

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v.

Case No. 22-000162-MZ

JOCELYN BENSON,
in her official capacity as the duly elected
SECRETARY OF STATE, and
JONATHAN BRATER,
in his official capacity as the **DIRECTOR
OF THE MICHIGAN BUREAU OF
ELECTIONS,**

Hon. Brock A. Swartzle

Defendants.

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

Plaintiffs,

v.

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Defendants.

ANN M. HOWARD, P.C.
Ann M. Howard (P49379)
26100 American Drive, #607

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General

Southfield, MI 48034
(248) 752-0650
ahoward@annhowardlaw.com
Attorneys for Plaintiffs in 22-162-MZ

DICKINSON WRIGHT, PLLC
Charles R. Spies (P83260)
Robert L. Avers (P75396)
Thomas F. Christian III (P83146)
350 S. Main, Ste. 300
Ann Arbor, MI 48104
(734) 623-1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com
Attorneys for Plaintiffs in 22-164-MZ

PO Box 30736
Lansing, Michigan 48909
(517) 335-7659
meingasth@michigan.gov
grille@michigan.gov
Attorneys for Defendants

MILLER, CANFIELD, PADDOCK AND
STONE, PLC
Scott R. Eldridge (P66452)
Scott R. Lesser (P72446)
Wendolyn Wrosch Richards (P67776)
One Michigan Ave., Suite 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com
lesser@millercanfield.com
richards@millercanfield.com
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*

**[10/11/2022] MOTION AND BRIEF FOR IMMEDIATE CONSIDERATION OF
[10/11/2022] MICHIGAN DEMOCRATIC PARTY'S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

The Michigan Democratic Party (“MDP”) respectfully moves this Court for immediate and expedited consideration of its contemporaneous motion for leave to file an amicus brief in this matter. In support of the requested relief, the MDP states as follows:

1. Plaintiffs seek to overturn or drastically alter *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (the “Manual”), appropriately issued by the Secretary of State in May 2022 under her authority over the administration of elections in Michigan. The Manual offers much-needed clarification of the Michigan Election Law regarding the rights and duties of election challengers and poll watchers.

2. While the Manual was released in May 2022, Plaintiffs waited to file this lawsuit on September 29, 2022, five months after the Guidance was issued and five weeks before Election Day.

3. Plaintiffs' requested relief threatens to disrupt the upcoming November 8 election by sowing confusion with respect to the rights and duties of election volunteers across the state, including those who volunteer for the MDP, and, in turn, potentially disenfranchising the MDP's voters and undermining the MDP's candidates' electoral success.

4. The MDP has filed today a contemporaneous motion for leave to file an amicus brief in support of the Secretary of State.

5. Election Day is a mere four weeks away – there is an imminent need to foster uniformity in training election challengers and poll watchers over the next month.

6. To best assist this Court in deciding this matter, immediate consideration of the MDP's motion for leave to file an amicus brief is necessary to allow the MDP to provide a critical perspective to this Court on behalf of its voters, election volunteers, members, and candidates, and without delaying a decision on the merits.

WHEREFORE, the Court should immediately consider and decide the MDP's motion for leave to file an amicus brief.

Respectfully submitted,

By: /s/ Scott R. Eldridge

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Scott R. Eldridge (P66452)
Wendolyn Wrosch Richards (P67776)
One Michigan Avenue, Suite 900
Lansing, Michigan 48933 (USA)
(517) 483-4918
richards@millercanfield.com
eldridge@millercanfield.com
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*

Dated: October 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2022, I electronically filed the foregoing document with the Clerk of the Court using the TrueFiling system that will send notification of such filing upon all filing participants.

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.

/s/ Scott R. Eldridge

Scott R. Eldridge (P66452)
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*
One Michigan Avenue, Suite 900
Lansing, MI 48933
(517) 483-4918
eldridge@millercanfield.com

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Southfield, MI 48034
(248) 752-0650
ahoward@annhowardlaw.com
Attorneys for Plaintiffs in 22-162-MZ

DICKINSON WRIGHT, PLLC
Charles R. Spies (P83260)
Robert L. Avers (P75396)
Thomas F. Christian III (P83146)
350 S. Main, Ste. 300
Ann Arbor, MI 48104
(734) 623-1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com
Attorneys for Plaintiffs in 22-164-MZ

PO Box 30736
Lansing, Michigan 48909
(517) 335-7659
meingasth@michigan.gov
grille@michigan.gov
Attorneys for Defendants

MILLER, CANFIELD, PADDOCK AND
STONE, PLC
Scott R. Eldridge (P66452)
Scott R. Lesser (P72446)
Wendolyn Wrosch Richards (P67776)
One Michigan Ave., Suite 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com
lesser@millercanfield.com
richards@millercanfield.com
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*

**[10/11/2022] MICHIGAN DEMOCRATIC PARTY'S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

The Michigan Democratic Party (“MDP”) moves for leave to file an amicus curiae brief. In support of this motion, the MDP states as follows:

1. The MDP is the Democratic Party’s official state party committee for the State of Michigan. For decades, it has credentialed election challengers as a major party under Section 16 of the Michigan Election Law (MCL 168.1 *et seq.*).
2. As a major political party and credentialing organization, the MDP has an interest in the proper and efficient administration of elections. For the process to work as intended, the organizations that credential challengers have a responsibility to know the rights and duties as set forth in the Michigan Election Law, supplemented by guidance issued by the Michigan Secretary of State from time to time.

3. The Secretary of State appropriately released under her authority *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* in May 2022 (the “Manual”), which is at issue in this case. The Manual provides greater clarity and unified direction in the wake of unnecessary chaos, anxiety, and tension caused by certain challengers during November 2020 election.

4. The Manual applies with equal force and effect to the MDP’s challengers as it does to the Plaintiffs. The MDP has already devoted substantial time and resources training hundreds of volunteer challengers based on the guidelines in the Manual. If the Court were to grant either Plaintiffs’ requests to rescind or modify this guidance, the MDP would be required to invest significant resources updating its training materials, training new volunteers and retraining volunteers who had already been briefed on the guidance contained in the Manual, to ensure compliance with the newly-applicable guidelines. Further, a change in the guidance this close to the election could disrupt the challengers’ and poll watchers’ ability to help facilitate an efficient election.

5. The MDP appears before this Court as a representative of millions of Democratic voters, all with an acute interest in the outcome of this case. As set forth in the attached proposed brief, the issues before the Court are of critical concern for the MDP and its voters, election challengers, poll watchers, members, and candidates.

6. The MDP respectfully asks the Court to grant leave to file an amicus brief addressing these important issues.

7. On October 5 and 9, 2022, the undersigned sought concurrence in the relief sought in this Motion from Plaintiffs and Defendants. Defendants do not object. Plaintiffs Richard Deviser, the Michigan Republican Party, and the Republican National Committee replied that they

do not object, provided this motion and accompanying brief are filed by 5pm on October 11, 2022. Plaintiffs Philip M. O'Halloran, M.D, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider denied concurrence, making this motion necessary.

8. A copy of the proposed amicus brief is attached in the event the Court grants this motion.

WHEREFORE, the MDP respectfully requests that the Court grant its request to participate as amicus curiae and accept the attached proposed brief for filing.

Respectfully submitted,

By: /s/ Scott R. Eldridge

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

Scott R. Eldridge (P66452)

Scott R. Lesser (P72446)

Wendolyn Wrosch Richards (P67776)

One Michigan Avenue, Suite 900

Lansing, Michigan 48933 (USA)

(517) 483-4918

richards@millercanfield.com

lesser@millercanfield.com

eldridge@millercanfield.com

Attorneys for Proposed Amicus Curiae

The Michigan Democratic Party

Dated: October 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2022, I electronically filed the foregoing document with the Clerk of the Court using the TrueFiling system that will send notification of such filing upon all filing participants.

MILLER, CANFIELD, PADDOCK AND
STONE, P.L.C.

