STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v.

JANICE WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants.
_____/

Case No. 22-012759-AW

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MOTION OF GWENDOLYN BABB, MATTHEW BAKKO, ALEXANDER HOWBERT, PRIORITIES USA, AND DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Gwendolyn Babb, Matthew Bakko, Alexander Howbert, Priorities USA ("Priorities"), and the Detroit/Downriver Chapter of the A. Philip Randolph Institute ("DAPRI") (collectively, "Proposed Amici") respectfully move for immediate and expedited consideration for leave to file an amicus curiae brief (attached as Exhibit 1). In support of this motion, Proposed Amici state as follows:

1. Proposed Amici are three individual absentee voters in Detroit and two non-profit voter education and mobilization organizations. As detailed below, each has a distinct interest in protecting Detroiters' right to vote absentee, which is implicated in this lawsuit.

2. Gwendolyn Babb is a 65-year-old resident of Detroit. Ex. 2, Affidavit of Gwendolyn Babb ("Babb Aff.") ¶ 2. She has been a registered voter in Detroit since approximately 1975. *Id*. Due to a physical disability and limited mobility, she does not drive. *Id*. ¶ 3. Due to her age and underlying health conditions, she is at risk of severe illness due to COVID-19 and continues to practice social distancing. *Id*. Voting has always been very important to her, and she tries to vote in every election. *Id*. ¶ 5. Due to her disability, she has been on the permanent absentee voter list since 2017. *Id.* Wanting to ensure her vote is counted this year, Ms. Babb submitted her ballot more than a week before Election Day. *Id*. ¶ 6. Because of her physical limitations, her son delivered her 2022 general election absentee ballot to the clerk's office in Detroit on October 31, 2022. *Id*.

3. Matthew Bakko is a 37-year-old resident of Detroit. Ex. 3, Affidavit of Matthew Bakko ("Bakko Aff.") ¶ 2. He has been registered to vote in Detroit since approximately August 2020. *Id*. ¶ 3. He has been voting absentee since 2020 because he travels for work and absentee voting ensures that he can submit his ballot if he is out of town on Election Day. *Id*. He mailed his absentee

ballot for the 2022 general election on September 24, 2022, to ensure that it would arrive at the Detroit clerk's office in time. *Id*. ¶ 4.

4. Alexander Howbert is a 41-year-old resident of Detroit. Ex. 4, Affidavit of Alexander Howbert ("Howbert Aff.") ¶ 2. He has been a registered voter in Detroit since 1999. *Id.* As a small business owner and a parent of young children, he often votes absentee because it provides him the flexibility to vote on his own schedule. *Id*. ¶ 3. He also sometimes travels out of Detroit for work, which is one of the reasons he is voting absentee this year. *Id*. On October 31, 2022, he picked up an absentee ballot for the November 2022 general election at his local vote center. *Id*. ¶ 4. Though he showed photo identification before being given a ballot, he did not have time to complete his ballot on the spot and plans to drop his ballot off at the drop box conveniently located one block from his house. *Id*. ¶ 4-5.

5. If the rules related to requesting, processing, and counting absentee ballots are suddenly changed, Proposed Amici voters could have their votes rejected. With the election just days away—and given the limitations that led them to vote absentee in the first place—these voters would not be able to vote again. They would simply be disenfranchised.

6. Priorities USA ("Priorities") is a 501(c)(4) nonprofit, voter-centric progressive advocacy organization. Ex. 5, Affidavit of Guy Cecil ("Cecil Aff.") ¶ 3. Priorities' mission is to build a permanent infrastructure to engage Americans by persuading and mobilizing citizens around issues and elections that affect their lives. *Id*. To further this purpose, Priorities spends resources to register and turn out voters across the country, including in Michigan. *Id*. ¶ 3-4. Priorities' efforts in Michigan involve reaching out to young voters and marginalized communities, including low-income communities and people of color, through various get-out-the-vote ("GOTV") efforts. *Id*. ¶ 4. Part of these GOTV efforts include informing these communities about their absentee voting

options and the locations of various drop boxes. *Id*. Plaintiffs' requested relief threatens Priorities' mission of engaging and mobilizing voters, and it will be forced to expend and divert additional funds and resources to mobilize and educate Michigan voters to combat the effects of the requested relief, at the expense of its other efforts in Michigan and in other states. *Id*. ¶ 6-8. Priorities has had a longstanding interest in absentee voting in Michigan. *Id*. ¶ 5. In 2019, it filed the lawsuit *Priorities USA v Benson*, 448 F Supp 3d 755 (D Mich, 2020), a challenge to the constitutionality of Michigan's signature matching laws, in response to which Michigan's Secretary of State released updated guidance around signature matching standards and cure procedures. *Id*. Plaintiffs' requested relief directly threatens Priorities' interest in ensuring that voters who attempt to vote by absentee ballot will not have their ballots erroneously rejected. *Id*. ¶ 7.

7. DAPRI is a local chapter of the national 501(c)(3) nonprofit organization the A. Philip Randolph Institute. Ex. 6, Affidavit of Andrea A. Hunter ("Hunter Aff.") ¶ 3. The A. Philip Randolph Institute, founded in 1965 by A. Philip Randolph and Bayard Rustin, is the senior constituency group of the AFL-CIO. *Id*. ¶ 3. DAPRI is a membership organization, and its mission is to fight for human equality and economic justice and to seek structural changes through the American democratic process. *Id*. ¶ 3. DAPRI's members are involved in election protection, voter registration, GOTV activities, political and community education, legislative action, and labor support activities in the Detroit and Downriver areas of Michigan. *Id*. ¶ 5. Part of DAPRI's mission is to turn out voters across Detroit, and one of its strategies is to encourage voters to vote via absentee ballot, particularly working people who do not get time off to vote during business hours or on Election Day. *Id*. ¶ 8. Many of its members and constituents have limited English proficiency or disabilities that make it difficult for them to vote in person. *Id*. ¶ 9. DAPRI dedicates time and resources educating members, volunteers, and constituents about their voting options, including

how and when to submit ballots in time to be counted. *Id*. ¶ 13. If the absentee voting process is upended days before Election Day, many of DAPRI's members and constituents will be at risk of having their votes rejected with no viable alternative to make their voices heard in the election.

8. As set forth above and in the attached proposed amicus curiae brief, Ex. 1, Proposed Amici would be directly and irreversibly impacted by Plaintiffs' requested relief.

9. Proposed Amici respectfully request that the Court grant leave to file an amicus curiae brief addressing these important issues and accept the attached proposed amicus curiae brief (Exhibit 1).

10. Pursuant to Local Rule 2.119(B)(2), on November 3, 2022, undersigned counsel sought concurrence in the relief sought in this motion from Plaintiffs and Defendants. Defendants granted concurrence, while Plaintiffs have not yet responded.

11. I hereby certify that I have complied with all provisions of LCR 2.119(B) on motion practice.

Dated: November 4, 2022

Respectfully submitted,

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PROOF OF SERVICE

Sarah S. Prescott certifies that on the 4th day of November, 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

s/ *Sarah S. Prescott*
Sarah S. Prescott

Exhibit 1

STATE OF MICHIGAN
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KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

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[PROPOSED] AMICUS CURIAE BRIEF OF GWENDOLYN BABB, MATTHEW BAKKO, ALEXANDER HOWBERT, PRIORITIES USA, AND DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE

INTRODUCTION[1]

Absentee voting is a cornerstone of the democratic process in Michigan. The Michigan Constitution guarantees the right to vote absentee without giving an excuse. As a result, millions of Michiganders—including hundreds of thousands of Detroiters—use this process to make their voices heard in elections. Despite this constitutional protection, Plaintiffs filed the instant lawsuit thirteen days before a general election, seeking to dismantle the absentee voting process in Detroit. Plaintiffs' Hail-Mary attempt to obtain injunctive, declaratory, and mandamus relief has no basis in law or fact and should be dismissed.

Moreover, this Court should promptly deny Plaintiffs' motion for preliminary relief. Plaintiffs have shown no likelihood of success on the merits because they lack standing to bring their causes of action, let alone prevail on them, and their claims fail as a matter of law. Nor have Plaintiffs provided this Court with *any* credible and persuasive proof of wrongdoing. Additionally, the public interest strongly counsels against an injunction, which would threaten to disenfranchise Proposed Amici and their members and constituents, along with countless other Detroit voters.

This lawsuit is simply a distraction to disrupt the timely and orderly completion of the democratic process. Preliminary relief should be denied, Plaintiffs' action should be dismissed, and the acceptance, processing, and counting of Detroit's absentee ballots should proceed.

BACKGROUND

In 2018, a supermajority of Michigan voters passed Proposal 3, amending the state's constitution to eliminate barriers to absentee voting. Previously, voters could request an absentee ballot only if they met certain criteria. The result of Proposal 3 was a self-executing constitutional

[1] This brief was authored by Elias Law Group LLP and the undersigned. Priorities Foundation is funding the preparation and submission of this brief. No party made a monetary contribution for the preparation or submission of this brief. See MCR 7.212(H)(3).

amendment giving eligible voters, among other things, the right to "vote an absent voter ballot without giving a reason" and "the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art 2, § 4(1)(g). This amendment led to record voter turnout in the 2020 election and is on pace to do the same this year.[2]

The most recently available data show that nearly two million absentee ballots have been requested in Michigan and more than a million have been submitted.[3] In Detroit alone, about 85,000 absentee ballots have been requested and nearly 48,000 ballots have already been received.[4] These numbers tell a powerful story: Michigan voters—including in Detroit—rely on the constitutional right to vote absentee to exercise their fundamental right to vote, and many have already received and cast ballots pursuant to that right.

ARGUMENT

Plaintiffs' lawsuit threatens to disenfranchise tens of thousands of Detroit voters—including Proposed Amici, their constituents, volunteers, and members—and significantly disrupt the election. Plaintiffs filed their complaint on October 26—when absentee voting was well underway—seeking to sow doubt in the integrity of the election and undermine confidence in its outcome. This lawsuit follows a familiar playbook. In 2020, dozens of lawsuits alleging election

[2] Lauren Gibbons, *One Big Winner in Michigan's 2020 Election Cycle: No-reason Absentee Voting*, MLIVE (Nov. 11, 2020), https://www.mlive.com/politics/2020/11/one-big-winner-in-michigans-2020-election-cycle-no-reason-absentee-voting.html.

[3] Angela Benander, *One Week Before Election Day, Nearly 2 Million Absentee Michiganders Have Requested Absentee Ballots*, MICHIGAN.GOV (November 1, 2022), https://www.michigan.gov/sos/resources/news/2022/11/01/one-week-before-election-day-nearly-2-million-michiganders-have-requested-absentee-ballots.

[4] *Id.* See https://www.michigan.gov/sos/-/media/Project/Websites/sos/Press-Release-Images/10-31-2022-PR-Nov-2022-AV--Ballot-Stats.xlsx.

fraud were filed in Michigan state and federal courts, but not a single one was successful.[5]

Plaintiffs' claims, like the baseless allegations lodged by Republican candidates and their allies in years past, constitute mere intrigue and fantasy, divorced from reality and the successful administration of elections by state and local officials. Supported only by flimsy evidence and rank generalizations, Plaintiffs seek extraordinary and unprecedented relief from this Court that would uproot the absentee voting process in Detroit and inject unwarranted chaos and confusion into the upcoming election. Among numerous other flaws, Plaintiffs fail to grapple with a central question posed by their requested relief: What would happen to the tens of thousands of absentee ballots already requested and voted?

Plaintiffs' requests for relief—to the extent they have been articulated—are untethered to any legal right. First, they appear to seek injunctive relief by asking this Court to require that (1) all absentee voters in Detroit obtain their absentee ballots in person at the clerk's office and (2) all absentee ballots are counted at a precinct, rather than statutorily-authorized counting boards. Even if such relief could take the form of an injunction, Plaintiffs do not satisfy *any* of the requirements for such extraordinary relief. Second, Plaintiffs seek declaratory relief in the form of "clarification" on certain allegedly unlawful past practices of the Detroit City Clerk, but they fail to identify any legal basis for obtaining such clarification. Third, Plaintiffs request mandamus relief but fail to identify a clear legal duty Defendants are required to perform or a clear legal right to performance of any duty. Plaintiffs' claims lack any modicum of merit, and the sweeping relief they request must be rejected.

[5] Dave Boucher et al., *Courts Rejected Claims of Fraud, Misconduct in Legal Challenges to Michigan Election*, DETROIT FREE PRESS (Dec. 11, 2020, 5:50 PM), https://www.freep.com/story/news/local/michigan/detroit/2020/12/11/summary-michigans-2020-election-lawsuits/3861548001/.

I. Plaintiffs are not entitled to a preliminary injunction.

Injunctive relief is an extraordinary remedy that should only issue when justice requires. *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012). In determining whether to grant this extraordinary remedy, the Court should consider four factors:

> (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. at 613, quoting *All for Mentally Ill v Dep't of Cmty Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998). Plaintiffs have not shown that *any* of these factors weigh in their favor, and thus, they are not entitled to a temporary restraining order or preliminary injunction.

A. Plaintiffs have shown no likelihood that their claims will prevail.

1. Plaintiffs lack standing to bring their claims.

To establish standing, absent a cause of action provided by law or a declaratory judgment action, plaintiffs must prove a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010); see also *League of Women Voters of Mich v Secyy of State*, 331 Mich App 156, 170; 952 NW2d 491 (2020), citing *Lansing Sch Ed Ass'n*, 487 Mich at 372. Here, Plaintiffs assert only a generalized grievance that could be shared by *any* Michigan citizen and thus lack standing.

Plaintiffs' claimed injury is nothing more than the generalized grievance that a law has—allegedly—not been followed. Plaintiffs fail to establish any particularized interest distinct from *every* Michigan citizen's shared interest in ensuring that the Michigan Election Law is followed. A generalized grievance that a law has allegedly not been followed is insufficient to trigger

standing under Michigan law, which requires a plaintiff to "establish that they have special damages different from those of others within the community." *Olsen v Chikaming Twp*, 325 Mich App 170, 193; 924 NW2d 889 (2018); see also *League of Women Voters*, 331 Mich App at 172 (plaintiffs "must establish that they have been deprived of a personal and legally cognizable interest peculiar to them individually, rather than assert a generalized grievance that the law is not being followed"). Indeed, Plaintiffs have not alleged that they have been personally injured in any way by the absentee ballot request, acceptance, and processing procedures.

Plaintiffs also lack standing for their claim that Plaintiffs who serve as poll challengers are denied their legal rights. Brief ISO Mot. 8.[6] After all, there is no constitutional right for any individual to serve in a poll watching capacity to challenge ballots. In *Donald J Trump for President v Boockvar*, for example, the court held that plaintiffs, including prospective poll watchers, did not have standing to assert a right to expanded opportunities to monitor the polls and lodge challenges because "there is no individual constitutional right to serve as a poll watcher," and a theory of harm that turns on "dilution of votes from fraud caused from the failure to have sufficient poll watchers . . . . rests on evidence of vote dilution that does not rise to the level of a concrete harm." 493 F Supp 3d 331, 348, 381 (WD Pa, 2020), quoting *Pa Democratic Party v Boockvar*, 238 A3d 345, 385 (Pa, 2020); see also *Republican Party of Pa v Cortés*, 218 F Supp 3d 396, 408 (ED Pa, 2016); *Cotz v Mastroeni*, 476 F Supp 2d 332, 364 (SDNY, 2007); *Turner v Cooper*, 583 F Supp 1160, 1161-62 (ND Ill, 1983).

Plaintiffs therefore lack standing, and this Court need not proceed to the merits.

[6] Plaintiffs' Motion for Preliminary Injunction and Brief in Support of Motion for Preliminary Injunction lack page numbers. Proposed Amici refer to the first page of the Brief's text as page 1.

2. Plaintiffs' claims are barred by laches.

Plaintiffs bring these claims too late for this Court to consider. It is well settled that a plaintiff must exercise "reasonable diligence" in seeking relief from the courts. See, e.g., *Henderson v Connolly's Est*, 294 Mich 1, 19; 292 NW 543, 550 (1940). The doctrine of laches may bar a plaintiff's action when the plaintiff has failed to exercise due diligence, resulting in prejudice to the defendant. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297, 300 (1998). That is especially true "when an election is imminent and when there is inadequate time to resolve factual disputes and legal disputes." *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5–6, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006)) (cleaned up). Under MCL 691.1031, there is "rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected." That is the case here. Plaintiffs filed this lawsuit *thirteen* days before the general election. "Call it what you will—laches, the Purcell principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston*, 841 F3d at 398.

