STATE OF MICHIGAN

IN THE COURT OF CLAIMS

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

Plaintiffs

v.

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

Case No.

Hon.

ORAL ARGUMENT REQUESTED

_____/

Counsel of Record:

ANN M. HOWARD (P49379)
Ann M. Howard, P.C.
Attorney for Plaintiffs
26100 American Drive, #607
Southfield, MI 48034
Phone: (248) 752-0650
Email: ahoward@annhowardlaw.com

EMERGENCY MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

1. NOW COME THE PLAINTIFFS, by and through their attorney, ANN M. HOWARD, for the reasons set forth in the attached brief, and hereby pray for the following declaratory and injunctive relief on an emergency basis, to ensure that the Nov. 08, 2022 election is conducted in a transparent, free, fair, and most importantly – a lawful manner:

a. That the Court declare that the May, 2022 guidance titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" be rescinded.

b. That defendants be enjoined from using the May, 2022 guidance to train Election Challengers and Poll Watchers until it complies with Michigan Election Law.

c. That the Court declare the entirety of MCL §168.733 and MCL§168.734 be added to Defendants' updated version of "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers"

d. That the Court order that the amendments and corrections be implemented and distributed by Defendants to all poll challengers, workers and polling places, well in advance of the Nov. 08, 2022 general election, with a Proof of Service filed.

e. That certain improper passages in "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" are amended as set forth below in Plaintiff's Prayer for Relief.

f. 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.

BRIEF IN SUPPORT

2. Plaintiffs respectfully petition that the Court grant this request for a temporary restraining order and preliminary injunction on an emergency basis. The requested relief is needed on an expedited basis to protect the rights of candidates and election challengers, as well as to provide senior election officials sufficient time to disseminate information to the thousands of election inspectors serving on election day.

3. Plaintiffs assert that a portion of election training material pertaining to election challengers' rights and responsibilities, does not faithfully reflect the plain intent of written statutes and properly promulgated election rules. Instructions clearly contrary to or inconsistent with statute requirements must be immediately enjoined, rescinded, and lawfully amended. Immediate action is critical to preserve election challenger's ability to meaningfully function in their independent advisory role as intended by the Legislature. As a second strike against the 'directive,' because it contains substantial "guidance" that is contradictory to or completely absent from statute text, it qualifies as a 'rule' or set of 'rules.' Rules that have not been promulgated in compliance with the provisions of the Administrative Procedures Act (APA), are illegitimate and unenforceable. Recent rulings from this Court have similarly found against the same Defendants for the same reasons, with lesser evidence.
4. In May, 2022, a directive was published, under seal of the State of Michigan and Secretary of State, by the Michigan Bureau of Elections, titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers." (Exhibit A). To the best of Plaintiffs' information and belief, this document has been significantly altered in form and content compared to previous iterations. In part, this document consolidates information scattered in other election related manuals describing election challenger conduct. However, its presentation substantially diminishes the rights and importance of election challengers as compared to relevant presentation in statute text.
5. Defendant, Benson, as the elected Secretary of State, serves the people of Michigan as the "chief election officer" and in part is tasked with overall responsibility for the lawful

conduct of elections. Adherence to the entirety of all election law statutes is critical to maintaining the public's faith and expectation that elections were in fact conducted in a fair and transparent manner. More specifically, the secretary of state is required to "… *issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.*" MCL 168.31(1)(a). As it pertains to counting boards, the secretary of state's responsibilities is further iterated as "*The secretary of state shall develop instructions consistent with this act for the conduct of absent voter counting boards or combined absent voter counting boards.* …" MCL 168.765a(13).

6. Defendant Brater is Defendant Benson's personally appointed Director of the Michigan Board of Elections. The person in that role carries out the secretary of state's will for the administration of elections. Jointly, Defendants risk further subversion of public trust through the publishing of improper "guidance" that appreciably neuters the role of election challengers as established in statute(s), and as such represents additional violation(s) of the APA. Lawful execution of the quickly approaching Nov. 08, 2022 election hinges on the immediate correction of these unlawful instructions.
7. Election challengers serve as motivated volunteers acting as independent 'oversight boards' to identify and correct errors present in the operation of election inspectors. Their presence and role are critical, particularly at locations where clerks have failed to recruit equal representation of partisan election inspectors to maintain election administration party 'neutrality.' Per MCL §168.730, political parties and other organizations with

substantial interest in election results are afforded the ability to appoint and certify a team of election challengers to serve across the state.

