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 SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S 10/17/22 REPLY BRIEF IN SUPPORT OF THEIR 10/11/22 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,

Defendants.

No. 22-000164-MZ

HON. BROCK A. SWARTZLE

Ann M. Howard (P49379)
Attorney for O'Halloran Plaintiffs
26100 American Drive, #607
Southfield, Michigan 48034
248.752.0650
ahoward@annhowardlaw.com

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for all Defendants
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
grille@michigan.gov
meingasth@michigan.gov

Charles R. Spies (P83260)
Robert L. Avers (P75396)
Thomas F. Christian III (83146)
Attorneys for DeVisser Plaintiffs
350 South Main Street, Suite 300
Ann Arbor, Michigan 48104
734.623.1672
cspies@dickinsonwright.com
ravers@dickinsonwright.com
tchristian@dickinsonwright.com

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I. Plaintiffs' claims are barred by laches.

In their response to Defendants' motion for summary disposition, the DeVisser Plaintiffs maintain they were diligent in bringing their claims because they only discovered the new instructions "the night of the August 2022 primary election." (DeVisser Resp, p 13.) They shrug off the fact that the RNC's Election Integrity Director for Michigan was aware of "the updated guidance on poll challengers and watchers" as of May 31, 2022. (Defs' Brf, Ex A, Attach C.) They further suggest it was simply too hard for them to locate the document on the Secretary's public website and read all 27 pages of instructions. (DeVisser Resp, p 13.) They note that they *did* bring the credential form issue to the Secretary's attention in their August 25, 2022, letter. *Id.*

Although incredible, even assuming the parties made no effort to check the Secretary's website in May, June or July, or inquire as to whether there were any changes to the Challenger Guidance, the test for diligence is the timing of their lawsuit. By their admission, they had knowledge of some changes the night of the August 2 primary, but waited 23 days to contact the Secretary's office, and then waited another 28 days to file their complaint after receiving a response to their letter on September 2. They had the whole summer to read the guidance and file suit. But Plaintiffs sat on their hands; they were not diligent.

Every day of delay in bringing election litigation is critical. And the delay has prejudiced Defendants and the 1,500+ clerks they supervise. Plaintiffs deny that and allege, with little evidence, that the "instructions were largely unenforced" during the primary. (DeVisser Resp, p 14.) Even if that were true, Defendants expect that the instructions will be fully implemented by clerks and election inspectors for the November 8 election. As Director Brater explained, there has already been significant training and incorporation of the new instructions into written guidance sent to the clerks, and clerks have already begun training election inspectors. (Defs'

Brf, Ex A, ¶¶ 56-59.) It would be difficult if not impossible to communicate new instructions to clerks and ensure an orderly election day—one where new changes are implemented uniformly in the thousands of election precincts and AVCBs across the state. Last, Plaintiffs argue that the doctrine of "unclean hands" bars application of laches. But Plaintiffs offer no support for such argument other restating their (incorrect) contention that Defendants have violated the law; none of the cases Plaintiffs cite involve election litigation; and there is a statutory presumption that laches now applies. MCL 691.1031; MCL 600.6422(1). Laches should bar Plaintiffs' claims.

II. The instructions need not be promulgated as rules under the APA.

The DeVisser Plaintiffs simply ignore the authority the Legislature has expressly conferred on the Secretary to act outside of promulgating rules. Under § 31(1), the Secretary "shall" (a) "*issue instructions* . . . for the conduct of elections . . . in accordance with the laws of this state," (b) "[*a*]*dvise and direct* local election officials as to the proper methods of conducting elections," (c) "[*p*]*ublish and furnish* for the use in each election precinct before each state . . . election a *manual of instructions* that includes . . . procedures and forms for processing challenges," and (e) "[*p*]*rescribe and require* uniform forms . . . the secretary . . . considers advisable for use in the conduct of elections[.]" Also, under § 765a(13) the Secretary "*shall develop instructions* consistent with this act for the conduct of [AVCBs]," which "are binding upon the operation of" AVCBs. None of these mechanisms are tethered to promulgation under the APA.[1] And when the Secretary utilizes these mechanisms, she is exercising her "permissive statutory power, although private rights or interests are [or may be] affected." MCL 24.207(j).

[1] The Legislature has only required the promulgation of rules in certain circumstances. See MCL 168.31(2), 168.794-799, 168.889.

These sections provide overlapping authority for the Secretary's instructions. And in reviewing her interpretation of these sections and the substantive sections of the Election Law, this Court must accord the Secretary's interpretation "respectful consideration." *In re Complaint of Rovas*, 482 Mich 90, 103 (2008) (cleaned up). There must be cogent reasons for overruling an agency's interpretation of a statute. *Id.* (cleaned up). Further, "when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent." *Id.*

The credential form: Plaintiffs argue that § 732 does not use the word "form" it uses the word "authority" and does not expressly authorize the Secretary to provide for the "authority." (DeVisser Br, p 8.) Here, the Secretary has provided for the "form" an "authority" should take, just as in numerous other instances where the Election Law does not use the word "form," such as a voter registration "application." See MCL 168.497. The "authority" form is a "form" related to "processing challenges" that the Secretary can issue under § 31(1)(c). Further, she has broad discretion to require a uniform form for use in the "conduct of elections" under § 31(1)(e), which term includes the challenger appointment process. Indeed, the challenger statutes appear in the chapter of the Election Law entitled "Conduct of Elections and Manner of Voting."

