimidate voters or election inspectors at any stage of the voting process;
- Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff;
- Make repeated impermissible challenges;
- Make a challenge indiscriminately or without good cause, or for the purpose of harassing, delaying, or annoying voters, election inspectors, or any other person;
- Physically touch or interact with ballots, absent voter ballot envelopes, electronic poll books, physical poll books, or any other election materials;
- Stand so close to the poll book or other materials that the challenger's proximity to those materials interferes with the election inspectors' ability to perform their duties;
- Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility;
- Provide or offer to provide assistance to voters;
- Wear any clothing or other apparel relating to any party, candidate, or proposition on the ballot or which disrupts the peace or order of the polling place, unless the challenger is serving at an absent voter ballot processing facility and is given permission or instructed to wear such an identifier;
- Wear clothing or other apparel expressly advocating for or against the election of a candidate or advocating the passage or defeat of a ballot measure;
- Set up a table or other furniture in the polling place;
- If serving at an absent voter ballot processing facility, possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day; or
- Take any actions to disrupt or interfere with voting, ballot tabulation, or any other election process.

Warning and Ejecting Challengers

If a challenger acts in a way prohibited by this instruction set or fails to follow a direction given by an election inspector serving at the location at

which the challenger is present, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected.

A challenger who repeatedly fails to follow any of the instructions or directions set out in this manual or issued by election inspectors may be ejected by any election inspector. A challenger who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may also be ejected by any election inspector. The ejection should be noted in the poll book. If the challenger refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the challenger from the polling place or absent voter ballot processing facility.

As explained above, a challenger who is ejected from an absent voter ballot processing facility before the close of polls and while the challenger is subject to sequestration should, in lieu of being removed from the area containing the facility, be directed to remain in a room or area of the location separate from the area where absent voter ballots are being processed.

Challenger Appeal of Election Inspector Determinations

A challenger may appeal a decision by the challenger liaison or any other election inspector relating to the validity of a challenge, to a challenger's conduct, or to a challenger's ejection to the city or township clerk of the jurisdiction in which the challenger is serving. At the request of a challenger, the challenger liaison must provide the contact information of the city or township clerk. The appeal must be made outside of the hearing of voters. If the challenger is appealing their ejection, the appeal must be made after the challenger has left the polling place or absent voter ballot processing facility. If the city or township clerk rejects the challenger's ejection as improper, the clerk shall inform the challenger liaison and the challenger shall be allowed to reenter the polling place or absent voter ballot processing facility.

The challenger may appeal the decision of the local clerk to the Bureau of Elections.

A challenger may not appeal to the city or township clerk an election inspector's resolution to a challenge to a voter's eligibility to vote. Appeals of an election inspector's resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day.

IV. Poll Watchers

Members of the public who are not credentialed challengers have a right to observe elections. Members of the public wishing to observe elections, often referred to as poll watchers, do not enjoy the same rights as credentialed challengers. A person does not need to be registered to vote in Michigan to serve as a poll watcher in this state, but a candidate for elective office being voted on in the election cannot serve as a poll watcher. There is no particular number of poll watchers that must be admitted to any election-related location, but poll watchers must be permitted to observe the electoral process so long as the total number of poll watchers does not cause the process to be disrupted.

A poll watcher present in an absent voter ballot processing facility prior to the close of polls on Election Day is sequestered and cannot leave the facility between the time ballot tallying begins and the time that the polls close. Such a poll watcher must take the same oath as a challenger serving at the facility.

Rights of Poll Watchers

Poll watchers are allowed to be present in a polling place or an absent voter ballot processing facility. Clerks or challenger liaisons must designate a Public Viewing Area from which poll watchers can observe the electoral process. The Public Viewing Area must be placed in a location that does not interfere in any way with the work of election inspectors present in the location. If the location is a polling place, the Public Viewing Area must be situated so that the presence of poll watchers does not interfere with voters participating in the voting process. If the Public Viewing Area for a particular election location is full and cannot accommodate more poll watchers, and if the Public Viewing Area cannot be enlarged without disrupting election processes, the clerk or challenger liaison may deny entry to additional poll watchers. If the location is an absent voter ballot processing facility, the poll watcher must take the same oath as a challenger present at such a facility

and is bound by all the same restrictions as a challenger present at such a facility.

A poll watcher may request that the challenger liaison allow the poll watcher to view the poll book without handling it, but the challenger liaison may decline that request. A poll watcher may never handle the poll book or other election equipment or materials.

Restrictions on Poll Watchers

Poll watchers are subject to all of the same restrictions as credentialed challengers, including the prohibitions against speaking with voters and against speaking with election inspectors other than the challenger liaison without the challenger liaison's permission. In addition, poll watchers cannot:

- Issue challenges;
- Stand behind the election inspectors as voters are processed; or
- Be present in any part of the polling place, clerk's office, or absent voter ballot processing facility except the designated Public Viewing Area.

Ejection of Poll Watchers

A poll watcher who repeatedly fails to follow any of the above instructions, who acts in a manner that disrupts the peace or order of the polling place or absent voter ballot processing facility, who acts to delay the work of any election inspector, or who threatens or intimidates a voter, election inspector, or election staff, may be ejected by any election inspector. If the poll watcher refuses to leave after being informed of their ejection by an election inspector, the election inspector may request law enforcement remove the poll watcher from the polling place or absent voter ballot processing facility.