/s/ Scott R. Eldridge

Scott R. Eldridge (P66452)
Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party
One Michigan Avenue, Suite 900
Lansing, MI 48933
(517) 483-4918
eldridge@millercanfield.com

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Ann M. Howard (P49379)
26100 American Drive, #607
Southfield, MI 48034

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Assistant Attorneys General

(248) 752-0650
ahoward@annhowardlaw.com
Attorneys for Plaintiffs in 22-162-MZ

DICKINSON WRIGHT, PLLC
Charles R. Spies (P83260)
Robert L. Avers (P75396)
Thomas F. Christian III (P83146)
350 S. Main, Ste. 300
Ann Arbor, MI 48104
(734) 623-1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com
Attorneys for Plaintiffs in 22-164-MZ

PO Box 30736
Lansing, Michigan 48909
(517) 335-7659
meingasth@michigan.gov
grille@michigan.gov
Attorneys for Defendants

MILLER, CANFIELD, PADDOCK AND
STONE, PLC
Scott R. Eldridge (P66452)
Scott R. Lesser (P72446)
Wendolyn Wrosch Richards (P67776)
One Michigan Ave., Suite 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com
lesser@millercanfield.com
richards@millercanfield.com
*Attorneys for Proposed Amicus Curiae
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**THE MICHIGAN DEMOCRATIC PARTY'S
PROPOSED AMICUS CURIAE BRIEF**

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**THE MICHIGAN DEMOCRATIC PARTY’S
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DESCRIPTION OF AMICUS CURIAE AND STATEMENT OF INTEREST¹

The Michigan Democratic Party (“MDP”) is the Democratic Party’s official state party committee for the State of Michigan. Affidavit of Erica Peresman (“Peresman Aff.”), Ex. 1 at ¶ 1. The MDP aims to ensure that the constitutional rights of its members, voters, and candidates are not impeded. For decades, both the MDP and the Michigan Republican Party (“MRP”), as major political parties under Section 16 of the Michigan Election Law (MCL 168.1 *et seq.*), have overseen election challenger programs. *Id.* These programs require designating and issuing credentials to election challengers.

As a major political party and credentialing organization, the MDP has an interest in the proper and efficient administration of elections. Election challengers and poll watchers it appoints help facilitate this. They act as a check and balance on the process, and their presence in polling places and absentee counting rooms helps boost public confidence in the integrity of our elections. For the process to work as intended, the organizations that credential challengers have a responsibility to know the rights and duties as set forth in the Michigan Election Law, supplemented by guidance issued by the Michigan Secretary of State from time to time. The MDP takes very seriously its responsibility to educate its appointed and credentialed challengers about these matters.

The Secretary of State’s guidance includes *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*, released in May 2022 (the “Manual”), at issue in this case.

¹ No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the amicus curiae, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

Michigan Election Law requires the Secretary of State to issue this manual. MCL 168.31(1)(c). The Manual applies to challengers credentialed by the MDP in the same way as those credentialed by the MRP. Accordingly, the MDP incorporated these instructions in its challenger and poll watcher training for the August 2022 Primary Election. Peresman Aff. at ¶ 5. It was not difficult. Nor did the Manual impair challengers' or poll watchers' discharge of their duties during the August 2022 Primary Election. In fact, the new Manual's guidance provided for a smoother administration of the election by clarifying how challengers should approach their tasks.

The MDP has already devoted substantial time and resources training hundreds of volunteer challengers based on the guidelines in the Manual. If either Plaintiffs' request is granted, the MDP would have to invest significant resources updating and retraining volunteers to comply under new guidelines. Peresman Aff. at ¶ 12. The MDP is also concerned that rescinding the current Manual would interfere with its challengers' and poll watchers' ability to help facilitate an efficient election in which the public can place its trust.

INTRODUCTION

In November 2020, the world witnessed what could go wrong when election challengers are improperly trained and when protocols for those challengers are ambiguous. The Senate Oversight Committee's Report on the November 2020 Election in Michigan ("Senate Oversight Committee Report"), signed onto by the three Republican members of the Committee, found that:

The environment and those emotions were compounded by a lack of proper recruitment and/or training of election workers on the part of the clerk, as well as a failure of the Republican party to verify recruitment and training, supply an adequate number of election attorneys, and to properly train and counsel some of their volunteers and challengers. Republican officials, along with some ostensibly Independent challengers, furthered the crisis by putting out the call to other members and citizens to descend on the location to stop what was described and presented as a stealing of the election.

Id. at 13. This was particularly apparent at then-TCF Center in Detroit, where disorder and disruption dominated the absent voter counting board. The proliferation of challenges by untrained challengers built on one another to create chaos that “increased the angst and fears of the untrained challengers and observers, as well as the many in the public who did not understand what was shown to them by the media.” *Id.* This prompted a call to ensure that “the rights and duties of poll watchers and challengers be better understood and reinforced in their respective training and must be protected equally by election officials.” *Id.* at 12.

Following these findings, the Secretary of State executed her authority to oversee the administration of elections in the State of Michigan by issuing the current Manual in May 2022. This authority is under express Legislative directive, which requires the Secretary of State to “issue instructions,” including “a manual of instructions that includes specific instructions on ... procedures and forms for processing challenges,” among other things. MCL 168.31(1)(a) and (c). The Manual appropriately interprets and applies the Michigan Election Law—which the Secretary of State is empowered to do. *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239, 501 NW2d 88 (1993) (“Agencies have the authority to interpret the statutes they are bound to administer and enforce.”). So long as the Manual does not directly conflict with the Michigan Election Law or tread entirely new policy ground (it does not), the Michigan Election Law grants the Secretary of State full authority to publish the Manual. *See Michigan Trucking Ass’n v Michigan Pub Serv Comm’n*, 225 Mich App 424, 430 (1997).

Rather than recognize this clear Legislative direction, Plaintiffs ask this Court to simultaneously *eviscerate* the Secretary of State’s authority under the Michigan Election Law and *exercise* the Secretary of State’s authority by rewriting the Manual in an act of judicial overreach. Either would set us back to the dark days of November 2020. In that cycle, election challengers

and poll watchers on behalf of the MDP observed numerous instances – well documented in the Senate Oversight Committee Report, the media, and various court cases alike – of individuals on behalf of the MRP and “ostensibly Independent challengers” (Senate Oversight Committee Report at 13) issuing indiscriminate challenges, without good cause grounded in the Michigan Election Law, and with the purpose of interfering with or unduly delaying the work of election inspectors. Affidavit of David Jaffe, Ex. 2 (“Jaffe Aff.”), at ¶ 6. That conduct hindered the ability of election officials to perform their duties under the Michigan Election Law and caused untold damage to our democracy by sowing mistrust in the public in our electoral system.

The Manual’s detailed procedures help fortify Michigan’s election procedures against the types of disruption faced during the November 2020 election. The MDP has reviewed that Manual cover-to-cover. Peresman Aff. at ¶ 5. It is fully consistent with the Michigan Election Law. It is also materially consistent with prior practice in many ways, including guidance issued by the Secretary of State in 2020 (the “Prior Manual”). The differences relative to the Prior Manual are rooted in specific problems that arose in the November 2020 election and subsequently, but nonetheless stay within the bounds of the Michigan Election Law.

The MDP has already trained numerous election challengers and poll watchers, and will train others in the coming weeks, to serve their important roles in the election process by following the terms of the Manual in their entirety. *Id.* at ¶¶ 6, 10, 12. Retraining volunteers to comply with any new, judicially-mandated guidelines would require investing significant resources. *Id.* at ¶ 11. The Plaintiffs nonetheless want to turn back the clock to the chaotic days of the November 2020 election, with MRP specifically seeking to reinstate the Prior Manual.² This is somewhat ironic

² The O’Halloran Plaintiffs are represented by Ann Howard, who is the subject of a petition by the Attorney General to appoint a Special Prosecutor for review of a charging request relating to conspiracy to unlawfully obtain access to voting machines used in the 2020 election, among other
Continued on next page.

when many of the complained-of elements of the Manual can also be found in the Prior Manual; the Manual simply enhances them to improve clarity and address specific issues. Contrary to the Plaintiffs' suggestions, the MDP – to which the Manual is equally applicable – is confident that election challengers and poll watchers can discharge all statutory rights and duties with alacrity without running afoul of the Michigan Election Law.

ARGUMENT

I. THE SECRETARY OF STATE APPROPRIATELY EXERCISED ITS AUTHORITY TO INTERPRET AND EXPLAIN EXISTING STATUTORY PROVISIONS TO A SPECIFIC CLASS OF ELECTION PARTICIPANTS.

The Michigan Election Law assigns to the Secretary of State ultimate responsibility for administering elections in the state. MCL 168.21 (“The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.”). This requires the Secretary of State to fulfill a wide array of duties. For example, the Secretary is entrusted to issue instructions for how elections and registrations will be conducted. MCL 168.31(1)(a) and (c). The Secretary executed that authority when issuing the Manual, offering the Secretary’s view on the rights and duties of election challengers and poll watchers in Michigan.

