STATE OF MICHIGAN
COURT OF CLAIMS

MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE and CINDY BERRY,

Plaintiffs,

v

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

Defendants.

No. 24-000165-MB

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**DEFENDANTS' BRIEF IN SUPPORT OF THEIR 10/14/2024 MOTION FOR SUMMARY DISPOSITION**

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## INTRODUCTION

The people who serve in the United States' armed forces deserve our respect and gratitude. It would be bad enough that Plaintiffs Republican National Committee, the Michigan Republican Party, and Chesterfield Township Clerk Cindy Barry even secretly desired to prevent the spouses and adult children of members of the armed services from exercising their constitutional right to vote. The same is true for other American citizens working and living overseas. But that Plaintiffs filed this baseless and poorly-constructed lawsuit seeking to disenfranchise those American citizens less than a month before November's presidential election—when both the instruction they challenge and the statute it essentially repeats have existed for years or even decades—is both irresponsible and abusive. This lawsuit is frivolous and sanctionable.

Its purpose is plainly to harass the Secretary and sow doubt about the integrity of the election. This is evident from the face of the complaint, which seeks only a declaration invalidating the Secretary's guidance to clerks—leaving untouched the decades-old statutes that the guidance restates almost verbatim. So, even if the Plaintiffs were entitled to all the relief sought in this complaint—and they are not—local clerks would *still be bound by the statute* to accept voter registrations from the spouses and dependents of military voters and from other overseas voters.

Regardless, this Court need not reach the merits of this complaint because it is clearly and obviously barred.

*First*, Plaintiffs claims are barred where they failed to timely file a notice of intent to sue within 12 months of the date their claims accrued under Michigan's Court of Claims Act, MCL 600.6431(1). The statute and guidance have existed unchanged for years—much longer than 12 months—and Plaintiffs failed to file any notice.

*Second*, even if their claims were not time-barred, the doctrine of laches applies to preclude their claims where Plaintiffs have unreasonably delayed for years in challenging these longstanding laws and instructions, and the Secretary—as well as the voters—have been prejudiced by their delay. Even if Plaintiffs were correct on their legal claims (and they are not) there is no time to create new instructions or cobble together a remedy so that voters are not disenfranchised.

*Third*, Plaintiffs have not alleged an actual controversy and thus lack standing to bring their claims. Plaintiffs' asserted interests in fair elections and concerns over vote dilution are no different from those of the public generally and are otherwise abstract and hypothetical. Such generalized and hypothetical challenges to election laws do not support standing.

And *fourth*, the instructions do not violate the Michigan Constitution or the Michigan Election Law. Indeed, the instructions simply parrot the statute, and are well within the Secretary's authority to make interpretative statements of the law, as recognized by the Michigan Supreme Court in its recent opinion in *O'Halloran, et al v Secretary of State*. Here, the statement barely interprets the statute and mostly just repeats it. Moreover, the constitutional provision on which Plaintiffs rely grants the Legislature the authority to define residence for voting purposes—which it did by allowing spouses and dependents of military voters and other overseas voters to register.

For these reasons, Plaintiffs' complaint must be dismissed, and judgment issued in Defendants' favor.

## STATEMENT OF FACTS

As explained below, the process for reviewing absent voter (AV) ballots is governed by the constitution, by statutes, and by instructions issued by the Secretary of State.

### A. Constitutional provisions

Article 2, § 1 of the Michigan Constitution provides:

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

Under the constitution, as enacted, it imposes a state and a local residency requirement. But the six-month state residency requirement was declared unconstitutional over forty years ago.

In 1978, Attorney General Frank Kelley concluded that—based upon the U.S. Supreme Court's decision in *Dunn v Blumstein,* 405 US 330 (1972)—the six-month durational residency requirement was no longer valid. OAG 1977-1978, No 5356 (August 23, 1978). In *Dunn,* the Supreme Court held:

> Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of "'a fundamental political right, . . . preservative of all rights.'" There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote," is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." [405 US at 336 (internal citations omitted).]

The Court then ultimately concluded that durational residence requirements were not necessary to further a compelling state interest. *Dunn*, 405 US at 360.

[1]Under the Twenty-Sixth Amendment to the United States Constitution, the age requirement has been changed to 18.

As a result, only legislatively imposed local residence requirements remain in effect. By statute, a person must reside in the city or township for at least thirty days before the election in which they wish to vote. MCL 168.10(1) ("Except as provided in subsection (2), the term 'qualified elector', as used in this act, means a person who . . . who has resided in the city or township 30 days.") Further, by its plain language, the constitution gives the Legislature the power to define residence for voting purposes. Const 1963, art 2, § 1. The Legislature has done so with respect to spouses and dependents of overseas voters.