TO: Michigan County, City, and Township Election Clerks

FROM: Daniel J. Hartman (P52632)
Attorney at Law

RE: Response to Email August 26, 2022
Lori A. Boubonias

DATE: August 2^, 2022

This memo is written in response to the Email dated August 26, 2022, from Lori A. Boubonias, Director of Election Administration Division f the Michigan Bureau of Election to the County Clerks after my Memo of 8/25/22 addressing the instruction- entitled ***Recounts; Release of Security***.

YOU as a clerk are not required to comply with an unlawful order. The Secretary of State or Bureau of Elections should instruct you to violate the law. Please seek independent legal advice on record retention requirements.

TRANSPARENCY OF ELECTIONS

As you read R168.771 et seq that were promulgated long before the current computers used in an election which I referenced yesterday it is important to realize that the computer program used to be available for public inspection. There was no fear of with an 'open' or public computer program of malicious code or tampering with the election. The programmers among us provided the checks and balances.

A tabulator need not be any more complicated than a calculator or spreadsheet. Working properly, it will convert an optical image into a table. This is to tabulate.

What is on the drives that the Bureau of Elections is desperate to delete? The answer is logs of activity. It shows exactly what happened and has many time stamps with the order of how the election was conducted. Any person especially a clerk that wanted to review their election to ensure that there was no problem would be wise to review these logs.

The claim that the logs are top secret is a bald-faced lie. I am certain that someone's pants caught on fire and their nose grew three inches.

Attached to this memo will be an audit file from a tabulator that shows exactly what transpires during the election. It shows the date and time the equipment was turned on and it shows when the election was closed. It shows the time that each ballot was scanned. It shows all problems such as reversals. It keeps a total of the ballots. More importantly, it shows all of the settings of the devices. Another storage drive will show the cast vote record.

There are no national security threats or secrets on the tabulator security and audit logs.

If the removable storage drive is preserved and fell into the hands of people who wanted to tamper with the election what could they do without access to the tabulator? We the people have been repeatedly assured there is no connection to internet or cellular service during the election and that the tabulator is "air gapped" so that it cannot be penetrated by a hacker foreign or domestic…

Where is the security breach more at risk after seven days than before? Why would there be risk on day 20 that is not present on day 7?

Look in the mirror tonight and as yourself why does the Secretary of State want to delete this air-gapped data stick? The answer is so that the people you were elected to serve will never see the information contained on it and no law enforcement can check the security of our elections.

Have you been transparent? Do you view FOIA as a burden? Do you believe that the people have the right to check their election? Are you comfortable with the Secretary of State instructing you against transparency?

SEPERATION OF POWERS DOCTRINE

I want to discuss the separation of powers as enshrined in the American and Michigan system of government. A legislature makes the law. The executive branch including the secretary of state must comply with the law. They may not change it or alter it because they do not like the law. They may not decide to suspend the law because they perceive some security risk or other health crisis. When there is a question of what a law means then the judicial branch will determine the answer or how to apply the law to a specific problem.

You are responsible for complying with the law. Ignorance of the law is no excuse. Providing as an excuse that someone else told you it was not unlawful is no excuse.

The Michigan Constitution created local control and local government over certain areas of our life which define our freedoms. This is why Michigan has precincts and local election clerks instead of emailing a ballot into Washington DC to vote. The clerks have an important role and that includes maintaining all election records that are generated while conducting an election. This duty was imposed by law on YOU. Read the memo sent yesterday.

I will briefly restate the law that we covered just so that you are clear as we continue examining the problem with the email instruction.

MCL 168.932 Prohibited conduct; violation as felony

Sec. 932. A person who violates 1 or more of the following subdivisions is guilty of a felony:

(c) An inspector of election, *clerk*, or other officer or *person having custody of any record*, election list of voters, affidavit, return, statement of votes, certificates, *poll book*, or of any paper, document, or vote of any description, which pursuant to this act is directed to be *made, filed, or preserved*, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or *fraudulently make any entry, erasure, or alteration on any or all of those items*, or permit any other person to do so. MCL 168.935 makes this felony punishable by 5 years and or $1000.00 or both

Read that and realize this is not addressed to the Secretary of State or the public at large. This crime is a crime committed by election clerks. You are the custodians of our voting records.

The email used the phrase "As has been done in past elections". This is not legal authority. While it may be a customary action it does not comply with the law. Maybe nobody cared when this instruction was previously issued.

The email used the phrase "The Bureau has issued a directive". This is a big statement. Based on past directives, it can be assumed that the Secretary of the State relies upon MCL 168.21 which states

168.21 Secretary of state; chief election officer, powers, and duties.

Sec. 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.

This section needs to be understood that it HAS to be read in the context of the entire Election Code and Michigan Constitution. This will require a person to understand certain words. What is supervisory control? Does it include the power to give directives? What are the duties of the local election clerk? What does the word 'performance' mean?

The rules of statutory interpretation will direct the person to look within the 'act'. That is MCL 168.1 et seq which is known as Public Act 116 of 1954.

