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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. 166424
Court of Appeals No. 363503
COC 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 JONATHAN BRATER, in his Official capacity as Director of Elections,

Defendants-Appellants.

Supreme Court No. 166425
Court of Appeals No. 363505
COC No. 22-000164-MM

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O'HALLORAN PLAINTIFFS-APPELLEES BRIEF IN SUPPORT OF PENDING ORAL ARGUMENTS PER MICHIGAN SUPREME COURT ORDER 166424-5, PUBLISHED MAY 29, 2024

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Dated: June 10, 2024

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STATUTES INVOLVED

(as of May 30, 2024, relevant parts expressed below)

MCL 8.3(a):

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

MCL 8.3(b):

Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number. Every word importing the masculine gender only may extend and be applied to females as well as males.

MCL 24.203:

> … (2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Subject to section 115(5), agency includes the municipal employees' retirement system and the retirement board created by the municipal employees' retirement act of 1984, 1984 PA 427, MCL 38.1501 to 38.1555. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of

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1956, 1956 PA 218, MCL 500.100 to 500.8302, or other association or facility formed under that act as a nonprofit organization of insurer members. …

(7) "Guideline" means an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person. …

MCL 24.207 (excerpts):

"Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:

… (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.

(h) 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.

(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected. …

MCL 24.226:

An agency shall not adopt a guideline in lieu of a rule.

MCL 24.232:

… (5) A guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is not enforceable by an agency, is considered merely advisory, and must not be given the force and effect of law. An agency shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision is subject to judicial review. A court shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act.

(6) If a statute provides that an agency may proceed by rule-making or by order and an agency proceeds by order in lieu of rule-making, the agency shall not give the order general applicability to persons who were not parties to the proceeding or contested case before the issuance of the order, unless the order was issued after public notice and a public hearing.

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(7) A rule must not exceed the rule-making delegation contained in the statute authorizing the rule-making. …

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.

(d) Publish indexed pamphlet copies of the registration, primary, and election laws and furnish to the various county, city, township, and village clerks a sufficient number of copies for their own use and to enable them to include 1 copy with the election supplies furnished each precinct board of election inspectors under their respective jurisdictions. The secretary of state may furnish single copies of the publications to organizations or individuals who request the same for purposes of instruction or public reference.

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

(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. The standards for petition signatures may include, but need not be limited to, standards for all of the following: …

MCL 168.727:

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(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 168.733:

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(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,

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applying to vote, entering the voting compartment, voting, or leaving the polling place.

MCL 168.734:

> Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

MCL 168.931:

> (1) An individual who violates 1 or more of the following subdivisions is guilty of a misdemeanor:
>
> … (g) An individual shall not willfully fail to perform a duty imposed upon that individual by this act or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election. …
>
> (2) An individual who violates a provision of this act for which a penalty is not otherwise specifically provided in this act is guilty of a misdemeanor. …

MCL 168.934:

> Any person who shall be found guilty of a misdemeanor under the provisions of this act shall, unless herein otherwise provided, be punished by a fine of not exceeding $500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both such fine and imprisonment in the discretion of the court.

QUESTIONS POSED BY THE COURT

… whether:
(1) the challenged provisions of the election procedure manual issued by the Secretary of State are consistent with Michigan Election Law, MCL 168.1 et seq.; and
(2) even if authorized by statute, the Secretary of State was required to promulgate the challenged provisions as formal rules under the Administrative Procedures Act, MCL 24.201 et seq.

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O'HALLORAN PLAINTIFFS' ANSWERS TO QUESTIONS POSED BY THE COURT

The combined DeVisser and O'Halloran Plaintiffs filed complaints with claims of five component 'instruction' defects within Defendant-Appellants (Defendants) 'directive'[1]. Portions identified as offensive to Michigan Election Law (MEL) were concisely summarized by the relevant Court of Claims Order from October 20, 2022, p14:

(1) the credential-form requirement;
(2) appointment of challengers on election day;
(3) communication with election inspectors other than the "challenger liaison";
(4) the prohibition on electronic devices in AVCB facilities, and
(5) the prohibition on recording "impermissible challenges."

O'Halloran Plaintiffs-Appellees' (Plaintiffs) complaint sought corrections for the latter three items. This response brief similarly limits discussion to the same. Of these, Defendants' most recent 'directive' incarnation[2] resolved (i.e., removed) the disagreeable substance of item #4. Unfortunately, a similar 'error' lingers in a companion election manual chapter[3]. By virtue of corrections made elsewhere in the

[1] https://web.archive.org/web/20231123094734/https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750 p21; O'Halloran Plaintiffs refer to this document as the 'directive.' It is but one of many chapters or subsections of the large body of documents commonly considered to the 'election manual' or 'election manuals.'

