STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT

KRISTINA KARAMO; PHILIP O'HALLORAN, MD; BRADEN GIACOBAZZI; TIMOTHY MAHONEY; KRISTIE WALLS; PATRICIA FARMER; and ELECTION INTEGRITY FUND AND FORCE, a Michigan non-profit corporation,

Plaintiffs,

v

JANICE WINFREY, in her official capacity as Detroit City Clerk; and CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

Defendants.

Case No. 22-012759-AW

Hon. Timothy M. Kenny

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DEFENDANT JANICE WINFREY'S POST-HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs come before this Court seeking extraordinary relief. Though Plaintiffs' counsel have continued to obfuscate (even during closing argument) regarding the specific remedy sought, Defendant Janice Winfrey, in her official capacity as Detroit City Clerk (the "City Clerk") can only take Plaintiffs' pleadings at their words: "Plaintiffs request the Court order Detroit to (1) halt the use of absentee ballots that are obtained without identification, (3) [sic] halt the counting of ballots cast through drop boxes that are not effectively monitored; and (3) distribute the ballots to the precincts to use equipment and procedures that are as near as possible as the in-person process and in compliance of law." Complaint ¶ 133. In short, Plaintiffs seek to disenfranchise as many as 60,000 Detroit voters who have already cast absentee ballots in the November 2022 general election.

Based on what evidence do Plaintiffs claim they are entitled to such an injunction? Only the testimony of former Michigan Director of Elections Christopher Thomas and former Detroit Department of Elections Director Daniel Baxter—advisors to the City Clerk—that *Detroit's election procedures are in compliance with the law*. Plaintiffs have presented zero evidence to the contrary: No exhibits. No affidavits. No testimony. Indeed, Plaintiffs did not even verify their complaint. They have failed to present a case that the City Clerk's election operations and processing of absentee ballots for the 2022 general election are in violation of any law, or are in any way improper, notwithstanding this Court's affording Plaintiffs the opportunity to present evidence at a full and fair evidentiary hearing. Instead, Plaintiffs have offered preposterous conspiracy theories. They have misrepresented evidence to this Court. To say their case is based on speculation and innuendo gives speculation and innuendo a bad name.

The law sets forth a clearly defined and well established test to determine whether a party is entitled to injunctive relief. Plaintiffs carry the burden of establishing (1) that they are likely to succeed on the merits of their case; (2) that they will suffer irreparable harm in the absence of an injunction; (3) that the harm suffered by Plaintiffs absent an injunction would outweigh the harm to Defendant should the injunction issue; and (4) that the injunction is in the public interest. Plaintiffs have failed to establish each and every one of these factors. As the evidence presented to this Court has made abundantly clear, Plaintiffs have no likelihood of succeeding on the merits—they have marshalled no evidence to support any of their numerous and sundry claims. Plaintiffs have failed to establish that they will suffer any harm—let alone *irreparable* harm—without an injunction. And crucially, all of the evidence presented to this Court shows that the harm an injunction would cause—both to the City Clerk in administering the election and to the people of Detroit in exercising their franchise—far outweighs any harm (*i.e.* none) incurred by Plaintiffs absent an injunction.

Regardless of its weak underpinnings, Plaintiffs' entire case should be dismissed under the doctrine of laches, which alone is a sufficient ground for deciding this case against Plaintiffs. Black letter Michigan law states that "[i]n all civil actions brought in any circuit court of this state affecting elections, dates of elections, candidates, qualifications of candidates, ballots or questions of ballots, 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. Plaintiffs filed this case thirteen days before the general election. Notwithstanding ample opportunity to do so, Plaintiffs have offered no proofs to rebut the presumption. Any excuse proffered by Plaintiffs for their delay in commencing this lawsuit (such as purportedly learning of a non-existent training video created by the City Clerk just weeks ago) has been proven false by the record. Plaintiffs filed this lawsuit at

the eleventh hour not only seeking to disenfranchise Detroit voters, but to sow confusion and instigate chaos. Plaintiffs' bad faith efforts should neither be rewarded nor tolerated. Plaintiffs should be sanctioned, and the entire case should be dismissed with prejudice.