Plaintiffs unreasonably delayed raising their claims before this Court. There is no dispute that Plaintiffs have been aware of the allegedly unlawful activities for months, if not years. Plaintiffs admit that "[t]he Complaint asks for declaratory, injunctive, and mandamus relief from numerous violations of Michigan Election Law that have occurred in the General Election of 2020 and the August 2, 2022 Primary." Brief ISO Mot. 1. Indeed, Plaintiffs seek to invalidate the statewide process of verifying an absent voter's signature, which they admit has been an established procedure since 2020. Compl. ¶¶ 52-53. Plaintiffs also purport to be affronted by the procedures Detroit election inspectors have used to match signatures and count ballots since 2020. Compl. ¶¶ 51, 85, 89. Similarly, Plaintiffs complain about poll challengers being denied access to absentee ballot processing centers during the November 2020 general election and the August

2022 primary election. Compl. ¶¶ 108-111. And Plaintiffs' claim about allegedly ineffective monitoring of drop boxes cites to evidence from the 2020 general election. Compl. ¶ 40.

Plaintiffs fail to justify their decision to wait until thirteen days before the November 2022 general election to bring these claims. In an attempt to explain why "this filing is so close to the election," Plaintiffs assert that they have "only recently realized that these issues were not going to be addressed." Brief ISO Mot. 1. In other words, Plaintiffs were waiting for someone else to do something about the alleged "issues" they now bring to the Court. This plainly demonstrates their failure to exercise reasonable diligence. Plaintiffs further assert that "[c]hallenges were filed at the August 2, 2022 primary" and they "expected action on the challenges." *Id*. Plaintiffs apparently refer to poll challengers' unfounded objections to certain procedures at AVCBs during the primary. But once again, Plaintiffs admit that they sat on their hands instead of bringing legal claims to this or any other court. See Ex. A, *O'Halloran v Benson*, order of the Michigan Supreme Court, issued November 3, 2022 (Docket No. 164955), p 3 (Bernstein, J., concurring) ("[T]he doctrine of laches does not ask whether a plaintiff makes just any move in attempting to address the complained-of situation—it specifically asks whether there has been an unreasonable delay in *commencing a legal action*."), citing *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996).

Proposed Amici are prejudiced by Plaintiffs' delay in several ways. First, Proposed Amici voters have already relied on the ready availability of absentee voting and requested their ballots well in advance of Election Day. See Ex. 2, Affidavit of Gwendolyn Babb ("Babb Aff.") ¶ 6; Ex. 3, Affidavit of Matthew Bakko ("Bakko Aff.") ¶ 4; Ex. 4, Affidavit of Alexander Howbert ("Howbert Aff.") ¶¶ 4-5.[7] Plaintiffs' eleventh-hour lawsuit threatens to disqualify the absentee

[7] All affidavits cited are attached as exhibits to Proposed Amici's Motion for Leave to File Amicus Curiae Brief.

ballots they have either already voted or are planning to vote. Second, Proposed Amicus Priorities, like similar organizations, has spent resources informing constituents about their absentee voting options and the locations of various drop boxes. Ex. 5, Affidavit of Guy Cecil ("Cecil Aff.") ¶ 4. Plaintiffs' requested relief will force Priorities to divert significant funds and resources into re-educating Michigan voters about their voting options and how to ensure that the absentee ballots they have already voted will be counted. *Id*. ¶ 6. Third, Proposed Amicus DAPRI has many members who vote absentee in each election, including working people who do not get time off to vote during business hours or on Election Day, and who therefore rely on the availability of voting by mail or drop box. Ex. 6, Affidavit of Andrea A. Hunter ("Hunter Aff.") ¶ 9. Plaintiffs' requested relief would thus disenfranchise many of DAPRI's members, volunteers, and constituents and would force DAPRI to divert resources away from its typical GOTV programming during this critical week before election day. *Id*. ¶ 13.

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

3. Plaintiffs' claims fail as a matter of law.

a. Plaintiffs are prohibited from curtailing Michigan citizens' constitutional right to vote absentee.

Statutory schemes cannot run afoul of the basic rights guaranteed in the Michigan Constitution. *Arlee v Lucas*, 55 Mich App 340, 344, 222 NW2d 233, 236 (1974). Since 1963, Michiganders have been guaranteed the constitutional right to vote by an absentee ballot. *Id.* Though the right to vote absentee was once subject to a specific set of criteria—that the voter has a physical disability, is 65 years of age or older, is unable to go to the polls on election day due to a religious observance, is serving as an election inspector, expects to be absent from the township

or city on election day, or is in confinement of jail or prison—these criteria were replaced by no-excuse absentee voting in 2018 by an overwhelmingly popular voter initiative.

The Michigan Constitution now grants Michiganders the right to "vote an absent voter ballot without giving a reason, during the forty (40) days before an election, *and the right to choose whether the absent voter ballot is* applied for, received and *submitted* in person or *by mail*." Const 1963, art 2, § 4(1)(g) (emphases added). This constitutional guarantee is self-executing and must be "liberally construed in favor of voters' rights in order to effectuate its purposes." Const 1963, art 2, § 4(1). Because this right is self-executing, it cannot be unduly burdened or curtailed, *Wolverine Golf Club v Hare*, 384 Mich 461, 466; 185 NW2d 392 (1971), nor can additional obligations be imposed, *Soutar v St Clair Cnty Election Comm'n*, 334 Mich 258, 265; 54 NW2d 425 (1952). Indeed, any statute concerning the right must "further [its] exercise . . . and make it *more available*." *Wolverine Golf Club v Hare*, 24 Mich App 711, 730; 180 NW2d 820 (1970) (citation omitted) (emphasis added).

Because Plaintiffs cannot directly attack the constitutional right to vote by absentee ballot, they seek to muddle, confuse, and erect obstacles to the entire absentee voting process. They allege issues in the procedures around requesting, receiving, verifying, processing, and counting absentee ballots in Detroit. Among other requests, Plaintiffs ask the Court to "declare that only Absentee Ballots that have been requested in person can be validly voted in the election." Compl. ¶ 27. With mere days left before the election and after 85,000 absentee ballots have already been requested and nearly 48,000 ballots received, Plaintiffs' requested relief plainly seeks to disenfranchise tens of thousands of Detroit voters. Many, if not all, of these voters will not have the time and opportunity to vote again or make different arrangements, as they have already relied on the availability of absentee ballots—and just 100 hours remain until the close of polls on Election Day.

Plaintiffs' other complaints focus on alleged violations of the Michigan Election Law in absentee ballot procedures. Not only do Plaintiffs seek to wholesale disqualify all absentee ballots requested by mail, including absentee ballots already requested and cast, their requested relief threatens *all* absentee ballots in Detroit—including those requested in person after showing identification, like Alexander Howbert's, see Howbert Aff. ¶ 4. Plaintiffs' requested relief—which rests on baseless legal and factual grounds—threatens to eviscerate the constitutional right to vote by absentee ballot guaranteed to all Michigan citizens. Particularly where the legislature itself is prohibited from imposing barriers to the constitutional right to vote absentee, see *Arlee*, 55 Mich App at 344, Plaintiffs have no basis for doing so via scattershot, last-minute litigation.

b. Plaintiffs do not have a statutory right to the relief they seek.

Plaintiffs cite a litany of statutes regulating election administration and baldly allege violations. They specifically identify MCL 168.761(2), which requires a signature comparison for absent voter ballot applications; MCL 168.761D(2)(c),[8] which directs city or township clerks to use video monitoring of drop boxes; MCL 168.764a-b, which contain limits on who may return an absent voter ballot; MCL 168.798a, which indicates that absent voter ballot counting center proceedings should be conducted under observation by the public and which addresses the procedure for processing damaged or defective ballots[9]; MCL 168.765(6), which indicates the number of challengers that may be designated at a facility that pre-processes absent voter ballots; MCL 168.766, which governs signature verification for absent voter ballots; MCL 168.767, which governs the rejection of absent voter ballots; MCL 168.765(5), which indicates that the clerk shall

[8] Plaintiffs cite MCL 168.761D(4)(c), which does not exist, so Proposed Amici instead address their best guess of the statute Plaintiffs intended to reference.

[9] Plaintiffs mistakenly cite MCL 168.798b as the statute that governs the procedure for processing damaged or defective ballots.

post by 8 a.m. on election day the number of absent voter ballots distributed and received; MCL 168.765(8), which governs the procedure for election inspectors at absent voter counting boards to verify, count, and record absent voter ballots; MCL 168.795a, which governs the approval of electronic voting systems by the board of state canvassers; MCL 168.795(1)(k),[10] which provides that electronic voting systems should provide an audit trail; 52 U.S.C. 21081, which provides voting systems standards; MCL 168.803, which governs the counting and recounting of votes, including guidance on stray marks; MCL 168.795(2), which specifies that electronic tabulating equipment be programmed to reject a ballot if the choices recorded exceed the number the elector is entitled to vote for or if no valid choices are recorded; and MCL 168.733, which governs the rights and limitations of challengers. Plaintiffs also cite MCL 168.974(D), which refers to a provision of the Michigan Election Law that has been repealed.

Even setting aside Plaintiffs' repeated mis-citations and misstatements of the Michigan Election Law, Plaintiffs fail to demonstrate a private right of action for *any* of these statutory claims. Indeed, they do not set forth a cause of action at all. See Ex. B, *Stoddard v City Election Comm*, opinion and order of the Third Circuit Court, issued November 6, 2020 (Docket No. 20-014604-CZ), p 3 ("Since there is no cause of action, the injunctive relief remedy is unavailable."), citing *Terlecki v Stewart*, 278 Mich App 644; 754 NW2d 899 (2009). The closest they come to asserting a private right of action to challenge alleged violations of the rules regarding election administration is citing MCL 168.733, which governs what election challengers may do, but Plaintiffs have not asserted that they have been deprived of the opportunity to perform any of the activities listed, nor do they cite any authority giving them a cause of action under this law.

[10] Plaintiffs cite MCL 168.795(K), which does not exist. Proposed Amici set forth their best guess at the statute Plaintiffs intended to reference.

Even if Plaintiffs *could* assert claims under these laws, they seek a remedy totally divorced from them. To remedy these purported procedural violations of the Michigan Election Law, Plaintiffs apparently seek to disqualify all absentee ballots in Detroit, an astonishing request that is completely unmoored from these statutes. Michigan law provides a clear remedy for violations of the challenger law, MCL 168.733, and it includes *nothing* resembling the relief Plaintiffs seek:

> Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

MCL 168.734. That's it. Conspicuously absent from this provision—or any other statute under which Plaintiffs assert their claims—is any mention of disqualifying *any*—let alone *all*—absentee ballots in a city within a week of the election.

4. Plaintiffs' claims fail as a matter of proof.

Though Plaintiffs were given 8 hours to present evidence to substantiate their assertions, they continue to fail to identify a single, actual illegal act. Plaintiffs have not offered any eyewitness testimony or affidavits.[11] Although Plaintiffs purported to have video documentation of Defendants' wrongdoing, they failed to credibly demonstrate that the video—which was apparently surreptitiously recorded and affiliated with Plaintiff Election Integrity Fund and Force—captured *any* action by Defendants, let alone depict evidence of Defendants' violations of the Michigan Election Law. To the extent Plaintiffs rely on a Dominion training video cited in their complaint, that video does nothing to advance their allegations that *Defendants* violated the law. Plaintiffs' ventures into hypotheticals or stated preference for their desired procedures has

[11] Indeed, Plaintiffs have not even verified the allegations in their complaint.

nothing to do with whether Defendants are complying with the Michigan Election Law.

Plaintiffs called only two witnesses, both Detroit election officials, in an effort to uncover some wrongdoing. But instead of substantiating Plaintiffs' claims, those witnesses laid bare just how baseless and speculative those claims are. Both Christopher Thomas—who served in the Secretary of State's Bureau of Elections for 40 years and currently serves as Senior Advisor to Detroit City Clerk Janice Winfrey—and Daniel Baxter—who serves as Chief of Operations of Absentee Voting in Detroit—provided extensive testimony based on their decades of experience in election administration in Michigan. They carefully explained procedures related to signature verification by staff at the clerk's office, the duplication of defective ballots that cannot be read by a tabulator, the adjudication process, the use of high-speed scanners which have been approved by the board of state canvassers, the retaining of paper ballots as the audit trail, the video monitoring of all drop boxes in Detroit, the machine rejection of ballots that voters then get a chance to fix, and the security issues with allowing poll challengers to access the central platform in the AVCB. All of these procedures are rooted in the Michigan Election Law and based on decades of experience administering elections. None of their testimony suggested violations of the Michigan Election Law by Defendants. Plaintiffs' motion and allegations do not evidence any improper practices; they merely demonstrate their own lack of understanding of election administration and the Michigan Election Law. Without a shred of proof, Plaintiffs' allegations are mere conjecture.

B. Plaintiffs have not demonstrated irreparable injury.

To be entitled to preliminary relief, Plaintiffs must establish the "indispensable requirement" of showing "particularized" irreparable harm. *Mich AFSCME Council v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011). It follows that a litigant's speculative assertions cannot demonstrate the type of harm necessary for the issuance of injunctive

relief. *Pontiac Fire Fighters Union v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

Here, Plaintiffs do not credibly demonstrate what irreparable harm they will suffer if an injunction is not issued. Plaintiffs' only asserted harm is the "loss of confidence" in an election due to the purported violations of the Michigan Election Law. Compl. ¶127; Brief ISO Mot. 7. But a pure statutory violation, without more, does not give rise to irreparable harm. See, e.g., *Detroit Fin Review Team*, 296 Mich App at 621 (in case where open records law was not followed, court noted that "caselaw [] recognizes that when the record fails to indicate that a public body has acted in bad faith, there is no real and imminent danger of irreparable injury requiring issuance of an injunction"). Indeed, where Plaintiffs fail to establish *any* cognizable injury at all, *supra* Section I(A)(1), they certainly cannot establish the higher bar of *irreparable* injury.

Plaintiffs' unreasonable delay in bringing this lawsuit, in addition to being barred by laches, further undermines any claim of irreparable harm. Plaintiffs' allegations are based on purportedly unlawful activities that occurred months and years ago, in previous elections. Compl. ¶¶ 40, 51-53, 85, 89, 108-111. Yet they have waited until the final days before the 2022 general election to seek any legal remedy for those alleged harms. To the extent they suffered any cognizable injury from these practices, Plaintiffs have remained idly by, apparently with no urgent need for relief. They cannot now credibly assert that this Court must act urgently to stave off any irreparable harm.

In any event, this Court should have no fear that any alleged deviation from procedures will undermine the integrity of Michigan's elections, as Plaintiffs claim. For all the reasons explained above, this fear is baseless. No injunction is warranted.

C. The balance of the equities and public interest weigh strongly against an injunction.

Plaintiffs do not seem to comprehend the magnitude of the impact of their requested relief on the public interest. In their motion, Plaintiffs merely state that the "public interest is to follow

the law" and that there is "NO harm to the defendants," though they recognize there might be economic harm or inconvenience. Brief ISO Mot 4, 7. They then threaten Defendants with years of litigation, citing their lack of confidence in the election. Brief ISO Mot 7. Plaintiffs' characterization of the public interest ignores the massive consequences of the relief they seek, which threatens to significantly disrupt the right to vote for tens of thousands of voters in Detroit who rely, in good faith, on absentee voting.

While the availability and procedures around absentee voting cause no real injury to Plaintiffs, they do affect Detroit voters who have been voting absentee and plan to continue voting absentee. Those voters include people like Gwendolyn Babb, whose health conditions qualify her for the permanent absentee ballot list and who cannot vote in person. Babb Aff. ¶ 3–6. They include small business owners and parents like Alexander Howbert who rely on absentee voting to provide flexibility so they can meet the competing demands for their time. Howbert Aff. ¶ 3–5. They also include working professionals like Matthew Bakko who travel for work and might be out of town on Election Day. Bakko Aff. ¶ 3–4. This lawsuit directly impacts young voters, like those that Priorities mobilizes, who might attend school out of town and might not be able to vote in person. Cecil Aff. ¶ 4. It also impacts voters like DAPRI's members, volunteers, and constituents, many of whom work on Election Day and do not get time off to vote. Hunter Aff. ¶ 8. DAPRI also serves voters with limited English proficiency or disabilities that make it difficult for them to vote in person. *Id.* ¶ 9. These voters, and tens of thousands of others like them, deserve to have their vote count. The public interest counsels in favor of counting their votes, not throwing out their ballots or casting their legitimacy into question.