A careful read of the statute will provide a clear definition of the scope of authority of the secretary of state.

A statute that is overbroad or vague is often declared unconstitutional. A statute that grants too much authority without definition will be declared unconstitutional. Lawyers will use terms like arbitrary and capricious which just means that it is without clarity so it is up to the whim of the

executive. The founders of our country were very skeptical so they designed a system in which only expressly enumerated powers are granted and all other powers are reserved to the people.

The legislature spoke in the Michigan Election Law and described the role of the secretary of state with definite instructions. Let us review what is said here.

The term Secretary of State is used 12 times in Chapter 2 of the election code. We have already examined the first in MCL 168.21 which is two of the times it is mentioned. The term is mentioned four times in MCL 168.22g related to expenses and once in MCL 168.24c which references the appointment of the board of state canvassers the number of votes cast for secretary of state determines the two largest political parties.

MCL 168.24j is the first grant of specific authority which is that a manufacturer of a ballot container must submit for approval. However, the legislature does not give the Secretary of sSate open-ended authority rather the statute then defines the requirements for approval. The Secretary of State is authorized to determine if the container meets the standards passed by the legislature.

Sec. 24j. (1) A ballot container includes a ballot box, transfer case, or other container used to secure ballots, including optical scan ballots and electronic voting systems and data. (2) A manufacturer or distributor of ballot containers shall submit a nonmetal ballot container to the **secretary of state** for approval *under the requirements of subsection* before the ballot container is sold to a county, city, township, village, or school district for use at an election. (3) A ballot container **shall** not be approved unless it meets both of the following requirements: (a) It is made of metal, plastic, fiberglass, or other material, that *provides resistance to tampering.* (b) It is capable of *being sealed* with a metal seal.

This is an excellent example of the legislature providing a law requiring use of a container. The container is important, so they define how to have it approved and the standards for approval and then authorize the executive branch official to apply the standards. THERE IS NO AUTHORITY to excuse the standards or ignore the standards. Optional features that do not violate the statute are within the discretion of the Secretary of State. Obviously, the quality of the material and the exact mechanism of the seal are not defined--but the Secretary of State can not lawfully select cardboard or a ballot container that is not able to be closed.

MCL 168.24k provides the Secretary of State authority to approve the ballot secrecy envelopes and there is again a minimum threshold standard.

MCL 168.30 provides that clerks who are required to notify the Secretary of State of compliance with their duties as to an address notification. This is also important to understand. The duty is imposed upon the clerk to perform an action and then to provide proof the secretary of state of compliance. This is supervisory control.

There is no authority to discipline or remove a clerk only to report their failure to perform a duty which subjects the clerk to local recall, criminal prosecution for misfeasance, malfeasance or non-feasance but it is usually a kind reminder to comply.

It is time to review.

168.21 Secretary of state; chief election officer, powers, and duties.

> Sec. 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.

The election-related duties belong to the "local election official", and the supervisory control is teaching, training, coaching and then finally obtaining reports and holding accountable by investigation and reporting. There is no direct authority anywhere over the local election clerks.

In an exploration of chapter 2 Michigan Election Law, we reviewed how the legislature delegates authority to an executive branch official and places a check on that authority by supervising was explored.

All powers of the Secretary of State must be enumerated. Likewise, all duties imposed on a clerk are enumerated. Where is the Secretary of States' Power to issue a directive to delete election-related electronic records based on a custom of doing so without even citing a law—it can not be on their authority.

Now we will look at the other sections of the Act and see what relevant powers the Secretary of State has been granted by the legislature. In the previous memo, I explained the clerks' duties as to record retention and the criminal penalties for violating them.

Chapter 3 of the Election Code is very specific and is entitled DUTIES OF THE SECRETARY OF STATE.

DUTIES OF SECRETARY OF STATE
168.31 Secretary of state; duties as to elections; rules.
Sec. 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.

(d) Publish indexed pamphlet copies of the registration, primary, and election laws and furnish to the various county, city, township, and village clerks a sufficient number of copies for their own use and to enable them to include 1 copy with the election supplies furnished each precinct board of election inspectors under their respective jurisdictions. The secretary of state may furnish single copies of the publications to organizations or individuals who request the same for purposes of instruction or public reference.

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

(f) Prepare the form of ballot for any proposed amendment to the constitution or proposal under the initiative or referendum provision of the constitution to be submitted to the voters of this state.

(g) Require reports from the local election officials the secretary of state considers necessary.

(h) Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution.

(i) Publish in the legislative manual the vote for governor and secretary of state by townships and wards and the vote for members of the state legislature cast at the preceding November election, which shall be returned to the secretary of state by the county clerks on or before the first day of December following the election. All clerks shall furnish to the secretary of state, promptly and without compensation, any further information requested of them to be used in the compilation of the legislative manual.

(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.

(n) Create an election day dispute resolution team that has regional representatives of the department of state, which team shall appear on site, if necessary.

(2) Pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the ***secretary of state shall promulgate rules establishing uniform standards*** for state and local nominating, recall, and ballot question petition signatures. The standards for petition signatures may include, but need not be limited to, standards for all of the following:

(a) Determining the validity of registration of a circulator or individual signing a petition.