Almost every claim these Plaintiffs bring against the Detroit City Clerk would apply equally to many, if not all, cities in this state. But, Plaintiffs and their lawyers—hailing from Emmet County, Ionia County, Macomb County, Oakland County and Romulus—choose to sue only Detroit, justifying their focus on Detroit with unsupported accusations of "corruption" and the City's "national reputation." But there is no denying the intended disparate impact of their litigation strategy, when the only city targeted for disenfranchisement is home to the largest African-American population in the State of Michigan. This Court should review this motion in the context in which it is offered—it is a bold attempt to silence the votes of tens of thousands of African-American voters. Using laws and procedures commonly implemented across the State to target the voters of the City of Detroit—and only the City of Detroit—is racism at its worst. It cannot be tolerated by this Court.

ARGUMENT

I. Plaintiffs' Case is Barred by Laches.

As the United States Supreme Court has held, when an election is "imminen[t]" and when there is "inadequate time to resolve the factual disputes" and legal disputes, the Court will generally decline to grant an injunction to alter a State's established election procedures. *Purcell v Gonzalez*, 549 US 1, 5-6; 127 S Ct 5 (2006) (per curiam). "That is especially true when a plaintiff has unreasonably delayed bringing his claim." *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016). Justice Kavanaugh has noted that the Supreme Court's "precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled

. . . For those reasons, among others, this Court has regularly cautioned that . . . last-minute interference with state election laws is ordinarily inappropriate." *Democratic Nat'l Committee v Wisconsin State Legislature*, 141 S Ct 28, 31 (Mem) (2020) (Kavanaugh, J. Concurring).

The same result is compelled by Michigan case law. Laches applies "to cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005). Laches is particularly applicable in election matters. See *New Democratic Coalition v Austin*, 41 Mich App 343, 356-57; 200 NW2d 749 (1972). Here, the City Clerk is indisputably prejudiced by Plaintiffs' delay. Were the Court to grant the relief sought by Plaintiffs only days before the 2022 general election, it would cause chaos on election day and would likely result in the effective disenfranchisement of tens of thousands of Detroit voters. Furthermore, MCL 691.1031 imposes a rebuttable presumption that laches applies where an action affecting elections is filed within 28 days of an election. Plaintiffs produced absolutely no evidence to support a claim that the rebuttable presumption is overcome here.

Plaintiffs' inexcusable delay in filing this lawsuit bars their request for equitable relief and indeed, warrants dismissal of the entire case. Plaintiffs did not file this lawsuit after they supposedly witnessed violations of Michigan Election law by the City Clerk during the August 2, 2022 primary. Plaintiffs did not file this lawsuit seeking to invalidate certain procedures regarding absentee ballots by September 29, 2022, when absent voting began for the 2022 general election. Instead, they waited until *just thirteen days* before the election to file. And, when they did file the case, Plaintiffs made no effort to serve the City Clerk.[1] Instead, they filed a baseless

[1] Plaintiffs' counsel offered the explanation on the record that she saw no need to serve Defendants, because the City Clerk filed a response to Plaintiffs' Motion to Disqualify the Third Judicial Circuit Bench. But the City Clerk filed that response at 4:20 p.m. on Friday, October 28, after learning

Disqualification Motion—a motion that Plaintiffs ultimately withdrew, having no support in fact or law—that, nonetheless, this Court was required to consider as a preliminary matter, wasting five additional days.

