STATE OF MICHIGAN

COURT OF CLAIMS

REPUBLICAN NATIONAL COMMITTEE, MICHIGAN REPUBLICAN PARTY, and CINDY BERRY,

Plaintiffs,

v

Case No. 24-000148-MZ

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

Hon. Brock A. Swartzle

Defendants.
_____/

OPINION AND ORDER

As sure "as the night the day,"[1] when there is an instance of ***X***, there will be an instance of ***not X***. Thus, as a matter of course, when one reads a statement in the form of ***if X, then Y***, one expects that the statement immediately following will be in the form of ***if not X, then __***. When the latter statement goes missing, however, one might read the omission (i) as implying the answer (i.e., ***if not X, then logically not Y***); (ii) as an oversight by the author permitting someone else to provide the answer (i.e., ***I declare: if not X, then Z***); or (iii) as an invitation to the reader to look elsewhere to infer the answer (i.e., ***Based on everything related, it seems clear: if not X, then J***).

[1] William Shakespeare, Hamlet, act 1, sc 3; cf. Book of Genesis 1:5.

With its recent amendment to MCL 168.768, our Legislature defied the reader's expectation by adding the ***if X, then Y*** statement, but then omitting the related ***if not X, then __*** statement. Specifically, our Legislature amended MCL 168.768 in February of this year to state that, if the number printed on an absent voter's ballot stub agrees with the number printed on the return envelope, then the ballot must be tabulated. As to what happens when the numbers do not agree—when there is a "mismatch" of the numbers or a missing stub—our Legislature was silent.

On September 18, 2024, the Republican National Committee (the "RNC"), the Michigan Republican Party (the "MRP"), and Chesterfield Township Clerk Cindy Berry sued defendants, arguing that the Legislature's silence in MCL 168.768 is deafening and the Michigan Election Law in toto makes clear that a mismatched absent-voter ballot or an absent-voter ballot with a missing stub must be rejected and the affected voters—the absent voter to whom the ballot was issued and the absent voter to whom the return envelope was issued—must be given an opportunity to cure. Defendants—Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater—respond just as loudly that the Legislature's silence must be understood to mean an oversight, a statutory gap, and that Secretary Benson has the clear legal authority to provide the definitive answer.

Whether one side is fully right, or whether each side partially hits and partially misses the mark, is not immediately clear on this nascent record, the case being precisely two weeks old. What is clear to this Court are the following points: (1) plaintiffs have standing; (2) plaintiffs have satisfied the one-year notice requirement under the Court of Claims Act; (3) plaintiffs are entitled to partial declaratory and injunctive relief; (4) there remain complex questions of law and fact on whether to treat absent-voter ballots that are mismatched or missing a stub as rejected, challenged,

or something else; and (5) defendants are entitled to partial relief under their affirmative defense of laches.

I. BACKGROUND

A. MICHIGAN ELECTION LAW REGARDING ABSENT VOTERS

The Michigan Election Law, MCL 168.1 *et seq*. (the "act"), includes the right to vote by early voting, in-person voting, or absentee voting. Except for ballots used at early-voting sites, ballots are prepared with a detachable stub at the top that includes a number. MCL 168.795b(2).[2] For an absent voter, the local clerk will record the number on the stub of the ballot assigned to the absent voter in the qualified voter file (the "QVF"). Absent-voter ballots are issued to voters with a secrecy sleeve included for returning the ballot inside of the absent-voter ballot-return envelope (the "return envelope"). MCL 168.736b-168.736e; MCL 168.764a(2). Specific instructions are provided to voters for returning their absent-voter ballot to their local clerk. MCL 168.764; MCL 168.764a(1). The instructions for the general election instruct the voter to "[p]lace the ballot in the secrecy sleeve so that votes cannot be seen and, if there is a numbered stub, the numbered stub is visible." MCL 168.736c.

After an absent-voter ballot is completed and returned to the local clerk's office by one of the authorized methods, MCL 168.764a, the local clerk reviews the return envelope to ensure that the voter is registered in the jurisdiction and the signature on the envelope sufficiently agrees with the voter's signature on file, MCL 168.765(2); MCL 168.766; MCL 168.766a. If both elements are satisfied, then the local clerk must write or stamp on each return envelope the date that the

[2] Military and overseas ballots that are transmitted electronically to voters do not have stubs, but after those ballots are returned, they are duplicated onto regular ballots for tabulation. MCL 168.759a.

clerk received the return envelope (or the time and date if received on election day). MCL 168.765(2). The return envelope must also include a statement by the local clerk that the absent-voter ballot is approved for tabulation. MCL 168.765(2). The local clerk who receives a return envelope "shall not open that sealed absent voter ballot return envelope and shall safely keep the sealed absent voter ballot return envelopes in the clerk's office until delivering the absent voter ballot return envelopes" to designated absent-voter ballot processors. MCL 168.765(1).