Proposed Amici are not alone in relying upon the widespread availability of absentee voting to exercise their right to vote. In 2012, before the availability of no-excuse absentee voting,

25% of voters in Michigan voted absentee.[12] After no-excuse absentee voting was added to the Michigan Constitution in 2018 by an overwhelmingly popular ballot initiative, 3.2 million (or 57% of) voters cast absentee ballots in 2020.[13] This year, by the time Plaintiffs filed their lawsuit, over 1.8 million absentee ballots had been requested and 771,967 absentee ballots had been submitted.[14] Just in Detroit, over 80,000 absentee ballots had been requested and over 35,000 ballots had already been received *before* Plaintiffs called their legitimacy into question.[15] By seeking to cast aside tens of thousands of absentee ballots in Detroit, Plaintiffs would disenfranchise voters who have already relied on the widespread availability of absentee voting.

Michigan voters have been voting absentee for decades without any loss of confidence in the security of the election. Plaintiffs' lawsuit, on the other hand, has the potential to cause chaos and confusion around election procedures and threatens Detroit voters' constitutional right to vote absentee. Again, Plaintiffs' requested relief suggests throwing out tens of thousands of absentee votes. With just *days* before the election, many of these voters cannot make plans to vote in another fashion and will simply be disenfranchised. In short, Plaintiffs' attacks—and not the procedures they challenge—are damaging and disruptive to the public's confidence in the election. See *Stoddard* (Docket No. 20-014604-CZ), p 4 ("A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the

[12] Derek Melot, *Bridge Survey Finds Big Support for Easier Absentee Voting, Yet Legislation Lags*, BRIDGE MICHIGAN (Mar. 28, 2013), https://www.bridgemi.com/michigan-government/bridge-survey-finds-big-support-easier-absentee-voting-yet-legislation-lags.

[13] *Supra*, note 2.

[14] Angela Benander, *Two Weeks Before Election Day, 1.8 Million Absentee Ballots Have Been Requested by Michigan Voters*, MICHIGAN.GOV (October 25, 2022), https://www.michigan.gov/sos/resources/news/2022/10/25/two-weeks-before-election-day-1-point-8-million-absentee-ballots.

[15] *Id.* See https://www.michigan.gov/sos/-/media/Project/Websites/sos/Press-Release-Images/PR-Nov-2022-AV--Ballot-Stats-2022-10-24.xlsx. This data was updated on October 24, 2022.

City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.").

At bottom, Plaintiffs' lawsuit challenges the core principle of our electoral process—that "all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted." *Reynolds v Sims*, 377 US 533, 554; 84 S Ct 1362; 12 L Ed 2d 506 (1964). Plaintiffs' entirely unfounded lawsuit threatens to disenfranchise more than 80,000 Detroit voters, and courts across the country—including this one—have always rejected such attempts to disenfranchise. See, e.g., Ex. C, *Costantino v City of Detroit*, opinion and order of the Third Circuit Court, issued November 13, 2020 (Docket No. 20-014780-AW), p 12-13 (denying injunctive relief)*; Stoddard* (Docket No. 20-014604-CZ), p 4 (same). This Court should deny this one as well.

II. Plaintiffs do not meet the threshold requirement for declaratory judgment under MCR 2.605.

Under Michigan Court Rule 2.605(A)(1), this Court has the power to enter declaratory relief only in cases where there is an "actual controversy." *UAW*, 295 Mich App at 495. "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights" and the "essential requirement . . . is that the plaintiff pleads and proves facts that demonstrate an 'adverse interest necessitating the sharpening of the issues raised.'" *Id*. (citation omitted). Where no actual controversy exists, a plaintiff does not have standing to bring a declaratory action. *City of South Haven v Van Buren Ctny Bd of Comm'rs*, 478 Mich 518, 534; 734 NW2d 533 (2007).

Plaintiffs have not shown that declaratory relief is necessary to defend any legal right. To advance their request, they assert only that "Plaintiffs seeks [sic] clarification on certain past practices of the Detroit City Clerk which are illegal, done improperly, or done without authority of law." Compl. ¶ 118. Their desire to have the Court explain to them the Michigan Election Law

does not amount to a cognizable injury or legal right. See *supra* Section I(A)(1).

III. Plaintiffs fail to meet the standard to obtain mandamus relief.

Plaintiffs have failed to clear the very high bar for mandamus relief. "The plaintiff has the burden to demonstrate an entitlement to the extraordinary remedy of a writ of mandamus." *Citizens Protecting Michigan's Constitution v Secy of State*, 324 Mich App 561, 584; 922 NW2d 404 (2018). The party seeking a writ of mandamus must meet four requirements to obtain relief: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (internal quotation marks omitted); see also *McLeod v Kelly*, 304 Mich 120, 125; 7 NW2d 240 (1942) ("Writ of mandamus will issue to compel public officers and tribunals to perform their duties, when [the] right is clear and specific."). Plaintiffs meet none.

First, Plaintiffs have failed to identify any cognizable legal right of which they have been deprived. See *League of Women Voters of Mich v Secy of State*, 333 Mich App 1, 8; 959 NW2d 1 (2020), *app den* 506 Mich 886; 946 NW2d 307 (2020) ("A clear legal right is a right 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.") They simply argue that "Plaintiffs have a clear legal right to have the clerk follow the law as written." Compl. ¶ 138. For the same reasons they do not have standing, see *supra* Section I(A)(1), the Court should deny their request for mandamus.

Second, Plaintiffs fail to identify a clear legal duty on behalf of any Defendant to comply with their requested relief. They do not even attempt to do so, but instead baldly contend, "The

Defendants have a clear legal obligation to follow the law as it is written and to refrain from creating new processes, new procedures, and using unapproved equipment that is not certified as required by law." Compl. ¶ 139. Without so much as a single citation supporting their theory, let alone a shred of evidence substantiating their claim, Plaintiffs are not entitled to mandamus relief. See, e.g. *Hanlin v Saugatuck Twp*, 299 Mich App 233, 249; 829 NW2d 335 (2013) (affirming denial of mandamus relief where, "[n]otably, plaintiffs do not rely on any statute . . . to claim that the [County] Board of Canvassers violated a clear legal duty" by certifying election without conducting investigation into alleged irregularity); *Herp v Lansing City Clerk*, 164 Mich App 150, 161; 416 NW2d 367 (1987) (affirming denial of mandamus where "plaintiffs have not persuasively demonstrated that the city clerk had a clear legal duty to certify their petitions as sufficient under § 8b of the building authority act"); *Childers v Kent Co Clerk*, 140 Mich App 131, 136; 362 NW2d 911 (1985) (affirming denial of writ of mandamus where statute did not create clear legal duty for clerk to accept signatures on petition where there were defects in certificate of circulators).

Third, Plaintiffs have entirely failed to identify any ministerial act that they seek to have any Defendant perform. "A ministerial act is one 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." *League of Women Voters*, 333 Mich App at 8 (internal quotation marks omitted). Thus, "[i]f the act requested by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate." *Hanlin v Saugatuck Twp*, 299 Mich App 233, 248; 829 NW2d 335 (2013). Plaintiffs identify no such ministerial act here. Rather, Plaintiffs offer only the conclusory allegation that "[t]he acts governed by the mandamus action are acts of the clerk are ministerial and not discretionary" because "[t]hey are required by statute." Compl. ¶ 140. Plaintiffs' unsupported assertions fail under any standard. If anything, Plaintiffs' primary objective appears

to be to *undo* the ministerial acts Defendants have already performed or *prevent* Defendants from completing their ministerial duties of accepting and processing absentee ballots.

Finally, Plaintiffs cannot establish that no other remedy exists that might achieve the same relief they seek here. Rather than asking for an order directing Defendants to take a ministerial, statutorily required action, Plaintiffs are asking *this Court* to intervene in an ongoing election, to change the process for accepting and counting absentee ballots, and to disenfranchise hundreds of thousands of Detroit voters. See *Costantino*, p 11 ("The Court cannot defy a legislative crafted process [and] substitute its judgment for that of the Legislature."). This is not the type of administrative function that can be vindicated through mandamus, and Plaintiffs cite no legal authority in support of their requested relief. Thus, while nominally seeking to ensure that "Defendants be required to fulfill their clear administrative duties," Compl. 37, Plaintiffs would instead trample Michigan's Constitution in an attempt to throw the election into chaos. Plaintiffs have entirely failed to demonstrate an entitlement to mandamus relief.

CONCLUSION

For the reasons stated, Proposed Amici respectfully submit that this Court should deny Plaintiffs' motion for preliminary injunction and dismiss their complaint in its entirety.

Dated: November 4, 2022

Respectfully submitted,

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**Pro hac vice motion pending*
***Pro hac vice motion forthcoming*

PROOF OF SERVICE

Sarah Prescott certifies that on the 4th day of November 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE .

s/ *Sarah S. Prescott*
Sarah Prescott

Exhibit A

Order

Michigan Supreme Court
Lansing, Michigan

November 3, 2022

Bridget M. McCormack,
Chief Justice

164955 & (24)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

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

v

SC: 164955
COA: 363503
Ct of Claims: 22-000162-MZ

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,
Defendants-Appellants.

_____/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the request made in the bypass application to stay the October 20, 2022 opinion and order of the Court of Claims is considered, and it is GRANTED. We ORDER that the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from the Court of Appeals decision, until further order of this Court. This order disposes of the defendants' application for leave to appeal.

BERNSTEIN, J. (*concurring*).

I agree with the majority's decision to grant a stay in these consolidated cases. I write to explain why.

Justice VIVIANO appears to believe that granting a stay in this case is "a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek." The assumption that we are being driven by a results-oriented agenda is a confusing one at best, given that there are clearly significant legal issues at play here that merit this Court's full attention, which is unfortunately not feasible in the time left before election day. Justice VIVIANO notes that granting a stay here is inappropriate, referring to MCR 7.209(A)(2), but that court rule only speaks in terms of motions to stay filed in the Court

of Appeals, where defendants filed a motion to waive the requirements of MCR 7.209. Although they did not file such a motion in this Court, there is nothing in MCR 7.209 to suggest that this requirement extends to this Court.[1] Justice VIVIANO even acknowledges that "our rules do not expressly address the standard applicable to these stays," but in the same breath chastises the majority for not identifying a standard that he admits does not exist and that his dissenting colleague similarly does not apply.

In the interests of full transparency, assuming that the standard Justice VIVIANO has articulated is applicable here, I will briefly explain why I believe that a stay is appropriate under these circumstances. Justice VIVIANO notes that there is a four-part test that asks:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken v Holder*, 556 US 418, 434 (2009), quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

First, I believe defendants have made a strong showing that the doctrine of laches could apply to bar the relief that plaintiffs seek. The doctrine is an equitable one, and it may remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (quotation marks and citation omitted). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id.*, citing *Lothian v Detroit*, 414 Mich 160, 168 (1982); *McGregor v Carney*, 271 Mich 278, 280 (1935); and 11A Callaghan's Michigan Pleading & Practice (2d ed), § 92.12, p 580. In other words, "[t]he doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation." *Mich Ed Emp Mut Ins Co v Morris*, 460 Mich 180, 200 (1999).

The Court of Claims granted injunctive relief as to five of the plaintiffs' challenges to provisions of the election guidance published by the Bureau of Elections.[2] The majority

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[1] Although MCR 7.305(I) states that "MCR 7.209 applies to appeals in the Supreme Court," given that MCR 7.209(A)(2) only speaks in terms of the Court of Appeals, it is unclear what the effect of MCR 7.305(I) is as to that provision. More importantly, MCR 7.209(F) refers to both the Court of Appeals and the Supreme Court, thus suggesting that the reference to the Court of Appeals alone in MCR 7.209(A)(2) is meaningful.

[2] Briefly, the first challenged provision standardizes the form that election challengers must use to be credentialed, whereas political parties formerly used custom forms for their own

of the challenged provisions at issue were first published in May 2022. Notably, the Court of Claims opinion pointed out that an earlier version of at least one of the challenged provisions was published in October 2020, and "there is nothing in the record to suggest that the manual was challenged in court on these grounds." In the consolidated cases before us, one set of plaintiffs first filed suit in the Court of Claims on September 28, 2022, while the other set of plaintiffs first filed suit in the same court on September 30, 2022. The Court of Claims did not enter its opinion and order until October 20, 2022.

It is clear that some delay took place in both cases, particularly with respect to the challenged provision that existed in a similar form as early as October 2020. The Court of Claims faults the Bureau of Elections for failing to "highlight or redline" the new provisions for the benefit of potential challengers, and it notes that one set of plaintiffs communicated its disagreements with these provisions in July 2022, concluding that "plaintiffs did not simply sit on their hands for four months, as defendants argue." But the doctrine of laches does not ask whether a plaintiff makes just any move in attempting to address the complained-of situation—it specifically asks whether there has been an unreasonable delay in *commencing a legal action*. See *Pub Health Dep't*, 452 Mich at 507.

I also believe that defendants have made a strong showing that this delay would result in prejudice. Defendants note that the guidance is binding on local clerks, and that training based on this guidance for both local clerks and election inspectors has already taken place across the state. It is impractical to think that new training could both be developed and take place the week before the election without a significant use of state resources, even if we assume this is a logistically achievable task within the time frame before us. Although both of my dissenting colleagues deny that any significant changes would be necessary at this point, it seems obvious that they would be—the August 2022 primary election was held with the challenged provisions in place, and a change would need to be made less than a week before the November 2022 general election. To say this would not be disruptive is to ignore reality and basic human behavior.

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challengers; the second challenged provision states that challengers may be appointed up to the day before election day, but not on election day itself; the third challenged provision states that challengers may only communicate with a particular election inspector, designated as the challenger liaison, with repeat violations leading to the potential ejection of a challenger; the fourth challenged provision restricts the possession of electronic devices only in absent voter ballot processing facilities while absent voter ballots are being processed with violations subject to ejection (as opposed to polling places, where electronic devices may be possessed subject to certain limitations); and the fifth challenged provision states that impermissible election challenges, defined for example as challenges that are made with respect to something other than a voter's eligibility or challenges that are made on the basis of a prohibited reason, need not be recorded in the poll book.

Accordingly, I believe that defendants have made a strong showing that they are likely to succeed on the merits of their laches defense.

Second, given that the doctrine of laches already incorporates a prejudice requirement, like Justice VIVIANO, I find that this factor follows the first.

The third and fourth factors concern whether there will be substantial injury to other interested parties and where the public interest lies. I begin by noting that defendants have submitted affidavits from current and former elections officials that explain why the challenged provisions are necessary to prevent the intimidation of both voters and election inspectors alike. I believe it more appropriate to defer both to the collective experience of these seasoned professionals and to the legal record that has been developed in this case, instead of inserting my own personal notions of what is efficient or not. Although Justice VIVIANO concludes that the public interest lies in striking the challenged provisions, it is especially noteworthy that these provisions applied to the August 2022 primary election, and yet there are no claims before us of any sort of havoc or catastrophe that resulted from the use of this guidance in that election.

I would thus find that defendants have met the standard articulated by Justice VIVIANO for a stay.

Moreover, it is important to bear in mind that the relief the Court of Claims granted in these cases was injunctive relief, which "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." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 (2008) (quotation marks and citations omitted; emphasis added). I find it hard to believe that plaintiffs could establish a real and imminent danger of irreparable injury, again in light of the unchallenged administration of the August 2022 primary election. One set of plaintiffs in these cases includes the Michigan Republican Party and the Republican National Committee. I find it puzzling how these plaintiffs could establish a real danger of irreparable injury, given that the challenged provisions apply equally to all would-be election challengers, be they Republican, Democratic, or otherwise.

Given the strong arguments that defendants have made in favor of the application of the doctrine of laches, and given the high standards applicable where plaintiffs request injunctive relief, I vote with the majority to grant a stay in this case. I continue to be confused by the insinuation that "the stakes of this case . . . could not be higher." Of course I believe in the importance of elections in our representative democracy, a statement that I have repeated across a number of election cases over the eight years I have served on this Court. But it remains the case that the August 2022 primary election was conducted without any problems or objections. If August 2nd went smoothly, I have no reason to believe November 8th will be any different.

WELCH, J. (*concurring*).