One may wonder whether there were extenuating circumstances that made it impossible for Plaintiffs to file sooner. But there is no evidence of that. Plaintiffs offered several inconsistent explanations for their late filing. In the brief in support of this Motion, Plaintiffs stated: "[i]t only became apparent about one week ago when the Detroit clerk, during its training of election staff, indicated that the same violations of the law would be used in the 2022 General Midterm Election." Pls' Br at 3. Then, at the October 31, 2022 hearing on Plaintiffs' Motion to Disqualify, Plaintiffs' counsel doubled-down on this excuse, advising this Court that "the Detroit Clerk, approximately a week before our filing issues a training video that leaks into my hands and which they call me out . . ." and then stated "that relates to the timing."

What happened to that training video? Counsel promised to produce it on multiple occasions, but it never resurfaced. As late as November 1, when Plaintiffs provided their "Restatement of Relief Requested with Supporting Statements," Plaintiffs promised: "Plaintiff will produce the training video for November 2022." "Restatement" at 4. But the video never surfaced, because it did not exist. Instead, after promising repeatedly that the video would be forthcoming, at the November 2, 2022 status conference, Plaintiffs' counsel admitted that this "training video" had, in fact, been produced by an organization affiliated with the Democratic Party and not by the

about the lawsuit via a paid subscription service listing Wayne County Circuit Court filings. Plaintiffs filed the lawsuit on Wednesday, October 26. This Court had already scheduled a hearing on the Motion for Disqualification for Monday, October 31, at 12:00 p.m. Plaintiffs' counsel stated—on the record—that she planned to serve the City Clerk, but saw no need since Defendant responded to the Disqualification Motion. It strains credulity to imagine when, exactly, between 4:20 p.m. on Friday, and a hearing set for noon on the following Monday, counsel planned to effectuate service on Defendant.

City Clerk. Plaintiffs' argument that they did not learn of supposed violations of election law by the City Clerk until they received a video produced by a party organization with no connection to the City Clerk is nonsensical. No evidence has been presented by Plaintiffs to show that the City Clerk took some action just a week before their filing that prompted them to act: No action by the City Clerk. No change in policy. No publication. Nothing.

This unwarranted delay has resulted in significant prejudice to the City Clerk. The relief sought by Plaintiffs would radically alter the conduct of the election in Detroit when preprocessing of absentee ballots is set to begin on Sunday, November 6—less than 48 hours from the filing of this brief. As recently noted by Justice Bernstein in a similar election case, "it is impractical to think that new training [regarding election procedures] could be both developed and take place the week before the election…even if we assume this is a logistically achievable task within the time frame before us." *O'Halloran v Secretary of State*, memorandum opinion of the Supreme Court, issued November 3, 2022 (Docket No. 164955), at p 3 (Bernstein, J., Concurring) (attached as Exhibit A).

The law is unequivocal that laches should bar such a lawsuit. In *Cavanagh v Wayne County Election Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued July 31, 2014 (Docket No. 322892) 2014 WL 3795255 (attached as Exhibit B), the Court of Appeals held that MCL 691.1031 barred a plaintiff's election challenge where plaintiff's only argument for rebutting the presumption of laches was that he was personally unaware of publicly available information until shortly before the election. The same analysis applies here. The statutes Plaintiffs rely on have been in effect, and any supposed violations of the statutes by the City Clerk would have been apparent, during the August 2, 2022 primary. Nor can Plaintiffs rely on the fact that they raised similar issues by submitting election challenges during the August 2, 2022 primary. The doctrine

of laches does not address whether a plaintiff makes some attempt to address their grievance; it addresses whether there has been an unreasonable delay in commencing a legal action. See *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996).

