Order

Michigan Supreme Court
Lansing, Michigan

November 3, 2022

Bridget M. McCormack,
Chief Justice

164956

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

RICHARD DeVISSER, MICHIGAN REPUBLICAN PARTY, and REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellees,

v

SC: 164956
COA: 363505
Ct of Claims: 22-000164-MZ

SECRETARY OF STATE and DIRECTOR OF THE BUREAU OF ELECTIONS,
Defendants-Appellants.

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On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the request made in the bypass application to stay the October 20, 2022 opinion and order of the Court of Claims is considered, and it is GRANTED. We ORDER that the October 20, 2022 opinion and order of the Court of Claims, and any decision of the Court of Appeals in this matter, is stayed pending the appeal period for the filing of an application for leave to appeal in this Court, and if an application for leave to appeal is filed from the Court of Appeals decision, until further order of this Court. This order disposes of the defendants' application for leave to appeal.

BERNSTEIN, J. (*concurring*).

I agree with the majority's decision to grant a stay in these consolidated cases. I write to explain why.

Justice VIVIANO appears to believe that granting a stay in this case is "a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek." The assumption that we are being driven by a results-oriented agenda is a confusing one at best, given that there are clearly significant legal issues at play here that merit this Court's full attention, which is unfortunately not feasible in the time left before election day. Justice VIVIANO notes that granting a stay here is inappropriate, referring to MCR 7.209(A)(2), but that court rule only speaks in terms of motions to stay filed in the Court of Appeals, where defendants filed a motion to waive the requirements of MCR 7.209.

Although they did not file such a motion in this Court, there is nothing in MCR 7.209 to suggest that this requirement extends to this Court.[1] Justice VIVIANO even acknowledges that "our rules do not expressly address the standard applicable to these stays," but in the same breath chastises the majority for not identifying a standard that he admits does not exist and that his dissenting colleague similarly does not apply.

In the interests of full transparency, assuming that the standard Justice VIVIANO has articulated is applicable here, I will briefly explain why I believe that a stay is appropriate under these circumstances. Justice VIVIANO notes that there is a four-part test that asks:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken v Holder*, 556 US 418, 434 (2009), quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

First, I believe defendants have made a strong showing that the doctrine of laches could apply to bar the relief that plaintiffs seek. The doctrine is an equitable one, and it may remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (quotation marks and citation omitted). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id*., citing *Lothian v Detroit*, 414 Mich 160, 168 (1982); *McGregor v Carney*, 271 Mich 278, 280 (1935); and 11A Callaghan's Michigan Pleading & Practice (2d ed), § 92.12, p 580. In other words, "[t]he doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation." *Mich Ed Emp Mut Ins Co v Morris*, 460 Mich 180, 200 (1999).

The Court of Claims granted injunctive relief as to five of the plaintiffs' challenges to provisions of the election guidance published by the Bureau of Elections.[2] The majority

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[1] Although MCR 7.305(I) states that "MCR 7.209 applies to appeals in the Supreme Court," given that MCR 7.209(A)(2) only speaks in terms of the Court of Appeals, it is unclear what the effect of MCR 7.305(I) is as to that provision. More importantly, MCR 7.209(F) refers to both the Court of Appeals and the Supreme Court, thus suggesting that the reference to the Court of Appeals alone in MCR 7.209(A)(2) is meaningful.

[2] Briefly, the first challenged provision standardizes the form that election challengers must use to be credentialed, whereas political parties formerly used custom forms for their own challengers; the second challenged provision states that challengers may be appointed up

of the challenged provisions at issue were first published in May 2022. Notably, the Court of Claims opinion pointed out that an earlier version of at least one of the challenged provisions was published in October 2020, and "there is nothing in the record to suggest that the manual was challenged in court on these grounds." In the consolidated cases before us, one set of plaintiffs first filed suit in the Court of Claims on September 28, 2022, while the other set of plaintiffs first filed suit in the same court on September 30, 2022. The Court of Claims did not enter its opinion and order until October 20, 2022.

It is clear that some delay took place in both cases, particularly with respect to the challenged provision that existed in a similar form as early as October 2020. The Court of Claims faults the Bureau of Elections for failing to "highlight or redline" the new provisions for the benefit of potential challengers, and it notes that one set of plaintiffs communicated its disagreements with these provisions in July 2022, concluding that "plaintiffs did not simply sit on their hands for four months, as defendants argue." But the doctrine of laches does not ask whether a plaintiff makes just any move in attempting to address the complained-of situation—it specifically asks whether there has been an unreasonable delay in *commencing a legal action*. See *Pub Health Dep't*, 452 Mich at 507.

I also believe that defendants have made a strong showing that this delay would result in prejudice. Defendants note that the guidance is binding on local clerks, and that training based on this guidance for both local clerks and election inspectors has already taken place across the state. It is impractical to think that new training could both be developed and take place the week before the election without a significant use of state resources, even if we assume this is a logistically achievable task within the time frame before us. Although both of my dissenting colleagues deny that any significant changes would be necessary at this point, it seems obvious that they would be—the August 2022 primary election was held with the challenged provisions in place, and a change would need to be made less than a week before the November 2022 general election. To say this would not be disruptive is to ignore reality and basic human behavior.

Accordingly, I believe that defendants have made a strong showing that they are likely to succeed on the merits of their laches defense.

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to the day before election day, but not on election day itself; the third challenged provision states that challengers may only communicate with a particular election inspector, designated as the challenger liaison, with repeat violations leading to the potential ejection of a challenger; the fourth challenged provision restricts the possession of electronic devices only in absent voter ballot processing facilities while absent voter ballots are being processed with violations subject to ejection (as opposed to polling places, where electronic devices may be possessed subject to certain limitations); and the fifth challenged provision states that impermissible election challenges, defined for example as challenges that are made with respect to something other than a voter's eligibility or challenges that are made on the basis of a prohibited reason, need not be recorded in the poll book.

Second, given that the doctrine of laches already incorporates a prejudice requirement, like Justice VIVIANO, I find that this factor follows the first.

The third and fourth factors concern whether there will be substantial injury to other interested parties and where the public interest lies. I begin by noting that defendants have submitted affidavits from current and former elections officials that explain why the challenged provisions are necessary to prevent the intimidation of both voters and election inspectors alike. I believe it more appropriate to defer both to the collective experience of these seasoned professionals and to the legal record that has been developed in this case, instead of inserting my own personal notions of what is efficient or not. Although Justice VIVIANO concludes that the public interest lies in striking the challenged provisions, it is especially noteworthy that these provisions applied to the August 2022 primary election, and yet there are no claims before us of any sort of havoc or catastrophe that resulted from the use of this guidance in that election.

I would thus find that defendants have met the standard articulated by Justice VIVIANO for a stay.