I agree with the Court's decision to stay the legal effect of the Court of Claims' October 20, 2022 opinion and order. I write separately to explain why I believe a stay is appropriate. At issue in this case are several modifications made by the Bureau of Elections to its election manual in May 2022. With respect to the changes in the manual, the parties have competing arguments about the interaction of the Michigan Election Law (MEL), MCL 168.1 *et seq*., and the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Thoughtful consideration and conclusive resolution by the judiciary are warranted on these important issues. But timing matters, especially when a lawsuit contests election procedures and seeks emergency relief just days before an election. See *Purcell v Gonzalez*, 549 US 1, 5-6 (2006); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016); *New Democratic Coalition v Secretary of State*, 41 Mich App 343, 356-357 (1972).

Specifically, plaintiffs in these two cases raise challenges to an election manual relating to election challengers and poll watchers, which was published by the Michigan Bureau of Elections on May 25, 2022, and announced through a digital news bulletin on the Secretary of State's website on the same date.[3] It appears to be undisputed that either staff or attorneys of plaintiffs Michigan Republican Party and Republican National Committee have been aware of the 2022 manual since it was issued or shortly thereafter, regardless of when the those parties claim to have realized that the 2022 manual was not identical to the 2020 manual. The record also shows that plaintiff Philip O'Halloran was personally aware of the new provisions in the manual as early as July 2022, as evidenced by e-mails sent by O'Halloran to the Secretary of State raising some of the exact concerns that have been pleaded in these cases. The 2022 manual was in place and relied on by local clerks, election workers, poll watchers, and challengers for the August 4, 2022 primary election. It further appears that plaintiffs O'Halloran, Braden Giacobazzi, Robert Cushman, and Richard DeVisser served as election challengers for the August primary election.

Despite the availability of the 2022 manual since May 2022 and several of the plaintiffs' subjective knowledge of the manual and its contents, the lawsuits in this matter were not filed in the Court of Claims until September 28, 2022, and September 30, 2022. Both groups of plaintiffs claim that aspects of the 2022 manual conflict with the MEL, exceed the legal authority held by defendants to issue election instructions and guidance without first going through formal notice-and-comment rulemaking under the APA, and infringe the statutory rights of designated election challengers under MCL 168.730. Defendants, in response, point both to the statutory authority provided by the MEL and the historic practices of the office of the Secretary of State and the Bureau of Elections. After

[3] The 2022 manual that is at issue is titled: "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers."

the Court of Claims largely ruled in favor of plaintiffs on October 20, 2022, defendants immediately requested that the Court of Appeals grant expedited relief or a stay of the Court of Claims' decision no later than October 26, 2022 and requested waiver of the requirement under MCR 7.209(A)(2) that a motion for a stay pending appeal must first be filed in the applicable trial court. The Court of Appeals has yet to issue an order. Accordingly, defendants filed a bypass application in this Court on October 28, 2022, asking the Court to enter a stay of the Court of Claims' decision.[4] The requested stay would ensure that local election workers can rely on the 2022 manual in the November 2022 general election while the courts work through the complex and jurisprudentially significant legal issues presented in these cases.[5]

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[4] To be clear, the Court of Appeals has yet to rule on the merits of the parties' arguments, and the stay that this Court is putting in place merely prevents the Court of Claims' decision from being enforced immediately. Defendants have not asked this Court to resolve the merits of this dispute at this time. Nor does any Michigan precedent or court rule require an evaluation of the merits of an appeal when deciding whether to grant or deny a stay pending appeal. Regardless of whether this Court should adopt a new general standard for when a stay pending appeal should be granted, we certainly should not adopt such a standard for the first time when an appeal is before the Court in an emergency posture. Thus, rather than engage in a merits analysis on matters that are likely to be reviewed by this Court in the future, I believe it most appropriate to look to relevant state and federal precedent concerning delayed legal challenges that relate to election matters. That authority weighs strongly in favor of the Court's decision to grant a stay.

[5] I agree with Justice BERNSTEIN that the procedural posture of this case does not preclude ordering a stay. Defendants' bypass application sought a ruling on their motion to grant a stay and to waive the procedural requirements contained in MCR 7.209(A) that is still undecided and pending before the Court of Appeals. This Court has the authority to entertain such a request both under its general powers and pursuant to MCR 7.303(B)(1), MCR 7.305(C), and MCR 7.316(A)(7). In fact, while this Court denied a bypass application and a request for a stay in *AFT Mich v Michigan*, 493 Mich 884 (2012), it granted the request to waive the procedural requirement under MCR 7.209(A)(2) and (3), as well as the requirements under MCR 7.302(I) (which has since been renumbered as MCR 7.305(I)). *AFT Mich* was before this Court in a different procedural posture given that a separate motion for a stay was filed along with the bypass application, but no motion for a stay had been filed in or denied by the lower courts. We also granted a motion to waive MCR 7.209(A) in *Bailey v Pornpichit*, 722 NW2d 221 (Mich, 2006). And, since the *AFT Mich* order was entered, this Court has denied at least two other requests to waive the procedural requirements of MCR 7.209(A) without suggesting that it lacked the authority to grant such a request. See *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 502 Mich 881 (2018); *Doe v Dep't of Corrections*, 497 Mich 882 (2014). This is not the first time this Court has entertained or granted requests to waive procedural requirements

All parties agree that " '[a] State indisputably has a compelling interest in preserving the integrity of its election process,' " *Purcell*, 549 US at 4 (citation omitted), but they disagree about whether certain provisions of the 2022 manual hinder or help this compelling interest. The United States Supreme Court has long recognized that courts should be cautious in granting injunctive or declaratory relief that will alter election rules or procedures when an election is imminent, there is a need for clear guidance, and there is inadequate time to resolve complex factual or legal disputes relating to important election matters. See *id*. at 5-6. This is especially true where a plaintiff has unreasonably delayed bringing a claim before the court. See, e.g., *Crookston*, 841 F3d at 398 ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). This is, in essence, the equitable doctrine of laches applied in a unique way to election matters. See *New Democratic Coalition*, 41 Mich App at 356-357 ("We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections."); *Nykoriak v Napoleon*, 334 Mich App 370, 383 (2020) ("The circuit court did not err by finding unexcused or unexplained delay, particularly in light of plaintiff's prior experience with elections").[6]

As the Sixth Circuit noted in *Crookston*, 841 F3d at 398, whether it be "laches, the *Purcell* principle, or common sense," there are compelling reasons not to disrupt established election processes and procedures on the eve of an election "absent a powerful reason for doing so." No adequate justification exists in these cases. The 2022 manual has been publicly available since May 25, 2022. Since its release, the 2022 manual has been relied on for both training purposes and administration of the August primary election. At least one plaintiff had personal knowledge of the changes implemented by the 2022 manual prior to the August primary, and several plaintiffs served as election challengers for the August primary under the terms provided by the manual. But the lawsuits at issue were

governing requests for a stay, and while granting such requests should be rare, the timing and nature of this election-related matter warrants granting defendants' request.

[6] See also *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (holding that laches "is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party"); 4 Restatement Torts, 2d, § 939, comment *a*, p 576 ("Even during a period less than that prescribed by an applicable or analogous statute of limitations, delay by the plaintiff in bringing suit, after he knew or should have known of the tort may result in relief being denied, wholly or in part, if the delay has operated to the prejudice of the defendant or has weakened the court's facility of administration."); *id*. at § 939, comment *b*, p 577 ("The reasonableness of the delay is tested by asking what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed.").

not filed until the end of September. Additionally, the November 2022 general election was less than three weeks away when the Court of Claims entered its opinion and order. The general election is now less than one week away. Training for poll workers has been completed. It would be impossible to retrain thousands of workers across our state within a matter of days.

The parties raise compelling legal arguments, and the scope of defendants' power to administer election processes and procedures are jurisprudentially significant. While the parties and the electorate of Michigan deserve definitive answers, I believe the stay in this case will avoid confusion on election day and still allow for the merits of the claims in plaintiffs' lawsuits to proceed through the courts for resolution.

ZAHRA, J. (*dissenting*.)

I dissent from the majority's decision to grant a stay.

Defendants[7] filed a motion to bypass[8] the Court of Appeals' jurisdiction[9] asking this Court to overturn the Court of Claims' decision granting DeVisser limited relief in this election case. The underlying matter concerns defendants' May 25, 2022 release and implementation of a publication entitled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (the Manual). Plaintiffs filed lawsuits in the Court of Claims on September 28 and 29, 2022, arguing that the Manual included "rules" that ought to have been promulgated by the Administrative Procedures Act (APA), MCL 24.201 *et seq*. On October 3, 2022, the court consolidated the cases and directed defendants to show cause why relief should not be granted and to file any motions for summary disposition by October 11, 2022. On October 20, 2022, the court issued a 29-page opinion that largely granted the relief sought by the DeVisser plaintiffs and denied the O'Halloran plaintiffs the broader relief sought in that case.[10] The court ruled that defendants were required to promulgate rules under the APA in regard to the Manual's requirements that: (1) poll watchers use a uniform credential form supplied by the Secretary of State, (2) poll watchers must be appointed or credentialed no later than the day before election day, (3) poll

[7] I refer to defendant Secretary of State and defendant Director of the Bureau of Elections collectively as "defendants" and specify the Secretary of State when referring to that party in the singular.

[8] See MCR 7.303(B)(1) and 7.305(C)(1).

[9] Defendants' claim of appeal and motion to stay the Court of Claims' decision remain pending in the Court of Appeals.

[10] In this procedural posture, the additional relief sought by DeVisser and O'Halloran that the Court of Claims denied is not at issue.

watchers may only communicate with an appointed "challenger liaison," as opposed to communicating with any election inspector, (4) poll watchers are prohibited from possessing electronic devices in absent voter counting board facilities, and (5) so-called "impermissible challenges" to a person's eligibility to vote not be recorded in the poll book. The Court of Claims also rejected defendants' laches defense, concluding that plaintiffs acted with reasonable diligence and that defendants failed to demonstrate prejudice.

The Court of Claims provided defendants some discretion in how to proceed:

> 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.

Defendants appealed and filed a motion to stay the Court of Claims' judgment, but the Court of Appeals has not yet taken action. Defendants now seek relief from this Court through a bypass application.

Under the APA, a "rule" is defined as "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, including the amendment, suspension, or rescission of the law enforced or administered by the agency."[11] A "rule" not promulgated in accordance with the APA's procedures is invalid.[12] An agency must use formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program."[13] "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed,

[11] MCL 24.207.

[12] MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205 (1982).

[13] *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998).

while the exceptions are to be narrowly construed."[14] It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA.[15]

This is not the first time that the Secretary of State has claimed to merely be issuing "instructions" to justify the lack of open and transparent promulgation of rules under the APA. The same claim was made before the 2020 general election. Yet, in March 2021, the Court of Claims issued an opinion that held, "[i]n sum, the standards issued by defendant [Secretary of State] on October 6, 2020, with respect to signature-matching requirements amounted to a 'rule' that should have been promulgated in accordance with the APA. And absent compliance with the APA, the 'rule' is invalid."[16] In the present case, the Court of Claims carefully and reasonably reviewed the challenges and found each to be in conflict with statutory law concerning the credentialling of poll watchers and their conduct during the election. At this stage of these proceedings, I cannot conclude that a stay of the Court of Claims judgment should enter. Indeed, it appears likely that defendants have once again chosen to implement "rules" under the guise of "instruction."

Under MCL 168.31(1)(a), the Secretary of State shall "issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections and registrations in accordance with the laws of this state." Defendants undisputedly did not promulgate revisions to the Manual pursuant to the APA, and they argue that they were not required to do so because the revisions were only instructional. Yet, defendants assert that "the instructions are binding on local clerks, MCL 168.21, MCL 168.31(1)(a)-(c), who in turn have the obligation to train all election inspectors on Election Day procedures pursuant to those instructions, including the procedures related to challengers and the challenge process, MCL 168.31(1)(c), (i), (m)." Defendants cannot have it both ways. While defendants maintain that the Manual was revised to provide mere instructions, those instructions became manifest when actually implemented and put into practice during the August 2, 2022 primary. At that point, plaintiffs could cite the revisions to the Manual and claim the revisions were not merely instructional, they were in fact rules that were required to be promulgated under the APA to have the effect of law.[17]

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[14] *American Federation of State, Co, & Muni Employees v Dep't of Mental Health*, 452 Mich 1, 10 (1996) (*AFSCME*).

[15] *In re Pub Serv Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263 (2002).

[16] *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), p 14.

[17] See *AFSCME*, 452 Mich at 12 (recognizing that the Department of Mental Health did not need to take a certain action; however, once the department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule").

Further, because the rules were first implemented during the August 2, 2022 primary, I am hard-pressed to conclude that a lawsuit filed eight weeks after the primary and six weeks before the general election shows an unexcused or unexplained delay in commencing an action. Nor am I convinced that defendants have shown prejudice because of an allegedly late filing.[18] Surely, the Secretary of State was aware that these proposed instructions might later be challenged as rules that must be promulgated under the APA. As mentioned, a very similar challenge occurred during the Secretary of State's tenure, just a year before the Manual was revised.[19]

Obviously, the more prudent and transparent manner of revising the Manual is to simply promulgate the rules under the APA. For this reason, defendants do not arrive at this Court with clean hands to claim they are prejudiced by a judicial decision that they were entirely able to avoid. In fact, the majority's decision to grant a stay will only enable defendants to continue this practice. Further, I seriously question defendants' claim that significant retraining will be required without the stay. The Court of Claims' judgment is narrowly tailored to five concerns. These concerns relate to revisions of the Manual addressing practices that had been permitted in prior elections. Thus, seasoned poll workers will need only be informed that they should revert to their prior practices. In sum, officials need not require a uniform credential form, poll watchers may be credentialed the day of the election, poll watchers may communicate with any election inspector, poll watchers may possess electronic devices in absent voter counting board facilities, and challenges to a person's eligibility to vote must be recorded in the poll book. Given that this was the practice for a significant amount of time before the August 2, 2022 primary, following this directive hardly strikes me as something on which significant retraining is required, if any at all. For these reasons, I would deny the stay.

VIVIANO, J. (*dissenting*.)

We live in a political age where one side claims our "democracy is at stake" because the other is questioning the integrity of our elections—an age-old and seemingly bipartisan tradition. See Foley, *Ballot Battles: The History of Disputed Elections in the United States*

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[18] There is a statutory rebuttable presumption of laches in cases brought within four weeks of an election. MCL 691.1031. Plaintiffs avoided this presumption by filing their claims six weeks prior to the general election. Election litigation will always be expedited. But I have consistently maintained that six weeks is a sufficient amount of time to consider matters that will affect an election, such as the collection and tabulation of ballots. See *Johnson v Bd of State Canvassers*, 509 Mich ___, ___; 974 NW2d 235, 236 (2022) (ZAHRA, J., concurring).

[19] See note 16 of this statement and accompanying text.

(New York: Oxford University Press, 2016). Therefore, the stakes of this case—which will affect how this year's election is administered—could not be higher. But you would not know it from the majority's treatment of the case. The majority's order, which is barren of any legal analysis or discussion, stays the trial court's decision enjoining enforcement of changes made by defendant Secretary of State to the 2022 Election Manual (hereafter "Manual") to regulate the conduct of the upcoming election. In doing so, the majority disregards our court rules and the basic need to provide reasoned, principled decisions. And it has almost certainly ensured that the present election will not be governed by Michigan law as interpreted by the only court to rule on the merits of this election dispute.

Instead, under the general principles governing stays, I would reject defendants' motion for a stay, as I believe defendants have not shown sufficient likelihood of success on the merits or that they would be irreparably harmed by enforcement of the trial court's order.

I. FACTS AND PROCEDURAL HISTORY

These cases start with the Election Manual itself, and the recent changes to it. Under MCL 168.31(1)(c), the Secretary of State must "[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on . . . procedures and forms for processing challenges . . . ." The Secretary of State must also "develop instructions consistent with [the Michigan Election Law, MCL 168.1 *et seq*.] for the conduct of absent voter counting boards or combined absent voter counting boards." MCL 168.765a(13). Those instructions "are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township." *Id*. In May 2022, the Secretary of State issued a substantially new version of the portion of the Election Manual pertaining to election challengers and poll watchers.[20]

[20] An electronic version of the Manual appears on the Secretary of State's website. The updated portion at issue here—titled *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*—seems to replace a portion of the Manual; however, the online version of the manual does not reflect this update and instead reports that the relevant section of the Manual was last updated in October 2020. Michigan Secretary of State, *Election Administrator Information* <https://www.michigan.gov/sos/elections/admin-info> (accessed November 2, 2022) [https://perma.cc/NXB6-UVV6] (see the boldface heading "Election Officials' Manual / Accreditation Study Guide" and under that heading the link to Chapter 11, which concerns "Election Day Issues," indicating that the linked material was last updated in October 2020). The updated portion at issue is not included with the Manual but is provided under a separate heading and is not identified as part of the Manual.