8. Although election inspectors are forbidden direct contact with election materials, they are required sufficient access (from their prospective) to observe and scrutinize all election documents handled by election inspectors, as well as the ability to observe all actions taken by election inspectors and other election officials. The points below indicate a subset of the major discrepancies between the directive "guidance" and relevant statute requirements.

   a) (P. 21-23) "*A challenger who repeatedly fails to follow any of the instructions or directions set out in this manual or issued by election inspectors may be ejected by an election inspector.*" The referenced instructions include: (a)speaking or interacting with an unauthorized election inspector, (b)making multiple challenges not accepted by election inspectors, and (c)possessing a mobile phone. In contrast MCL §168.733(2) outlines only two reasons why an election challenger can be ejected from a counting board: "*Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board.* …" Further, the '*disorderly*' (conduct) definition of penal code MCL §750.167(1),(1)(e),(1)(f),(1)(l) provides guidance: "*(1) A person is a disorderly person if the person is any of the following: … (e) A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance. (f) A person who is engaged in indecent or obscene conduct in a public place. … (l) A person who is found jostling or*

roughly crowding people unnecessarily in a public place." None of the items identified previously in the Defendants' 'directive' qualify as '*disorderly conduct.*'

b) (P. 21) "… *Challengers may not … Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee* …" This guidance is inconsistent with the provision of MCL §168.733(1)(e): "*Bring to an election inspector's attention any of the following: … .*" The term '*an election inspector*' is used several times within MCL §168.733. Each of these instances can only be reasonably interpreted to mean '*any election inspector*' and not '*a single designated election inspector*' as is mandated in Defendants' "guidance."

c) (P. 7-8) "… *When determining how many challengers each credentialing organization is allowed to have in an absent voter ballot processing facility, clerks must balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility*. …" This guidance is contrary to the long-standing and properly promulgated rule R 168.791, which provides: "*Challengers designated pursuant to section 730 of the act may be at the counting center and a receiving station, including 1 challenger for each separate receiving, ballot inspection, duplicating, and certifying board and for each computer being used to tabulate the ballots*." This conflict is irreconcilable. As written in the directive, clerks conceivably could eliminate access to all election challengers by choosing venues that are only large enough to contain the election inspectors required to work an election. The same thing could occur in an appropriately sized venue that is ludicrously filled with tables.

d) (P. 21 "… *Challengers may not … Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility … .*" MCL §168.733 simultaneously requires that an election challenger have rights to "*Examine without handling each ballot as it is being counted*" and "*Keep records of votes cast and other election procedures as the challenger desires*." It is not just that "*some votes*" that may be "*recorded;*" it is all votes on "*each ballot as it is being counted*" by the election inspectors. The intent is that the challenger has the same ability to count and accumulate votes as afforded to the election inspectors. As electronic tools are now available to election inspectors, so must they for election challengers for these rights to have any meaning.

9. Additionally, certain rights guaranteed to election challengers have been completely 'written-out' of the directive. It should be obvious that all statutory rights should be presented in a document auspiciously titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers." It is as if there was an underlying pretext in the creation of the document – attempting to demote election challengers to little more than glorified poll watchers. As presented in the directive, the election challengers every movement is largely at the 'direction' of election inspectors – or more specifically the one designated election inspector with whom they are allowed to interact with. However, per statute, election challengers are afforded the firm expectation that election inspectors provide for their protection and convenience. In fact, MCL §168.733(3) states "… *The election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties* …" and MCL §168.733(4) states "… *A person shall not*

threaten or intimidate a challenger while performing an activity allowed under subsection (1) …" These passages are backed up with some bite per MCL §168.734: "*Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.*" Clearly a subject to which so much ink is devoted in statute should have some prominence in a document informing election challengers of their rights?

10. If the Court is not moved to act just on the evidence proving Defendant's directive contains statute contradicting (and therefore illegitimate) instructions, it should also consider that similar "guidance," in similar circumstances involving the same Defendants, has been found to be invalid for its circumvention of the APA, *twice*. Judge Murray's thoughts from *Davis v. Benson*, (Case No. 20-000207-MZ) are particularly enlightening.

First:

> "A directive that is inconsistent with the law is not a directive but a rule requiring promulgation under the APA. *Jordan v Dep't of Corrections*, 165 Mich App at 27 ("A policy directive cannot be considered an 'interpretive statement' of a rule if it is in fact inconsistent with the rule or contains provisions which go beyond the scope of the rule."). And, compliance with the APA is no mere procedural nicety. Instead, our appellate courts have repeatedly emphasized the importance of the democratic principles embodied in the APA, which requires notice and an opportunity to be heard on the subject under consideration. See *AFSCME*, 452 Mich at 14-15. Thus, the directive is a rule which defendant intends to have enforced as a law, and was required to be promulgated through the procedures of the APA."

And then:

> "An agency must utilize formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency

derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002)."

And:

"As for whether the guidance or directive at issue is a "rule" subject to the APA, the Court must look beyond the labels used by the agency and make an independent determination of whether the action taken by the agency was permissible or whether it was an impermissible rule that evaded the APA's requirements. *AFSCME*, 452 Mich at 9."