Moreover, it is important to bear in mind that the relief the Court of Claims granted in these cases was injunctive relief, which "is an *extraordinary* remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9 (2008) (quotation marks and citations omitted; emphasis added). I find it hard to believe that plaintiffs could establish a real and imminent danger of irreparable injury, again in light of the unchallenged administration of the August 2022 primary election. One set of plaintiffs in these cases includes the Michigan Republican Party and the Republican National Committee. I find it puzzling how these plaintiffs could establish a real danger of irreparable injury, given that the challenged provisions apply equally to all would-be election challengers, be they Republican, Democratic, or otherwise.

Given the strong arguments that defendants have made in favor of the application of the doctrine of laches, and given the high standards applicable where plaintiffs request injunctive relief, I vote with the majority to grant a stay in this case. I continue to be confused by the insinuation that "the stakes of this case . . . could not be higher." Of course I believe in the importance of elections in our representative democracy, a statement that I have repeated across a number of election cases over the eight years I have served on this Court. But it remains the case that the August 2022 primary election was conducted without any problems or objections. If August 2nd went smoothly, I have no reason to believe November 8th will be any different.

WELCH, J. (*concurring*).

I agree with the Court's decision to stay the legal effect of the Court of Claims' October 20, 2022 opinion and order. I write separately to explain why I believe a stay is appropriate. At issue in this case are several modifications made by the Bureau of Elections to its election manual in May 2022. With respect to the changes in the manual, the parties have competing arguments about the interaction of the Michigan Election Law (MEL), MCL 168.1 *et seq*., and the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Thoughtful consideration and conclusive resolution by the judiciary are warranted on these important issues. But timing matters, especially when a lawsuit contests election procedures and seeks emergency relief just days before an election. See *Purcell v Gonzalez*, 549 US 1, 5-6 (2006); *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016); *New Democratic Coalition v Secretary of State*, 41 Mich App 343, 356-357 (1972).

Specifically, plaintiffs in these two cases raise challenges to an election manual relating to election challengers and poll watchers, which was published by the Michigan Bureau of Elections on May 25, 2022, and announced through a digital news bulletin on the Secretary of State's website on the same date.[3] It appears to be undisputed that either staff or attorneys of plaintiffs Michigan Republican Party and Republican National Committee have been aware of the 2022 manual since it was issued or shortly thereafter, regardless of when the those parties claim to have realized that the 2022 manual was not identical to the 2020 manual. The record also shows that plaintiff Philip O'Halloran was personally aware of the new provisions in the manual as early as July 2022, as evidenced by e-mails sent by O'Halloran to the Secretary of State raising some of the exact concerns that have been pleaded in these cases. The 2022 manual was in place and relied on by local clerks, election workers, poll watchers, and challengers for the August 4, 2022 primary election. It further appears that plaintiffs O'Halloran, Braden Giacobazzi, Robert Cushman, and Richard DeVisser served as election challengers for the August primary election.

Despite the availability of the 2022 manual since May 2022 and several of the plaintiffs' subjective knowledge of the manual and its contents, the lawsuits in this matter were not filed in the Court of Claims until September 28, 2022, and September 30, 2022. Both groups of plaintiffs claim that aspects of the 2022 manual conflict with the MEL, exceed the legal authority held by defendants to issue election instructions and guidance without first going through formal notice-and-comment rulemaking under the APA, and infringe the statutory rights of designated election challengers under MCL 168.730. Defendants, in response, point both to the statutory authority provided by the MEL and the historic practices of the office of the Secretary of State and the Bureau of Elections. After the Court of Claims largely ruled in favor of plaintiffs on October 20, 2022, defendants immediately requested that the Court of Appeals grant expedited relief or a stay of the

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[3] The 2022 manual that is at issue is titled: "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers."

Court of Claims' decision no later than October 26, 2022 and requested waiver of the requirement under MCR 7.209(A)(2) that a motion for a stay pending appeal must first be filed in the applicable trial court. The Court of Appeals has yet to issue an order. Accordingly, defendants filed a bypass application in this Court on October 28, 2022, asking the Court to enter a stay of the Court of Claims' decision.[4] The requested stay would ensure that local election workers can rely on the 2022 manual in the November 2022 general election while the courts work through the complex and jurisprudentially significant legal issues presented in these cases.[5]

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[4] To be clear, the Court of Appeals has yet to rule on the merits of the parties' arguments, and the stay that this Court is putting in place merely prevents the Court of Claims' decision from being enforced immediately. Defendants have not asked this Court to resolve the merits of this dispute at this time. Nor does any Michigan precedent or court rule require an evaluation of the merits of an appeal when deciding whether to grant or deny a stay pending appeal. Regardless of whether this Court should adopt a new general standard for when a stay pending appeal should be granted, we certainly should not adopt such a standard for the first time when an appeal is before the Court in an emergency posture. Thus, rather than engage in a merits analysis on matters that are likely to be reviewed by this Court in the future, I believe it most appropriate to look to relevant state and federal precedent concerning delayed legal challenges that relate to election matters. That authority weighs strongly in favor of the Court's decision to grant a stay.

[5] I agree with Justice BERNSTEIN that the procedural posture of this case does not preclude ordering a stay. Defendants' bypass application sought a ruling on their motion to grant a stay and to waive the procedural requirements contained in MCR 7.209(A) that is still undecided and pending before the Court of Appeals. This Court has the authority to entertain such a request both under its general powers and pursuant to MCR 7.303(B)(1), MCR 7.305(C), and MCR 7.316(A)(7). In fact, while this Court denied a bypass application and a request for a stay in *AFT Mich v Michigan*, 493 Mich 884 (2012), it granted the request to waive the procedural requirement under MCR 7.209(A)(2) and (3), as well as the requirements under MCR 7.302(I) (which has since been renumbered as MCR 7.305(I)). *AFT Mich* was before this Court in a different procedural posture given that a separate motion for a stay was filed along with the bypass application, but no motion for a stay had been filed in or denied by the lower courts. We also granted a motion to waive MCR 7.209(A) in *Bailey v Pornpichit*, 722 NW2d 221 (Mich, 2006). And, since the *AFT Mich* order was entered, this Court has denied at least two other requests to waive the procedural requirements of MCR 7.209(A) without suggesting that it lacked the authority to grant such a request. See *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 502 Mich 881 (2018); *Doe v Dep't of Corrections*, 497 Mich 882 (2014). This is not the first time this Court has entertained or granted requests to waive procedural requirements governing requests for a stay, and while granting such requests should be rare, the timing and nature of this election-related matter warrants granting defendants' request.