**B. Statutory provisions concerning military and overseas voters**

MCL 168.759a(3) provides for the right of spouses and dependents of overseas voters who are American citizens to apply for an AV ballot:

> (3) A spouse or dependent of an overseas voter **who is a citizen of the United States**, is accompanying that overseas voter, and is not a qualified and registered elector anywhere else in the United States, may apply for an absent voter ballot even though the spouse or dependent is not a qualified elector of a city or township of this state. [MCL 168.759a(3) (emphasis added).]

Subsection 759a(4) provides for how these American voters may register and obtain an AV ballot:

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

> a separate file. **The address in this state shown on a registration form is the residence of the registrant.** [Emphasis added.]

The statute thus imposes three requirements on spouses and dependents in order for them to be eligible to register and vote in Michigan: 1) they must be American citizens; 2) they must be accompanying that overseas voter; and 3) they must not be registered anywhere else in the United States. If these requirements are met, then the address on the registration is accepted as their residence. This statutory language has been unchanged since 2010. See 2010 PA 50. However, allowing spouses and dependents of military and overseas voters to register and vote has deep roots in Michigan law and tradition.

MCL 168.759a was first passed in 1956. In its original form, it already provided, in pertinent part, for registration of spouses and immediate family members of military and civilian overseas voters:

> Any civilian employee of the armed services of the United States outside of the United States or any member of his immediate family outside of the United States, or any member of the armed services of the United States or member of his immediate family, who is a qualified elector of any city or township of this state but is not registered for voting, may apply at the time of making application to register by mail, as provided in section 504 of this act, for absent voters' ballots…. [Exhibit A, 1956 PA 21, MCL 168.759a.]

In 1971, § 759a was revised, expanding its scope beyond the armed services and specifying that the address of the registrant would be considered the residence of the person:

> Any civilian employee of the armed services of the United States outside of the United States or any member of his immediate family outside of the United States, or any member of the armed services of the United States or member of his immediate family **or any citizen of the United States temporarily residing outside of the territorial limits of the United States and the District of Columbia and a spouse or dependent residing with or accompanying such a person**, who is a qualified elector of any city or township of this state but is not registered for voting, may apply at the time of making application to register by mail, as provided in section 504 of this act, for absent voters' ballots. A citizen temporarily residing outside the territorial limits of the United States and the District of Columbia shall include with any application for absent voters' ballots or registration, an affidavit in a form and manner approved by the state director of

elections stating his qualifications as an elector at the time he departed from the United States and affirming that he has not relinquished his citizenship or established residence for voting in any other place.

* * *

**The address in this state shown on the registration shall be deemed the residence of the registrant.** These registrations shall not be considered in determining the size of precincts. [Exhibit B, 1971 PA 68, (emphasis added).]

Then, in 1996, § 759a was again revised, in pertinent part, to allow spouses and dependents of military and overseas voters to register even if they were not already a qualified elector of a city or township of Michigan, and accepting the address on the registration as their residence:

(1) Except as provided in subjection (5), each of the following persons who is a qualified elector of a city or township in this state and who is not a registered voter may apply for an absent voter ballot pursuant to section 504:

(a) A civilian employee of the armed services outside of the United States

(b) A member of the armed services outside of the United States.

(c) A citizen of the United States temporarily residing outside of the territorial limits of the United States.

(d) A citizen of the United States residing in the District of Columbia.

(e) **A spouse or dependent of a person described in subdivisions (a) through (d) who is a citizen of the United States and who is accompanying that person, notwithstanding that the spouse or dependent is not a qualified elector of a city or township of this state,** as long as that spouse or dependent is not a qualified and registered elector anywhere else in the United States.

(2) A citizen described in subsection (1) who is temporarily residing outside of the territorial limits of the United States or residing in the District of Columbia shall include with an application for an absent voter ballot or registration, an affidavit in the form and manner approved by the director of elections stating either of the following:

* * *

(b) That he or she is spouse or dependent of a person described in subsection (1)(a) to (d), that he or she meets the qualifications of an elector **other than**

> **residency** in the state, and that he or she has not established a residence for voting in any other place.
>
> (3) Upon receipt of an application under this section that complies with this act, a city or township clerk shall forward to the applicant the absent voter ballots requested, the forms necessary for registration, and instructions for completing the forms.
>
> * * *
>
> **The address this state shown on a registration form is the residence of the registrant. [**1996 PA 207, MCL 168.759a(1)-(3)[2] (emphasis added).]

In 1999, subsection 759a(2) was revised slightly to read, "A citizen described in subsection (1) OTHER THAN A PERSON DESCRIBED IN SUBSECTION (1)(B) OR A SPOUSE OR DEPENDENT OF SUCH A PERSON DESCRIBED IN SUBSECTION (1)(B) shall include, with an application for an absent voter ballot or registration, an affidavit in a form and manner approved by the state director of elections stating either of the following…." See 1999 PA 216.[3] This change removed the affidavit requirement for members of the armed services or their spouses and dependents.