Of course, the Secretary of State’s powers are not boundless, and agency actions are subject to the Administrative Procedures Act. See MCL 24.203(2). Unless exercising its rule-making authority in accordance with the Administrative Procedures Act, it may not decide matters of

things. In particular, Howard’s alleged role under investigation is the “coordinat[ing of] printing of fake ballots to be run through the tabulators and recruitment of ‘volunteers.’” Ex. 3 (Aug. 5, 2022 Petition for Appointment of Special Counsel, *available at* <https://www.michigan.gov/-/media/Project/Websites/AG/releases/2022/August/SPA-Petition---Tabulators-Case.pdf>).

public policy, or dictate the actions of local election officers. This Court clarified the scope of these limitations in two recent decisions, *Davis v Benson* and *Genetski v Benson*.

In *Davis*, this Court took issue with the Secretary of State's directive prohibiting "the open carry of firearms on election day in polling places, clerk's office(s), and absent voter counting boards[.]" and within 100 feet of those locations. *Davis v Benson*, 2020 WL 7033534, at *1 (Mich Ct Cl Oct 27, 2020). The Court's primary concerns were that "[t]he directive itself covers a substantive policy area—where a resident can openly carry a firearm—and applies to every resident of this state," and that it placed additional general restrictions on where people not involved in the election process can openly carry a firearm beyond those contained in existing statutes. *Id.* at *3.

In *Genetski*, this Court was concerned with the Secretary of State establishing a presumption that signatures on absent voter ballot applications and return envelopes were valid. *Genetski v Benson*, 2021 WL 1624452 (Mich Ct Cl March 9, 2021). The Court held that there was no such presumption in the Michigan Election Law; the declaration had general application because it applied to any person exercising the right to vote through absent voter ballot applications and absent voter ballots; and the Secretary of State obligating local election officials to act in particular fashion resulted in its proclamation having the force of law. *Id.* at *4.

Outside of the election context, courts have taken issue with agency action that conflicted directly with statutory provisions. See, e.g., *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 187-188 (1988) (where rule required hearings to take place in the county where the claimant resided, agency action permitting telephonic hearings would be deemed to take place where the referee was located and not in two places

simultaneously, and thereby conflicted with the rule's requirements when the referee was located in a different county).

These cases, however, do not mean that the Secretary of State has *no* power to issue instructions relating to elections. To the contrary, ***the Secretary of State is specifically empowered by the Michigan Election Law to (1) issue instructions regarding the administration of elections, and (2) issue the Manual.*** MCL 168.31(1)(a) and (c). Thus, so long as the Manual is consistent with the Michigan Election Law and does not tread new policy ground, the Secretary of State's issuance is a permissive exercise of statutory authority that is allowed under the Administrative Procedures Act. *See* MCL 24.207(j).

Michigan courts have consistently held that these powers rest with agencies, and their exercise does not violate the Administrative Procedures Act. *See, e.g., Twp of Hopkins v State Boundary Comm'n*, __ Mich App __, No. 355195 (Feb 24, 2022) (statute provided comprehensive scheme to resolve boundary disputes, and agency's guidelines do not add to or contradict the requirements already found in the statute, so the agency's guidelines were enforceable and its failure to issue rules did not breach a statutory requirement to make rules "necessary or desirable" because the determination of what was necessary was left to the reasonable discretion of the agency); *Michigan Trucking Ass'n v Michigan Pub Serv Comm'n*, 225 Mich App 424, 430 (1997) (broad statutory authorization to implement a motor carrier safety rating system by "rule or order" rendered agency implementation of a motor carrier rating system a proper permissive exercise of statutory authority under MCL 24.207(j)); *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19, 47 (2005) (" [c]ertain portions of RAB 91-12 are clearly explanatory and interpretive, expressing Treasury's position on its standardization of invoices as to form and content [and those] portions of the document are within the § 7(h) exclusion from the APA' rule promulgation requirements").

Despite Plaintiffs' hyperbole, the Manual here properly and legitimately provides helpful clarification to election challengers and poll watchers about how to comply with the Michigan Election Law. This is an essential function of an agency:

Communication to the public does not convert an interpretive statement into an independently enforceable rule. Rather, informing the public is one of the purposes of interpretive "rules." Interpretive rules are statements as to what the agency thinks a statute or regulation means; they are statements issued to *advise* the public of the agency's construction of the law it administers.

Clonlara, supra at 243-244 (cleaned up). The Manual's permissibility is further emphasized by its exception to the definition of "rule" under the Administrative Procedures Act. Not only is it excepted from the definition under MCL 24.207(j), but elements of it additionally fall under exceptions found in MCL 24.207(g) and (h). To hold otherwise would effectively eliminate all ability of the Secretary of State to interpret the statutes it is entrusted with administering. Not only would this needlessly impede the efficient and proper administration of elections, but it would create substantial legal uncertainty by contradicting clear precedent from this Court, the Michigan Court of Appeals, and the Michigan Supreme Court.

II. THE PRACTICAL IMPACT OF THE MANUAL, AND ITS CONSISTENCY WITH THE PRIOR MANUAL AND MICHIGAN ELECTION LAW, DEMONSTRATES THAT IT IS NOT A RULE.

Several MDP employees are registered to receive notifications from the Secretary of State relating to elections. Peresman Aff. at ¶ 4. These are available to the public and anyone who subscribes.³ From this, the MDP received notification that the Manual had been issued on May 25, 2022. Peresman Aff. at ¶ 4 & ex. A thereto. The MDP promptly reviewed the Manual, cover-to-

³ See https://service.govdelivery.com/accounts/MISOS/subscriber/new?topic_id=MISOS_48 (last visited on October 8, 2022). The MDP notes that while the Manual was first made available in May 2022 (and at a minimum the MRP admits to having received by the latest July 2022), the MRP waited until just five weeks before the General Election to file this suit.

cover. *Id.* at ¶ 5. The MDP confirmed that its provisions are consistent with the Michigan Election Law. Afterward, the MDP made the minor updates necessary to its training protocols. *Id.* The MDP trained approximately 368 election challengers and poll watchers before the August 2022 primary. *Id.* at ¶ 6. It has trained 723 challengers and poll watchers for the November 2022 election to date, and expects to train hundreds more. *Id.* at ¶ 10. Each training session is approximately an hour and a half long, with additional time for the Detroit Absent Voter Counting Facility at Huntington Place. *Id.* at ¶ 7. The MDP fully expects that it and its trained election challengers and poll watchers will be able to discharge their duties, and find none of their rights impaired, while abiding by the entirety of the Manual. *Id.* at ¶ 12.

The Plaintiffs' argument seems to be that the Manual is improper because it includes language and terms not contained in the Michigan Election Law. Indeed, the argument endorsed by the O'Halloran Plaintiffs (and, to a lesser degree, the MRP) seems to be that the Secretary of State is only empowered to issue a manual that duplicates the statutory language contained in the Michigan Election Law. See O'Halloran Motion at 7-8 (arguing that "[i]t should be obvious that all statutory rights should be presented" in the Manual); see generally O'Halloran Motion at 5-7, and MRP Compl. at ¶ 30 (arguing that the Manual is improper because certain procedural elements are not contained word-for-word in the Michigan Election Law). That is not the standard. To hold that as the standard would read the phrase "issue instructions" out of MCL 168.31(1)(a) entirely, read language into MCL 168.31(1)(c) requiring the Secretary of State's "manual of instructions" to include all of the Michigan Election Law word-for-word, and read the words "procedures and forms for processing challenges" out. It also would render the exceptions to the definition of "rule" contained in MCL 24.207 a nullity. This would upend the established precedents of *Clonlara*, *Hinderer*, *Michigan Trucking*, and a host of other Michigan Supreme Court and Court of Appeals

decisions—all for no purpose, because the Manual is not disruptive. The MDP had absolutely no difficulty training its challengers for the August 2022 primary using the Manual, and those challengers had no difficulty exercising their rights and performing their duties in the August 2022 primary. Peresman Aff. at ¶¶ 5, 6, 8. There is no reason to think November will be any different. Peresman Aff. at ¶ 12.

In accordance with this Court’s October 3, 2022 Order, the remainder of this Brief will explain why each of the Plaintiffs’ complaints about specific elements of the Manual are hollow, and how each provision is consistent with the Michigan Election Law. Each qualifies as a permissive exercise of statutory power to “issue instructions” and to “publish...a manual of instructions” pursuant to MCL 168.31(1)(a) and (c), in accordance with MCL 24.207(j). Other exceptions taking the Manual outside the definition of “rule” are noted where also applicable.

A. THE PROVISIONS OF THE MANUAL WITH WHICH THE MRP TAKES ISSUE ARE CONSISTENT WITH THE MICHIGAN ELECTION LAW AND DO NOT IMPEDE A CHALLENGER’S PROPER EXERCISE OF ITS STATUTORY RIGHTS AND DUTIES.