All parties agree that " '[a] State indisputably has a compelling interest in preserving the integrity of its election process,' " *Purcell*, 549 US at 4 (citation omitted), but they disagree about whether certain provisions of the 2022 manual hinder or help this compelling interest. The United States Supreme Court has long recognized that courts should be cautious in granting injunctive or declaratory relief that will alter election rules or procedures when an election is imminent, there is a need for clear guidance, and there is inadequate time to resolve complex factual or legal disputes relating to important election matters. See *id*. at 5-6. This is especially true where a plaintiff has unreasonably delayed bringing a claim before the court. See, e.g., *Crookston*, 841 F3d at 398 ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). This is, in essence, the equitable doctrine of laches applied in a unique way to election matters. See *New Democratic Coalition*, 41 Mich App at 356-357 ("We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections."); *Nykoriak v Napoleon*, 334 Mich App 370, 383 (2020) ("The circuit court did not err by finding unexcused or unexplained delay, particularly in light of plaintiff's prior experience with elections").[6]

As the Sixth Circuit noted in *Crookston*, 841 F3d at 398, whether it be "laches, the *Purcell* principle, or common sense," there are compelling reasons not to disrupt established election processes and procedures on the eve of an election "absent a powerful reason for doing so." No adequate justification exists in these cases. The 2022 manual has been publicly available since May 25, 2022. Since its release, the 2022 manual has been relied on for both training purposes and administration of the August primary election. At least one plaintiff had personal knowledge of the changes implemented by the 2022 manual prior to the August primary, and several plaintiffs served as election challengers for the August primary under the terms provided by the manual. But the lawsuits at issue were not filed until the end of September. Additionally, the November 2022 general election was less than three weeks away when the Court of Claims entered its opinion and order.

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[6] See also *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507 (1996) (holding that laches "is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party"); 4 Restatement Torts, 2d, § 939, comment *a*, p 576 ("Even during a period less than that prescribed by an applicable or analogous statute of limitations, delay by the plaintiff in bringing suit, after he knew or should have known of the tort may result in relief being denied, wholly or in part, if the delay has operated to the prejudice of the defendant or has weakened the court's facility of administration."); *id*. at § 939, comment *b*, p 577 ("The reasonableness of the delay is tested by asking what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed.").

The general election is now less than one week away. Training for poll workers has been completed. It would be impossible to retrain thousands of workers across our state within a matter of days.

The parties raise compelling legal arguments, and the scope of defendants' power to administer election processes and procedures are jurisprudentially significant. While the parties and the electorate of Michigan deserve definitive answers, I believe the stay in this case will avoid confusion on election day and still allow for the merits of the claims in plaintiffs' lawsuits to proceed through the courts for resolution.

ZAHRA, J. (*dissenting*.)

I dissent from the majority's decision to grant a stay.

Defendants[7] filed a motion to bypass[8] the Court of Appeals' jurisdiction[9] asking this Court to overturn the Court of Claims' decision granting DeVisser limited relief in this election case. The underlying matter concerns defendants' May 25, 2022 release and implementation of a publication entitled "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (the Manual). Plaintiffs filed lawsuits in the Court of Claims on September 28 and 29, 2022, arguing that the Manual included "rules" that ought to have been promulgated by the Administrative Procedures Act (APA), MCL 24.201 *et seq*. On October 3, 2022, the court consolidated the cases and directed defendants to show cause why relief should not be granted and to file any motions for summary disposition by October 11, 2022. On October 20, 2022, the court issued a 29-page opinion that largely granted the relief sought by the DeVisser plaintiffs and denied the O'Halloran plaintiffs the broader relief sought in that case.[10] The court ruled that defendants were required to promulgate rules under the APA in regard to the Manual's requirements that: (1) poll watchers use a uniform credential form supplied by the Secretary of State, (2) poll watchers must be appointed or credentialed no later than the day before election day, (3) poll watchers may only communicate with an appointed "challenger liaison," as opposed to communicating with any election inspector, (4) poll watchers are prohibited from

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[7] I refer to defendant Secretary of State and defendant Director of the Bureau of Elections collectively as "defendants" and specify the Secretary of State when referring to that party in the singular.

[8] See MCR 7.303(B)(1) and 7.305(C)(1).

[9] Defendants' claim of appeal and motion to stay the Court of Claims' decision remain pending in the Court of Appeals.

[10] In this procedural posture, the additional relief sought by DeVisser and O'Halloran that the Court of Claims denied is not at issue.

possessing electronic devices in absent voter counting board facilities, and (5) so-called "impermissible challenges" to a person's eligibility to vote not be recorded in the poll book. The Court of Claims also rejected defendants' laches defense, concluding that plaintiffs acted with reasonable diligence and that defendants failed to demonstrate prejudice.

The Court of Claims provided defendants some discretion in how to proceed:

> Under MCR 2.116(I) and MCR 2.605, the Court concludes that the DeVisser Plaintiffs' claims set forth in Paragraph 30 of their complaint are well-founded in fact and law, and, as a result, the Court declares that defendants have violated the Michigan Election Law and the APA, as explained in this Opinion and Order. The May 2022 Manual, in and of itself, does not have the force and effect of law and defendants are enjoined from using or otherwise implementing the current version of the May 2022 Manual to the extent that such enforcement, use, or implementation would be inconsistent with this Opinion and Order.

Defendants appealed and filed a motion to stay the Court of Claims' judgment, but the Court of Appeals has not yet taken action. Defendants now seek relief from this Court through a bypass application.

Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."[11] A "rule" not promulgated in accordance with the APA's procedures is invalid.[12] An agency must use formal APA rulemaking procedures when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program."[13] "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is to be broadly construed,

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[11] MCL 24.207.

[12] MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205 (1982).

[13] *Faircloth v Family Independence Agency*, 232 Mich App 391, 404 (1998).

while the exceptions are to be narrowly construed."[14] It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA.[15]

This is not the first time that the Secretary of State has claimed to merely be issuing "instructions" to justify the lack of open and transparent promulgation of rules under the APA. The same claim was made before the 2020 general election. Yet, in March 2021, the Court of Claims issued an opinion that held, "[i]n sum, the standards issued by defendant [Secretary of State] on October 6, 2020, with respect to signature-matching requirements amounted to a 'rule' that should have been promulgated in accordance with the APA. And absent compliance with the APA, the 'rule' is invalid."[16] In the present case, the Court of Claims carefully and reasonably reviewed the challenges and found each to be in conflict with statutory law concerning the credentialling of poll watchers and their conduct during the election. At this stage of these proceedings, I cannot conclude that a stay of the Court of Claims judgment should enter. Indeed, it appears likely that defendants have once again chosen to implement "rules" under the guise of "instruction."

Under MCL 168.31(1)(a), the Secretary of State shall "issue instructions and promulgate rules pursuant to the [APA] for the conduct of elections and registrations in accordance with the laws of this state." Defendants undisputedly did not promulgate revisions to the Manual pursuant to the APA, and they argue that they were not required to do so because the revisions were only instructional. Yet, defendants assert that "the instructions are binding on local clerks, MCL 168.21, MCL 168.31(1)(a)-(c), who in turn have the obligation to train all election inspectors on Election Day procedures pursuant to those instructions, including the procedures related to challengers and the challenge process, MCL 168.31(1)(c), (i), (m)." Defendants cannot have it both ways. While defendants maintain that the Manual was revised to provide mere instructions, those instructions became manifest when actually implemented and put into practice during the August 2, 2022 primary. At that point, plaintiffs could cite the revisions to the Manual and claim the revisions were not merely instructional, they were in fact rules that were required to be promulgated under the APA to have the effect of law.[17]

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[14] *American Federation of State, Co, & Muni Employees v Dep't of Mental Health*, 452 Mich 1, 10 (1996) (*AFSCME*).

