

STATE OF MICHIGAN
COURT OF CLAIMS

SHARON OLSON, in her official capacity as
IRVING TOWNSHIP CLERK, and SHELLY
LAKE, in her official capacity as IRVING
TOWNSHIP DEPUTY CLERK,

Plaintiffs,

v

Case No. 24-000181-MB

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

Hon. Brock A. Swartzle

Defendants.

_____ /

OPINION AND ORDER

Plaintiffs sued defendants in this current election-related matter at 9:35 a.m. on election day, November 5, 2024. Plaintiffs have had notice of their claims since October 24, 2024, but through a series of missteps, plaintiffs failed to bring their claims properly before this Court until today. Even setting aside the late hour, plaintiffs’ most critical allegations have no support in the record. For the reasons stated more fully below, and in light of the possibility of appellate review, the Court grants judgment in favor of defendants in this expedited manner.

I. BACKGROUND

Straight-Party and Split-Party Voting in Michigan. Under current Michigan election law, voters have the ability to vote a “straight-party ballot” or a “split-party ballot.” For a straight-party ballot, the process is simple and straightforward—on the front page of the ballot, in the left-hand

column, the voter selects a party from those listed in the “Straight Party Ticket” section. By making this selection, the voter will have cast votes in all of the partisan races.

For a split-party ballot, there are actually two ways to vote such a ballot: one that is simple and straightforward, and another that is unintuitive and esoteric. Under the simple, straightforward method, the voter bypasses the “Straight Party Ticket” section and makes individual selections for the various partisan offices, just as the voter would do for the nonpartisan races.

Under a second method, the voter begins by voting a straight-party ballot in the “Straight Party Ticket” section, but then the voter *overrides* that straight-party selection, in an ad hoc fashion, by voting for a candidate of a different party in individual partisan races. For example, a voter could vote Republican Party in the “Straight Party Ticket” section, but then select the Green Party candidate for Trustee of Michigan State University. In this scenario, the voter would have voted, in effect, a split-party ballot—votes for the Republican Party candidates in all of the partisan races *except* for the race for Trustee of Michigan State University, where that voter would have voted for the Green Party candidate instead.

This second method of split-party voting seems quite unintuitive and esoteric to this Court. This method could conceivably occur only in a jurisdiction that permits straight-party voting, like Michigan. If a straight-party vote is not permitted, then there would be nothing to override. And, it appears that even in those relatively few jurisdictions that permit straight-party voting,¹

¹ Only six states, including Michigan, even allow straight-party voting. <<https://www.ncsl.org/elections-and-campaigns/straight-ticket-voting>> (accessed November 5, 2024).

Michigan is an outlier with respect to this somewhat quirky way to vote a straight party but then override that selection in individual races.

Voter Assist Terminals. When filling out their ballots—whether straight-party or not—some voters in Michigan might be physically unable to mark a ballot. For example, a person with both arms in casts might not be able to hold a pen. In those relatively rare instances, Michigan offers a disabled voter the option of using a “Voter Assist Terminal” or “VAT.” A VAT is essentially a tablet-like digital screen that a voter who cannot mark a ballot can use instead to cast a ballot. Anyone familiar with how an iPad works would feel quite at home using a VAT. It must be emphasized that the use of a VAT to fill out a ballot is the relatively rare exception, not the norm, for voting a ballot in Michigan.

The Michigan Bureau of Elections (BOE) identified an issue with the software programming of certain VATs used in Michigan. Like with a regular ballot, these VATs allow a voter to cast a straight-party ballot. These VATs also allow a voter to cast a split-party ballot in the simple, straightforward method described above. But, these VATs do not allow a voter to cast a split-party ballot by first selecting a straight-party ballot but then overriding that vote in individual partisan races. If a disabled voter using one of these VATs tries to vote a split-party ballot in this second manner, then the machine will return an error message and the voter must start over.

On October 24, 2024, the BOE sent an e-mail to clerks and election directors informing them of the issue with these VATs. The e-mail explained that the BOE discovered the issue in the VATs “too late to make changes for this election.” The BOE also advised that a “Quick Resource Guide” would be forthcoming with specific instructions on how to use the VATs with the straight-

party/split-party functionality. The BOE further advised that election inspectors should assist a voter who used one of these VATs “to ensure that voters who wish to split their ticket by voting for candidates of different parties in different races are able to do so without difficulty.” Clerks and elections directors were directed that the following instructions should be made available to those disabled voters who use the affected VATs:

If you are using the Dominion voter assist terminal and wish to vote for all candidates of a single party, you may use the straight party option to pre-select candidates of that party for all partisan races. If you are using the Dominion voter assist terminal and wish to split your ticket and vote for candidates of different parties in different races, you should not use the straight party option to pre-select candidates. If you use the straight party option for one party but select a candidate in an individual race of a different party, you will receive an error message and you will need to go back and de-select your straight-party section before you can vote for candidates in the races individually.