The first major change related to the credentials for election challengers. The relevant statute provides that the challenger must have an "[a]uthority signed by the recognized chairman or presiding officer" of a political party or certain other groups—and that this authority "shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept . . . ." MCL 168.732. Past election manuals have not required anything more than what is required by this statute. But in the present Manual, the Secretary of State has attempted to define the "authority" mentioned in the statute as a "Michigan Challengers Credential Card," which must appear "on a form promulgated by the Secretary of State."[21] "If the entire form is not completed," the Manual warns, "the credential is invalid and the individual presenting the form cannot serve as a challenger."[22]

The next changes deal with a new position created by the Secretary of State: the challenger liaison. Election challengers have statutory authority to "[b]ring to an election inspector's attention" various problems, such as improper ballot handling or violations of election law. MCL 168.733(1)(e). Past manuals have provided for election officials to supervise these challenges. The 2020 manual, for example, provided that certain challenges "must be directed to the chairperson of the precinct board . . . ."[23] The current Manual, by contrast, prohibits challengers from even speaking with anyone other than the liaison: "Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee," unless instructed otherwise.[24] Violation of this, or any other instructions, will lead to a warning, followed by possible ejection.

The third change is to the possession of electronic devices. No statute speaks to whether challengers can possess such devices. However, the Legislature has prohibited

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[21] Michigan Secretary of State, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p 4, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750> (accessed November 3, 2022) [https://perma.cc/GL8Z-GLSK].

[22] *Id*. at 4-5.

[23] Michigan Department of State, Bureau of Elections, *Election Officials' Manual* (October 2020), ch 11, p 32, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/XI_Election_Day_Issues.pdf?rev=dca6cfa2f9dd422a8444825a521324b8&hash=E80A0F3EDFF7F288B13ECA626E380237> (accessed November 2, 2022) [https://perma.cc/F3RB-9ME5].

[24] *Appointment, Rights, and Duties* (May 2022), p 6 (boldface omitted).

challengers from communicating information relating to the processing or tallying of votes until the polls close. MCL 168.765a(9). Past manuals have prohibited the use of electronic devices but never their mere possession. The present Manual, however, bans possession in absent voter ballot facilities while absent voter ballots are being processed.[25]

The final change is to recording challenges. By statute, registered electors of a precinct can "challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." MCL 168.727(1). If such a challenge is made, the election inspector must "[m]ake a written report including" various information. MCL 168.727(2)(b). The statute further prohibits challenges made "indiscriminately and without good cause" and provides that a challenger who makes challenges "for the purpose of annoying or delaying voters is guilty of a misdemeanor." MCL 168.727(3). The 2022 Manual has created a new class of challenges, what it deems "impermissible challenges": those made on improper grounds, such as to something other than the voter's eligibility.[26] "Election inspectors are not required to record an impermissible challenge in the poll book," according to the Manual.[27]

Plaintiffs sued, seeking to enjoin these aspects of the Manual, among other requested relief. The Court of Claims agreed. It noted, at the outset, that the Secretary of State's instructions were not promulgated as rules under the Administrative Procedures Act, MCL 24.201 *et seq*. Therefore, as defendants acknowledged, they did not have the force and effect of law. With regard to the Secretary of State's credential form, the court explained that "our Legislature expressly set out the 'evidence' needed to show that a person was properly credentialed as a challenger" in MCL 168.732. The Secretary of State could not add to the requirements by mandating the use of a particular form.

With regard to the challenger liaison, the Court of Claims stated that "[t]he authority to designate a 'challenger liaison' is absent from the Michigan Election Law—in fact, the very label appears nowhere in the statute." No sources were cited, the court observed, to support this restriction of the challengers' statutory "right to communicate to 'an' election inspector . . . ." Therefore, the restriction was inappropriate. Next, in relation to electronic devices in the absent voter counting board facilities, the court again noted the lack of

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[25] Appointment, Rights, and Duties (May 2022), p 9.

[26] The 2003 manual distinguished between "proper" and "improper" challenges but did not purport to absolve election inspectors of their duty to record the challenge or threaten challengers with expulsion for making these challenges. The 2003 manual did, however, allow the precinct chairperson to expel challengers who "abuse[d] the challenge process." This provision does not appear to have been continued in subsequent manuals.

[27] *Appointment, Rights, and Duties* (May 2022), p 10 (boldface omitted).

statutory authority supporting the change. The Legislature restricted communications made by challengers regarding the processing of absentee ballots, but it did not prohibit possession of electronic devices, even though it would have been very easy to do so. "Prohibiting electronic devices in the [absent voter counting board] 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." Therefore, the restriction was impermissible.

Finally, the court enjoined enforcement of the "impermissible" challenges provision. The court noted that nothing in MCL 168.727(2) gave election inspectors discretion to decline to record a challenge made to the voting rights of a person. This contrasted with other types of challenges and actions that election challengers were entitled to make, such as many of those under MCL 168.733.[28] Nor did defendants cite any authority for the proposition that a challenger could be ejected for making impermissible challenges. Consequently, the Manual veered from the statutes and could not be enforced.[29]

The court also rejected defendants' laches argument, i.e., that plaintiffs unduly delayed suit to the prejudice of defendants. It explained that the plaintiffs "did not simply sit on their hands for four months" after the Manual was issued in May 2022. Further, the court found no evidence that defendants would be prejudiced by any delay in bringing the case. The Manual is almost entirely instructive, rather than enforceable, the court observed, and could be easily tweaked on the few points where it went astray.

Defendants then appealed in the Court of Appeals, filing a motion to stay the Court of Claims judgment. The Court of Appeals has not yet ruled. Defendants now seek to bypass the intermediate appellate stage and come straight to this Court. They ask that this Court grant the bypass application and stay enforcement of the Court of Claims judgment.

II. PROCEDURES AND STANDARDS FOR A STAY

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[28] For example, MCL 168.733(1)(d) provides challengers the right to "[c]hallenge an election procedure that is not being properly performed." MCL 168.733(1)(c), by contrast, involves challenges to voting rights under MCL 168.727, which do require reports.

[29] Plaintiffs also challenged language in the Manual providing that "[p]olitical parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day." Defendants acknowledged, however, that MCL 168.730 and MCL 168.731 permit appointment through election day itself. The Court of Claims required defendants to make this amendment to the Manual. Because defendants conceded this issue, and because the Court of Claims' decision appears plainly correct, I will not address it below.

A. MCR 7.209

The majority has found a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek. Instead of addressing the merits of this election-emergency case prior to the election, or doing anything that ensures the merits will be addressed on appeal by then, the majority simply stays all lower court decisions in this case until after the Court of Appeals issues a decision and after we have subsequently disposed of the case. With less than one week to go before the election, there is little prospect of the case being finally resolved before election day. The election will likely come and go with the Secretary of State's challenged Manual firmly in place, even though the only court to rule on the merits found it contained new provisions that exceeded the Secretary of State's authority.

The majority tramples over the court rules allowing us to order a stay. MCR 7.209, which addresses stays for cases on appeal in the Court of Appeals, applies to appeals in this Court. See MCR 7.305(I). Under MCR 7.209, a party can seek in the Court of Appeals to stay the effect or enforceability of a trial court's judgment *if* a stay bond or motion for a stay pending appeal was decided by the trial court. MCR 7.209(A)(2) ("A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court."). The Court of Appeals "may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just." MCR 7.209(D).

In the present case, it does not appear that defendants ever moved for a stay in the trial court (here, the Court of Claims), and the trial court never decided the issue. Thus, under MCR 7.209(A)(2), defendants were prohibited from even filing a motion for a stay in the Court of Appeals. Yet they did just that, along with a request to waive the requirements in MCR 7.209(A)(2). But nothing in MCR 7.209 suggests that courts have the power to waive this threshold requirement. Nor does the majority's order suggest that it is granting the waiver or provide any reasons for doing so. And in seeking a bypass application here, defendants only sought entry of a stay—they did not even seek a waiver of MCR 7.209(A)(2)'s requirements. Thus, even if courts can absolve parties of legal requirements that the parties admit noncompliance with, it does not appear that this stay motion is properly before this Court.

B. STANDARDS FOR ENTERING A STAY

More amazing still, the majority accomplishes its result, in an important case affecting the statewide rules governing the upcoming election, without any pretense that it must justify the stay by giving reasons based in law. This is in tension with the constitutional requirement that our "[d]ecisions . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ." Const 1963, art 6, § 6. Often, this constitutional provision does not require much. Many of our cases are decided

or resolved in short orders. But more is called for here, at the very least as a prudential matter. In a case of this magnitude, when the Court is halting a decision by a lower court—the only court to have considered the merits thus far—in a manner that will affect the conduct of the election and almost certainly will deprive plaintiffs of relief in this election, I believe the Court should provide at least some legal rationale for its decision.

Compounding this problem is the lack of any clear standard being applied by the majority in cases involving stays of lower court orders. To be sure, our rules do not expressly address the standard applicable to these stays. MCR 7.209(D)—which is applicable to this Court under MCR 7.305(I)—allows an appellate court to stay enforcement of trial court judgments on "terms it deems just." And neither has this Court established a standard, having ordered stays in the past without any rationale—a practice I have occasionally dissented from. *Sheffield v Detroit City Clerk*, 507 Mich 956, 957 (2021) (VIVIANO, J., concurring in part and dissenting in part).

Without any standard whatsoever, these stays are essentially arbitrary, as far as the parties and public are concerned. It might be that the majority favors the arguments of one side or the other, or prefers a particular political outcome, or enters a stay because it is Tuesday. This lack of any discernable standard being applied by the Court in these cases conflicts with the nature of judicial decisionmaking. Principled judicial decisionmaking requires a reasoned application of general principles and laws applicable to the present case and like cases. Cf. Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993), pp 3-4. If a judge cannot discover such principles that yield his or her desired result, it usually means those principles do not exist. *Id*. To give no basis for a decision means that the judges might have acted for *any* reason, good or bad, principled or unprincipled. As the United States Supreme Court has explained, an appellate court's ability to hold a lower court order in abeyance pending an appeal is an inherent power within the discretion of the court—but this " 'does not mean that no legal standard governs that discretion. . . . "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." ' " *Nken v Holder*, 556 US 418, 434 (2009), quoting *Martin v Franklin Capital Corp*, 546 US 132, 139 (2005) (citation omitted; alterations in original).

The majority identifies no standard and provides no reasoning for its decision to stay this case. Nor could I identify any "sound legal principles" supporting its conclusion. In this regard, it has been observed that the nature of the question whether to enter a stay in these circumstances is equitable. See *Daly v San Bernardino Co Bd of Supervisors*, 11 Cal 5th 1030, 1054 (2021) (noting "the essentially equitable nature of the stay pending appeal" and observing that many courts apply equitable considerations). The United States Supreme Court has articulated the widely followed test for stays pending appeal:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured

> absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken*, 556 US at 434, quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

Many, if not most, other courts follow this standard or something like it.[30] In the present case, moreover, defendants have analyzed their request for a stay under these same basic factors. I believe this four-part standard applies to stays sought under MCR 7.209 and, unlike the majority, would apply it in the present matter.[31]

III. APPLICATION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

The first question is whether defendants have shown a likelihood of success on the merits. There are two parts to this question. First, have defendants demonstrated that the trial court erred in its analysis of the statutory provisions and the Secretary of State's violations of them? Second, even if not, have defendants demonstrated a likelihood of success on the merits of their laches defense? For the reasons that follow, I find that this factor weighs against the stay.

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[30] See Or Rev Stat 19.350(3) (enacting four factors similar to the federal standards); Nev R App P 8(c) (same); *Ex parte Krukenberg*, 252 So 3d 676, 678 n 1 (Ala Civ App, 2017) (using federal-standard factors); *Smith v Arizona Citizens Clean Elections Comm*, 212 Ariz 407, 410 (2006) (same); *Romero v City of Fountain*, 307 P3d 120, 122 (Colo App, 2011) (adopting federal standards); *State v Gudenschwager*, 191 Wis 2d 431, 440 (1995) (using the federal standards); *Reading Anthracite Co v Rich*, 525 Pa 118, 125 (1990) (applying the federal standards); *Purser v Rahm*, 104 Wash 2d 159, 177 (1985) (applying a different test that similarly examines the "equities of the situation"); see generally 4 CJS, Appeal and Error, § 530 (Oct 2022 update) ("A party requesting a stay pending appeal must show a likelihood of prevailing on the merits, irreparable injury in the absence of the stay, and that a stay will not substantially harm other interested parties nor harm the public interest.").

[31] Another very concerning aspect of the majority's order is its highly unusual end-to-end scope of coverage. In a normal case, this Court might stay a trial court decision pending a decision by the Court of Appeals. Here, by contrast, this Court has ensured that the Court of Appeals will not be able to interfere even if it carefully considers the matter and issues an opinion founded on solid legal grounds. Blunting the impact of any action by the Court of Appeals sight-unseen, without this Court providing any legal basis for doing so, appears to be unprecedented.

1. STATUTORY VIOLATIONS

On the statutory issues, the trial court thoroughly assessed each argument, and I agree with its analysis. The trial court's analysis of the credential-form issue accurately determined that this new provision added requirements beyond what the statutes provided. In this Court, defendants contend that MCL 168.732 does not explicitly allow individual groups to use their own challenger cards, whereas MCL 168.31(1) gives the Secretary of State authority to create a manual "that includes procedures and forms for processing challenges." Defendants' argument ignores MCL 168.731(1), which allows the opportunity for certain other groups—"incorporated organization[s] or organized committee[s] of interested citizens other than political party committees authorized by this act"—to seek appointment of challengers. In applying to appoint challengers, the group must submit, among other things, "a facsimile of the card to be used" by the challenger. *Id*.

The Secretary of State's credential-form requirement applies to all challengers, not just challengers appointed by political parties. That clearly contradicts MCL 168.731(1). And it would make little sense for the nonpolitical-party challengers to use their own cards whereas political-party challengers cannot. Any distinction between MCL 168.731 and MCL 168.732 is not an invitation to the Secretary of State to use her authority under MCL 168.31(1) to add new requirements onto political-party challengers. Although she has the obligation to furnish a manual providing forms, nowhere does she have authority to make the use of those forms mandatory such that, even if a challenger satisfies all other statutory requirements, the challenger can be removed for failure to use the Secretary of State's preferred form. Indeed, as she admits, the Manual lacks the force of law—so how can it require outcomes different from those mandated by statute?

The challenger-liaison requirement has even less support. As the trial court observed, the statute allows challengers to bring their challenges to "an election inspector[]." MCL 168.733(1)(e). Defendants argue that "an election inspector" does not mean "*any* election inspector." That may be true, but the Manual goes well beyond that. As noted above, past manuals have channeled certain challenges to certain officials. Requiring that a challenge ultimately be handled by a certain individual is arguably consistent with the statutory language and defendants' observation. But the Secretary of State's rule precludes all communication between challengers and inspectors other than the liaison. It imposes a restriction on challengers that is nowhere found in the statutes and that can lead to the challengers' ejection. The Secretary of State's power under MCL 168.31(1)(c) to issue nonbinding procedures for challenges cannot encompass the power to create extrastatutory rules that result in the expulsion of otherwise legally present challengers.

The prohibition on electronic devices likewise impermissibly adds to the statutory requirements. As the trial court noted, the Legislature carefully calibrated the prohibitions

in this area, prohibiting communications about the absent-ballot processing but nowhere prohibiting electronic devices. Defendants' argument in this Court boils down to the proposition that to effectuate the prohibition on outside communications—a prohibition that was first enacted in 1965 PA 331—the Secretary of State must now prohibit electronic devices. If that is so, it is a policy choice for the Legislature to make and not for the Secretary of State to decree.[32]

Finally, I agree with the trial court's analysis of the impermissible challenges. MCL 168.727(1) provides that any registered elector can challenge an individual's right to vote "if the elector knows or has good reason to suspect that individual is not" a registered voter. If such a challenge is made, the election inspector "shall" record it. MCL 168.727(2). Nothing in the statute purports to give election inspectors the discretion to determine sua sponte whether a challenge is permissible or not. This gives the inspector the power to eliminate any record of the challenge, and therefore any opportunity to review this determination in the future. The Secretary of State has erected categories of challenges with discrete requirements that find no support from the statutes.[33] And, yet again, the Secretary of State has added a basis for expulsion of challengers.