[15] *In re Pub Serv Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263 (2002).

[16] *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM), p 14.

[17] See *AFSCME*, 452 Mich at 12 (recognizing that the Department of Mental Health did not need to take a certain action; however, once the department exercised its discretion to act, the implementation of the decision "must be promulgated as a rule").

Further, because the rules were first implemented during the August 2, 2022 primary, I am hard-pressed to conclude that a lawsuit filed eight weeks after the primary and six weeks before the general election shows an unexcused or unexplained delay in commencing an action. Nor am I convinced that defendants have shown prejudice because of an allegedly late filing.[18] Surely, the Secretary of State was aware that these proposed instructions might later be challenged as rules that must be promulgated under the APA. As mentioned, a very similar challenge occurred during the Secretary of State's tenure, just a year before the Manual was revised.[19]

Obviously, the more prudent and transparent manner of revising the Manual is to simply promulgate the rules under the APA. For this reason, defendants do not arrive at this Court with clean hands to claim they are prejudiced by a judicial decision that they were entirely able to avoid. In fact, the majority's decision to grant a stay will only enable defendants to continue this practice. Further, I seriously question defendants' claim that significant retraining will be required without the stay. The Court of Claims' judgment is narrowly tailored to five concerns. These concerns relate to revisions of the Manual addressing practices that had been permitted in prior elections. Thus, seasoned poll workers will need only be informed that they should revert to their prior practices. In sum, officials need not require a uniform credential form, poll watchers may be credentialed the day of the election, poll watchers may communicate with any election inspector, poll watchers may possess electronic devices in absent voter counting board facilities, and challenges to a person's eligibility to vote must be recorded in the poll book. Given that this was the practice for a significant amount of time before the August 2, 2022 primary, following this directive hardly strikes me as something on which significant retraining is required, if any at all. For these reasons, I would deny the stay.

VIVIANO, J. (*dissenting*.)

We live in a political age where one side claims our "democracy is at stake" because the other is questioning the integrity of our elections—an age-old and seemingly bipartisan tradition. See Foley, *Ballot Battles: The History of Disputed Elections in the United States*

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[18] There is a statutory rebuttable presumption of laches in cases brought within four weeks of an election. MCL 691.1031. Plaintiffs avoided this presumption by filing their claims six weeks prior to the general election. Election litigation will always be expedited. But I have consistently maintained that six weeks is a sufficient amount of time to consider matters that will affect an election, such as the collection and tabulation of ballots. See *Johnson v Bd of State Canvassers*, 509 Mich ___, ___; 974 NW2d 235, 236 (2022) (ZAHRA, J., concurring).

[19] See note 16 of this statement and accompanying text.

(New York: Oxford University Press, 2016). Therefore, the stakes of this case—which will affect how this year's election is administered—could not be higher. But you would not know it from the majority's treatment of the case. The majority's order, which is barren of any legal analysis or discussion, stays the trial court's decision enjoining enforcement of changes made by defendant Secretary of State to the 2022 Election Manual (hereafter "Manual") to regulate the conduct of the upcoming election. In doing so, the majority disregards our court rules and the basic need to provide reasoned, principled decisions. And it has almost certainly ensured that the present election will not be governed by Michigan law as interpreted by the only court to rule on the merits of this election dispute.

Instead, under the general principles governing stays, I would reject defendants' motion for a stay, as I believe defendants have not shown sufficient likelihood of success on the merits or that they would be irreparably harmed by enforcement of the trial court's order.

I. FACTS AND PROCEDURAL HISTORY

These cases start with the Election Manual itself, and the recent changes to it. Under MCL 168.31(1)(c), the Secretary of State must "[p]ublish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes specific instructions on . . . procedures and forms for processing challenges . . . ." The Secretary of State must also "develop instructions consistent with [the Michigan Election Law, MCL 168.1 *et seq*.] for the conduct of absent voter counting boards or combined absent voter counting boards." MCL 168.765a(13). Those instructions "are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township." *Id*. In May 2022, the Secretary of State issued a substantially new version of the portion of the Election Manual pertaining to election challengers and poll watchers.[20]

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[20] An electronic version of the Manual appears on the Secretary of State's website. The updated portion at issue here—titled *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*—seems to replace a portion of the Manual; however, the online version of the manual does not reflect this update and instead reports that the relevant section of the Manual was last updated in October 2020. Michigan Secretary of State, *Election Administrator Information* <https://www.michigan.gov/sos/elections/admin-info> (accessed November 2, 2022) [https://perma.cc/NXB6-UVV6] (see the boldface heading "Election Officials' Manual / Accreditation Study Guide" and under that heading the link to Chapter 11, which concerns "Election Day Issues," indicating that the linked material was last updated in October 2020). The updated portion at issue is not included with the Manual but is provided under a separate heading and is not identified as part of the Manual.

The first major change related to the credentials for election challengers. The relevant statute provides that the challenger must have an "[a]uthority signed by the recognized chairman or presiding officer" of a political party or certain other groups—and that this authority "shall be sufficient evidence of the right of such challengers to be present inside the room where the ballot box is kept . . . ." MCL 168.732. Past election manuals have not required anything more than what is required by this statute. But in the present Manual, the Secretary of State has attempted to define the "authority" mentioned in the statute as a "Michigan Challengers Credential Card," which must appear "on a form promulgated by the Secretary of State."[21] "If the entire form is not completed," the Manual warns, "the credential is invalid and the individual presenting the form cannot serve as a challenger."[22]

The next changes deal with a new position created by the Secretary of State: the challenger liaison. Election challengers have statutory authority to "[b]ring to an election inspector's attention" various problems, such as improper ballot handling or violations of election law. MCL 168.733(1)(e). Past manuals have provided for election officials to supervise these challenges. The 2020 manual, for example, provided that certain challenges "must be directed to the chairperson of the precinct board . . . ."[23] The current Manual, by contrast, prohibits challengers from even speaking with anyone other than the liaison: "Challengers must not communicate with election inspectors other than the challenger liaison or the challenger liaison's designee," unless instructed otherwise.[24] Violation of this, or any other instructions, will lead to a warning, followed by possible ejection.

The third change is to the possession of electronic devices. No statute speaks to whether challengers can possess such devices. However, the Legislature has prohibited

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[21] Michigan Secretary of State, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), p 4, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750> (accessed November 3, 2022) [https://perma.cc/GL8Z-GLSK].

[22] *Id*. at 4-5.

[23] Michigan Department of State, Bureau of Elections, *Election Officials' Manual* (October 2020), ch 11, p 32, available at <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/XI_Election_Day_Issues.pdf?rev=dca6cfa2f9dd422a8444825a521324b8&hash=E80A0F3EDFF7F288B13ECA626E380237> (accessed November 2, 2022) [https://perma.cc/F3RB-9ME5].

