STATE OF MICHIGAN
COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.

No. 22-000162-MZ

HON. BROCK A. SWARTZLE

DEFENDANTS' 10/11/2022 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(4), (8) AND (10)

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

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

Defendants.

No. 22-000164-MZ

HON. BROCK A. SWARTZLE

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DEFENDANTS' 10/11/2022 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(4), (8) AND (10)

Defendants move under MCR 2.116(C)(4), (8) and (10) for the dismissal of Plaintiffs' complaints on the grounds that the Court lacks jurisdiction, the claims are barred by laches, and the claims fail as a matter of law for the reasons stated in the accompanying brief, together with any other relief that the Court determines to be appropriate under the circumstances.

RELIEF REQUESTED

For the reasons stated more fully in the accompanying brief, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Honorable Court grant their motion for summary disposition and dismiss Plaintiffs' complaints in their entirety.

Respectfully submitted,

/s/Erik A. Grill
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Dated: October 11, 2022

PROOF OF SERVICE

Erik A. Grill certifies that on October 11, 2022, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Erik A. Grill
Erik A. Grill

STATE OF MICHIGAN
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HON. BROCK A. SWARTZLE

DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S RESPONSE TO ORDER TO SHOW CAUSE AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

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

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DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S RESPONSE TO ORDER TO SHOW CAUSE AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF FACTS

Pursuant to the Court's order, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater submit the instant response to the Court's order to show cause and in support of Defendants' motion for summary disposition.

A. History of the Challenger Guidance and Instructions

There have been several iterations of guidance and instructions issued by the Bureau of Elections concerning election challengers over at least the past 20 years. The Department first issued guidance on election challengers in 2003 or earlier. (DeVisser Compl, Ex A, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," September 2003). The Bureau revised its guidance multiple times, including in October of 2020. (*Id.*, Ex B, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," October 2020). After certain issues and disputes surrounding the 2020 election, the Bureau again revised its guidance in May of 2022 (the Challenger Guidance). (*Id.*, Ex C, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," May 2022). In addition to revising certain instructions, the 2022 version made formatting changes for readability—including larger type size and subject headings and a table of contents. (*Id.*, Ex C). Notably, the 2020 guidance included instructions restricting the use of video recording devices in polling places and prohibiting smart phones or tablets or laptops in absent voter counting boards (AVCBs). (*Id.*, Ex B, p 3, 6-7). These were not new to the Challenger Guidance issued in May 2022. (Compare *Id.,* DeVisser Compl, Ex C, p 9, 21).

B. Plaintiffs' Complaints and Procedural History

1. O'Halloran Complaint

On September 28, 2022, Plaintiffs Phillip M. O'Halloran, Braden Giacobazzi, Robert Cushman, Penny Crider, and Kenneth Crider (the O'Halloran Plaintiffs) filed a complaint against

Secretary of State Benson and Director Brater. (O'Halloran Compl, p 1). Plaintiffs O'Halloran, Giacobazzi, and Cushman allege that they were each designated to be an election challenger during the August 2022 primary and will be again for the November 2022 election. (*Id.*, ¶23-24). Plaintiff Penny Crider is a candidate for the House of Representatives in the 17th District. (*Id.*, ¶28). Kenneth Crider is a candidate for State Senate in the 6th District. (*Id*., ¶28).

The O'Halloran Complaint raises two counts. First, they allege a violation of MCL 168.733, based on their contention that the Bureau of Elections' May 2022 Challenger Guidance violates the rights of election challengers. (*Id*., ¶56). Second, a violation of the administrative procedures act (APA) of 1969, 1969 PA 306, MCL 24.201 *et seq.*, based on their contention that several so-called "policy changes" included in the Challenger Guidance constituted "rules" that were not promulgated as required by the APA. (*Id.*, ¶75-83).

Each count appears to be based or focused on the following restrictions they understand to be included in the Challenger Guidance: (1) challengers may not speak with election inspectors who are not the challenger liaison or designee, make repeated impermissible challenges, use a device to make video or audio recordings in a polling place or AVCB, or possess a mobile phone other device capable of sending or receiving information at an AVCB between the opening and closing of polls on Election Day; (2) if a challenger acts in a way prohibited by these instructions or fails to follow a direction given by an election inspector the challenger will be warned or the warning will be waived if the conduct is so egregious that the challenger is immediately ejected. A challenger who repeatedly fails to follow instructions or directions may be ejected; (3) a challenger may not appeal to the city or township clerk an election inspector's resolution to a challenge to a voter's eligibility to vote and appeals can only be adjudicated through the judicial process after Election Day; (4) when determining how many

challengers each credentialling organization is allowed to have in an AVCB, clerks must balance the rights of challengers to meaningfully observe the process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility, and clerks may consider the number of processing teams and election inspectors, the number of tables or stations, the physical size and layout of the facility, and the number of rooms and areas used to process ballots within the facility. (*Id.*, ¶44, 53).

In their motion for emergency declaratory and injunctive relief, the O'Halloran Plaintiffs appear to narrow their challenges to the parts of the guidance concerning ejection of challengers failing to follow the instructions or directions issued by inspectors, speaking to inspectors who are not the designated challenger liaison, balancing how many challengers may be in the AVCB's, and challengers using audio or video recording devices in polling places, clerk's offices, or AVCB's. (O'Halloran 9/28/22 Brf, p 5-6, ¶8a-d.)

In addition, the O'Halloran Plaintiffs make allegations about supposed violations of O'Halloran and Giacobazzi's rights as challengers at the Detroit Huntington Place AVCB during the August 2022 primary. (*Id.*, ¶45-46). However, the allegations concerning their experiences at the City of Detroit's AVCB do not reference either Defendant. (*Id.*, ¶45-46). Also, as stated in the attached affidavit of Director Brater, the Bureau of Elections issues instructions to clerks and elections officials on the proper method of conducting elections but does *not* hire or directly supervise any election inspectors or security personnel. (Defs' Ex A, Brater Aff, ¶13).

The O'Halloran Plaintiffs request that this Court declare the Challenger Guidance rescinded, declare that the "rules" are invalid because they were not promulgated under the APA, enjoin the Defendants from using the 2022 Challenger Guidance to train challengers or poll watchers, declare that the entirety of MCL 168.733 and 168.734 be added to Defendants'

"updated version" of the Challenger Guidance; order that the "amendments and corrections" be implemented and distributed to all poll challengers and poll workers in advance of the November 8 general election, order that certain passages of the document be "amended" by removing language, and that, "the remainder of the document and other published election manuals be similarly audited and amended to attain strict compliance with lawful rule and statute instructions." (*Id.*, p 26-27). The O'Halloran Plaintiffs do not identify any other "election manuals" or documents they wish to be subject to any declaratory or injunctive relief.

2. DeVisser Complaint

On September 30, 2022, Plaintiffs Richard DeVisser, the Michigan Republican Party (MRP) and the Republican National Committee (RNC) ("the DeVisser Plaintiffs") filed a verified complaint against Secretary Benson and Director Brater. (DeVisser Complaint, p 1). DeVisser alleges that he is a registered voter and was appointed by MRP as an election challenger for the August 2022 primary election. (DeVisser Complaint, ¶8). MRP is a "major political party" as defined under MCL 168.16. (*Id.*, ¶7). RNC is a national political party with offices in Washington D.C. and alleges that it supports MRP and has contributed to Republican candidates in Michigan. (*Id.*, ¶9).

The DeVisser Complaint raises two counts. First, they allege a violation of the Election Law based on their contention that the Challenger Guidance is "directly inconsistent" with the Election Law. (*Id.*, ¶54). Second, they allege a violation of the APA, based on their contention that certain so-called "policy changes" included in the May 2022 guidance document constituted "rules" that were not promulgated as required by the APA. (*Id.*, ¶64).

Each count appears to be based or focused on the following "changes" in the May 2022 Challenger Guidance: (1) challenger credentials must be on a form provided by the Secretary of State, but Plaintiffs contend that because MCL 168.732 does not specifically allow the Secretary

to prescribe a credential form, the Secretary cannot prescribe a form under her authority in MCL 168.31(1)(e) to prescribe election forms; (2) political parties may appoint challengers at any time until Election Day, but Plaintiffs contend that the guidance is not sufficiently clear in affirming that parties can wait until Election Day itself to train challengers and appoint challengers *during* Election Day; (3) challengers must present their challenges to a challenger liaison, but Plaintiffs insist the election law must be read to allow challengers to speak to any poll worker at any time, despite no such language appearing in the statute; (4) no electronic devices capable of sending or receiving information (phones, laptops, tablets, etc.) are permitted in AVCBs while ballots are being processed, and that challengers who bring such devices into the facility may be ejected—while Plaintiffs insist they must be allowed to possess communication devices even where certain communications outside the facility are prohibited, and must be allowed to use recording devices even where courts have already recognized the need to prevent recording to protect voter privacy; and (5) election inspectors need not record in the pollbook repeated challenges with no basis in law every single time they are made, while Plaintiffs contend that challengers must be given the power to make the same legally unsupported challenge repeatedly, and force election inspectors to record it every single time, even if the challenge is not supported by law or fact. (*Id.*, ¶30(a)-(e), 54, 64).

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

3. Consolidation and Response to Motion for Preliminary Injunction

On October 3, 2022, this Court issued an order consolidating the O'Halloran and DeVisser complaints and directing the Defendants to show cause why the Court should not issue the relief sought by Plaintiffs on October 11, 2022.

STANDARD OF REVIEW

The decision to grant a request for declaratory relief is within a court's discretion presuming an actual controversy exists. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 126 (2006) ("The language of MCR 2.605 is permissive rather than mandatory[.]")

Summary disposition is proper under MCR 2.116(C)(8) if the plaintiff has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co,* 473 Mich 63, 71 (2005). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332 (2001).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206 (2012). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003).

I. The O'Halloran Complaint must be dismissed for lack of jurisdiction.

While the Legislature has wide discretion to confer rights of action onto private citizens to bring claims against the State, *Moulter v Grand Rapids*, 155 Mich 165 (1908); *McCahan v Brennan*, 492 Mich 730, 736 (2012), claims against the State must be brought consistent with the conditions imposed by the Court of Claims Act, MCL 600.6401 *et seq*. See *Okrie v State of*

Mich, 306 Mich App 445, 448 (2014) (noting that the Court of Claims Act "reflects the state's waiver of sovereign immunity from suit and submission to a court's jurisdiction").

One such limitation is the signature and verification requirement contained in MCL 600.6431(1)–(2)(d), which provides that a "claim or notice" against the State "must contain all of the following . . . (d) *A signature and verification by the claimant before an officer authorized to administer oaths*. (Emphasis added.) "[T]he judiciary has no authority to restrict or amend" these conditions, *McCahan*, 492 Mich at 732, as "any relinquishment of sovereign immunity must be strictly interpreted," *Pohutski*, 465 Mich at 681. In other words, if a claimant fails to comply with MCL 600.6431, the claims against the State are barred by sovereign immunity. *Fairley v Dep't of Corrections*, 497 Mich 290, 297 (2015); see also *Rusha v Dep't of Corrections*, 307 Mich App 300, 307 (2014).

Here, the O'Halloran Complaint is not signed by any of the plaintiffs before an officer authorized to administer oaths.[1] Rather, each of the plaintiffs merely "signed" the complaint with a "/s/" typed electronic signature. (O'Halloran Comp, p 28). Defendants are unaware of any authority providing that such electronic signatures by plaintiffs constitute "signing" a complaint in compliance with the Court of Claims Act. Even if these electronic signatures were to be accepted, there is no question that these purported signatures were not signed before an officer authorized to administer oaths. Thus, the O'Halloran complaint must be dismissed. See *Fairley*, 497 Mich at 297, 299–300 (dismissing plaintiffs' claims because they did not comply with the signature and verification requirements of MCL 600.6431).

[1] With respect to the manner in which a document must be verified, the Supreme Court recently explained that "MCR 1.109(D)(3) specifies [the Court of Claims Act's] verification requirement. *Progress Michigan v Attorney General*, 506 Mich 74, 92 n 10 (2020).

In addition to the signature requirement listed in MCL 600.6431(2)(d), § 6434 of the Court of Claims Act also provides that "[t]he complaint shall be verified." See *Progress Mich v Attorney General*, 506 Mich 74, 91 (2020) ("Even if MCL 600.6431 does not apply because defendant is not a 'state,' there is no question plaintiff was required to comply with MCL 600.6434."); see also *Reighard v Central Mich Univ*, unpublished per curiam decision of the Court of Appeals, issued May 26, 2022 (Docket Nos 358196, 358759), p 3 ("Even if MCL 600.6431 did not apply to defendant, MCL 600.6434 undisputedly would, and MCL 600.6434 also requires verification of the complaints.") Because the O'Halloran Plaintiffs failed to sign and verify their complaint in compliance with MCL 600.6434(2), their complaint must be dismissed without prejudice.

