

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

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

Court of Appeals No. 363503
Court of Claims No. 22-000162-MZ

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,

RICHARD DEVISSER, MICHIGAN
REPUBLICAN PARTY, and REPUBLICAN
NATIONAL COMMITTEE,

Court of Appeals No. 363505
Court of Claims No. 22-000164-MZ

Plaintiffs-Appellees,

v

JOCELYN BENSION, in her official capacity as
SECRETARY OF STATE, and JONATHAN
BRATER, in his official capacity as DIRECTOR
OF ELECTIONS.

Defendants-Appellants.

**BRIEF OF PROPOSED *AMICUS CURIAE* LEAGUE OF
WOMEN VOTERS OF MICHIGAN IN SUPPORT OF
DEFENDANTS-APPELLANTS**

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STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.203(A)(1).

STATEMENT OF QUESTIONS INVOLVED

I. Does the Michigan Constitution Purity of Election Clause in Article 2, § 4(2) authorize the Secretary of State to issue the Guidance and Instructions?

The Court of Claims failed to address this issue.

The parties focus only on whether the Election Law authorizes the Guidance and Instructions.

Amicus Curiae says: Yes.

II. Does the fundamental right to vote added to the Michigan Constitution as Article 2, § 4(1)(a) by 2022 Proposal 2 inherently authorize the Secretary of State to issue the Guidance and Instructions?

The Court of Claims did not address this issue.

The parties do not address this issue.

Amicus Curiae says: Yes.

III. Does the Administrative Procedures Act unconstitutionally encroach on the Secretary of State's authority to protect the fundamental right to vote of Article 2, § 4(1)(a)?

The Court of Claims failed to address this issue.

The parties do not address this issue.

Amicus Curiae says: Yes.

INTERESTS OF AMICUS CURIAE¹

The League of Women Voters of Michigan (“the League”) is a nonpartisan community-based statewide organization with headquarters in Lansing, Michigan. The League was formed in April 1919, after Michigan voters granted women suffrage in November 1918. The League is affiliated with the League of Women Voters of the United States which was founded in 1920. The League is dedicated to encouraging its members and the people of Michigan to exercise their rights to petition, to vote, and to participate in all aspects of the democratic process, as protected by the federal Constitution, the Michigan Constitution, and federal and state laws. The mission of the League is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. The League impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process, including by supporting ballot proposals, such as 2018 Proposals 2 and 3 and 2022 Proposal 2. The League has members in almost every county in the State, including Republicans, Democrats, and Independents. League members dedicate substantial time and effort to voter training and civic engagement activities, including voter registration and non-partisan voter guides, and serving as polling place challengers and poll watchers. The League’s members wish to vote in orderly polling places without the disruption of unruly challengers and to continue to serve as challengers and poll watchers themselves in an orderly polling place environment. The League has often participated directly or as *amicus curiae* in litigation to protect the rights of Michigan voters. *See, e.g., League of Women Voters of Mich v Secretary of State*, 508 Mich 520; 975 NW2d 840 (2022); *Graziano v Brater*, S Ct No 164763.

¹ Counsel for *amicus curiae* is the sole author of this entire brief which was funded entirely by *amicus curiae*. Neither undersigned counsel nor any other party or *amicus curiae* made a monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION

[Election officials] recognize that the challenge process under Michigan law is vulnerable to misuse by challengers and that election officials must therefore be vigilant to protect the rights of voters.

– Consent Order and Decree,
United States v City of Hamtramck, No. 00-73541 (ED Mich, August 7, 2000), p 2

Just as the federal court and parties in *United States v City of Hamtramck* recognized the affirmative obligation of election officials to protect voters from challengers who abuse the challenge process, Secretary of State Benson issued the Guidance and Instructions at issue here based on her affirmative duty to protect voters in 2022 and beyond from the unprecedented abuse of the challenge process that occurred in 2020.

Not only are the Guidance and Instructions valid for all the reasons argued by the Defendants-Appellants, but since their issuance and the Court of Claims decision, a powerful new constitutional basis for them has become law: Proposal 2 of 2022. That proposal—overwhelmingly adopted by the voters—created a self-executing fundamental state constitutional right to vote that bars any person—public or private, including challengers and their sponsors—from using “harassing, threatening, or intimidating conduct” to interfere with or burden that fundamental right to vote. Const 1963, art 2, § 4(1)(a). The Secretary of State now has an *affirmative duty* to enforce these state constitutional rights against abusive challengers, which provides all the authority she needs to issue the Guidance and Instructions at issue.

On this basis alone, the decision of the Court of Claims should be reversed, and the Guidance and Instructions sustained.

STATEMENT OF FACTS AND PROCEEDINGS

A. Proceedings in this Matter.

Proposed *Amicus Curiae* League of Women Voters of Michigan (“LWVMI”) adopts the Statement of Facts and Proceedings of Defendants-Appellants and supplements in detail below their statement that there were “certain issues and disputes surrounding the 2020 election,” Defs’-Appellants’ Br, p 4.