[24] *Appointment, Rights, and Duties* (May 2022), p 6 (boldface omitted).

challengers from communicating information relating to the processing or tallying of votes until the polls close. MCL 168.765a(9). Past manuals have prohibited the use of electronic devices but never their mere possession. The present Manual, however, bans possession in absent voter ballot facilities while absent voter ballots are being processed.[25]

The final change is to recording challenges. By statute, registered electors of a precinct can "challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct." MCL 168.727(1). If such a challenge is made, the election inspector must "[m]ake a written report including" various information. MCL 168.727(2)(b). The statute further prohibits challenges made "indiscriminately and without good cause" and provides that a challenger who makes challenges "for the purpose of annoying or delaying voters is guilty of a misdemeanor." MCL 168.727(3). The 2022 Manual has created a new class of challenges, what it deems "impermissible challenges": those made on improper grounds, such as to something other than the voter's eligibility.[26] "Election inspectors are not required to record an impermissible challenge in the poll book," according to the Manual.[27]

Plaintiffs sued, seeking to enjoin these aspects of the Manual, among other requested relief. The Court of Claims agreed. It noted, at the outset, that the Secretary of State's instructions were not promulgated as rules under the Administrative Procedures Act, MCL 24.201 *et seq*. Therefore, as defendants acknowledged, they did not have the force and effect of law. With regard to the Secretary of State's credential form, the court explained that "our Legislature expressly set out the 'evidence' needed to show that a person was properly credentialed as a challenger" in MCL 168.732. The Secretary of State could not add to the requirements by mandating the use of a particular form.

With regard to the challenger liaison, the Court of Claims stated that "[t]he authority to designate a 'challenger liaison' is absent from the Michigan Election Law—in fact, the very label appears nowhere in the statute." No sources were cited, the court observed, to support this restriction of the challengers' statutory "right to communicate to 'an' election inspector . . . ." Therefore, the restriction was inappropriate. Next, in relation to electronic devices in the absent voter counting board facilities, the court again noted the lack of

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[25] Appointment, Rights, and Duties (May 2022), p 9.

[26] The 2003 manual distinguished between "proper" and "improper" challenges but did not purport to absolve election inspectors of their duty to record the challenge or threaten challengers with expulsion for making these challenges. The 2003 manual did, however, allow the precinct chairperson to expel challengers who "abuse[d] the challenge process." This provision does not appear to have been continued in subsequent manuals.

[27] *Appointment, Rights, and Duties* (May 2022), p 10 (boldface omitted).

statutory authority supporting the change. The Legislature restricted communications made by challengers regarding the processing of absentee ballots, but it did not prohibit possession of electronic devices, even though it would have been very easy to do so. "Prohibiting electronic devices in the [absent voter counting board] facility might be a good idea, but before a good idea can become law or have legal force and effect, that idea must be embodied within an enacted statute or promulgated rule." Therefore, the restriction was impermissible.

Finally, the court enjoined enforcement of the "impermissible" challenges provision. The court noted that nothing in MCL 168.727(2) gave election inspectors discretion to decline to record a challenge made to the voting rights of a person. This contrasted with other types of challenges and actions that election challengers were entitled to make, such as many of those under MCL 168.733.[28] Nor did defendants cite any authority for the proposition that a challenger could be ejected for making impermissible challenges. Consequently, the Manual veered from the statutes and could not be enforced.[29]

The court also rejected defendants' laches argument, i.e., that plaintiffs unduly delayed suit to the prejudice of defendants. It explained that the plaintiffs "did not simply sit on their hands for four months" after the Manual was issued in May 2022. Further, the court found no evidence that defendants would be prejudiced by any delay in bringing the case. The Manual is almost entirely instructive, rather than enforceable, the court observed, and could be easily tweaked on the few points where it went astray.

Defendants then appealed in the Court of Appeals, filing a motion to stay the Court of Claims judgment. The Court of Appeals has not yet ruled. Defendants now seek to bypass the intermediate appellate stage and come straight to this Court. They ask that this Court grant the bypass application and stay enforcement of the Court of Claims judgment.

II. PROCEDURES AND STANDARDS FOR A STAY

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[28] For example, MCL 168.733(1)(d) provides challengers the right to "[c]hallenge an election procedure that is not being properly performed." MCL 168.733(1)(c), by contrast, involves challenges to voting rights under MCL 168.727, which do require reports.

[29] Plaintiffs also challenged language in the Manual providing that "[p]olitical parties eligible to appear on the ballot may appoint or credential challengers at any time *until* Election Day." Defendants acknowledged, however, that MCL 168.730 and MCL 168.731 permit appointment through election day itself. The Court of Claims required defendants to make this amendment to the Manual. Because defendants conceded this issue, and because the Court of Claims' decision appears plainly correct, I will not address it below.

A. MCR 7.209

The majority has found a convenient way to sidestep the merits of this appeal while still granting defendants the relief they seek. Instead of addressing the merits of this election-emergency case prior to the election, or doing anything that ensures the merits will be addressed on appeal by then, the majority simply stays all lower court decisions in this case until after the Court of Appeals issues a decision and after we have subsequently disposed of the case. With less than one week to go before the election, there is little prospect of the case being finally resolved before election day. The election will likely come and go with the Secretary of State's challenged Manual firmly in place, even though the only court to rule on the merits found it contained new provisions that exceeded the Secretary of State's authority.

The majority tramples over the court rules allowing us to order a stay. MCR 7.209, which addresses stays for cases on appeal in the Court of Appeals, applies to appeals in this Court. See MCR 7.305(I). Under MCR 7.209, a party can seek in the Court of Appeals to stay the effect or enforceability of a trial court's judgment *if* a stay bond or motion for a stay pending appeal was decided by the trial court. MCR 7.209(A)(2) ("A motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court."). The Court of Appeals "may grant a stay of proceedings in the trial court or stay of effect or enforcement of any judgment or order of a trial court on the terms it deems just." MCR 7.209(D).

In the present case, it does not appear that defendants ever moved for a stay in the trial court (here, the Court of Claims), and the trial court never decided the issue. Thus, under MCR 7.209(A)(2), defendants were prohibited from even filing a motion for a stay in the Court of Appeals. Yet they did just that, along with a request to waive the requirements in MCR 7.209(A)(2). But nothing in MCR 7.209 suggests that courts have the power to waive this threshold requirement. Nor does the majority's order suggest that it is granting the waiver or provide any reasons for doing so. And in seeking a bypass application here, defendants only sought entry of a stay—they did not even seek a waiver of MCR 7.209(A)(2)'s requirements. Thus, even if courts can absolve parties of legal requirements that the parties admit noncompliance with, it does not appear that this stay motion is properly before this Court.

