STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellees,

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-Appellants.

Supreme Court No. _____

Court of Appeals No. 363503

Court of Claims No. 22-000162-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellees,

v

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE, AND JONTHAN BRATER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF ELECTIONS,

Defendants-Appellants.

_____/

Court of Appeals No. 363505

Court of Claims No. 22-000164-MZ

DEFENDANTS-APPELLANTS SECRETARY OF STATE AND DIRECTOR OF ELECTIONS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

On October 19, 2023, the Court of Appeals issued its opinion in these consolidated cases affirming the Court of Claims' October 21, 2022, opinion and order declaring various instructions issued by the Secretary of State regarding poll watchers and challengers unlawful and enjoining their enforcement. (Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 468-482.) This Court has jurisdiction over this timely application for leave to appeal under MCR 7.303(B)(1) and 7.305(C)(2).

STATEMENT OF QUESTION PRESENTED

1. The Legislature has authorized the Secretary of State to act outside the standard rulemaking process by issuing instructions rather than promulgating rules. The Secretary of State exercised that authority to issue instructions regarding challengers and the operation of absent voter counting boards that were consistent with her enabling statutes. Did the Court of Claims err in declaring that several of the challenged instructions were not in accordance with the Election Law or had to be promulgated as rules under the Administrative Procedures Act?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

Const 1963, art 2, § 4:

> (1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:
>
> (a) The fundamental right to vote, including but not limited to the right, once registered, to vote a secret ballot in all elections. No person shall: (1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote. . . .
>
> ***
>
> (2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

MCL 168.21:

> The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.

MCL 168.31:

> (1) The secretary of state shall do all of the following:
>
> (a) Subject to subsection (2), 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.
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.

(c) Publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on assisting voters in casting their ballots, directions on the location of voting stations in polling places, procedures and forms for processing challenges, and procedures on prohibiting campaigning in the polling places as prescribed in this act.

***

(e) Prescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations.

(j) Establish a curriculum for comprehensive training and accreditation of all county, city, township, and village officials who are responsible for conducting elections.

(k) Establish a continuing election education program for all county, city, township, and village clerks.

(l) Establish and require attendance by all new appointed or elected election officials at an initial course of instruction within 6 months before the date of the election.

(m) Establish a comprehensive training curriculum for all precinct inspectors.

MCL 168.727:

(1) An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book. A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct. An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot.

(2) Upon a challenge being made under subsection (1), an election inspector shall immediately do all of the following:

(a) Identify as provided in sections 745 and 746 a ballot voted by the challenged individual, if any.

(b) Make a written report including all of the following information:

(i) All election disparities or infractions complained of or believed to have occurred.

(ii) The name of the individual making the challenge.

(iii) The time of the challenge.

(iv) The name, telephone number, and address of the challenged individual.

(v) Other information considered appropriate by the election inspector.

(c) Retain the written report created under subdivision (b) and make it a part of the election record.

(d) Inform a challenged elector of his or her rights under section 729.

(3) A challenger shall not make a challenge indiscriminately and without good cause. A challenger shall not handle the poll books while observing election procedures or the ballots during the counting of the ballots. A challenger shall not interfere with or unduly delay the work of the election inspectors. An individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor.

MCL 168.732:

Authority signed by the recognized chairman or presiding officer of the chief managing committee of any organization or committee of citizens interested in the adoption or defeat of any measure to be voted for or upon at any election, or interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, or of any political party in such county, township, city, ward or village, shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.

MCL 168.733:

(1) The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:

(a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.

(b) Observe the manner in which the duties of the election inspectors are being performed.

(c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.

(d) Challenge an election procedure that is not being properly performed.

(e) Bring to an election inspector's attention any of the following:

(i) Improper handling of a ballot by an elector or election inspector.

(ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.

(iii) Campaigning being performed by an election inspector or other person in violation of section 744.

(iv) A violation of election law or other prescribed election procedure.

(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.

(g) Examine without handling each ballot as it is being counted.

(h) Keep records of votes cast and other election procedures as the challenger desires.

(i) Observe the recording of absent voter ballots on voting machines.

(2) The board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting

board may do 1 or more of the activities allowed in subsection (1), as applicable.

(3) 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. The election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties.

(4) A person shall not threaten or intimidate a challenger while performing an activity allowed under subsection (1). A challenger shall not threaten or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place.

MCL 168.765a, as amended by 2023 PA 81:

***

(17) 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. The secretary of state shall distribute the instructions developed under this subsection to county, city, and township clerks 40 days or more before a general election in which absent voter counting boards or combined absent voter counting boards will be used. A county, city, or township clerk shall make the instructions developed under this subsection available to the public and shall make the instructions available for inspection by challengers in attendance at an absent voter counting board or combined absent voter counting board. The instructions developed under this subsection are binding on the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township.

(18) Except as otherwise provided in this subsection, an individual shall not photograph, or audio or video record, within an absent voter counting place. A county, city, or township clerk, or an assistant of that clerk, shall expel an individual from the absent voter counting place if that individual violates this subsection. This subsection does not apply to any of the following: (a) An individual who photographs, or audio or video records, posted election results within an absent voter counting place. (b) A county, city, or township clerk, or an employee, assistant, or consultant of that clerk, if the photographing, or audio or video recording, is done in the performance of that individual's official duties. (c) If authorized by an individual in charge of an absent voter

counting place, the news media that take wide-angled photographs or video from a distance that does not disclose the face of any marked ballot.

(19) An individual shall not photograph or video record a ballot or any other election records, other than posted election results, in an absent voter counting place. An individual who violates this subsection is guilty of a misdemeanor.

INTRODUCTION

Elections play a fundamental role in our constitutional democracy. And the election-related issues presented in this application are of significant public interest, now more so than ever. MCR 7.305(B)(2). The Legislature has entrusted the Secretary of State with supervising elections and the officials who conduct them in the State of Michigan. MCL 168.21. This is no small feat. In any given year, multiple elections are held around the State. These elections are conducted under the Secretary's supervision by the 83 county clerks, and the 1,520 city and township clerks, in over 4,600 polling places and absent voter counting boards across the State. And on election day, thousands of appointed election inspectors are charged with maintaining order in each polling place and absent voter counting board.

In addition to the logistical challenges that our decentralized elections present, Michigan's election laws are numerous and often complex. Spanning the entire process – from voter registration to the tabulation of ballots on election night, and everything in between – the laws create an extensive statutory framework administered by the Secretary and the officials she supervises. While many laws are comprehensive, leaving little discretion as to their administration, others are not, providing only a basic framework within which to work. And despite the comprehensiveness of Michigan's election laws, not every issue that arises at an election is addressed by actual text in a corresponding statute.

Recognizing the complexity of the process and the benefit that experience in administering elections provides, the Legislature has long empowered the Secretary of State to act outside of rulemaking under the Administrative Procedures Act

(APA) by issuing instructions. And in certain areas, the Legislature has mandated that the Secretary issue specific instructions. That is the case here. The scope of the Secretary's authority to issue instructions rather than promulgate rules involves legal principles of major significance to the State's jurisprudence, especially where such authority continues to be a source of litigation. MCR 7.305(B)(3).

Section 31 of the Election Law requires the Secretary to "publish . . . specific instructions" for "procedures and forms for processing challenges[.]" MCL 168.31(1)(c). Further, section 765a requires the Secretary to "develop instructions consistent with [the Election Law] for the conduct of absent voter counting boards[.]" MCL 168.765a(17), as amended by 2023 PA 81. Under the authority granted her by these statutes, the Secretary issued revised instructions regarding challengers and the challenge process for polling places and absent voter counting boards. The revisions were largely prompted by events that occurred during the November 2020 general election, exposing a lack of clarity or completeness in the challenger laws.

Plaintiffs filed suit against the Secretary and the Director of Elections, alleging that several of the revised instructions conflicted with the underlying election statutes or otherwise had to be promulgated as rules under the APA. While the Court of Claims rejected certain of the Plaintiffs' arguments, the court ultimately agreed that several of the Secretary's instructions conflicted with the law and enjoined their enforcement.

But the Court of Claims erred. The court applied an overly stringent analysis with respect to whether the Secretary's instructions were within the relevant election laws, essentially limiting the Secretary to issuing instructions that repeat the statutes. But such an instruction is of little use to election officials or challengers, especially where the Legislature has mandated that the Secretary issue "specific" instructions. The court simply failed to appreciate the authority conferred on the Secretary to effectuate election laws through the issuance of supporting instructions. And its decision calls into question the innumerable instances in which the Secretary has issued instructions or provided direction and advice to election officials that did not mirror a statute. The Court of Appeals made the same error under largely the same reasoning.

Instead, each of these instructions is consistent with the enabling statutes and the intent of the Legislature as expressed through the plain language of the statutes. Further, the instructions were not arbitrary or capricious, but rather reasonable exercises of the Secretary's authority based on actual incidents. And none of these instructions were required to be promulgated as rules where the Legislature expressly authorized the Secretary to issue instructions. This Court should therefore grant Defendants' application for leave to appeal.

STATEMENT OF FACTS AND PROCEEDINGS

A. History of the Challenger Guidance and Instructions

Michigan Election Law, MCL 168.1 *et seq*., has long provided the opportunity for political parties and other organizations to designate "challengers" to appear at polling places and absent voter counting boards (AVCBs) on election day.[1]

Since at least 2003, the Bureau of Elections has issued guidance regarding challengers and the challenge process. (Defs Appx Vol 1, pp 29-39, DeVisser Compl, Ex A, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," September 2003.) The Bureau has revised its guidance multiple times, including in October of 2020. (*Id*., Vol 1, pp 40-52, 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. (*Id*., Vol 1, pp 53-80, Ex C, "The Appointment, Rights, and Duties of Election Challengers and Polls Watchers," May 2022.)