Absent-voter ballots can be processed by a precinct board of inspectors, an absent-voter counting board (an "AVCB")[3] on election day, or by an AVCB during a period of preprocessing before election day.[4] In a jurisdiction where an election inspector processes absent-voter ballots at a precinct on election day, the local clerk is required to deliver the absent-voter ballots that have been approved for tabulation, along with the local clerk's list or record that is kept relative to those absent voters, to the board of election inspectors of the election-day precinct. MCL 168.765(4).

Once in the possession of the precinct's board of election inspectors, the inspectors have specific, delineated responsibilities with respect to the absent-voter ballots. On this topic, prior to February 13, 2024, the act provided:

> If upon such examination of the envelope containing an absent voter's ballot or ballots, the board of inspectors shall determine that such vote is legal, the member of the board receiving ballots at such election shall, without unfolding such ballot or ballots, detach from each such ballot the perforated numbered corner, and shall deposit such ballot in the proper ballot box. One of the inspectors of election should

[3] AVCBs are special precincts established to process absent-voter ballots. They are precincts separate from in-person polling places operated on election days.

[4] In jurisdictions with a population of more than 5,000, a local or county board of election commissioners may authorize an AVCB to process and tabulate absent-voter ballots on any of the eight days before election day. MCL 168.765a(11).

> note upon the poll book and list the fact that such voter voted at such election by means of an absent voter ballot. [MCL 168.768 (pre-February 13, 2024).]

Effective on February 13, 2024, the act was amended to provide that, after the election inspector verifies that the approved-for-tabulation statement on the face of the return envelope is complete,

> the board of election inspectors shall open the absent voter ballot return envelope, take out the ballot, and, without unfolding the ballot, compare the ballot number on the ballot stub with the ballot number on the face of the absent voter ballot return envelope. If the ballot numbers match, the board of election inspectors shall detach the perforated numbered stub and prepare the ballot for tabulation, as directed by the secretary of state. Each ballot must be inserted into the tabulator. One of the election inspectors shall enter the elector in the poll book as having cast an absent voter ballot. [MCL 168.768, as amended by 2023 PA 81.]

In a jurisdiction that uses an AVCB, see MCL 168.764d; MCL 168.765a, the clerk is required to deliver absent-voter ballots approved for tabulation to the AVCB "by the time the election inspectors of the AVCB report for duty on election day." MCL 168.765(5). An AVCB must

> process the ballots and returns in as nearly as possible the same manner as ballots are processed in election day precincts. The poll book may be combined with the absent voter list or record required by section 760,[5] and the applications for absent voter ballots may be used as the poll list. Subject to [MCL 168.765a(11)], the processing and tabulating of absent voter ballots must commence at the time set by the board of election commissioners, but no earlier than 7 a.m. on the day of the election. [MCL 168.765a(6).]

In a jurisdiction that processes absent-voter ballots prior to election day using an AVCB, see MCL 168.765a(11), "[t]he instructions and procedures adopted by the secretary of state regarding the processing and tabulating of absent voter ballots before election day must be

[5] MCL 168.760 provides that upon receipt of a properly executed application for an absent-voter ballot, the clerk "shall file the same in his office and shall enter the name of the applicant and the address to which the ballot or ballots are to be sent upon a list or record to be kept for such purpose, together with the date of receiving the application, the date of mailing or delivering the ballot or ballots to such voter, the date of receiving the ballot from such voter, and such other information as may seem necessary or advisable."

followed. Absent voter ballots must be processed and tabulated in the same manner and under the same requirements as absent voter ballots are processed on election day." MCL 168.765a(13).

B. SECRETARY OF STATE GUIDANCE REGARDING THE PROCESSING OF ABSENT-VOTER BALLOTS

Under the act, Secretary Benson is expressly authorized to issue instructions and promulgate rules under the Administrative Procedures Act, MCL 24.201 *et seq*., for the conduct of elections, and advise and direct local election officials on the proper methods of conducting elections. MCL 168.31(1)(a)-(b). Secretary Benson is also required to develop instructions consistent with the act for the conduct of AVCBs. MCL 168.765a(17). Secretary Benson issued directives to election officials regarding absent-voter ballot processing in Chapter 8, Section III, of the Election Officials Manual (the "Manual"), and to election inspectors at the precinct on election day, in "Managing Your Precinct on Election Day: Election Inspectors' Procedure Manual," commonly referred to as "the Flipchart."