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[32] This is not the first time a party has claimed that the Secretary of State has exceeded her limited powers as an executive branch official. See, e.g., *Davis v Secretary of State*, 506 Mich 1022 (2020) (challenging the Secretary of State's last-minute directive banning the open carrying of firearms at polling places on election day); *Davis v Secretary of State*, 506 Mich 1040, 1040 (2020) (VIVIANO, J., dissenting) (challenging the Secretary of State's unsolicited mass mailing of absentee ballot applications); *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM) (determining that the Secretary of State's instructions regarding signature-matching requirements constituted a rule that should have been promulgated under the Administrative Procedures Act).

[33] At best, defendants might claim that the recording requirement is contingent on a challenge being made pursuant to MCL 168.727(1), and that a challenge made pursuant to that subsection must be one in which the challenger knows or has good reason to suspect the voter is ineligible to vote. In other words, the recording requirement is inapplicable if the challenger lacks knowledge of or good reason to suspect the voter's ineligibility. Such an interpretation, however, would seem to stretch the text beyond its limits. How is the inspector to discern, upfront, whether the challenger knows or has good reason to suspect ineligibility? The inspector could not determine this unless he or she prejudged the challenge. And again, there is nothing in the statute suggesting that inspectors wield this level of discretion. In any event, the Secretary of State has not attempted to justify her Manual on this interpretation, nor could she: the Manual's categories of impermissible challenges and various subcategories of challenges is far too detailed to find any support in the statute.

For these reasons, and those given by the trial court, I conclude that defendants have little chance of success on the merits of their statutory arguments.

2. LACHES

Defendants also contend that plaintiffs' entire cases are barred by laches. The trial court's application of the legal doctrine is reviewed de novo, but any findings of fact supporting its decision are reviewed for clear error. *Shelby Charter Twp v Papesh*, 267 Mich App 92, 108 (2005). Defendants do not explain why the trial court's factual determinations regarding the ease of rectifying the Manual are clearly erroneous.

More importantly, I agree with the trial court's conclusion that laches does not apply. Laches is an equitable doctrine that applies to prevent a party from proceeding to seek enforcement of a legal right. *Nykoriak v Napoleon*, 334 Mich App 370, 382-383 (2020). Laches applies when the party has failed to take timely action *and* the opposing party can demonstrate that it was prejudiced as a result. *Id*. at 382. This Court has emphasized, time and again, that delay alone is not enough—prejudice is essential. As we reiterated in *Kaiser v Kaiser*, 213 Mich 660, 661 (1921):

> "[M]ere lapse of time does not necessarily constitute laches. As a rule it involves other considerations. It means that negligence or omission to assert a right which, considering the lapse of time in connection with other facts and circumstances prejudicial to the interests of the adverse party, render it unjust and inequitable to recognize such right when finally asserted. * * * Where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot as a rule be recognized." [Quoting *Walker v Schultz*, 175 Mich 280, 293 (1913).]

See also *Dunn v Minnema*, 323 Mich 687, 696 (1949) ("This Court has repeatedly held that mere delay in attempting to enforce a right does not constitute laches, but that it must further appear that the delay resulted in prejudice to the party claiming laches of such character as to render it inequitable to enforce the right."). Other courts have emphasized that "the prejudice must be *material* before laches will bar relief." *State ex rel Pennington v Bivens*, 166 Ohio St 3d 241, 247 (2021) (emphasis added).

While, in the context of elections, promptness is critical, this is generally because courts do not wish to "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results . . . ." 29 CJS, Elections, § 459 (Oct 2022 update). But in other contexts, one court has observed, "a laches defense 'rarely prevails in election cases.' " *Bivens*, 166 Ohio St 3d at 247 (citation omitted) (noting that the defense typically applies in election cases involving absentee voter rights). The

Michigan Legislature has provided for laches in the election setting: "In all civil actions brought in any circuit court of this state affecting elections, . . . there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected." MCL 691.1031. Although this provision leaves open the possibility of finding laches in earlier-filed suits, it nevertheless indicates the Legislature's view of when this doctrine generally should apply.

The present cases were brought in September 2022, before the time frame in MCL 691.1031, and thus no rebuttable presumption of laches arises. Moreover, as Justice ZAHRA observes, the lawsuits came just eight weeks after these new rules were implemented in the August 2022 primary. And this is not a case in which the outcome will directly affect a candidate's placement on the ballot or an elector's ability to vote. The challenged amendments to the Manual do not relate to the substantive grounds for challenging voters. The effects of these changes do not imperil voters' rights.

Even assuming that there was delay in bringing these suits, I do not believe that defendants have been sufficiently prejudiced. As the trial court noted, defendants admit that the Manual is not binding and has no legal effect, especially to the extent it is in conflict with statutory laws. As such, tweaking the handful of offending changes in the Manual would not change the substance of anything with which local elections officials *must* comply. Moreover, the changes themselves would be minor and would generally restore the status quo from before May 2022. Plaintiffs have, in fact, proposed a supplement, roughly one page in length, to the Manual that would bring it into compliance with the statutory requirements and the Court of Claims order. Instead of taking this simple step, defendants have expended much time and effort appealing the court's decision.

Defendants focus their prejudice argument on the difficulty of disseminating an updated manual and training local officials on it. On the first issue, they point to an affidavit by the Director of Elections stating that "the Bureau of Elections cannot *publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date* . . . ." As an initial matter, it appears that in 2020, an updated version of the manual was furnished in October, shortly before the election. And defendants have not identified any law that requires the printing and physical distribution of entirely new manuals. The statute simply requires the Secretary of State to "[p]ublish and furnish" the instructions. MCL 168.31(1)(c). Defendants offer no reason why this could not be accomplished electronically. Even if printing is required, defendants could certainly provide a short, one-page supplement in line with what plaintiffs have proposed.

As for training, defendants cite the director's summary assertion that further in-person trainings would be impossible at this point. That may be so, but it is unclear why *in-person* trainings are necessary at all. For her part, the Detroit City Clerk, as amicus curiae, has provided an affidavit from a consultant for the city's Department of Elections that simply states that retraining would cause confusion, not that it is impossible. It is

difficult to see how the narrow changes to the Manual, which simply bring it in line with statutes that have been on the books for years, would be onerous to describe or confusing to understand. Staff would need to be instructed that: (1) challengers do not need to use the Secretary of State's prescribed credential form; (2) challengers are not prohibited from bringing their challenges to election inspectors other than the challenger liaison; (3) challengers can possess electronic devices; and (4) election inspectors must record all challenges as they have in the past, pursuant to MCL 168.272, and not under the byzantine system created by the Secretary of State. The changes, if anything, lighten the staff's load by relieving them of enforcing an additional layer of restrictions atop those imposed by the statute. Any disruption ultimately emanates from the Secretary of State's decision to depart from the statutes and the general practices encapsulated in past manuals.

For these reasons, I conclude that defendants have not made a strong showing that they are likely to succeed on the merits of their laches defense.

B. IRREPARABLE HARM

In light of my analysis of the laches argument, I believe that defendants will suffer little harm in complying with the law, let alone irreparable harm. Thus, I find that this factor weighs against a stay.

C. INJURY TO OTHERS AND THE PUBLIC INTEREST

The final two factors can be considered together, as defendants have put forward broad policy grounds to support the Secretary of State's changes to the Manual. Generally, defendants cite the need for efficiency and security in the election process. On their face, the Secretary of State's changes limit the ability of election observers to challenge the integrity of the election and make the vote-counting process less transparent. The Secretary of State has imposed extrastatutory requirements, the violation of which will lead to an otherwise legally authorized challenger's removal. The changes further imperil statutorily required records by creating a system of permissible and impermissible challenges that essentially forces election inspectors to adjudicate the merits of the challenge before deciding whether they even need to record it at all. It is also unclear how efficiency will be increased by creating a potential bottleneck by forcing all challenges to funnel through the challenger liaison.[34]

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[34] The Manual requires only a single liaison at every polling place or absent voter ballot processing facility—more can be appointed, but nothing requires additional liaisons. Many cities have a single facility for processing absentee ballots, and the Legislature allows municipalities to combine their absent voter boards. MCL 168.764d. Consequently, these facilities could involve a large number of precincts but, apparently under the Secretary of State's proposal, would need to be staffed with only a single liaison.

The state has made do without these innovations in the past. Indeed, the Secretary of State trumpeted the "accuracy, security and integrity of the November 2020 election," calling it "the most secure in history . . . ."[35] But it may prove more difficult to adjudicate any postelection challenges when the opportunity for making or recording challenges is circumscribed on the frontend. As for security, the Secretary of State has publicly stated that there have been "no significant attempts" in Michigan to disrupt polling places on election days in the past.[36] While defendants and some amici have noted that there have been many new applications for challengers for the upcoming election, they have not provided any evidence that these challengers threaten violence. And the statutes already provide solutions for expulsion of challengers engaging in "disorderly conduct." MCL 168.733(3). Further, at polling places, "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands . . . ." MCL 168.678.

Related concerns are transparency and accountability.

> [J]ust as Secretaries [of State] must work to serve the voters and citizens of their state, voters also have a responsibility to hold these statewide elections officials accountable to promoting those two sides of the . . . democracy coin . . . . Voters who wish to see elections that are accessible to all and produce accurate reflections of the people's will cannot overlook their important role in the process. In most states, voters hold the keys to ensuring their state's chief elections official oversees the elections process in a fair, transparent, and judicious manner. [Benson, *State Secretaries of State: Guardians of the Democratic Process* (New York: Routledge, 2010), p 147.]

As amicus Citizens United explains, our statutes foster these interests by allowing election challengers. The Legislature has expressly allowed designation of challengers by certain groups "interested in preserving the purity of elections and in guarding against the abuse of the elective franchise . . . ." MCL 168.730(1); see also Const 1963, art 2, § 4(2) ("Except as otherwise provided in this constitution or in the constitution or laws of the

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[35] Michigan Secretary of State, *More than 250 Audits Confirm Accuracy and Integrity of Michigan's Election*, <https://www.michigan.gov/sos/Resources/News/2021/03/02/more-than-250-audits-confirm-accuracy-and-integrity-of-michigans-election> (accessed November 2, 2022) [https://perma.cc/RBP7-UGFQ].

[36] CBS News, Transcript: Michigan Secretary of State Jocelyn Benson on "Face the Nation" (September 4, 2022) <https://www.cbsnews.com/news/jocelyn-benson-face-the-nation-transcript-09-04-2022/> (accessed November 2, 2022) [https://perma.cc/T5X7-L8HT].

United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."). These very interests are threatened by the extrastatutory restrictions placed upon challengers, who (1) will not be admitted unless their credential is on a certain form, (2) may not have adequate access to election inspectors to raise challenges, (3) are deprived of their cellphones, (4) may not have their challenges recorded, and (5) are threatened with expulsion for noncompliance.[37]

For these reasons, I believe the public interest weighs against a stay.

IV. CONCLUSION

In sum, I believe that defendants have not met the appropriate standard for a stay, and I would deny their motion accordingly. None of the relevant factors weighs in favor of the stay. The result of the majority's order is that the Secretary of State's changes to the

[37] Justice BERNSTEIN anticipates that because the Secretary of State's new instructions did not cause significant disruption to the primary election, the general election will similarly proceed without incident. I hope he is right. But voter turnout in general elections is generally much higher than turnout in primary elections. Just over two million Michiganders voted in the 2022 primary election. See Michigan Secretary of State, *2022 Michigan Election Voter Turnout* <https://mielections.us/election/results/2022PRI_CENR_TURNOUT.html> (accessed November 3, 2022) [https://perma.cc/VMU2-BANM] (showing that 2,167,798 voters participated). If the past few elections are any indication, we can expect at least twice as many voters to cast their ballots during this year's general election. See Michigan Secretary of State, *Election Results and Data* <https://www.michigan.gov/sos/elections/election-results-and-data> (accessed November 3, 2022) [https://perma.cc/M648-PPQK].

Manual—even though found improper by the only court to consider them—will apply in the upcoming election. Defendants have thus been handed a victory for this election, when it matters most. Because a stay is unwarranted, I dissent.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 3, 2022

Clerk

a1031

Exhibit B

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Sarah Stoddard and
Election Integrity Fund,

v

City Election Commission of
The City of Detroit and
Janice Winfrey, in her official
Capacity as Detroit City Clerk and
Chairperson of the City Election
Commission, and
Wayne County Board of
Canvassers,
_____/

Hon. Timothy M. Kenny
Case No. 20-014604-CZ

OPINION & ORDER

At a session of this Court
Held on: November 6, 2020
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

Plaintiffs Sarah Stoddard and the Election Integrity Fund petition this Court for preliminary injunctive relief seeking:

1. Defendants be required to retain all original and duplicate ballots and poll books.
2. The Wayne County Board of Canvassers not certify the election results until both Republican and Democratic party inspectors compare the duplicate ballots with original ballots.
3. The Wayne County Board of Canvassers unseal all ballot containers and remove all duplicate and original ballots for comparison purposes.
4. The Court provide expedited discovery to plaintiffs, such as limited interrogatories and depositions.

When considering a petition for injunctive relief the Court must apply the following four-prong test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk 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 injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2d 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity" Id at 612 fn 135, quoting *Senior Accountants, Analysts & Appraisers Ass'n v. Detroit*, 218 Mich. App. 263, 269; 553 NW2d 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) indicates that the plaintiff bears the burden of proving the preliminary injunction should be granted.

Plaintiffs' pleadings do not persuade this Court that they are likely to prevail on the merits for several reasons. First, this Court believes plaintiffs misinterpret the required placement of major party inspectors at the absent voter counting board location. MCL 168.765a (10) states in part "At least one election inspector from each major political party must be present at the absent voter counting place..." While plaintiffs contends the statutory section mandates there be a Republican and Democratic inspector at each table inside the room, the statute does not identify this requirement. This Court believes the plain language of the statute requires there be election inspectors at the TCF Center facility, the site of the absentee counting effort.

Pursuant to MCL 168.73a the County chairs for Republican and Democratic parties were permitted and did submit names of absent voter counting board inspectors to the City of Detroit Clerk. Consistent with MCL 168.674, the Detroit City Clerk did make appointments of inspectors. Both Republican and Democratic inspectors were present throughout the absent voter counting board location.

An affidavit supplied by Lawrence Garcia, Corporation Counsel for the City of Detroit, indicated he was present throughout the time of the counting of absentee

ballots at the TCF Center. Mr. Garcia indicated there were always Republican and Democratic inspectors there at the location. He also indicated he was unaware of any unresolved counting activity problems.

By contrast, plaintiffs do not offer any affidavits or specific eyewitness evidence to substantiate their assertions. Plaintiffs merely assert in their verified complaint "Hundreds or thousands of ballots were duplicated solely by Democratic party inspectors and then counted." Plaintiffs' allegation is mere speculation.

Plaintiffs' pleadings do not set forth a cause of action. They seek discovery in hopes of finding facts to establish a cause of action. Since there is no cause of action, the injunctive relief remedy is unavailable. *Terlecki v Stewart*, 278 Mich. App. 644; 754 NW2d 899 (2008).

The Court must also consider whether plaintiffs will suffer irreparable harm. Irreparable harm requires "A particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction." *Michigan Coalition of State Employee Unions v Michigan Civil Service Commission*, 465 Mich. 212, 225; 634 NW2d 692, (2001).

In *Dunlap v City of Southfield*, 54 Mich. App. 398, 403; 221 NW2d 237 (1974), the Michigan Court of Appeals stated "An injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural."

In the present case, Plaintiffs allege that the preparation and submission of "duplicate ballots" for "false reads" without the presence of inspectors of both parties violates both state law, MCL 168.765a (10), and the Secretary of State election manual. However, Plaintiffs fail to identify the occurrence and scope of any alleged violation The only "substantive" allegation appears in paragraph 15 of the First Amended Complaint, where Plaintiffs' allege "on information and belief" that hundreds or thousands of ballots have been impacted by this improper practice. Plaintiffs' Supplemental Motion fails to present any further specifics. In short, the motion is based upon speculation and conjecture. Absent any evidence of an improper practice, the Court cannot identify if this alleged violation occurred, and, if it did, the frequency of such violations. Consequently, Plaintiffs fail to move past mere apprehension of a future injury or to establish that a threatened injury is more than speculative or conjectural.

This Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified. Even with this assertion, plaintiffs do have several other remedies available. Plaintiffs are entitled to bring their challenge to the Wayne County Board of Canvassers pursuant to MCL 168.801 *et seq*. and MCL 168.821 *et seq*. Additionally, plaintiffs can file for a recount of the vote if they believe the canvass of the votes suffers from fraud or mistake. MCL168.865-168.868. Thus, this Court cannot conclude that plaintiffs would experience irreparable harm if a preliminary injunction were not issued.

Additionally, this Court must consider whether plaintiffs would be harmed more by the absence of injunctive relief than the defendants would be harmed with one.

If this Court denied plaintiffs' request for injunctive relief, the statutory ability to seek relief from the Wayne County Board of Canvassers (MCL 168.801 et seq. and MCL 168.821 et seq.) and also through a recount (MCL 168.865-868) would be available. By contrast, injunctive relief granted in this case could potentially delay the counting of ballots in this County and therefore in the state. Such delays could jeopardize Detroit's, Wayne County's, and Michigan's ability to certify the election. This in turn could impede the ability of Michigan's elector's to participate in the Electoral College.

Finally, the Court must consider the harm to the public interest. A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.

Clearly, every legitimate vote should be counted. Plaintiffs contend this has not been done in the 2020 Presidential election. However, plaintiffs have made only a claim but have offered no evidence to support their assertions. Plaintiffs are unable to meet their burden for the relief sought and for the above-mentioned reasons, the plaintiffs' petition for injunctive relief is denied.

It is so ordered.

November 6, 2020
Date

Hon. Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

Exhibit C

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Cheryl A. Costantino and
Edward P. McCall, Jr.
Plaintiffs,

Hon. Timothy M. Kenny
Case No. 20-014780-AW

City of Detroit; Detroit Election Commission; Janice M. Winfrey, in her official capacity as the Clerk of the City of Detroit and the Chairperson and the Detroit Election Commission; Cathy Garrett, In her official capacity as the Clerk of Wayne County; and the Wayne County Board of Canvassers,
Defendants.

_____/

OPINION & ORDER

At a session of this Court
Held on: November 13, 2020
In the Coleman A. Young Municipal Center
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

This matter comes before the Court on Plaintiffs' motion for preliminary injunction, protective order, and a results audit of the November 3, 2020 election. The Court having read the parties' filing and heard oral arguments, finds:

With the exception of a portion of Jessy Jacob affidavit, all alleged fraudulent claims brought by the Plaintiffs related to activity at the TCF Center. Nothing was alleged to

have occurred at the Detroit Election Headquarters on West Grand Blvd. or at any polling place on November 3, 2020.

The Defendants all contend Plaintiffs cannot meet the requirements for injunctive relief and request the Court deny the motion.

When considering a petition for injunction relief, the Court must apply the following four-pronged test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk the party seeking the injunction would be harmed more by the absence an injunction than the opposing party would be by the granting of the injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2nd 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* at 612 fn 135 quoting *Senior Accountants, Analysts and Appraisers Association v Detroit*, 218 Mich. App. 263, 269; 553 NW2nd 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) states that the Plaintiffs bear the burden of proving the preliminary injunction should be granted. In cases of alleged fraud, the Plaintiff must state with particularity the circumstances constituting the fraud. MCR 2.112 (B) (1)

Plaintiffs must establish they will likely prevail on the merits. Plaintiffs submitted seven affidavits in support of their petition for injunctive relief claiming widespread voter

fraud took place at the TCF Center. One of the affidavits also contended that there was blatant voter fraud at one of the satellite offices of the Detroit City Clerk. An additional affidavit supplied by current Republican State Senator and former Secretary of State Ruth Johnson, expressed concern about allegations of voter fraud and urged "Court intervention", as well as an audit of the votes.

In opposition to Plaintiffs' assertion that they will prevail, Defendants offered six affidavits from individuals who spent an extensive period of time at the TCF Center. In addition to disputing claims of voter fraud, six affidavits indicated there were numerous instances of disruptive and intimidating behavior by Republican challengers. Some behavior necessitated removing Republican challengers from the TCF Center by police.

After analyzing the affidavits and briefs submitted by the parties, this Court concludes the Defendants offered a more accurate and persuasive explanation of activity within the Absent Voter Counting Board (AVCB) at the TCF Center.

Affiant Jessy Jacob asserts Michigan election laws were violated prior to November 3, 2020, when City of Detroit election workers and employees allegedly coached voters to vote for Biden and the Democratic Party. Ms. Jacob, a furloughed City worker temporarily assigned to the Clerk's Office, indicated she witnessed workers and employees encouraging voters to vote a straight Democratic ticket and also witnessed election workers and employees going over to the voting booths with voters in order to encourage as well as watch them vote. Ms. Jacob additionally indicated while she was working at the satellite location, she was specifically instructed by superiors not to ask for driver's license or any photo ID when a person was trying to vote.

The allegations made by Ms. Jacob are serious. In the affidavit, however, Ms. Jacob does not name the location of the satellite office, the September or October date these

acts of fraud took place, nor does she state the number of occasions she witnessed the alleged misconduct. Ms. Jacob in her affidavit fails to name the city employees responsible for the voter fraud and never told a supervisor about the misconduct.

Ms. Jacob's information is generalized. It asserts behavior with no date, location, frequency, or names of employees. In addition, Ms. Jacob's offers no indication of whether she took steps to address the alleged misconduct or to alter any supervisor about the alleged voter fraud. Ms. Jacob only came forward after the unofficial results of the voting indicated former Vice President Biden was the winner in the state of Michigan.

Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives. Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of "pre-dating" ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*

The affidavit of current State Senator and former Secretary of State Ruth Johnson essentially focuses on the affidavits of Ms. Jacob and Zachery Larsen. Senator Johnson believed the information was concerning to the point that judicial intervention was needed and an audit of the ballots was required. Senator Johnson bases her assessment entirely on the contents of the Plaintiffs' affidavits and Mr. Thomas' affidavit. Nothing in Senator Johnson's affidavit indicates she was at the TCF Center and witnessed the established protocols and how the AVCB activity was carried out. Similarly, she offers no explanation as to her apparent dismissal of Mr. Thomas' affidavit. Senator Johnson's conclusion stands in significant contrast to the affidavit of Christopher Thomas, who was present for many hours at TCF Center on November 2, 3 and 4. In this Court's view, Mr. Thomas provided compelling evidence regarding the activity at the TCF Center's AVCB workplace. This Court found Mr. Thomas' background, expertise, role at the TCF Center during the election, and history of bipartisan work persuasive.

Affiant Andrew Sitto was a Republican challenger who did not attend the October 29th walk- through meeting provided to all challengers and organizations that would be appearing at the TCF Center on November 3 and 4, 2020. Mr. Sitto offers an affidavit indicating that he heard other challengers state that several vehicles with out-of-state license plates pulled up to the TCF Center at approximately 4:30 AM on November 4th. Mr. Sitto states that "tens of thousands of ballots" were brought in and placed on eight long tables and, unlike other ballots, they were brought in from the rear of the room. Sitto also indicated that every ballot that he saw after 4:30 AM was cast for former Vice President Biden.

Mr. Sitto's affidavit, while stating a few general facts, is rife with speculation and guess-work about sinister motives. Mr. Sitto knew little about the process of the absentee voter counting board activity. His sinister motives attributed to the City of Detroit were negated by Christopher Thomas' explanation that all ballots were delivered to the back of Hall E at the TCF Center. Thomas also indicated that the City utilized a rental truck to deliver ballots. There is no evidentiary basis to attribute any evil activity by virtue of the city using a rental truck with out-of-state license plates.

Mr. Sitto contends that tens of thousands of ballots were brought in to the TCF Center at approximately 4:30 AM on November 4, 2020. A number of ballots speculative on Mr. Sitto's part, as is his speculation that all of the ballots delivered were cast for Mr. Biden. It is not surprising that many of the votes being observed by Mr. Sitto were votes cast for Mr. Biden in light of the fact that former Vice President Biden received approximately 220,000 more votes than President Trump.

Daniel Gustafson, another affiant, offers little other than to indicate that he witnessed "large quantities of ballots" delivered to the TCF Center in containers that did not have lids were not sealed, or did not have marking indicating their source of origin. Mr. Gustafson's affidavit is another example of generalized speculation fueled by the belief that there was a Michigan legal requirement that all ballots had to be delivered in a sealed box. Plaintiffs have not supplied any statutory requirement supporting Mr. Gustafson's speculative suspicion of fraud.

Patrick Colbeck's affidavit centered around concern about whether any of the computers at the absent voter counting board were connected to the internet. The answer given by a David Nathan indicated the computers were not connected to the

internet. Mr. Colbeck implies that there was internet connectivity because of an icon that appeared on one of the computers. Christopher Thomas indicated computers were not connected for workers, only the essential tables had computer connectivity. Mr. Colbeck, in his affidavit, speculates that there was in fact Wi-Fi connection for workers use at the TCF Center. No evidence supports Mr. Colbeck's position.

This Court also reads Mr. Colbeck's affidavit in light of his pre-election day Facebook posts. In a post before the November 3, 2020 election, Mr. Colbeck stated on Facebook that the Democrats were using COVID as a cover for Election Day fraud. His predilection to believe fraud was occurring undermines his credibility as a witness.

Affiant Melissa Carone was contracted by Dominion Voting Services to do IT work at the TCF Center for the November 3, 2020 election. Ms. Carone, a Republican, indicated that she "witnessed nothing but fraudulent actions take place" during her time at the TCF Center. Offering generalized statements, Ms. Carone described illegal activity that included, untrained counter tabulating machines that would get jammed four to five times per hour, as well as alleged cover up of loss of vast amounts of data. Ms. Carone indicated she reported her observations to the FBI.

Ms. Carone's description of the events at the TCF Center does not square with any of the other affidavits. There are no other reports of lost data, or tabulating machines that jammed repeatedly every hour during the count. Neither Republican nor Democratic challengers nor city officials substantiate her version of events. The allegations simply are not credible.

Lastly, Plaintiffs rely heavily on the affidavit submitted by attorney Zachery Larsen. Mr. Larsen is a former Assistant Attorney General for the State of Michigan who alleged mistreatment by city workers at the TCF Center, as well as fraudulent activity by election workers. Mr. Larsen expressed concern that ballots were being processed without confirmation that the voter was eligible. Mr. Larsen also expressed concern that he was unable to observe the activities of election official because he was required to stand six feet away from the election workers. Additionally, he claimed as a Republican challenger, he was excluded from the TCF Center after leaving briefly to have something to eat on November 4th. He expressed his belief that he had been excluded because he was a Republican challenger.

Mr. Larsen's claim about the reason for being excluded from reentry into the absent voter counting board area is contradicted by two other individuals. Democratic challengers were also prohibited from reentering the room because the maximum occupancy of the room had taken place. Given the COVID-19 concerns, no additional individuals could be allowed into the counting area. Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4th as efforts were made to avoid overcrowding.

Mr. Larsen's concern about verifying the eligibility of voters at the AVCB was incorrect. As stated earlier, voter eligibility was determined at the Detroit Election Headquarters by other Detroit city clerk personnel.

The claim that Mr. Larsen was prevented from viewing the work being processed at the tables is simply not correct. As seen in a City of Detroit exhibit, a large monitor was

at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed. Mr. Jaffe confirmed his experience and observation that efforts were made to ensure that all challengers could observe the process.

Despite Mr. Larsen's claimed expertise, his knowledge of the procedures at the AVCB paled in comparison to Christopher Thomas'. Mr. Thomas' detailed explanation of the procedures and processes at the TCF Center were more comprehensive than Mr. Larsen's. It is noteworthy, as well, that Mr. Larsen did not file any formal complaint as the challenger while at the AVCB. Given the concerns raised in Mr. Larsen's affidavit, one would expect an attorney would have done so. Mr. Larsen, however, only came forward to complain after the unofficial vote results indicated his candidate had lost.

In contrast to Plaintiffs' witnesses, Christopher Thomas served in the Secretary of State's Bureau of Elections for 40 years, from 1977 through 2017. In 1981, he was appointed Director of Elections and in that capacity implemented Secretary of State Election Administration Campaign Finance and Lobbyist disclosure programs. On September 3, 2020 he was appointed as Senior Advisor to Detroit City Clerk Janice Winfrey and provided advice to her and her management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting boards, satellite offices and drop boxes. Mr. Thomas helped prepare the City of Detroit for the November 3, 2020 General Election.

As part of the City's preparation for the November 3rd election Mr. Thomas invited challenger organizations and political parties to the TCF Center on October 29, 2020 to have a walk-through of the entire absent voter counting facility and process. None of Plaintiff challenger affiants attended the session.

On November 2, 3, and 4, 2020, Mr. Thomas worked at the TCF Center absent voter counting boards primarily as a liaison with Challenger Organizations and Parties. Mr. Thomas indicated that he "provided answers to questions about processes at the counting board's resolved dispute about process and directed leadership of each organization or party to adhere to Michigan Election Law and Secretary of State procedures concerning the rights and responsibilities of challengers."

Additionally, Mr. Thomas resolved disputes about the processes and satisfactorily reduced the number of challenges raised at the TCF Center.

In determining whether injunctive relief is required, the Court must also determine whether the Plaintiffs sustained their burden of establishing they would suffer irreparable harm if an injunction were not granted. Irreparable harm does not exist if there is a legal remedy provided to Plaintiffs.

Plaintiffs contend they need injunctive relief to obtain a results audit under Michigan Constitution Article 2, § IV, Paragraph 1 (h) which states in part "the right to have the results of statewide elections audited, in such as manner as prescribed by law, to ensure the accuracy and integrity of the law of elections." Article 2, § IV, was passed by the voters of the state of Michigan in November, 2018.

A question for the Court is whether the phrase "in such as manner as prescribed by law" requires the Court to fashion a remedy by independently appointing an auditor to examine the votes from the November 3, 2020 election before any County certification of votes or whether there is another manner "as prescribed by law".

Following the adoption of the amended Article 2, § IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least

one race in each audited precinct. Although Plaintiffs may not care for the wording of the current MCL 168.31a, a results audit has been approved by the Legislature. Any amendment to MCL 168.31a is a question for the voice of the people through the legislature rather than action by the Court.

It would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process, substitute its judgment for that of the Legislature, and appoint an independent auditor because of an unwieldy process. In addition to being an unwarranted intrusion on the authority of the Legislature, such an audit would require the rest of the County and State to wait on the results. Remedies are provided to the Plaintiffs. Any unhappiness with MCL 168.31a calls for legislative action rather than judicial intervention.

As stated above, Plaintiffs have multiple remedies at law. Plaintiffs are free to petition the Wayne County Board of Canvassers who are responsible for certifying the votes. (MCL 168.801 and 168.821 et seq.) Fraud claims can be brought to the Board of Canvassers, a panel that consists of two Republicans and two Democrats. If dissatisfied with the results, Plaintiffs also can avail themselves of the legal remedy of a recount and a Secretary of State audit pursuant to MCL 168.31a.

Plaintiff's petition for injunctive relief and for a protective order is not required at this time in light of the legal remedy found at 52 USC § 20701 and Michigan's General Schedule #23 – Election Records, Item Number 306, which imposes a statutory obligation to preserve all federal ballots for 22 months after the election.

In assessing the petition for injunctive relief, the Court must determine whether there will be harm to the Plaintiff if the injunction is not granted, as Plaintiffs' existing legal

remedies would remain in place unaltered. There would be harm, however, to the Defendants if the Court were to grant the requested injunction. This Court finds that there are legal remedies for Plaintiffs to pursue and there is no harm to Plaintiffs if the injunction is not granted. There would be harm, however, to the Defendants if the injunction is granted. Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Finally, the Court has to determine would there be harm to the public interest. This Court finds the answer is a resounding yes. Granting Plaintiffs' requested relief would interfere with the Michigan's selection of Presidential electors needed to vote on December 14, 2020. Delay past December 14, 2020 could disenfranchise Michigan voters from having their state electors participate in the Electoral College vote.