(b) Determining the genuineness of the signature of a circulator or individual signing a petition, including digitized signatures.

(c) Proper designation of the place of registration of a circulator or individual signing a petition.

As a clerk, it is important to review the duties imposed by the Legislature on the Secretary of State. Start with paragraph (2). This required the Secretary of State to promulgate rules. This means following the administrative procedures to use the rulemaking authority. Rules are not laws. They are procedural and describe the process and fill in details to accomplish the duty. The administrative procedures require the proposal of the rule, public comment etc.

Start by asking right now if the Michigan Secretary of State has promulgated rules to comply with this duty. The answer is NO and the citizens of Michigan had five candidates removed from the ballot for Republican Party in a process that was best described as a goat rodeo as THERE IS NO UNIFORM STANDARD. There are only three sets of promulgated rules in the Administrative Code from the Department of State related to MCL 168. This is failure to perform a clear duty.

Next, let us review paragraph 1 which has been divided into subsections a-n and begins with the word SHALL. This makes all of the parts in sections a—n mandatory.

(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.*

Section (a) references a duty to make instructions and promulgate rules for the registration and conduct of elections IN ACCORDANCE WITH THE LAWS OF THE STATE. The laws control and the rules are meant to fill in the gaps with uniform processes. Instructions are to teach the laws of the state to the clerks.

Instruction and rulemaking authority (which have been not used by this SOS) are specific legal concepts. Instruction can be best understood when a judge provides jury instructions. The judge does not change the law rather the judge teaches the law necessary to render a decision to the jury. Likewise, the secretary of state is to teach the law related to the registration and conduct of elections to the clerks—not change or alter the laws.

Rulemaking authority again is a public process. It offers notice and comment from the public before the rules are adopted through a process of promulgation which requires the time and energy of having a democratic process such as notice and comment on rules to make processes uniform.

Therefore, we have three sets of rules issued by the Secretary of State and they can be found discussed in the memo from yesterday related to this act. There are times when the legislature required rules that have not been completed such as in MCL 168.31(2)

(b) **Advise and direct** local election officials as to the proper methods of conducting elections.

Section b provides the phrase "advise and direct". This is important to understand that advise means suggestive and direct is more forceful. This is what is meant by supervisory control. The rest of the phrase is important-the advise and direct is to the local election officials and the subject matter is the PROPER METHODS FOR CONDUCTING ELECTIONS.

The retention of records generated during the election process is not a method for conducting elections. In fact, there is a chapter in the ACT that deals with the method for conducting elections. This is chapter XXVIII.

The Legislature did not authorize the Secretary of State "to instruct them to delete log files which were generated during the conduct of elections." Nor did it authorize the secretary of state to act during a records retention period or provide advice and instruction on records retention.

c-n The majority of these relate to the creation of material that will help educate the over or the election officials on the law. There is some verbs like publish, furnish, and prepare. There is a requirement to establish training programs. All of this is educational to comply with the law.

Section g is worth noting in that it permits the secretary of state the authority to require reports.

(h) Investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution.

This is a supervisory role in which violations are investigated and reported.

Even with this, there is no authority to create the authority of the secretary of state barriers between the people and their election records including computer-generated records. There is no authority to instruct the clerks to wipe the storage of material generated by the election system.

When a person carefully reads the election law, which I have done so many times, then it becomes clear that the Legislature provided a Secretary of State to be the person who is accountable to the legislature for the registration and election system, but the election system is diversified and executed by local election clerks.

The authority of the Secretary of State is essentially to teach the law to the clerks and when they do not follow the law then to report the fact that a clerk has not followed the law. In a democracy it's unfortunate that even some of the clerks have not complied with the training or filed reports that are required. The Secretary of the State is supposed to be monitoring and leading the election system on those areas to encourage and entice and document and report.

CONCLUSION

The big secret is that the election clerks have all of the power to conduct the election. You live in our neighborhoods and go to our churches and schools and you are We the People even if you're

from a different party. Our government is by the people and of the people. Our government is you, our neighbor, our friend, the lady who sits a few rows over in church, the man who has a son on my daughter's sports team.

I have pledged my life to my faith in Jesus Christ. Others may relate or not understand. It's ok. As part of that commitment, I take seriously the instructions to love my neighbors. I accept his teaching which is that I am to be non-violent. Jesus humbly went to the cross when his government came for him. None of the people I associate with are insurrectionists or will use violence to bring awareness to the problem. We will watch our cities burned by other groups and shake our heads. We do still believe that we have the right to assemble and to petition our grievances to our government which is supposed to be us. Our neighbors take turns and serve as election workers and clerks and school board members as we strive to keep the authority over our lives firmly entrenched in local officials—like as sheriff we can go into his office and look him or her in the eye, or the congressman who twice a year has to come to seek our vote or a dedicated clerk who took the job to represent the people and not advance themselves at the expense of the people.

I apologize to all of the men and women who have become agitated over the problems that we see. I want each of you to know we know that like every occupation there are good and evil. We still believe that the clerks of our state are by an overwhelming majority honest folks who may have been the victim of an election crime that was designed to circumvent your controls. All bad criminals know that the "best" way to commit a crime is when the crime is undetected. A crime that is based on the confidence of the mark is a con job. Even when a local clerk does everything right is there any ability to change or alter the result? Do you know what happens inside the black box of the voting tabulator?