[2] https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=35366ca14b9e45798a3887dea7efa615&hash=61B5E3CB1FE16FA9BB5C67FC4582EB95 p21

[3] https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/VIII_Absent_Voter_County_Boards.pdf?rev=e01a554b63aa49d1bfe

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same document, it seems reasonable that this particular 'error' may amount to an editing oversight.

When constrained to the outstanding O'Halloran Plaintiffs' initiated items (e.g., #3 and #5 from above), **the answer to the Courts' first question is a resounding 'NO.'** The challenged provisions of the election procedure manual(s) issued by the Secretary of State are *not* wholly consistent with Michigan Election Law, MCL 168.1 et seq.

The second question seems to expect a remedial answer or alternatively anticipates some degree of nuance in light of either answer given for the first. Nonetheless, O'Halloran Plaintiffs suggest **the best answer to the Court's second question is most likely 'NO,'** but it would depend largely on the construction of controlling statutes – assumed to be written in a manner fully compatible with Defendants' (static) emanation.

IS DEFENDANTS' 'DIRECTIVE' INCONSISTENT WITH MICHIGAN ELECTION LAW?

A. COMMUNICATION WITH ELECTION INSPECTORS OTHER THAN THE "CHALLENGER LIAISON"

O'Halloran Plaintiffs disputed Defendants' May 2022 'directive' language wherein challenger conduct restrictions contradict statute established rights (see **footnote 1**). The offensive instructions (repeated below) persist in the most recent

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eb4b80ecbd08d&hash=E22E7197C6DC2E7C4E6E651C53632C31 p6 verbiage includes expected corrections, but p18 remains in conflict with statutes and the corrected 'directive'

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'directive' embodiment (see **footnote 2**) and have likewise substantially infected other related election manual chapters[4], [5]. See also **footnote 3** p19.:

> **"Restrictions on Challengers**
> Challengers may not:
> … Speak with or interact with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff"

In contrast to the above 'instructions,' MCL §168.733(1) provides (in part) that challengers may (*emphasis* added):

> "… (e)Bring to *an election inspector*'s attention any of the following: …
>
> (i)Improper handling of a ballot by *an elector or* [an] *election inspector*. …
>
> (iii)Campaigning being performed by *an election inspector or* [an] *other person* in violation of section 744. …"

O'Halloran Plaintiffs insist the 'directive' and related election manual 'chapters' facilitate blatant statutory rights abridgment. They institute nothing short of infringement on challengers' right to interact with *any* election inspector.

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[4] https://www.michigan.gov/sos/-/media/Project/Websites/sos/Election-Administrators/Managing-Your-Precinct-on-Election-Day.pdf?rev=099687d67e9249d98941ce03647543a3&hash=86B2799DC0E246E42596FAF6F720ACD0 p21

[5] https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/XI_Election_Day_Issues.pdf?rev=55e142f250fe4e76a801c0af77baf0f8&hash=0DEA5AD70BF0A0E5C40A06E4DC088C5F p26

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This position is firmly planted in boilerplate statute interpretation and long-standing definitions of '*an*' (or 'a') as an 'indefinite article'[6].

MCL §8.3a and §8.3b embrace this sentiment when stating, respectively (*emphasis* added):

> "*All words and phrases shall be construed and understood according to the common and approved usage of the language*; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.";
>
> "*Every word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number*. Every word importing the masculine gender only may extend and be applied to females as well as males. "

In further support of O'Halloran Plaintiffs' position, Merriam-Webster[7] provides (*italics* in original, **bold** emphasis added):

> "The *indefinite article* is *a*; it identifies a single, **but not specific**, person or thing. *An* is used instead of *a* whenever the word following it begins with a vowel sound. … The *definite article* is *the*; it is used to refer to identified or specified people or things, both singular and plural."

Defendants' 'directive' wishfully interprets relevant statutes as if the definite article was employed with implied or hidden authorization to choose *the* election inspector(s) fancied by the authors. However, the plain text reflects the

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[6] "… the dictionary should be seen as a tool to facilitate [legal] judgments, not conclusively resolve linguistic questions.... The dictionary is but one data point; it guides our analysis, but it does not by itself settle it." *King v. Nash (In re Estate of Erwin)*, 503 Mich. 1, 19-21; 921 N.W.2d 308 (2018)

[7] https://www.merriam-webster.com/dictionary/indefinite%20article

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Legislature's repeated provisions for a *non-specific* election inspector – a generic one from all readers' perspectives.