The Manual, as amended in February 2024,[6] provides directions for processing absent-voter ballots. The Manual explains that the processing of absent-voter ballots is "divided into two steps explained below." Manual, p 6. The Manual states that "[w]hile jurisdictions may deviate from the process described here, jurisdictions must take care that whatever process they settle on does not compromise ballot secrecy." *Id*. The Manual further states that, after the signature on the return envelope has been verified, the election inspector "*should* open the absent voter ballot envelope" and "*should* verify that the number on the ballot stub agrees with the ballot number

[6] According to the parties, the Manual was amended again in September 2024; the changes are not relevant here.

recorded for the voter in the QVF Absent Voter List." *Id.*, p 7 (emphasis added). The Manual then provides:

> If the number on the ballot does not agree with the ballot number recorded for the voter in the QVF Absent Voter List or the ePollbook and no explanation for the discrepancy can be found, the ballot *must* be processed as a challenged ballot. Possible explanations for a discrepancy that do not require the ballot to be processed as a challenged ballot include that the voter lives in the same household as a second voter and that the voters accidentally switched absent ballot return envelopes.
>
> If the ballot is missing its stub, the election inspector should check to see if the detached stub is included inside the absent voter ballot envelope. If the stub is inside the envelope, the stub should be treated as it if were attached to the ballot. If the stub is not inside the envelope, the ballot *should* be processed as a challenged ballot. [*Id.* (emphasis added).]

The Flipchart was amended in April 2024. The April 2024 version of the Flipchart instructs election inspectors processing absentee ballots at the polling place on election day to open the return envelope and "verify that the number on the ballot stub agrees with the ballot number recorded on the AV list *or* Absent Voter Ballot Return Envelope." (Emphasis added.) It further instructs, "If the ballot numbers do not agree or the ballot stub is missing and no explanation for the discrepancy can be found (i.e., voters residing in the same household switched their ballots), the ballot must be prepared as a challenged ballot."[7]

C. THE PRESENT DISPUTE

On September 18, 2024, plaintiffs sued defendants, seeking expedited declaratory relief. (Although the complaint is a bit unclear as to injunctive relief, plaintiffs' counsel explained during the hearing that plaintiffs are, indeed, seeking expedited injunctive relief with respect to the Manual.) In two counts, plaintiffs ask this Court to declare unlawful Secretary Benson's guidance

[7] The Flipchart was amended in May 2024, with no change to the relevant language.

instructing local election officials to treat as challenged ballots those absent-voter ballots that are mismatched or missing a stub. Plaintiffs contend, first, that such absent-voter ballots should be rejected in the same way that the ballot of an in-person voter is rejected when there is a mismatched ballot or a missing ballot stub, and, second, that the absent voter whose ballot is rejected should be given the same opportunity to cure as an absent voter whose ballot is rejected by the clerk when the clerk is unable to verify the absent voter's signature on the return envelope. Plaintiffs also ask this Court to order Secretary Benson to revise her current guidance or issue new guidance consistent with their reading of the act.

Defendants moved for summary disposition in lieu of filing an answer. They make a multipronged defense against plaintiffs' complaint. First, they argue that plaintiffs lack standing. Second, they maintain that plaintiffs missed the one-year notice period in MCL 600.6431, because the guidance instructing inspection electors to treat as challenged an absent voter's mismatched ballot or ballot with a missing stub has been found in similar guidance since at least 1996, under both Republican and Democrat Secretaries of State. Third, defendants argue that if plaintiffs' claims are not subject to dismissal for the above reasons, the claims are barred by laches. Lastly, defendants address the merits of plaintiffs' statutory argument and contend that Secretary Benson's guidance is not contrary to law and that she has the statutory authority to fill-in gaps in the act. Not surprisingly, plaintiffs responded in opposition to the motion, and, for their part, asked for summary disposition in their favor under MCR 2.116(I)(1). Defendants replied in support of their motion.

After this expedited and extensive briefing by the parties, as well as a brief filed by proposed amicus curiae, the Court heard oral arguments and held an evidentiary hearing on September 26, 2024.

D. THE HEARING ON SEPTEMBER 26, 2024

The parties' counsel presented arguments at the hearing mirroring the arguments in their respective briefing. Plaintiffs offered into evidence affidavits from Berry, Tyson Shepard (the Executive Director of the MRP), and Christina Norton (the Executive Director of the RNC). Defendants offered as an exhibit a May 2024 version of the Flipchart. Defendants also offered the testimony of Adam Fracassi, Deputy Director of the Bureau of Elections, on the issue of laches and, more specifically, the element of prejudice.

The parties disagreed about the practical ability of Secretary Benson to issue revised directions in the event this Court agreed with plaintiffs' claim that absent-voter ballots returned with a mismatched ballot or a missing stub should be processed as rejected ballots. Plaintiffs relied on plaintiff Berry's affidavit, which avers that if the Secretary were to issue revised directions, "no further 'training' would be necessary" because "there is nothing new in the process; you would simply reject the ballot . . ., and then implement the cure process like with any other ballot deficiency requiring immediate voter notification." She further avers that "[l]ocal election officials are familiar with this cure process" and that "[w]e commonly call and email voters to alert them of ballot deficiencies, even as late as Election Day, so that they may cure their ballot by, for example, visiting the clerk's office to fix the issue with their ballot." Berry Affidavit, pp 4-5.