II. Plaintiffs' claims are barred by laches.

The defense of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v Schram*, 117 F2d 160 (CA 6, 1941). Courts apply laches in election cases. See e.g, *Detroit Unity Fund v Whitmer*, 819 F App'x 421, 422 (CA 6, 2020). An action may be barred by laches if: (1) the plaintiff delayed unreasonably in asserting their rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co v Central States, Southeast and Southwest Areas Pension Fund*, 206 F3d 680, 684 (CA 6, 2000). Laches applies in this case where both elements are satisfied.

Plaintiffs unreasonably delayed raising their claims before this Court. The O'Halloran Plaintiffs filed their action on September 28, 2022, while the DeVisser Plaintiffs filed their complaint on September 30, 2022. Both complaints were filed less than six weeks before the November 8, 2022 general election. But the Challenger Guidance they contest was published in May of 2022. (See DeVisser Compl, Ex C.) The DeVisser Plaintiffs suggest that the 2022 instructions may have been posted on the Secretary's site as late as July 4, 2022, (*Id*., ¶24), but

Plaintiffs previously acknowledged viewing the instructions as early as May 31, 2022. (Defs' Ex A, Brater Aff, ¶50-53). Any concerns about these instructions could – and should – have been raised far in advance of the election.

Further, as noted in the attached affidavit of Director Brater, MRP, one of the DeVisser Plaintiffs, wrote a letter on August 25, 2022 complaining of the credential instruction and demanding a response in five business days. (Defs' Ex A, Brater Aff, ¶54). Curiously, the MRP letter did not address any of the other challenges raised in this lawsuit. (DeVisser Compl, Ex G.) MRP was provided a response to its complaint about the challenger credentials on September 2, 2022. (DeVisser Compl, Ex G; Defs' Ex A, Brater Aff, ¶54). MRP took no action for a month before filing its complaint on September 30, 2022—four months after it initially acknowledged viewing the Challenger Guidance, (Defs' Ex A, Brater Aff, ¶50-53), three months after the primary election, and a month after receiving a response to the previous letter. As a result of their delay and the upcoming election, Defendants were permitted only 6 business days to respond to their legal arguments in the midst of an extremely busy period a month before the election.

Plaintiffs make no attempt to explain their delays in filing their respective suits. By Plaintiffs' admissions, these instructions were issued in May—five months ago. (See e.g. O'Halloran Compl, ¶1; DeVisser Compl, ¶24). Indeed, Plaintiffs DeVisser, O'Halloran, Giocobazzi, and Cushman allege that they served as election challengers in the August 2022 primary election. (O'Halloran Compl, ¶23; DeVisser Compl, ¶8.) That election took place after the May 2022 instructions were issued. But Plaintiffs now claim to have "recently learned" about the 2022 instructions relating to election challenges despite previously acknowledging seeing them in May 2022. (See DeVisser Compl, ¶2; (Defs' Ex A, Brater Aff, ¶50-53.)

The Defendants have most certainly been prejudiced by Plaintiffs' delay. As of this filing, the election is 28 days away. See *Kay v Austin*, 621 F2d 809, 813 (CA 6, 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.") The instructions Plaintiffs contest have been in place for five months and have been applied in one election already. Defendants' staff communicated with the DeVisser Plaintiffs multiple times prior to the August primary (Defs' Ex A, Brater Aff, ¶50-53), yet were not made aware of one of their concerns until the August 25, 2022 letter and of the remaining concerns a month after their response to that letter (*Id.*, ¶54). Clerks and election inspectors have, therefore, already learned and applied these instructions. (*Id*., ¶57-60.) Plaintiffs seek to impose another change to the instructions less than a month before the election. Even reversing the instructions to a previous version at this point risks substantial confusion, error, and disruption during the election. (*Id.*, ¶59.)

Further still, the broader holding that Plaintiffs seek from this Court – that the Bureau of Elections can never issue binding instructions on clerks without promulgating a rule under the APA – would reverse decades of practice less than a month before a statewide election, with the Defendants being given a short time to mount their defense. (*Id.*, ¶8.) And should this Court rule against Defendants, there would be little to no opportunity for Defendants to seek relief in the appellate courts and still conduct an orderly election.

When a party seeks equitable relief, as Plaintiffs do, "[t]he equitable doctrine of laches shall also apply." MCL 600.5815. In Defendants' motion and in response to this Court's show-cause order, Defendants raise the defense of laches. "If a plaintiff has not exercised

reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich App 109, 114 (2013). The doctrine is particularly applicable in election matters. See, e.g., *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357 (1972) ("The state has a compelling interest in the orderly process of elections."); *Purcell v Gonzalez*, 549 US 1, 5-6 (2006) (per curiam); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); see also MCL 691.1031 (creating a "rebuttable presumption of laches" if an action affecting an election is brought within 28 days of that election).

Plaintiffs unreasonably delayed in raising their claims before this Court, and the consequences of their delay has prejudiced Defendants. Plaintiffs' claims are, therefore, barred by the doctrine of laches and should be dismissed.

III. The challenger instructions are lawful and did not need to be promulgated as a rule.

As an initial matter, Plaintiffs have not established the existence of an actual controversy that would support declaratory relief. An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. *UAW v Central Michigan Univ Tr,* 295 Mich App 486, 495 (2012). "The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Shavers v Attorney General*, 402 Mich 554, 588 (1978); *see also Genesis Ctr, PLC v Comm'r of Fin & Ins Servs*, 246 Mich App 531, 544 (2001). Here, Plaintiffs may well desire the instructions to be re-written to meet their preferences, but that is not the same as requiring a declaration to guide their future conduct. Simply put, Plaintiffs will still be able to appoint election challengers who will be able to make any challenges allowed under the law.

Even assuming the existence of an actual controversy, the requirements of the APA do not apply to the instructions at issue here. Recognizing the need for flexibility in administering elections, the Legislature gave the Secretary discretion to issue instructions *or* promulgate rules, and she has properly issued the instructions here in accordance with the law just has previous Secretaries of State have done for decades. Because the instructions do not violate the Election Law and were not required to be promulgated as rules, Plaintiffs' requests for emergency declaratory and injunctive relief must be denied.

The requirements of the APA do not apply to the instructions at issue here. Recognizing the need for flexibility in administering elections, the Legislature gave the Secretary discretion to issue instructions *or* promulgate rules, and she has properly issued the instructions here in accordance with the law just has previous Secretaries of State have done for decades. Because the instructions do not violate the Election Law and were not required to be promulgated as rules, Plaintiffs' requests for emergency declaratory and injunctive relief must be denied.

A. The Legislature delegated the task of conducting elections to the Secretary of State and gave her broad authority to issue instructions, advice and directives.

Under the Michigan Constitution, the Legislature "shall enact laws to regulate the time, place and manner of all . . . elections[.]" Const 1963, art 2, § 4(2). Consistent with that mandate, the Legislature enacted the Michigan Election Law (the Election Law), MCL 168.1 *et seq*. And the Legislature delegated the task of conducting proper elections to the Secretary, an elected Executive-branch officer, and the head of the Department of State. Const 1963, art 5, §§ 3, 9.

Section 21 of the Election Law makes the Secretary the "chief election officer" and she "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Further, under § 31, the Secretary "shall do all of the following": "(a). . . *issue instructions* and promulgate rules . . . for the *conduct of elections*

. . . in accordance with *the laws of this state*," and "(b) [a]dvise and direct local election officials as to *the proper methods of conducting elections*." MCL 168.31(1)(a)-(b) (emphasis added). The Secretary "shall" also "[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*[.]" MCL 168.31(1)(c) (emphasis added.) And she "shall" "[p]rescribe and require uniform forms . . . the secretary of state considers advisable for use in the conduct of elections[.]" MCL 168.31(1)(e).

These sections provide the Secretary with broad authority to issue instructions and directions for the proper conduct of elections and to require adherence to those instructions by the election officials over whom she exercises supervisory control. See *Hare v Berrien Co Bd of Election Commr's*, 373 Mich 526, 531 (1964) (local election board had "duty to follow" the Secretary of State's "instructions" under MCL 168.31).

The Secretary's authority under these sections extends to all local election officials and to the places in which they perform their duties, including polling places and AVCBs. Polling places and AVCBs are established within election precincts. MCL 168.654. Section 662 states that each city and township "shall provide a suitable polling place in or for each precinct located in the city . . . or township for use at each election." MCL 168.662(1). Similarly, in a jurisdiction using AVCBs to process ballots, "that city or township shall establish an [AVCB] for each election day precinct in that city or township." MCL 168.765a(1). Thus, polling places and AVCBs function within an election precinct under the Secretary's supervision.

The Secretary also has ultimate general supervisory authority over election inspectors.[2] Election inspectors have supervisory authority over polling places and AVCBs on Election Day. Section 678 provides that "[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* during any . . . election[.]" MCL 168.678 (emphasis added). In turn, under § 21, the Secretary can direct election inspectors in the proper conduct of an election in their polling places and AVCBs. And the Secretary's authority to direct inspectors includes providing instructions on maintaining peace, regularity, and order at polling places. MCL 168.21, 168.31(1)(a)-(b). Such instructions provide the source for the "lawfulness" of any command given by an election inspector. In this way, the Secretary supervises, through general instruction, polling places and AVCBs.

As it pertains to the Secretary's specific authority to instruct clerks conducting elections under the Michigan Election Law as the Chief Election Officer, there is no simple dichotomy of mandatory "rule" and nonbinding "guidance" under the general provisions of the APA. Rather, the Secretary may, and frequently does, provide instructions to clerks on the proper methods of conducting elections consistent with the Election Law. Only when the Secretary establishes directives with policy determinations not found within the Michigan Election Law—which is not the case here—is rulemaking required.

B. The instructions are not required to be promulgated as rules under the APA.

[2] Direct supervision of election inspectors is performed by the clerk. For Election Day, the city or township election commissioners must appoint at least three election inspectors to each election precinct or as many as are needed "for the efficient, speedy, and proper conduct of the election." MCL 168.674(1). This is true for the AVCBs in each precinct as well, and the inspectors appointed to AVCBs have the same authority as inspectors at in-person voting precincts. MCL 168.765a(1), (4).

Under the APA, "rule" is defined as "(1) 'an agency regulation, statement, standard, policy, ruling, or instruction of general applicability,' (2) 'that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency[.]' " *Am Fed'n of State, Co & Mun Employees, AFL-CIO v Dept of Mental Health*, 452 Mich 1, 8 (1996), quoting MCL 24.207. Plaintiffs' complaints fail as a matter of law because the Secretary's Challenger Guidance is specifically excluded from the definition of "rule" under the APA. This is because the instructions fall under the "permissive statutory power" exclusion under MCL 24.207(j). Alternatively, the contested instructions are exempt from the definition of a "rule" under MCL 24.207(g) and (h).

1. The Secretary has permissive authority to issue instructions without promulgating them as a rule.

The "permissive statutory power" exception applies where "explicit or implicit authorization for the actions in question have been found." *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs,* 431 Mich 172, 187-188 (1988); see also *Hinderer v Dep't of Social Servs,* 95 Mich App 716, 727 (1980) ("[I]f an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption."). The exception applies here for three reasons.

First, the enabling statute gives the Secretary discretion to either issue instructions or promulgate rules under the APA. The permissive power exception applies to statutory grants of authority that do not require an agency to be bound to the requirements of the APA.

For example, in *Michigan Trucking Association v Michigan Public Service Commission*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was invalid because it was not promulgated as a rule under the APA. 225 Mich App 424, 430-430 (1997). The statute at issue provided, at the time, that the

PSC "will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after the effective date of this article." MCL 479.43 (emphasis added). The Court of Appeals rejected plaintiffs' argument, finding that the order was issued in "an exercise of permissive statutory power," and was therefore "exempted from formal adoption and promulgation under the APA." *Id*. at 430. In reaching this conclusion, the Court emphasized that the statute "directly and explicitly authorize[d] the PSC to implement, either by rule or order," the safety rating system. *Id*., citing MCL 479.43. See also *Pyke v Department of Social Services*, 182 Mich App 619 (1990) (concluding that permissive statutory power exclusion applied); *By Lo Oil Co v Department of Treasury*, 267 Mich App 19 (2005) (same); *Ann Arbor Transp Auth v Michigan Dep't of Transp*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002, (Docket No. 232163).

As in *Michigan Trucking*, because the Legislature has not tied the Secretary's authority to issue instructions and advise local election officials to the APA, the Challenger Guidance is not subject to the APA's rulemaking procedures.