B. The Abuse of the Challenger Process in the 2020 Election.

There certainly were “issues and disputes” surrounding the 2020 election. The Guidance and Instructions at issue here were not promulgated in a vacuum but in direct response to the massive challenger misconduct that occurred then and was threatened in 2022. Those facts are critical to the legal analysis.

Since its establishment decades ago, the system of allowing challengers in polling places and absentee voting counting boards (“AVCB’s”) has been orderly and worked well, providing assurance to the public that Michigan’s elections were well-run, had integrity, and were accurate. That changed in 2020 when unprecedented and widespread abuse of the challenger process and misconduct by challengers and their sponsoring organizations threatened the conduct of Michigan elections. As a result of those problems, Secretary of State Benson issued the Guidance and Instructions at issue—necessary prophylactic measures to prevent those problems from repeating themselves in future elections.

1. General Problems

Many problems arose in 2020 with challengers that were not addressed in the Secretary of State’s Guidance and Instructions at that time. For example, the *Detroit Free Press* reported:

On Nov. 4, chaos erupted at Detroit’s TCF Center, the convention hall where election workers processed and counted the city’s

absentee ballots, as dozens of partisan poll monitors² clamored to get into the counting area. They banged on the doors and windows, demanding that election workers stop the count until they could enter.³

The *Detroit News* similarly reported:

Some of the behavior from Republican challengers was “bad,” [longtime volunteer Todd Davis] said. “There was one guy who took his mask off and was standing over one of the poll workers. . . . It just seems like their intention is just to come down here and disrupt and delay.”⁴

An interview with Candice Fortman, a poll worker at TCF Center in 2020, provided even greater details:

At [one] point, poll workers were leaving. So one particular challenger had been removed from the room for using his camera to record election equipment. He’s standing at those windows that they had been knocking on earlier, and he’s calling to someone in the lobby. Our senior poll workers were leaving out of the doors right there, where that glass window was, because that’s the only place there’s access to an elevator. . . . Many of them had large bags, because, again, they’ve been there all day. . . . I mean, one woman had a piece of luggage and she had a blanket in there because the room had gotten cold to her.

And so as this woman is rolling this piece of luggage out, this young man is calling out into the lobby, and he says, “Go follow her, go follow her! She’s stealing ballots! They’re stealing ballots!”

...

There was a mix of fear, there was anger

...

I’m hearing this from the poll workers, right? They’re coming back and relaying these stories [about challengers] to me. You had

² The cited articles use “poll monitor” and “poll watcher” interchangeably with “poll challenger.”

³ Hendrickson, *More Than 100 Republican Challengers Monitored Absentee Ballot Count in Detroit*, *Detroit Free Press* (November 6, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/11/06/republican-challengers-barred-detroit-tcf/6190533002/>.

⁴ Noble & Mauger, *Shouting, Confrontation at Detroit Vote Count Center: Poll Challengers Barred by Police*, *Detroit News* (November 4, 2020), <https://www.detroitnews.com/story/news/politics/2020/11/04/poll-challengers-converge-detroit-amid-close-election-results/6161484002/>.

everything from questioning the intelligence of the person working—“Are you able to understand the rules?” In one instance, there was a GOP challenger who said to a Black woman sitting at a table, “You know, what you’re doing is against the law,” to which she responded back, “Well, I’m a lawyer, so we can *have* that conversation.” There was no assumption that the people sitting at this table have just as much intellect as you do.

We would have moments where a group of challengers would get together and even inside of the facility would start chanting that chant that again is running in my head, “Stop the count.” So you would have these moments of direct intentional antagonizing of one poll worker or this groupthink of antagonizing the entire room of poll workers.⁵

2. Lack of a Uniform Credential Form and Challenger Liaison Created Problems

In 2020, polling places and AVCB’s were inundated with poll challengers with a wide variety of alleged “credentials” issued by several sponsoring organizations. At the same time, these poll challengers could approach *any* election worker in the polling place or AVCB, regardless of the election worker’s role or the frivolity of the challenge. The lack of a uniform challenger credential form and appointed challenger liaison hindered control of the challengers’ admission to AVCB’s and their conduct inside:

[O]n Wednesday, [November 4, 2020,] the number of challengers observing the count exceeded the allowed limit. At one point, there were more than 570 challengers in the counting room, the Detroit Free Press reported, including 227 Republican challengers.

In a statement shared Wednesday, Lawrence Garcia, Detroit’s lead attorney, explained what happened next. “We were well over the 134 maximum. In the haste of doing business, nobody noticed that until it was over 200 for each party, and at that point, we said, we better stop admitting people until some people leave, and we’re under the 134 number.”⁶

⁵ *Inside the Vote Count Chaos in Detroit*, Reveal (November 14, 2020), <https://revealnews.org/article/inside-the-vote-count-chaos-in-detroit/>.

⁶ Hendrickson, *More Than 100 Republican Challengers*.

Poll worker Candice Fortman recounted her experience:

[Y]ou would get a rush of Democratic challengers, but what was absolutely noticeable was how GOP challengers were showing up in large numbers at one time. You could not ignore it.

...