B. Plaintiffs' Complaints and Procedural History

1. O'Halloran Complaints

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

[1] Along with credentialed challengers, the State has permitted the presence of members of the public, i.e., "poll watchers", at precincts on election day. No law expressly provides for poll watchers. However, former Attorney General Frank Kelley opined that members of the public may be present at polling places in designated areas during the hours the polls are open subject to reasonable restrictions. OAG, 1987-1988, No. 6488, p 244 (January 15, 1988).

filed a complaint against the Secretary and Director Brater, along with a motion for emergency declaratory and injunctive relief. (Defs' Appx Vol 1, pp 103-104, O'Halloran 9/28/22 Motion Brf, pp 5-6, ¶8a-d.) Plaintiffs filed an amended complaint on October 13, 2022. (Defs' Appx Vol 1, p 113, O'Halloran Amend Compl, p 1.) The O'Halloran Plaintiffs brought two counts. First, they alleged 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.*, Vol 1, p 131, ¶56.) Second, they alleged a violation of the APA, MCL 24.201 *et seq.*, based on their contention that several "policy changes" included in the 2022 instructions constituted "rules" that were not promulgated under the APA. (*Id.*, Vol 1, pp 135-139, ¶75-83.)

Each count appeared based on restrictions they understood to be included in the instructions, including: (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 or 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. (*Id.*, Vol 1, pp 128, 130, ¶44, 53.)

The O'Halloran Plaintiffs requested that the Court of Claims declare the May 2022 instructions rescinded, declare that the "rules" are invalid because they were not promulgated under the APA, and enjoin the Defendants from using the instructions to train challengers. (*Id.*, Vol 1, pp 139-141, ¶¶ 27-29.) The O'Halloran Plaintiffs also asked the court to declare that the entirety of MCL 168.733 and 168.734 be added to Defendants' "updated version" of the instructions, order that the "amendments and corrections" be implemented and distributed to all challengers and election workers in advance of the November 8, 2022 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.*, Vol 1, pp 138-139, pp 26-27.)

2. DeVisser Complaint

On September 30, 2022, Plaintiffs Richard DeVisser, the Michigan Republican Party (MRP), and the Republican National Committee (RNC) (the DeVisser Plaintiffs) also filed suit. (Defs' Appx Vol 1, p 1, DeVisser Compl, p 1.) They alleged a violation of the Election Law based on their contention that the 2022 instructions were "directly inconsistent" with the Election Law. (*Id.*, Vol 1, pp 20-21, ¶¶54-60.) They also alleged a violation of the APA, based on their contention that certain "policy changes" included in the 2022 instructions constituted "rules" that were not promulgated under the APA. (*Id.*, Vol 1, pp 21-22, ¶¶61-66.)

Each count appeared based on the following "changes" in the 2022 instructions: (1) challenger credentials must be on a form provided by the Secretary of State; (2) challengers must present their challenges to a challenger liaison; (3) 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; and (4) election inspectors need not record repeated challenges with no basis in law every single time they are made. (*Id.*, Vol 1, pp 11-15, 20, 22, ¶¶30(a)-(e), 54, 64.)

The DeVisser Plaintiffs requested that the court declare the 2022 instructions to be "inconsistent" with the Election Law and unenforceable, declare that the "rules" are invalid because they were not promulgated under the APA, enjoin the Defendants from implementing the instructions in advance of the November 2022 general election, and order the Defendants to "reissue" the previous October 2020 instructions. (*Id.*, Vol 1, pp 22-23.)

The Court of Claims consolidated the two cases and directed Defendants to show cause why the court should not grant relief to the Plaintiffs, and to file any motions for summary disposition, by October 11, 2022. (10/3/22 Order.) Pursuant to that court's order, Defendants responded to the order to show cause and moved for summary disposition as to both complaints.

Among the arguments raised by Defendants in their October 11, 2022 brief and motion was that the O'Halloran complaint was not signed and verified in compliance with the Court of Claims Act and so the court lacked jurisdiction. (Defs'

Appx Vols 1 and 2, pp 147-231, Defs' 10/11/22 MSD Brf.) But as noted above, the O'Halloran Plaintiffs filed an amended complaint, curing those errors. Defendants then filed a second motion for summary disposition regarding the amended complaint, incorporating their prior briefing, and addressing additional issues. (Defs' Appx Vols 1 and 2, pp 147-231, Defs' 10/14/22 MSD Brf.)

In their consolidated brief, Defendants moved for summary disposition with respect to the *DeVisser* complaint on October 11, 2022, and later filed a reply brief in support of their motion. (Defs' Appx Vol 2, pp 232-241, Defs' Reply Brf.)

On October 20, 2022, the Court of Claims issued its opinion and order granting in part and denying in part Defendants' motions for summary disposition and granting in part and denying in part Plaintiffs' complaints for declaratory and injunctive relief. (Defs' Appx Vols 2 and 3, pp 358-414, Opinion.) The court concluded that the Secretary's prescribed form for challenger credentials violated the Election Law; that the instruction requiring challengers to communicate with a designated challenger liaison violated the Election Law; that the Secretary's prohibition on the possession of electronic devices by challengers at AVCBs violated the Election Law; and the Secretary's instruction describing permissible and impermissible challenges at in-person polling places and AVCBs violated the Election Law. (*Id.*)[2]

[2] The Court of Claims agreed with Defendants' interpretation of its instruction pertaining to the appointment of challengers "until Election Day," and ordered Defendants to simply clarify that instruction. (Def's Appx Vol 2, pp 372-373, Opinion, pp 15-16.) Defendants did not appeal as to that part of the order.

The court permanently enjoined Defendants from using, implementing, or enforcing the instructions declared unlawful by the court, and ordered Defendants to take steps to rescind or revise its manual consistent with the court's order. (*Id.*)

C. Post-judgment proceedings.

On October 21, 2022, Defendants filed their claims[3] of appeal with the Court of Appeals, along with an emergency motion for stay pending appeal and a motion for immediate consideration of that motion. Defendants requested relief on the motions by 3:00 p.m. on October 26, 2022. The Court of Appeals did not act on Defendants' motions by the requested date and Defendants thereafter filed an emergency bypass application and request for stay pending appeal in this Court on October 28, 2022. In lieu of granting the bypass application, on November 3, 2022, this Court granted Defendants request for a stay pending appeal of the Court of Claims' orders. (Defs' Appx Vol 3, pp 415-440.)[4]

The Court of Appeals heard oral argument in the cases on October 3, 2023. On October 18, 2023, Defendants filed a supplemental authority to bring to the courts' attention that MCL 168.765a had been amended by Public Act 81 of 2023. (Defs' Appx Vol 3, Supp Auth, pp 465-467.) Among other changes, the Act amended the statute to prohibit photographing, and audio or video recording in AVCBs with certain exceptions. See MCL 168.765a(18) and (19), as amended by 2023 PA 81.

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[3] The cases were later consolidated by order of the Court of Appeals on October 31, 2023.

[4] Shortly after this Court issued its order, the Court of Appeals issued an order denying Defendants' motion for a stay pending appeal.

The implication of the amendment is that persons may possess a device capable of video and audio recording within an AVCB. As a result, Defendants advised the Court of Appeals that they will be amending the challenged instruction relating to the possession of electronic devices at AVCBs as the current instruction is inconsistent with the new statute. (Defs' Appx, Supp Auth, pp 465-467.)

The next day, the Court of Appeals issued its opinion affirming the Court of Claims' decision. (Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 468-482.)[5]

STANDARD OF REVIEW

This Court reviews for abuse of discretion the trial court's decision to grant or deny declaratory relief. *Allstate Ins Co v Hayes,* 442 Mich 56, 75 (1993).
The scope of an administrative agency's statutory rulemaking authority and whether an agency has exceeded that authority are questions of law this Court reviews de novo. *Consumers Power Co v Pub Serv Comm,* 460 Mich 148, 157 (1999). "Whether an administrative rule is arbitrary and capricious is a question of law, as is the question whether a rule comports with the intent of the Legislature." *Michigan Farm Bureau v Dep't of Env't Quality*, 292 Mich App 106, 128 (2011).

The interpretation of the APA and other statutes are also issues of statutory interpretation reviewed de novo. *In re Complaint of Rovas Against SBC Mich,* 482 Mich 90, 102 (2008).

[5] On November 14, 2023, the Court of Appeals issued an order amending its opinion to correct a minor clerical error. (Defs' Appx Vol 3, Court of Appeals order correcting published opinion, p 483.)

ARGUMENT

I. The Court of Claims erred in declaring the Secretary's instructions unlawful where the instructions are consistent with the Michigan Election Law and did not need to be promulgated as rules.

The requirements of the APA do not apply to the credential form and challenger instructions at issue here. The Legislature has authorized the Secretary to prescribe forms and issue instructions (rather than promulgate rules), and she properly issued the instructions consistent with the Election Law. The Court of Appeals erred as a matter of law in affirming the Court of Claims' conclusion otherwise. This Court should reverse the Court of Claims' grant of declaratory and permanent injunctive relief in favor of Plaintiffs.

A. The Secretary of State has broad authority to instruct the election officials she supervises in the proper conduct of elections, and to issue instructions in specific areas.

The source of the Secretary's authority to issue the challenger instructions is found in several sections of the law. But to fully understand the Legislature's delegation of authority to the Secretary in these enabling statutes, it is important to first understand her broad statutory and constitutional authority over elections.

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, 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*";
>
> "(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 . . . *a manual of instructions that includes specific . . . procedures and forms for processing challenges*"; and
>
> "(e) [p]rescribe and require *uniform forms*, notices, and supplies the secretary of state *considers advisable* for use in the conduct of elections[.]" [MCL 168.31(1)(a)-(c), (e) (emphasis added).]

In addition to section 31, MCL 168.765a(17) requires that the Secretary of State "develop instructions consistent with [the Election Law] for the conduct of absent voter counting boards or combined absent voter counting boards," and the "instructions developed under this subsection are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election[.]"[6]

These sections provide the Secretary with broad authority to issue instructions for the proper conduct of elections, the processing of challenges, to prescribe uniform forms for elections, the operation of AVCBs, and to require

[6] This language was previously set forth in subsection 13 of section 765a. Public Act 81 did not amend this particular language, so the brief will refer to the amended section.

adherence to these 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). See also MCL 168.931(h) ("A person shall not . . . disobey a lawful instruction or order of the secretary of state as chief state election officer[.]").