Second, the plain language of MCL 168.31 shows that the Secretary has a choice between issuing instructions and promulgating rules. Like the statute in *Michigan Trucking*, the enabling statute for the Secretary provides permissive statutory power: "The secretary of state shall . . . *issue instructions* and *promulgate rules pursuant to the [APA]* . . . for the conduct of elections[.]" MCL 168.31(1)(a) (emphasis added). While the use of "shall" connotes mandatory action, the statutory language itself contemplates two different acts that the Secretary "shall do": either (1) issue instructions, or (2) promulgate rules.[3] Thus, § 31 does not mandate that the

[3] The statute's use of the word "and" does not require a different result. See, e.g., *Aikens v State Dep't of Conservation*, 387 Mich 495, 500 (1972) (internal quotations and citation omitted) (explaining that the "strict meaning [of the words "and" and "or"] is more readily departed from

Secretary promulgate rules for the conduct of elections.[4] Rather, the Secretary, in her discretion, can *either* issue instructions *or* promulgate rules. MCL 168.31(1)(a). Here, the Secretary issued instructions.

This interpretation avoids rendering nugatory the word "instruction" in § 31(a). See, e.g., *Hanay v Dep't of Transp*, 497 Mich 45, 57 (2014) (courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."). And it is consistent with the structure of § 31, which only mandates that the Secretary promulgate rules in a certain area—petition signature gathering. MCL 168.31(2).

And ***third***, the Legislature provided permissive grants of authority when agencies may need to act quickly. For example, MCL 30.310 empowers the director of the Michigan State Police "*to issue orders* and promulgate rules and regulations for the purpose of administration and preparation of a *plan of civil defense for this state*[.]" (Emphasis added). This grant of permissive power makes sense since, when providing for the civil defense of the State, an agency or officer must be able to act quickly without the deliberate procedures required in the APA.

In enacting § 31, the Legislature similarly recognized that virtually all aspects of an election are time sensitive and that the Secretary has roughly 1,600 clerks to supervise in the conducting of elections, and provided her with flexibility—which rulemaking does not typically allow—to "issue instructions" separate from her authority to promulgate rules.

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than that of other words, and [the words can be] read in place of the other in deference to the meaning of the context").

[4] The Legislature's intent to give the separate power to instruct is demonstrated by the language in section 795a of the Election Law, which provides that the Secretary "shall *instruct* local election officials regarding the operation and use of an approved electronic voting system in order to carry out the purposes of sections 794 to 799a *and the rules promulgated* pursuant to sections 794 to 799a." MCL 168.795a(8) (emphasis added).

Finally, even assuming they were correctly decided,[5] *Davis v Benson*, Court of Claims Docket No 20-207-MZ, issued October 27, 2020, and *Genetski v Benson*, Court of Claims Docket No 20-216-MM, issued March 9, 2021, are not to the contrary. *Davis* concerned an instruction prohibiting firearms in polling places. The court determined such an instruction constituted a directive, with the binding force of law, based on a policy determination outside the election law. *Genetski*, meanwhile, involved a substantive policy determination about the standards clerks should use in determining whether signatures match. In those cases, the courts found the Secretary to be making policy determinations not found in the Election Law, hence the courts' determination that rulemaking was required.

That is not the case here, where the Secretary's instructions concern the proper methods of conducting elections and application of the Election Law to circumstances involving challengers. Indeed, the facts here are aligned with those in *Associated Builders & Contractors of Michigan v DTMB*, Court of Claims No 22-111-MZ, attached as Ex B. There the Court of Claims determined that DTMB's prevailing wage requirement was not a rule required to promulgated under the APA because the agency had permissive statutory authority to implement the policy in state contracts. (Defs' Ex B, ACB of Michigan, pp 16-19) ("Defendant's prevailing-wage policy follows from its permissive statutory authority to make *all* discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j).")

For these reasons, the Secretary's Challenger Guidance was properly issued as instructions and was not required to have been promulgated as a rule.

[5] These Court of Claims decisions only bind the parties to the cases and thus are not binding precedent as to the parties here or on this Court.

2. Alternatively, the challenger instructions are not "rules" under MCL 24.207(g) and (h).

Even if this Court were to conclude that the permissive power exception does not apply, the Challenger Guidance instructions do not constitute "rules" as that term has been defined and explained by the courts. Under MCL 24.207(g) a "rule" does not include "[a]n intergovernmental . . . memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public." Similarly, under § 207(h), "rule" does *not* include "[a] form with instructions, an interpretive statement, a guideline,[6] an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 168.207(h).

Here, to the extent they pertain to the conduct of challengers and poll watchers, the May 2022 instructions fall readily into § 207(g) or 207(h), or both. The Challenger Guidance is principally explanatory, does not have the force and effect of law, and does not affect the rights of the public. The guidance summarizes the requirements of election law as it pertains to challengers and explains how clerks and election inspectors will enforce the law. See *Twp of Hopkins v State Boundary Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2022 (Docket No 355195), p 25; see also *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404 (1998)(explaining that APA rulemaking is necessary when establishing policies that "do not merely interpret or explain the statute or rules from which an agency derives its authority," but rather "establish the substantive standards implementing the program.") This is so because the May 2022 instructions are binding on *clerks* (not challengers)

[6] The APA defines "guideline" as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7).

under the Secretary's authority as Chief Election Officer, MCL 168.21, to instruct clerks on the proper methods of conducting elections, MCL 168.31(1). In this respect, the circumstances in this case differ from those in *Twp of Hopkins*, where the administrative body had no similar authority to issue instructions.

Further, because the instructions are grounded in the Election Law – as set forth below – they do not suggest or permit deviation from the statutory authority on which they are based and prevent any official from being accused of handling any challenger disputes inconsistently or arbitrarily. *Id.* Thus, while clerks and election inspectors must follow the guidance, it likewise informs challengers in order that they understand the process and carry out their roles efficiently, correctly, and without confusion. *Id.*

a. The credential form

The DeVisser Plaintiffs claim that the Secretary's requirement for a specific credential form either violates the Election Law, MCL 168.732, because the Legislature has not specifically applied the Secretary's express authority to prescribe forms to this specific form, or alternatively the APA because the form needed to be promulgated as a rule even though the Election Law expressly authorizes the Secretary to prescribe forms without promulgating a rule under the APA. Plaintiffs are wrong on both fronts. Section 732 of the Election Law requires that challengers possess a signed (written) "authority" in order to serve as a challenger. MCL 168.732. As explained in the Secretary's September 2, 2022, response letter to the MRP, § 732 does not prescribe what form the "authority" should take, requiring only that it be "signed" by the requisite individual, include the "name of the challenger" and the "number of the precinct to which the challenger has been assigned." (DeVisser Compl, Ex G.)

Under the Election Law, the Secretary "shall" publish a manual that includes "forms for processing challenges" and she "shall" "[p]rescribe and require uniform forms" as she "considers

advisable." MCL 168.31(1)(c), (e). After reports from the November 2020 election, the Secretary considered it advisable to prescribe and require a uniform credential form. The principal reasons for doing so are to ensure uniformity and consistency and to allow the challenger liaison to clearly identify challengers who have been issued a credential by an authorized entity that has reviewed the challenger instructions and provided required training to the challenger. (Defs' Ex A, Brater Aff, ¶31-33; DeVisser Compl, Ex G.) Mandating a uniform credential form does not conflict with § 732, which is silent as to the form of an "authority," and the new form does not need to be promulgated as a rule where the Secretary can "prescribe and require uniform forms" under § 31(1)(e). And "a form with instructions" is expressly *excluded* from the definition of a "rule." See MCL 24.207(h).

Accepting Plaintiffs' argument that the Secretary cannot prescribe a form, notwithstanding her express statutory authority to prescribe forms, unless the specific section of law describing the form also expressly grants her the authority to prescribe that form would render MCL 168.31(1)(e) meaningless, and would invalidate dozens of others forms the Secretary has prescribed in past years and decades including, among other things, paper voter registration forms (see MCL 168.497, which does not specifically provide for the Secretary to prescribe a paper voter registration form).

In any case, Plaintiffs have not explained why using a credential form prescribed by the Secretary of State, as opposed to their own template, harms them in any way. Plaintiffs point to only one example in which a challenger was not allowed to access a location on the basis of not having the prescribed credential, which Plaintiffs can remedy by simply using the publicly available credential form. In every other situation cited by Plaintiffs, their challengers were allowed to access the site.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(h), Plaintiffs' claims as to the credential form are without merit and should be dismissed.

b. Appointment of challengers until Election Day

The DeVisser Plaintiffs interpret the challenger instructions as prohibiting the appointment of challengers on Election Day. However, the Challenger Guidance instructions say nothing about *prohibiting* appointments on Election Day. The instructions say only that "Political parties eligible to appear on the ballot may appoint or credential challengers at any time *until Election Day*." (DeVisser Compl, Ex C, p 1) (emphasis added). The word "until" does not exclude Election Day. (Defs' Ex A, Brater Aff, ¶ 38). The expectation is that political parties, like other organizations, will prepare ahead of time and not wait until the actual day of the election to train and appoint their challengers. (*Id*., ¶ 37.)[7] Training is critical to prevent challengers from mistaking routine election procedures as apparent acts of fraud or conspiracy, which challengers did on numerous occasions during the November 2020 general election. (Defs' Ex A, Brater Aff, ¶ 35-36).

While political parties should prepare ahead of time, and generally do, challengers appointed on Election Day (for example, to replace challengers who become ill or otherwise unable to perform their role) will be accepted. (*Id*., ¶ 39.) And, because MCL 168.730(1) provides that organizations may appoint challengers "at an election," and the names of organizations authorized to appoint challengers must be certified "[b]efore the opening of the

[7] Section 731(1) requires organizations other than the political parties to advise clerks "[n]ot less than 20 nor more than 30 days *before* an election" of their intention to appoint challengers. MCL 168.731(1) (emphasis added). And "[*b*]*efore the opening of the polls*, the clerk shall certify in writing to the board of election inspectors . . . the names of organizations and committees that are authorized . . . to appoint and keep challengers at the polling places[.]" MCL 168.731(3) (emphasis added.)

polls," MCL 168.731(3), it follows that challengers generally may not be appointed *after* Election Day.

Moreover, Plaintiffs overstate their claim regarding their ability to appoint challengers at any time they choose, including on Election Day. While they allege that the Election Law provides no limit on when challengers may be appointed, MCL 168.730(1) provides that a party may appoint no more than 2 challengers to serve in a precinct "at any one time," and not more than one challenger to serve at an AVCB. A party's ability to appoint challengers at any time is thus inherently limited by statute to a specific number of persons at a specific precinct or AVCB at any one time.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the appointment of challengers are without merit and should be dismissed.

c. Election inspector challenger liaison

Both sets of Plaintiffs allege the instruction that challengers only communicate through and with the election inspector challenger liaison is unlawful. But MCL 168.733(1)(e) only provides that a challenger may bring certain issues "to an election inspector's attention"—it does *not* provide that a challenger may speak to any and all inspectors at any time. The May 2022 instruction absolutely provides for challengers to bring matters to an inspector's attention by bringing their challenge to the designated person. Simply put, the instruction merely outlines the process of raising a challenge and identifies a point of contact for challengers to ensure that challenges are received and addressed appropriately. The guidance helps ensure that challenges are brought to a person equipped to respond correctly and consistently. (Defs' Ex A, Brater Aff, ¶44.) As such, the instructions concerning the challenger liaison merely interpret and explain the process of making a challenge. *Twp of Hopkins, supra* at p 25.

Further, and significantly, nothing in the May 2022 guidance prohibits clerks or election inspectors from determining that *all* election inspectors may serve in this liaison role or that challengers can speak to any election inspector, if that is what the clerk, precinct chair, or challenger liaison prefers. (Defs' Ex A, Brater Aff, ¶44.) As a result, Plaintiffs' concerns about not being able to speak to elections inspectors is speculative at this point, and it is far from certain that any of Plaintiffs' concerns would come to pass. Regardless, the instruction is not contrary to law. The Secretary is expressly authorized to "publish and furnish . . . a manual of instructions that includes specific instructions on . . . procedures . . . for processing challenges[.]" MCL 168.31(1)(c). Pursuant to that command, the contested instruction simply effectuates the language of § 733 by explaining the means for how a challenger should bring a challenge "to an election inspector's attention." MCL 168.733(1)(e).

In sum, Plaintiffs simply invent a requirement that does not exist in MCL 168.733(1)(e) and assert that challengers must be allowed to speak to any election inspector at any time about any type of challenge. In fact, clerks and election inspectors have authority to determine an orderly process by which challengers should bring these challenges to an election inspector's attention. MCL 168.678.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the challenger liaison instruction are without merit and should be dismissed.

d. Electronic device restrictions in AVCBs and polling places.

Both sets of Plaintiffs allege the instructions regarding the use of electronic devices, such as cell phones, at polling places and AVCBs are unlawful. These prohibitions are not new. (Defs' Ex A, Brater Aff, ¶45.) The Secretary of State has long issued instructions to poll

challengers and watchers related to the possession of phones and other media devices. (*Id.*) Different restrictions apply in an AVCB and an in-person polling place.

With respect to AVCBs, "[e]lectronic devices are not permitted within the absent voter ballot processing facility." (DeVisser Compl, Ex C, p 5.) More specifically:

> No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day. A challenger who possesses such an electronic device in an absent voter ballot processing facility between the beginning of tallying and the close of polls may be ejected from the facility. [*Id.*, pp 9, 21.][8]

The only exception to this is that a challenger may use his or her phone to display credentials but must then secure the phone elsewhere outside the processing area. *Id.*, p 5.