In 2010, the statute was amended again, and took what is essentially the same form as exists today:

> (3) **A spouse or dependent of an overseas voter who is a citizen of the United States, is accompanying that overseas voter, and is not a qualified and registered elector anywhere else in the United States, may apply for an absent voter ballot even though the spouse or dependent is not a qualified elector of a city or township of this state.**
>
> (4) An absent uniformed services voter or an overseas voter, whether or not registered to vote, may apply for an absent voter ballot.

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[2] The legislative history of 1996 PA 207 shows that it was passed unanimously in both the House and the Senate. It was approved by Governor John Engler on May 21, 1996. See House Bill 4443 of 1995 (Public Act 207 of 1996) - Michigan Legislature (accessed October 14, 2024.)

[3] See 1999 PA 216, available at https://www.legislature.mi.gov/documents/1999-2000/publicact/pdf/1999-PA-0216.pdf (accessed October 14, 2024.)

* * *

**The address in this state shown on a registration form is the residence of the registrant.**

See 2010 PA 50. The relevant provisions of this statute exist in essentially the same form today.

### C. The Secretary's military and overseas voter instructions

The Secretary of State is expressly authorized to issue instructions and provide directions and advice to election officials for the conduct of elections. MCL 168.31(1)(a)-(b). Consistent with these statutes and the underlying enabling statutes, the Secretary has issued comprehensive instructional guidance to local elections officials regarding military and overseas voter registration in Chapter 7 of the Election Officials Manual. (Plfs' Ex A, Chapter 7, July 2024, Military and Overseas Voters, Federal Voter Registration and Absent Voting Programs.)[4]

In Section III of Chapter 7, the Secretary's guidance manual states:

> **Eligibility to register to vote using the FPCA[5] or FWAB[6]**
>
> To be eligible to register to vote using the FPCA or the FWAB, the voter must be absent from their jurisdiction of residence. If the voter is a civilian, the voter must be living outside of the United States and its territories. If the voter is a member of a uniformed service on active duty, a member of the Merchant Marine, or a National Guardsman activated on state orders, or if the voter is a dependent of a member of any of the listed organizations, the voter is eligible to register to vote using the FPCA or FWAB regardless of whether the voter is serving overseas or inside the United States. Each UOCAVA voter must submit their own FPCA or FWAB form.
>
> *A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible*

[4] See also Election Officials Manual, July 2024, Chapter 7, Michigan's Absent Voter Process, July 2024, available at https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/MOVE-Federal-Registration-and-Absentee-Voting-Programs.pdf?rev=029b4b6973744c24bae24d2139958954&hash=AEB110E5F681F2898F07F927080DD59C (accessed October 14, 2024.)

[5] Federal Post Card Application (FPCA).

[6] Federal Write-In Absentee Ballot (FWAB).

*to vote in Michigan as long as the citizen has not registered or voted in another state.*

**Registration address for UOCAVA voters**

A UOCAVA voter may register to vote at their last address of residence in the jurisdiction in which they are registering even if someone else now resides at that address, if the building where the voter resided has been demolished, or if the address no longer exists. The only requirement is that the address supplied by the voter is the last address which the voter considered their permanent residence within the jurisdiction in question. [Plfs' Ex A, p 3 (emphasis added).]

### D. Affidavit of the Director of Elections

Director of Elections Jonathan Brater supervises the creation and dissemination of written material advising local elections officials, as well as the creation and provision of trainings offered to local clerks in all 83 Michigan counties. (Exhibit C, Brater Aff, ¶6-7.) Director Brater avers that the language in the current Elections Official Manual pertaining to spouses and dependents of military and overseas voters has been included in each version of the manual since at least August 2017,[7] which version was prepared by then-Secretary of State Ruth Johnson. (Ex C, ¶13-4.) Director Brater also states that overseas voter registrations are, in fact, checked for accuracy against the state's qualified voter file (QVF), drivers' license, or social security records, and that some applications are rejected if applicants are not eligible under Michigan law. (Ex C, ¶15-19.)

AV ballots were required to have been delivered to military and overseas voters—including spouses and dependents—by September 21, 2024. Const 1963, art 2, § 4(1). Director Brater attests that is now too late to implement any kind of systematic removal or segregation of overseas voters. (Ex C, ¶27-29.) Further, Director Brater avers that there are approximately

[7] This is not necessarily the first time this language was used, but it is the oldest version of the manual that Defendants have been able to locate under the time constraints.