The Sixth Circuit Court of Appeals' reasoning in *Crookston v Johnson*, 841 F3d 396, 399 (CA 6, 2016) is compelling and should guide this Court's decision. In *Crookston*, Plaintiff sought a preliminary injunction—on September 26, 2016—to prevent the State from enforcing Michigan law in the upcoming November election regarding an issue concerning voter privacy. The Court of Appeals wrote: "Timing is everything . . . . With just ten days before the November 2016 election, . . . we will not accept his invitation to suddenly alter Michigan's venerable voting protocols, especially when he could have filed this lawsuit long ago." Id. at 398. For the same reasons, this Court should deny Plaintiffs' requested relief. As the *Crookston* court held: "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. No such reason appears here." Id. Plaintiffs have failed to carry their burden of rebutting the presumption of laches codified in MCL 691.1031; their claims for equitable relief should be denied, and the lawsuit should be dismissed in its entirety.

II. Plaintiffs are Not Entitled to Injunctive Relief.

In order for this Court to grant the extraordinary relief requested, Plaintiffs have the burden of showing that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm in the absence of an injunction; (3) the harm to Plaintiffs absent an injunction outweighs the harm it would cause to Defendants, and (4) that issuance of an injunction is in the public interest. *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). Plaintiffs have failed to establish any one of these factors.

a. Plaintiffs are Not Likely to Prevail on the Merits

Plaintiffs structure their Motion for Preliminary Injunction—as "clarified" in their "Restatement of Relief Requested With Supporting Statements"—among twelve topics. For simplicity, Defendant responds to each of these twelve issues in turn. Plaintiffs have presented no evidence, and offer no compelling legal analysis, for why the City Clerk's 2022 general election operations, including processing of absentee ballots, fail to comply with Michigan Election law concerning any of these twelve topics.

i. Signature Comparison Standard

Plaintiffs assert that the City Clerk violated the law because the Secretary of State did not promulgate a rule to guide the comparison of signatures on absentee ballots and ballot applications and therefore there is "no ability to fulfil the requirements for signature comparison pursuant to MCL 168.761(2)." (Mot. at ¶ 2(i)). First, absolutely nothing about this issue is unique to the City of Detroit. It is troubling that Plaintiffs make this claim—that would apply equally to every jurisdiction in Michigan—in a lawsuit attacking only the Detroit City Clerk, especially where only one of the seven named plaintiffs is a resident of Detroit.

Plaintiffs' assertion notwithstanding, the uncontroverted evidence in the record, as testified to by Christopher Thomas, is that there is no statutory requirement that the Secretary of State issue a rule creating standards for signature comparison. Both Mr. Thomas and Mr. Baxter testified that the City Clerk does not rely on a presumption of validity in examining voters' signatures. All of the evidence introduced at the hearing described a perfectly normal procedure for signature verification, which is used all around the state.

ii. Drop Boxes

Plaintiffs produced absolutely no evidence in support of their claim that ballots returned to drop boxes in the City of Detroit are somehow invalid because of "the failure to provide cameras

as required by law." (Mot. ¶2(ii)). As Daniel Baxter testified, every single ballot drop box in the City of Detroit is monitored by video and the video recordings are preserved for at least 30 days, in full compliance with MCL 168.761d(2)(c).

iii. Signature Comparison Process

Plaintiffs claim that signature verification for returned absentee ballots must be performed at precincts by the "board of election inspectors" was refuted by Mr. Thomas, who testified that MCL 168.765a(6) authorizes the City Clerk to verify signatures as absentee ballots are received. Indeed, Plaintiffs themselves were aware that MCL 168.765a(6) authorizes the process used by the City Clerk: Plaintiffs allege in their Complaint that MCL 168.765a(6) authorizes a clerk to verify signatures and mark or stamp the absentee ballot envelop before the ballot is sent to an absent voter counting board ("AVCB"). Compl. ¶¶ 55(a-b). Plaintiffs then inexplicably claim it is a violation of the law for the City Clerk to follow that procedure. As Mr. Thomas testified, the fact that MCL 168.765a(6) refers to MCL 168.766, which describes the process for signature comparison by a board of election inspectors at a polling place—not an AVCB—is to provide guidance to clerks regarding the signature verification process. Accepting Plaintiffs' theory that section 766 bars a clerk from performing signature comparison would render section 765a nugatory and would prevent absent voters from having the opportunity to cure their ballot, as signature comparison could not be done until Election Day. Plaintiffs' interpretation of the statute is simply implausible.