Watchers and challengers serving at an in-person polling place, however, may "use electronic devices, so long as the device is not disruptive and so long as the device is not used to make video or audio recordings of the polling place." *Id.*, p 20. [9]

The complete ban inside AVCB facilities is grounded in statutes that prohibit the sharing of information learned at the AVCBs before the polls close. MCL 168.765a(9) requires that a "challenger, or any other person at an" AVCB "at any time after the processing of ballots has begun shall take and sign" the following "oath":

> "I (name of person taking oath) do solemnly swear (or affirm) that *I shall not communicate in any way any information relative to the processing or tallying of votes that may come to me while in this counting place until after the polls are closed*.". [Emphasis added.]

And MCL 168.765a(10) thereafter provides, in part:

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[8] The same instructions are given to election officials. See, p 3, Chapter 8, Absent Voter Ballot Election Day Processing, VIII_Absent_Voter_Counting_Boards.pdf (michigan.gov).

[9] The same instructions are included in the Bureau of Elections' Manual for Elections Inspectors. See, p 27, Managing Your Precinct on Election Day 2022 (michigan.gov). See also Election Officials' Manual, Chapter 11, Election Day Issues, October 2020, pp 38-40, XI_Election_Day_Issues.pdf (michigan.gov).

> The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. . . . *A person . . . who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony.* [Emphasis added.]

The oath statute prohibits a challenger from "communicat[ing] in *any way* [for example, by text message, email, video, or an actual phone call] any information relative to the processing or tallying of votes that may come to [the challenger] while in [the] counting place until after the polls are closed." MCL 168.765a(9). And the penalty statute makes it a felony to disclose how any absent voter ballot was voted before the polls close. MCL 168.765a(10). Further, a watcher or challenger who refuses to abide by the electronic device prohibitions could be guilty of a misdemeanor under MCL 168.931(1)(h) ("A person shall not willfully . . . disobey a lawful instruction or order of the secretary of state as chief state election officer . . . or board of inspectors of election.")

AVCBs may commence processing and tabulating absent voter ballots by 7 a.m. on Election Day, and do not stop until all ballots are tabulated. MCL 168.765a(8). Because electronic devices like cell phones, smartwatches, tablets, etc, make it easy to communicate information from within an AVCB, they pose a threat to the security of the information present at AVCBs, most significantly in what direction absent voter ballots may be trending. And because it would be impossible for election officials to police what challengers may be texting or emailing from their electronic devices, the Secretary has instructed clerks that the proper method of enforcing this requirement is to prohibit these devices to ensure that no unlawful communications are made.

With respect to in-person polling places, challengers may possess and use electronic devices so long as they do not use the devices to make visual or audio recordings. The purposes of this restriction are obvious—to protect the privacy of voters, to deter possible voter intimidation, and to deter or curb disruption at the polls. (Defs' Ex A, Brater Aff, ¶45-46.) The Michigan Constitution provides for the right to vote a "secret ballot." Const 1963, art 2, § 4(1)(a). See also art 2, § 4(2) ("the legislature shall enact laws . . . to preserve the secrecy of the ballot[.]") Activity that disrupts voting or that rises to voter intimidation is likewise prohibited. See MCL 750.170; MCL 168.932(1)(a). Further, the U.S. Supreme Court has observed that states have an obligation to safeguard their citizens' constitutional right to vote. *Cf. Burdick v Takushi*, 504 US 428, 433 (1992).

The Secretary's authority to issue these instructions for AVCBs and polling places is fully supported by the language in § 31(1)(a), (b), and (c), empowering her to issue instructions, advice and directives for the conduct of elections, including "procedures . . . for processing challenges." MCL 168.31(1)(a)-(c). Notably, the Secretary's prohibitions with respect to the use of cell phones by voters in the polls was previously challenged on First Amendment grounds by a voter who wished to use his cell phone to take a "ballot selfie" but was barred from doing so under the instructions in place at that time. See *Crookston v Johnson*, 841 F3d 396 (CA 6, 2016). In staying the preliminary injunction issued in that case based on laches, the Sixth Circuit spoke favorably of the Secretary's instructions: "The State's policy advances several serious governmental interests: preserving the *privacy* of other voters, *avoiding delays and distractions at the polls*, preventing vote buying, and *preventing voter intimidation*." *Id*. at 400 (emphasis added). While the state later agreed to allow a limited opportunity to take a "ballot selfie," this

case supports the Secretary's authority to issue instructions to protect privacy, and to forestall disturbances and delays at polling places relating to the use of electronic devices.

Further, the Secretary's instructions do not conflict with any existing election laws. Nothing in § 733 gives challengers the right to possess and use electronic devices in AVCBs or polling places. Section 733 provides that challengers may "observe" certain actions and "[k]eep records of votes cast and other election procedures as the challenger desires." MCL 168.733(1)(b), (h), (i). Challengers may "observe" actions by watching and they may "keep records" by taking handwritten notes, as paper, notebooks, pens, etc, are not prohibited within AVCBs or polling places. The phrase "as the challenger desires" in § 733(1)(h) does not mean that a challenger can use any method he or she sees fit to keep a record. It simply means that if a challenger wishes to make a record, he or she may do so.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the prohibitions regarding electronic devices are without merit and should be dismissed.

e. The recording of impermissible challenges

The DeVisser Plaintiffs complain that the instructions do not require election inspectors to make a record in the poll book of every single time an impermissible challenge – one without basis in law – is made by a challenger. These instructions were implemented due to an increase in the volume of indiscriminate or impermissible challenges. (Defs' Ex A, Brater Aff, ¶ 41.)

Notably, the instructions require permissible challenges (those with a basis in law) to be recorded even if the challenge is rejected. (*Id*., ¶ 42.) The law only permits challenges of a voter's registration status in the precinct, that an election procedure is not being properly performed, or to a voter attempting to vote who previously applied for an absent voter ballot. MCL 168.733(1)(c)-(d), MCL 168.727(1). Section 727(2) only requires an election inspector to

make a written report of a challenge to a voter's registration status. MCL 168.727(2)(a)-(c). The Election Law prohibits challengers from making a "challenge indiscriminately and without good cause," and from "interfere[ing] with and unduly" delaying the work of the election inspectors. MCL 168.727(3).

It is difficult to ascertain what harm Plaintiffs will suffer if they are not permitted to make an infinite number of unsupported challenges and require election inspectors to deviate from assisting voters and tabulating ballots to record impermissible challenges. Again, the Secretary is expressly mandated to "publish and furnish . . . a manual of instructions that includes specific instructions on . . . procedures . . . for processing challenges[.]" MCL 168.31(1)(c). The instructions are consistent with the challenger-related statutes and simply clarify that all challenges with a basis in law must be heard and recorded (whether the challenger is correct or incorrect that a voter is ineligible or that a procedure is not being followed), and that challenges without a basis in law or contrary to the law cannot be made and need not be recorded. (Defs' Ex A, Brater Aff, ¶¶ 40-42.) Nothing in the Challenger Guidance allows an election inspector to determine that a challenge with a basis in law is impermissible or need not be recorded.

Because the instructions are consistent with the Election Law and are not a "rule" under § 207(g) or (h), Plaintiffs' claims as to the prohibitions regarding electronic devices are without merit and should be dismissed.

3. The remaining claims by the O'Halloran Plaintiffs need not be addressed at this time.

The O'Halloran Plaintiffs contest several other instructions that the DeVisser Plaintiffs do not and they filed a motion for emergency declaratory and injunctive relief.[10] But because the

[10] The O'Halloran Plaintiffs contest instructions relating to the ejection of challengers from polling places and AVCBs, the appeal of challenges resolved by an election inspector to the local

O'Halloran complaint must be dismissed without prejudice as discussed in Argument I, it is unnecessary to address their additional claims or their motion for injunctive relief. Indeed, at this time it is unclear whether these Plaintiffs will properly refile their complaint, when they may do so, and whether they will modify any of the additional claims from that previously alleged. If they do refile, Defendants request the opportunity to submit supplemental briefing.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Defendants Secretary of State Benson and Director Brater respectfully request that this Honorable Court deny Plaintiffs' requested relief and grant Defendants' motion for summary disposition, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

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Dated: October 11, 2022

PROOF OF SERVICE

Heather S. Meingast certifies that on October 11, 2022, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast (P55439)

clerk, and guidance related to factors election officials should take into consideration in establishing AVCBs.

EXHIBIT A

STATE OF MICHIGAN
COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendants.

No. 22-000162-MZ

HON. BROCK A. SWARTZLE

AFFIDAVIT OF DIRECTOR OF ELECTIONS JONATHAN BRATER

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

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

Defendants.

No. 22-000164-MZ

HON. BROCK A. SWARTZLE

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AFFIDAVIT OF DIRECTOR OF ELECTIONS JONATHAN BRATER

I, Jonathan Brater, being duly sworn, voluntarily state as follows:

1. I have been employed by the Secretary of State as Director of Elections since January 2, 2020 and in such capacity serve as Director of the Bureau of Elections (Bureau). See MCL 168.32.

2. I bring this affidavit in support of Defendants' response to order to show cause and in support of Defendants' motion for summary disposition. If called as a witness, I could testify truthfully and accurately as to the information contained within this declaration.

3. I am personally knowledgeable about provisions of the Michigan Election Law that govern absent voter ballots, election inspectors, election challengers, and the tabulation of ballots.

THE BUREAU'S AUTHORITY

4. Under the authority of the Secretary of State, the Bureau is required to issue instructions and promulgate rules for the conduct of elections, as well as advise and direct local election officials as to the proper methods of conducting elections, including instructions regarding election challenges and challengers. See MCL 168.31(1)(a)-(b).

5. The Bureau is required to publish and provide for use in each precinct a manual of instructions including specific instructions and procedures and forms for processing challenges. See MCL 168.31(1)(c).

6. The Bureau is required to prescribe and require uniform forms it considers advisable for use in the conduct of elections. See MCL 168.31(1)(e).

7. The Bureau is required to establish a curriculum for comprehensive training of all clerks and a comprehensive training curriculum of all precinct inspectors, including those applicable to challengers. See MCL 168.31(1)(j).

8. For decades, the Bureau has issued, produced, and updated instructions and forms under its authority to "issue instructions", "advise and direct local election officials as to the proper methods of conducting elections", publish a "manual of instructions that includes specific instructions on … procedures and forms for processing challenges", "prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections", and establish a training for election officials and election inspectors, found in the Election Law, rather than under the Bureau's separate authority to "promulgate rules pursuant to the administrative procedures act". See MCL 168.31.

9. Collectively, these instructions and forms comprise hundreds, or even thousands, of pages of material, all of it updated periodically throughout each election cycle as needed. For example, the "Election administrator information" section of the Secretary of State website, found at Michigan.gov/sos/elections includes, among many other materials: a 48-page Ballot Production Standards document; a 57-page Election Inspectors' Procedure Manual; a 357-page Election Officials' Manual; a 13-page Post-election Audit Manual; a 26-page Recall Guide; a 94-page County Canvass Manual; and a 39-page Voting Equipment Test Procedure Manual. In addition to these documents and others posted on the Election administrator information website, the Bureau produces dozens of instructional materials that clerks review as part of their accreditation and continuing education requirements. See MCL 168.31(j)-(m).

10. The Bureau's instructions and forms apply the Michigan Election Law as well other legal authorities governing the conduct of elections in Michigan. When the Bureau provides instructions and training, and when it answers thousands of questions each election cycle from 1,603 clerks and their staff, the Bureau must regularly provide direction, advice, and guidance on methods of conducting elections where the method is not expressly and specifically described by a provision of the Election Law. Election administration is extremely complex, and in the course of multiple elections conducted in thousands of precincts each year, local election officials encounter innumerable combinations of possible scenarios with new situations and questions arising each election.

11. In its instructions, advice, and guidance, the Bureau does not attempt the impossible task of listing every possible scenario that could occur, but it does update its trainings and instructions to address issues that have occurred in recent elections. The Bureau does not provide instruction by merely restating verbatim the language of the Michigan Election Law in providing instructions to clerks; this would be of no help to election officials and would not fulfill the Bureau's responsibility to provide instruction, direction, and training to clerks on the proper method of conducting elections.

12. It would be impossible for the Bureau to promulgate rules under the Administrative Procedures Act, MCL 24.201 *et seq.*, each time it issues instructions, guidance, or direction on issues not expressly and specifically covered by a provision of the Michigan Election Law, and the Bureau has never attempted to do so. In addition to the time, delay, and material resources that would render rulemaking in each situation impossible for the Bureau, providing instruction only through rulemaking would also ignore the Bureau's separate responsibility to provide instruction, direction, and training to clerks on the proper method of conducting elections.