There were probably close to a hundred [GOP] people standing in the lobby, trying to get into the space to be challengers, but also causing what can only be described as a complete scene.⁷

As was done in 2020, overwhelming clerks and election workers again was encouraged at poll challenger trainings in 2022 by the GOP and other groups:

[Matthew Seifried, RNC Election Integrity Director in Michigan,] urged [challenger] recruits to approach clerks, including attending “public accuracy” meetings to question them about how voting machines work, recording machine numbers, requesting copies of tabulator results before and after voting begins and challenging clerks to prove their machines are not connected to the internet.⁸

A uniform challenger credential form would have streamlined the challenger check-in process, giving greater control to those running the polling places and AVCB’s and helping to prevent this chaos. Similarly, appointing a single challenger liaison in each polling place and AVCB with whom challengers are directed to work prevents *all* of the clerks and election workers from being overrun with challenges and questions while they should be focusing on their official responsibilities.

3. *Impermissible Challenges*

Prior to May 2022, when Secretary of State Benson released her Guidance and Instructions, Election Integrity Force (“EIF”)—one of Michigan’s leading election denier groups that has been

⁷ Reveal, *Inside the Vote Count Chaos*.

⁸ Przybyla, ‘It’s Going to be an Army’: Tapes Reveal GOP Plan to Contest Elections, Politico (June 1, 2022), <https://www.politico.com/news/2022/06/01/gop-contest-elections-tapes-000357> 58.

sanctioned for frivolous litigation⁹—announced its plans to scour the voter rolls and available address data to uncover allegedly fraudulent registrations and “prepare for upcoming elections.”¹⁰

The project was described as follows:

The Election Integrity Force is spearheading the physical canvass of registered, suspicious addresses associated with the Michigan Qualified Voter File (QVF) throughout the entire state of Michigan as part of the national movement to identify phantom voter addresses and fraudulent votes.¹¹

As early as February 2022—months before Secretary of State Benson’s Guidance and Instructions were released—EIF began posting that its canvass was underway:

Following is a link to an 11 minute video created by the Freedom Fighters Project called Canvass for Truth in Michigan featuring Ottawa County’s resident Gretchen Cosby conducting her perfectly legal due diligence as a respectful citizen canvasser concerned with the ever mounting evidence of irregularities in the Michigan Qualified Voter Files (QVF)

In this video you can see the polite process used by the volunteers from the Election Integrity Fund & Force Canvass Project as they seek to verify publicly accessible information with their fellow neighbors.¹²

In 2022, election deniers planned to—and did—send and raise endless frivolous challenges to clerks based on the address data gathered through its canvassing program. *Reuters* exposed many of the plans in a widely published story:

A group called the Election Integrity Force says it plans to field election challengers in each of the state’s 83 counties to raise

⁹ See *Karamo v Winfrey*, opinion and order of the Third Judicial Circuit Court, issued June 12, 2023 (Docket No. 22-012759-AW).

¹⁰ *Boots*, Election Integrity Force, <https://electionintegrityforce.com/pages/boots> (describing another new program, “Boots on the Ground,” which “aims to provide every township and precinct clerk in Michigan with a one-on-one volunteer, helping them to both clean up and maintain their Qualified Voter File and support them while they prepare for upcoming elections”).

¹¹ *QVF Canvass*, Election Integrity Force, <https://electionintegrityforce.com/pages/qvf-canvass>.

¹² Daniels, *The Canvasser vs The State*, Election Integrity Force (February 25, 2022), <https://electionintegrityforce.com/blogs/news/the-canvasser-vs-the-state>.

objections to people they suspect are not legally registered to vote.

Those election challengers will be equipped with lists of ineligible voters, culled from their canvas and voter roll findings, said Sandy Kiesel, the group's director

Under state law, an election challenger can raise an objection to a voter if he or she has good reason to believe the voter doesn't live there or is otherwise unqualified. The election official on site then settles the complaint.

Michigan's Secretary of State Jocelyn Benson told Reuters that clerks "are prepared to reject challenges that lack substance and eject challengers who repeatedly issue them."¹³

A *New York Times* story provided a similar look into EIF's strategy of filing impermissible bulk challenges:

In Michigan, the secretary of state's office said an attempt to challenge 22,027 ballots at once was invalid—state law says challenges must be submitted one at a time rather than in bulk, Jonathan Brater, director of the state's Bureau of Elections, wrote in a letter to local officials.

Mr. Brater highlighted other issues with [EIF's] work. The activists used the U.S. Postal Service's change of address system as evidence indicating a voter's registration isn't valid. But many people in that system, including students and members of the military, are still eligible to vote at their previous address, he wrote. Other challenges were based on a glitch that listed Jan. 1, 1900, as a place-holder registration date for people registered before new software was introduced.

In interviews with *The Times*, leaders with the group behind the effort, Election Integrity Fund and Force, said they did not have clear evidence that the voters listed were ineligible. They were simply prompting elections officials to make a closer examination of some potential errors, they said.

They weren't aware of any voters removed from the rolls as a result, they said.