B. STANDARDS FOR ENTERING A STAY

More amazing still, the majority accomplishes its result, in an important case affecting the statewide rules governing the upcoming election, without any pretense that it must justify the stay by giving reasons based in law. This is in tension with the constitutional requirement that our "[d]ecisions . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . ." Const 1963, art 6, § 6. Often, this constitutional provision does not require much. Many of our cases are decided

or resolved in short orders. But more is called for here, at the very least as a prudential matter. In a case of this magnitude, when the Court is halting a decision by a lower court—the only court to have considered the merits thus far—in a manner that will affect the conduct of the election and almost certainly will deprive plaintiffs of relief in this election, I believe the Court should provide at least some legal rationale for its decision.

Compounding this problem is the lack of any clear standard being applied by the majority in cases involving stays of lower court orders. To be sure, our rules do not expressly address the standard applicable to these stays. MCR 7.209(D)—which is applicable to this Court under MCR 7.305(I)—allows an appellate court to stay enforcement of trial court judgments on "terms it deems just." And neither has this Court established a standard, having ordered stays in the past without any rationale—a practice I have occasionally dissented from. *Sheffield v Detroit City Clerk*, 507 Mich 956, 957 (2021) (VIVIANO, J., concurring in part and dissenting in part).

Without any standard whatsoever, these stays are essentially arbitrary, as far as the parties and public are concerned. It might be that the majority favors the arguments of one side or the other, or prefers a particular political outcome, or enters a stay because it is Tuesday. This lack of any discernable standard being applied by the Court in these cases conflicts with the nature of judicial decisionmaking. Principled judicial decisionmaking requires a reasoned application of general principles and laws applicable to the present case and like cases. Cf. Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993), pp 3-4. If a judge cannot discover such principles that yield his or her desired result, it usually means those principles do not exist. *Id*. To give no basis for a decision means that the judges might have acted for *any* reason, good or bad, principled or unprincipled. As the United States Supreme Court has explained, an appellate court's ability to hold a lower court order in abeyance pending an appeal is an inherent power within the discretion of the court—but this " 'does not mean that no legal standard governs that discretion. . . . "[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." ' " *Nken v Holder*, 556 US 418, 434 (2009), quoting *Martin v Franklin Capital Corp*, 546 US 132, 139 (2005) (citation omitted; alterations in original).

The majority identifies no standard and provides no reasoning for its decision to stay this case. Nor could I identify any "sound legal principles" supporting its conclusion. In this regard, it has been observed that the nature of the question whether to enter a stay in these circumstances is equitable. See *Daly v San Bernardino Co Bd of Supervisors*, 11 Cal 5th 1030, 1054 (2021) (noting "the essentially equitable nature of the stay pending appeal" and observing that many courts apply equitable considerations). The United States Supreme Court has articulated the widely followed test for stays pending appeal:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured

> absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Nken*, 556 US at 434, quoting *Hilton v Braunskill*, 481 US 770, 776 (1987).]

Many, if not most, other courts follow this standard or something like it.[30] In the present case, moreover, defendants have analyzed their request for a stay under these same basic factors. I believe this four-part standard applies to stays sought under MCR 7.209 and, unlike the majority, would apply it in the present matter.[31]

III. APPLICATION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

The first question is whether defendants have shown a likelihood of success on the merits. There are two parts to this question. First, have defendants demonstrated that the trial court erred in its analysis of the statutory provisions and the Secretary of State's violations of them? Second, even if not, have defendants demonstrated a likelihood of success on the merits of their laches defense? For the reasons that follow, I find that this factor weighs against the stay.

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[30] See Or Rev Stat 19.350(3) (enacting four factors similar to the federal standards); Nev R App P 8(c) (same); *Ex parte Krukenberg*, 252 So 3d 676, 678 n 1 (Ala Civ App, 2017) (using federal-standard factors); *Smith v Arizona Citizens Clean Elections Comm*, 212 Ariz 407, 410 (2006) (same); *Romero v City of Fountain*, 307 P3d 120, 122 (Colo App, 2011) (adopting federal standards); *State v Gudenschwager*, 191 Wis 2d 431, 440 (1995) (using the federal standards); *Reading Anthracite Co v Rich*, 525 Pa 118, 125 (1990) (applying the federal standards); *Purser v Rahm*, 104 Wash 2d 159, 177 (1985) (applying a different test that similarly examines the "equities of the situation"); see generally 4 CJS, Appeal and Error, § 530 (Oct 2022 update) ("A party requesting a stay pending appeal must show a likelihood of prevailing on the merits, irreparable injury in the absence of the stay, and that a stay will not substantially harm other interested parties nor harm the public interest.").

[31] Another very concerning aspect of the majority's order is its highly unusual end-to-end scope of coverage. In a normal case, this Court might stay a trial court decision pending a decision by the Court of Appeals. Here, by contrast, this Court has ensured that the Court of Appeals will not be able to interfere even if it carefully considers the matter and issues an opinion founded on solid legal grounds. Blunting the impact of any action by the Court of Appeals sight-unseen, without this Court providing any legal basis for doing so, appears to be unprecedented.

1. STATUTORY VIOLATIONS

On the statutory issues, the trial court thoroughly assessed each argument, and I agree with its analysis. The trial court's analysis of the credential-form issue accurately determined that this new provision added requirements beyond what the statutes provided. In this Court, defendants contend that MCL 168.732 does not explicitly allow individual groups to use their own challenger cards, whereas MCL 168.31(1) gives the Secretary of State authority to create a manual "that includes procedures and forms for processing challenges." Defendants' argument ignores MCL 168.731(1), which allows the opportunity for certain other groups—"incorporated organization[s] or organized committee[s] of interested citizens other than political party committees authorized by this act"—to seek appointment of challengers. In applying to appoint challengers, the group must submit, among other things, "a facsimile of the card to be used" by the challenger. *Id*.

The Secretary of State's credential-form requirement applies to all challengers, not just challengers appointed by political parties. That clearly contradicts MCL 168.731(1). And it would make little sense for the nonpolitical-party challengers to use their own cards whereas political-party challengers cannot. Any distinction between MCL 168.731 and MCL 168.732 is not an invitation to the Secretary of State to use her authority under MCL 168.31(1) to add new requirements onto political-party challengers. Although she has the obligation to furnish a manual providing forms, nowhere does she have authority to make the use of those forms mandatory such that, even if a challenger satisfies all other statutory requirements, the challenger can be removed for failure to use the Secretary of State's preferred form. Indeed, as she admits, the Manual lacks the force of law—so how can it require outcomes different from those mandated by statute?

The challenger-liaison requirement has even less support. As the trial court observed, the statute allows challengers to bring their challenges to "an election inspector[]." MCL 168.733(1)(e). Defendants argue that "an election inspector" does not mean "*any* election inspector." That may be true, but the Manual goes well beyond that. As noted above, past manuals have channeled certain challenges to certain officials. Requiring that a challenge ultimately be handled by a certain individual is arguably consistent with the statutory language and defendants' observation. But the Secretary of State's rule precludes all communication between challengers and inspectors other than the liaison. It imposes a restriction on challengers that is nowhere found in the statutes and that can lead to the challengers' ejection. The Secretary of State's power under MCL 168.31(1)(c) to issue nonbinding procedures for challenges cannot encompass the power to create extrastatutory rules that result in the expulsion of otherwise legally present challengers.