Preliminarily, it is important to note that the MRP’s requested relief is to reissue the Prior Manual – from October 2020. This matters because almost all of the provisions of the Manual with which the MRP takes issue were also present in the Prior Manual.

1. **The Manual and the Michigan Election Law are consistent with respect to the form of credential for election challengers (MRP Compl. at ¶ 30(a)).**

The MRP seems to argue that because the Secretary of State has historically left credentialing organizations to generate their own challenger credential forms, the Secretary of State cannot now require the use of any specific form. To the contrary, the Secretary of State is empowered to “prescribe and require uniform forms ... the secretary of state considers advisable for use in the conduct of elections and registrations.” MCL 168.31(1)(e). Pursuant to this statutory authority, the Secretary of State considered it advisable to, and did, craft a form of challenger

credential. See also *Michigan Trucking, supra*. The MRP has suggested no manner in which the Secretary of State’s designated form of credential is inadequate under or inconsistent with the Michigan Election Law.

Moreover, this is a procedural matter, not a substantive right; and there is absolutely no burden in complying, as the Secretary of State has posted a link to the credential on its website and allows for the provision of digital credentials that arguably are more convenient for any credentialing organization for challengers outside of the AVCBs. Manual at 5. The MDP had no difficulty adopting the Secretary of State’s designated form of credential for use by its election challengers in August 2022, and respectfully suggests that more than adequate time remains for the MRP to issue compliant credentials before the November 2022 election. In all candor, it hardly seems worth expending judicial resources on a matter so trivial that it imposes no hardship and can be resolved by simply using the new forms.

2. **The Manual and the Michigan Election Law are consistent with respect to the timing when an election challenger may be appointed, and merely suggest that credentialing organizations should train their challengers in advance (MRP Compl. at ¶ 30(b)).**

The Michigan Election Law details that challengers must be appointed and credentialed, but is silent about when that must occur. Under the Prior Manual – notably, *not* a rule – political parties could appoint challengers “through” the date of the election. Prior Manual at 4. The current Manual states that political parties may appoint challengers “until Election Day.” Manual at 2. The MRP implicitly argues that the Prior Manual, although not promulgated as a rule, is somehow elevated to the status of a rule by virtue of prior practice; and therefore, the Prior Manual’s language cannot be varied absent the rule-making process.

Initially, the MDP notes that the Manual and Prior Manual do not conflict. The current Manual uses “until,” which includes the day-of deadline. This is consistent with practice, such that

challengers have been appointed on Election Day. The Manual does not use the words “before” or “prior to,” after all. Regardless, providing that challengers may be appointed “until” Election Day is a reasonable interpretation of the Michigan Election Law in response to the November 2020 election. Training challengers in their rights, duties, and limitations takes time. As recognized in the Senate Oversight Committee Report, the “failure of the Republican party to verify recruitment and training ... and to properly train and counsel some of their volunteers and challengers” created considerable disorder and disruption. Senate Oversight Committee Report at 13. They recommended that “the rights and duties of poll watchers and challengers be better understood and reinforced in their respective training and must be protected equally by election officials.” *Id.* at 12. Requiring advance credentialing will improve the opportunity to properly train challengers. It will also reduce the likelihood that a situation similar to that which arose in November 2020 will occur again, where “Republican officials, along with some ostensibly Independent challengers, furthered the crisis by putting out the call to other members and citizens to descend on the location to stop what was described and presented as a stealing of the election.” Senate Oversight Committee Report at 13.

The MDP has already begun training its challengers and poll watchers based on the Manual. Peresman Aff. at ¶ 10. If the MRP is concerned about the Manual’s use of the word “until,” its solution is much simpler than running to court: simply train, appoint, and credential challengers in advance.

3. **The Michigan Election Law requires that election challengers be able to raise objections with “an” election inspector, not “any” election inspector (MRP Compl. at ¶ 30(c)).**

The Michigan Election Law requires that an election challenger be able to raise objections with “an” election inspector. *See* MCL 168.733(1)(e). Contrary to the MRP’s suggestion, “an” is not the same word as “any.” Courts must construe all words in a statute in accordance with their

common usage. MCL 8.3a. Based on the common usage of “an,” so long as an election challenger can raise objections with *at least one* identified election inspector, the Michigan Election Law is satisfied. Moreover, the Michigan Election Law vests the Secretary of State with the ability to oversee and administer elections (MCL 168.21), and to issue instructions concerning the procedures to process challenges (MCL 168.31(1)(a) and (c)). For Plaintiffs’ argument to prevail would require this Court to re-write the statute or read language into it that simply is not there.

The Manual confirms that a “challenger liaison” is, in fact, “an election inspector.” *See* Manual at 5. It also permits additional election inspectors to be designated as challenger liaisons or their designees, and creates a process to determine who the challenger liaison is if none is formally identified. *Id.* This complies with the Michigan Election Law as it ensures that there is always “an” election inspector to whom challenges may be presented. Because it is consistent with the Michigan Election Law, this element of the Manual is a permissive exercise of statutory power to “issue instructions,” MCL 168.31(1)(a), and to “publish and furnish...a manual of instructions,” MCL 168.31(1)(c), in accordance with MCL 24.207(j).

Notably, this is similar to the approach taken in the Prior Manual. The Prior Manual formally focused challenges with the precinct chairperson. Prior Manual at 8. If anything, the Manual improves a challenger’s flexibility in bringing challenges by permitting additional challenger liaisons or designees.

By designating challenger liaisons and their designees, the Manual establishes a procedure (*not* a substantive right) that helps ensure both that experienced election inspectors are tasked with managing challenges, and that those challenges are handled consistently. This is important considering the activities observed during the November 2020 and subsequent elections, where election challengers did not appear to be familiar with the election process or aware of their rights

and duties. Jaffe Aff. at ¶ 7. Indeed, election challengers were observed in some precincts to intentionally ask the same question multiple times of different election inspectors in the hopes of obtaining differing answers. Jaffe Aff. at ¶ 9(c). This highlights the need for consistency and uniformity.

Moreover, focusing challenges with challenger liaisons also minimizes disruption to the duties of other election inspectors, as was experienced in the November 2020 election. *See* Jaffe Aff. at ¶ 8. The other election inspectors present can focus on the task of administering the election without unnecessary distraction. This is consistent with the Michigan Election Law. *See* MCL 168.727(3).

4. **The Manual’s restriction on access to certain electronic devices is consistent with the Michigan law regarding secret ballots (MRP Compl. at ¶ 30(d)).**

The MRP takes issue with the Manual’s prohibition on the possession of certain electronic devices at the AVCB.⁴ The Michigan Election Law requires that election challengers be permitted to “[k]eep records of votes cast and other election procedures as the challenger desires.” MCL 168.733(1)(h). No statutory language specifies the manner in which election challengers are permitted to keep records. As this provision was enacted in 1955, the drafters certainly could not have intended it to apply to the use of cell phones, laptops, or tablets. To permit video or audio recordings runs a severe risk of violating various Michigan Election Law provisions designed to protect voters and election inspectors alike. It also poses a threat to the right to a secret ballot enshrined in the Michigan Constitution. Mich. Const. § 4(1)(a). Accordingly, this same prohibition was part of the Prior Manual, which the MRP advocates keeping. Prior Manual at 3.

⁴ There is no restriction to possessing electronic devices at in person polling locations, although their use is restricted.

The MRP further argues that a challenger’s oath, sworn in accordance with MCL 168.765a(9), is sufficient protection. The Prior Manual, however, also barred challengers from “using phones, laptops, tablets or other electronic devices in an AVCB [absent voter counting board].” Prior Manual at 6. Unfortunately, in November 2020, an oath and prohibition on use proved insufficient. More than a few Republican challengers were caught filming, and at least one flagrant repeat offender was escorted from the TCF Center by Detroit Police. Jaffe Aff. at ¶ 8(b)(iii); see also MCL 168.727(3); 168.733(4).

Regardless, and significantly, the Manual’s bar on the *possession* of the identified electronic devices does not impair a challenger’s ability to exercise his or her rights in comparison with the bar on their *use* contained in the Prior Manual. The MDP’s challengers had no difficulty relinquishing their electronic devices during the August 2022 primary. It is difficult to see how other challengers cannot also comply—unless their true intent, as in November 2020, is to skirt the ban on use of specified electronic devices and utilize them for improper purposes.

Other means exist for keeping records. The MDP’s election challengers and poll watchers keep notes using pen and paper in absent voter ballot counting facilities, which the MDP collects afterward. Peresman Aff. at ¶ 9. This has proven more than adequate, election after election, for many years before (and after) cellular phones were available.