Plaintiffs also claimed that the City Clerk was using the Relia-vote system to unlawfully compare signatures using "artificial intelligence." Compl. ¶ 51(a). Mr. Baxter and Mr. Thomas testified that the Relia-vote system simply displays images of voters' signatures—one from the

absentee voter envelope and one from the qualified voter file ("QVF") to facilitate comparison by the Clerk's office.

iv. Failure to Reject Ballots

Plaintiffs' claim that the City Clerk was failing to reject ballots as required by MCL 168.767 is unsupported by any evidence. To the contrary, Mr. Baxter testified that hundreds of ballots have been rejected during previous election cycles for various deficiencies. During the evidentiary hearing, Plaintiffs' counsel claimed that he had mistakenly referred to section 767 on this point instead of MCL 168.797a.[2] Even if accepted at face value, this argument makes no sense: Section 797a relates to in-person voting at a precinct. The first subsection of section 797a refers to instruction that must be offered to a voter "[b]efore entering the voting station." Plaintiffs' claim on this point fails.

v. Posting of Absentee Ballot Information

Plaintiffs' claim that the City Clerk did not intend to post certain information about absentee ballots on Election Day in violation of MCL 168.765(5) is unsupportable. Plaintiffs cannot claim they are entitled to a preliminary injunction based on speculation about what might occur in the future. *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974).

vi. Rejection of Non-Matching Ballots

Plaintiffs claim that the City Clerk violated the law by allowing absentee ballots with ballot numbers that do not match the number mailed by the Clerk to be processed and "comingled." Mot. ¶ 2(vi). Plaintiffs never offered any explanation as to how this allegation would amount to a

[2] Plaintiffs' counsel's explanation that he had transposed the statutory citation while preparing the Restatement of Relief Requested in a rush is belied by the pleadings: Plaintiffs' referred to section 767 on the same point in the Motion for Preliminary Injunction. Mot. ¶ 2(iv). And, in fact, they referred to the same section of the statute in their Complaint, which includes a quotation of the entirety of section 767. Compl. ¶ 48.

violation of MCL 168.765(6), which requires only that a clerk's office verify the numbers, even if true. Mr. Thomas testified that when a ballot with a non-matching number is received, it is marked as a challenged ballot—not "comingled"—creating a clear audit trail in the event of a recount.

vii. Ballot Duplication

Christopher Thomas testified that the duplication of ballots is a well-established procedure authorized by statute. As Mr. Thomas explained, some ballots cannot be counted by the tabulator, so they are duplicated in a simple, non-controversial process, with Democratic and Republican representatives present, as well as election challengers. Mr. Thomas testified about the example of overseas military ballots, which are not cast on standard ballots and must, therefore, be duplicated to be tabulated. And in the event of a recount, the original paper ballots are maintained.

Further, this Court should be clear about the relief Plaintiffs are requesting concerning this issue. Plaintiffs demand that all absentee ballots for Detroit voters must be requested in person at the Clerk's office. This would *necessarily* disenfranchise members of the military stationed overseas, or anywhere distant from Detroit. Had Plaintiffs conducted any due diligence into voting procedures for overseas and military ballots, they would have discovered that those votes are not cast on standard ballots, so a conversion is necessary for tabulation. But there is absolutely nothing nefarious, or improper, about duplicating a ballot this way.

viii. High Speed Tabulators

Plaintiffs' claim that the City Clerk's use of high speed tabulators to count votes is not a uniform procedure with the rest of the state, and that those tabulators are not properly certified, was rebutted by the testimony of Mr. Thomas and Mr. Baxter. Mr. Thomas and Mr. Baxter both testified that the scanners had been approved by the Board of State Canvassers. And as Mr. Thomas explained, there is nothing novel about the system used in Detroit—the same high speed tabulating

equipment is used in Grand Rapids, Lansing, Farmington Hill, Rochester Hills, and Oakland County. Further, Mr. Thomas' sworn testimony directly contradicted the unsupported assertion made *twice* by Plaintiffs' counsel that a board of election inspectors verifies signatures in Ann Arbor. Just as in Detroit, the Ann Arbor Clerk checks signatures.