The prohibition on electronic devices likewise impermissibly adds to the statutory requirements. As the trial court noted, the Legislature carefully calibrated the prohibitions

in this area, prohibiting communications about the absent-ballot processing but nowhere prohibiting electronic devices. Defendants' argument in this Court boils down to the proposition that to effectuate the prohibition on outside communications—a prohibition that was first enacted in 1965 PA 331—the Secretary of State must now prohibit electronic devices. If that is so, it is a policy choice for the Legislature to make and not for the Secretary of State to decree.[32]

Finally, I agree with the trial court's analysis of the impermissible challenges. MCL 168.727(1) provides that any registered elector can challenge an individual's right to vote "if the elector knows or has good reason to suspect that individual is not" a registered voter. If such a challenge is made, the election inspector "shall" record it. MCL 168.727(2). Nothing in the statute purports to give election inspectors the discretion to determine sua sponte whether a challenge is permissible or not. This gives the inspector the power to eliminate any record of the challenge, and therefore any opportunity to review this determination in the future. The Secretary of State has erected categories of challenges with discrete requirements that find no support from the statutes.[33] And, yet again, the Secretary of State has added a basis for expulsion of challengers.

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[32] This is not the first time a party has claimed that the Secretary of State has exceeded her limited powers as an executive branch official. See, e.g., *Davis v Secretary of State*, 506 Mich 1022 (2020) (challenging the Secretary of State's last-minute directive banning the open carrying of firearms at polling places on election day); *Davis v Secretary of State*, 506 Mich 1040, 1040 (2020) (VIVIANO, J., dissenting) (challenging the Secretary of State's unsolicited mass mailing of absentee ballot applications); *Genetski v Benson*, unpublished opinion and order of the Court of Claims, issued March 9, 2021 (Docket No. 20-000216-MM) (determining that the Secretary of State's instructions regarding signature-matching requirements constituted a rule that should have been promulgated under the Administrative Procedures Act).

[33] At best, defendants might claim that the recording requirement is contingent on a challenge being made pursuant to MCL 168.727(1), and that a challenge made pursuant to that subsection must be one in which the challenger knows or has good reason to suspect the voter is ineligible to vote. In other words, the recording requirement is inapplicable if the challenger lacks knowledge of or good reason to suspect the voter's ineligibility. Such an interpretation, however, would seem to stretch the text beyond its limits. How is the inspector to discern, upfront, whether the challenger knows or has good reason to suspect ineligibility? The inspector could not determine this unless he or she prejudged the challenge. And again, there is nothing in the statute suggesting that inspectors wield this level of discretion. In any event, the Secretary of State has not attempted to justify her Manual on this interpretation, nor could she: the Manual's categories of impermissible challenges and various subcategories of challenges is far too detailed to find any support in the statute.

For these reasons, and those given by the trial court, I conclude that defendants have little chance of success on the merits of their statutory arguments.

2. LACHES

Defendants also contend that plaintiffs' entire cases are barred by laches. The trial court's application of the legal doctrine is reviewed de novo, but any findings of fact supporting its decision are reviewed for clear error. *Shelby Charter Twp v Papesh*, 267 Mich App 92, 108 (2005). Defendants do not explain why the trial court's factual determinations regarding the ease of rectifying the Manual are clearly erroneous.

More importantly, I agree with the trial court's conclusion that laches does not apply. Laches is an equitable doctrine that applies to prevent a party from proceeding to seek enforcement of a legal right. *Nykoriak v Napoleon*, 334 Mich App 370, 382-383 (2020). Laches applies when the party has failed to take timely action *and* the opposing party can demonstrate that it was prejudiced as a result. *Id*. at 382. This Court has emphasized, time and again, that delay alone is not enough—prejudice is essential. As we reiterated in *Kaiser v Kaiser*, 213 Mich 660, 661 (1921):

> "[M]ere lapse of time does not necessarily constitute laches. As a rule it involves other considerations. It means that negligence or omission to assert a right which, considering the lapse of time in connection with other facts and circumstances prejudicial to the interests of the adverse party, render it unjust and inequitable to recognize such right when finally asserted. * * * Where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot as a rule be recognized." [Quoting *Walker v Schultz*, 175 Mich 280, 293 (1913).]

See also *Dunn v Minnema*, 323 Mich 687, 696 (1949) ("This Court has repeatedly held that mere delay in attempting to enforce a right does not constitute laches, but that it must further appear that the delay resulted in prejudice to the party claiming laches of such character as to render it inequitable to enforce the right."). Other courts have emphasized that "the prejudice must be *material* before laches will bar relief." *State ex rel Pennington v Bivens*, 166 Ohio St 3d 241, 247 (2021) (emphasis added).

While, in the context of elections, promptness is critical, this is generally because courts do not wish to "allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results . . . ." 29 CJS, Elections, § 459 (Oct 2022 update). But in other contexts, one court has observed, "a laches defense 'rarely prevails in election cases.' " *Bivens*, 166 Ohio St 3d at 247 (citation omitted) (noting that the defense typically applies in election cases involving absentee voter rights). The

Michigan Legislature has provided for laches in the election setting: "In all civil actions brought in any circuit court of this state affecting elections, . . . 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." MCL 691.1031. Although this provision leaves open the possibility of finding laches in earlier-filed suits, it nevertheless indicates the Legislature's view of when this doctrine generally should apply.

The present cases were brought in September 2022, before the time frame in MCL 691.1031, and thus no rebuttable presumption of laches arises. Moreover, as Justice ZAHRA observes, the lawsuits came just eight weeks after these new rules were implemented in the August 2022 primary. And this is not a case in which the outcome will directly affect a candidate's placement on the ballot or an elector's ability to vote. The challenged amendments to the Manual do not relate to the substantive grounds for challenging voters. The effects of these changes do not imperil voters' rights.

Even assuming that there was delay in bringing these suits, I do not believe that defendants have been sufficiently prejudiced. As the trial court noted, defendants admit that the Manual is not binding and has no legal effect, especially to the extent it is in conflict with statutory laws. As such, tweaking the handful of offending changes in the Manual would not change the substance of anything with which local elections officials *must* comply. Moreover, the changes themselves would be minor and would generally restore the status quo from before May 2022. Plaintiffs have, in fact, proposed a supplement, roughly one page in length, to the Manual that would bring it into compliance with the statutory requirements and the Court of Claims order. Instead of taking this simple step, defendants have expended much time and effort appealing the court's decision.