At play here is the Court's long held practice to hold identical words or phrases within a statute to a consistent meaning[8]. The phrase 'an election inspector' warrants no special treatment in selectively parsed portions of MCL §168.733. Similarly, as to be explored in a few examples, endless other MEL statutes would revert to gibberish should the naked phrase 'an election inspector' be interpreted as 'a particular election inspector identified as the challenger liaison.'

MCL §168.733(1)(e) makes references to "Improper handling of a ballot by *an elector or election inspector,*" and "Campaigning being performed by *an election inspector or other person*" (*emphasis* added). These statements convey that challengers may initiate challenges to *any* instance of improper ballot handling or electioneering by *any* person or *any* election inspector. Constraining each reference of 'an election inspector' to mean just the election inspector(s) bequeathed the title of 'challenger liaison' makes for a very tortured reading. In effect, it would mean the challengers could only raise improper conduct objections to the 'challenger liaison' if the offending election inspector also happens to be the 'challenger liaison.' A more suitable view is that 'an election inspector' must be interpreted as 'unspecified

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[8] "[U]nless the Legislature indicates otherwise, when it repeatedly uses the same phrase in a statute, that phrase should be given the same meaning throughout the statute. *Paige v Sterling Hts*, 476 Mich 495, 520; 720 NW2d 219 (2006) (indicating that "absolutely identical phrases in our statutes" should have identical meanings)." *Robinson v. City of Lansing*, 486 Mich. 1, 17; (2010).

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election inspector' – or correspondingly, 'any one' of the 'unspecified election inspectors.'

Analysis of MCL §168.727(1) yields the same understanding:

> "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. … "

Shackling this "an election inspector" instance to mean "only appointed challenger liaison(s)" is as painfully narrow-minded as the prior example. Arguably, this particular sentences' first condition requiring challenge of the applicant (i.e., where the inspector is aware of disqualifications) provides statute-embedded additional descriptive means to positively isolate a specific inspector. In this case, the reference is to a particular election inspector with the specified knowledge. For the second condition in the sentence (i.e., where applicant disqualification is indicated in the registration book), the 'responsible' election inspector's identity remains nebulous. In other words, any one of the election inspectors could initiate the challenge. In light of just these examples, the statutes remain coherent only when 'an election inspector' is understood as *any* election inspector.

It is Defendants' prerogative to name one or more election inspectors as 'challenger liaison(s)' or confer upon them any other title, but restraining challengers' interaction to such named person(s) runs afoul of plain statute language rights established for challengers. Statutes may not extend authority for a

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challenger to direct all concerns at all election inspectors, but they certainly allow for challengers to raise any valid concern to any election inspector present.

B. PROHIBITION ON RECORDING "IMPERMISSIBLE CHALLENGES"

O'Halloran Plaintiffs argue Defendants' 'directive' language is unlawful to the extent it provides instruction to ignore 'impermissible' challenges with a potential for 'undocumented' challenger expulsions. Similar instruction may be found in related election manual chapters. See **footnotes 1** p21,22(excerpts below); **2** p10,12,13,18,21,22; **3** p20; **4** p22,27; **5** p27,33.

> **"Restrictions on Challengers**
> Challengers may not:
> … Make repeated impermissible challenges … "
>
> **Warning and Ejecting Challengers**
>
> "If a challenger acts in a way prohibited by this instruction set or fails to follow a direction given by an election inspector serving at the location at which the challenger is present, the challenger will be warned of their prohibited action and of their responsibility to adhere to the instructions in this manual and to directions issued by election inspectors. The warning and the reason that the warning was issued should be noted in the poll book. The warning requirement is waived if the prohibited action is so egregious that the challenger is immediately ejected."
>
> "A challenger who repeatedly fails to follow any of the instructions or directions set out in this manual or issued by election inspectors may be ejected by an election inspector."

In stark contrast, MCL §168.727(2) and MCL §168.733(1),(2) obligate election inspectors to document all challenges related to voter eligibility and improper election procedure praxis. MCL §168.727(2)(b) requires an election inspector to: "Make a written report including all of the following information: (i)All election disparities or infractions complained of or believed to have occurred [and] (ii)The

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name of the individual making the challenge … [and other requisite information]." MCL §168.727(2)(c) further mandates document preservation: "Retain the written report created under subdivision (b) and make it a part of the election record."