¹³ Parker & Sullivan, *In the Hunt for Voter Fraud, Republican Door Knockers Are Intimidating Residents: Officials*, Reuters (November 3, 2022), <https://www.reuters.com/legal/republican-door-knockers-intimidate-voters-while-hunting-voter-fraud-say-2022-11-03/>.

Election Integrity Fund and Force . . . has also sent volunteers knocking on doors to survey residents about the registered voters in their homes. They presented their results to election officials as evidence of problems with the voter rolls.

But officials who reviewed the group’s findings said they were riddled with errors and leaps in logic. “They don’t have a grasp of how things actually work,” said Lisa Brown, the county clerk for Oakland County in the Detroit suburbs.

Ms. Brown said a colleague found a friend on the group’s list of problematic registrations because the friend forwards her mail. “She’s a snowbird. So, yeah, she forwards her mail to Florida when she’s down there, but she still lives here,” Ms. Brown said.

Ms. Kiesel, the group’s executive director, said her group planned to send lists of names to Michigan election officials before the November election. The lists will also go to poll workers, she said.¹⁴

EIF did just that. In a Twitter post, reporter Grant Hermes wrote the following:

A local clerk just sent me some of the 143 challenges they’ve received for absentee ballots so far. All from the election denial group “Election Integrity Force.” Nearly every local clerk in Wayne Co. got some from this group.

We are 4 days from the election.¹⁵

Secretary of State Benson replied to that Twitter post:

This is their strategy, folks.

Step 1: flood election with challenges, even if invalid

Step 2: challenges slow voting, create lines, deter voters

¹⁴ Corasaniti & Berzon, *Activists Flood Election Offices with Challenges*, NY Times (September 28, 2022), <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html>.

¹⁵ Grant Hermes (@GrantHermes), Twitter (November 4, 2022, 1:04 PM), https://twitter.com/GrantHermes/status/1588577939234643969?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1588617567236915200%7Ctwgr%5E18d8006d85082f94cb284b931a98d84690b8f40d%7Ctwcon%5Es3_&ref_url=https%3A%2F%2Fmichiganadvance.com%2F2022%2F11%2F07%2Fvoting-rights-advocates-prepare-for-increase-of-frivolous-challenges-at-the-polls%2F.

Step 3: cite existence of challenges—despite lack of validity—to block certification of fair, secure, accurate election results.¹⁶

To prevent these mass, baseless challenges from obstructing the election process, the Secretary of State directed that impermissible challenges need not be recorded.

4. *Electronic Device Problems*

In 2020, there were numerous incidents when poll challengers brought electronic devices into AVCB's, even though it was prohibited. Poll worker Candice Fortman saw this firsthand:

[T]here were people who had to be removed from the room for what was deemed as harassment of poll workers for pulling phones out, because there were no phones allowed in the room at all on Tuesday. Anything like that was a violation of the room and you would be removed.

...

[O]ne particular challenger had been removed from the room for using his camera to record election equipment.¹⁷

The *Detroit News* relayed similar accounts:

[Lawrence Garcia] added [that] the cardboard coverings on the windows were added because people on the other side of them were taking photos and videotaping, which is not allowed by challengers and poll workers inside the ballot-counting room, and it was making some of the workers uncomfortable.¹⁸

Sneaking electronic devices in again in 2022 was encouraged at poll challenger trainings.

Media outlets like *CNN* accessed one such training that involved the following exchanges:

“None of the constraints that they’re putting on this are legal,” former state senator Patrick Colbeck told trainees on the August 1 call.

¹⁶ Jocelyn Benson (@JocelynBenson), Twitter (November 4, 2022, 3:41 PM), https://twitter.com/JocelynBenson/status/1588617567236915200?ref_src=twsrc%5Etfw%7Ctwamp%5Etweetembed%7Ctwtterm%5E1588617567236915200%7Ctwgr%5E18d8006d85082f94cb284b931a98d84690b8f40d%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fmichiganadvance.com%2F2022%2F11%2F07%2Fvoting-rights-advocates-prepare-for-increase-of-frivolous-challenges-at-the-polls%2F.

¹⁷ Reveal, *Inside the Vote Count Chaos*.

¹⁸ Noble & Mauger, *Shouting, Confrontation at Detroit Vote Count Center*.

As far as cell phones, “I would say maybe just hide it or something . . . ,” Cheryl Costantino, the GOP county chairwoman and host of the call, told participants.

Some participants raised concerns about being tossed out if they broke rules. “That’s why you got to do it secretly,” Costantino replied.¹⁹

Politico broke the story, writing:

[S]ome participants in the Sunday night session indicated they have no intention of abiding by [state and local] rules.

“Could anybody get like a hidden camera or a microphone so if you’re working down in Detroit you could have those things running and they would never know they are running,” said one female participant, suggesting “ear pieces” that can record.

“That is my intent, I don’t care what the frickin rules are, frankly,” answered [an] unidentified male participant.