Defendants offered Deputy Director Fracassi as a witness. Deputy Director Fracassi testified that if this Court were to declare that the act requires an inspector to reject an absent voter's ballot that was returned as mismatched or without a stub, defendants would not have sufficient time to establish and test a new rejection-and-cure procedure prior to the upcoming general election. He explained why the rejection-and-cure procedure for an invalid absent-voter signature could not be simply adopted and applied for the case of a mismatch ballot or missing

stub. He testified that approximately 1,600 local clerks would have to be trained, and then those clerks would have to train tens of thousands of election inspectors in approximately 3,500 precincts. All of this could not completed, he testified, before the preprocessing of absent-voter ballots begins in some jurisdictions on October 28, 2024.

On the underlying cause as to *why* there might be a mismatched ballot or missing stub in the first place, this was explored during the hearing. Defendants suggested that instances of such ballots often happen when members of the same household mix up their absentee ballots and envelopes—an honest mistake, made by persons who know each other, that does not raise any significant risk of fraud. In support of this assertion, however, defendants provided this Court with scant evidence. Bureau of Elections Director Brater avers in an affidavit that this scenario "could" explain a mismatched ballot, Brater Affidavit, p 3, but he offers no evidence to back up his supposition. In fact, defendants admitted during the hearing that they do not track instances of mismatched ballots or ballots with missing stubs. So, on this record, defendants' suggestion is not supported with any reliable evidence.

Upon questioning from the Court, defendants acknowledged another, more sinister reason as to why a mismatched ballot might occur—namely, voter fraud. To see how this might occur, consider the following scenario involving two hypothetical persons, "Sally and Jane." Sally is a patient, and Jane is her in-home caregiver. Sally is a vocal supporter of Candidate A for president, while Jane is an equally vocal supporter of Candidate B. They are friendly with each other, so they talk politics on occasion, and they even joke that their presidential votes will cancel each other out. But, unbeknownst to Sally, Jane hatches the following scheme—(a) Jane will vote for Candidate B on the absent-voter ballot issued to her; (b) Jane will watch Sally fill out the absent-voter ballot issued to Sally, and then take that ballot to another room where the return envelopes

are kept; (c) Jane will place her own ballot (with Jane's vote for Candidate B) in the return envelope issued to Sally; (d) Jane will then seal up Sally's return envelope, tell Sally that she placed her (i.e., Sally's) ballot in her return envelope, and have Sally sign her return envelope; and finally (e) Jane will help Sally to the mailbox to mail "Sally's ballot" (but really Jane's) so that Sally can tell her family and friends that "she voted" (but not really). To cover her tracks, Jane will destroy the unused return envelope issued to Jane as well as the absent-voter ballot issued to Sally. With this scheme, Jane will have voted for her preferred Candidate B and blocked a vote for Candidate A. If Jane's fraud evades detection, then she will have altered the vote total for the election.

But realistically, will Jane's fraud evade detection? Quite possibly, given defendants' current procedure for processing a mismatched ballot. Pursuant to the Manual, the mismatched ballot—the one sent in Sally's return envelope but with Jane's absent-voter ballot—will be treated as a challenged ballot. Under this procedure, an election inspector will place a unique identifier number on Jane's absent-voter ballot, but then that number will be physically covered up so that the mismatched ballot appears to be a regular ballot. The mismatched ballot will be tabulated like a regular ballot, Jane's fraudulent vote will be added to President B's vote total, and Sally's hope to vote for Candidate A will go unfulfilled. As for Sally's now-empty return envelope, that envelope is simply set aside and eventually returned to the local clerk.

The only chance that Jane's fraud might be discovered under defendants' current procedure is if, after the election, a candidate for office challenges the vote counts in Jane's specific precinct. MCL 168.883a(1). Given the cost and legal hurdles, however, such challenges are rarely made. Thus, statistically speaking, Jane's fraud might very well go undetected. And, even if Jane's fraud is somehow detected during the challenge process, Sally's hope to support her candidate will remain unfulfilled.

But realistically, how many Janes are out there? The unfortunate answer is—no one currently knows. Defendants do not know, because no one is currently tracking the mismatched ballots in any meaningful way. The mismatched return envelope is set aside, apparently without any record being made about the mismatched number on the return envelope. As for the absent-voter ballot, Secretary Benson instructs election inspectors to treat it like any other challenged ballot, without any record being made about *why* the ballot is being treated as challenged, i.e., because of a mismatched envelope (or missing stub). Even if the information could somehow be gleaned on an ad hoc basis from the collective memories of election inspectors, it does not appear that anyone at the statewide level is currently trying to collect that information.

The Court has now had the opportunity to review plaintiffs' pleading, defendants' motion, the various briefs, various exhibits, and the hearing transcript. The Court has also had the opportunity to review the applicable statutes and caselaw. The motion is now ripe for decision, and the Court takes up each of the parties' arguments in turn.