Similarly, MCL §168.733(1) provides detail outlining various rights of challengers, and enumerates conditions for which complaints may be lodged: "… A challenger may do 1 or more of the following: … (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. … " Although context assigned to MCL §168.733(1) is 'polling places,' MCL §168.733(2) extends the applicability to 'counting boards.' In this way, it seems inescapable that MCL §168.727 and MCL §168.733 (as well as several other intervening and surrounding statutes) should not be viewed as disjointed instructions in isolation. Rather, they must be evaluated collectively as *in pari materia*[9]. MCL §168.727 provides requirements for information that must be recorded when challenges are exercised and MCL §168.733, in part, confirms voter ineligibility and election procedure non-conformance as reasons for their initiation. Both find relevance at polling places and counting boards.

Perhaps with good intention, Defendants attempt to stitch closed perceived 'loose ends' in the fabric of challenger-related statutes. Presumably, 'true' motives

---

[9] "Statutes that relate to the same matter are considered to be *in pari materia*. *People v Perryman*, 432 Mich 235, 240; 439 NW2d 243 (1989). "Statutes that address the same subject or share a common purpose are in pari materia and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). This general rule of statutory interpretation requires courts to examine the statute at issue in the context of related statutes. *Id.*" *Bloomfield Township v. Kane*, 302 Mich. App. 170, 176; (2013).

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have given rise to 'impermissible challenge' definition and conduct standards. How best to deal with confrontations in an unavoidably adversarial system, when a challenger's repeatedly lodges presumably 'false' or 'improper' challenges bringing 'disorder' to the proceedings?' However, as previously mentioned, MCL §168.727(2) mandates that challenges 'immediately' get enshrined in the election record without first applying a subjective test for their 'validity.' MCL §168.733(3) authorizes expulsion of 'wayward' challengers, but not for 'simply' initiating challenges – even if 'misguided' in the election inspectors' view.

O'Halloran Plaintiffs raise the imaginably counter-intuitive observation that instructions to 'ignore' certain challenges may unintentionally place election inspectors in jeopardy of serious MCL §168.734 violations. This statute forbids election officials' interference with a challenger engaged in the "performance of the duties expected of him." The penalty for such transgressions is up to a $1000 fine and / or up to 2 years imprisonment. In a dispute of alleged challengers' rights infringement, where video and audio records are explicitly prohibited, complete and accurate written records might be favorable to elections officials potentially exposed to stiff penalties.

In parallel, challengers are forbidden from making indiscriminate challenges, intentionally delaying election inspectors or purposefully annoying qualified electors. MCL §168.727(3). Under MCL §168.931(1)(g), MCL §168.931(2), and MCL §168.934, such violations may be punishable as misdemeanors (i.e., up to 90 days in the county pokey and / or up to a $500 fine). Additionally, MCL §168.733(4) allows

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for the expulsion of challengers for which there is "evidence of drinking of alcoholic beverages or disorderly conduct." Expulsion may also be the net effect if law enforcement is requested to pursue MCL §168.931 derived arrest of a challenger.

The Legislature chose to impart considerably more potent penalties against election officials 'interfering' with lawful duties of challengers than the reciprocal. In light of this deliberate 'disparity,' strict adherence to statute-directed recording of 'all' challenges would appear prudent to preserve election inspector safety and (legal) self-protection. Of course, there may be occasional tension in high-stakes elections involving a nearly-evenly divided electorate. Should a challenger abandon decorum for expulsion-worthy activity and become belligerent (i.e., drunk or disorderly) or initiate barrages of 'unlawful' demands and protests, better for the election inspector to take a few moments and thoroughly enshrine at least the initial 'offenses' in the official election record. And not just because portions of MCL §168.727 mandates it!

C. RULE MAKING EXEMPTIONS AND BLANKET AUTHORITY DO NOT APPLY

It is conceivable for Defendants' aforementioned instructions to exist in apparent violation of enacted MEL statutes, yet the 'directive' and broader election manuals remain perfectly lawful. Such a conundrum presents when 'APA rule exemption' provisions of MCL §24.207 may be exercised. Prior arguments have already shown that the challenged 'directive' components are facially inconsistent with MEL provisions. As such they operate as 'amendments' altering statutes and qualify as 'rules' (by fiat) per the MCL §24.207 definition:

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> " "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. … "

Before exploring the APA exemptions in more detail, seemingly broad statements within MCL §168.31(1)(a) and (c) deserve some attention. Use of this statute to justify 'universal authority' for Defendants' 'directives' and election manual 'initiatives' was previously tamped as part of *Davis v Benson*, unpublished opinion of the COC issued 10/27/20, (Docket nos. 20-000207-MZ and 20-000208-MZ) (emph added):

> "MCL 168.31(1)(a) simply states that the secretary shall "issue instructions and promulgate rules pursuant to the" APA "for the conduct of elections." **If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the rule-making process of the APA, then defendant would never have to issue APA promulgated rules for any election related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw**."