16,600 military or overseas civilians who have requested and were issued a ballot for the November 2024 election, and that is impossible to know the exact number of individuals who have never lived in the United States. (Ex C, ¶22.)

**STANDARD OF REVIEW**

Summary disposition is proper under MCR 2.116(C)(7) when a claim against the opposing party is barred by immunity granted by law. A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may file supportive materials such as affidavits, depositions, admissions or other documentary evidence. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466 (2008). *Id*. If there is no relevant factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Eng'g Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 377 (1995). See also *Pike v Northern Mich Univ*, 327 Mich App 683, 690-691 (2019).

Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co,* 473 Mich 63, 71 (2005). A motion under MCR 2.116(C)(8) may only be granted "where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair v Michigan*, 470 Mich 105, 119 (2004) (quotation marks and citation omitted).

Alternatively, summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and

the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5 (2016).

## ARGUMENT

### I. Plaintiffs' claims must be dismissed where they failed to comply with the notice requirement of the Court of Claims Act.

The State and its officers are generally immune from suit "unless it consents, and… any relinquishment of sovereign immunity must be strictly interpreted." *Pohutski v City of Allen Park,* 465 Mich 675, 681-682 (2002) (citation omitted). Relevant here, the Michigan Legislature has maintained immunity as to how suit may be filed against the State. "[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. One such condition on the right to sue the state is the notice provision of the Court of Claims Act [COCA][.]" *McCahan v Brennan*, 492 Mich 730, 737 (2012).

Subsection 6431(1) of the COCA provides:

> Except as otherwise provided in this section, 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. [MCL 600.6431(1) (emphasis added).]

And subsection 6431(2) specifies the contents of the notice. MCL 600.6431(2).

The Michigan Supreme Court has "categorized MCL 600.6431 as a precondition to suing the state and cautioned that full compliance with the provision is required regardless of a finding of prejudice[.]" *Christie v Wayne State Univ*, 511 Mich 39, 51 (2023).

Here, Plaintiffs challenge the Secretary's instruction regarding registration of spouses and dependents accompanying military and overseas voters. They point to the Secretary's guidance in Chapter 7, Michigan's Absent Voter Process, p 6, (Plfs' Ex A), which provides:

> *A United States citizen who has never resided in the United States but who has a parent, legal guardian, or spouse who was last domiciled in Michigan is eligible to vote in Michigan as long as the citizen has not registered or voted in another state.* [Emphasis added.]

However, this instruction has been in place consistently since at least 2017—and possibly longer. (Def's Exhibit C, Brater Aff, ¶13.) The statutory language on which it is based—MCL 168.759a—has similarly existed for decades. The instructional language has not been changed in any way during the past 12 months.

Plaintiffs filed their complaint on October 8, 2024, without having filed a separate notice of intent to file their claim. To have strictly complied with the one-year notice requirement of subsection 6431(1), Plaintiffs' claims must have accrued on or after October 8, 2023—the date one-year prior to the date of filing. While the instructions (and statute) have existed continuously since their creation, Plaintiffs cannot rely on a "continuing wrong" theory, because the Court of Appeals has held:

> The continuing-wrongs doctrine (or its abrogation) is not relevant to plaintiff's claim for relief. The doctrine allowed a plaintiff to reach back to recover for wrongs that occurred outside the statutory period of limitations. If a plaintiff could establish that a wrong or injury experienced within the permitted time period was part of a series of sufficiently related "continuing wrongs," the plaintiff might have been able to recover damages for each wrong that was part of the series—including those that otherwise would have been time-barred. *But even under the continuing-wrongs doctrine, a plaintiff had to establish that one of the wrongs or injuries occurred within the statutory period of limitations.* The doctrine has never operated to toll the statutory period of limitations for such claims, which were timely because the claim accrued during the limitations period.

*Twp of Fraser v Haney,* 509 Mich 18, 28-29 (2022) (emphasis added). Here, Plaintiffs' injuries are based on the mere existence of the Secretary's instructions. There is no allegation in the complaint of any new act taken by the Defendants within the past 12 months.

Clerk Berry alleges she is unable to reconcile the instructions with the Michigan Election Law and Michigan Constitution and is concerned that her own vote will be diluted. (Compl, ¶

12-13, 18.) But Clerk Berry has served as the clerk in Chesterfield Township since 2012[8] and was thus responsible for enforcing these very same instructions in every election for many years. So, to the extent she is injured by the instructions in her capacity as clerk or as a voter, her claim accrued well before October 8, 2023.

The MRP and RNC allege that their interests in promoting Republican candidates, mobilizing voters, ensuring that elections in Michigan are conducted in a fair and transparent manner, and working to protect the fundamental rights of its members and candidates to participate in the political process are injured by the challenged instructions. (Compl, ¶ 7-8.) But, like Clerk Berry, these interests would also have been implicated in every election as far back as 1996. So, to the extent the RNC and MRP have been injured by the instructions, their claims also accrued well before October 8, 2023.