Together We can Fix This. *Save the Data, Be Transparent.*

Dan…

STATE OF MICHIGAN

COURT OF CLAIMS

DONALD D. WILSON,

Plaintiff,

v

JOCELYN BENSON, Secretary of State, JONATHAN BRATER, Director of the BUREAU OF ELECTIONS, NORMAN D. SHINKLE, former Chair of the BOARD OF STATE CANVASSERS, and RUTH JOHNSON, former Secretary of State,

Defendants.
_____/

OPINION AND ORDER

Case No. 22-000097-MB

Hon. Douglas B. Shapiro

Pending before the Court is defendants' MCR 2.116(C)(8) motion for summary disposition in this action under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and for declaratory relief relating to the upcoming November 8, 2022 general election. Having reviewed the briefing, the Court dispenses with oral argument per LCR 2.119(A)(6). For the reasons discussed below, the motion is GRANTED with regard to Counts II and III of the complaint, but DENIED as to Count I of the complaint.

I. BACKGROUND

Plaintiff's lawsuit arises from his challenge to defendants' electronic-voting systems and election-record retention policies, as well as plaintiff's FOIA request for documentation about defendants' certification of electronic voting machines. On September 25, 2021, plaintiff submitted a FOIA request to the Michigan Department of State, requesting "any documentation

concerning the certification of the election machines used in Michigan for the 2020 November election."

On October 18, 2021, the Department of State responded by granting the request, but required a deposit fee of $659.83—half of the Department's good-faith estimate to fulfill the request. The Department of State also estimated that it would take approximately 12 weeks, or by around mid-January 2022, to fulfill the request. Plaintiff paid the deposit fee on November 29, 2021.

As of March 2022, plaintiff had not received responsive documents and on March 24, 2022, he contacted the FOIA coordinator, Adam Fracassi, inquiring about the status. Fracassi responded, "We have received your payment and it was validated at the beginning of December and it is in process. I'll be in touch when we are completed processing and inform you if there is any additional money due." Plaintiff contacted Fracassi again in mid-June 2022, requesting another update on the status of his FOIA request and expressing his frustration with the delay.

After not receiving a response, plaintiff filed a three-count complaint on July 4, 2022. Count I is a FOIA claim requesting production of correspondence relating to the certification of the electronic-voting machines, as well as fees, costs, and disbursements under MCL 15.240(6), and punitive damages under MCL 15.240(7). Count II requests a declaratory judgment regarding "unaccredited electronic voting systems" in violation of the Michigan Election Law, MCL 168.1 *et seq.*, and the Help America Vote Act (HAVA), 52 USC 20901 *et seq*. In essence, plaintiff claims that the electronic-voting systems used in Michigan were not accredited through the proper channels. Count III is a declaratory-judgment claim for violation of 52 USC §§ 20701 and 20705, relating to defendants' electronic-records retention policies.

In Counts II and III, plaintiff requests various forms of declaratory and equitable relief, including: (1) an emergency injunction that prohibits the state from using voting machines in the 2022 general election; (2) an emergency injunction prohibiting use of the data and information from the voting systems and equipment used in the 2020 general elections to be "tampered with" or deleted; (3) an order compelling the Secretary of State to issue a complaint referral, under 42 USC § 20511(2), to the Attorney General's office and the Department of Justice to investigate alleged criminal and fraudulent election activity; (4) an order compelling the Secretary of State to request a temporary restraining order (TRO) or injunction to prevent the use of any electronic voting equipment in the upcoming general election; (5) a final judgment directing Governor Gretchen Whitmer to render elections void because "fraud vitiates everything;" and (6) an emergency TRO for the Secretary of State and Bureau of Elections to preserve all of the 2020 general-election documentation.

Defendants moved for summary disposition on August 8, 2022. On the same day, Fracassi contacted plaintiff to provide responsive records. Defendants' production totaled about 45 pages. Fracassi stated that additional records were available on the United States Election Assistance Commission's website, and provided the website link. He added, "Additional copies of these records are not being provided as they are already available online, and the adjustment to the original fee reflects the online availability of records." Fracassi did *not* suggest that defendants had withheld any responsive documents. Fracassi reminded plaintiff that he had a remaining invoice balance of $8.48 (which plaintiff contends he has paid).

In their motion for summary disposition, defendants argue that plaintiff's FOIA claim lacks merit because defendants never denied plaintiff's FOIA request. Rather, defendants granted plaintiff's request and were not bound by any particular time frame for fulfillment. The lawsuit

was not necessary to fulfill the request because defendants were processing the request when plaintiff filed his complaint. Regarding the declaratory-relief claims, defendants argue that plaintiff lacks standing, and his claims are barred by laches because he sued only a few months before the election. Finally, defendants argue, plaintiff's declaratory claims are "conspiracy theories" and disguised mandamus claims, which fail because none of the laws on which plaintiff relies create a private cause of action or establish a violation of a clearly-established legal right.

