STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE and CINDY BERRY,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Secretary of State, and JONATHAN BRATER, in his official capacity as Director of Elections,

Defendants.
_____/

OPINION AND ORDER

Case No. 24-000165-MZ

Hon. Sima G. Patel

OPINION AND ORDER GRANTING DEFENDANTS' AND DENYING PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

"Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. . . ." *Reynolds v Sims*, 377 US 533, 561-562; 84 S Ct 1362; 12 L Ed 2d 506 (1964). Disenfranchisement is a serious matter and "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 562. At any given time, tens of thousands of United States citizens (including Michigan residents) live abroad, serving our country in the armed forces and diplomatic corps. Others live abroad for civilian purposes. Sometimes, spouses and dependents accompany these overseas United States citizens, sacrificing for the good of their families. And sometimes these spouses and dependents leave the United States before registering to vote, or are born and raised overseas,

reaching the age of suffrage without ever residing in this state or country. Congress protects the right of these citizens to vote, as does the Michigan Legislature.

At 4:09 p.m. on the 28th day before the November 5, 2024 general election, plaintiffs—Michigan Republican Party, Republican National Committee, and Chesterfield Township Clerk Cindy Berry—seek a declaration from this Court invalidating instructions issued by defendants—Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater—designed to allow these spouses and dependents to register and cast their votes. Laches bars this 11th hour attempt to disenfranchise these electors in the November 5, 2024 general election. Furthermore, the challenged language in the Secretary of State Election Officials Manual (the Manual) is consistent with federal and state law, and the Michigan Constitution.

The Court GRANTS defendants' motion for summary disposition and DENIES plaintiffs' cross motion. The Court also GRANTS defendants' motion to file a brief in excess of the page limit. The Court DENIES defendants' request for sanctions.

I. FACTS

At stake in this case is the right of the spouses and dependents of absent uniformed services and overseas voters (collectively "the subject group") to register to vote and cast absent voter ballots (AVBs) in Michigan. The subject group members do not currently live in Michigan and therefore cannot vote in person, nor can they easily drop by their local clerk's office to vote in person or to remedy alleged deficiencies with their AVBs before the November 5, 2024 general election. Given this reality, both federal and state law protect the right of subject group to vote by AVB.

The federal government requires states to permit absent uniformed services and overseas voters, as well as their spouses and dependents, to apply for and vote by AVB. The Uniformed and Overseas Citizens Absentee Voting Act, 52 USC § 20301 *et seq*. (UOCAVA), requires "[e]ach State" to "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by [AVB] in general, special, primary, and runoff elections for Federal office." 52 USC § 20302(1)(a). The federal act defines "absent uniformed services voters and overseas voters" to include the subject group as follows:

> (1) "absent uniformed services voter" means—
>
> (A) a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote;
>
> (B) a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and
>
> (C) *a spouse or dependent of a member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote*[.]
>
> * * *
>
> (5) "overseas voter" means—
>
> (A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;
>
> (B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or
>
> (C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States. [52 USC § 20310 (emphasis added).]

Michigan amended its election laws long ago to implement the federal mandate. As a general rule, the Legislature provides that a qualified elector must live in the municipality in which

he or she registers for 30 days. MCL 168.10(1). The Legislature generally defines "residence" for election purposes in MCL 168.11, in relevant part, as:

> (1) "Residence", as used in this act, for registration and voting purposes means that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a person has a residence separate from that of his or her spouse, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. This section does not affect existing judicial interpretation of the term residence.
>
> (2) An elector does not gain or lose a residence while employed in the service of the United States or of this state, while engaged in the navigation of the waters of this state, of the United States, or of the high seas . . . .