11. The pain inflicted by these illegitimate rules is not merely hypothetical. Plaintiffs' rights will be violated in the next election, just as in the August 02, 2020 election. Plaintiff O'Halloran's affidavit (Exhibit C) provides the following accounts whereby inadequate access to recording tools has prevented the collection of material evidence to support process challenges, if not felonies:

a) Plaintiff was prevented meaningful observation of absentee ballot return envelope markings even after noting that several of these envelopes were being unlawfully altered while by election inspectors.
b) Plaintiff was constantly bullied into maintaining a minimum 6-foot separation from election inspectors
c) Plaintiff was prevented from access to an area where votes were being counted.
d) Plaintiff witnessed one of his fellow poll challengers get dragged out of the room, despite not being drunk or disorderly.

12. Plaintiff Braden Giacobazzi similarly attested (Exhibit D) to the following violation of his rights during the Aug. 02, 2022 election while serving as an election challenger at the Detroit Huntington Place AVCB (Absent Voter Counting Board):

a) Plaintiff was forced to stand in certain places and was denied access to where votes were being counted. He was told he had to stand 6-feet away from poll workers,

despite citing a previous ruling from a judge that allows poll workers to approach within 6 feet in order to do their job.

b) Plaintiff was repeatedly told by men dressed in black that they don't care what the law is and the only thing that matters is what they tell him to do.
c) Plaintiff was routinely harassed and bullied into producing his credentials, but the men with ICU shirts wouldn't disclose their own names.
d) Plaintiff had to escalate a challenge through three people to have someone disconnect an e-poll book from the internet.
e) Plaintiff was forcefully removed despite not being drunk or disorderly.

13. The motion for a preliminary injunction submitted by counsel Gronda in *Carra v Benson* (Case No. 20-000211-MZ), provides succinct reasoning for the applicability of emergency injunctive relief. Counsel Gronda's arguments are so eerily and perfectly suited to this case, they may be quoted in bulk, with the exception that references to the 2020 general election get replaced with **2022**, as emphasized below:

> "A court may, without advance written or oral notice to the defendants, issue a temporary restraining order. MCR 3.310(B).2 It should do so when it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice. MCR 3.310(B)(1)(a). TROs, as the name implies, are indeed temporary and can only remain effective 14 days absent good cause shown. MCR 3.310(B)(3). Upon issuance, the court must set either a hearing on the earliest possible date or order the parties to show cause why the TRO should not become a preliminary injunction. A party seeking issuance of a TRO must also describe the efforts made to give notice of the request. MCR 3.310(B)(1)(b). By signature upon this document, the undersigned counsel does certify that every effort will be made to serve a copy of the complaint and this motion upon the defendants immediately upon filing. Upon service, proof will be promptly filed.
>
> Preliminary injunctions are, in essence, a longer-term TRO that remain in effect throughout the pendency of a case (or until further order). They are authorized by MCR 3.310. Unlike TROs, a preliminary injunction may not be issued until either after hearing or following an order to show cause why a preliminary injunction should indeed not issue. While injunctive relief is indeed an extraordinary remedy to be ordered only when justice so requires, it is appropriate when there is no adequate remedy at law and there is a real and imminent danger of irreparable injury. See *In re Esquire Products International, Inc*, 136 Mich App 492, 495; 357 NW2d 77 (1984).

When considering a request for a preliminary injunction, a court should evaluate the following four factors:

> 1.the likelihood that the party seeking the injunction will prevail on the merits;
> 2.the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued;
> 3.the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and
> 4.the harm to the public interest if the injunction is issued.

Alliance for Mentally Ill v Department of Community Health, 231 Mich App 647; 588 NW2d 133 (1998).

Applying this test, a preliminary injunction is both warranted and required.

First, the plaintiffs have a strong if not certain chance of success on the merits. The **2022** General Election Directives as it applies to election challengers interferes with the duties and rights of said challengers as outlined in MCL §168.733. The Election Bureau Director and the Secretary "must apply the statute as written," *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019), not what these defendants believe the statute "ought to" provide for, *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002).

Second, the plaintiffs and all those interested in maintaining transparent and fair elections will be irreparably harmed absent the issuance of an injunction. There is no remedy at law and no means to correct the election law violations prior to or after the election. See *Treasurer of the Comm. to Elect Gerald D. Lostracco v Fox*, 150 Mich App 617; 389 NW2d 446 (1986).

Third, it cannot be properly said that the defendants will be harmed by the issuance of an injunction. Defendant Benson and her designee Defendant Brater have the statutorily imposed duty of ensuring that local election officials conduct the November **8, 2022** election in conformity with Michigan Election Law. As discussed, their current **2022** General Election Directives is violative of that law. Correcting that error while there is still time to do so, even if they don't want to - is not harmful to them in any proper sense of the word.