Plaintiff responds that he has not, in fact, received all responsive documents. He contends the lawsuit was necessary to produce the documents, which entitles him to reimbursement of his fees, costs, and disbursements, as well as punitive damages. Plaintiff claims to have standing to sue under the Michigan Constitution, as well as under both Michigan and federal law. He contends that laches does not apply because he was waiting to review the FOIA documents before determining whether he had any valid claims. Plaintiff outlines the merits of each of his declaratory-relief claims, but does not directly address defendants' contention that none of the relevant laws establish a private cause of action.

II. ANALYSIS

A. FOIA CLAIM

Defendants argue that plaintiff's FOIA claim fails on the pleadings[1] because the Department of State produced responsive records and was not bound by any specific time frame when doing so. The Court disagrees.

[1] Defendants move for summary disposition on the pleadings under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint. *Ass'n of Home Help Care Agencies v Dep't of Health and Human Servs*, 334 Mich App 674, 684 n 4; 965 NW2d

Under FOIA, a person may make a written request to the FOIA coordinator for a public body asking for public records. MCL 15.235(1). Next, FOIA requires the public body to respond to the request within five business days. MCL 15.235(2) explains:

> Unless otherwise agreed to in writing by the person making the request, a public body shall, subject to subsection (10), respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a written notice to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
>
> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

Defendants assert that because the Department responded to the FOIA request by "granting" the request within the time parameters outlined in FOIA, there was no FOIA violation even though defendants took nearly a year to fulfill the request. They argue that FOIA does not mandate that the public body fulfill the request within the same time frame as is required to respond to the request. Defendants further argue that they have produced all responsive documents. As for the delay, defendants argue the process was time consuming because Michigan's elections are decentralized and carried out by local clerks in the state's 1,520 cities and townships.

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707 (2020). Summary disposition is proper if the plaintiff has failed to state a claim on which relief may be granted. *Id*. The court may only consider the pleadings in the complaint, but all factual allegations are accepted as true. *Id*. " 'The motion should be granted if no factual development could possibly justify recovery.' " *Id*. (citation omitted). Finally, the Court considers the documents that are attached as part of the plaintiff's complaint. See MCR 2.113(C); *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163; 934 NW2d 665 (2019).

While the Court agrees with defendants that FOIA does not require fulfillment of the request within the five-day time frame for the initial response, FOIA does not provide defendants carte blanche to indefinitely delay production. The Court of Appeals has reasoned that courts may look beyond the label the public body placed on the FOIA response to determine whether the FOIA request was, in fact, "granted." *King v Mich State Police Dep't*, 303 Mich App 162, 189; 841 NW2d 914 (2013). For example, in *King*, the Court determined that the public body's "grant" of a FOIA request was really a decision to grant the request in part and deny the request in part. See *id*. at 190.

Here, plaintiff argues that defendants' initial "grant" of his FOIA request became a de facto denial because of the delay in fulfillment. He also disputes whether defendants produced all the requested documents. Plaintiff contends defendants did not produce documentation establishing that the electronic-voting systems used in the 2018 or 2020 elections were lawfully certified. And he points out that defendants took nearly a year to produce only 45 pages of documents in response to his request.

A public body is only required to produce copies of existing responsive documents, and has no obligation to create responsive documents. *Bitterman v Village of Oakley*, 309 Mich App 53, 67; 868 NW2d 642 (2015). When the public body denies the request by claiming that responsive documents do not exist, the public body must certify that the public record does not exist. MCL 15.235(5)(b). Then, if the public body supports that the records do not exist, under MCR 2.116(C)(10), the burden shifts to the plaintiff to counter that evidence. *Coblentz v City of Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006), citing MCR 2.116(G)(4).

While it is true that the Court cannot compel production of documents that do not exist, at the pleadings stage, the Court cannot determine whether all responsive records have been produced, or whether additional documents may exist that are responsive to plaintiff's request. Nor is the Court permitted, under MCR 2.116(C)(8), to look beyond the pleadings to address the question. Therefore, the Court denies summary disposition on plaintiff's FOIA claim to the extent he requests disclosure of all responsive documents. The Court encourages the parties to work cooperatively to determine whether defendants have produced all responsive records.

Moreover, the Court agrees with plaintiff that production of requested documents is not the end of the story in a FOIA action. MCL 15.240(6) allows a FOIA plaintiff to recover attorney fees, costs, and disbursements if they prevail in the lawsuit. Additionally, MCL 15.240(7) provides for punitive damages as follows:

> If the court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of $1,000.00, which shall be deposited into the general fund of the state treasury. The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

In *Amberg v Dearborn*, 497 Mich 28, 33; 859 NW2d 674 (2014), the Michigan Supreme Court clarified that " '[t]he mere fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6).' " (Alteration in original; citation omitted.) Rather, to prevail on a FOIA claim, the plaintiff must establish that " 'the action was reasonably necessary to compel the disclosure [of public records], and [that] the

action had a substantial causative effect on the delivery of the information to the plaintiff.' " *Id*. at 34 (alterations in original), quoting *Scharret v City of Berkley*, 249 Mich App 405, 414; 642 NW2d 685 (2002). As far as the rationale behind this rule, the Court of Appeals explained, in *Thomas v City of New Baltimore*, 254 Mich App 196, 205; 657 NW2d 530 (2002), that "[a]n otherwise successful claimant should not assume the expenses of the litigation solely because it has been rendered moot by the unilateral actions of the public body." (Citation omitted.)