For this reason, if you are splitting your ticket it is more convenient to vote each race individually. If you do receive a warning message that does not clearly explain what you need to do, please alert an election inspector. When you complete your ballot, please pay attention to any alert messages that inform you if you have not selected a candidate in a race, in case you wish to vote in that race. Please also be sure to review your selections before printing your ballot.

When the voter has made the selections on the digital device, a hardcopy ballot with the voter’s selections is printed. Once the ballot is printed, the voter places the ballot into a separate tabulating machine. Tabulating machines are not at issue in this case.

The following day, the Secretary of State issued a press release consistent with the day-earlier e-mail to clerks and election directors. The press release made clear that voters with disabilities who needed assistance with the VATs *would not* be prevented from voting a straight-party ballot or a split-party ballot, but also made clear that there could be some minor inconvenience with the process. The press released explicitly stated, “It is not possible to fix the programming for the affected VATs this close to the election.”

So, in sum, for those disabled voters who use the affected VATs, the fix for the 2024 General Election is this—(1) detailed voter instructions and (2) assistance from election workers, but (3) *not* anything to do with the software itself.

The Present Lawsuit. Today—the main voting day for the November 2024 General Election—plaintiffs, the Irving Township Clerk and Deputy Clerk, filed a complaint and emergency ex parte motion for declaratory, mandamus, and injunctive relief against defendants Jocelyn Benson, in her official capacity as Michigan Secretary of State, and Jonathan Brater, in his official capacity as Director of Elections. Plaintiffs allege that an actual controversy exists between the parties as to their rights and obligations under Michigan law because (1) defendants found that there is a “glitch” and “issue” with certain VATs (the one described above), and (2) “ostensibly, Dominion or some other entity is planning to access, modify, manipulate, or alter source coding or other components thereby destroying the integrity of those machines.” Plaintiffs request a declaration and order that (a) the integrity and reliability of the “voting machines” to be used in the November 2024 General Election has been compromised; (b) defendants may not order, or otherwise allow any access to, modification, manipulation, or alteration of the voting machines in the exclusive custody and control of plaintiffs; and (c) as a result of (a) and (b), plaintiffs cannot fulfill their duties to protect and ensure such voting machines are competent and fit for their intended purpose and must instead conduct a hand count of ballots cast in their township for the November 2024 General Election.

Plaintiffs also request mandamus relief “to compel [defendants] from allowing the access, modification, manipulation, and/or alteration by remote access or otherwise of the voting machine’s in plaintiff’s custody and control.” Lastly, plaintiffs request injunctive relief to prevent

defendants “or any other entity or official, acting under their authority, from effectuating any such access, modification, manipulation and/or alteration to the voting machines in Plaintiff’s custody.”

Defendants have moved for summary disposition in lieu of filing an answer, arguing that this Court should dismiss plaintiff’s complaint due to laches or for lack of legal merit.

II. ANALYSIS

A. STANDARD OF REVIEW

Because the Court has considered matters outside the four-corners of plaintiffs’ complaint, defendants’ motion is reviewed through the lens of MCR 2.116(C)(10). *Silberstein v Pro-Golf America, Inc*, 278 Mich App 446, 457; 750 NW2d 165 (2018). A motion for summary disposition under MCR 2.116(C)(10) can be granted only if “there is no genuine issue of material fact.” The Court must view the evidence developed in the record in the light most favorable to the nonmovant. *American Civil Liberties Union of Michigan v Calhoun Co Sheriff’s Office*, 509 Mich 1, 9; 983 NW2d 300 (2022).

B. LACHES

Defendants claim that any relief to plaintiffs is barred by the doctrine of laches. In *Davis v Secretary of State*, ___ Mich App ___, ___; ___ NW3d ___ (2023); slip op at 9, our Court of Appeals recently described the doctrine as follows:

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. [Cleaned up.]

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).