Plaintiffs' argument on this point also has no basis in the election code. Plaintiffs cite MCL 168.765a(8) for the proposition that "[t]he requirement is that the AVCB is to process ballots in nearly the same manner as in person." Mot. ¶ 2(viii). However, section 765a(8) clearly distinguishes between the processing of ballots, which it requires to be done "in as nearly as possible the same manner as ballots are processed in paper ballot precincts," and the tabulation of ballots, to which no such requirement applies.

ix. Preservation of Ballot Images

Plaintiffs' claim that high speed scanners "create a ballot image that is altered by the adjudication process," ("Restatement" at 6), is flat out wrong. Mr. Thomas testified that while a new image might be created, the original image is preserved. Furthermore, in the event of a recount, the original paper ballots would be used, obviating any harm to Plaintiffs caused by this supposed violation of the law.

x. Adjudication Procedure

Plaintiffs' claim that all ballot adjudication is "completely unauthorized by law" is without merit. Mot. ¶ 2(x). As Mr. Thomas testified, ballot adjudication is clearly authorized by MCL 168.803. The evidence introduced at the hearing established that ballots with apparent over-votes, no-votes, and ballots with write-in votes are rejected by the tabulator, so that they can be closely reviewed in what is generally a non-controversial process involving both Democratic and Republican inspectors. In her closing argument, Plaintiffs' Counsel completely misconstrued Mr.

Thomas' testimony, suggesting that this process constitutes "manipulation" of the ballot. To the contrary, Mr. Thomas testified that the removal of a stray mark that caused a ballot to be rejected by a tabulator is not a "determination of a voter's intent"—it is a determination as to whether a mark is an intentional vote or a stray mark, the very process that section 803 authorizes.

xi. Requirement that Ballots be Rejected

As explained by Mr. Thomas, Plaintiffs' claim that MCL 168.792(2) requires the rejection, not adjudication, of an overvoted ballot is based on a misunderstanding of the law. Mr. Thomas testified that section 792 sets standards for the programming of tabulators. Mr. Thomas explained that tabulators must be programmed to reject overvoted ballots to prevent the recording of invalid votes and to facilitate adjudication. When a ballot is rejected by a tabulator, as required under section 792, it then must be adjudicated under MCL 168.803 to determine if the rejection was caused by an actual overvote (in which case the ballot is not counted), or by a stray mark. Contrary to Plaintiffs' misreading of the statute, the requirement that tabulators be programmed to "reject a ballot" under certain circumstances was not intended to disenfranchise voters; it was intended to give voters a second chance to correct their ballot at a precinct and, similarly, it provides an opportunity for the ballot to be reviewed in the adjudication process.

xii. Access to the "Platform"

Plaintiffs' claim that they are entitled to access the "platform" at Huntington Place is wholly unsupported by law. Mr. Thomas testified that the raised platform at Huntington Place is essentially a computer room where counts from the high speed scanners are received and stored in servers. The platform is a safe place for the servers, and it is a place where Mr. Thomas and Mr. Baxter can oversee the room and make announcements.