5. **The Manual’s approach to “impermissible challenges” is consistent with the Michigan Election Law (MRP Compl. at ¶ 30(e)).**

The Michigan Election Law distinguishes between permissible and impermissible challenges by identifying specific permissible challenges: “the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant’s name in the registration book.” MCL 168.737(1). To be qualified, an elector must be a citizen of the United States, not less than 18 years of age, a resident of the State of Michigan, and a resident of

the township or city for at least 30 days. MCL 168.492; MCL 168.10. The Michigan Election Law allows recording “a challenge being made under subsection (1)” only. MCL 168.737(2). It does not permit challenges made on any other grounds, nor does it require recording challenges that are not contemplated by subsection (1).

The Manual identifies the four specific ways that a challenger may make a challenge that is permitted under the Michigan Election Law, specifically that the person is: (i) not registered to vote; (ii) underage; (iii) not a U.S. citizen; or (iv) not a 30-day resident where they are voting. Manual at 11-12. The Manual then identifies numerous specific impermissible challenges, none of which would constitute a challenge of a type permitted under the Michigan Election Law. Manual at 12-13. Because these impermissible challenges do not arise under MCL 168.737(1) and therefore are not required to be recorded under the Michigan Election Law, the Manual states that impermissible challenges need not be recorded. The two are perfectly consistent.

The MRP nonetheless argues that the Manual is improper because it uses different language from the Prior Manual when discussing challenges. Although the Prior Manual does not provide the convenient moniker of “permissible” and “impermissible” challenges, the Prior Manual is consistent with the current Manual in its treatment of challenges. Specifically, the Prior Manual identifies specific types of challenges that may be made, and directs that those specific types of challenges must be recorded in the pollbook. Prior Manual at 8-10.⁵ Like the Michigan Election Law, the Prior Manual thereby indirectly states that challenges of other, unpermitted types need

⁵ The Prior Manual also identifies additional “types of challenges” beyond the “unqualified voter[.]” Prior Manual at 8. These are contemplated by the Manual also, but are described more broadly as a challenger’s rights. Manual at 19-20. This is another purely procedural point, updated in response to the confusion encountered in November 2020.

not be recorded. The Prior Manual even identifies some of the types of challenges now labeled as “impermissible” as challenges that may not be asserted. Prior Manual at 8.

Unfortunately, the clarification in the Manual is also necessary. As learned the hard way in the 2020 election, challengers raised impermissible challenges. Even when asserted at AVCBs – i.e., away from voters, eliminating the possibility of direct voter intimidation – these challenges were used to intimidate election inspectors and disrupt the election process. Jaffe Aff. at ¶¶ 8(c), 9. These are the specific issues that the Manual is attempting to redress. Manual at 12.

B. THE PROVISIONS OF THE MANUAL WITH WHICH THE O’HALLORAN PLAINTIFFS TAKE ISSUE ARE CONSISTENT WITH THE MICHIGAN ELECTION LAW AND DO NOT IMPEDE A CHALLENGER’S PROPER EXERCISE OF ITS STATUTORY RIGHTS AND DUTIES.

Unlike the MRP, the O’Halloran Plaintiffs ask this Court to rescind the Manual on one hand, and on the other ask for the Court to rewrite specific provisions. Assuming that rescission would reinstitute the Prior Manual, the MDP directs this Court to the similarities between the manuals addressed above. Any Court-ordered line-by-line revision, however, represents judicial overreach and a significant violation of separation of powers principles that make such a request untenable. Nonetheless, the MDP will address each of the objections raised in the O’Halloran Plaintiffs’ Motion.

1. **The Manual does not mandate ejecting election inspectors, and the Michigan Election Law does not restrict the grounds for ejection (O’Halloran Motion at ¶ 8(a)).**

Under the Michigan Election Law, “[a]ny evidence of drinking of alcoholic beverage or disorderly conduct is *sufficient cause* for the expulsion of a challenger from the polling place or the counting board.” MCL 168.733(3) (emphasis added). No statutory provision *limits* the grounds for expulsion to these two categories of offenses. It is a reasonable interpretation of the Michigan Election Law that any challenger who repeatedly violates his or her duties to “not make a challenge indiscriminately and without good cause” or to “not interfere with or unduly delay the work of the

election inspectors” may be removed. MCL 168.727(3). Indeed, this is consistent with existing practice under the Prior Manual; the only distinction is that an election inspector may eject challengers directly instead of only asking that they leave and relying on the precinct chairperson or law enforcement to remove them. *Cf.* Manual at 22 *with* Prior Manual at 5, 8. By permitting election inspectors to eject challengers when they violate the Michigan Election Law instead of turning solely to law enforcement, the Manual avoids an unnecessary strain on public resources and diversion from addressing other public safety concerns in the community.

Moreover, the Manual only states that “[a] challenger who *repeatedly* fails to follow any of the instructions or directions set out in this manual or issued by election inspectors *may* be ejected by an election inspector.” Manual at 22 (emphasis added). This phrase vests authority and discretion in local election inspectors. But because it does not obligate local election officials to undertake any specific course of action, the Manual does not have the force of law. *Cf. Genetski, supra.* It therefore is an exception to the definition of “rule” under MCL 24.207(h).

This addition to the Manual is also important in light of activity observed at the November 2020 and subsequent elections. Specifically, numerous credentialed election challengers engaged in activity intended to, and which did, interfere with or unduly delay the work of election inspectors. Jaffe Aff. at ¶ 6. This is specifically barred by the Michigan Election Law. MCL 168.727(3). Advising election challengers that they may be ejected for violating the Michigan Election Law does not contradict the statute. It merely puts election challengers on notice that they may be held to account if they violate the law.

2. **The Michigan Election Law require that election challengers be able to raise objections with “an” election inspector, not “any” election inspector (O’Halloran Motion at ¶ 8(b)).**

This issue is duplicative of a concern raised by the MRP Plaintiffs, and the MDP respectfully refers to and incorporates Section III(A)(3) of this Brief.

3. **The Manual and the Michigan Election Law are consistent with respect to the number of challengers each credentialing organization may have present in absent voter ballot processing facilities (O’Halloran Motion at ¶ 8(c)).**

The Manual sets forth factors that clerks should consider when determining the number of challengers each credentialing organization may field in an absent voter ballot processing facility. This is not a contraction relative to Rule 168.791, as the O’Halloran Plaintiffs suggest. Rather, it is a guard against improper contraction based on a misreading of the Michigan Election Law, arising out of an ambiguity in the Michigan Election Law. The Michigan Election law provides that each credentialing organization “may designate not more than 1 challenger to serve at each counting board.” MCL 168.730(1). As the Manual explains, this is ambiguous because “counting board” is used in multiple different ways in the Michigan Election Law:

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

Manual at 7-8. In other words, the Manual is designed to prevent a misreading of the Michigan Election Law that could allow local election officials to deny challengers sufficient access by claiming only one challenger is permitted per facility (or “board”) in a larger or combined precinct.

This intent is made clear by the Manual expressly providing that “clerks must balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk’s responsibility to ensure safety and maintain orderly movement within the facility.” Manual at 8. The Manual thereby expressly recognizes, and requires clerks to consider, a challenger’s right to meaningfully observe the process. It does not bless a clerk’s subversion of this critical task.

4. **The Michigan Election Law does not require that election challengers have access to the same technologies as election inspectors (O'Halloran Motion at ¶ 8(d)).**

This element is duplicative of a concern raised by the MRP Plaintiffs, and the MDP respectfully refers to and incorporates Section III(A)(1) of this Brief.

The O'Halloran Plaintiffs further state that challengers should have the same access to electronic tools that are available to election inspectors, but nothing in the Michigan Election Law suggests that. Again, challengers can exercise their rights and fulfill their duties with pen and paper alone in absent voter ballot counting facilities, as has been the consistent practice for many decades. Peresman Aff. at ¶ 9.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed herein and the motion and brief filed by the Secretary of State, the Court should deny Plaintiffs' motion for declaratory judgment and injunctive relief and dismiss the complaint with prejudice pursuant to MCR 2.116(C)(8).

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Scott R. Eldridge
Scott R. Eldridge (P66452)
Scott R. Lesser (P72446)
Wendolyn Wrosch Richards (P67776)
One Michigan Ave, Suite 900
Lansing, MI 48933
eldridge@milleranfield.com
lesser@milleranfield.com
richards@milleranfield.com
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*

Dated: October 11, 2022

EXHIBIT 1

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v.

Case No. 22-000162-MZ

JOCELYN BENSON,
in her official capacity as the duly elected
SECRETARY OF STATE, and
JONATHAN BRATER,
in his official capacity as the **DIRECTOR
OF THE MICHIGAN BUREAU OF
ELECTIONS,**

Hon. Brock A. Swartzle

Defendants.