“I will have a phone on in my pocket, with an excellent [recording] system, because, frankly, at the end of the day here, we need to be able to, if there is an issue and I pray this is not. Now, we need to have some, you know, evidence to come back and back up our claim, because otherwise it’s a he-said-she-said.”²⁰

Secretary of State Benson’s ban on electronic devices in AVCB’s was in direct response to these 2020 abuses and was designed to prevent them in 2022.

C. Challenger Plans for 2022

In 2022, groups planned to replicate the abuses of 2020, though in a more organized fashion targeted at minority voters and areas perceived to be “Democratic.” A nationally circulated story by *Politico* gleaned significant details from trainings it accessed:

¹⁹ Ortega, Ash, Abou-Ghazala & Griffin, *Michigan GOP Leaders Encourage Rule Breaking at Poll Worker Training Session*, CNN (September 8, 2022), <https://www.cnn.com/2022/09/07/politics/michigan-gop-poll-worker-training-invs/index.html>.

²⁰ Przybyla, *GOP Activist Group Instructs Michigan Poll Watchers to Call 911*, *Politico* (August 2, 2022), <https://www.politico.com/news/2022/08/02/michigan-poll-911-gop-00049332>.

Video recordings of Republican Party operatives meeting with grassroots activists provide an inside look at a multi-pronged strategy to target and potentially overturn votes in *Democratic precincts*: Install trained recruits as regular poll workers and put them in direct contact with party attorneys.

The plan, as outlined by a Republican National Committee staffer in Michigan, includes utilizing rules designed to provide political balance among poll workers to install party-trained volunteers prepared to *challenge voters at Democratic-majority polling places*, developing a website to connect those workers to local lawyers and establishing a network of party-friendly district attorneys who could intervene to block vote counts in certain precincts.

...

Backing up those front-line workers, “it’s going to be an army”

...

In the recorded meeting with activists in March, Seifried said [of 2020 that] there “was a lot of disorganization, a lot of lack of preparedness and I’ve heard horror story after horror story,” referring to the GOP watchers barred by police due to Covid restrictions.

...

In an October meeting, Seifried said *priority targets are Detroit, Pontiac and Southfield, which are heavily Democratic and minority areas*.²¹

Bridge also reported on the trainings and planning:

There are likely to be more partisan actors involved in this election than in years past, from poll workers to poll watchers and challengers. Republicans, some of whom contend without proof that the 2020 presidential election was stolen, Democrats and other interest groups have recruited and trained more Election Day volunteers in Michigan and across the U.S. than in the past.

Some of the training has included advice that could lead to confrontations.

For example, in January, then-Republican gubernatorial candidate Ryan Kelley encouraged poll workers to unplug election equipment if they suspect something suspicious is going on. In August, trainees were told by Patrick Colbeck, a former Republican state senator, that

²¹ Przybyla, *‘It’s Going to be an Army’* (emphasis added).

poll challengers can demand tabulator tapes after polls close, according to a report by Michigan Radio.

One recent advertisement for Election Day training, promoted by the Lakes Area Tea Party in Oakland County, featured a photo of men carrying guns and wearing camouflage. The event was billed as “Seal Team 6 Poll Challenger Training.”²²

As did *Michigan Radio*:

On the night before Michigan’s primary election in August, Wayne County Republican Party leaders held a virtual training session for poll workers and partisan poll observers. During that video call, the party leaders encouraged people to break election rules.

A recording of that training includes this exchange between Wayne County Republican Party Chairwoman Cheryl Costantino and one of the attendees.

Costantino: “And maybe hide a small pad and a small pen. You need to take accurate notes.”

Trainee: “If we are observed with a pen and a piece of paper writing on anything, they just said they would . . . remove us.”

Costantino: “That’s why you’ve got to do it secretly.”²³

And *CNN*:

The evening before Michigan’s state primary, Wayne County GOP leaders held a Zoom training session for poll workers and partisan observers—warning them about “bad stuff happening” during the election and encouraging them to ignore local election rules barring cell phones and pens from polling places and vote-counting centers.

“None of the constraints that they’re putting on this are legal,” former state senator Patrick Colbeck told trainees on the August 1 call.

²² French & Oosting, *As Michigan Election Nears, Some Apprehension Over Strife at Polls*, Bridge (October 25, 2022), <https://www.bridgemi.com/michigan-government/michigan-election-nears-some-apprehension-over-strife-polls>.

²³ Tribou & Talley, *Wayne County Republicans Urged Primary Poll Workers, Watchers to Break Michigan Election Rules*, Michigan Radio (September 12, 2022), <https://www.michiganradio.org/politics-government/2022-09-12/wayne-county-republicans-urged-primary-poll-workers-watchers-to-break-michigan-election-rules>.

As far as cell phones, “I would say maybe just hide it or something . . . ,” Cheryl Costantino, the GOP county chairwoman and host of the call, told participants.

...

Towards the end of the Zoom call, Costantino told the trainees, “So you are all, really, undercover agents. Congratulations. That’s undercover training.”²⁴

And, finally, *Politico*:

Members of a GOP activist group coaching Michigan poll workers and watchers before Tuesday’s primary election instructed them to call 911 and contact sheriffs to involve law enforcement in election-related complaints, according to a recording of a Sunday night meeting obtained by POLITICO.