Claims for MCL §168.31(1)(a) - derived 'universal authority' similarly fail inasmuch as they more directly render the remainder of MEL statutes as mere suggestions. Such a position is affront to long-held practice that every nugget of statute text be given proper consideration[10]. The same holds true for inclinations to disseminate novel election procedures based on the MCL §168.31(1)(c) statement

[10] "The rule is no less elementary that effect must be given, if possible, to every word, sentence and section. To that end, the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v. Crocker*, 219 Mich. 178, 182 (1922).

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requiring the secretary to "publish … a manual of instruction…" Likewise, the phrases "in accordance with the laws of this state" and "as prescribed in this act" do not amount to effective rule making authority self-actualization because the words "the secretary of state shall … promulgate rules … [or] … publish … a manual of instructions" are simply included in the text of the act. Rather, they function as constraining tethers to the remaining 200 plus pages of MEL, and other laws. At least this seems to have been a customary understanding. For instance, there are five instances of statutes mandating "the secretary of state shall promulgate rules" – which comported with the previously small[11] (but now expanding) handful of MEL-adjacent rules published[12] at the discernment of Defendants' prior office occupants.

Returning back to the plausibly suitable MCL §24.207 'APA rule exemptions':

> (g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.
>
> (h) 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.
>
> (j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

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11 https://web.archive.org/web/20201206214003/https://ars.apps.lara.state.mi.us/AdminCode/DeptBureauAdminCode?Department=State&Bureau=Elections%20%26%20Campaign%20Finance

12 https://ars.apps.lara.state.mi.us/AdminCode/DeptBureauAdminCode?Department=State&Bureau=Elections%20%26%20Campaign%20Finance

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Item 'g' fails for Defendant's 'directive' trampling of challengers' rights to communicate with 'any' election inspectors and to have their challenges documented in the election record. Challengers act as private citizen volunteers regardless of their political inclinations or place of employment. Item 'h' stumbles for the challenged 'directive' components' conflict with the 'force and effect of law' test. Aside from 'creating' MCL §168.931 related misdemeanor citation risks for (repeatedly) interacting with those other than the 'challenger liaison,' or initiating 'impermissible challenges," challengers may be inappropriately expelled for the same. These penalties are not otherwise provided for in statutes. Item 'j' fails as the 'directive' creates new extra-statutory powers (i.e., new reasons to expel challengers), not just the discretion to exercise existing statutory authority.

ASSUMING DEFENDANTS' 'DIRECTIVE' IS CONSISTENT WITH MICHIGAN ELECTION LAW, IS FORMAL APA RULE PROMULGATION REQUIRED?

O'Halloran Plaintiffs ponder if the Court intended the second question to be elementary but nuanced, and in response restate their understanding. When the Court asks "(2) even if authorized by *statute*," the implied context seems confined to Michigan Election Law statutes. To rephrase the O'Halloran Plaintiffs' understanding of the entire question a bit differently: had the Legislature's intent[13]

[13] ' "The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature." *Amburgey v Sauder*, 238 Mich App 228, 231-232; 605 NW2d 84 (1999). Once the intent of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989). '*Michigan Basic Property Insurance v. Office of Financial & Insurance Regulation*, 288 Mich. App. 552, 558 (2010)

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as embodied in the expansive MEL statute text[14] 'remained' out of conflict with the challenged 'directive' (and broader election manual) provisions, would formal Administrative Procedures Act 'rule' promulgation be required? **To that general question, it seems the obvious answer is 'NO**,' aside from an important caveat.

Outside the general statement in MCL §168.31(1)(c), there are five additional passages in which MEL prompts that "the secretary of state shall promulgate [APA compliant] rules," but for various specific purposes. If the hypothetical controlling statutes in reference to the current matter included similar language, APA adherence would naturally be compulsory as well.

Alternatively, had the hypothetical 'compliance mechanism' taken the form of something like a hypothetical MCL §168.733(5): "At the discretion of the clerk or election inspector chairperson, challengers shall interact exclusively with one or more designated election inspector(s)," statute compliance with the 'directive' would have been 'preserved.' If all challenged 'directive' and election manual provisions had similar statue-embedded support, no election manual components might be viewed as statute 'amendments'[15] and thereby APA defined 'rules', so no accompanying formal APA promulgation burdens would be required.

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[14] "our goal 'is to give effect to the Legislature's in-tent, focusing first on the statute's plain language.' " [20 citation to *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013)] In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. [21 citation to Id.]" *Madugula v. Taub*, 496 Mich. 685, 696; 853 N.W.2d 75 (2014).

[15] MCL 24.207 provides in part: "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

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