Defendants rely on *Cramer v Village of Oakley*, 316 Mich App 60, 66-68; 890 NW2d 895 (2016), vacated in part 500 Mich 964 (2017). In *Cramer*, the Court of Appeals concluded that although a public body is required to respond to a FOIA request within the statutory time frame, a public body does not need to fulfill the FOIA request within that five-day time frame. *Id*. However, in Part III of its opinion, the Court repeated its reasoning from *King* that a public body does not have unlimited authority to avoid production of responsive documents. *Id*. at 68. The Court held, for example, that a plaintiff could sue on the basis that the public body's inordinate delay was an effective denial of the FOIA request, even if the public body had "granted" the request. *Id*., citing MCL 15.240(7).

As it related to attorney fees and costs, in Part IV of the opinion, the Court concluded, consistent with *Amberg*, that to prevail in a FOIA action where documents have already been produced, the plaintiff must establish that "the action was reasonably necessary to compel the disclosure [of public records], and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff." *Cramer*, 316 Mich App at 70-71 (citations omitted; alterations in original).

In 2017, the Michigan Supreme Court vacated as moot Part III of the Court of Appeals' opinion and remanded the case to the circuit court for dismissal of all the plaintiffs' FOIA claims. *Cramer v Village of Oakley*, 500 Mich 964; 892 NW2d 371 (2017). But the Court did *not* vacate Part IV of the Court of Appeals' opinion regarding fees and costs. *Id*. Nor did the Court express disagreement with its prior decision in *Amberg* or the Court of Appeals' opinions in *Scharrett* and *Thomas*. See *id*. Thus, if plaintiff can establish that his FOIA lawsuit was reasonably necessary to prompt defendants' production of documents, under *Amberg, Scharrett*, and *Thomas,* plaintiff has stated a valid claim for reimbursement of his fees and expenses.

The timing of defendants' production—a month after plaintiff filed this lawsuit (on July 4, 2022) and on the same day as its dispositive motion (on August 8, 2022)—suggests that the production was a direct reaction to plaintiff's FOIA lawsuit. Plaintiff sued after waiting nearly a year for a 45-page document production. This case differs significantly from *Cramer*, where the production occurred within days of the public body's decision to grant the request. See *Cramer*, 316 Mich App at 71. And defendants do not explain the delay beyond a cursory argument that the requested documents were located at the local level. Yet defendants produced only around 45 pages of responsive documents. Under these circumstances, the Court concludes that plaintiff has stated a valid claim that the timing of the production was more than mere coincidence. Therefore, accepting plaintiff's allegations as true, plaintiff has stated valid claims for attorney fees and costs, under MCL 15.240(6). As far as punitive damages, accepting the factual allegations as true, plaintiff has stated a valid claim that defendants arbitrarily and capriciously delayed disclosure of the public records. MCL 15.240(7). Therefore, the Court denies defendants' motion as it relates to plaintiff's FOIA claim in Count I of the complaint.

B. DECLARATORY-JUDGMENT CLAIMS

In Count II and Count III of the complaint, plaintiff requests a declaratory judgment under HAVA, the Michigan Election Law, and two federal criminal statutes that address retention and destruction of election records. MCR 2.605 provides, in relevant part, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1).

Regarding HAVA, the Sixth Circuit has concluded that "HAVA does not itself create a private right of action." *Sandusky Co Democratic Party v Blackwell*, 387 F3d 565, 572 (CA 6, 2004). To the extent that HAVA creates a federal right enforceable under 42 USC § 1983, plaintiff does not raise a § 1983 claim in this case.[2] See *id*. (indicating that HAVA may form the basis of a § 1983 claim). Even if he did, the United States Supreme Court has held that state entities and state officials, are *not* "persons" subject to liability under § 1983. *Will v Mich Dep't of State Police*, 491 US 58, 65-71; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Therefore, plaintiff's HAVA claim fails as a matter of law.

As for 52 USC § 20701 and 52 USC § 20705, which relate to retention of federal election records, neither of these statutes authorize a private cause of action. Section 20705 merely outlines which courts have jurisdiction to hear a claim under § 20701 and subsequent statutory provisions. Likewise, § 20701 is a criminal statute that requires election officials to retain and preserve election records. There is no language in the statute authorizing a private cause of action. Several

[2] Plaintiff suggests in his response brief that he has standing to sue under § 1983, but he does not plead any claims under § 1983.

federal courts have confirmed that 52 USC § 20701 does not contain a private right of action and that enforcement of the statute rests with the states. See, e.g., *Ayyadurai v Galvin*, 560 F Supp 3d 406, 409 (D Mass, 2021); *Pirtle v Nago*, unpublished order of the United States District Court for the District of Hawaii, issued August 31, 2022 (Docket No. 22-00381), p 3; *Fox v Lee*, unpublished order of the United States District Court for the Northern District of Florida, issued April 2, 2019 (Docket No. 4:18cv529), p 1.