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

Plaintiffs,

v.

Case No. 22-000164-MZ

JOCELYN BENSON,
in her official capacity as the duly elected
SECRETARY OF STATE, and
JONATHAN BRATER,
in his official capacity as **DIRECTOR OF
ELECTIONS,**

Hon. Brock A. Swartzle

Defendants.

ANN M. HOWARD, P.C.
Ann M. Howard (P49379)
26100 American Drive, #607

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General

Southfield, MI 48034
(248) 752-0650
ahoward@annhowardlaw.com
Attorneys for Plaintiffs in 22-162-MZ

DICKINSON WRIGHT, PLLC
Charles R. Spies (P83260)
Robert L. Avers (P75396)
Thomas F. Christian III (P83146)
350 S. Main, Ste. 300
Ann Arbor, MI 48104
(734) 623-1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com
Attorneys for Plaintiffs in 22-164-MZ

PO Box 30736
Lansing, Michigan 48909
(517) 335-7659
meingasth@michigan.gov
grille@michigan.gov
Attorneys for Defendants

MILLER, CANFIELD, PADDOCK AND
STONE, PLC
Scott R. Eldridge (P66452)
Scott R. Lesser (P72446)
Wendolyn Wrosch Richards (P67776)
One Michigan Ave., Suite 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com
lesser@millercanfield.com
richards@millercanfield.com
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*

AFFIDAVIT OF ERICA PERESMAN

Erica Peresman, being duly sworn, deposes and states as follows:

1. I am an adult of sound mind, have personal knowledge of the matters stated in this affidavit, and if called as a witness, could testify competently to the truth of the matters herein.
2. I have been employed as the Voter Protection Director of the Michigan Democratic Party since March 2019, and I first volunteered as a challenger in 2000. I am a licensed attorney in good standing in the State of Michigan and have specialized in Michigan election law for the past several years.
3. The MDP is the Democratic Party's official state party committee for the State of Michigan. The MDP aims to ensure that the constitutional rights of its members, voters, and candidates are not impeded. For decades, the MDP has overseen election challenger programs. These programs include training and require designating and issuing credentials to election challengers.

4. Several MDP employees are registered to receive notifications available from the Secretary of State relating to elections. On May 25, 2022, MDP employees received notice via email, attached as ex. A hereto, that the Secretary of State had published *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (the “Manual”).

5. After reviewing the Manual cover-to-cover, the MDP made the minor updates necessary to its training protocols, and began training election challengers and poll watchers for the August 2022 primary on June 13.

6. The MDP trained approximately 368 election challengers and poll watchers for the August 2022 primary based on the Manual, as well as applicable statutes and the Election Officials’ Manual promulgated by the Michigan Bureau of Elections.

7. Generally, challenger training for the August 2022 primary consisted of one training session of 1-1.5 hours for all challengers, followed by a second 1-1.5 hour training session for challengers who would be serving at the Detroit Absent Voter Counting Facility at Huntington Place.

8. The MDP’s challengers did not have any difficulty exercising any of their rights and duties while abiding by the Manual in its entirety during the August 2022 primary.

9. The MDP’s election challengers and poll watchers in absent voter ballot counting facilities keep notes using pen and paper, which the MDP collects afterward. This has been the practice for many decades.

10. The MDP started training its election challengers and poll watchers for the November 2022 election on September 14, relying on the Manual. It has trained 723 challengers and poll watchers for the November 2022 election to date, and expects to train hundreds more.

11. The MDP would have to invest significant resources updating and retraining volunteers to comply under any new guidelines. With the November election four weeks away, this poses an enormous and potentially insurmountable burden to ensure that all challengers will be prepared properly if there are changes. The MDP is also concerned that rescinding the current Manual would interfere with its challengers' and poll watchers' ability to help facilitate an efficient election in which the public can place its trust.

12. The MDP expects that its challengers and poll watchers will abide by the Manual in its entirety, and does not anticipate this impeding the discharge of challenger duties or impeding challenger rights.

FURTHER AFFIANT SAYETH NOT.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Executed this Oct. 11, 2022


Name: Erica Peresman

Subscribed and sworn to before me
this 11 day of October, 2022.



Notary Public,

My Commission Expires: Feb 16, 2029

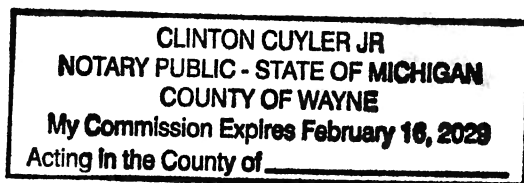


EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

5/25/2022 News Update - Updated Challenger Document, Ballot Proof Approval, Election Geo and AV Impacts and more

1 message

Michigan Bureau of Elections <MISOS@public.govdelivery.com>
Reply-To: MISOS@public.govdelivery.com
To: olockett@michigandems.com

Wed, May 25, 2022 at 9:03 AM

Having trouble viewing this email? [View it as a Web page.](#)



Michigan Bureau of Elections

News Update

for Election Administrators

Regular Edition News Update #2022-18

May 25, 2022



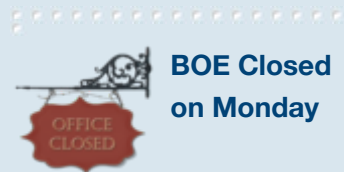
Updated Challenger Document

The Bureau of Elections' [Appointment, Rights and Duties of Election Challengers and Poll Watchers](#) document has been updated and is available on Michigan.gov/Elections. This document provides more detailed information for challengers, poll watchers, clerks, and election inspectors regarding the different types of challenges allowed and the steps to take when those challenges are made. It also provides guidance regarding challengers and poll watchers in Absent Voter Counting Boards. We will be printing the document in a booklet form for easier use in precincts. We will also add the booklets to the county order form in eLearning when they are available.

Additionally, we have provided a [Michigan Challenger Credential Card](#) on our website. Parties and credentialing organizations should ensure the credentials issued to their challengers substantially comply with this form.

In this issue:

- Updated Challenger Document
- BOE Closed on Monday
- Ballot Proof Approval for August 2, 2022 Primary Election
- QVF Software Updates
- Election Security
- Redistricting Status Update
- Election Geo and AV Impacts
- Polling Location Assignments
- Redistricting Module Retirement



BOE Closed on Monday

The Bureau of Elections will be closed on Monday, May 30 in observance of Memorial Day.

Ballot Proof Approval for



QVF Software Updates

- Mass AV now has an “Include: Perm Accessible” option to email the accessible app link to voters from QVF. Uncheck the voters for whom QVF does not have an email address on file before clicking “Send Accessible App”; an error message will show the voters who could not be emailed.
- Perm AV and Perm Accessible lists are now exclusive of one another. Uncheck one list to add a check to the other.
- AV Details & AV Scan now shows a secondary signature as well as the primary signature, when available.
- In AV Details, a ballot’s sent or received date can be edited without having to delete the ballot and re-enter with the corrected dates.
- In Voting History, changed the address to display “Legacy Address” for elections held prior to the launch of QVF Refresh



Election Security

Over the past few months many of our local clerks have received phishing emails from a malicious source. Fortunately, clerks have been diligent and able to identify these malicious emails, doing an excellent job of putting their election-security training to good use! It is critical to remain cyber-resilient. At the below link is a detailed infographic to assist with avoiding Phishing emails:

[How to avoid Phishing Emails](#)



August 2, 2022 Primary Election

If the Board of State Canvassers has certified the candidate list, the Bureau of Elections will accept ballots for conditional approval as to form for the August 2, 2022 election beginning on Tuesday, May 31, 2022. This is part of an effort to help counties, local jurisdictions and vendors have more lead time to have absent voter ballots available for voters starting 40 days before August 2. Ballot proofs should be submitted to Dave Tarrant at Tarrantd2@Michigan.gov. Please note that under the Michigan Constitution, the Michigan Legislature may add proposed constitutional amendments to the ballot as late as June 3. The BOE is not aware of any efforts to add constitutional amendments to the August ballot at this time but cannot guarantee that the Michigan Legislature will not do so. BOE approval of ballot format will therefore be conditional on no additional state-level measures being added to the ballot.