II. LEGAL ANALYSIS

A. STANDING

The Court begins with defendants' argument that plaintiffs lack standing. "A motion for summary disposition premised on the doctrine of standing as a defense may be proper pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10) contingent upon the pleadings or other circumstances of the particular case." *Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 494-495 n 2; 948 NW2d 452 (2019). Because the Court considers matters outside the four-corners of plaintiffs' complaint, defendants' standing argument 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). Summary disposition under MCR 2.116(C)(10) is highly disfavored when discovery has not yet been completed. *Thirty-Sixth District Court v Owen*, 345 Mich App 637, 648; 8 NW3d 626 (2023).

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).

As noted just a moment ago, the Court has considered documents outside the pleadings. These documents include manuals, affidavits, and in-court testimony. Clerk Berry's affidavit states that she is responsible for running the township's elections; hiring and training election inspectors; and overseeing the tabulation of absent-voter ballots in compliance with applicable law. Clerk Berry has made clear that she has a clear, concrete, legal interest in how absent-voter ballots are tabulated, including those ballots that are mismatched or missing a stub. Given that at least one of the plaintiffs has established standing to bring this lawsuit, the Court will deny

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).

B. NOTICE UNDER THE COURT OF CLAIMS ACT

Moving to their next argument, defendants maintain that plaintiffs' action must be dismissed under MCR 2.116(C)(7) for failure to comply with the notice-and-verification requirement of MCL 600.6431 of the Court of Claims Act, MCL 600.6401 *et seq*. Defendants argue that plaintiffs' claims accrued more than one year before they filed this suit.

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 notice of intention to file a claim against this state or any of its departments, commissions, boards, institutions, arms, or agencies."

For purposes of notice under MCL 600.6431(1), a claim "accrues" when the essential elements of a claim exist and a party can commence a valid lawsuit based on that claim. *Michigan 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. Because an action seeking a declaratory judgment under MCR 2.605 cannot be brought until an "actual controversy" arises, in a declaratory-judgment action the claim "accrues" when an "actual controversy" arises. *Id*. "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.*

Plaintiffs' claims are based, in part, on the directives in both the Manual and Flipchart that absent-voter ballots that are mismatched or missing a stub are to be processed as challenged. Defendants contend that plaintiffs' claims accrued more than one year before plaintiffs filed suit because the relevant directives in the Manual and Flipchart have been substantially unchanged since at least 2017, and arguably for decades.

While true as far as that goes, defendants overlook that MCL 168.768 was materially amended in February 2024. Before February 13, 2024, MCL 168.768 required only that an election inspector "detach from each ballot the perforated corner of an absent voter's ballot." As amended effective February 13, 2024, MCL 168.768 currently requires that an election inspector compare the ballot number on the ballot stub with the ballot number on the return envelope. If the ballot numbers match, then the election inspector must tabulate the ballot. If not . . . well, that is the question now before the Court, and this is a question specifically created by the amendment, where the positive case with matching numbers was addressed, but the negative case with mismatched numbers was left unaddressed.

Moreover, penultimate to this unaddressed question is the question of whether defendants' guidance even accurately describes the comparison to be made by the election inspectors under MCL 168.768. This comparison was added to the version of the statute that became effective in February of this year.

Given the recent change in the law, and the implications that flow from that change, according to plaintiffs, the Court concludes that plaintiffs have satisfied the notice-and-verification requirement of MCL 600.6431. Accordingly, the Court will deny defendants' motion for summary disposition under MCR 2.116(C)(7) on this basis.

C. PROCESSING AN ABSENT-VOTER BALLOT WITH A MISMATCHED BALLOT OR MISSING BALLOT STUB

Turning now to the merits before reaching laches, the parties' dispute involves an issue of statutory interpretation. Under our constitutional separation of powers, our Legislature is supposed to enact statewide policy, and our Judiciary is supposed to interpret and apply that policy. To remain faithful to our Constitution, the Court must give effect to the Legislature's enactments. *Holliday v Secretary of State*, ___ Mich App ___, ___; ___ NW3d ___ (2024); slip op at 7, quoting *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 50; 778 NW2d 282 (2009). If the statute's language is unambiguous, then the Court must apply the plain meaning as written. *Id*. If the statute is ambiguous, then the Court must resort to various substantive canons of construction to make sense of the statute, and this construction may even involve questions of fact. See, e.g., *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019).

The broad import of plaintiffs' claims is that the act requires that all mismatched ballots or ballots with missing stubs be processed as rejected ballots, with an opportunity to cure. Plaintiffs acknowledge that MCL 168.768 states only, "If the ballot numbers match, the board of election inspectors shall detach the perforated numbered stub and prepare the ballot for tabulation." They maintain, however, that the Legislature's express direction to tabulate a ballot when the numbers match logically implies that, when the numbers do not match, there is no statutory authority for an election inspector to tabulate the ballot. In essence, statutory silence means something, according to plaintiffs.