Challenger appointments: Plaintiffs argue that § 731 permits the appointment of challengers "through Election Day," which they say the Challenger Guidance does not. (DeVisser Brf, p 9.) Plaintiffs state they want the "ability to re-deploy previously credentialed challengers from one area to another if and when necessary" on Election Day. *Id.* But nothing in § 731 addresses the specific timing for the appointment of challengers (as opposed to the organizations or committees). Thus, the guidance does not conflict with the statute, and under § 31(1)(c) the Secretary can "[*p*]*ublish and furnish* . . . a *manual of instructions* that includes . . . procedures . . . for processing challenges," which is broad enough to include

procedures for the appointment of challengers. Moreover, as Director Brater affirmed in his affidavit, the guidance does not prohibit credentialing challengers on Election Day or re-locating a challenger from one precinct to another. Indeed, the credential form does not require an appointment date, so neither the form nor the guidance will prevent appointing a challenger on Election Day. (Defs' 10/11/2 Brf, Ex A, Brater Aff, ¶¶ 38-39.)

Challenger liaison: Plaintiffs argue this instruction conflicts with § 733. (DeVisser Brf, p 9-10.) Section 733(1)(e) simply provides that a challenger may "bring to *an* election inspector*'s* attention" certain issues. (Emphasis added.) The use of the word "an" and "inspector's" suggests that a challenger will bring something to the attention of a single inspector. See also MCL 168.733(1)(a). Plaintiffs cite the use of "inspectors" in § 733(3) to argue that all inspectors must hear challenges, but that section does not pertain to the making of challenges like § 733(1)(e). Given the language, the instruction that challenges be made to a challenger liaison cannot be said to conflict with § 733. And the Secretary has authority to issue this instruction under § 31(1)(c) as part of her "procedures . . . for processing challenges." Contrary to Plaintiffs' assertion, the instruction does not "neuter" challengers. (DeVisser Brf, p 9-10.) Plaintiffs may still bring items to the attention of any election inspector, (Defs' 10/11/2 Brf, Ex A, Brater Aff, ¶ 44), and their concern over making a challenge to a neutral, uninvolved inspector is overstated where the challenger liaison, by design, is less likely to be involved and where there may be several designated challenger liaisons in a polling place or AVCB. Moreover, it is the role of the challenger liaison to resolve challenges, which includes accepting or rejecting challenges. Resolving a challenge does not render the liaison biased or not "neutral." The purpose of the instruction is to ensure that the most knowledgeable election inspector or official is resolving challenges so that challenges are handled correctly and consistently in the

polling place or AVCB. (Defs' 10/11/2 Brf, Ex A, Brater Aff, ¶ 44.) The consistent, correct resolution of challenges benefits all challengers, election officials, and voters.

Impermissible challenges: Plaintiffs quibble with the Secretary's terminology of "permissible" and "impermissible" challenges, noting the law does not use those words and argue the instructions "inject[ ] a level of subjectivity into the challenge process" that could allow inspectors to "ignore" challenges "with which they personally disagree." (DeVisser Brf, p 12.) But the Election Law provides only general guidance in this area, identifying three categories of challenges, MCL 168.733(1)(c)-(d), MCL 168.727(1), requiring the recording of only one category of challenge, MCL 168.727(2)(a)-(c), and generally prohibiting 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). See also MCL 168.733(4). Indeed, the Legislature recognized that additional guidance would be necessary and thus mandated that the Secretary "shall" "[*p*]*ublish and furnish* . . . a *manual of instructions* that includes . . . *procedures* . . . *for processing challenges*." MCL 168.31(1)(c) (emphasis added.) And in the latest version of these instructions, the Secretary adopted terminology to make it easier for election inspectors and challengers to understand what are lawful – "permissible" – challenges that should be resolved, i.e., accepted or rejected and recorded, and "impermissible" challenges that fall outside the law and thus need not be resolved and recorded. (Defs' 10/11/2 Brf, Ex A, Brater Aff, ¶ 40-42.) The instructions are comprehensive and despite Plaintiffs' concerns leave very little room for any subjectivity by election inspectors regarding what are permissible challenges based on the law.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request that this Honorable Court grant Defendants' motion for summary disposition.

Respectfully submitted,

/s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Bryan W. Beach (P69681)
Assistant Attorneys General
Attorneys for Defendants
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

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PROOF OF SERVICE

Heather S. Meingast certifies that on October 17, 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)