Because Plaintiffs failed to file their notice or written claim on or before October 8, 2023, their complaint must be dismissed under MCR 2.116(C)(7).

## II. Plaintiffs' claims are barred by laches where they unreasonably delayed challenging the Secretary's instructions and Defendants are prejudiced by their delay.

Even if Plaintiffs' claims were not subject to dismissal for failure to comply with the COCA, their claims are barred by the doctrine of laches.

As an initial matter, MCL 691.1031 expressly provides that "[i]n all civil actions . . . 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." Plaintiffs explicitly seek relief for the November 2024 general election. (Cmplt, ¶19). That election will be held on November 5, 2024. MCL 168.641. Subtracting 28 days from that date arrives at October 8—the

[8] See Chesterfield Township Clerk Cindy Berry joins race for Michigan secretary of state – The Voice (voicenews.com).

exact date Plaintiffs filed this suit. It defies belief that the Plaintiffs—the state and national bodies of a major political party and an experienced Michigan clerk—were unaware of this time limit and merely happened to bring suit exactly 28 before the election. Plaintiffs obviously chose this date deliberately in order to avoid the statutory bar, but in so doing they demonstrate an intention to wait until the last minute to bring their claims. Plaintiffs thus must have intentionally delayed bringing this lawsuit.

Regardless, even if their filing narrowly complies with the rebuttable-presumption statute, Plaintiffs cannot not evade the broader doctrine of laches. "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Charter Twp of Lyon v Petty*, 317 Mich App 482, 490 (2016) (quotation marks and citation omitted). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id.,* quoting *Yankee Springs Twp v Fox*, 264 Mich App 604, 612 (2004). Whether relief will be withheld based on laches depends upon the facts of the particular case. *Henderson v Connolly's Estate*, 294 Mich 1, 19 (1940). When no acceptable explanation is offered for a plaintiff's delay, the requested relief should be barred by unexcused laches. *Id.* This is because equity aids the vigilant, not those that slumber on their rights. *Id.* The purpose of the rule is to promote diligence, discourage laches, and prevent the enforcement of stale demands. *Id.*

Election cases are well-suited to the application of laches:

> [L]egal challenges that affect elections are especially prone to causing profound harm to the public and to the integrity of the election process the closer in time those challenges are made to the election, making laches especially appropriate to apply in such matters. *Purcell v Gonzalez*, 549 US 1, 4-6 [ ] (2006); *New Democratic Coalition v Secretary of State*, 41 Mich App 343, 356-357 [ ] (1972). "[E]lections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws." *Id.*

> at 356 [ ]. "Courts can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials." *Id.* at 357 [ ]. [*Davis v Sec'y of State*, No. 362841, 2023 WL 3027517, at *6 (Mich Ct App, Apr 20, 2023), leave denied, 513 Mich 856 (2023).]

As explained above in Argument I, the instruction and the statute on which it is based have existed for years—if not decades, and Plaintiffs plainly could have filed suit well before October 8, 2024. This suit with virtually identical allegations could have been filed at any time since at least 2017. Instead, Plaintiffs delayed filing suit until just 28 days—21 business days—before the November 5, 2024, general election. There is no obvious—or legitimate—reason for waiting to raise these claims, and nowhere in their complaint do they explain—or even acknowledge—their delay. Plaintiffs have thus unreasonably and inexcusably delayed in pursuing their election-related claims.

And the Secretary is prejudiced by Plaintiffs' delay. Indeed, Plaintiffs clearly recognize the timing problem created by their delinquent initiation of this lawsuit. They acknowledge that elections officials are "already accepting ballots from overseas voters" and request expedited relief. (Cmplt, ¶ 19 & p 19.) But the ongoing nature of the election and the resulting need for "expedited relief" are consequences of Plaintiffs' inexcusable and unjustifiable delay in raising claims that should have been raised months—if not years—earlier. Had these claims been presented promptly, Plaintiffs claims might possibly have been fully litigated without the haste required of expedited proceedings. Briefs could have been prepared according to the ordinary court rules, and any appeals could have been sought months before the election, even providing the appellate courts with the opportunity to hear oral arguments. See *Reproductive Freedom for All v Bd of State Canvassers,* 510 Mich 894, 897 (2022) (Bernstein, J., concurring) ("In numerous other cases where the legal issue before us was less clear-cut, I have voted for either further consideration or oral argument, given my strong interest in making sure we get these

cases right.") But now, due to Plaintiffs' mystifying delay, this case is presented on an emergency basis, harshly abbreviating the time for the Secretary to respond, and severely curtailing the time for any appellate review. None of this was necessary.