Further, "[a]s chief elections officer, with constitutional authority to 'perform duties prescribed by law,' the Secretary of State ha[s] the inherent authority to take measures to ensure that voters [are] able to avail themselves of the constitutional rights established" in Michigan's Constitution. *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020). As this Court has explained "everything reasonably necessary to be done by election officials to accomplish the purpose of" a constitutional provision "is fairly within its purview." *Elliott v Secretary of State*, 295 Mich 245, 249 (1940).

The constitutional rights relevant here include the right to vote, Const 1963, art 2, § 4(1)(a), and the right to vote an absent voter ballot, Const 1963, art 2, § 4(1)(h). There is no express, constitutional right for parties to appoint challengers or for persons to be designated as such. But the Legislature's statutory authorization for both stems from its power to "enact laws . . . to preserve the purity of elections, . . . [and] to guard against abuses of the elective franchise[.]" Const 1963, art 2, § 4(2). See also MCL 168.730(1). But this authority, as well as the Secretary's authority under sections 21, 31, and others, must be balanced with another recent amendment to the Constitution, which states that "[n]o person shall:

(1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote." Const 1963, art 2, § 4(1)(a). The constitutional rights enshrined in article 2, § 4(1) are self-executing.

B. Standards to be applied in analyzing the validity of a rule or agency policy.

"Agencies have the authority to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Bd of Ed,* 442 Mich 230, 240 (1993).

But "agencies may not do so by promulgating rules that conflict with the statutes they purport to interpret." *Chrisdiana v Dep't of Cmty Health,* 278 Mich App 685, 688-689 (2008), citing *Clonlara,* 442 Mich at 240-241, 243-244. Even though not promulgated pursuant to formal rule-making procedures, "'an agency policy is still required to be within the matter covered by the enabling statute, comply with the underlying legislative intent, and not be arbitrary or capricious.'" *Chrisdiana,* 278 Mich App at 689, quoting *Pyke v Dep't of Social Services,* 182 Mich App 619, 632 (1990). "Rules need not be mere reiterations of a statute," but again the " 'rules must be within the matter covered by the enabling statute, they must comply with the underlying legislative intent, and they must not be arbitrary and capricious.' " *Id.*, quoting *Cevigney v Economy Fire & Cas Co,* 185 Mich App 256, 263 (1990).

In reviewing an agency's interpretation, this Court must accord the agency's interpretation "respectful consideration." *In re Complaint of Rovas*, 482 Mich at 103 (cleaned up). There must be cogent reasons for overruling an agency's interpretation of a statute. *Id.* (cleaned up). Agency interpretations should be respectfully considered, "especially where the interpretation of a statute involves 'reconciling conflicting policies' or 'more than ordinary knowledge respecting the matters subjected to agency regulations.' " *Chrisdiana*, 278 Mich App at 689 (cleaned up).

C. The Secretary's instructions related to the challenge process are consistent with the Election Law and did not need to be promulgated as rules.

Contrary to the Court of Claims' decision, the Secretary's instructions are consistent with Michigan law and did not need to be promulgated as rules. A careful review of the statues supports this conclusion.

Here, there is a common theme running through the Court of Claims' and Court of Appeals' analysis of the challenged instructions. Both courts conclude that the instructions are invalid because the enabling statutes do not contain the exact words, i.e., "challenger liaison" or "permissible" and "impermissible" challenges, and do not set forth the exact procedures the Secretary developed in her instructions. In other words, the instructions do not parrot the statutes. But again, agency policy and rules need not reiterate or mirror the statute to be a valid interpretation of a statute. *Chrisdiana,* 278 Mich App at 688-689. As this Court has observed " 'rules fill in the interstices' " of a statute. *Clonlara*, 442 Mich at 240, quoting Bienenfeld,

Michigan Administrative Law (2d ed), ch 4, p 18. See also *Dep't of Labor and Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 224 (2009) (Agencies may generally promulgate rules to fill "gaps" in otherwise applicable legislation.)

The Legislature has long authorized the Secretary of State to issue instructions and provide direction and advice under section 31, MCL 168.31.[7] See, e.g., *Elliott*, 295 Mich at 249 ("Under the statute it is the duty of the Secretary of State to prepare rules, regulations and instructions for the conduct of elections, and to advise local election officials as to the proper method of conducting elections.") Thus, both Democratic and Republican Secretaries of State have, for decades, issued instructions and provided direction and advice in lieu of engaging in rulemaking. (Defs' Appx Vol 1, p 187, Defs' 10/11/22 MSD Brf, Ex A, ¶4.) As Director Brater stated, "[c]ollectively, these instructions and forms comprise hundreds, or even thousands, of pages of material, all of it updated periodically throughout each election cycle as needed." (*Id*., Vol 1, p 188, ¶9.) He further explained:

> 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

[7] The reference to rule promulgation under the APA was added to section 31 in 1999. See 1999 PA 220.

> scenarios with new situations and questions arising each election. [*Id.*, Vol 1, p 188, ¶10.]

And in providing this instruction and advice, the Bureau of Elections "does not . . . merely restat[e] 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." (*Id.*, Vol 1, p 188, ¶11.)

Further, to require all policies be made through rulemaking, particularly in the face of clear authorization to issue instructions and provide advice in addition to traditional rule promulgation, see MCL 168.31(1)(a)-(c), (e), "unduly restricts agency discretion, which is necessary for the appropriate functioning of government. Agencies must be free to issue opinions, advice, and interpretations of the statutes and rules they apply." Michigan Administrative Law, § 4:13. "To require that all such pronouncements be made through . . . rulemaking [ ] would unduly restrain agencies attempting to protect the public and assist those whom they regulate." *Id.*

The courts below rendered a cramped and rigid analysis of the enabling statutes and the Secretary's instructions that was inconsistent with the principles articulated above, and that generally disregarded the Secretary's authority and the complexity of the interwoven laws and process she administers. Here, the instructions were within the matter covered by their enabling statutes, did not conflict with legislative intent, and were not arbitrary or capricious. *Chrisdiana,*

278 Mich App at 689. Finally, none of the instructions needed to be promulgated as rules under the APA.

1. Prescription for a uniform form of an "authority" – the "credential form" instruction.

Plaintiffs argued the credential form instruction conflicted with the law or otherwise needed to be promulgated as a rule. Before addressing those arguments, some statutory and practical background is necessary.

Section 730 of the Election Law permits political parties and other organizations to designate challengers to serve in polling places and AVCBs on election day. MCL 168.730. See also MCL 168.731. Section 732 requires that challengers possess a signed "authority" in order to serve as a challenger on election day:

> *Authority signed by the recognized chairman or presiding officer* . . . of any political party in such county, township, city, ward or village, *shall be sufficient evidence of the right of such challengers to be present* inside the room where the ballot box is kept, provided the provisions of the preceding sections have been complied with. *The authority shall have written or printed thereon the name of the challenger to whom it is issued and the number of the precinct to which the challenger has been assigned.* [MCL 168.732 (emphasis added).]

Although no specific form of "authority" had been required in the past, the Secretary's revised instructions require that the "authority" a challenger must possess be in the form prescribed by the Secretary. (Defs' Appx Vol 2, pp 361-362, Opinion, Court's Ex, pp 4-5.)[8] Both courts below held that the Election Law did not

[8] The prescribed form is available online at https://www.michigan.gov/sos/-/media/Project/Websites/sos/25delrio/MichiganChallengerCredentialCard.pdf?rev=8

grant the Secretary the authority to mandate a uniform credential form. (*Id.*, Vol 2, p 372, Opinion, p 15; Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 475-477.) In reaching this conclusion, the Court of Claims relied entirely on its analysis of MCL 168.732 and concluded that because the Legislature established three criteria for challengers' "evidence of right to be present," the Secretary could not add a "fourth"—the requirement to use a mandated form. (*Id.*). The Court of Appeals agreed with this argument but added no analysis. (Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 475-477.) The courts erred in making this determination.

a. The credential form falls within the Election Law.

Section 732 is silent as to what *form* the "authority" should appear in, instead specifying certain *content* – 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." No express language in section 732 provides the sponsoring party with sole, unfettered discretion to design the format of its "authority", nor does it prohibit the Secretary from prescribing one. In this silence, Secretaries of State have allowed sponsoring parties to use their own "authority" so long as it contains the required content.

But MCL 168.31(1)(c) provides the Secretary with specific authority to "publish and furnish . . . a manual of instructions that includes procedures *and*

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forms for processing challenges." MCL 168.31(1)(c) (emphasis added). Further, subsection 31(1)(e) provides the Secretary with general authority and discretion to "[p]rescribe and require *uniform forms* . . . the secretary of state considers *advisable* for use in the conduct of elections[.]" MCL 168.31(1)(e) (emphasis added.) The term advisable means "practical or prudent,"[9] which means the Secretary may exercise judgment as to when a uniform form may be practical or prudent for carrying out elections.

The Legislature plainly and explicitly granted the Secretary the authority to develop and require "uniform forms" for conducting elections and "forms for processing challenges." Both sections readily encompass the "form" of the "authority" sponsoring parties and organizations use to designate challengers. The Court of Appeals did not even address the Secretary's explicit authority to require forms under either subsection 31(1)(c) or (e). The Secretary's instruction prescribing a form falls within these enabling statutes.

b. The credential form complies with legislative intent.

There is no support in the Election Law that the Plaintiffs or their authorizing organizations have an inviolable right to make up their own credentials, or that the Secretary of State is prohibited from mandating the use of a form to facilitate the efficient and orderly processing of challengers.

[9] See Merriam Webster Online Dictionary, entry for "advisable", available at Advisable Definition & Meaning - Merriam-Webster, (accessed November 30, 2023.)

" 'The primary goal when interpreting a statute is to discern the intent of the Legislature by focusing on the most "reliable evidence" of that intent, the language of the statute itself.' " *Christie v Wayne State University,* 511 Mich 39, 47 (2023) (cleaned up). "When considering the correct interpretation, the statute must be read as a whole and in a manner that ensures that it works in harmony with the entire statutory scheme." *Id.* (cleaned up). Again, section 732 makes no explicit provision that parties, organizations, or committees of citizens desiring to designate challengers have the sole right to create the authority required to access polling places and AVCBs.[10] Instead, section 732 merely provides what information must be included in the written authority. Nothing in the language indicates that the Legislature intended to preclude the Secretary from prescribing the form an "authority" should take. And contrary to the lower courts' rulings, the Secretary has not, by prescribing a form, added a substantive requirement to section 732. Cf. *Bryanton v Johnson*, 902 F Supp 2d 983, 1002-1003 (ED Mich, 2012) (change to ballot application form adding citizenship verification not within the Secretary's authority under MCL 168.31(1)(e)).