13. The Bureau issues general instructions and answers clerk questions; it does not control either the election-day operation or enforcement of election law in polling places or absent voter ballot processing facilities. The Bureau does not hire or supervise election inspectors or security personnel. These functions are fulfilled by the municipal clerks

and those whom they deputize. The Bureau does regularly update its general training and instruction materials to account for questions that have been raised by clerks in recent elections.

14. The Bureau cannot and does not instruct clerks on the question of whether a particular individual's conduct—such as alleged repeated impermissible or indiscriminate challenges (MCL 168.727), or alleged abusive language toward election inspectors–is disorderly and requires removal from the polling place (MCL 168.678, MCL 168.733). Clerks and election inspectors must make this determination based on the factual scenario they encounter, the Michigan Election Law, and the Bureau's general instruction materials.

THE ELECTION CHALLENGER GUIDANCE DOCUMENT

15. Bureau instructions regarding challengers have been published in multiple different formats for many years.

16. The Bureau has produced a document called "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (Challenger Guidance) since at least 2003.

17. Chapter VIII of the Election Officials' Manual, regarding Absent Voter Ballot Election Day Processing, and Chapter XI, regarding Election Day Issues, both include instructions regarding challengers. This manual also fulfills part of the Bureau's responsibility to establish a curriculum for comprehensive training for all clerks. See MCL 168.31(j).

18. The Bureau's document entitled "Managing Your Precinct on Election Day: Election Inspectors' Procedure Manual" also includes instructions regarding challengers. This document is designed for use by election inspectors in precincts on Election Day and fulfills part of the Bureau's responsibility to publish and provide instructions for precincts, including instructions and procedures regarding challenges. See MCL 168.31(1)(c).

19. The Bureau includes instruction on challengers as part of its training and accreditation curriculum for all clerks as well as a "train the trainer" course it provides for county clerks and municipal clerks in larger jurisdictions, who conduct training of election inspectors. Both of these curricula and training are offered in person. This training fulfills part of the Bureau's responsibility to establish a curriculum for comprehensive training for all clerks. See MCL 168.31(1)(j).

20. The Challenger Guidance is published and circulated to help clerks, election inspectors, political parties, organizations, challengers and poll watchers understand the legal provisions that govern challengers and poll watchers on election day, and to instruct

clerks and election inspectors on the proper methods of processing challengers and managing challengers on election day.

21. Both the current and former version of the Challenger Guidance provides instruction to clerks, which they are required to follow in their enforcement of the Election Law. MCL 168.21, 168.31(1).

22. The May 2022 update to the Challenger Guidance included formatting changes and revisions to make the document easier to understand and read. This included rewriting of several sections, which was generally not intended to substantively change the instructions. It also included a larger font size and headers, a table of contents, and the consolidation of two prior documents into one.

23. Previously, two documents regarding challengers were published on the Secretary of State Elections Website. One was the prior version of the Challenger Guidance (12 pages, including a title page) and the other was an FAQ document entitled "The Challenge Process: Questions and Answers" (3 pages). The updated Challenger Guidance is 27 pages including a title page and 2-page table of contents. Accordingly, approximately 14 pages of substantive guidance were replaced with 24 pages of substantive guidance (with fewer words per page).

24. The May 2022 version of the Challenger Guidance was also updated to add or clarify instructions in response to several issues that occurred during the November 2020 general election. Many of these issues occurred at absent voter ballot processing facilities, most frequently at the Detroit facility. Until November 2020, challengers at absent voter ballot processing facilities were relatively uncommon, but the number of challengers at these locations increased significantly in that election.

25. The Challenger Guidance uses the term "absent voter ballot processing facilities" to describe the locations at which jurisdictions tabulate absent voter ballots (unless this is done at in-person precincts, which is common in small jurisdictions).

26. Many of the questions or conflicts that arose in 2020—and the difficulty clerks and their staff encountered in answering those questions—stemmed partially from a lack of clarity and precision in the Michigan Election Law; specifically, how challenger and challenge provisions apply in absent voter ballot processing facilities. The Michigan Election Law does not consistently apply in-person precinct provisions or requirements to absent voter ballot processing facilities.

27. In the Michigan Election Law, the term "absent voter counting board" is used simultaneously to refer to a single absent voter counting board corresponding to an individual in-person precinct, a station within a facility processing absent voter ballots for multiple in-person precincts, the entire facility at which all absent voter ballots are processed for a jurisdiction, and an entire facility at which combined absent voter ballots

are processed for multiple jurisdictions in a county. The Michigan Election Law is not always specific as to which of these sub-definitions applies with regard to challengers. See MCL 168.569, 168.671, 168.679, 168.730, 168.733, 168.764d, 168.765a. Accordingly, the Challenger Guidance uses the phrase "absent voter ballot processing facility" for clarity.

28. Absent voter ballot processing facilities also differ from in-person precincts in other ways critical to the challenge process. Voters are not present at these facilities, and thus cannot be challenged or respond to questions. Voter eligibility is not verified by election inspectors at absent voter ballot processing facilities because the voter's eligibility has already been verified by the clerk. This differs from the process at in-person precincts, where the voter completes an application to vote and is verified by an election inspector in the electronic poll book. But with ballots tabulated at absent voter ballot processing facilities, the clerk has already reviewed the absent voter ballot envelope and checked the voter's signature and information against the Qualified Voter File before sending the envelope to the absent voter ballot processing facility, so absent voter ballot processing facility inspectors must merely verify that the envelope has been reviewed by the clerk by identifying the clerk's marking indicating the clerk has checked the envelope.

29. Additionally, there are sequestration provisions in effect at absent voter ballot processing facilities that do not apply in in-person precincts. Only certain individuals (not including challengers or election inspectors) may leave an absent voter ballot processing facility before the polls close, and individuals are prohibited from communicating information outside of the absent voter ballot processing facility. See MCL 168.765a(9)-(10).

30. In part because of these distinctions and the expanded presence of challengers at absent voter ballot processing facilities in November 2020, several points regarding the proper method of processing challengers and challenges required additional clarification. Accordingly, the Bureau updated the Challenger Guidance to address these points in May 2022.

THE ELECTION CHALLENGER CREDENTIAL FORM

31. In November 2020, there were several different political party and challenger organizations issuing credentials to challengers. This made it more difficult for election inspectors to determine if challengers possessed a valid credential signed by a party or verified challenger organization as required by the Michigan Election Law, particularly at the Detroit absent voter ballot processing facility where hundreds of challengers arrived well after processing had begun. See MCL 168.732. The Bureau also received reports that challengers were receiving credentials from multiple different entities or switching back and forth between entities, making the validity of the credential more difficult to track and verify.

32. The Bureau also received questions in both absent voter counting boards and in-person precincts about whether party logos printed on challenger credentials violated the

Michigan Election Law prohibition on electioneering materials within 100 feet of a polling place entrance. See MCL 168.744.

33. The Bureau had previously not prescribed a uniform form to be used to demonstrate the signed authority challengers must present under MCL 168.732; however, because of these issues, the Bureau determined it was advisable to prescribe a uniform credential form to be used by the challenger authority to designate and assign credentials to its challengers. MCL 168.31(1)(c), (e).

34. The Bureau also received questions about whether credentials had to be on paper or could be presented in electronic form. The Challenger Guidance now specifies that the credential *can* be in electronic form and displayed on a mobile device and explains how this can be effectuated even if the challenger cannot use the device in an absent voter ballot processing facility.

ELECTION CHALLENGER APPOINTMENT

35. The Bureau received numerous reports that challengers present in polling places and absent voter ballot processing facilities, particularly those arriving in absent voter ballot processing facilities well after ballot processing had begun on Election Day, were not clearly associated with a single party or verified organization eligible to appoint challengers; did not have basic knowledge of the election processes, and were disrupting the orderly administration of polling places and absent voter ballot processing facilities in part because of their ignorance of basic election procedures. For example, challengers were attempting to repeatedly raise challenges about voter eligibility or complaining that absent voter ballot signatures were not being checked in the absent voter ballot processing facilities (they are not checked at the facility but rather by the clerk, as explained above). Reports of this nature occurred only rarely in past elections but were very common in November 2020, particularly from challengers appearing on or after election day at the Detroit absent voter ballot processing facility.

36. The apparent misunderstanding of election law and process was evident in statements made by attorneys in a letter sent to the Wayne County Clerk alleging that "apparent widespread fraud and irregularities" occurred in the 2020 election, and that they would "get to the bottom of it." Among the supposed fraud and irregularities were claims of "failure to verify signatures" (as noted, signatures are verified by the clerk, not by election inspectors at the absent voter ballot processing facility) and of "40,000 unidentified ballots arriving" (challengers apparently did not understand that ballots received by the clerk until 8 p.m. are delivered later, and that ballots are also used to duplicate military voters' ballots for tabulation). The letter also claimed the Detroit absent voter ballot processing facility had processed ballots for Wayne County, when it in fact processed ballots only for the city of Detroit. (Attachment A, Letter to Wayne County Clerk). These types of fundamental and basic misunderstandings of election

processes can be avoided by properly educating challengers prior to their service on election day.

37. In past elections, parties and challenger organizations routinely appointed and trained challengers prior to election day. This general practice ensures challengers receive training on basic election procedures and standards of conduct before the election. The Challenger Guidance strongly encourages parties and organizations to train their challengers in advance of the election.

38. The Challenger Guidance also clarifies that there is no advance deadline to appoint challengers—challengers can be appointed up until Election Day. If a political party or organization inexplicably decides not to train or credential its challengers prior to election day, nothing in the Challenger Guidance prevents them from doing so — although as the November 2020 election demonstrated, unleashing untrained challengers on election workers and voters is irresponsible and inadvisable as it hindered an orderly election.

39. To the extent a party or challenger organization has concerns that the Challenger Guidance would prevent them from reassigning or relocating a previously trained and appointed challenger to a different precinct in the event of an unexpected illness or absence, it does not. The Challenger Credential Card does not require a date of appointment (just date of election), so the Challenger Guidance and form would not prevent a challenger from receiving a credential and entering a polling place or absent voter ballot processing facility.

IMPERMISSIBLE CHALLENGES

40. Challengers may make challenges to voters in a polling place, MCL 168.727, or to procedures in a polling place or absent voter ballot processing facility, MCL 168.733. Challenges must be based on a specific permitted reason that the challenger believes a voter is not eligible to vote or an election procedure is not being followed. Repeated baseless challenges may harass or delay voters or have the effect of improperly slowing down voting and election processes, interfering with an orderly polling place. See MCL 168.678, 168.727.

41. The Bureau has received reports of an increased volume of challenges that were not based on any permitted reason in the Michigan Election Law. For this reason, the Challenger Guidance provides additional instruction on the proper method for election inspectors to handle baseless challenges. The Challenger Guidance explains that a challenge must be permissible (have a valid basis), at which point the challenge is either accepted or rejected. If the challenge does not have a valid basis, it is impermissible and need not be recorded each time it is made.

42. For example, at an absent voter ballot processing valid facility it is *permissible* to make a challenge that an election inspector is not reviewing the envelope to ensure the clerk has

checked it; the challenge will be *accepted* or *rejected* depending upon whether the election inspector is actually reviewing the envelope. Conversely, it is *impermissible* to make a challenge that an election inspector is not checking the voter's signature against the Qualified Voter File, because this is not necessary or required at the processing facility. This guidance helps ensure all types of challenges are handled properly and in an orderly manner. See MCL 168.678, 168.727, 168.733. Nothing in the Challenger Guidance permits an election inspector from failing to record a challenge made with a permissible basis.

ELECTION CHALLENGER LIAISON

43. Clerks have authority to supervise election inspectors at polling places and absent voter processing facilities. Each precinct has a precinct chair, which is typically the most experienced or senior election inspector. MCL 168.674. In-person precincts also have an electronic pollbook inspector who is responsible for operating the electronic poll book. Election inspectors perform differing functions and have different levels of expertise.

44. Although challengers have the right to bring issues to the attention of election inspectors, the Michigan Election Law does not specifically state that they can do so by speaking to any election inspector at any time. MCL 168.733. Rather, consistent with clerks' authority to supervise election inspectors and election inspectors' mandate to maintain order at the polling place, MCL 168.678, the Challenger Guidance instructs that the proper method of handling challenges is to direct challengers to speak with a designated challenger liaison, who will be best equipped to answer and respond to all challenges correctly and consistently. The challenger liaison must respond to the challenge and nothing in the Challenger Guidance permits a challenger liaison from preventing a challenger from bringing an issue to the attention of an election inspector. Moreover, nothing in the Challenger Guidance prohibits clerks or election inspectors from determining that *all* election inspectors may serve in this liaison role or that challengers can speak to any election inspector, if that is what the clerk, precinct chair, or challenger liaison prefers. The Bureau's authority to issue this instruction is found in MCL 168.31(1)(c) ("procedures for processing . . . challenges").