But, beyond the constraints of accelerated litigation, the Secretary has been prejudiced even in her practical ability to comply with any order granting the Plaintiffs relief. Even if Plaintiffs were correct in their interpretation of the law, which they are not, there is no way to implement a remedy without significantly disrupting the process and disenfranchising voters.

Michigan currently has approximately 16,600 military or overseas voters who requested and were issued a ballot for the November general election. (Ex C, Brater Aff, ¶22.) Of that number, approximately 250 are 18 years old. *Id.* Defendants have no way of knowing whether any of these individuals have never lived in the U.S., or if they moved overseas only recently. *Id.* Plaintiffs ask this Court to order the Secretary to amend her current guidance or issue new guidance directing local election officials, and—astonishingly—to reject ballots of American citizens accompanying military and overseas voters as spouses or dependents. (Compl, ¶ B-E, p 23.) Plaintiffs do not acknowledge that this change would disenfranchise these voters, and they offer no alternative for these voters to cast ballots. But Plaintiffs' proposed remedies are not workable for numerous reasons, including the fact that they are contrary to federal law. Guidance from the U.S. Department of Justice prevents states from engaging in a program that systematically removes "ineligible" voters from the official lists of eligible voters less than 90 days before an election.[9] That guidance is based on 52 USC 20507(c)(2)(B). Again, had Plaintiffs acted sooner, any necessary program could have been conducted in advance of the 90-day deadline, but to do so now would violate federal law.

[9] See https://www.justice.gov/crt/media/1366561/dl (accessed October 14, 2024).

Moreover, even if were legal to do so, creating and executing a new program to identify and isolate particular voters based on their past residency would be impossible. (Ex C, Brater Aff, ¶29.) Statewide training of clerks and election inspectors has already occurred, and there is no time to retrain election workers statewide on a brand new, complex procedure to identify and separate absent voter ballots based on whether they are a spouse or dependent accompanying a military or overseas voter. This is particularly so when the procedure would require a new reason for ballot rejection. As aptly stated by Director Brater, with only 3 weeks before the election, the focus of election administrators needs to be entirely on administering the election, and not on changing procedures that have existed for decades. *Id.* As of now, more than 2 million ballots have been issued and more than 611,000 have already been returned. (Ex C, ¶28.)

Lastly—and most troubling—these Plaintiffs already knew at the time they filed this complaint that new actions challenging existing instructions for this election were likely barred by laches because this Court has already applied laches to bar relief directed at the November election that these same Plaintiffs filed on *September 18.* On October 3—five days before Plaintiffs filed this new complaint—Court of Claims Judge Brock Swartzle found that Plaintiffs had delayed bringing their challenge to a different part of the Election Officials Manual, and that the Secretary of State had been prejudiced because there was insufficient time before the election to craft an appropriate remedy. (Exhibit D, *RNC, et al v Benson*, COC No. 24-148-MZ, 10/3/2024 Opin & Ord, p 20-22.) The Court accordingly granted summary disposition in part as they pertained to the upcoming election. *Id.*

The Plaintiffs are thus well-aware of the prejudicial effect of delay at this time, but they nonetheless initiated this action less than a month before the election. Plaintiffs' delay is even more egregious here than in the case before Judge Swartzle, as the instruction at issue has not

been revised by the Defendants and has existed continuously for years predating the Defendants' time in office. Plaintiffs make no effort to explain their delay raising these claims, or why the Defendants would not be prejudiced by literal last-minute changes to election procedures during an already on-going election.

Where Plaintiffs unreasonably delayed bringing their challenges to the instructions, and where the Secretary is prejudiced by that delay, Plaintiffs' claims should be dismissed based on laches under MCR 2.116(C)(8) or (10).

## III. Plaintiffs lack standing because they do not have a sufficient interest that is distinguishable from that of the public at large and their alleged harms are hypothetical.

Plaintiffs' complaint does not state any legal causes of action, and instead each count seeks various declarations that the Secretary's instructions conflict with the Michigan Election Law or constitution. Where there is no legal cause of action, a plaintiff must satisfy MCR 2.605, which provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

"The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Lansing Sch Educ Ass'n v Lansing Bd of Educ* (*On Remand*), 293 Mich App 506, 515 (2011) (citation omitted). "An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. Though 'a court is not precluded from reaching issues before actual injuries or losses have occurred,' there still must be 'a present legal controversy, not one that is merely hypothetical or anticipated in the future.' " *League of Women Voters of Michigan v Sec'y of State*, 506 Mich 561, 586 (2020) (internal footnotes and citations omitted). "The essential requirement of the term actual controversy under the rule is that plaintiffs plead and prove facts that demonstrate an adverse

interest necessitating the sharpening of the issues raised." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (citation and internal quotation marks omitted). A litigant may also have standing in this context if they have a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. *Lansing Sch Educ Ass'n v Lansing Bd Of Educ*, 487 Mich 349, 372 (2010). The bar for standing is not lower in election cases. See *League of Women Voters of Michigan*, 506 Mich at 587-588.