...

The Republican National Committee, which is also running workshops on how to challenge votes and voting processes, has stressed in its sessions that all workers should follow state and local rules including a ban on electronic devices that could compromise voter privacy. Yet some participants in the Sunday night session indicated they have no intention of abiding by those rules.²⁵

D. Secretary of State Benson’s & Others’ Responses

In 2022, Secretary of State Benson responded to the massive challenger misconduct in 2020 and planned misconduct for 2022. She spoke with *CNN*, saying:

The mounting efforts to influence poll workers have prompted concerns over election disruptions, forcing the state to establish a code of conduct for those individuals, said Michigan Secretary of State Jocelyn Benson.

Poll workers who don’t adhere to the rules will be removed “by the local clerk, if they violate the law . . . or in any way interfere with the administration of fair and secure elections,” Benson told *CNN*.

...

The training sessions are providing a thinly veiled, read-between-the-lines instructions that essentially show “people how to break the

²⁴ Ortega, Ash, Abou-Ghazala & Griffin, *Michigan GOP Leaders Encourage Rule Breaking*.

²⁵ Przybyla, *GOP Activist Group Instructs Michigan Poll Watchers to Call 911*.

law without expressly telling them to break the law, in most cases,” said [Jeff] Timmer, an advisor to the Lincoln Project²⁶

In another interview with *Newsweek*, Secretary of State Benson said that she

fears that 2020 may have just been a first attempt to subvert the will of voters in Michigan, as well as in other states.

...

Benson believes the “stakes are high” going into the 2022 midterm election.²⁷

Michigan Radio reported that Secretary of State Benson was not the only one fearful:

The potential presence of Election Integrity Force [challengers] at polling locations around the state is raising fears of voter suppression.²⁸

The State is “permitted to take prophylactic action to respond to potential electoral problems.” *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 27; 740 NW2d 444 (2007). Secretary of State Benson’s responses to the 2020 problems and threats of repetition for 2022 included the prophylactic Guidance and Instructions at issue:

1. A uniform credential form;
2. Communication by challengers to a single challenger liaison in each polling place and AVCB;
3. Banning possession of electronic devices in AVCB’s; and
4. Not recording impermissible challenges.

Seeking the ability to recreate the anarchy of 2020, these Plaintiffs sued claiming that the Guidance and Instructions exceeded Secretary of State Benson’s authority under the Election Law and were issued in violation of the Administrative Procedures Act (“APA”).

²⁶ Ortega, Ash, Abou-Ghazala & Griffin, *Michigan GOP Leaders Encourage Rule Breaking*.

²⁷ Lemon, *Jocelyn Benson Warns Trump-Backed Challenger Could Sway 2024 Results*, *Newsweek* (May 13, 2022), <https://www.newsweek.com/jocelyn-benson-2020-election-misinformation-2024-results-1706574>.

²⁸ Jackson, *Voting-Rights Advocates Fear Overzealous Poll Challengers on Election Day*, *Michigan Radio* (November 4, 2022), <https://www.michiganradio.org/politics-government/2022-11-04/voting-rights-advocates-fear-overzealous-poll-challengers-on-election-day>.

ARGUMENT

Under both the Purity of Elections Clause of the Michigan Constitution and 2022 Proposal 2—a constitutional amendment that created a fundamental right to vote—the Secretary of State has the clear authority and duty to issue the Guidance and Instructions at issue in this case regardless of the Election Law. In addition, Plaintiffs’ use of the APA to block the Guidance and Instructions is misplaced because of the breadth, self-executing nature, and liberal construction required of both constitutional provisions.

I. UNDER THE STATE CONSTITUTION, THE SECRETARY OF STATE HAS THE AUTHORITY AND DUTY TO ISSUE THE GUIDANCE AND INSTRUCTIONS.

A. The Purity of Elections Clause Grants the Authority to the Secretary of State and Imposes a Duty on Her to Protect the Integrity of Michigan Elections by Issuing the Guidance and Instructions.

The Court of Claims failed to even mention, let alone grapple with, the Secretary of State’s well-established 80-year-old authority and duty under the State Constitution’s Purity of Elections Clause, Const 1963, art 2, § 4(2), to protect the integrity of Michigan’s elections from abusive challengers. This authority renders unnecessary any reliance on the Election Law as the source of her authority.

The Michigan Supreme Court has long held that the Purity of Elections Clause imposes on election officials a duty to take affirmative steps to protect the integrity of Michigan elections:

[E]ven in the absence of specific constitutional or statutory provision, it is the clear duty of election officials . . . to . . . effectively comply with the constitutional mandate touching the preservation of the purity of elections and guarding against abuse or misuse of the elective franchise.

Elliott v Secretary of State, 295 Mich 245, 250; 294 NW 171 (1940). This core holding of *Elliott* has been repeatedly applied by the courts of this state. *See, e.g., Socialist Workers Party v Secretary*

of State, 412 Mich 571, 597; 317 NW2d 1 (1982); *Wells v Kent Co Bd of Election Comm'rs*, 382 Mich 112, 122; 168 NW2d 222 (1969).