Again, section 732 provides that "[a]uthority *signed by the recognized chairman or presiding officer* . . . of any political party . . . *shall be sufficient evidence* of the right of such challengers to be present" at a polling place or AVCB.

[10] MCL 178.731(1) refers to organizations submitting a "facsimile of the card [i.e., authority] to be used" to the clerk as part of obtaining permission to designate challengers. The "facsimile" of the card to be used would simply be the Secretary's prescribed form with the required information added to it by the sponsoring organization.

MCL 168.732 (emphasis added). The "sufficient evidence" is the signature of the chairman or presiding officer, not the form of the piece of paper the signature is affixed to. Thus, the Secretary's prescription of a uniform credential form does not change what constitutes "sufficient evidence" for a challenger to be present. The Secretary's form with a signature affixed to it is still all the "sufficient evidence" a challenger needs to be "present" at a polling place or AVCB, assuming the other required information is included as well. Accordingly, the Secretary's prescription of a form is compliant or consistent with the legislative intent of section 732 based on the language of the statute itself.

c. The credential form is not arbitrary or capricious.

The Secretary's instruction prescribing a uniform form is neither arbitrary nor capricious. " 'Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance, and capricious means apt to change suddenly, freakish or whimsical[.]' " *Michigan Farm Bureau v Dep't of Env't Quality*, 292 Mich App 106, 141 (2011), quoting *Nolan v Dep't of Licensing & Regulation,* 151 Mich App 641, 652 (1986). "In general, an agency's rules will be found to be arbitrary only if the agency 'had no reasonable ground for the exercise of judgment.' " *Michigan Farm Bureau,* 292 Mich App 106, 141-42, quoting *American Trucking Associations, Inc v United States,* 344 US 298, 314 (1953).

Here, as stated in Director Brater's affidavit, it was determined that prescribing a uniform credential form was advisable because of difficulties election

inspectors encountered during the November 2020 general election in verifying challenger credentials due to the numerous entities sponsoring challengers and the large numbers of challengers that were present at locations, particularly at the City of Detroit's AVCB. (Defs' Appx Vol 1, pp 191-192, Brater Aff, ¶31, 33.) In addition, the Bureau of Elections received questions about whether party logos printed on challenger credentials violated MCL 168.744, which prohibits electioneering. (*Id.*, ¶32.) Prescribing a uniform credential form addressed these concerns as well.

As a result, the Secretary did not adopt the form requirement on a whim, but rather in response to circumstances that occurred during an actual election and involved election officials and challengers. These complaints provided reasonable grounds for the Secretary to adopt this innocuous instruction. The Court of Claims apparently thought so, noting that there was "much to commend with such a form, in terms of clarity and administrative efficiency." (Defs' Appx Vol 2, p 372, Opinion, p 15.) Indeed, neither set of Plaintiffs offered any argument as to why or how using a uniform credential form harmed their rights or interests as challengers. The Secretary's instruction prescribing a uniform credential form was a reasonable exercise of the Secretary's judgment.

d. The credential form was not required to be promulgated as a rule.

Because the Secretary's instruction reflects a valid and reasonable interpretation of the relevant election statutes, the remaining question is whether it had to be promulgated as a rule under the APA. The lower courts did not address

this issue since they wrongly concluded the credential form requirement violated MCL 168.732. But the answer is no.

Again, as set forth above, the Secretary plainly has the authority to prescribe the credential form under subsections 31(1)(c) and (e) without promulgating it as rule. MCL 168.31(1)(c), (e). Even so, the form is exempt from the rulemaking process. 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 (AFSCME) v Dept of Mental Health*, 452 Mich 1, 8 (1996), quoting MCL 24.207. To be valid and enforceable, a "rule" must be properly promulgated according to the APA. See MCL 24.231–264. See also *Clonlara*, 442 Mich at 239. The law, however, excepts various items from the definition of a rule, and thus from promulgation, including "[a] *form* with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h) (emphasis added).

The credential form falls within this exception as it does not have the force and effect of law, and thus did not need to be promulgated as a rule. See, e.g., *Auto Club Ins Ass'n v Sarate,* 236 Mich App 432, 435-436 (1999) (certificate of title form with instructions fell within MCL 24.207(h)). For these reasons, the Secretary's prescription for a uniform credential form does not violate the Michigan Election

Law and was instead a proper exercise of her authority under subsections 31(1)(c) and (e). And this form did not need to be promulgated as a rule.

2. Instruction directing to whom a challenger should direct a challenge or other communication – the "challenger liaison" instruction.

Plaintiffs also contend that the "challenger liaison" instruction is invalid. Again, some statutory and practical background is necessary. Section 733 of the Election Law principally provides for the various rights of challengers:

> (1) The *board of election inspectors* shall provide space for the challengers *within the polling place* that enables the challengers to observe the election procedure and each person applying to vote. *A challenger may do 1 or more of the following*:
>
> (a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.
>
> (b) Observe the manner in which the duties of the election inspectors are being performed.
>
> (c) *Challenge* the voting rights of a person who the challenger has good reason to believe is not a registered elector.
>
> (d) *Challenge* an election procedure that is not being properly performed.
>
> (e) *Bring to an election inspector's attention any of the following:*
>
> (i) Improper handling of a ballot by an elector or election inspector.
>
> (ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.
>
> (iii) Campaigning being performed by an election inspector or other person in violation of section 744.
>
> (iv) A violation of election law or other prescribed election procedure.

***

> (2) *The board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable*. . . . [MCL 168.733(1)(c)-(e) (emphasis added).]

Section 727 also provides for the right of challengers to make challenges. MCL 168.727. Under subsection 727(1), a challenger may "challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot." (*Id.*)[11] Under subsection 727(2), "[u]pon a challenge being made under subsection (1), an election inspector shall immediately" take certain prescribed actions. MCL 168.727(2).

Under these statutes then, a challenger has a right to make certain challenges at polling places or AVCBs, see MCL 168.733(1)(c), (d), (2), MCL 168.727(1). And under subsection 733(1)(e), a challenger has a right, apart from making a challenge, to "[b]ring" certain matters "to an election inspector's attention" at a polling place or AVCB.

Each in-person election precinct appoints at least three election inspectors, one of which is appointed to act as the precinct chair; the chair is typically the most experienced or senior election inspector, as election inspectors perform different tasks and have different levels of experience. (Defs' Appx Vol 1, p 194, Defs'

[11] Subsection 727(1) also provides that "[a] *registered elector* of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." MCL 168.727(1) (emphasis added).

10/11/22 MSD Brf, Ex A, Brater Aff, ¶43.) See also MCL 168.764(1)-(2). Election inspectors are also appointed for each AVCB, and the inspectors appointed to these boards have the same authority as inspectors at in-person voting precincts. MCL 168.765a(2), (4).

The revised instructions provide that challenges are to be directed only to the person or persons designated as the "challenger liaison(s)" for the polling place or AVCB. (Defs' Appx Vol 2, p 400, Opinion, Court's Ex, p 10; Appx Vol 1, p 194, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶44.) Under the instructions, unless the local clerk specifies otherwise, the challenger liaison at a polling place is the election inspector appointed as the precinct chair under MCL 168.764, and for an AVCB, the liaison is the most senior member of the clerk's staff present at the facility or the chairperson of the counting facility. (Defs' Appx Vol 2, p 395, Opinion, Court's Ex, p 5.) The instructions further mandate that challengers "must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee unless otherwise instructed by the challenger liaison or a member of the clerk's staff," and that "challengers must communicate only with the challenger liaison unless otherwise instructed[.]" (*Id.*, p 6.)

The lower courts concluded that the Election Law does not expressly authorize the Secretary to designate election inspectors (or other election officials) as "challenger liaisons" and to prohibit challengers from communicating with anyone other than the challenger liaison. (Defs' Appx Vol 2, p 374, Opinion, p 17; Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 477-478.) Citing

subsection 733(1)(e), that Court of Claims concluded the Secretary's instruction "restricts a challenger's ability to *bring* certain issues to *any* inspector's attention." (Defs' Appx Vol 2, p 374, Opinion, p 17) (emphasis added.) The Court of Appeals simply agreed with this argument, adding no significant analysis. (Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 477-478.) But both courts erred in making this determination.

a. The challenger liaison instruction falls within the Election Law.

As an initial matter, it is not entirely clear from the Court of Claims' opinion whether it concluded the Secretary could not limit to whom a challenger may direct a *challenge*, or whether the court only concluded the Secretary could not restrict a challenger's *non-challenge* related communications under § 733(1)(e). It is the Secretary's position that the latter is the court's holding. The Secretary raised this issue in her briefing in the Court of Appeals and neither that Court nor the parties disagreed. Nevertheless, in the interest of completeness, the Secretary will again address both types of communications.

The Court of Appeals and Court of Claims both observed that nowhere in the Election Law does it use the words or refer to a "challenger liaison." That is true.[12]

[12] The Election Law also does not use the word "greeter," but the Bureau instructs election officials that one or more election inspectors should be designated as voter "greeters" to assist voters and facilitate an orderly polling place, see *Managing Your Precinct on Election Day*, p. 8, https://www.michigan.gov/sos/-/media/Project/Websites/sos/Election-Administrators/Managing-Your-Precinct-on-Election-Day-July-2022.pdf?rev=c3f3495746284db4bb85c2a091367905&hash=A8AC1F8E745DB319C4

But the designation of "challenger liaison" is simply a useful term the Bureau of Elections developed. It is the substance of the instructions that matter, and the "challenger liaison" instructions requiring that challenges and non-challenge communications be directed to the liaison do not conflict with the express language of section 733.