Plaintiffs here are the RNC, the MRP, and Clerk Berry. Each of the Plaintiffs allege injury in general terms. Clerk Berry alleges that she has "attempted to reconcile the Secretary's" guidance "against the text of the Michigan Constitution and Michigan Election Law," and will continue to be subject to the guidance in her capacity as clerk. (Compl, ¶ 6, 12-13). She also asserts an interest as a voter in ensuring that her "vote counts and is not diluted." (*Id.*) For its part, the MRP alleges an interest in having elections conducted "in a free, fair, and transparent manner" on behalf of itself and its candidates and members. (Compl, ¶ 7.) Lastly, the complaint states that the RNC supports state parties, such as MRP, by "supporting MRP's efforts to ensure that elections in Michigan are conducted in a free, fair, and transparent manner," as well as to "protect the fundamental constitutional right to vote of the RNC's members and candidates." (Compl, ¶ 8).

In short, each of these Plaintiffs do not assert any claim to legal standing and are instead alleging standing under MCR 2.605 by virtue of a "substantial interest" in having fair elections that are conducted in accordance with the constitution and with the election law. But such an interest is not special or unique to these Plaintiffs, and it is instead shared by all citizens equally. See *Lansing Sch Educ Ass'n*, 487 Mich at 372.

The recent Court of Appeals decision in *Mich Republican Party v Donahue*, __ Mich App __, Docket No. 364048 (Mar 7, 2024) (2024 Mich App LEXIS 1732; 2024 WL 995238) is instructive here. There, the MRP and RNC brought claims challenging the partisan composition of election inspector appointees under Michigan Election Law and similarly alleged they had an interest in having the election law applied correctly. After reviewing the Supreme Court's decisions in both *Lansing Sch Educ Ass'n* and *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629 (1995), the Court of Appeals determined that RNC and MRP lacked standing:

> In *Detroit Fire Fighters*, the plaintiffs had the most to gain from the hiring of new firefighters, but that interest was secondary to the primary goal behind the legislation, which was to provide greater safety to the public. Similarly, in this case, the legislation at issue is helpful to major political parties. But the overall benefit of the statutes falls upon the public at large. *The benefit of election integrity is shared by each member of the public, rather than benefiting major political parties more than the public.* Therefore, plaintiffs do not have a special right or a substantial interest in the enforcement of MCL 168.674(2) and MCL 168.765a(2) that is different from the public and do not have standing to enforce the statutes on that basis. [*Donahue*, 2024 Mich App LEXIS 1732 at *27 (emphasis added).]

Likewise, in this case, the benefits of election integrity, in having "votes counted and not diluted," and in "fair elections" are also shared by all members of the public. So, the interests of the Plaintiffs here are not different from that of the public. The Plaintiffs have not been injured in any unique way, and so they do not have standing to bring these claims.

Insofar as Clerk Berry states that she—in her capacity as a clerk—is obliged to follow the Secretary's instructions, this interest differs from the other plaintiffs. But the problem for Clerk Berry is that her concerns about the instructions are entirely hypothetical. As the Michigan Supreme Court held in *League of Women Voters*, a declaratory judgment is not appropriate where it might only be perhaps needed in the future:

> As the remaining plaintiffs now admit, and the Secretary of State agrees, they cannot show a present legal controversy rather than a hypothetical or anticipated one. A declaratory judgment is not needed to guide plaintiffs' future conduct.

> Plaintiffs only ask for a declaratory judgment because it perhaps may be needed in the future should they decide to sign some initiative. They have no plans now to sign any. Therefore, because plaintiffs do not meet the requirements of MCR 2.605, they do not have standing.

*League of Women Voters of Michigan*, 506 Mich at 586–587. But Clerk Berry's interests—indeed, all the Plaintiffs' claimed interests—are abstract.

Clerk Berry has not identified a single occasion in which she received or accepted a voter registration from an overseas voter who has never lived in Michigan or would not have accepted a registration under the requirements of the constitution or Michigan Election Law. Her concern over being subject to the instructions, therefore, are abstract and unconnected to any practical application of her duties. She has not, then, alleged any actual controversy involving the application of the Secretary's instructions.

Because the Plaintiffs have not alleged any interests that are different from the public at large, and because Clerk Berry's claims are entirely hypothetical and abstract, all Plaintiffs lack standing and the Defendants are entitled to summary disposition under MCR 2.116(C)(8).