More directly on point, the Legislature enacted MCL 168.759a, which permits absent uniformed services voters and overseas voters, as well as the subject group, to register to vote in Michigan and to request to vote by AVB:

> (1) An absent uniformed services voter or an overseas voter who is not registered, but possessed the qualifications of an elector under [MCL 168.492], may apply for registration by using the federal postcard application. The department of state, bureau of elections, is responsible for disseminating information on the procedures for registering and voting to an absent uniformed services voter and an overseas voter.
>
> (2) Upon the request of an absent uniformed services voter or an overseas voter, the clerk of a county, city, or township shall electronically transmit a blank voter registration application or blank [AVB] application to the voter. The clerk of a county, city, or township shall accept a completed voter registration application or completed [AVB] application electronically transmitted by an absent uniformed services voter or overseas voter. A voter registration application or [AVB] application submitted by an absent uniformed services voter or overseas voter must contain the signature of the voter.
>
> (3) *A spouse or dependent of an overseas voter who [a] is a citizen of the United States, [b] is accompanying that overseas voter, and [c] is not a qualified and registered elector anywhere else in the United States, may apply for an [AVB] even though the spouse or dependent is not a qualified elector of a city or township of this state.*

> (4) An absent uniformed services voter or an overseas voter, whether or not registered to vote, may apply for an [AVB]. Upon receipt of an application for an [AVB] under this section that complies with this act, a county, city, or township clerk shall forward to the applicant the [AVBs] requested, the forms necessary for registration, and instructions for completing the forms. If the ballots are not yet available at the time of receipt of the application, the clerk shall immediately forward to the applicant the registration forms and instructions, and forward the ballots as soon as they are available. If a federal postcard application or an application from the official United States Department of Defense website is filed, the clerk shall accept the federal postcard application or the application from the official United States Department of Defense website as the registration application and shall not send any additional registration forms to the applicant. Subject to subsection (18), if the ballots and registration forms are received before the close of the polls on election day and if the registration complies with the requirements of this act, the [AVBs] must be delivered to the proper election board to be tabulated. If the registration does not comply with the requirements of this act, the clerk shall retain the [AVBs] until the expiration of the time that the voted ballots must be kept and shall then destroy the ballots without opening the envelope. *The clerk may retain registration forms completed under this section in a separate file. The address in this state shown on a registration form is the residence of the registrant.* [Emphasis added.]

MCL 168.759a(19) also provides definitions for "absent uniformed services voter" and "overseas voter" identical to the definitions of the UOCAVA.

But plaintiffs' complaint is not directed at MCL 168.759a. Rather, plaintiffs take issue with language in the Secretary of State Election Officials Manual permitting the subject group to register and vote in Michigan, even if they never personally resided in Michigan:

> **Eligibility to register to vote using the FPCA [federal postcard application] or FWAB [federal write-in absentee ballot]**
>
> To be eligible to register to vote using the FPCA or the FWAB, the voter must be absent from their jurisdiction of residence. If the voter is a civilian, the voter must be living outside of the United States and its territories. If the voter is a member of a uniformed service on active duty, a member of the Merchant Marine, or a National Guardsman activated on state orders, *or if the voter is a dependent of a member of any of the listed organizations, the voter is eligible to register to vote* using the FPCA or FWAB regardless of whether the voter is serving overseas or inside the United States. Each UOCAVA voter must submit their own FPCA or FWAB form.

> *A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state*.
>
> **Registration address for UOCAVA voters**
>
> A UOCAVA voter may register to vote at their last address of residence in the jurisdiction in which they are registering even if someone else now resides at that address, if the building where the voter resided has been demolished, or if the address no longer exists. The only requirement is that the address supplied by the voter is the last address which the voter considered their permanent residence within the jurisdiction in question. [Secretary of State Election Officials Manual, Chapter 7: Military and Overseas Votes (July 2024), p 3 (emphasis added).]

Plaintiffs filed suit complaining that this section of the Manual violates Const 1963, art 2, § 1, which provides:

> **§ 1 Qualifications of electors; residence.**
>
> Sec. 1. Every citizen of the United States who has attained the age of 21 years,[1] who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.