Further, under subsection 31(1)(c), the Secretary "shall" "[p]ublish and furnish for the use in each election precinct before each state . . . election a manual of *instructions* that includes *specific instructions* on . . . procedures . . . for processing challenges[.]" (Emphasis added.) In addition, MCL 168.765a(17) provides the Secretary with express authority to issue instructions for the conduct of AVCBs, "[t]he secretary of state shall develop instructions consistent with this act for the conduct of absent voter counting boards," and those instructions "are binding upon the operation of an absent voter counting board[.]" Establishing a designated challenger liaison for receiving and responding to challenges and other communications is easily within the scope of subsection 31(1)(c) and subsection 765a(17), and thus readily within the Secretary's authority to issue instructions.

Challenges to voters or election procedures in polling places:

Subsections 733(1)(c) and (d) do not expressly prescribe to whom a challenger must direct a challenge made under those subsections. See MCL 168.733(1)(c), (d). But given section 733's references to the "board of election inspectors" and to

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"election inspector(s)," see MCL 168.733(1)(a), (b), (e), (2), it is reasonable to conclude that an election inspector is a person to whom a challenge may be directed under subsections 733(1)(c), (d) and (2), whether at a polling place or an AVCB. This interpretation is consistent with neighboring subsection 727(2), which expressly prescribes that "an election inspector" shall respond to a challenge under subsection 727(1). MCL 168.727(2). Section 733, however, does not mandate that or prohibit the directing of challenges to someone other than an election inspector or to a particular inspector.

Here, the instructions provide that the "challenger liaison" in a polling location is the election inspector appointed as the chair of the precinct. So, the instruction is consistent with the above interpretation of section 733 as permitting challenges to be made to election inspectors. It is also consistent with subsection 727(2), which requires making a challenge to "an election inspector." There, the word "an" is best understood as being used as an indefinite article. This Court has observed with respect to the indefinite article "a" that "[w]hether 'a' should be read as referring to a discrete item or as referring to one of many potential items depends on the context in which it is used." *S Dearborn Env't Improvement Ass'n, Inc v Dep't of Env't Quality*, 502 Mich 349, 368 (2018).

As noted above, there are at least three inspectors appointed for every polling place, MCL 168.674(1), but the Legislature has expressly provided that one inspector must be designated as the chairperson of the board of election inspectors. MCL 168.674(2) ("The board of election commissioners shall designate 1 appointed

election inspector as chairperson.") The "chairperson" functions as the "presiding officer" of the board of election inspectors.[13] The requirement for appointment of a precinct chairperson supports interpreting the word "an" in its indefinite sense, meaning that challenges made under subsection 727(1) may be directed to one of the appointed election inspectors, including the precinct chair. This is not the same as providing that a challenger may address a challenge to *any* election inspector.

Here, the Secretary determined that challengers should direct challenges made under either section 727 or section 733 to one of the inspectors, the inspector designated as the challenger liaison, which generally will be the precinct chair.[14] This instruction falls within the statutes, and certainly does not conflict with any express language in section 733 or in section 727 as interpreted above.

Challenges to election procedures in AVCBs:

Turning to AVCBs, the "challenger liaison" for AVCBs is the most senior member of the clerk's staff present at the facility or the chairperson of the counting facility. This instruction does not conflict with any language in section 733 because, again, that statute does not specify to whom a challenge should be directed and thus

[13] See Merriam Webster Online Dictionary, definition of "chairperson," available at https://www.merriam-webster.com/dictionary/chairperson (accessed November 30, 2023.)

[14] It should be noted that the instructions permit designating more than one inspector as a challenger liaison at a polling place. (Defs' Appx Vol 2, p 395, Opinion, Court's Ex, p 5.) So, depending upon the size of a precinct there may be more than one inspector acting as a challenger liaison in a polling place.

does not prohibit directing challenges made at AVCBs to someone other than an election inspector.[15]

Further, the Legislature granted the Secretary the authority to issue an instruction establishing a point of contact for challengers present at AVCBs under the broad language in subsections 31(1)(c) and subsection 765a(17). Critically, the Court of Claims failed to address the Secretary's explicit authority to do so under these statutes. (Defs' Appx Vol 2, p 368, Opinion, p 11.) Thus, the Secretary's instruction requiring that challenges be directed to the designated "challenger liaison" at AVCBs falls within these enabling statutes.

Communications other than challenges in polling places and AVCBs:

Under subsection 733(1)(e), in lieu of making a challenge, a challenger "may" "[b]ring to an election inspector's attention" certain categories of potential election violations as applicable. MCL 168.733(1)(e)(i)-(iv), (2).

Plaintiffs argued below that challengers should be allowed to communicate with any election inspector. They noted the reference to "*an* election inspector" in subsection 733(1)(e) and suggested that the word "an" must be understood to mean "any." The Court of Claims tracked that argument, concluding the Secretary's

[15] Voter-related challenges under subsection 733(1)(c) cannot be made at AVCBs as subsection 733(1) generally applies to "polling place(s)," and only "applicable" portions of that subsection apply to AVCBs. MCL 168.733(2) ("A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable.") There are no voters at AVCBs. Thus, challengers at AVCBs are limited to making challenges regarding election procedures under subsection 733(1)(d). Likewise, section 727 is irrelevant with respect to AVCBs as the voter-related challenges provided for under subsection 727(1) can only be made in a polling location where voters are present. See MCL 168.727(1).

instruction "restricts a challenger's ability to bring *certain issues* to *any* inspector's attention." (Defs' Appx Vol 2, p 374, Opinion, p 17) (emphasis added.) The Court of Appeals did so as well. (Defs' Appx Vol 3, Court of Appeals Published Opinion, p 478.) But even if Plaintiffs and the courts are correct, that interpretation only renders the Secretary's instruction unlawful as to non-challenge communications under subsection 733(1)(e) and not as to challenges made under subsections 733(1)(c) and (d), which lack any reference to "an inspector." Even so, the court's analysis was wrong.

As discussed above with respect to subsection 727(2), the word "an" is best understood as being used as an indefinite article in subsection 733(1)(e), and the same interpretation may be applied to this identical language. Accordingly, subsection 733(1)(e) should be read to mean a challenger may direct a non-challenge communication to "an" or one of the appointed election inspectors. Again, this is not the same as providing that a challenger may communicate with *any* election inspector. In other words, the statute does not guarantee challengers the right to communicate with any election inspector they choose.

As discussed above, the instructions add clarity and provide that the "challenger liaison" at a polling location is an election inspector. Requiring a challenger to communicate only with the challenger liaison at a polling location is consistent with subsection 733(1)(e), which simply requires that a challenger be able to bring to the attention of an election inspector certain matters. The instructions permit that.

With respect to AVCBs, the "challenger liaison" is a member of the clerk's staff, and not an election inspector. In this case, a challenger would first communicate with the member of the clerk's staff appointed as the liaison, who would then pass the challenger on to an election inspector. Under this process, a challenger is still able to "[b]ring to an election inspector's attention" any matter set forth in subsection 733(1)(e)(i)-(iv). The language in subsection 733(1)(e) is silent on this process.

Again, the Secretary determined that there should be one point of contact for challengers at polling locations and AVCBs – the "challenger liaison(s)." This is not foreclosed by the Election Law and in fact is contemplated by the broad grant of authority to the Secretary to establish specific procedures for the challenge process.

b. The challenger liaison instruction complies with legislative intent.

Again, the language of a statute provides the best evidence of the Legislature's intent. *Christie*, 511 Mich at 47. As explained in detail above, the challenger liaison instructions do not conflict with the plain language of the relevant statutes. The Court of Claims interpreted subsection 733(1)(e) as permitting challengers to approach "any" election inspector. (Defs' Appx Vol 2, pp 373-374, Opinion, pp 16-17.) Noting again that this subsection only controls non-challenge related communications, the court's interpretation is not the only possible interpretation nor is it a reasonable interpretation. Rather, as explained above, the Secretary's interpretation of the statutes is consistent with the plain text.

Accordingly, the Secretary's instruction is consistent with the underlying legislative intent of the statutes.

c. The challenger liaison instruction is not arbitrary or capricious.

The Secretary's instructions providing for a "challenger liaison" are not arbitrary or capricious. See *Michigan Farm Bureau*, 292 Mich App at 141.

The Secretary's updated instructions, including the challenger liaison requirement, are designed to implement and support the statutes discussed above so that election inspectors, challengers, and voters can perform their duties and exercise their rights freely, fairly, and consistently across the state. The specific purposes of the challenger liaison instruction are to streamline challenger communications; to ensure that challengers are directed to the most-experienced election official; and to ensure that challenges are being handled correctly and consistently and that challengers are given correct and consistent information. (Defs' Appx Vol 1, p 194, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶44.) The decision to require a challenger liaison was spurred, at least in part, by the confusion that occurred at AVCBs during the November 2020 general election with respect to how the challenger-related statutes apply at AVCBs. (*Id.*, pp 190, 191, ¶¶24, 26, 30.) Under these circumstances, the Secretary's instruction prescribing a challenger liaison was not arbitrary or capricious, but rather a reasonable exercise of the Secretary's judgment.

d. The challenger liaison instruction was not required to be promulgated as a rule.

Because the Secretary's challenger liaison instruction reflects a valid and reasonable interpretation of the relevant election statutes, the remaining question is whether the instruction had to be promulgated as a rule. As before, the lower courts did not address this issue. But the answer is again "no."

Like the credential form, the Secretary has the authority to issue the instruction under subsections 31(1)(c) and 765a(17) without promulgating it as rule. MCL 168.31(1)(c), 168.765a(17). Even so, the instruction falls within exceptions from the definition of a rule.

Again, a "rule" is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency[.]" MCL 24.207. Exceptions from the definition of a "rule" include "[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public." MCL 24.207(g). Also excluded is "an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). So, too, is "[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). The "definition of 'rule' is to be broadly construed, while the exceptions are to be narrowly construed." *AFSCME*, 452 Mich at 10 (internal citation omitted).