They argue that their reading is further confirmed by looking elsewhere in the act. Specifically, plaintiffs argue that MCL 168.765a(6) requires AVCBs to process absent-voter ballots in "as nearly as possible the same manner" as ballots processed at the precinct through in-

person voting. When an elector appears in person to vote, the election inspector is required to compare the number on the elector's ballot with the number recorded on the poll list and "if the numbers do not agree, the ballot must be marked as 'rejected', and the elector must not be allowed to vote." MCL 168.797a(2).

Defendants reject plaintiffs' reading. They respond to plaintiffs' reliance on MCL 168.765a(6) by pointing out that the section merely refers to the procedure for processing absent-voter ballots in election-day precincts—polling places—not the processing of in-person voters at polling place. As for MCL 168.797a, they maintain that the section applies only to voters voting in person at election-day polling places, and not to the processing of absent-voter ballots at polling places or by an AVCB.

Under defendants' reading of the act, the only relevant statute for purposes of this dispute is MCL 168.768. If the Legislature had intended that an absent voter's ballot was to be rejected when it had a mismatched ballot or missing stub, then it would have included language to that effect. Because the Legislature did not do so, and because the statute does not address what steps to take in the event an absent-voter ballot is returned with a mismatched ballot or missing stub, defendants argue that the Secretary has the legislatively granted authority to issue the challenged instructions. In essence, statutory silence is nothing more than silence, and Secretary Benson can fill in the gap.

Having reviewed MCL 168.768, the other sections cited by the parties, and the act as a whole, the Court cannot grant either party the broad relief that they have requested at this time, the case being barely two weeks old. Each side provides what could be, on first (and second) blush, a plausible reading of MCL 168.768—plaintiffs read silence to mean the absence of legislative

authority to tabulate, while defendants read silence as a legislative oversight. There are statutory clues in other parts of the act to support each reading.

Furthermore, even assuming for the sake of argument that Secretary Benson might have the authority to fill certain statutory gaps, it remains an open question, and a question that may have a factual component, whether she has appropriately used her authority *in this case* to fill *this purported statutory gap*. It is undisputed, for example, that Secretary Benson has not used her rulemaking authority to promulgate a rule. Defendants' preferred reading has not, therefore, survived the crucible of public notice-and-comment rulemaking.

As to whether mere direction from Secretary Benson in the form of the Manual or Flipchart is itself sufficient to fill the purported statutory gap, such an assertion is highly questionable. Simply put, this is one area of the election law in which election inspectors should have a single, clear mandate—otherwise, "like ballots" could very well be treated "unlike" from precinct to precinct, undermining the purity of our elections. If defendants' directions are not clear and mandatory, and if the directions do not have the force and effect of law, then there is a real question of whether Secretary Benson has, in fact, filled the statutory gap purportedly found in MCL 168.768. As our Supreme Court has recently suggested, it is important to consider whether, on a particular issue, the Manual offers mere guidance, or, instead, has the force and effect of law. See *O'Halloran v Secretary of State*, ___ Mich ___, ___; ___ NW3d ___ (2024); maj slip op at 17-19; see also slip op at 2 (CLEMENT, CJ) (concurring in part and dissenting in part) and slip op at 4-7 (ZAHRA, J) (concurring in part and dissenting in part).

On this point, the Court specifically asked defense counsel and Deputy Director Fracassi whether a rogue inspector—one who, for example, treated a mismatched ballot as rejected, rather

than challenged—would face civil or even criminal penalty. Or, instead, would the rogue inspector be subject to something akin to mere "tut-tut" disapproval by defendants? Even considering MCL 168.765a(17), their answers were, at best, equivocal and unconvincing.[8]

The Court further observes that, although the parties have provided relevant, useful information in their submissions thus far, much of that information has been focused on matters other than the meaning of MCL 168.768 within the context of the act as a whole. Although those matters may have been necessary to resolve before this Court could reach the merits of plaintiffs' claim, they have limited the parties' arguments and attention with respect to the merits. This is one of the many reasons that summary disposition under MCR 2.116(C)(10) is highly disfavored at the outset of a case, before sufficient development of the law and facts can take place.

With that said, the Court will grant partial summary disposition to plaintiffs under MCR 2.116(I)(1) on one of the subissues subsumed within their broader claims. Specifically, the current Manual misstates the law as to an election inspector's duties with respect to absentee ballots.