Plaintiffs assert that they are entitled to access the platform under MCL 168.733, but nothing in that statute supports the right of Plaintiffs to access a technical area where no processing or tabulation of ballots is occurring. While the counts from the tabulators are stored in the servers on the platform, the transmission and storage of such counts is not physically observable. Mr. Thomas testified that the platform is small and cramped even when occupied by only a few people. And crucially, the presence of election challengers on the platform, where the servers are located, presents a serious—and wholly unnecessary—security risk.

b. Plaintiffs have Not Demonstrate Irreparable Harm

A showing of irreparable harm is "an indispensable requirement for a preliminary injunction." *Michigan AFSCME Council 25 v Woodhaven-Brownstone School Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011). This requires a particularized showing of irreparable harm. Id. "[I]t is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974). The injury is evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief. *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 167; 365 NW2d 93 (1984).

Here, Plaintiffs have failed to show that they will suffer irreparable harm without an injunction. Even if Plaintiffs were to establish (and to be perfectly clear, they have not) that the City Clerk's election operations for the 2022 general election were not fully in compliance with the law, Mr. Thomas' and Mr. Baxter's testimony establishes that all paper ballots voted in the election are retained in sealed ballot containers, and any recount would be conducted using the paper ballots. But having failed to make a *prima facie* case for non-compliance with the law, or indeed, to offer any evidence whatsoever that the City Clerk's 2020 general election procedures

are improper, Plaintiffs have failed to establish that they are being harmed at all, let alone *irreparably*. Plaintiffs were afforded every opportunity by this Court to show that the City Clerk's procedures for the 2022 general election are unlawful, resulting in some harm to Plaintiffs. They offered none. Neither Mr. Thomas' nor Mr. Baxter's testimony suggested Plaintiffs would be harmed. And Plaintiffs have offered no other evidence at all in these proceedings.

The law requires that Plaintiffs make a particularized showing of irreparable harm. That showing cannot be based on "mere apprehension of future injury or where the threatened injury is speculative or conjectural," *Dunlap*, 54 Mich App at 403. Having made no such showing here, this factor unequivocally weighs against this Court's issuing an injunction.

c. The Harm to Defendant Outweighs any Harm to Plaintiffs

The record is clear that the City Clerk has been working for months to assure a successful election in the City of Detroit. More than 1,200 election inspectors have been trained, and preprocessing is scheduled to begin Sunday morning, at 10:00 a.m. Any Order requiring retraining of those inspectors and other City Clerk employees would be devastating and would far outweigh any theoretical harm claimed by Plaintiffs. Preprocessing would be impossible, and it is hard to imagine how the City Clerk could effectively manage operations at the absent voter counting boards, while undertaking additional mandated tasks.

d. The Public Interest does Not Support an Injunction.

The public interest strongly favors holding orderly elections. A "belated challenge to Michigan's election procedures prejudices the State's interest in holding orderly elections." *Crookston v Johnson*, 841 F3d 396, 399 (CA 6, 2016). "The state has a compelling interest in the orderly process of elections." *New Democratic Coalition v Austin*, 41 Mich App 343, 356-57 (1972).

More than any other factor, the harm to the public interest weighs against issuing an injunction. While it is not clear what remedy Plaintiffs seek, their pleadings have called for various forms of injunctive relief most of which threaten the disenfranchisement of as many as 60,000 Detroiters—people who followed the laws and rules dictating how they could cast their absentee ballots. The awesome powers of this Court to render pre-judgment relief must always be wielded in ways to advance the common good. Certainly an Order of any kind that interferes with the ability of Detroit citizens to exercise their right to vote absentee—a right enshrined in the Constitution of the State of Michigan—would set back generations of progress and cause untold harm to our City and our State.

Nor should this Court take any action that contributes to the false perception that the City of Detroit is somehow "corrupt" and cannot be trusted to conduct a free, fair and secure election. The irony of Plaintiffs claiming to sue the City of Detroit because of its "reputation," while broadcasting false allegations that would tarnish that reputation need not be ignored by this Court. Any injunctive relief against the City would validate the false narratives leveled against Detroit and its citizens. With no evidence and without a legal leg to stand on, Plaintiffs ask this Court to cause harm that might never be undone.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied, and costs and attorneys' fees should be awarded to Defendant Janice Winfrey.