Here, the Legislature has not only authorized but mandated that the Secretary issue "for the *use in each election precinct . . . specific instructions* . . . on . . . procedures . . . for processing *challenges*" before each election. MCL 168.31(1)(c) (emphasis added). While the publication containing the instructions at issue here is intended to be read by challengers and sponsoring organizations for educational purposes, the instructions are directed to the local election officials the Secretary supervises under MCL 168.21. In other words, the instructions provide the procedures for how election inspectors and other election officials working in the precincts and AVCBs will process challenges and communicate with challengers on election day. Accordingly, because the challenger liaison instruction is directed to the officials the Secretary supervises, the instruction does not have "general applicability" and thus is not a "rule" under MCL 24.207. The Court of Appeals gave a similar analysis in its discussion of the electronic device instruction:

> Election workers, including inspectors, conduct operations that come under the authority of the Secretary of State, and thus while doing so are effectively the Secretary's subordinates. Accordingly, instructions directed at such subordinates are not directives of "general applicability" for purposes of the definition of "rule" under MCL 24.207. Defendants are thus free to issue binding instructions applicable to election workers without resort to the APA's formal rulemaking procedures. [Defs' Appx Vol 3, Court of Appeals opinion, p 481.][16]

[16] While Defendants are advocating for the vacatur of the Court of Appeals' opinion regarding the electronic device instruction based on mootness, see Argument I.C.4, that does not preclude Defendants from arguing for a similar construction by this Court.

But even if the instruction is a "rule," several exceptions apply. Here, the instructions fall readily into subsections 207(g) or 207(h), or both. Under subsection 207(g) the instruction functions as an intergovernmental directive between state government (the Secretary) and local governments (the local clerks, appointed inspectors, etc.) that does not affect the rights of, or procedures and practices available to, the public because the right to act as a credentialed challenger is not generally available to the public. Rather, challengers must be designated by a sponsoring party or organization. See MCL 168.730(1), 168.731(1). And for purposes of subsection 207(h), the instruction is principally explanatory, does not have the force and effect of law, and does not affect the rights of the public. See e.g., *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.") Here the instructions interpret and summarize the requirements of election law as it pertains to challengers and the challenge process, explain how clerks and election inspectors will enforce the law, and are binding on elections officials (not challengers) under the Secretary's authority under section 21, MCL 168.21.

Additionally, the Secretary's instructions are excluded from the definition of "rule" under the "permissive statutory power" exclusion set forth in MCL 24.207(j). See, e.g., *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 47 (2005) (court determined that the statute under which the agency acted "explicitly required [the

agency] to 'prescribe' the invoice . . . and *did not mandate the department to do so pursuant to the procedural requirements of the APA*," thus the "permissive statutory power" exclusion applied"). 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."). In a footnote, the Court of Claims dismissed Defendants' arguments on this exception, citing to the holding of another Court of Claims judge in a different case analyzing a different instruction, different enabling statutes, and a different subsection of section 31. (Defs' Appx Vol 2, p 367, Opinion, p 10 n 1.) But the court erred in doing so.

As noted above, the Secretary's enabling statutes grant her authority that is not tied to the APA, and thus relieves her from the APA's rule promulgating procedures. MCL 168.31 provides, in part:

> (1) The secretary of state ***shall*** *do* ***all*** *of the following*:
>
> (a) *Subject to subsection (2), 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.*
>
> (b) Advise and direct local election officials as to the proper methods of conducting elections.
>
> (c) *Publish 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 . . . .
>
> ***
>
> (2) Pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, *the secretary of state shall promulgate rules*

> establishing uniform standards for state and local nominating, recall, and ballot question petition signatures. [MCL 168.31(1), (2) (emphasis added).]

Under subsection 31(1)(a), the Secretary has general rule-making authority "for the conduct of elections and registrations in accordance with the laws of this state," but the Legislature also expressly granted her authority to act outside of rulemaking by "issu[ing] instructions." MCL 168.31(1)(a). This authority to provide instructions is repeated in subsection 31(1)(c), which requires the Secretary to "[p]ublish and furnish for the use in each election precinct . . . *a manual of instructions that includes specific . . . procedures and forms for processing challenges*[.]" MCL 168.31(1)(c) (emphasis added). As well as in subsection 765a(17), which requires that the Secretary "develop *instructions* . . . for the conduct of absent voter counting boards," and that the "instructions developed under this subsection are binding upon the operation of an absent voter counting board . . . used in an election[.]" MCL 168.765a(17) (emphasis added). See also MCL 168.795a(8) ("secretary shall instruct local election officials regarding the operation and use of an approved electronic voting system"); MCL 168.799a(3) ("secretary of state shall issue instructions . . . relevant to stray marks"); MCL 168.803(2) (same); MCL 168.874 ("secretary of state shall develop instructions consistent with this act for conducting recount").

As discussed above, the Legislature provided for the general rights of challengers but did not prescribe many details with respect to the challenge process, whether in polling places or AVCBs. Instead, the Legislature mandated that the Secretary "publish" "specific instructions" "before each state primary and election"

that include "procedures and forms for processing challenges." MCL 168.31(1)(c). It is plain the Legislature contemplated that the Secretary would use her authority as the chief elections officer with supervisory control over elections officials, to fill gaps in the procedures to ensure a fair and orderly process for all involved – challengers, voters, and election officials. See, e.g., *In re Reliability Plans of Elec Utilities for 2017-2021,* unpublished opinion of the Michigan Court of Appeals, issued December 3, 2020 (Docket Nos. 340600, 340607), 2020 WL 7089873, at *5 (holding permissive statutory power exception applied and noting that "where the Legislature did not specify how to proceed, it expected the MPSC to do so within its own discretion").

And the fact that the Legislature required the issuance of instructions before each state election indicates that the Legislature did not expect the Secretary to promulgate these "instructions" as rules under the APA before each state election. See *Mich Trucking Ass'n v Pub Serv Comm*, 225 Mich App 424, 430 (1997) (treating the impossibility of promulgating rules within the envisioned timeframe as indicating that the Legislature did not intend to require APA rulemaking). As Director Brater affirmed in his affidavit, "the time, delay, and material resources" required for rulemaking make it "impossible for the Bureau to promulgate rules . . . 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." (Defs' Appx Vol 1, p 188, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶12.)[17]

Indeed, if the Legislature had wanted the Secretary to promulgate rules for challenge procedures, it could have required her to do so as it has in other statutes, including *within the same statute*. See MCL 168.31(2) (mandating that the secretary "shall promulgate rules" providing for petition standards). See also MCL 168.759a(17), MCL 168.794c, MCL 168.797b, MCL 168.798. But it did not do so. And because the Legislature did not link the Secretary's authority to issue instructions under subsection 31(1)(c) to the APA, the instructions were not subject to the APA's rulemaking procedures.

This interpretation is supported by case law. For example, in *Michigan Trucking Ass'n v Mich Pub Serv Comm'n*, the plaintiffs asserted that a Public Service Commission (PSC) order that established a safety rating system for motor carriers was "invalid because it [was] essentially a rule that was not properly promulgated pursuant to the rule-making procedures set forth in" the APA. 225 Mich App 424, 429 (1997). The statute, MCL 479.43, provided:[18]

> The public service commission, in cooperation with the department of state police, will develop and implement *by rule or order* a motor carrier safety rating system within 12 months after

[17] Indeed, it can take over a year to promulgate rules under the APA. In July of 2021, the Department of State initiated rulemaking under the APA to promulgate signature matching standards. See Pending Rule Set 2021-61 ST, available at ARS Public - RFR Transaction (state.mi.us). The Legislature took no action on the rule set, so by default the rules became eligible for filing with the Secretary of State in December 2022. See MCL 24.245a(7). See also AACS, R 168.21 to R 168.26.

[18] MCL 479.43 was repealed by the Legislature in 2014 PA 493.

the effective date of this article. [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. And the court emphasized that the statute [MCL 479.43] "directly and explicitly authorize[d] the PSC to implement, either by rule or order," the safety rating system. *Id*.

A comparison of *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, and *By Lo Oil* provides further support. In *Detroit Base Coalition*, this Court found that a program bulletin attempting to implement a mandatory telephone hearing policy did not constitute an exercise of permissive statutory authority because "[t]he only relevant statutory provision mandate[d] that the department conduct hearings pursuant to promulgated rules." 431 Mich 172, 188 (1988) (emphasis added). Conversely, in *By Lo Oil Co*, the Court of Appeals addressed whether an administrative revenue bulletin should have been promulgated as a rule. The Court determined that the statute under which the agency acted "explicitly required [the agency] to 'prescribe' the invoice . . . and did not mandate the department to do so pursuant to the procedural requirements of the APA," thus the "permissive statutory power" exclusion applied. 267 Mich App at 47 (emphasis added). The courts recognize that the Legislature knows how to require formal APA rulemaking; the Legislature did not do so here.

This Court's decision in *AFSCME* does not preclude application of the permissive power exception in this case. There, the Court held that the

Department of Mental Health could not use its discretionary authority to enter into contracts under MCL 333.1116 to embed policies into a form contract by incorporating a guideline that should have been promulgated as a rule. 452 Mich at 6-15. That is not what the Secretary has done. Here, the Legislature has expressly authorized—mandated actually—that the Secretary issue instructions (not rules) setting forth procedures for the challenge process, MCL 168.31(1)(c), and for the operation of AVCBs, MCL 168.765a(17).

For these reasons, the Secretary's "challenger liaison" instructions constituted a proper exercise of her authority under subsections 31(1)(c) and 765a(17), and did not need to be promulgated as a rule.

3. Instruction for resolving challenges made with and without good reason or good cause – the "permissible - impermissible challenge" instruction.

Plaintiffs also challenged the Secretary's instruction that details what are permissible and impermissible challenges and how to process those challenges. Again, some background is appropriate.

The Election Law permits challengers to make the following challenges, and no others. Under subsection 727(1), a "*registered elector* of the precinct present in the polling place may *challenge* the right of anyone attempting to vote if the elector knows or has *good reason to suspect* that individual is not a registered elector in that precinct." MCL 168.727(1) (emphasis added). Subsection 727(1) also provides that a *challenger* at a polling place "may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on

election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot." MCL 168.727(1). "Upon a challenge being made under subsection (1) [whether by a registered elector or challenger], an election inspector shall immediately do all of the following":

> (a) Identify as provided in sections 745 and 746 a ballot voted by the challenged individual, if any.
>
> (b) Make a written report including all of the following information:
>
> > (i) All election disparities or infractions complained of or believed to have occurred.
> >
> > (ii) The name of the individual making the challenge.
> >
> > (iii) The time of the challenge.
> >
> > (iv) The name, telephone number, and address of the challenged individual.
> >
> > (v) Other information considered appropriate by the election inspector.
>
> (c) Retain the written report created under subdivision (b) and make it a part of the election record.
>
> (d) Inform a challenged elector of his or her rights under section 729. [MCL 168.727(2) (emphasis added).]