CHALLENGER POSSESSION OF ELECTRONIC DEVICES

45. As with prior versions of the challenger guidance and other instructional materials, the 2022 Challenger Guidance explains that recording devices (including the recording functions of smart phones) may not be used in polling places or absent voter processing facilities. These prohibitions have long been in place to safeguard voter privacy, maintain an orderly polling place, and prevent voter intimidation. See Const 193, art 2, § 4, MCL 168.678, MCL 168.932.

46. Voters cast their ballots in open rooms within polling places. Voters have the right to a secret ballot and the right to vote without being intimidated. Recording devices capable

of viewing voted ballots and recording voters interfere with both of these rights. Accordingly, the Bureau has long instructed clerks that these devices are not permitted in the polling place. The only exception is voters using a smartphone or camera to photograph their own voted ballot in the voting station, if the voter wishes to do so; this change was made as part of a settlement to a federal lawsuit (*Crookston v. Benson*, WD-Mich, Docket No. 1:16-cv-1109) challenging the prohibition on photography in the polling place.

47. At the absent voter ballot processing facility, voted ballots and envelopes with voter names are also present and visible. Thus, photographing or recording the processing of absent voter ballots could also result in voters' selections being revealed at these locations. In addition, phones are not permitted in the processing facility because of the sequestration provisions prohibiting communication outside the counting board, which apply to anyone present in a counting board aside from authorized individuals. MCL168.765a(9)-(10).

PUBLICATION AND DISTRIBUTION OF CHALLENGER GUIDANCE

48. The Challenger Guidance was updated in May 2022 to ensure the guidance could be reviewed and incorporated into clerk training materials, and so that parties, challenger organizations, and challengers would have access to the guidance well in advance of the August 2022 primary and November 2022 general election.

49. When the Challenger Guidance was updated in May 2022, it was published on the Secretary of State's public website. The updated Challenger Guidance, along with a link to the Challenger Credential Form was also announced in a Bureau of Elections News Update on May 25, 2022. (Attachment B, News Update).

50. I have reviewed the Complaint submitted in this case by Richard DeVisser, the Michigan Republican Party, and the Republican National Committee. The complaint contains a number of inaccuracies regarding the timing of the release of the guidance and the Party's awareness of the new document. The Complaint claims that new version of the Challenger Guidance was published "as late as July 4, 2022" (the Complaint notes that July 4, the date the Complaint provides, is within a month of the August Primary). But July 4 is a state holiday. In fact, the Challenger Guidance was published on the Secretary of State website and distributed in a News Update on May 25, 2022.

51. The Complaint also claims that the Plaintiffs "learned of one such rule change [the challenger credential form] on the evening of the August 2022 primary election." However, on May 31, 2022, Adam Fracassi, the Bureau of Elections Regulatory Manager, received a text message from Matthew Seifried, Elections Integrity Director for the Republican National Committee. The text message read, in part, "I just saw the updated guidance on poll challengers and poll watchers. Thank you and everyone at the

Bureau of Elections for putting that together. Im [sic] in the process of developing our AVCB training and am going to reference it a lot." Mr. Seifried also asked about the location of the blank poll challenger credential card (which is posted online). (Attachment C, 5/31/22 Text Messages).

52. Furthermore, Adam Fracassi emailed John Inhulsen on July 26, 2022, explaining that he coordinates with parties on challenger issues and was seeking contact information regarding challenger coordination for the Republican Party. On August 1, 2022, Mr. Inhulsen responded providing contact information for himself and Paul Cordes. (Attachment D, 7/26/22 E-mails).

53. Based on the messages received from Mr. Seifried (on May 31, 2022) and Mr. Inhulsen (on August 1, 2022), the Bureau had no reason to believe the Michigan Republican Party or Republican National Committee had any concerns with the updated Challenger Guidance. (See Attachments C & D).

54. Then, on August 25, 2022, the Republican National Committee and the Michigan Republican Party sent a letter to the Bureau inquiring about the legal basis for the challenger credential form. The Attorney General's office responded to this letter on behalf of the Secretary on September 2, 2022.

55. The August 25, 2022 letter raised questions only about the challenger credential form. The Bureau did not learn of the Republican Party's concerns with other provisions of the Challenger Guidance until this lawsuit was filed on September 30, 2022—four months after the Challenger Guidance was released and the Republican National Committee contacted the Bureau confirming they had reviewed it, two months after the August 2022 primary, and five weeks after they received a response to their letter.

PREJUDICE CAUSED BY PLAINTIFFS' DELAY

56. This is an extremely busy time for the Bureau; absentee ballot voting is already underway and numerous deadlines for the administration of the November 8, 2022 election are occurring over the next month. There is limited time and resources available to respond to legal challenges to guidance that was published months earlier, and the Bureau's ability to respond to these legal challenges has been hindered by Plaintiffs' waiting to bring this action until the election was not only imminent but already underway.

57. The updated Challenger Guidance has already been incorporated into Bureau training provided to clerks in the Summer of 2022. Specifically, the Bureau conducted its biannual election cycle training, which are courses in person in locations across the state in May and June 2022, as well as in clerk accreditation trainings.

58. Additionally, the Challenger Guidance was incorporated into the Election Procedures Manual used at polling places. This document has been printed and mailed to clerks across the state.

59. Although it would be possible to make changes to the online version of the Challenger Guidance and other training materials, the Bureau of Elections cannot publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date, and cannot conduct further in-person trainings in this short period before the election. Even if this were possible, clerks are no longer available to attend new training courses at this time. Changing training and manuals at this late date would also cause significant confusion among clerks and election inspectors.

60. Some clerks have already begun training their election inspectors for the upcoming election, so these inspectors would need to somehow be retrained on the changed procedures.

Jonathan Brater, Director of Elections
Department of State

Dated: October 11, 2022

Subscribed and sworn to before me
October 11, 2022.

Charles Walter Darnell

Print name exactly as it appears on application for commission as a notary public
Notary Public, State of Michigan, County of Washtenaw
My Commission Expires 05/23/2025
Acting in the County of Washtenaw

CHARLES WALTER DARNELL
Notary Public: Washtenaw County, MI
My Commission Expires May 23, 2025
Acting In The County of Washtenaw

EXHIBIT A

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November 5, 2020

Via email to: cgarrett@waynecounty.com

Cathy M. Garrett
Wayne County Clerk
2 Woodward Avenue
Detroit, MI 48226

Re: Preservation of Evidence

Dear Ms. Garrett:

We represent John James, candidate for U.S. Senate. It has come to our attention that due to apparent widespread fraud and irregularities, the absent voter ballots counted in Wayne County may be in question. The vote counts in Wayne County appear to be irregular, if not fraudulent. This letter places you on notice to preserve and not destroy *any* evidence related to the absent voter process in Wayne County.

We have received and documented hundreds of reports of irregularities that occurred during the processing of Wayne County absent voter ballots at the TCF Center in Detroit. The information we have received casts serious doubt on the validity of the results of the election. Irregularities range from challenger intimidation, lack of access, unsecure ballots, improper processing, failure to verify signatures, mismatched envelopes and ballots, ballot back-dating, failure to verify individuals in e-poll and supplemental poll books and even reports of nearly 40,000 unidentified ballots arriving at 3:45 AM on November 4. These incidents raise serious concerns over the sanctity of the electoral process in Wayne County. As a result, we expect investigations and recounts will occur. We will get to the bottom of it.

In light the egregious actions discussed above, we demand that you affirmatively preserve, and not destroy, delete, hide or misplace the following:

- Absent ballot requests
- E-poll books
- Supplemental poll books
- Ballot drop boxes
- Footage from all ballot drop box locations[1]

[1] Michigan law requires absent voter ballot drop boxes to be monitored by video. *See* Senate Bill 757 at 761d(4)(c) ("The city or township clerk must use video monitoring of that drop box to ensure effective monitoring of that drop

- All absent ballots, including those counted, challenged and provisional
- Personnel records
- Challenger sign in sheets
- Documents and materials of all kinds, without limitation regarding the absent voter process—from absent ballot request through the sealing of the ballot boxes and uploading of tabulations.

Further, we demand a list of every absent voter ballot drop box in Wayne County.

Thank you for your prompt attention to this matter. Please respond within 8 hours to confirm your compliance with these demands.

Sincerely,

Charles R. Spies
Robert Avers
Jessica Brouckaert

cc: Heather S. Meingast
Erik A. Grill
Assistant Attorneys General
Post Office Box 30736
Lansing, Michigan 48909

Jonathan Brater
Michigan Department of Elections
430 West Allegan Street
Lansing, MI 48933

Matthew Schneider
U.S. Attorney
Eastern District of Michigan
211 W. Fort Street, Suite 2001
Detroit, MI 48226

box."). Michigan law allows "challengers" to monitor the absentee ballot process and challenge ballots that do not meet Michigan's strict compliance with absent voting procedures. MCL 168.730-168.734 It is critical that election challengers have access to all recordings of all ballot drop-boxes so that they can aid in determining the propriety of ballots deposited in those boxes.

EXHIBIT B

Michigan Secretary of State's Office

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

Michigan Secretary of State sent this bulletin at 05/25/2022 09:02 AM EDT

Having trouble viewing this email? View it as a Web page.

Michigan Bureau of Elections
News Update
for Election Administrators

Regular Edition News Update #2022-18

May 25, 2022

In this issue:

Updated Challenger Document

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

Additionally, we have provided a Michigan Challenger Credential Card on our website. Parties and

BOE Closed on Monday

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

credentialling organizations should ensure the credentials issued to their challengers substantially comply with this form.

QVF Software Updates

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

Election Security

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

Ballot Proof Approval for August 2, 2022 Primary Election

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

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

- Counties and municipalities should establish points of contact and timelines for the review of ballots to ensure that every ballot style is reviewed by both the

How to avoid Phishing Emails

Redistricting Status Update

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

Polling Location Assignments

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

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

county and municipal clerk prior to printing.
- Counties should communicate with neighboring counties about any school district language in school districts that cross county lines.
- Carefully review your split precincts and any district numbers that have changed. Ensure you have accounted for all your ballot splits.
- Ensure all "vote for" numbers are correct.
- Make sure all local office partial terms are included on the ballot.

Election Geo & AV Impacts

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

Redistricting Module Retirement

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

Helpful Links

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EXHIBIT C

Tue, May 31 at 6:35 PM

Hey Adam. This is Matthew Seifried. I hope you're doing well and had a great Memorial Day weekend. I just saw the updated guidance on poll challengers and poll watchers. Thank you and everyone at the Bureau of Elections for putting that together. Im in the process of developing our AVCB training and am going to reference it a lot.

One question I do have is in regards to the blank poll challenger credential card. I couldn't find it on the SOS website. Are you able to send it to me or point me in the

EXHIBIT D

From: John Inhulsen
To: Fracassi, Adam (MDOS)
Cc: Paul Cordes
Subject: Re: Challenger Contact
Date: Monday, August 1, 2022 9:15:20 AM

Good morning, Adam!

Please have myself and Paul Corrdes down as contacts.

John Inhulsen
616.490.5121
john@inhulsenlaw.com

Paul Cordes
616.551.8326
pcordes@migop.org

John W. Inhulsen
Inhulsen Law PLC
3351 Claystone St. SE, Suite 104
Grand Rapids, Michigan 49546
Phone: 616.747.0000 | Fax: 616.747.8888
Email: john@inhulsenlaw.com | www.inhulsenlaw.com

> On Jul 26, 2022, at 2:14 PM, Fracassi, Adam (MDOS) <FracassiA@michigan.gov> wrote:
>
> Hi John,
>
> As you know, election day is coming up. On each election day, I coordinate with both of the parties on challenger issues. As part of that, I typically reach out to the parties to seek contact information for whomever coordinates the challenger/poll watcher part on your respective sides. I'm seeking a name, email and phone number so if there is an issue with challengers in a particular precinct, I have a person to contact. I like to be able to contact directly as issues arise so we can attempt to resolve them as quickly as possible.
>
> If you could email me directly the individual that I can contact if any issues arise, I would greatly appreciate it.
>
> Thank you,
>
> Adam Fracassi, Manager

Regulatory Section
Michigan Bureau of Elections
P.O. Box 20126
Lansing, Michigan 48901

EXHIBIT B

STATE OF MICHIGAN

COURT OF CLAIMS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN (also known as ABC OF MICHIGAN),

Plaintiff,

v

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET, a State Government Agency,

Defendant,

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,

Intervening Defendant.
_____/

OPINION AND ORDER

Case No. 22-000111-MZ

Hon. Douglas B. Shapiro

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan.

Pending before the Court is plaintiff's motion for a preliminary injunction and defendant's MCR 2.116(C)(4) and (C)(8) motion for summary disposition. Having reviewed the briefing and hearing arguments on September 20, 2022, the Court GRANTS defendant's motion for summary disposition and DISMISSES plaintiff's motion for a preliminary injunction as moot.

I. BACKGROUND

At issue in this matter is whether defendant, Department of Technology, Management & Budget (DTMB), lawfully established a prevailing-wage policy for contractors working on state

projects several years after the repeal of the Prevailing Wage Act, MCL 408.551 *et seq.*, repealed by 2018 PA 171.