Respectfully submitted,

November 4, 2022

FINK BRESSACK

By: */s/ David H. Fink*

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the MiFILE system, which served a copy on all counsel of record registered for efiling in this matter.

/s/ Philip D.W. Miller
Philip D.W. Miller

Exhibit A

2022 WL 16703203
Only the Westlaw citation is currently available.
Supreme Court of Michigan.

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER, Plaintiffs-Appellees,
v.
SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS, Defendants-Appellants.

SC: 164955
|
November 3, 2022

COA: 363503

Ct of Claims: 22-000162-MZ

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

Order

Bridget M. McCormack, Chief Justice

***1** 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).]

***2** 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 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.

***3** 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).

***4** 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 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]

***5** 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 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 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.

***6** 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, 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."

***7** 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]

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.)

***8** 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* (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]

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]

***9** 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 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.

***10** 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 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

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.

***11** 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).

***12** 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.

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*.

***13** 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.

***14** 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.

***15** 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.

***16** 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]

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.

***17** 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 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 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.

***18** 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.

All Citations

--- N.W.2d ----, 2022 WL 16703203 (Mem)

Footnotes

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 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.

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

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 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.").

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.

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).

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").

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.

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.

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=9620 0bfb95184c9b91d5b1779d08cb1b&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=dca6cfa2f9dd 422a8444825a521324b8&hash=E80A0F3EDFF7F288B13ECA626E380237> (accessed November 2, 2022) [https://perma.cc/F3RB-9ME5].

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

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).

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.

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.

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.

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.

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/morethan-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-thenation-transcript-09-04-2022/> (accessed November 2, 2022) [https://perma.cc/T5X7-L8HT].

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].

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Exhibit B

2014 WL 3795255
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Philip M. CAVANAGH, Plaintiff–Appellant,
v.
WAYNE COUNTY ELECTION COMMISSION, Wayne County Board of Canvassers, and Cathy M. Garrett, in her official capacity as Wayne County Clerk, Defendants–Appellees,
and
Warren C. Evans, Intervening Defendant–Appellee.

Docket No. 322892.
|
July 31, 2014.

Wayne Circuit Court; LC No. 14–009568–AW.

Before: MURRAY, P.J., and WILDER and FORT HOOD, JJ.

Opinion

PER CURIAM.

***1** Plaintiff Philip M. Cavanagh has filed an appeal of right from the final order of the trial court dismissing his challenge, filed July 25, 2014, to the qualifications of Intervening Defendant Warren C. Evans to be a candidate for Wayne County Executive on the August 5, 2014 primary ballot. Plaintiff requested an expedited decision on his appeal, a request with which Evans has concurred. Both that request, as well as the motion for immediate consideration, have been granted. [1]

One of several problems to this challenge, as the trial court held, is that the complaint was filed less than 28 days prior to the primary, so a rebuttable statutory presumption exists that laches [2] bars the challenge. MCL 691.1031. Plaintiff's sole explanation for bringing this action so close to the actual election—that *he* did not know the alleged facts about Evan's residency until late July—is insufficient to overcome this important statutory presumption, particularly in light of the fact that Evan's Affidavit of Identity stating Evan's residence address was filed on April 21, 2014. The trial court did not clearly err in holding that plaintiff's challenge was barred by laches. *Wayne Co. v. Wayne Co. Retirement Comm.*, 267 Mich.App 230, 252; 704 NW2d 117 (2005).

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 3795255

Footnotes

1 See *Cavanagh v. Wayne Co. Election Comm.*, unpublished order of the Court of Appeals, entered July 31, 2014 (Docket No. 322892).

2 Laches is an equitable remedy that generally precludes a party from asserting a right when the delay in bringing the action causes prejudice to an opposing party. *Wayne Co. v. Wayne Co. Retirement Comm.*, 267 Mich.App 230, 252; 704 NW2d 117 (2005).