Plaintiffs seek a declaratory judgment that Const 1963, art 2, § 1 requires every voter to have resided in Michigan for a six-month period, and the federal UOCAVA preempts this state residency requirement only to the extent the absent uniformed services or overseas voter (or their spouse or dependent) each personally last resided in Michigan. As such, plaintiffs seek a declaration that the Manual's provision that a spouse or dependent is eligible to vote despite never living in the United States or Michigan is invalid. Plaintiffs do not challenge the constitutionality of any Michigan statute, however.

[1] Individuals are now qualified to vote at 18, not 21, years of age. MCL 168.492.

II. CROSS MOTIONS FOR SUMMARY DISPOSITION

Defendants responded to the complaint with a motion for summary disposition. First, defendants contend that plaintiffs' complaint must be dismissed for failure to comply with the notice requirement of the Court of Claims Act (COCA), specifically, MCL 600.6431(1)'s requirement that a plaintiff file a notice of intent (NOI) within 12 months of the accrual of the claim. The challenged Manual language has been in place since at least 2017, rendering plaintiffs' 2024 verified complaint untimely to provide the necessary notice.

Second, defendants argue that plaintiffs' claim is barred by the doctrine of laches. A challenge could have been raised at any time after 2017, and should have at least been brought earlier in the year leading up to the general election, not 28 days before. Defendants contend that it is too close to the general election to remedy any potential defect in the Manual instructions or in the handling of registrations, AVB applications, or returned AVBs.

Third, defendants contend that plaintiffs lack standing to challenge the Manual language because they do not have an interest distinguishable from the public at large and the harm they allege is merely hypothetical.

Fourth, defendants contend they are entitled to summary disposition under MCR 2.116(C)(8) and (10) because the manual language does not conflict with Const 1963, art 2, § 1. The final sentence of Article 2, section 1 permits the Legislature to define residence under the election law. Defendants assert that the relevant election statutes permit the subject group to register in Michigan if their spouse or parent is qualified to register in Michigan. Defendants contend the Manual language tracks the language of the state and federal statutes.

Plaintiffs filed a cross-motion seeking summary disposition in their favor under MCR 2.116(C)(10) and (I)(1). They assert the challenged Manual language conflicts with Const 1963, art 2, § 1's requirement that a person reside in Michigan for six months to become eligible to vote here. The Manual allows individuals who have never lived in Michigan, or even in the United States, to register to vote in Michigan. Plaintiffs concede that the UOCAVA "partially preempts Michigan's six-month residency requirement," but only "to the extent that UOCAVA requires that uniformed or overseas voters who reside outside the United States have a right to register to vote and cast a ballot in the state [in which] they last resided." (Plaintiffs' Motion for Summary Disposition, p 2.) Plaintiffs interpret the UOCAVA as assessing each applicant's ability to vote based on his or her own qualifications, not by borrowing the residency status of an absent uniformed services or overseas voter.

Defendants retort that the six-month residency requirement of Const 1963, art 2, § 1 has been deemed unconstitutional and, as a result, has not been enforced in approximately 50 years. Accordingly, it cannot be a basis for challenging the subject group members' eligibility to vote. Plaintiffs, on the other hand, respond that MCL 168.759a "merely waives the local residency requirement," but did not permit defendants to allow United States citizens who have never lived in this state or even this country to vote. (Plaintiffs' Responsive Brief, p 2.)

III. STANDARDS OF REVIEW

MCR 2.116(C)(1) provides: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." "MCR 2.116(I)(1) is a corollary to the various grounds for summary disposition stated in MCR 2.116(C)." *Zelasko v Bloomfield Charter Twp*,

___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 359002), slip op at 5. Under this subrule, a court is authorized to grant summary disposition at any time and without delay, "(1) if the pleadings demonstrate that a party is entitled to judgment as a matter of law, or (2) if the proofs demonstrate that there is no genuine issue of material fact." *Id*.