Once BOE approves the form of the ballot, it is imperative that county and local clerks employ a rigorous proofing process of the content of the ballot. That is especially important this year; while reprinting ballots because of errors is always problematic, it will likely be especially difficult and expensive this year because of shortages in paper supply. Important steps to take include:

- Counties and municipalities should establish points of contact and timelines for the review of ballots to ensure that every ballot style is reviewed by both the county and municipal clerk prior to printing.
- Counties should communicate with neighboring counties



Redistricting Status Update

All districts subject to redistricting in 2021 have been updated in QVF. This does not necessarily mean that every jurisdiction's redistricting is 100% complete at this time. Please review your jurisdiction's Street Index Report and Permanent Geography module to identify areas of concern and email questions to ElectionData@Michigan.gov. Redistricting-related questions should not be submitted through the standard "Street Change Requests" tool. The "Street Change Requests" tool is for new street segments, expanded house number ranges or school district assignment corrections. The Bureau will do its best to address these requests expeditiously as redistricting winds down.



Polling Location Assignments

Polling locations for the August Primary have been published to MVIC. Clerks should review precinct assignments in **both** the Precincts & Polling Locations and the Election Geography modules for accuracy. Any edits to polling locations moving forward for August and November will need to be committed in both modules of QVF. MVIC displays the polling location that is assigned in the Election Geography module.

- Lookup > Precincts and Polling Locations
- Elections > Election Geography

about any school district language in school districts that cross county lines.

- Carefully review your split precincts and any district numbers that have changed. Ensure you have accounted for all your ballot splits.
- Ensure all "vote for" numbers are correct.
- Make sure all local office partial terms are included on the ballot.



Election Geo & AV Impacts

The Bureau of Elections continues to review US Congressional, State House, State Senate, County Commissioner districts and precinct assignments, making corrections where necessary. During this time, changes may occur that impact your jurisdiction's election geography. Counting Boards and Ballot Style Aliases may be reset while making district corrections, so please be aware of the potential for these changes while processing absent voter ballot applications.



Redistricting Module Retirement

Clerk access to the Redistricting module will be removed soon. New requests can no longer be submitted through the module; however, any requests and files already submitted will be retained and accessed by Bureau staff.

Helpful Links



Questions? Please contact the Bureau of Elections at 1-800-292-5973 or elections@michigan.gov.

The Bureau of Elections News Update will always be sent to the Clerk and Deputy Clerk email accounts. If other election administrators would like to receive this newsletter as well use the Subscribe link below to have it sent directly to another email account.

It is recommended that you add misos@govsubscriptions.michigan.gov and MISOS@public.govdelivery.com to your safe senders list.



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EXHIBIT 2

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v.

Case No. 22-000162-MZ

JOCELYN BENSON,
in her official capacity as the duly elected
**SECRETARY OF STATE, and
JONATHAN BRATER,**
in his official capacity as the **DIRECTOR
OF THE MICHIGAN BUREAU OF
ELECTIONS,**

Hon. Brock A. Swartzle

Defendants.

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

Plaintiffs,

v.

Case No. 22-000164-MZ

JOCELYN BENSON,
in her official capacity as the duly elected
**SECRETARY OF STATE, and
JONATHAN BRATER,**
in his official capacity as **DIRECTOR OF
ELECTIONS,**

Hon. Brock A. Swartzle

Defendants.

ANN M. HOWARD, P.C.
Ann M. Howard (P49379)
26100 American Drive, #607

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General

Southfield, MI 48034
(248) 752-0650
ahoward@annhowardlaw.com
Attorneys for Plaintiffs in 22-162-MZ

DICKINSON WRIGHT, PLLC
Charles R. Spies (P83260)
Robert L. Avers (P75396)
Thomas F. Christian III (P83146)
350 S. Main, Ste. 300
Ann Arbor, MI 48104
(734) 623-1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com
Attorneys for Plaintiffs in 22-164-MZ

PO Box 30736
Lansing, Michigan 48909
(517) 335-7659
meingasth@michigan.gov
grille@michigan.gov
Attorneys for Defendants

MILLER, CANFIELD, PADDOCK AND
STONE, PLC
Scott R. Eldridge (P66452)
Scott R. Lesser (P72446)
Wendolyn Wrosch Richards (P67776)
One Michigan Ave., Suite 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com
lesser@millercanfield.com
richards@millercanfield.com
*Attorneys for Proposed Amicus Curiae
The Michigan Democratic Party*

AFFIDAVIT OF DAVID JAFFE

David Jaffe, being duly sworn, deposes and states as follows:

1. I am an adult of sound mind and have personal knowledge of the matters stated in this affidavit.
2. I am the volunteer team leader for the Democratic election challengers credentialed by the Michigan Democratic Party (the "MDP") at Huntington Place, known in August and November 2020 as TCF Center. I have been a volunteer team leader in three election cycles, and have served as an election challenger in at least six election cycles. I am also a licensed attorney in good standing in the State of Michigan.
3. I have been trained for my role as a volunteer team leader by the Michigan Democratic Party's Voter Protection Program.
4. In three election cycles, I have helped train election challengers before they were credentialed by the MDP, including by preparing and presenting training materials.

5. In the performance of my duties as a volunteer team leader for the Democratic election challengers, I have access to and knowledge of MDP's records from the Huntington Place/TCF Center location, and knowledge of its practices as described in this Affidavit. The following statements are based on my own personal knowledge and a review of the business records maintained by the MDP. Based on my review of those records, if called as a witness, I could testify competently to the truth of the matters set forth in this Affidavit.

6. During the November 2020 election, many MDP challengers, and I personally, witnessed many instances of MRP challengers and ostensibly independent challengers credentialed by the Election Integrity Fund ("EIF") issuing indiscriminate challenges, without good cause, and with the clear purpose of interfering with or unduly delaying the work of election inspectors. Because MRP and EIF challengers coordinated their efforts, I will refer to them together as "Republican challengers."

7. Based on my observations and those of other MDP challengers, which were documented with contemporaneous notes, I believe that many Republican challengers were not trained or were inadequately trained in their rights, duties, and restrictions, while others were unfamiliar with the election process more broadly. Exceptionally routine election activities, which had been done for decades without incident, were "challenged"—not because they were improper, but because the challengers did not understand what was happening.

8. To name a few examples, I or other MDP challengers at TCF Center witnessed the following in the November 2020:

- a. Republican challengers did not understand Michigan law and procedures for counting absentee ballots. They often claimed that election workers broke the

law or cheated when in fact things were being done correctly. For example, but without limitation:

- i. They believed that ballots that were returned without the secrecy sleeve were invalid. This is not Michigan law.
 - ii. They complained vociferously that voters' signatures were not being checked at TCF Center. But the law requires signatures to be checked at the Clerk's office before they are delivered to the AVCB.
 - iii. They were evidently not aware of what happens to a challenged ballot under the Michigan Election Law. Many Republican challengers mistakenly thought that a challenge meant that the ballot should be set aside and not counted. The law actually requires that the ballot number be noted, but that the ballot be counted. That way, if there is a court proceeding later, the judge can order that a challenged ballot be retrieved.
 - iv. They did not know that the election inspectors in the AVCB did not have access to Qualified Voter File. They did not know that the electronic list on the computer screens was an Electronic Poll Book.
 - v. They believed that there was a legal requirement that absentee ballots be recorded in the QVF by 9:00 pm on Election Day. There is no such rule.
- b. Republican challengers and their leaders aggressively and systematically violated the laws and rules that govern challengers. For example:
- i. Whenever an envelope contained a ballot that wasn't in a secrecy sleeve, a challenger "challenged" the ballot, and demanded that Election Inspectors stop and write down each challenge. But voters in Michigan are not required to use secrecy sleeves, and these ballots were perfectly legitimate. Election officials explained the law. Republican challengers continued these baseless challenges anyway.
 - ii. At one point a large group of Republican challengers huddled with some of their leaders. One of these leaders shouted, loud enough for several of our volunteers to hear, "You've got to be more aggressive." From that point onward, the shouting, the abuse and the disruption increased. Many Republican challengers began challenging every ballot and demanding that the election inspectors stop and write down the challenge. Our team never heard any challenger articulate a good reason to believe that the voter is not eligible to vote.
 - iii. Phones were allowed after the polls closed Tuesday evening, but filming and recording were not. The Republicans knew this rule and flouted it

intentionally and repeatedly. More than a few Republican challengers were caught filming; most were given warnings. But at least one flagrant repeat offender was escorted from the room by the Detroit Police.