Before it was repealed in 2018, the Prevailing Wage Act provided, in relevant part, that

> [e]very contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [MCL 408.552, repealed by 2018 PA 171.]

The Prevailing Wage Act further required the contracting agent (the state entity) to have the commissioner (of the Department of Labor) determine the prevailing-wage rates and fringe-benefit rates for all classes of construction mechanics outlined in the proposed contract and to include a schedule of the rates within the specifications for the work. MCL 408.553, repealed by 2018 PA 171. The Prevailing Wage Act also made it a misdemeanor to violate the provisions of the statute. MCL 408.557, repealed by 2018 PA 171.

In June 2018, the Legislature approved a voter-initiated petition, under Const 1963, art 2, § 9, that repealed the Prevailing Wage Act. See 2018 PA 171. The repealer, which appears in 2018 PA 171, simply stated "408.551-408.588 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018." "Enacting section 2" of the repealer appropriated certain funds toward communicating the repeal of the Prevailing Wage Act to the public, and "[e]nacting section 3" contained a severability clause. The corresponding Compiler's Note stated, "Public Act 171 of 2018 was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 6, 2018, the initiative petition was approved by an affirmative vote of the majority of the Senate and the House of Representatives, and filed with the Secretary of State." The repealer did *not* restrict defendant from establishing its own

prevailing-wage policy based on its authority to develop the terms of state contracts, as outlined in the Management and Budget Act, MCL 18.1101 *et seq*.

On October 7, 2021, Governor Gretchen Whitmer issued a press statement announcing that defendant would require contractors and subcontractors bidding on DTMB projects greater than $50,000 to pay their employees the prevailing wage in the region. At the time, the Governor's Office explained, "Michigan's repeal eliminated the state's prevailing-wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts." Thus, "[t]he move reinstates the prevailing wage requirement, which was repealed in June 2018, and ensures that any construction worker working on a state construction project receives a fair wage." Unlike a violation of the Prevailing Wage Act, violation of defendant's prevailing-wage policy does *not* constitute a crime.

Beginning with contracts initially posted for bidding after March 1, 2022, defendant required state contractors and subcontractors to pay the applicable prevailing wage. Defendant posted certain requirements and frequently asked questions for the prevailing-wage policy on its website, providing the following administrative guide citation:

> **1.3.13 Prevailing Wage**
>
> With the exception of lease build-outs, if a project greater than $50,000 involves employing construction mechanics (e.g., asbestos, hazardous material handling, boilermaker, carpenter, cement mason, electrician, office reconstruction and installation, laborer including cleaning debris, scraping floors, or sweeping floors in construction areas, etc.) and is sponsored or financed in whole or in part by State funds, state contractors must pay prevailing wage. [*Prevailing Wage for DTMB Construction Contracts—Administrative Guide Citation, Effective March 1, 2022*, available at https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information (last accessed October 7, 2022).]

On July 21, 2022, plaintiff, a trade association representing approximately 900 construction and construction-related firms, sued in this Court for declaratory and injunctive relief, claiming that (1) defendant's prevailing-wage policy violated the separation-of-powers doctrine; (2) the prevailing-wage policy was not enacted in compliance with the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*.; and (3) defendant's conduct was an *ultra vires* exercise of legislative power. Plaintiff also moves for a preliminary injunction to enjoin enforcement of defendant's prevailing-wage policy, arguing that it is likely to prevail on the merits, and that its members will sustain irreparable financial harm without an injunction and if forced to pay a prevailing wage. Finally, plaintiff argues, an injunction would not harm defendant or the public because the injunction would return the contract-bidding process to the status quo between 2018 and 2022.

Defendant responded to the motion for a preliminary injunction and moved for summary disposition as its first response to the complaint. Defendant first argues, in its motion for summary disposition, that plaintiff lacks standing to sue and its claims are unripe. Next, defendant argues it did not violate separation of powers or commit an *ultra vires* act by establishing a prevailing-wage policy for DTMB contracts. The APA did not bind defendant because it was exercising a legislative grant of power when enacting the prevailing-wage policy. In its response to plaintiff's motion for a preliminary injunction, defendant adds that plaintiff failed to sue for nine months after Governor Whitmer's announcement, and nearly five months after defendant's prevailing-wage policy went into effect. Also, according to defendant, plaintiff's claim for irreparable harm

remains speculative and is outweighed by the harm to local economies if defendant were prohibited from enforcing the prevailing-wage policy.[1]

The Court heard arguments on both motions on September 20, 2022, and the parties agreed that the Court may decide both motions simultaneously.

II. ANALYSIS

A. JUSTICIABILITY CHALLENGE

Defendant challenges plaintiff's standing to sue on behalf of its membership and the ripeness of its claims.[2] The Court disagrees with defendant's arguments and concludes that plaintiff's claims are justiciable.

[1] The Court permitted Michigan Building and Construction Trades Council to intervene as a defendant. Michigan Building and Construction Trades Council has concurred in defendant's response to plaintiff's motion for a preliminary injunction and in defendant's motion for summary disposition.

[2] Defendant requests summary disposition under MCR 2.116(C)(4) on the basis that plaintiff's claims are not justiciable. Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). " 'When viewing a motion under MCR 2.116(C)(4), [the] Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.' " *Id*. (citation omitted).

Defendant further argues that plaintiff has failed to state a claim for relief under MCR 2.116(C)(8). This motion tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 357838); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*. The court will consider the factual allegations in the complaint as true, but may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

To the extent the Court is required to interpret the Management and Budget Act, the Court will examine the language of the statutes to determine the Legislature's intent. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). "The Legislature is

> [A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Groves v Dep't of Corrections*, 295 Mich App 1, 5; 811 NW2d 563 (2011) (alteration in original), citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*).]

The Court of Appeals has explained that the doctrine of ripeness is like the doctrine of standing in that both doctrines focus on the timing of the lawsuit. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017). For a matter to be ripe, the plaintiff must have an actual injury to bring a claim, and cannot premise their lawsuit on a hypothetical injury. *Id*. at 554.

Defendants argue that plaintiff lacks standing to sue under the "disappointed bidder doctrine." As the Court of Appeals acknowledged in *Groves*, "Michigan jurisprudence has never recognized that a disappointed bidder . . . has the right to challenge the bidding process." *Groves*, 295 Mich App at 5. This is because a contract bidder lacks an expectancy interest in the public contract to be awarded. *Id*. at 5-6. The rationale behind the rule is that competitive bidding for public contracts is designed to benefit taxpayers and not the parties seeking the contracts. *Id*. at 7.

---

presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *Id*. As for the Prevailing Wage Act's repealer, 2018 PA 171, to the extent the Court is required to interpret its provisions, the court will do so in line with the intent of the electors who initiated the law. *DeRuiter v Byron Twp*, 505 Mich 130, 139; 949 NW2d 91 (2020).

The problem with defendant's theory is that plaintiff is not a disappointed bidder to a specific state contract. As plaintiff notes, each case defendant cites addressed a losing bidder's challenge to a state contract after it was made. See *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 43-44; 821 NW2d 1 (2012) (the plaintiff, the lowest bidder, sued the defendant for tortious interference after a public body awarded a contract to the defendant, the second-lowest bidder); *Detroit v Wayne Circuit Judges*, 128 Mich 438, 438-439; 87 NW 376 (1901) (the city of Detroit accepted a bid to repave a street and the plaintiff, the lowest bidder, challenged the decision); *MCNA Ins Co v Dep't of Tech, Mgt & Budget*, 326 Mich App 740, 741-742; 929 NW2d 817 (2019) (the petitioner submitted a proposal in response to a state request for submissions and challenged the respondent's decision to accept another proposal); *Groves*, 295 Mich App at 4 (the plaintiff sued after another entity won a state-contract bid); and *Rayford v Detroit*, 132 Mich App 248; 347 NW2d 210 (1984) (laid-off police officers sued to get their jobs back after a change to the city budget). In this case, plaintiff is challenging defendant's authority to enforce the prevailing-wage policy—not its decision to enter into a specific contract. Thus, the disappointed bidder doctrine does not preclude plaintiff's lawsuit.

The Court looks, instead, to whether plaintiff has met the criteria to request declaratory relief under MCR 2.605. MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Defendant challenges whether there is an "actual controversy" in this matter, arguing that plaintiff's injury is purely hypothetical. It argues that plaintiff and its members have no special injury or right distinct from the public at large, which renders its claims unripe.

The most relevant case on this topic is *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486; 815 NW2d 132 (2012) (*UAW*). In *UAW*, the plaintiff sued on behalf of its members to enjoin enforcement of a policy relating to the political candidacy of the defendant's employees. *Id*. at 489-492. The defendant argued there was no actual controversy, for standing purposes, because it had not yet applied the policy to any employees. *Id*. at 492. The Court of Appeals held that courts may not decide hypothetical (or unripe) issues, but clarified that a court may grant declaratory relief to guide or direct future conduct. *Id*. at 495. "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *Id*. (quotation marks and citation omitted). Thus, the Court concluded that even though the defendant had not yet acted on the policy, the plaintiff had standing to settle the issue before it ripened into a violation of the law. *Id*. at 496-497.

Likewise, although plaintiff does not allege that defendant has denied its members a contract based on the prevailing-wage requirements, the Court concludes that, as a representative for bidders on state contracts, plaintiff has demonstrated an adverse interest that is distinct from the public at large and that necessitates a sharpening of the issues at this juncture. Plaintiff's injury is not purely hypothetical because its members must alter their business practices to obtain a state-government contract. Plaintiff has standing to sue for declaratory relief, and its claim is ripe for this Court's review.

B. SEPARATION OF POWERS

Next, defendant argues that the prevailing-wage policy was a proper exercise of its discretionary authority under the Management and Budget Act. On this point, the Court agrees.

Plaintiff's first challenge to defendant's authority to enact a prevailing-wage policy is on the basis of separation of powers. Article 3, § 2 of the Michigan Constitution provides for separation of powers among the three branches of government as follows: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The Michigan Supreme Court has explained that " 'the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers.' " *Taxpayers of Mich against Casinos v Michigan*, 478 Mich 99, 105; 732 NW2d 487 (2007) (citation omitted). Rather, an overlap is permissible if " 'the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other . . . .' " *Id*. (citation omitted). Thus, the branches of government are not "wholly separate." *Id*. at 105-106 (quotation marks and citation omitted).

The separation-of-powers principle has led to the development of a standard known as the nondelegation doctrine. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). The nondelegation doctrine essentially prohibits the Legislature from delegating its power to either the executive branch or judicial branch, but permits the Legislature to obtain assistance from the other branches of government under certain circumstances. *Id*. By way of example, the Legislature may delegate a task to an executive-branch agency if the Legislature provides "sufficient standards" for the executive agency to follow, at which point the task becomes a proper exercise of executive power. *Id*. at 10 n 9.

The Legislature has delegated certain powers to defendant in the Management and Budget Act. Among other powers, MCL 18.1261(2) grants defendant broad discretionary authority over the award, solicitation, and amendment of state contracts. The statute provides, "The department shall *make all discretionary decisions* concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2) (emphasis added).

With that said, the Legislature also gave defendant ample guidance to support its discretionary decision making, as required under the nondelegation doctrine. By way of example, the Legislature requires defendant to award a construction contract to the "responsive and responsible best value bidder." MCL 18.1241(4). The Legislature defined the term "responsive and responsible best value bidder" to mean the bidder who meets the following criteria:

> (a) A bidder who complies with all bid specifications and requirements.
>
> (b) A bidder who has been determined by the department to be responsible by the following criteria:
>
> (*i*) The bidder's financial resources.
>
> (*ii*) The bidder's technical capabilities.
>
> (*iii*) The bidder's professional experience.
>
> (*iv*) The bidder's past performance.
>
> (*v*) The bidder's insurance and bonding capacity.
>
> (*vi*) The bidder's business integrity.
>
> (c) A bidder who has been selected by the department through a selection process that evaluates the bid on both price and qualitative components to determine what is the best value for this state. Qualitative components may include, but are not limited to, all of the following:
>
> (*i*) Technical design.
>
> (*ii*) Technical approach.

(*iii*) Quality of proposed personnel.

(*iv*) Management plans. [MCL 18.1241(4)(a)-(4)(c).]

By providing the above criteria, the Legislature provides defendant with "sufficient standards" to follow, making the Management and Budget Act a proper delegation of legislative power. But beyond providing the above standards, the Legislature does not regulate defendant's discretionary powers at the granular level. For example, when deciding the quality of proposed personnel, defendant has the discretion to determine what metrics it uses to measure the quality of the personnel, such as experiential background. Nor does the Legislature, provide detailed guidance on how to measure the bidder's business integrity, leaving the specifics of that decision to defendant as well. The Legislature also does not direct defendant on what materials to require as part of the "technical design" or the "technical approach."