Under section 733 a challenger may "[c]hallenge the voting rights of a person who the challenger has *good reason to believe* is not a registered elector[.]" MCL 168.733(1)(c) (emphasis added). And under subsection 733(1)(d), a challenger may "[c]hallenge an election procedure that is not being properly performed." MCL 168.733(1)(d). Unlike section 727, section 733 does not impose any specific requirements for addressing either voter-eligibility challenges or election-procedure challenges made under that section.

The updated instructions provide that the challenger liaison will determine if a challenge is "permissible" and if it is a permissible challenge, the challenge will be recorded. An "impermissible" challenge is a "challenge made on improper grounds," meaning a challenge to something other than a voter's eligibility or to an election process, a challenge made with insufficient "good reason," or a challenge made for a prohibited reason. (Defs' Appx Vol 2, p 400, Opinion, Court's Ex, p 10.) If the challenger liaison determines the challenge is "impermissible" the challenge need not be recorded. (*Id.*) This process is explained in great detail in the instructions. (*Id.*, Vols 2 and 3, pp 400-409.) The instructions also provide that if a challenger makes repeated "impermissible" challenges, he or she may be removed. (*Id.* Vol 3, p 401.)

As with the "challenger liaison" designation, the Court of Appeals and Court of Claims quibbled with the Secretary's use of the terms "permissible" and "impermissible" challenges because the Election Law does not use those terms. (Defs' Appx Vol 2, p 380, Opinion, p 23; Defs' Appx Vol 3, Court of Appeals opinion, p 479.)[19] The Court of Claims made piecemeal conclusions regarding the

[19] Again, the court's hyper-focus on the Secretary's instructions using words not found in the Election Law is at odds with the reality of election administration. For example, the Election Law does not use the term "resemble" but the Bureau provides instructions on what to do if the photograph on a picture ID provided by the voter does not "resemble" the voter as part of its instruction on how to administer the ID requirement. See Election Official's Manual, Chapter 11, p. 17, https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/XI_Election_Day_Issues.pdf?rev=1094a6d753b74bc5acdd13d6a26a7bfd&hash=6E3988DE0589382C78B336BE5540C4BD (accessed November 30, 2023.)

instructions. First, the court made the following conclusions regarding the recording of challenges under section 727:

> Our Legislature has made clear that, when a challenge is made to the voting rights of a person-regardless of who makes the challenge- "an election inspector *shall* immediately ... Make a written report [including certain information] ... [and] Retain the written report ... and make it a part of the election record." MCL 168.727(2)(b) and (c) (emphasis added). There is no discretion available to the election inspector not to record a so-called "impermissible challenge" to a person's voting rights under MCL 168.727(1). Thus, to the extent that the May 2022 Manual permits an election inspector not to record a challenger's challenge to a person's voting rights because, in the election inspector's view, such challenge does not have a sufficient basis, this is directly contrary to our Legislature's requirement in MCL 168.727(2) that a record of the challenge be made. Even if the challenge is determined to be without basis in law or fact, if the challenge is made, it must be recorded. *Id.* [Defs' Appx Vol 2, p 381, Opinion, p 24.]

The court then went on to conclude that challenges under subsection 733(1)(c) must be recorded as well:

> With respect to a challenger's claim that *does not* involve a particular person's **right to vote** (i.e., a reason other than those listed in MCL 168.727(1) or **MCL 168.733(1)(c)**), our Legislature does not require that any specific report be generated, and the parties have not pointed this Court to any promulgated rule that would so require. See MCL 168.733. So, for example, if a challenger brings to an election inspector's attention the purported improper handling of a ballot by an election worker, our Legislature does not require that a report of that matter be recorded by the election inspector. See *id.* It certainly seems advisable to make a record of such alleged instances, and our Legislature expressly permits a challenger to "[k]eep records of ... other election procedures as the challenger desires." MCL 168.733(1)(11). But, defendants have the discretion to adopt a system of recordkeeping for these non-voter's rights challenges, and the one identified in the May 2022 Manual is reasonable, except as otherwise explained here. Defendants will need to revise the May 2022 Manual to make clear that the exception for not recording so-called "impermissible challenges" has no applicability to challenges involving **voting rights** set forth in MCL 168.727 or **MCL 168.733(1)(c).** [Defs' Appx Vol 2, p 381, Opinion, p 24 (bolded emphasis added).]

Last, the court addressed the removal of challengers for making "impermissible challenges":

> On the prohibition against making repeated "impermissible challenges," the May 2022 Manual warns challengers (with bold in the original), **"Repeated impermissible challenges may result in a challenger's removal from the polling place or absent voter ballot processing facility."** May 2022 Manual, p 11. The authority for this warning is not apparent. A challenger can be removed for drinking alcohol or disorderly conduct in a polling place or AVCB facility. MCL 168.733(3). The "disorderly conduct" prohibition would necessarily cover someone who commits a felony in an AVCB facility by, for example, divulging certain prohibited information or violating the specific sequestration requirements. Defendants have not pointed this Court to any other part of the Michigan Election Law or a promulgated rule that would permit expulsion merely for several challenges that an election inspector deems to be "impermissible." Only if a challenger's repeated, unfounded challenges rise to the level of "disorderly conduct" does the law permit that challenger's expulsion. [Defs' Appx Vol 2, p 382, Opinion, p 25 (bolded emphasis added).]

The Court of Appeals affirmed the Court of Claims' determinations, again with no significant analysis. (Defs' Appx Vol 3, Court of Appeals Published Opinion, pp 478-480.) But again, the courts erred in certain respects.

a. The permissible – impermissible challenge instruction falls within the Election Law.

The Court of Appeals and Court of Claims concluded Defendants could not categorize "permissible" and "impermissible" challenges for purposes of subsections 727(1) and 733(1)(c) and instruct that "impermissible" challenges need not be recorded. The courts, however, concluded Defendants could do so for challenges under subsection 733(1)(d) because the Legislature had not imposed a recording requirement for challenges to election procedures under that section.

Challenges to a voter's eligibility by registered electors under section 727:

Under subsection 727(1), a "registered elector"[20] may challenge a voter's registration status in the precinct if the elector "knows or has *good reason to suspect* that individual is not a *registered* elector in that precinct." (Emphasis added). To be properly registered, a voter must (1) be 18 years of age (by the election he or she seeks to vote in), (2) be a US citizen, (3) have resided in the city or township in which they are offering to vote for at least 30 days, and (4) be registered. See also Const 1963, art 2, § 1; MCL 168.10; MCL 168.492.

A challenge to a voter's registration status must therefore be based on one or more of the four grounds required for proper registration. (Defs' Appx Vol 3, pp 401-402, Opinion, Court's Ex, p 11-12.) And a challenge must specify which ground(s) forms the basis of the challenge because a person challenging a voter cannot "challenge indiscriminately." MCL 168.727(3).

Accordingly, based on these statutes, a person making a challenge cannot simply say, "I challenge Mr. Smith's eligibility to vote," without specifying the ground and offering some support for the assertion to demonstrate the required "good reason." MCL 168.727(1). Such as, "I challenge Mr. Smith's eligibility to vote because I have knowledge that he has not resided in the city for 30 days." Likewise, a person could not challenge Mr. Smith's eligibility to vote because the person states he or she "knows there are no African Americans registered to vote in this precinct."

[20] A credentialed challenger might also be a "registered elector" within a precinct for purposes of this portion of subsection 727(1), meaning that the challenger could make a "registered elector" challenge.

That would be a challenge without "good reason" under subsection 727(1) or "good cause" under subsection 727(3) because race is unrelated to a voter's eligibility or status as a registered elector.

The first and last examples are types of "impermissible" challenges that the challenger liaison should not be *required* to record and process under subsection 727(2). But the lower courts interpreted the language in subsection 727(2) as requiring the recording of all challenges and prohibiting any initial review or threshold determination by an inspector: "*Upon a challenge being made* under subsection (1), an election inspector *shall immediately*" take certain actions, including making a report. MCL 168.727(2) (emphasis added). Defendants disagree. Reading the language to require that an inspector process every purported challenge under subsection 727(1) would essentially render nugatory or surplusage the requirement that a challenge be based on the person's "know[ledge]" or a "good reason to suspect" that the challenged voter is not properly registered in the precinct. See, e.g, *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002) (courts must "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory[.]")

Indeed, the fact that a registered elector must demonstrate to an inspector good reason for his or her challenge supports an interpretation that an inspector has discretion to determine whether that threshold is met. Further, it makes sense that an inspector would make a threshold determination that good reason exists to

proceed before subjecting the challenged voter to the rigors and potential embarrassment of the challenge process, which requires the voter to be pulled aside, MCL 168.728, to be sworn, answer questions, have his or her ballot marked as challenged, etc. See MCL 168.727(2) and 168.729. Further, subsection 727(3) prohibits a person from challenging a voter for the purpose of annoying or delaying the voter. Requiring the recording of challenges made without good cause will certainly delay and annoy voters.

Finally, it makes eminent sense that a challenge unsupported by "good reason" need not be processed under subsection 727(2). Complying with the requirements of subsection 727(2) takes time, and necessarily pulls the impacted inspector away from other duties, including processing properly supported challenges. Subsection 727(3) provides that a "challenger shall not interfere with or unduly delay the work of the election inspectors." MCL 168.727(3). Interpreting subsection 727(2) as requiring inspectors to go through its steps where a challenge is not supported by good reason will unnecessarily and unduly burden and delay the work of election inspectors.

The Secretary is expressly authorized to issue "specific instructions" for "processing challenges" under subsection 31(1)(c). Here, the instructions simply provide structure and guidance to the election officials she supervises for determining whether a challenge to a voter's eligibility has been properly made and supported such that the procedures in subsection 727(2) must be invoked. These

instructions are in no way inconsistent with the plain text of section 727. Thus, the instructions fall within these enabling statutes.