A motion for summary disposition under MCR 2.116(C)(8) "tests the legal sufficiency of a claim on the pleadings alone." *Armstrong v Ottawa Co Bd of Comms*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 366906); slip op at 3. This Court must accept a plaintiff's factual allegations as true and construe them "in the light most favorable to the nonmoving party." *Id*. Summary disposition is warranted under (C)(8) "only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted).

"A motion under MCR 2.116(C)(10) . . . tests the factual sufficiency of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019) (emphasis omitted). A (C)(10) motion can be granted only if, viewing the evidence in the light most favorable to the nonmoving party, "there is no genuine issue of material fact." *American Civil Liberties Union of Mich v Calhoun Co Sheriff's Office*, 509 Mich 1, 9; 983 NW2d 300 (2022).

To consider the merits of plaintiffs' challenge to the Manual, the Court must interpret the statutes on which it is based. "The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature" by examining the language of the statute, "both the plain meaning of the critical word[s] or phrase[s] as well as its placement and purpose in the statutory scheme." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999) (quotation marks and citation omitted). "If the language of a statute is clear and

unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Tryc v Mich Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996).

IV. ANALYSIS

A. NOTICE UNDER THE COURT OF CLAIMS ACT

Defendants contend that plaintiffs' action must be dismissed for failure to comply with the notice requirement of MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*. Defendants argue that plaintiffs' claim accrued more than one year before they filed this suit because the challenged Manual language has been in place since at least 2017.

MCL 600.6431(1) sets forth a condition precedent to maintaining a suit against the state. *Elia Cos, LLC v Univ of Mich Regents*, 511 Mich 66, 69, 72-74; 993 NW2d 392 (2023). MCL 600.6431(1) states that, unless an exception not at issue here applies, "a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written [NOI] to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies."

For purposes of this notice, a claim "accrues" when the harm occurs, i.e. when "each element of the cause of action, including some form of damages, exists." *Mays v Governor*, 506 Mich 157, 182; 954 NW2d 139 (2020). Because an action seeking a declaratory judgment under MCR 2.605 cannot be brought until an "actual controversy" arises, a declaratory-judgment claim "accrues" when an "actual controversy" arises. *Mich Immigrant Rights Center v Governor*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2024 (Docket Nos.

361451, 362515); slip op at 4. "Therefore, such a claim 'accrues' when a party's need for a judicial determination to guide its conduct stops being merely hypothetical or anticipated." *Id*.

Giving plaintiffs the greatest leeway in their argument, plaintiffs' claim accrues each time the plaintiff clerk is required to follow the Manual's instructions. That occurs every time an AVB application or voter registration is received from a subject group member. This event would have occurred several times within the last year. Accordingly, plaintiffs' verified complaint was received within the notice period. Defendants are not entitled to summary disposition on this ground.

B. STANDING

Defendants further contend that plaintiffs lack standing to file this suit. Specifically, they argue that plaintiffs have no greater interest than the general populace to protect the integrity of elections. Plaintiffs request declaratory relief under MCR 2.605, which permits the Court "[i]n a case of actual controversy within its jurisdiction" to "declare the rights and other legal relations of an interested party seeking a declaratory judgment." MCR 2.605(A)(1). If "a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Generally, an "actual controversy" giving rise to standing "under MCR 2.605(A)(1) exists when declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Our Supreme Court has explained that "the bar for standing is lower when a case concerns election law." *League of Women Voters of Mich v Secretary of State*, 506 Mich 461, 587; 957 NW2d 751 (2020).