Finally, in Count II of the complaint, plaintiff cites various provisions of the Michigan Election Law, as outlined in MCL 168.794, MCL 168.795, and MCL 168.795a, all of which relate to use of electronic voting systems.[3] None of these provisions expressly provide a private cause of action. When read generously, plaintiff's complaint is one for mandamus relief because, in each request for declaratory relief, plaintiff asks the Court to compel defendants to perform an alleged legal duty. " 'Mandamus is the appropriate remedy for a party seeking to compel action by election officials.' " *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (citation omitted).

To the extent that plaintiff requests mandamus relief, he has standing to pursue that claim as it relates to the upcoming election. See *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 505-506; 688 NW2d 847 (2004) (holding that ordinary citizens have standing to sue to enforce election laws); *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) (" 'It is generally held, in the absence of a statute to the contrary, that a private person as relator may enforce by mandamus a public right or duty relating to elections without showing a special

[3] Plaintiff also cites "MCL 168.274," but no Michigan statute exists with that citation.

interest distinct from the interest of the public.' ") (Citation omitted.) See also *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 588; 957 NW2d 731 (2020) (holding that *Deleeuw* and *Helmkamp* only apply when there is a "present legal controversy"—*i.e.*, when the plaintiff raises a challenge in the context of an upcoming election). The Court concludes there is no present legal controversy as it relates to the 2018 and 2020 elections and, therefore, plaintiff lacks standing to pursue a claim relating to the prior elections.

> To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. [*Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016) (citation and quotation marks omitted).]

A ministerial act is an act "in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* at 42 (citation and quotation marks omitted).

Taking each claim in turn, plaintiff first requests an emergency injunction that prohibits the state from using voting machines in the 2022 general election. He suggests that the election should be conducted via paper ballots. But, as defendants note, Michigan already uses paper ballots, which are then counted by an electronic system, as prescribed under Michigan's Election Law. See MCL 168.37 (requiring the Secretary of State to select a uniform voting system); MCL 168.795 (outlining the requirements for electronic-voting systems; MCL 168.795a (outlining the process for approval of electronic-voting systems). Plaintiff has not presented the Court with any authority to suggest that the use of electronic-voting systems, in and of themselves, is unlawful or unconstitutional.

As for plaintiff's second request, he asks for an emergency injunction preventing the data and information from the 2020 and 2022 general-election voting systems from being tampered with or deleted. Plaintiff's response brief is difficult to follow but, reading it in as generous a light as possible, he does not raise any specific claim of tampering or deletion. He has not established a clear legal right for this request, nor any clear legal duty on the part of defendants to perform any specific action. And, as noted earlier, plaintiff lacks standing as it relates to the 2020 election.

Next, plaintiff requests that the Court compel the Secretary of State to refer a complaint to the Attorney General's office and the Department of Justice to investigate alleged criminal and fraudulent elections violations. But plaintiff has not alleged any specific criminal or fraudulent election violations. Even if he had, the decision whether to pursue criminal charges is discretionary—not ministerial. Therefore, this Court lacks authority to issue a writ of mandamus compelling the Secretary of State to pursue a criminal complaint.

Plaintiff also requests an order compelling the Secretary of State to seek a TRO or injunction to prevent the use of any voting system or voting-system equipment, because none have been approved via HAVA. But, as discussed earlier, HAVA does not create a private right of action. Even if it did, plaintiff has not met the high bar to establish a clear violation of any legal right based on an alleged HAVA violation. Nor has he established that any technical HAVA violation would warrant an order preventing the use of all electronic voting systems in the upcoming election.

In his fifth request, plaintiff asks the Court to issue an order compelling Governor Whitmer to render unspecified elections void because "fraud vitiates everything." However, plaintiff has not pleaded, with any specificity, the conduct constituting fraud. MCR 2.112(B)(1). Even if he

had, Governor Whitmer is not a party to this lawsuit, and plaintiff cites no law that would provide her with the legal authority to declare elections void.

Plaintiff requests that the Court grant an emergency TRO for the Secretary of State and Bureau of Elections to preserve all documentation from the 2020 general election. But, once again, plaintiff lacks standing in relation to the 2020 election. Even if he had standing, plaintiff has not alleged a violation of the law relating to retention of election documentation. Count II centers on alleged accreditation problems at the federal level, and Count III of the complaint (which relates to retention of records) does not allege that defendants have failed to preserve any election records (or that destruction is imminent). He further acknowledges that the election laws require the *local election clerks* to maintain records—not defendants. So plaintiff has not established a clear legal right to performance of any ministerial function beyond what the election laws already requires. In sum, plaintiff fails to meet the high bar to establish a mandamus claim. Summary disposition is warranted on Count II and Count III of the complaint.[4]

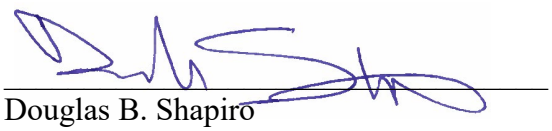
III. CONCLUSION

For the reasons discussed, IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED as to Counts II and III of the complaint, but DENIED as to Count I of the complaint.

[4] Because the Court has determined that plaintiff's declaratory-relief claims lack merit, the Court need not address defendants' argument that the claims are barred by the equitable doctrine of laches.

This is not a final order and does not dismiss the final claim or close the case.

Date: October 4, 2022



Douglas B. Shapiro
Judge, Court of Claims