[8] Related to this point, in Part III, the Manual describes the various steps to be taken by election inspectors when processing absent-voter ballots. The Manual states that the "processing of absent voter ballots is divided into two steps explained in the following sections," Manual p 6, and then it goes on to discuss the specific topic at issue here, i.e., mismatched ballots and ballots without stubs, *id*. p 7. Somewhat confusingly, however, the Manual further states near the beginning of the absent-voter discussion, "While jurisdictions *might deviate* from the process described here, jurisdictions must take care that whatever process they select does not compromise ballot secrecy." *Id*. p 6 (emphasis added). Even more confusingly, election inspectors are directed that they "must" treat mismatched ballots as challenged ballots, but only "should" treat ballots without stubs as challenged ballots. *Id.* p 7. A lack of clarity on this topic would seem to undermine the argument that defendants have sufficiently filled the statutory gap purportedly found in MCL 168.768. The Court sought clarification from defendants on this matter during the hearing, to no avail. Plaintiffs have not made a specific claim on the basis of the "might deviate" statement in the Manual, and the statement may very well have a reasonable explanation, but such explanation is not evident from the Manual itself.

Currently, the Manual states that an election inspector should compare the number on the ballot stub with the number recorded for the voter in the QVF Absent Voter List. Manual, p 7. Since February 13, 2024, however, MCL 168.768 requires that an inspector compare the number on the ballot stub with the number on the return envelope. In amending MCL 168.768, our Legislature did not speak in terms of discretion or suggestion; rather, it spoke in terms of mandate. If defendants decide to direct election inspectors to make an *additional* comparison with the QVF Absent Voter List for the sake of thoroughness, then that might well be within their discretion. But, what is certainly not left to their discretion is whether to follow a statute enacted by our Legislature. The current Manual misstates the law, and, accordingly, plaintiffs are entitled to immediate declaratory relief on this subissue.

D. LACHES

Finally, 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).

On the basis of the current record—with the benefit of affidavits and exhibits submitted by the parties, as well as testimony presented by defendants—the Court makes the following findings of fact solely with respect to defendants' affirmative defense of laches.

First, the Court finds that plaintiffs did, in fact, marginally delay in bringing this action, though the Court places minimal weight on this factor, given the public importance of elections and the preference for addressing merits. See *Davis*, __ Mich App at ___; slip op at 11. As defendants have pointed out, the current practice of treating mismatched ballots and ballots with lost stubs as challenged ballots (rather than rejected ballots) has been essentially unchanged for decades, through Secretary-of-State regimes of both major parties. Although the law did change effective February 13, 2024, this recent change does not explain why plaintiffs waited until September 18, 2024, to challenge this long-standing practice.

Second, much more critical to this Court for its equitable weighing is the matter of prejudice. Even assuming for the sake of argument that the Court could conclude at this early stage of the lawsuit that plaintiffs' interpretation of the act is the correct one, there would still be insufficient time to craft an appropriate remedy for the upcoming general election. Defendants have shown that, as a factual matter, implementing a process that accords with fundamental notions of due process, equal protection, and election purity cannot, as a practical matter, be accomplished before November 5, 2024.

Defendants have shown to this Court's satisfaction that the existing process for curing an absent-voter ballot rejected because of an unverified signature cannot be seamlessly adopted for the instance when an absentee ballot would be rejected for mismatched numbers or a missing stub. Developing a process for curing a ballot rejected for mismatched numbers or a missing stub would

likely require, for example, contacting *both* the voter associated with the return envelope as well as the voter associated with the ballot. How this should be done administratively (particularly since, except for AVCBs that preprocess absent-voter ballots, absent-voter return envelopes are not opened until election day), who should do this (the clerk? the inspector? someone else?), how much time would the voters have to cure (one day? three days? more? less?), how would the voters be able to cure (remotely? only in-person?)—these are all factual questions that remain unanswered these few weeks before the election. And, even if these questions could be answered within the coming days, the implementation and training that would be needed before the election would be, for all practical purposes, impossible. Thus, the Court will grant summary disposition to defendants in part on the basis of laches, but only with respect to plaintiffs' broader claims as they pertain to the upcoming general election; laches will not extend beyond the upcoming election.

Nor does this end the inquiry with respect to laches. The Court concludes as a factual matter that, on the basis of the testimony of Deputy Director Fracassi, defendants are able to revise and electronically distribute the Manual quickly with minimal administrative effort. Moreover, the comparison required by MCL 168.768 is a simple, straightforward one, and the Court is confident that our election inspectors can quickly learn and easily follow a modest, narrow clarification. In fact, defendants' Flipchart already provides for the appropriate comparison between the ballot-stub number and the return-envelope number, though it mistakenly gives an election inspector *the choice* of whether to verify the ballot-stub number "with the ballot number on the AV list or Absent Voter Ballot Return Envelope." Under MCL 168.768, an election inspector does not have the choice—the inspector *must* compare, at a minimum, the ballot-stub number with the return-envelope number.