The Court has considered the pleadings, as well as the attached Manual section and affidavits. Clerk Berry's affidavit states that she is responsible "for hiring and training election inspectors (also known as poll workers), preparing [AVBs] for distribution, compiling precinct results on Election Day, and certifying election results," as well as "overseeing the tabulation of [AVBs] in compliance with the Michigan Constitution." (Affidavit of Cindy Berry, p 1, Ex D to Complaint.) Clerk Berry has a clear, concrete, legal interest in how AVBs are tabulated. Given that at least one of the plaintiffs has established standing to bring this lawsuit, the Court denies defendants' motion for summary disposition on this basis. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

C. LACHES

MCL 691.1031 creates a rebuttable presumption of laches when a civil action related to an election is filed less than 28 days before an election:

> In all civil actions brought in any circuit court of this state affecting elections, dates of elections, candidates, qualifications of candidates, ballots or questions on ballots, there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected. This section shall not apply to actions brought after the date of the affected election.

See *Nykoriak v Napoleon*, 334 Mich App 370, 382-383; 964 NW2d 895 (2020) ("Moreover, in election cases, MCL 691.1031 creates a rebuttable presumption of laches[.]").

> Laches is an equitable tool that may be used to remedy the inconvenience or prejudice caused to a party because of an improper delay in asserting a right. The issue of whether relief will be withheld on the basis of laches is contingent upon the facts and circumstances of the particular case. . . . As the Court of Claims observed, legal challenges that affect elections are especially prone to causing profound harm to the public and to the integrity of the election process the closer in time those challenges are made to the election, making laches especially appropriate to apply in such matters. Elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and

> complexities of our election laws. [*Davis v Secretary of State*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 362841); slip op at 9 (cleaned up).]

The doctrine of laches "is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Lyon Charter Twp v Petty*, 317 Mich App 482, 490; 896 NW2d 477 (2016) (quotation marks and citation omitted), vacated in part on other grounds 500 Mich 1010 (2017). To establish laches as an affirmative defense, a defendant must demonstrate both undue delay and prejudice occasioned by that delay. *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 589; 939 NW2d 705 (2019).

> [L]egal challenges that affect elections are especially prone to causing profound harm to the public and to the integrity of the election process the closer in time those challenges are made to the election, making laches especially appropriate to apply in such matters. *Purcell v Gonzalez*, 549 US 1, 4-6, 127 S Ct 5, 166 L Ed 2d 1 (2006); *New Democratic Coalition v Secretary of State*, 41 Mich App 343, 356-357, 200 NW2d 749 (1972). "[E]lections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws." *Id*. at 356. "Courts can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials." *Id*. at 357. [*Davis v Secretary of State*, ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 362841), slip op at 9.]

There certainly was delay in this case. Plaintiffs filed their action at the end of the day on October 8, 2024. While this was 28 days before the November 5, 2024 general election, the late-in-the-day filing ensured that this Court had only 27 days to consider the issue. Plaintiffs did not serve defendants until October 10, leaving only 25 days until the general election. Notably, plaintiffs filed their complaint 17 days *after* the final day to send AVBs to absent uniformed services and overseas voters, as well as the subject group members.

The Court need not rely on a presumption of prejudice, however, as the prejudice of granting plaintiffs' requested relief this close to the general election is so clear.

First and foremost, Michigan electors have already begun casting their AVBs. According to the Secretary of State, approximately 31% of AVBs had been returned by October 15, 2024, or more than 670,000 ballots. See *More Than 670K Michigan Voters Have Cast Absentee Ballots Three Weeks Before General Elections* (October 15, 2024), available at <https://www.michigan.gov/sos/resources/news/2024/10/15/more-than-670k-michigan-voters-have-cast-absentee-ballots-three-weeks-before-general-election> (accessed October 18, 2024). More than a million AVBs were cast by October 21, 2024. See Dashboard, available at <https://www.michigan.gov/sos/elections/election-results-and-data/voter-participation-dashboard> (accessed October 21, 2024). The AVBs of subject group members are surely among those already cast. This leads to two avenues of prejudice: how are defendants expected to cull the AVBs of subject group members who have never resided in Michigan, and by the time these electors are uncovered and deemed ineligible, how could they re-register to vote in time and in a proper location for the 2024 general election?