Under *Elliott* and the Purity of Elections Clause, the Secretary of State does not need legislative authorization to protect Michigan elections—the Clause as interpreted in *Elliott* not only gives her the authority to issue the Guidance and Instructions but imposes a duty on her to do so. She would have been derelict in her duty not to issue them in the wake of the massive challenger misconduct in 2020 and their plans for 2022 detailed *supra*.

The Purity of Elections Clause alone supports Secretary of State Benson's actions here.

B. The Michigan Constitution's New Express, Textual, and Self-Executing Fundamental Right to Vote Also Grants the Secretary of State the Authority to Issue the Guidance and Instructions.

As a result of the passage of 2022 Proposal 2, there is now an express, textual, and self-executing fundamental right to vote in the State Constitution:

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.

Const 1963, art 2, § 4(1)(a). This right is enforceable against private individuals and organizations, including challengers and their sponsors:

For purposes of this part (a) of subsection (4)(1), "person" means an individual, association, corporation, joint stock company, labor organization, legal representative, mutual company, partnership, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal entity, and includes an agent of a person.

Id. This right also must be liberally construed and is self-executing:

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes.

Const 1963, art 2, § 4(1).

The duty imposed on the Secretary of State by the Purity of Elections Clause under *Elliott* and its progeny applies with particular force when implementing a new constitutional amendment, such as 2022 Proposal 2. In that circumstance, the Court in *Elliott* held that:

[E]verything reasonably necessary to be done by election officials to accomplish the purpose of the amendment is fairly within its purview.

Elliott, 295 Mich at 249 (emphasis added).

Not only do *Elliott* and the Purity of Elections Clause impose a duty on the Secretary of State to issue the Guidance and Instructions, but Article 2, § 4(1)(a) now authorizes and requires the Secretary to do so under this Court's interpretation of Article 2, § 4's broad mandate.²⁹

In *Davis v Secretary of State*, 333 Mich App 588; 963 NW2d 653 (2020), *lv den* 506 Mich 1040; 951 NW2d 911 (2020), this Court addressed the issue of whether the Secretary of State needed statutory authority to distribute absentee ballot applications to all Michigan voters. In holding that the Secretary did not need statutory authority, this Court took a very expansive view of the Secretary's inherent authority under Article 2, § 4 based on its self-executing nature and liberal construction requirement. That expansive view is equally applicable here and provides an alternative basis to uphold the Guidance and Instructions:

²⁹ Appellate courts can consider on appeal new legal developments that support reversal of a lower court. *See Daugherty v Michigan*, 91 Mich App 658, 663; 283 NW2d 825 (1979) (reversing the trial court's decision because of new Michigan Supreme Court caselaw).

As the chief elections officer, with constitutional authority to “perform duties prescribed by law,” the Secretary of State had the *inherent authority to take measures to ensure that voters were able to avail themselves of the constitutional rights . . . regarding . . . voting.*

...

As explained by our Supreme Court in *Elliott v Secretary of State*, 295 Mich 245, 249; 294 NW 171 (1940), “[E]verything reasonably necessary to be done by election officials to accomplish the purpose of” a constitutional provision . . . “is fairly within its purview.”

...

[I]n *Elliott* . . . our Supreme Court relied on the “purity of elections” provision of the Constitution as requiring election officials to ensure that ballots are created in such a manner so as to accomplish the purpose of the constitutional amendment, even absent specific statutory guidance. *Elliott* retains its vitality under the Constitution of 1963. See *Wells v Kent Co Bd of Election Comm’rs*, 382 Mich 112, 123; 168 NW2d 222 (1969).

We conclude that the Secretary of State’s action . . . fell within her authority as chief elections officer of the state and comported with her constitutional obligation to liberally construe Const 1963, art 2, § 4(1) to effectuate its purposes. See *Elliott*, 295 Mich at 250 [T]he decision that the Secretary of State made . . . comported with the constitutional directive to liberally construe Const 1963, art 2, § 4(1) to effectuate its purposes

Id at 601–03 (emphasis added).

The same principles and reasoning apply here. The Guidance and Instructions enable “voters . . . to avail themselves of the constitutional right[]” to vote without the polling place chaos of 2020. *Id* at 601. They were “reasonably necessary” to accomplish the goals of Article 4, § 1(a) to protect voters against “harassing, threatening, or intimidating conduct” that interfered with their right to vote. *Id*. Finally, the Guidance and Instructions fulfilled the Secretary’s “constitutional obligation to liberally construe Const 1963, art 2, § 4(1) to effectuate its purposes.” *Id* at 602.

Thus, not only were the Guidance and Instructions authorized—indeed required—by the Purity of Elections Clause and *Elliott*, but they are also now authorized and compelled by 2022

Proposal 2.

The decision of the Court of Claims should be reversed based on the adoption of 2022

Proposal 2.