The only case plaintiff cites to limit defendant's discretionary authority to award a state contract is *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), in which the Michigan Supreme Court held that a public body's exercise of discretion to accept or reject contract bids is only curtailed when necessary to prevent fraud, violation of trust, or an injustice. But plaintiff does not allege that defendant has acted with fraud or has committed a violation of trust. 2018 PA 171 simply repealed the Prevailing Wage Act without substituting any language in its place or providing any rationale for the repeal. See 2018 PA 171. The Court declines to read any prohibitions into the Prevailing Wage Act repealer that do not appear in, and cannot be implied from, the language of the statute. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 564; 741 NW2d 549 (2007) ("A court cannot read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself.").

The Court finds *Associated Builders & Contractors v Lansing*, 499 Mich 177; 880 NW2d 765 (2016), instructive in this context. In *Associated Builders*, the plaintiff alleged that the defendant (a municipality) lacked authority to adopt an ordinance regulating wages paid by third parties, even when the work was done on municipal contracts and through the use of municipal funds. *Id*. at 181. The Michigan Supreme Court, however, held that municipalities had broad constitutional powers over local concerns, which included the power to set terms for municipal contracts with third parties. *Id*. at 187-188. Thus, because the Michigan Constitution granted municipalities broad control over local concerns, and because there was no other source of law prohibiting the city of Lansing from setting a wage policy, Lansing's ordinance withstood the plaintiff's challenge. *Id*. at 189-190. Similarly, in this case, the Prevailing Wage Act repealer did not limit defendant's broad authority under the Management and Budget Act to enact policies relating to state contracts, including a prevailing-wage policy.

Had the Legislature wished to limit defendant's ability to set a prevailing wage, it could have done so through statute. The Local Government Labor Regulatory Limitation Act, MCL 123.1381 *et seq.*, expressly prohibits local governments from requiring employers to pay an employee a wage or benefit based on the prevailing wage in the locality. MCL 123.1386 provides, in relevant part, "A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to pay to an employee a wage or fringe benefit based on wage and fringe benefit rates prevailing in the locality." The statute did not apply to state projects subject to the Prevailing Wage Act (which was still in effect at the time the Local Government Labor Regulatory Limitation Act was enacted). *Id.* The rationale for the Local Government Labor Regulatory Limitation Act was the Legislature's conclusion that "regulation of the employment relationship between a nonpublic employer and its employees is a matter of

state concern and is outside the express or implied authority of local governmental bodies to regulate, absent express delegation of that authority to the local governmental body." MCL 123.1382. This statute demonstrates that the Legislature knew how to limit another governmental body's ability to set a prevailing wage. The Legislature declined to do so here. And while plaintiff notes that the repeal of the Prevailing Wage Law was initiated by voter petition (not by proposed legislation), the Legislature could have proposed an alternative law for voter consideration that expressly prohibited prevailing wage. Or, now that the 2018 legislative session has expired, the Legislature could pass a new law at any time prohibiting defendant from establishing a prevailing-wage policy.

Finally, plaintiff argues that defendant's interpretation of its powers under the Management and Budget Act conflicts with certain prohibitions outlined in the Fair and Open Competition in Governmental Construction Act, MCL 408.871 *et seq*. The implication is that by violating the Fair and Open Competition in Governmental Construction Act, defendant has violated the separation-of-powers doctrine as well.

The purpose of Fair and Open Competition in Governmental Construction Act is to "provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants, and providing for fair and open competition best effectuates this intent." MCL 408.872.[3] Plaintiff cites MCL 408.875, which provides:

[3] As intervening-defendant notes, the Sixth Circuit has concluded that the Fair and Open Competition in Governmental Construction Act is proprietary—as opposed to regulatory—in nature. *Mich Bldg and Constr Trades Council v Snyder*, 729 F3d 572, 577 (CA 6, 2013).

> Subject to section [MCL 408.878], a governmental unit awarding a contract on or after the effective date of the amendatory act that added [MCL 408.872] for the construction, repair, remodeling, or demolition of a facility and any construction manager acting on its behalf shall not, in any bid specifications, project agreements, or other controlling documents:
>
> (a) Require or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with 1 or more labor organizations in regard to that project or a related construction project.
>
> (b) Otherwise discriminate against a bidder, offeror, contractor, or subcontractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with 1 or more labor organizations in regard to that project or a related construction project.

Plaintiff argues that the prevailing-wage policy discriminates in favor of bidders who enter into collective bargaining agreements with unionized employees, in violation of MCL 408.875(b). It points to language in a Michigan Department of Labor and Economic Opportunity (LEO) document titled "DTMB Prevailing Wage Commercial Survey," which defendant used to set the prevailing-wage rates. Plaintiff argues that the survey violated the Fair and Open Competition in Governmental Construction Act because the survey directs prospective bidders, "It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form." But plaintiff does not cite the entirety of the provision.

The complete text of relevant provision in the commercial survey provides:

> Please provide prevailing wages and fringe benefits currently in effect under the applicable collective bargaining agreement, and under any applicable understandings associated with the agreement. List rates separately for each geographic area and, if applicable, for each size of project for which there are different rates in effect.
>
> On each rate sheet you complete, if there is only one pay rate in effect for a job classification, list that rate as the prevailing wage. If there is more than one pay

> rate in effect, list as the prevailing wage the one that has been the most frequently or commonly paid during the 60 days prior to completing this Survey. In determining the most common or frequent wage, include the pay rates in effect in the area even if a collective bargaining agreement or understanding excludes those rates from prevailing wage projects.
>
> It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form.
>
> **Rates cannot be included in the state prevailing wage schedules if they are not submitted with a current collective bargaining agreement or understanding.**

Considering the survey as a whole, the language of the survey does not constitute a "bid specification," a "project agreement" or another "controlling document" as outlined in MCL 480.875. Rather, the survey is intended to assist defendant in establishing the prevailing wage in a given locality. There is no indication, from this document alone, that defendant has discriminated against (or intends to discriminate against) any specific bidder for refusing to enter into a collective-bargaining agreement. In fact, in another document titled *Informational Sheet: Prevailing Wages on DTMB Projects*, attached to plaintiff's complaint, defendant has explained, "Prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. While the DTMB prevailing wage rates are compiled though surveys of collectively bargained agreements, a collective bargaining agreement is *not required* for contractors to be on or be awarded state projects." (Emphasis added.) The survey, in and of itself, does not violate the Fair and Open Competition in Governmental Construction Act or establish a separation-of-powers violation.

The bottom line is that plaintiff attempts to read language into the initiative petition repealing the Prevailing Wage Act that does not appear in the repealer. The voter-initiated law simply repealed the Prevailing Wage Act, without otherwise limiting defendant's authority under

the Management and Budget Act. When the Prevailing Wage Act was repealed, the Management and Budget Act became the status quo. At present, the Management and Budget Act provides defendant with broad discretionary authority, which encompasses the ability to establish a prevailing-wage policy. Plaintiff has not pointed to a single source that denies defendant that discretion or prohibits defendant from setting a prevailing wage for construction contracts. For these reasons, defendant's implementation of a prevailing-wage policy does not violate separation of powers.

C. APA COMPLIANCE

Plaintiff next argues that defendant failed to follow the appropriate procedures to enact the prevailing-wage policy as a "rule" under the APA. Plaintiff further contends that when the Legislature repealed the Prevailing Wage Act, there was no longer an "executive agency actor" who had the power to make or enforce a prevailing-wage requirement. But the Management and Budget Act grants defendant broad discretionary authority relating to solicitation and award of state contracts. See MCL 18.1261(2). So defendant continued to serve as the executive agency actor with the power to set or enforce a prevailing-wage requirement.

Moreover, defendant does not claim that its prevailing-wage policy was a "rule" within the meaning of the APA. Rather, defendant's position is that the policy falls within an exception to the APA's rulemaking requirements, as outlined in MCL 24.207(j). MCL 24.207 defines the term "rule" to mean, in relevant part:

> 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.

In general, an administrative agency cannot rely on a guideline or policy in lieu of a rule promulgated under the APA. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 82; 678 NW2d 444 (2003). The APA requires agencies to follow certain procedures, including providing notice and holding a hearing. *Id*., citing MCL 24.241 (outlining the notice and hearing requirements for a proposed rule). The failure to do so will render the rule invalid. *Id*.

But there are several exceptions. Defendant relies on the exception for "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). As the Court of Appeals has explained, "If an agency policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption." *Pyke v Dep't of Social Servs*, 182 Mich App 619, 630; 453 NW2d 274 (1990). MCL 24.207(p) also excludes from the definition of rule "[t]he provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract."

The Court of Appeals explored a similar situation in *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56; 261 NW2d 206 (1977). In *Wolverine Lake*, both Commerce Township and the Village of Wolverine Lake submitted separate petitions to the State Boundary Commission (SBC) to incorporate their existing township and village. *Id*. at 57. The SBC granted Commerce Township's petition, denied Wolverine Lake's petition, and adjusted the boundaries for Commerce Township to include the Village of Wolverine Lake. *Id*. at 57-58.

Wolverine Lake challenged the decision, arguing that the SBC had adopted a "rule," without engaging in proper rulemaking procedures, that disfavored small cities in the metropolitan Detroit area. *Id*. at 58. The Court concluded, however, that the SBC exercised a permissive

statutory power under MCL 123.1009, which provided the SBC with criteria when considering a petition for proposed incorporation. Like the Management and Budget Act, the statute at issue in *Wolverine Lake* did *not* expressly permit favoring larger communities, but allowed the SBC to consider certain factors, including "past and probable future urban growth," "probable future needs for services," "practicability of supplying such services," "the probable effect on the cost and adequacy of services in the area to be incorporated and on the remaining portion of the unit from which the area will be detached," and "the financial ability of the incorporating municipality to maintain urban type services in the area." *Id*. at 59.

The Court concluded that, because the statutory criteria favored "future growth and ability to provide services," the SBC was bound to favor larger communities with an industrial-tax base. *Id*. Thus, the statute—not the SBC's internal policies--created the perceived bias against small communities. *Id*. at 59-60. See also *Hinderer v Dir, Mich Dep't of Social Servs*, 95 Mich App 716, 727; 291 NW2d 672 (1980) (citing *Wolverine Lake* for the proposition that "if an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption").

Here, as discussed earlier, the Management and Budget Act grants defendant broad discretionary powers when awarding state contracts, but provides certain criteria for defendant to consider when awarding a contract to the responsive and responsible best-value bidder. Defendant's prevailing-wage policy follows from its permissive statutory authority to make *all* discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j). Additionally, the prevailing-wage policy applies to, and forms a term of, defendant's contracts with private entities. So the rulemaking exception outlined in MCL 24.207(p) applies in

this circumstance as well.[4] Accordingly, defendant was not required to follow the APA's formal rulemaking process when enacting the prevailing-wage policy.

D. *ULTRA VIRES* ACTIVITY

Plaintiff also argues that the prevailing-wage policy was an *ultra vires* exercise of governmental power. An *ultra vires* activity is one that is "*not* expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). For the reasons discussed earlier, defendant did not engage in an *ultra vires* activity because its decision to implement a prevailing-wage policy was within its discretionary powers outlined in the Management and Budget Act.[5]

III. CONCLUSION

For these reasons, the Court GRANTS defendant's motion for summary disposition. Because the Court concludes that defendant is entitled to summary disposition, the Court need not

[4] Even if the prevailing-wage policy were a "rule," MCL 24.264 provides that the validity of a rule may be determined in a declaratory-judgment action only if it impairs the legal rights or privileges of the plaintiff. Plaintiff's members have no legal right or privilege to obtain a state contract or to prohibit the state from considering their wages when granting a government contract. The outcome for plaintiff's members, if they fail to abide by the prevailing-wage policy, is the denial of a state contract; they are still eligible for local or private jobs.

[5] Plaintiff also cites the Michigan Supreme Court's recent decision in *People v Peeler*, ___ Mich ___; ___ NW2d ___ (2022) (Docket Nos. 163667, 163672, and 164191), for the position that "an administrative official [cannot] revive the content and meaning of a statute that has been specifically amended to remove that content." *Peeler* explored the exercise of a "one-man grand jury," as outlined in MCL 767.3 and MCL 767.4. *Id*. at ___; slip op at 2. The Court concluded that although the Legislature had initially permitted judges to issue indictments, it later amended the relevant statute to remove that authority. *Id*. at ___; slip op at 12. The Court held, therefore, that the statute did not permit a judicial indictment initiating a criminal prosecution. *Id*. at ___; slip op at 12-13, 15. Where this case differs from *Peeler* is the fact that the Legislature *has* provided defendant with broad discretionary powers in relation to the solicitation, award, amendment, cancellation, and appeal of state contracts. See MCL 18.1261(2). *Peeler* is inapplicable in this context.

address the merits of plaintiff's motion for a preliminary injunction, which is DISMISSED AS MOOT.

This is a final order that dismisses the final claim and closes the case.

Date: October 10, 2022

Douglas B. Shapiro
Judge, Court of Claims