Although plaintiffs urge that they simply want the challenged language in the Manual revised, it is undisputed that the effect is that individuals who have registered to vote in Michigan and have already been issued AVBs (and may have already cast their AVB) will be rendered ineligible to vote. Defendants argue that such a belated purge of an entire group from the elector rolls may violate federal law. For example, 52 USC § 20507(c)(2)(A) provides that a state may not start a program "to systematically remove the names of ineligible voters from the official lists of eligible voters," less than 90 days before an election. The only exceptions to that limit are for individuals rendered ineligible to vote because of a criminal conviction, mental incapacity, or death. 52 USC 20507(c)(2)(B). Creating a new program to systematically eliminate the current subject group does not fall within one of these exceptions.

It would be extremely difficult or impossible for defendants to design and carry out a program to reject potentially thousands of AVBs at this time. The Secretary of State is "the chief election officer of the state" and has "supervisory control over local election officials in the performance of their duties under the provisions" of the election laws. MCL 168.21. In this role, the Secretary of State is responsible for various tasks to ensure the integrity and smooth and fair operation of elections. See MCL 168.31(1). The Secretary of State has no process in place to distinguish the AVBs cast by absent uniformed and overseas voters whose last residence was in Michigan from AVBs cast by spouses and dependents who gained residence status under MCL 168.759a(3). Defendants are busy with myriad tasks in the final days leading up to a general election in a presidential election year. Plaintiffs' request would require defendants to create an entirely new process to cull those returned AVBs issued to members of the subject group who have never resided in Michigan and remove them before tabulation. It is hard to imagine a more prejudicial situation arising from plaintiffs' delay.

Ultimately, with so little time left before the November 5, 2024 general election and the extreme prejudice to the threatened electors and already heavily burdened defendants, the Court concludes that plaintiffs' requested relief is barred by the doctrine of laches.

D. MERITS

Although the Court summarily dismisses plaintiffs' complaint on laches grounds, as this issue is likely to recur, the Court considers the merits and finds that the challenged language in the Manual is consistent with Const 1963, art 2, § 1 and MCL 168.759a.

MCL 168.31(1)(a) and (c) requires the Secretary of State to issue and publish instructions to guide election officials. As an executive agency, the Secretary of State "has the authority to

interpret the statutes it administers and enforces." *O'Halloran v Secretary of State*, ___ Mich ___; ___ NW3d ___ (2024) (Docket Nos. 166424, 166425), slip op at 17. These interpretations are not binding and "may not conflict with the Legislature's clearly expressed language," but are "entitled to respectful consideration and should not be overturned absent cogent reasons for doing so." *Id*. When, as here, "a statute does not require rulemaking for its interpretation, an agency may choose to issue 'interpretative rules,' " instead of issuing official rules under the Administrative Procedures Act. *Id*., slip op at 18. The Manual falls into this category. The Manual does not have the effect of law, but rather "interpret[s] and appl[ies] the provisions of the statute under which the agency operates." *Id*. (quotation marks and citation omitted). The interpretation must be within "the scope of the law" subject to the instruction. *Id*., slip op at 19. Such rules are "intended to interpret and explain the requirements of the Michigan Election Law without restating those statutes verbatim." *Id*., slip op at 30.

Plaintiffs focus on Const 1963, art 2, § 1's mandate that to be a qualified elector in Michigan, a person must be a United States citizen "who has resided in this state six months." However, such durational requirements to qualify to vote were found unconstitutional by the United States Supreme Court in *Dunn v Blumstein*, 405 US 330; 92 S Ct 995; 31 L Ed 2d 274 (1972) (holding a one-year state and three-month county residency requirement were unconstitutional).

> Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote. [*Id*. at 334-335.]

Further, "[d]urational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of a fundamental political right, preservative of all rights." *Id*. at 336 (cleaned up).