Fourth, the real harm to the public is in not granting an injunction. The people of a democracy have no greater interest than ensuring that their elections are open, fair, transparent, and checked for accuracy. By denying them the services of election challengers, they are being robbed of a critical check on the system."

PRAYER FOR RELIEF

Wherefore, the Plaintiffs pray that the Court grant their motion and order the following:

a) That the Court declare that the May, 2022 guidance titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" be rescinded;

b) That defendants be enjoined from using the May, 2022 guidance to train Election Challengers and Poll Watchers until it complies with Michigan Election Law.

c) That the Court declare the entirety of MCL §168.733 and MCL§168.734 be added to Defendants' updated version of "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers"

d) That the Court order that the amendments and corrections be implemented and distributed by Defendants to all poll challengers, workers and polling places, well in advance of the Nov. 08, 2022 general election, with a Proof of Service filed in this case.

e) That certain improper passages in "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" are amended as set forth below to attain strict compliance with Michigan Law:

Restrictions on Challengers; Challengers may not:

~~"Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff;" (P. 21)~~

"~~Make repeated impermissible challenges;~~ **Make a challenge indiscriminately and without good cause, or interfere with or unduly delay the work of the election inspectors;**" (P. 21)

"Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility **that duplicates or attempts to duplicate protected voter information contained within the ePB (electronic Poll Book) or QVF supplemental sheets (i.e., license numbers or complete birth dates), or captures any images of a voter exercising his or her right to vote;**" (P. 21)

"If serving at an absent voter ballot processing facility, ~~possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day~~ **election challengers will be asked to place all devices capable of network communications into "airplane mode" to eliminate the possibility of incidental communications in violation of their oath of service;**" (P. 21)

Warning and Ejecting Challengers

"If a challenger acts in a way prohibited by ~~this instruction set or fails to follow a direction given by an election inspector serving at the location at which the challenger is present~~ **law**, the challenger will be warned of their prohibited action ~~and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors~~. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected." (P. 21-22)

"A challenger who repeatedly fails to follow any of the **lawful** instructions or directions set out in this manual or issued by election inspectors may be ejected by an election inspector." (P. 23)

Challenger Appeal of Election Inspector Determinations

~~"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. Appeals of an election inspector's resolution to an eligibility challenge can only be adjudicated through the judicial process after Election Day." (P.23)~~

Challengers at Absent Voter Ballot Processing Facilities

"When determining how many challengers each credentialing organization is allowed to have in an absent voter ballot processing facility, clerks must **provide for 1 challenger for each separate receiving, ballot inspection, duplicating, and certifying board and for each computer being used to tabulate the ballots.** ~~balance the rights of challengers to meaningfully observe the absent voter ballot counting process and the clerk's responsibility to ensure safety and maintain orderly movement within the facility. Clerk considerations in setting the number~~

~~of challengers each credentialing organization may field in the absent voter ballot processing facility should include:~~

- ~~The number of processing teams and the number of election inspectors;~~
- ~~The number of tables or discrete stations at which ballots are processed;~~
- ~~The physical size and layout of the facility; and~~
- ~~The number of rooms and areas used to process absent voter ballots within the facility." (P. 7-8)~~

f. 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.

RESPECTFULLY SUBMITTED BY COUNSEL:

September 29, 2022

/s/Ann M. Howard
Ann M. Howard (P49379)
Attorney for Plaintiffs

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Ann M. Howard, P.C.
Attorney for Plaintiffs
26100 American Drive, #607
Southfield, MI 48034
Phone: (248) 752- 0650
Email: ahoward@annhowardlaw.com

PROPOSED ORDER

This court, having read and reviewed the Emergency Motion, and having been duly advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED:

a) Defendants' May, 2022 guidance titled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" is hereby rescinded;

b) Defendants are enjoined from using the May, 2022 guidance to train Election Challengers and Poll Watchers until it complies with Michigan Election Law.

c) Defendants add the entirety of MCL §168.733 and MCL§168.734 to the updated version of "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers"

d) The amendments and corrections shall be implemented and distributed by Defendants to all poll challengers, workers and polling places, well in advance of the Nov. 08, 2022 general election, with a Proof of Service filed in this case.

e) The following improper passages in "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" shall be amended as set forth below to attain strict compliance with Michigan Law:

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- ~~The number of processing teams and the number of election inspectors;~~
- ~~The number of tables or discrete stations at which ballots are processed;~~
- ~~The physical size and layout of the facility; and~~
- ~~The number of rooms and areas used to process absent voter ballots within the facility." (P. 7-8)~~

f. The remainder of the document and other published election manuals shall be similarly audited and amended to attain strict compliance with lawful rule and statute instructions.

SO ORDERED.