Conclusion

Plaintiffs rely on numerous affidavits from election challengers who paint a picture of sinister fraudulent activities occurring both openly in the TCF Center and under the cloak of darkness. The challengers' conclusions are decidedly contradicted by the highly-respected former State Elections Director Christopher Thomas who spent hours and hours at the TCF Center November 3rd and 4th explaining processes to challengers and resolving disputes. Mr. Thomas' account of the November 3rd and 4th events at the TCF Center is consistent with the affidavits of challengers David Jaffe, Donna MacKenzie and Jeffrey Zimmerman, as well as former Detroit City Election Official, now contractor, Daniel Baxter and City of Detroit Corporation Counsel Lawrence Garcia.

Perhaps if Plaintiffs' election challenger affiants had attended the October 29, 2020 walk-through of the TCF Center ballot counting location, questions and concerns could have been answered in advance of Election Day. Regrettably, they did not and, therefore, Plaintiffs' affiants did not have a full understanding of the TCF absent ballot tabulation process. No formal challenges were filed. However, sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs' interpretation of events is incorrect and not credible.

Plaintiffs are unable to meet their burden for the relief sought and for the above mentioned reasons, the Plaintiffs' petition for injunctive relief is DENIED. The Court further finds that no basis exists for the protective order for the reasons identified above. Therefore, that motion is DENIED. Finally, the Court finds that MCL 168.31a governs the audit process. The motion for an independent audit is DENIED.

It is so ordered.

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

November 13, 2020

Hon. Timothy M. Kenny
Chief Judge
Third Judicial Circuit Court of Michigan

Exhibit 2

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v.

JANICE WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants,

v.

GWENDOLYN BABB; MATTHEW BAKKO; ALEX HOWBERT; PRIORITIES USA; and DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,

[Proposed] Intervenor Defendants

_____/

Case No. 22-012759-AW

HON. TIMOTHY M. KENNY

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(248) 679-8711

Pro hac vice motion forthcoming

AFFIDAVIT OF GWENDOLYN BABB

I, Gwendolyn Babb, having been duly sworn according to law, do hereby depose and state as follows:

1. I am at least 18 years of age and have personal knowledge of the below facts, which are true and accurate to the best of my knowledge and belief.

2. I am 65 years old and a resident of Detroit, Michigan, where I have been a registered voter since approximately 1975.

3. I live with my son in a single-family home. Due to a physical disability and my limited mobility, I do not drive. I am at risk of severe illness due to COVID-19 because of my age and underlying health conditions, and I observe strict social distancing protocols. I rely on family and online services for everyday needs like grocery deliveries.

4. Because I use a cane or a walker to get around and have difficulty breathing, leaving the house always takes planning and assistance. Some days, my health conditions prevent me from leaving at all.

5. Voting is very important to me, and I try to vote in every election that I can, and I encourage my family and friends to do the same. Since 2017, I have been on the permanent absentee voter list due to my disability. I have no choice but to vote absentee.

6. My son delivered my 2022 general election absentee ballot to the clerk's office in Detroit on October 31, 2022. I submitted my ballot more than a week before Election Day because I wanted to ensure that my vote would be counted.

Gwendolyn Babb

Gwendolyn Babb

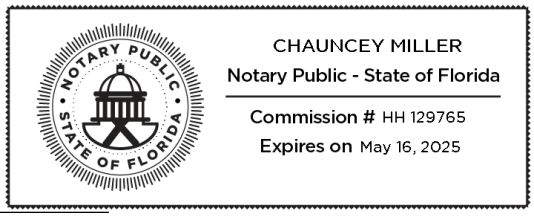
10/31/2022

Date

Florida Broward

Subscribed and sworn to (or affirmed) before me on this 31st day of October, 2022.

Gwendlon Babb ID Produced Driver License



Chauncey Miller

Notary Public
Chauncey Miller

My commission expires on 05/16/2025.

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Exhibit 3

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v.

JANICE WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants,

v.

GWENDOLYN BABB; MATTHEW BAKKO; ALEX HOWBERT; PRIORITIES USA; and DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,

[Proposed] Intervenor Defendants

_____/

Case No. 22-012759-AW

HON. TIMOTHY M. KENNY

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Sarah S. Prescott (P70510)
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Northville, MI 48167
(248) 679-8711

Pro hac vice motion forthcoming

AFFIDAVIT OF MATTHEW BAKKO

I, Matthew Bakko, having been duly sworn according to law, do hereby depose and state as follows:

1. I am at least 18 years of age and have personal knowledge of the below facts, which are true and accurate to the best of my knowledge and belief.

2. I am 37 years old and a resident of Detroit, Michigan, where I have been a registered voter since approximately August 2020.

3. I have been voting absentee since 2020 because it is the most accessible way to vote. I travel for work and rely on voting absentee to make sure that I can submit my ballot if I am out of town on Election Day.

4. I put my absentee ballot for the 2022 general election in the mail on September 24, 2022 because I wanted to make sure that it arrived at the Detroit clerk's office in time to be counted.

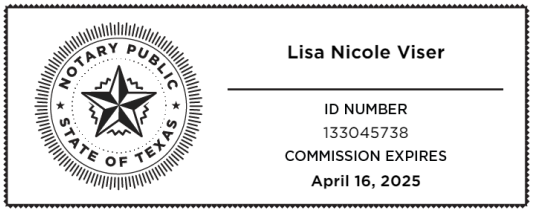
SIGNATURE PAGE FOLLOWS

Matthew Marvin Bakko 10/31/2022

Matthew Bakko Date

State of Texas ; County of Harris

Subscribed and sworn to (or affirmed) before me on this 31st day of October, 2022.
by Matthew Marvin Bakko



Lisa Nicole Viser

Notary Public , State of Texas

My commission expires on 04/16/2025.

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Exhibit 4

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v.

JANICE WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants,

v.

GWENDOLYN BABB; MATTHEW BAKKO; ALEX HOWBERT; PRIORITIES USA; and DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,

[Proposed] Intervenor Defendants

_____/

Case No. 22-012759-AW

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Sarah S. Prescott (P70510)
Attorney for Proposed Intervenors
105 E. Main Street
Northville, MI 48167
(248) 679-8711

Pro hac vice motion forthcoming

AFFIDAVIT OF ALEXANDER HOWBERT

I, Alexander Howbert, having been duly sworn according to law, do hereby depose and state as follows:

1. I am at least 18 years of age and have personal knowledge of the below facts, which are true and accurate to the best of my knowledge and belief.

2. I am 41 years old and a lifelong resident of Detroit, Michigan, where I have been a registered voter since 1999.

3. As a small business owner and parent of young children, I often vote absentee because it provides me with flexibility to vote on my own schedule. I also sometimes travel outside of Detroit for work, which is one of the reasons I am voting absentee this year.

4. Earlier today, I picked up an absentee ballot at the Vote Center located at the Butzel Family Recreation Center, which is located just a block away from my house. I showed identification before I was given a ballot, but I did not have time to stay at the Center to fill it out.

5. I plan to drop my ballot off at the Butzel Center's drop box at my convenience, as that is the easiest way for me to vote and to ensure that my ballot is submitted before Election Day.

Alexander Howbert

Alexander Howbert

10/31/2022

Date

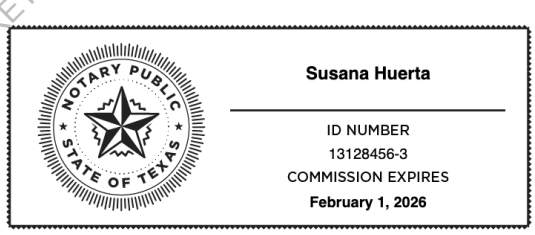
Subscribed and sworn to (or affirmed) before me on this 31st day of October, 2022.

Susana Huerta

Notary Public

Susana Huerta

Notary Public, State of Texas



My commission expires on 02/01/2026.

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Exhibit 5

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v.

JANICE WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants,

v.

GWENDOLYN BABB; MATTHEW BAKKO; ALEXANDER HOWBERT; PRIORITIES USA; and DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,

[Proposed] Intervenor Defendants

_____/

Case No. 22-012759-AW

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Pro hac vice motion forthcoming

AFFIDAVIT OF GUY CECIL

I, Guy Cecil, having been duly sworn according to law, do hereby depose and state as follows:

1. I am at least 18 years of age and have personal knowledge of the below facts, which are true and accurate to the best of my knowledge and belief.

2. I am currently the Chairman of Priorities USA and have held this position since 2017. In this role, I provide strategic oversight to senior staff, raise money, and am responsible for directing the organization's overall operations, including its programing, activities, and use and allocation of funds and resources.

3. Priorities USA is a 501(c)(4) nonprofit, voter-centric, progressive advocacy and service organization. Its mission is to build a powerful progressive movement across the country, including in Michigan, through organizing and building relationships with outside groups and deploying a targeted campaign to persuade and mobilize Americans around issues and elections that affect their lives. Priorities USA advances this mission by conducting programs and engaging in activities designed to increase voter registration and turnout (i.e., mobilization) and to persuade

voters, especially young and minority voters, to participate in the political process and support progressive policies (i.e., persuasion).

4. Priorities USA's mobilization efforts in Michigan include working with and supporting organizations on the ground to educate voters on progressive policies, informing voters about their voting options, and encouraging voters to vote in each election. For example, Priorities USA is supporting local organizations to reach out to young voters and marginalized communities, including low-income communities and people of color, through various get-out-the-vote (GOTV) efforts. Part of these GOTV efforts include informing these communities of their absentee voting options and the locations of various drop boxes.

5. Priorities USA has a history of advocating for expanded protections for absentee voting in Michigan. In 2019, it filed a federal lawsuit against Secretary Benson, challenging Michigan's signature matching process at the time as unconstitutional. In response to Priorities USA's motion for preliminary injunction, Secretary Benson released updated guidance around signature matching standards and cure procedures that largely tracked Priorities USA's requested relief. I understand that Plaintiffs in this lawsuit now seek to invalidate all absentee ballots that were subject to *any* signature matching process.

6. Because Priorities USA's various programs present issues of resource allocation, a decision to spend more resources in Michigan has real consequences for what it can do in other states. Similarly, a decision to spend more resources on absentee voters to avoid disenfranchisement in Michigan means that there is less money available for voter registration and turnout in the State.

7. Any relief that is granted in this lawsuit puts Michigan voters at risk of having their absentee ballots and ballot applications rejected. The resulting suppression of absentee votes mere

days before Election Day undermines Priorities USA's mobilization and persuasion efforts, making it more difficult for Priorities USA to advance its mission.

8. Because Plaintiffs filed this dubious lawsuit within days of the Election, Priorities USA must make difficult resource allocation decisions. Unless this last-minute effort to restrict absentee voting is dismissed, Priorities USA will be forced to divert resources from its other programs in Michigan, as well as its activities in other states, and devote more resources to educating absentee voters about the possibility that absentee ballots—many of which have already been cast—will be rejected. Priorities USA will also be required to divert resources toward efforts to mobilize Michiganders to track and cure ballots already sent in the mail or placed in drop boxes, or to vote through other means (i.e. in person on Election Day) to ensure that their ballots will be counted. These efforts are no small undertaking, especially with one week until Election Day, and they will leave fewer resources available for Priorities USA's other programs. Therefore, Priorities USA also seeks intervention in this lawsuit to protect its ability to continue its work, further its mission, and choose how to allocate its resources.

Guy Henry Cecil

Guy Cecil

11/01/21022

Date

State of Florida

County of Broward

Subscribed and sworn to (or affirmed) before me on this 1st day of November, 2022.

Provided: Washington D.C. DRIVER LICENSE.

Natasha T Thomas

Notary Public Natasha T. Thomas

NATASHA T. THOMAS
Notary Public - State of Florida
Commission # HH91977
Expires on February 11, 2025

My commission expires on 02/11/2025.

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Exhibit 6

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE,

Plaintiffs,

v.

JANICE WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT; CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants,

v.

GWENDOLYN BABB; MATTHEW BAKKO; ALEXANDER HOWBERT; PRIORITIES USA; and DETROIT/DOWNRIVER CHAPTER OF THE A. PHILIP RANDOLPH INSTITUTE,

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Pro hac vice motion forthcoming

AFFIDAVIT OF ANDREA HUNTER

I, Andrea A. Hunter, hereby declare as follows:

1. I am at least 18 years of age and have personal knowledge of the below facts, which are true and accurate to the best of my knowledge and belief.

2. I am currently President of the A. Philip Randolph Institute's Detroit/Downriver Chapter, as well as President of United Steelworkers Local 1299.

3. The A. Philip Randolph Institute ("APRI") is the senior constituency group of the AFL-CIO. APRI was founded in 1965 by A. Philip Randolph and Bayard Rustin to fight for human equality and economic justice and to seek structural changes through the American democratic process. The Detroit/Downriver Chapter of APRI ("DAPRI") serves the Downriver and Detroit areas of Michigan.

4. DAPRI formed in June 2012 and now has 78 members, the majority of whom are people of color, who typically meet on a monthly basis.

5. DAPRI members are involved in election protection, voter registration, political and community education, legislative action, and labor support activities. Voting rights are central

to our efforts, and protecting them is the only way to ensure that people have an opportunity to have a say in their governments and communities.

6. Making sure that voters actually cast their ballots effectively is incredibly important to APRI and to me individually. When APRI members conduct voter engagement work, we are not only facilitating individuals' access to the ballot, but also expressing to people in our community that voting is an important way to make positive change. Since the Detroit/Downriver Chapter of APRI formed ten years ago, we have built a reputation for spreading the message of encouraging civic participation. When we assist with absentee voting, we intend to convey that voting is important to us and that it should be to our community as well.

7. Part of APRI's mission is to turn out voters across Detroit and Downriver, especially voters who may not vote without APRI's assistance. Because APRI is well known and has roots in the community, voters trust APRI to provide assistance with voting, and the same voters return to seek assistance from year to year.

8. One of the ways that APRI Detroit/Downriver fulfills its mission is through its historic involvement in encouraging individuals to vote via absentee ballot. Those individuals have included working people who do not get time off to vote during business hours or on Election Day, and who therefore choose to vote by mail or drop box.

9. Many of DAPRI's members vote by absentee ballot in Detroit, and we seek intervention in this lawsuit on their behalf. In addition to representing the interests of its dues-paying members, APRI brings this lawsuit based on its relationships with individual voters in the community, many of whom have limited English proficiency or disabilities that make it difficult for them to vote. Such individuals rely on APRI to advocate for their needs, connect them to relevant services, and facilitate their civic participation.

10. Many of the voters that APRI serves are the most vulnerable individuals in the community, and they suffer disproportionately from limited financial resources and time as well as low levels of English literacy and education. Because of these challenges, they face practical obstacles to bringing lawsuits on their own and rely on APRI to advocate for their interests.

11. Since Proposal 3 expanded the number of people eligible to absentee vote in 2018, APRI Detroit/Downriver has expanded its absentee ballot education and assistance efforts.

12. Specifically, APRI Detroit/Downriver (a) educates individuals throughout our community about their ability to apply to vote absentee; (b) provides assistance with applications; and (c) informs voters about their absentee voting options, including by posting signs to make people aware of drop box locations where they can return their ballots.

13. APRI spends time and resources educating our members, volunteers, and constituents about their voting options. Our members and volunteers must also spend time and resources on additional outreach to ensure that individual voters in the communities APRI serves know when and how to submit their ballots in time to be counted. Besides disenfranchising many of DAPRI's members, volunteers, and constituents, any relief that is granted in this lawsuit would require APRI to divert resources from its typical get-out-the-vote programming—during this last critical week before Election Day—to finding ways to cure already-cast absentee ballots and educate voters about an eleventh-hour change in the law. Therefore, APRI also seeks intervention in this lawsuit to protect its ability to continue its work, further its mission, and choose how to use its limited resources.

SIGNATURE PAGE FOLLOWS

Andrea Hunter

Andrea Hunter

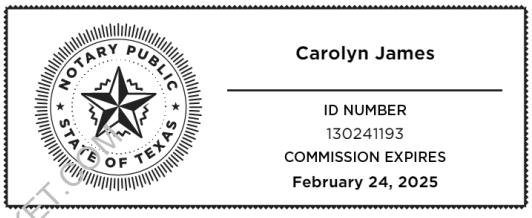
11/01/2022

Date

Subscribed and sworn to (or affirmed) before me on this 1st day of November, 2022.

Carolyn James

Notary Public Notary Public, State of Texas Harris



My commission expires on 02/24/2025.

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