Lower federal courts have applied *Dunn* to six-month residency requirements like that present here. A federal district court in Connecticut, in fact, held that "[w]hether a state has the power to impose a six[-]month durational residence requirement on the right of a citizen to vote is no longer an open constitutional question." *Nicholls v Schaffer*, 344 F Supp 238, 241 (D Ct Conn, 1972). "In view of *Dunn v Blumstein*, it is frivolous for [challengers] to contend that the constitutional and statutory requirements of six months residence in a town as a condition on the right to be admitted as an elector are not unconstitutional." *Id*. at 242. Much like the 21-year age requirement, Const 1963, art 2, § 1's six-month state residency requirement is no longer valid law.

Moreover, this provision must be read in light of the mandate in the same constitutional provision that the Legislature has the power to "define residence for voting purposes." The Legislature has defined residency for election purposes to include the spouses and dependents of absent uniformed services and overseas voters as long as the spouse or dependent (1) is a United States citizen, (2) is accompanying the absent uniformed services or overseas voter, and (3) is not a qualified and registered voter anywhere else in the United States." MCL 168.759a(3). The challenged Manual language does not quote the statute verbatim, but it does not need to. As held in *O'Halloran*, the Manual language must explain the statute and not conflict with the statutory language. The challenged language meets both requirements.

Consistent with federal law, the Michigan Legislature made a policy choice to allow a small pool of individuals who accompany family members abroad to qualify as Michigan residents

for the purpose of voting in Michigan because they are connected to Michigan through their spouse, parent, or someone serving a parental role. The Manual explains to local election officials that applications and AVBs from these spouses and dependents are to be tabulated even though the individual has never personally resided in Michigan. Rather, the subject group members are treated as living with their spouse, parent, or someone serving a parental role at that person's last designated Michigan residence for voting purposes.

Because the Manual language comports with the Michigan Constitution and statutes, there is no ground to invalidate it. Accordingly, the Court denies plaintiffs' motion for summary disposition and grants defendants' motion.

V. SANCTIONS

Defendants characterize plaintiffs' action as frivolous and ask this Court to impose sanctions. MCR 1.109(E)(5) provides that a party and its attorney, by signing the complaint, certify that the document is well grounded in fact and law and was not filed for an improper purpose. The court rule permits a trial court to impose sanctions if the action was filed in violation of subsection (E)(5) or if the action is frivolous. MCR 1.109(E)(6), (7). A claim is frivolous if:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true[, or]
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

Although plaintiffs filed their complaint late in the election season, the Court finds this insufficient reason to impose sanctions. Plaintiffs' complaint was not devoid of arguable legal merit. They raised a constitutional challenge to the language selected by defendants to explain the

statutory qualifications of electors. This was an issue of great public importance. Moreover, a claim is not frivolous simply because it fails. *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 368; 844 NW2d 143 (2013).

Accordingly, the Court denies defendants' request for sanctions.

VI. CONCLUSION

The Secretary of State Election Officials Manual provides "[a] United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state." Const 1963, art 2, § 1 granted the Legislature the authority to define residence for election purposes, and the Legislature granted residency to the subject group in MCL 168.759a(3). The Manual comports with this statutory language. Even if plaintiffs' challenge was meritorious, this Court would deny relief under the doctrine of laches based on the significant prejudice to the subject group members and defendants occasioned by the delay in filing suit.

IT IS ORDERED:

1. Defendants' motion to file a brief in excess of the page limits is GRANTED.

2. Defendants' motion for summary disposition is GRANTED.

3. Plaintiffs' cross motion for summary disposition is DENIED.

4. Plaintiffs' complaint is DISMISSED with prejudice.

5. Defendants' motion for sanctions is DENIED.

6. This is a final order resolving all issues in this matter.

Date: October 21, 2024

Sima G. Patel
Judge, Court of Claims