- c. Republican challengers and their leaders aggressively harassed election workers and obstructed their work in an effort to disrupt and slow the count, and to make false claims of misconduct and fraud. For example, but without limitation:
- i. A female election inspector had a challenger snarl at her, out of the blue, “I’ll bet you aborted your babies!”
 - ii. Republican challengers repeatedly pressed in close to election workers and yelled accusations. Some came face to face with election inspectors and removed their masks to taunt the inspectors about COVID-19. I could see the fear on election workers’ faces, and saw more than one reduced to tears.
 - iii. Republican challengers repeatedly tried to stop the work at Counting Boards to interrogate each inspector about his or her party affiliation, falsely claiming – often by yelling -- that there has to be a Republican inspector at each counting Board. Supervisors repeatedly had to intervene to stop these improper challenges and the hostile and aggressive conduct of Republican challengers.
 - iv. At one point, after I intervened when a Republican challenger was aggressively shouting at an election supervisor, the challenger told me that he knows who I am, and that “we will be coming after you.”
 - v. One Republican challenger asked one of my colleagues, “do you want to get hurt?” It took the head of security and a Detroit Police captain to talk him down.

9. A limited number of Republican challengers appeared for the August 2021 primary (approximately eleven, credentialed by the Election Integrity Fund) and November 2021 general election (one Republican challenger, who arrived late and left early). The general approach of the approximately eleven Election Integrity Fund challengers was consistent with that during the November 2020 election, albeit at a smaller scale. For example, but sadly without limitation, I observed the following:

- a. Crowding of election inspectors, looking over their shoulders, and removing of masks, despite COVID-19 guidelines that applied to all. These are classic physical intimidation techniques; many election inspectors expressed objections and distress. Republican challengers claimed they had to stand close to see, and (often loudly) accused of election supervisors and security personnel of interfering with their rights when asked to step back or respect the physical space of election inspectors. Our challengers were able to see perfectly well from a distance.
- b. Even though a large monitor is provided for challengers, most Republican challengers insisted on crowding in on the election inspector operating the computer and leaning over that person to see the small screen. Republican challengers also crowded in on other election inspectors in a manner that was clearly intimidating
- c. Republican challengers intentionally asked the same question of many election inspectors across the counting room. They would gather in an aisle, often where other challengers were standing; a leader would assign a question or objection and instruct the challengers to ask it across the room. This was done quite openly, and our challengers were not eavesdropping; the instructions were loud enough for other people who were nearby to hear quite easily. On one of these occasions, the person giving instructions said words to the effect of “let’s see if we can get them to give different answers.”
- d. Republican challengers repeatedly asked individual election inspectors to explain their process in detail. These questions were often couched with an explanation

that the challenger was (purportedly) new and didn't understand. The many inspectors who tried to patiently explain what they were doing had to take time away from their work to do so. Once one explained, the Republican challengers repeated the requests and questions to different inspectors around the room.

- e. Republican challengers repeatedly asked whether Republican election inspectors were present at various locations and asked for the names of Republican election inspectors.
- f. One EIF challenger who was observing the adjudication stations pulled out her mobile phone at 1:50 pm and began texting. Security personnel told her that phone use was not permitted, and she claimed that she was a new challenger and did not know about the rule. The security personnel reminded her of the acknowledgement and oath she had signed when she entered, which expressly state that phones are not allowed.
- g. The one MRP-credentialed challenger who came at the General Election left before the polls closed (not permitted under the Michigan Election Law and based on the oath signed by challengers). He took photographs of the counting room (through the glass door) immediately after leaving. Security personnel were alerted, and insisted that he delete the photographs.

10. In May 2022, the Secretary of State published *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (the "Manual"). The MDP is registered to receive notifications available from the Secretary of State relating to elections, and received notice that the Manual had been issued on May 25, 2022.

11. After reviewing the Manual, the MDP made the minor updates necessary to its training protocols, then began training election challengers and poll watchers in advance of the August 2022 primary.

12. The MDP trained approximately thirty election challengers and poll watchers to work at the Detroit Absent Voter Counting Facility at Huntington Place for the August 2022 primary. The training was based on the Manual, as well as applicable statutes and the Election Officials' Manual promulgated by the Michigan Bureau of Elections.

13. Generally, challenger training for the August 2022 primary consisted of one training session of 1-1.5 hours, followed by a second 1-1.5 hour training session for the Detroit Absent Voter Counting Facility at Huntington Place.

14. The MDP's challengers at the Detroit Absent Voter Counting Facility at Huntington Place did not have any difficulty exercising all of their rights while abiding by the Manual in its entirety during the August 2022 primary.

15. In my view, the Manual's protocols helped improve the administration of the August 2022 primary. I observed challengers credentialed by Michigan Citizens for Election Integrity (MCEI) make challenges and ask questions without interference. However, some of these challengers behaved aggressively and harassed election inspectors and violated other rules. When they did so, they were admonished by election officials. I did not observe any interference by election officials with proper challenger conduct.

FURTHER AFFIANT SAYETH NOT.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Executed this October 11, 2022

DJ D
Name: David Jaffe

Subscribed and sworn to before me
this 11 day of October, 2022.

Michelle Temby
Notary Public,
Michelle Temby
My Commission Expires: 1-25-2025

MICHELLE TEMBY
NOTARY PUBLIC - MICHIGAN
MACOMB COUNTY
ACTING IN THE COUNTY OF Oakland
MY COMMISSION EXPIRES 01/25/2025

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EXHIBIT 3

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STATE OF MICHIGAN

OFFICE OF THE ATTORNEY GENERAL

IN THE MATTERS OF:

Matthew DePerno

Stefanie Lambert Juntilla

Daire Rendon

Ann Howard

Ben Cotton

Jeff Lenberg

Douglas Logan

James Penrose

Dar Leaf

**PETITION FOR APPOINTMENT
OF SPECIAL PROSECUTOR**

NOW COMES Dana Nessel, Attorney General for the State of Michigan, and petitions the Prosecuting Attorneys Coordinating Council (PACC) for the appointment of a Special Prosecuting Attorney for the following reasons:

1. The Michigan State Police and the Michigan Department of Attorney General (MDAG) are jointly investigating a conspiracy to unlawfully obtain access to voting machines used in the 2020 General Election.
2. The Michigan State Police and the special agents with the MDAG have completed a preliminary review and it is now time for a prosecutorial review for charges that include but are not limited to Conspiracy, MCL 750.157a; Using a Computer System to Commit a Crime, MCL 752.796; Willfully Damaging a Voting Machine, MCL 168.932(b); Malicious Destruction of Property, MCL 750.377a; Fraudulent Access to a Computer or Computer System, MCL 752.795a; and False Pretenses, MCL 750.218.

3. On February 10, 2022, Michigan Secretary of State Jocelyn Benson requested the MDAG and MSP investigate third party access to vote tabulators, components and technology in Roscommon, Michigan. That investigation has now been presented to the Criminal Trials and Appeals Division seeking approval for criminal charges against the above listed individuals.
4. It is alleged that DePerno, Lambert Juntilla and Rendon orchestrated a coordinated plan to gain access to voting tabulators that had been used in Roscommon County and Richfield Township (Roscommon County), Irving Township (Barry County) and Lake City Township (Missaukee County). In Roscommon County the clerk stated she was told by Rep Rendon that the House of Representatives was conducting an investigation in election fraud.
5. All 5 tabulators were taken to hotels and/or AIRBNB's in Oakland County where Lenberg, Cotton, Penrose and Logan broke into the tabulators and performed "tests" on the equipment. It was determined during the investigation that DePerno was present at a hotel room during such "testing."
6. Howard coordinated printing of fake ballots to be run through the tabulators and recruitment of "volunteers."
7. Irving Township Clerk Sharon Olson indicated that she was asked by Barry County Sheriff Dar Leaf to cooperate with investigators regarding an election fraud investigation. Subsequent to this conversation, Olson turned over her tabulator to a third party.
8. When this investigation began there was not a conflict of interest. However, during the course of the investigation, facts were developed that DePerno was one of the prime instigators of the conspiracy.

9. DePerno is now the presumptive Republican nominee for Attorney General.
10. A conflict arises when “the prosecuting attorney has a personal interest (financial or emotional) in the litigation.” *People v Doyle*, 159 Mich App 632 (1987).
11. It is hereby understood and agreed that pursuant to the provisions of MCL 49.160, if any Special Prosecutor appointed pursuant to this petition shall handle any matter on behalf of the petitioner, all costs of prosecution, other than personnel costs, shall be borne by the Michigan Department of Attorney General, who has been determined disqualified or otherwise unable to serve.

WHEREFORE, your Petitioner prays:

- A. That a Special Prosecuting Attorney be appointed in this matter to review the charging request and handle any prosecution that may result against DePerno, Lambert Juntilla, Rendon, Howard, Cotton, Lenberg, Logan, Penrose and Leaf.
- B. For any additional relief that law and justice may require.

Dated: August 5, 2022



Danielle Hagaman-Clark (P63017)
Division Chief
Criminal Trials and Appeals Division
Michigan Department of Attorney General