But even if the courts are correct in their analysis of section 727, both clearly erred in applying the same analysis to section 733, which lacks a recording requirement.

Challenges to a voter's eligibility by challengers under section 733:

The Court of Appeals and the Court of Claims concluded Defendants could not categorize challenges for purposes of subsection 733(1)(c) and instruct that "impermissible" challenges need not be recorded because challenges under this subsection had to be recorded like those under section 727. But the courts are wrong.

Subsection 733(1)(c) provides that a "challenger may . . . [c]hallenge the voting rights of a person who *the challenger has good reason to believe is not a registered elector*." MCL 168.733(1)(c) (emphasis added.) But unlike subsection 727(2), subsection 733(1)(c) is silent regarding the manner in which challenges should be processed. There simply is no recording requirement for these challenges (just as the Court of Appeals and the Court of Claims recognized there was none for procedural challenges under subsection 733(1)(d)). The courts erred by engrafting such a requirement for challenges under subsection 733(1)(c). See *McQueer v Perfect Fence Co*, 502 Mich 276, 286 (2018) (courts may not read something into a statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself."); *State Farm Fire & Cas Co v Old Republic Ins Co,* 466

Mich 142, 146 (2002) ("[T]he proper role of the judiciary is to interpret and not to write the law . . . .").

Otherwise, the analysis set forth above regarding section 727 is equally applicable to challenges under subsection 733(1)(c). In other words, challenges must be supported by good reason that the voter is not registered based on one or more of the four grounds and that if the challenger cannot articulate good reason, the challenge need not be recorded.

Removal of a challenger for repeated impermissible challenges:

Finally, with respect to the instruction that making repeated "impermissible" challenges may lead to the removal of a challenger, the Court of Claims concluded that there is no authority to remove a challenger for merely making several challenges an inspector deems "impermissible." (Defs' Appx Vol 2, p 382, Opinion, p 25.) The court noted that the Election Law permits removal only for "disorderly conduct." (*Id.*) See MCL 168.733(3). But the court then concluded that "only if a challenger's repeated, unfounded challenges rise to the level of 'disorderly conduct' does the law permit the challenger's expulsion." (Defs' Appx Vol 2, p 382, Opinion, p 25.) The Court of Appeals agreed, noting that "unless the repeated 'impermissible' challenges rise to the level of disorderly conduct . . . there is no basis in law for the challenger's expulsion." (Defs' Appx Vol 3, Court of Appeals opinion, p 480.) In other words, both courts agreed there *is* support in the Election Law for removing a challenger for making repeated "unfounded" or "impermissible" challenges.

Further, the court failed to acknowledge other statutes explicitly governing challenger behavior. Subsection 727(3) provides that "[a] challenger shall not interfere with or unduly delay the work of the election inspectors," and a challenger "who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor." MCL 168.727(3). In addition, subsection 733(4) provides that "[a] challenger shall not threaten or intimidate an elector while the elector is . . . applying to vote . . . [or] voting[.]" MCL 168.733(4). Finally, election inspectors have long had "full authority to maintain peace, regularity and order at [ ] polling place[s], and to enforce obedience to their lawful commands during any . . . election[.]." MCL 168.678.

The Secretary's instruction on "repeated impermissible challenges" is grounded in all these statutes. Indeed, what may rise to "disorderly conduct" is informed by the permissions and restrictions on challenges and challengers described in all these statutes. And like the instructions on "permissible" and "impermissible" challenges, the instruction on "repeated impermissible challenges" falls well within the Secretary's authority under subsection 31(1)(c) to issue instructions for processing challenges.

b. The permissible – impermissible challenge instruction complies with legislative intent.

As explained above, the instructions do not conflict with, but are in fact consistent with, the plain language of sections 727 and 733, and the authority

granted the Secretary under subsection 31(1)(c). This is especially true with respect to section 733 where the Legislature entrusted the Secretary with establishing the procedures for such challengers under subsection 31(1)(c).

Accordingly, the Secretary's instructions are compliant or consistent with the underlying legislative intent of the statutes.

c. The permissible – impermissible challenge instruction is not arbitrary or capricious.

The Secretary's instructions regarding "permissible" and "impermissible" challenges and "repeated impermissible challenges" are not arbitrary or capricious. The Secretary's updated instructions are designed to implement and support the statutes discussed above so that election inspectors, challengers, and voters can perform their duties and exercise their rights freely, fairly, and consistently across the state. As stated in Director Brater's affidavit, the instructions were updated after the Bureau "received reports of an increased volume of challenges that were not based on any permitted reason in the Michigan Election Law," and because "[r]epeated 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." (Defs' Appx Vol 1, p 193, Defs' 10/11/22 MSD Brf, Ex A, Brater Aff, ¶¶40-41.)

Thus, the Secretary did not adopt these instructions on a whim, but rather in response to specific complaints of events occurring during elections and involving election officials, challengers, and voters. These complaints provided grounds for

the Secretary to adopt these instructions, and doing so was not arbitrary or capricious, but rather a reasonable exercise of the Secretary's judgment.

d. The permissible – impermissible challenge instruction was not required to be promulgated as a rule.

Because the Secretary's instruction reflects a valid and reasonable interpretation of the relevant election statutes, the remaining question is whether this instruction had to be promulgated as a rule. For the same reasons discussed above in Argument I.C.2.d., the instruction is not a rule as defined in section 207, but even if it were, it is excepted from the definition of a rule under MCL 24.207(g), (h), and (j).

For these reasons, the Secretary's "permissible" and "impermissible" challenge instructions constituted a proper exercise of her authority under subsections 31(1)(c) and 765a(17), and did not need to be promulgated as a rule.

4. Electronic device instruction – the opinions of the Court of Appeals and Court of Claims should be vacated.

The instructions challenged by the Plaintiffs included an updated instruction providing that electronic devices are prohibited at AVCBs during sequestration. (Defs' Appx Vol 2, p 399, Opinion, Court's Ex, p 9.) The Court of Claims concluded that the prohibition on possession conflicted with the Election Law because no statute expressly prohibited possession of such devices. (Defs' Appx Vol 2, pp 377-378, Opinion, pp 20-21.) The Court of Appeals affirmed. (Defs' Appx Vol 3, Court of Appeals Published Opinion, p 481.)

As noted above, after Defendants completed their briefing in this matter, the Legislature amended section 765a.[21] Among other changes, Senate Bill 367, now Public Act 81 of 2023, amended the statute to remove the sequestration requirement and to expressly prohibit photographing and audio or video recording in AVCBs with certain exceptions, such as to photograph posted election results. See MCL 168.765a(8), (18)(a) and (19), as amended by 2023 PA 81. The Act will take effect February 13, 2024. See Const 1963, art 4, § 27. The implication of the amendment is that persons may possess an electronic device capable of video and audio recording within an AVCB since the new law only prohibits the use of such devices. As a result, Defendants will have to amend the instruction, which prohibits the possession of such devices within AVCBs, as it is inconsistent with the new statute. As of the date of this filing, Defendants have not amended the instruction, but will do so before the next election, which is the presidential primary election on February 27, 2024. See 2023 PA 2.

Given the amendment, Defendants assert that any challenge to the electronic device instruction is moot. Whether a case is moot is a "threshold question" that this Court must address before reaching the substantive issues of a case. *In re MCI Telecom Complaint*, 460 Mich 396, 435 n 13 (1999). As this Court has explained:

> "'It is universally understood by the bench and bar ... that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some

[21] See legislative history for Senate Bill 367, available at http://www.legislature.mi.gov/(S(ydjfpjdrnuewbjqfctxszx1n))/mileg.aspx?page=getObject&objectName=2023-SB-0367.

> matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.'" [*League of Women Voters of Michigan v Sec'y of State*, 506 Mich 561, 580 (2020), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 610 (1920) (citation omitted).]

Here, the electronic device instruction has been rendered invalid by the Legislature's amendment of section 765a, which now permits the possession and limited use of electronic devices in AVCBs. See, e.g., *Howe v Doyle,* 187 Mich 655, 656 (1915) (dismissing appeal of challenge to "blue sky law" where the Legislature had since repealed the challenged laws); *B P 7 and Jerry Renouf v Michigan Bureau of State Lottery*, 231 Mich App 356, 359 (1998) (dismissing appeal as moot where Legislature amended statute to permit action sought by plaintiffs); *Ann Arbor Bank and Trust Co v Francis*, 86 Mich App 131, 136 (1978) (question moot where amended statute eliminated a requirement). As a result, this case now presents nothing more than abstract questions of law as to the validity of the now-invalid electronic device instruction. Any determination as to that instruction would not have any practical, legal effect since Defendants cannot enforce the instruction as written. Nor would engaging in an analysis of this instruction assist in the analysis of the other challenged instructions since each instruction is dependent on the associated enabling statutes. For these reasons, the dispute regarding the electronic device instruction is now moot.

Because this issue is moot, the opinions of the Court of Appeals and Court of Claims as to this instruction should be vacated. "The United States Supreme Court normally vacates lower-court judgments in moot cases," and this Court has "followed this general practice." *League of Women Voters of Michigan*, 506 Mich at

588-589 (footnotes and citations omitted). But " '[b]ecause this practice is rooted in equity, the decision whether to vacate turns on "the conditions and circumstances of the particular case." ' " *Id.* at 589 (footnotes and citations omitted).

Here, the equitable considerations weigh in favor of vacating this portion of the lower court opinions. The Legislature's recent amendment of section 765a in this manner was not foreseeable earlier and certainly the Secretary does not direct or control the passage of legislation. In other words, she did not act or cause this issue to become moot on appeal to avoid defense of her instruction or an unfavorable ruling. For these reasons, Defendants request that this Court vacate the portions of the Court of Appeals' and Court of Claims' opinions determining the electronic device instruction to be invalid.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Defendants-Appellants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Court grant their application for leave to appeal from the Court of Appeals' October 19, 2023 opinion affirming the Court of Claims' grant of declaratory and injunctive relief in Plaintiffs' favor.

Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.305(A)(1) and 7.212(B) because, excluding the part of the document exempted, this **application for leave to appeal** contains no more than 16,000 words. This document contains 15,481 words.

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