Defendants focus their prejudice argument on the difficulty of disseminating an updated manual and training local officials on it. On the first issue, they point to an affidavit by the Director of Elections stating that "the Bureau of Elections cannot *publish, print, and distribute statewide thousands of copies of the Election Procedures Manual at this date* . . . ." As an initial matter, it appears that in 2020, an updated version of the manual was furnished in October, shortly before the election. And defendants have not identified any law that requires the printing and physical distribution of entirely new manuals. The statute simply requires the Secretary of State to "[p]ublish and furnish" the instructions. MCL 168.31(1)(c). Defendants offer no reason why this could not be accomplished electronically. Even if printing is required, defendants could certainly provide a short, one-page supplement in line with what plaintiffs have proposed.

As for training, defendants cite the director's summary assertion that further in-person trainings would be impossible at this point. That may be so, but it is unclear why *in-person* trainings are necessary at all. For her part, the Detroit City Clerk, as amicus curiae, has provided an affidavit from a consultant for the city's Department of Elections that simply states that retraining would cause confusion, not that it is impossible. It is

difficult to see how the narrow changes to the Manual, which simply bring it in line with statutes that have been on the books for years, would be onerous to describe or confusing to understand. Staff would need to be instructed that: (1) challengers do not need to use the Secretary of State's prescribed credential form; (2) challengers are not prohibited from bringing their challenges to election inspectors other than the challenger liaison; (3) challengers can possess electronic devices; and (4) election inspectors must record all challenges as they have in the past, pursuant to MCL 168.272, and not under the byzantine system created by the Secretary of State. The changes, if anything, lighten the staff's load by relieving them of enforcing an additional layer of restrictions atop those imposed by the statute. Any disruption ultimately emanates from the Secretary of State's decision to depart from the statutes and the general practices encapsulated in past manuals.

For these reasons, I conclude that defendants have not made a strong showing that they are likely to succeed on the merits of their laches defense.

B. IRREPARABLE HARM

In light of my analysis of the laches argument, I believe that defendants will suffer little harm in complying with the law, let alone irreparable harm. Thus, I find that this factor weighs against a stay.

C. INJURY TO OTHERS AND THE PUBLIC INTEREST

The final two factors can be considered together, as defendants have put forward broad policy grounds to support the Secretary of State's changes to the Manual. Generally, defendants cite the need for efficiency and security in the election process. On their face, the Secretary of State's changes limit the ability of election observers to challenge the integrity of the election and make the vote-counting process less transparent. The Secretary of State has imposed extrastatutory requirements, the violation of which will lead to an otherwise legally authorized challenger's removal. The changes further imperil statutorily required records by creating a system of permissible and impermissible challenges that essentially forces election inspectors to adjudicate the merits of the challenge before deciding whether they even need to record it at all. It is also unclear how efficiency will be increased by creating a potential bottleneck by forcing all challenges to funnel through the challenger liaison.[34]

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[34] The Manual requires only a single liaison at every polling place or absent voter ballot processing facility—more can be appointed, but nothing requires additional liaisons. Many cities have a single facility for processing absentee ballots, and the Legislature allows municipalities to combine their absent voter boards. MCL 168.764d. Consequently, these facilities could involve a large number of precincts but, apparently under the Secretary of State's proposal, would need to be staffed with only a single liaison.

The state has made do without these innovations in the past. Indeed, the Secretary of State trumpeted the "accuracy, security and integrity of the November 2020 election," calling it "the most secure in history . . . ."[35] But it may prove more difficult to adjudicate any postelection challenges when the opportunity for making or recording challenges is circumscribed on the frontend. As for security, the Secretary of State has publicly stated that there have been "no significant attempts" in Michigan to disrupt polling places on election days in the past.[36] While defendants and some amici have noted that there have been many new applications for challengers for the upcoming election, they have not provided any evidence that these challengers threaten violence. And the statutes already provide solutions for expulsion of challengers engaging in "disorderly conduct." MCL 168.733(3). Further, at polling places, "[e]ach board of election inspectors shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands . . . ." MCL 168.678.

Related concerns are transparency and accountability.

> [J]ust as Secretaries [of State] must work to serve the voters and citizens of their state, voters also have a responsibility to hold these statewide elections officials accountable to promoting those two sides of the . . . democracy coin . . . . Voters who wish to see elections that are accessible to all and produce accurate reflections of the people's will cannot overlook their important role in the process. In most states, voters hold the keys to ensuring their state's chief elections official oversees the elections process in a fair, transparent, and judicious manner. [Benson, *State Secretaries of State: Guardians of the Democratic Process* (New York: Routledge, 2010), p 147.]

As amicus Citizens United explains, our statutes foster these interests by allowing election challengers. The Legislature has expressly allowed designation of challengers by certain groups "interested in preserving the purity of elections and in guarding against the abuse of the elective franchise . . . ." MCL 168.730(1); see also Const 1963, art 2, § 4(2) ("Except as otherwise provided in this constitution or in the constitution or laws of the

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[35] Michigan Secretary of State, *More than 250 Audits Confirm Accuracy and Integrity of Michigan's Election*, <https://www.michigan.gov/sos/Resources/News/2021/03/02/more-than-250-audits-confirm-accuracy-and-integrity-of-michigans-election> (accessed November 2, 2022) [https://perma.cc/RBP7-UGFQ].

[36] CBS News, Transcript: Michigan Secretary of State Jocelyn Benson on "Face the Nation" (September 4, 2022) <https://www.cbsnews.com/news/jocelyn-benson-face-the-nation-transcript-09-04-2022/> (accessed November 2, 2022) [https://perma.cc/T5X7-L8HT].

United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."). These very interests are threatened by the extrastatutory restrictions placed upon challengers, who (1) will not be admitted unless their credential is on a certain form, (2) may not have adequate access to election inspectors to raise challenges, (3) are deprived of their cellphones, (4) may not have their challenges recorded, and (5) are threatened with expulsion for noncompliance.[37]

For these reasons, I believe the public interest weighs against a stay.

IV. CONCLUSION

In sum, I believe that defendants have not met the appropriate standard for a stay, and I would deny their motion accordingly. None of the relevant factors weighs in favor of the stay. The result of the majority's order is that the Secretary of State's changes to the Manual—even though found improper by the only court to consider them—will apply in the upcoming election. Defendants have thus been handed a victory for this election, when it matters most. Because a stay is unwarranted, I dissent.

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[37] Justice BERNSTEIN anticipates that because the Secretary of State's new instructions did not cause significant disruption to the primary election, the general election will similarly proceed without incident. I hope he is right. But voter turnout in general elections is generally much higher than turnout in primary elections. Just over two million Michiganders voted in the 2022 primary election. See Michigan Secretary of State, *2022 Michigan Election Voter Turnout* <https://mielections.us/election/results/2022PRI_CENR_TURNOUT.html> (accessed November 3, 2022) [https://perma.cc/VMU2-BANM] (showing that 2,167,798 voters participated). If the past few elections are any indication, we can expect at least twice as many voters to cast their ballots during this year's general election. See Michigan Secretary of State, *Election Results and Data* <https://www.michigan.gov/sos/elections/election-results-and-data> (accessed November 3, 2022) [https://perma.cc/M648-PPQK].