Accordingly, the Court will order defendants to update the Manual to reflect the statutory requirement placed on election inspectors with respect to comparing ballot-stub and return-envelope numbers under MCL 168.768; the updated Manual must be posted and distributed in time for tabulation of absent-voter ballots cast in the November 2024 general election. The Court will also order defendants to correct the Flipchart to reflect the statutory requirements in MCL 168.768. For purposes of the upcoming general election, with respect to the Flipchart, the Court will leave it to defendants' sound discretion whether to reprint and distribute an updated version or, instead, merely to instruct election officials to take their respective Flipchart and strike with a pen the word "or" and replace it with the word "and" in the following phrase: "with the ballot number on the AV list or Absent Voter Ballot Return Envelope".

Finally, during the hearing, the Court questioned defendants about how many mismatched ballots or ballots without stubs are typically submitted by absent voters during a general election. No one knew the answer, or even had an educated guess. The scope of the problem would appear to be relevant to plaintiffs' broader claims because, if the problem is widespread, and if the Court ultimately agrees with plaintiffs and concludes that mismatched ballots and ballots without stubs should be rejected, with an opportunity for the affected voters to cure, then the appropriate process to put in place might need to be relatively robust and extensive. In contrast, if the problem rarely happens, if ever, then a much more modest process might be appropriate. In other words, we do not know what we do not know, and that is a problem here.

Relevant to this point, generally speaking, the Court found Deputy Director Fracassi to be a helpful, informative, and credible witness. But, on how to get a handle on the scope of the problem, the Court places little weight on that part of his testimony. Specifically, on whether it would be possible for defendants to track when a mismatched ballot or a ballot without a stub is

treated as a challenged ballot, the Court observes that defendants already have a process in place for tracking when a mismatched ballot is to be treated as "challenged." Specifically, a notation is made in the QVF Absent Voter List that the ballot has been challenged. In a similar situation, when a return envelope is simply empty, the Manual directs an election inspector to make a note of that fact in "the *Remarks* page of the ePollbook or physical pollbook." Manual, p 7. Thus, defendants' current procedures, already in place, contemplate that certain deficiencies with respect to absent-voter ballots can be readily recorded and tracked.

The Court concludes that, on the basis of the record before it, minimal administrative burden would be required for election inspectors to make a notation in the QVF Absent Voter List or "*Remarks* page" that an absent-voter ballot is being challenged on the basis of a "mismatch" or "missing stub." Plaintiffs have not requested interim equitable relief in the form of mismatched ballot/missing stub tracking, and therefore the Court will not order such relief at this time. With that said, defendants are encouraged to do so voluntarily, as the information would have obvious relevance to this case. The effort would require little more than a notation in the "Remarks" section and would provide this Court, and the People of the State of Michigan, valuable information about the security of our elections. Moreover, the Court is confident that our election inspectors are capable of being quickly and effectively trained on such a discrete matter.

Accordingly, with respect to these more narrow, specific matters related to plaintiffs' claims, the Court will deny defendants' motion for summary disposition on the basis of laches.

III. CONCLUSION

For the reasons stated in this Opinion and Order:

IT IS ORDERED that defendants' motion for summary disposition under MCR 2.116(C)(8) and (10) on the basis of standing is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary disposition under MCR 2.116(C)(7) on the basis of the Court of Claims Act is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary disposition under MCR 2.116(C)(8) and (10) on the question of declaratory relief is DENIED, and summary disposition is GRANTED IN PART to plaintiffs under MCR 2.116(I)(1).

IT IS FURTHER ORDERED that defendants' motion for summary disposition under MCR 2.116(C)(8) and (10) with respect to the affirmative defense of laches is GRANTED IN PART and DENIED IN PART, and summary disposition is GRANTED IN PART to plaintiffs under MCR 2.116(I)(1).

IT IS FURTHER ORDERED that, consistent with this Opinion and Order, defendants shall revise the Manual as follows:

> The following sentence found on page 7 of the Manual—"Without exposing any votes, the election inspector should verify that the number on the ballot stub agrees with the ballot recorded for the voter in the QVF Absent Voter List."—shall be revised to read as follows:
>
> > "Without exposing any votes, the election inspector must verify that the number on the ballot stub agrees with the ballot number on the face of the absent voter return envelope."
>
> For the sake of clarity, defendants can, as an additional step, continue with the current practice that the ballot stub number should be compared with the ballot number recorded in the QVF Absent Voter List, but, at a minimum, the Manual must be revised to reflect the statutory requirement that the ballot stub number must be compared to the number on the return envelope.

Defendants shall promptly post and distribute the updated Manual to the appropriate persons and offices prior to tabulation of any absent-voter ballots for the November 5, 2024, general election. With respect to the Flipchart, the Court leaves it to defendants' sound discretion whether to revise

and reprint the Flipchart in accordance with this Opinion and Order or, instead, give officials instructions on how manually to correct the Flipchart, as explained above.

IT IS FURTHER ORDERED that the parties' motions for leave to file a brief with excess pages, and the Democratic National Committee's motion for leave to file an amicus curiae brief, are GRANTED.

IT IS SO ORDERED. This is not a final order and does not close the case.

Date: October 3, 2024

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