II. THE ADMINISTRATIVE PROCEDURES ACT UNCONSTITUTIONALLY ENCROACHES ON THE SELF-EXECUTING FUNDAMENTAL RIGHT TO VOTE AND CANNOT BE APPLIED TO THE SECRETARY OF STATE'S ENFORCEMENT OF ARTICLE 2, § 4(1)(A).

Plaintiffs' principal attack on the Guidance and Instructions is that they were issued in alleged violation of the Administrative Procedures Act ("APA"), MCL 24.201 *et seq.* However, while the APA may apply to the Secretary of State when generally issuing regulations, it cannot constitutionally be applied to her when issuing instructions and guidance protecting the fundamental right to vote under Article 2, § 4(1)(a), as here.

The fundamental right to vote created and protected by Article 2, § 4(1)(a) is self-executing. The courts have long-held that self-executing constitutional provisions may not be encroached upon by the Legislature. In *Wolverine Golf Club v Secretary of State*, 24 Mich App 711; 180 NW2d 820 (1970), *aff'd* 384 Mich 461; 185 NW2d 392 (1971), this Court concluded that self-executing constitutional provisions are protected from "legislative encroachment":

We view the term "self-executing" to be more than an after-the-fact description of the operative effect of the constitutional provision. *It is a term intended to cloak the provision with the necessary characteristics to render its express provisions free from legislative encroachment.* And this is so irrespective of the implementing provision contained therein.

Id at 728–29 (emphasis added). The Michigan Supreme Court has since reaffirmed this principle. *See, e.g., League of Women Voters of Mich*, 508 Mich at 540–41 ("[T]he courts will protect a self-executing provision from legislative encroachment."), *citing Wolverine Golf Club*, 24 Mich App at 728–29; *Woodland v Mich Citizens Lobby*, 423 Mich 188, 213; 378 NW2d 337 (1985). The

“limitation . . . on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon.” *Hamilton v Secretary of State*, 227 Mich 111, 125; 198 NW 843 (1924). That supplementary legislation “must be in harmony with the spirit of the Michigan Constitution, and their object must be to further the exercise of the constitutional rights and make them more available.” *Promote the Vote v Secretary of State*, 333 Mich App 93, 121; 958 NW2d 861 (2020), *lv den* 506 Mich 888; 946 NW2d 782 (2020).

Unconstitutional encroachment on self-executing state constitutional rights can occur in several ways. It may occur through legislation attempting to limit those rights. *See, e g, Wolverine Golf Club*, 24 Mich App 711; *League of Women Voters of Mich*, 508 Mich 520. It might occur by administrative action of election officials. *See, e g, Hamilton v Secretary of State*, 221 Mich 541; 191 NW 829 (1923) (*per curiam*) (Secretary of State cannot impose a time limit on validity of initiative petition signatures). It could occur by a legislature using its power over election regulations to amend or even nullify a regulation, thereby burdening or curtailing a self-executing constitutional right. *See, e g, MCL 24.245a(1)(a), (6), and (7)* (permitting the Legislature to block a regulation). It could be accomplished by a legislature refusing to appropriate funds or prohibiting the use of funds to enforce a self-executing law. *See, e g, Const 1963, art 9, § 17* (no payment of state funds except by legislative appropriation).

Under these principles, the APA is an unconstitutional legislative encroachment on the self-executing provisions of Article 2, § 4(1)(a) because it allows the Legislature to block a regulation that protects a self-executing provision from being curtailed or burdened. *See MCL 24.245a(1)(a), (6), and (7)* (permitting the Legislature to block a regulation).

The Guidance and Instructions were issued by the Secretary of State to prevent challengers

from “curtailing” or “undu[ly] burden[ing],” *Hamilton*, 227 Mich at 120, the self-executing constitutional right to vote in Article 2, § 4(1)(a). With the Guidance and Instructions, the Secretary was seeking to “further the exercise of the constitutional rights and make them more available,” *Promote the Vote*, 333 Mich App at 121. The exercise of a legislative veto of the Guidance and Instructions under the APA would thus not only obstruct the Secretary of State’s constitutional *duty* to issue them, *see* Part I, but would be an unconstitutional legislative encroachment on the self-executing right to vote. Since the APA encroaches on the authority of the Secretary of State to protect the self-executing constitutional voting rights in Article 2, § 4(1)(a), the APA cannot be used as a basis to challenge the Guidance and Instructions.³⁰

On this basis alone the decision of the Court of Claims should be reversed.

CONCLUSION AND RELIEF SOUGHT

For all of these reasons, Proposed *Amicus Curiae* League of Women Voters of Michigan urges the Court to reverse the decision of the Court of Claims and sustain the Guidance and Instructions.

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Dated: June 15, 2023

³⁰ That is not to say that the Secretary’s issuance of the Guidance and Instructions could not be regulated by the Legislature, only that the APA as currently written with its legislative veto cannot be used to do so.

Certificate of Compliance

I certify that this brief complies with the word volume limitation set forth in MCR 7.212(B)(1) and with the format requirements of MCR 7.212(B)(5). I am relying on the word count of the word-processing system used to produce this document. The word count is 6,379.

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Proof of Service

The undersigned certifies that on June 15, 2023, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
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