The allegations in plaintiffs' complaint demonstrate that plaintiffs became aware of the instruction-and-assistance issue with certain VATs at least by October 24, 2024. Rather than take a measured, considered approach to filing a state claim against a state department and a state official in her official capacity—an approach that would necessarily come through *this* Court of Claims, MCL 600.6419, where a notarized notice of intent or complaint has long been a statutory requirement, MCL 600.6431(2)(d)—plaintiffs filed the suit in the wrong court and in a critically deficient manner. Plaintiffs wasted *eleven days*—a lifetime when it comes to election lawsuits—to get this suit finally to the correct court, in the correct manner, on election day. Plaintiffs did not only unduly delay the filing of this lawsuit, but also prejudiced defendants' ability to respond.

Given the narrow nature of the actual issue—an issue that *does not* implicate any software or updates related to tabulating machines, but rather a software limitation in some VATs that is adequately addressed by (1) instructions available on the VATs and, if needed, (2) election-worker assistance—the Court cannot overlook plaintiffs' dilatory efforts with respect to this lawsuit. For this reason alone, the Court concludes that plaintiffs' complaint is barred by laches.

C. PLAINTIFFS' CLAIMS

Although the Court finds that plaintiffs' complaint is barred by laches, the Court will briefly address plaintiffs' claims for declaratory, mandamus, and injunctive relief. A review of the claims reveals that each is premised on three purported "facts": (1) defendants "have admitted" that the affected VATs "have been compromised"; (2) there is a "glitch" or "flaw" in the software

“which automatically destroys the integrity of the machines and of the voting process itself”; and (3) defendants or some other entity “ostensibly” are planning to “access, modify, manipulate, or alter source code or other components thereby destroying the integrity of those machines.”

First and most importantly, none of these three so-called “facts” has any support in the actual record before this Court. Instead, the undisputed evidence shows that, eleven days ago, the BOE identified a limitation with respect to certain VATs for a voter who is disabled, who needs to use a VAT to help create a completed ballot, *and* who wishes to vote a split ticket using the alternative, Michigan-specific method described above. To be clear, the only voter who is affected is the one who exhibits all three of these characteristics. The Secretary of State’s press release states that the programming issues “will not stop people from voting or making their preferred selections, and it will not change anyone’s votes,” and this is amply reflected in the record. Disabled voters who use the affected VATs and want to vote split-party ballots can still easily do so by using the simple, straightforward method described above. The record confirms that instructions have been provided for those disabled voters who use the affected VATs.

Critically, the voter who uses the affected VAT and wants to vote a split-party ticket will have to *review* all of selected choices on the screen *before* printing the ballot to ensure that the voter’s actual votes are that voter’s intended votes. Only then will the voter print a ballot and put that ballot into a tabulating machine. Nothing in the record suggests that tabulating machines themselves are impacted at all by this issue involving some VATs.

Second, the undisputed evidence before the Court also establishes that the BOE advised in its e-mail to clerks and election directors, and the Secretary of State announced in the press release, that the programming issue with the VATs would *not* be further addressed before the November

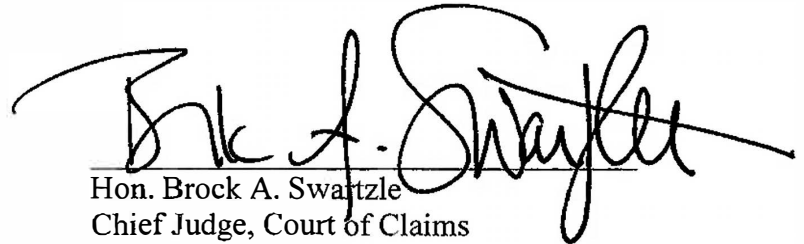
2024 General Election. Indeed, plaintiffs' use of the term "ostensibly" in the complaint is indicative that plaintiffs have no evidence that defendants plan to access, modify, manipulate, or alter any aspect of the VATs' software before the election. Plaintiff's factual allegations in support of their claims for declaratory, mandamus, and injunctive relief are not supported by the evidence before the Court.

D. CONCLUSION

The Court DENIES plaintiffs' ex parte motion for injunctive relief and mandamus relief, GRANTS defendants' motion for summary disposition, and DISMISSES plaintiffs' complaint with prejudice.

IT IS SO ORDERED. This is a final order and closes the case.

Date: November 5, 2024


Hon. Brock A. Swartzle
Chief Judge, Court of Claims