## IV. Plaintiffs are not entitled to declaratory relief because the Secretary's instructions do not conflict with the Michigan Constitution or the Michigan Election law.

Here, Plaintiffs' complaint for declaratory relief fails entirely because the Secretary's instructions do not conflict with the Michigan Constitution or the Michigan Election Law.

### A. The instructions are consistent with the constitution and merely restate the requirements of Michigan Election Law as provided in statute.

While not entirely unfettered, the right to vote is fundamental. *Promote the Vote v Sec'y of State,* 333 Mich App 93, 120 (2020). That fundamental right is now enshrined in our constitution. Const 1963, art 2, §4(1)(a). Plaintiffs' complaint disputes the legitimacy of spouses and dependents of military and overseas voters, and casually seeks to disenfranchise voters, apparently on the premise that these voters tend to support a party other than their own.

(Cmplt, ¶10.) Plaintiffs do not recognize or address the fundamental right of these American citizens to vote.

In the sole count of their complaint, Plaintiffs allege that the Secretary's instructions violate the constitution. Plaintiffs rely entirely upon article 2, § 1, which provides in part that "[e]very citizen of the United States . . . who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes." Const 1963, art 2, § 1. Plaintiffs' claim appears to be premised entirely on the first sentence—"resided in this state six months"—while entirely ignoring the second. But, as noted earlier, the "six month" requirement is no longer valid based on U.S. Supreme Court rulings. Plaintiffs' claims are based on an incomplete and inaccurate reading of the state constitution.

Moreover, the Legislature has the constitutional authority to set or waive local residency requirements and to "define residence for voting purposes," and it did so in MCL 168.759a. Subsection 759a(4) provides that the address on the registration form is the "residence" of the registrant. For spouses and dependents of military and overseas voters—when they are U.S. citizens and accompanying that overseas voter—they are, in effect, considered as sharing the same residence shown on the overseas voter's registration. This is demonstrated in MCL 168.759a(19)(a)(iii), which defines "absent uniformed services voter" to include, "A spouse or dependent of a member [of uniformed service on active duty or merchant marine] who, *by reason of the active duty or service of the member*, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote." (Emphasis added). Simply put, these voters are overseas because their spouse, parent, or legal guardian is stationed abroad.

The law, in essence, does not require a spouse or dependent to leave their military or overseas voter behind and live separately in Michigan for a period of time just to qualify to vote. The law simply presumes that the family would reside together with the military or overseas voter but for their duty or obligations overseas. The legislature thus defines the "residence" of these overseas voters for purposes of voting, as authorized by article 2, § 1. Again, this recognition extends only to U.S. citizens who are accompanying a military or overseas voter, and it is tied to the residency and qualification of an existing military or overseas voter.

Defendants' guidance adds nothing to this statutory scheme, and instead simply restates it so as to be understood by elections officials. This is well-within the Secretary's duty and authority to issue instructions. Under the Michigan Election Law, "the Secretary of State shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. In the performance of its duties, the Legislature has designated several general responsibilities that the Secretary "shall do." MCL 168.31(1). These mandatory executive duties include: (1) "issu[ing] instructions and promulgat[ing] rules pursuant to the" APA "for the conduct of elections and registrations in accordance with the laws of this state," MCL 168.31(1)(a); (2) "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections," MCL 168.31(1)(b).

When a statute does not require rulemaking for its interpretation, an agency may choose to issue "interpretive rules," which would fall under the MCL 24.207(h) rulemaking exception as policy statements that give guidance but do not have the force and effect of law. *O'Halloran v Secretary of State,* __ Mich __, 2024 WL 3976495, at *8 (Mich. Aug. 28, 2024). " 'An interpretive rule is any rule an agency issues without exercising delegated legislative power to

make law through rules.' " *Id*., quoting *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240 (1993). An interpretative statement "in itself lacks the force and effect of law because it is the underlying statute that determines how an entity must act, i.e., that alters the rights or imposes obligations."

Here, the Secretary's guidance is entirely interpretive, and does not exceed any of the terms of MCL 168.759a. Instead, the guidance repeats and restates only what the statute already requires. It is the statute that determines how the Defendants—and the local clerks—must act. However, Plaintiffs here do not even challenge the statute, despite the fact that the statute is identical to the Defendants' instruction. Thus, even if the instruction were rescinded, clerks would still be obligated to accept registrations and absent voter ballots from spouses and dependents of military and overseas voters, even if they have not (yet) physically lived in Michigan. The Plaintiffs' requested declaration, therefore, would provide no guidance on future conduct, and would not have any effect on the parties' legal duties or obligations. Plaintiffs are not entitled to declaratory relief, and their claims fail as a matter of law.

## V. This Court should sanction Plaintiffs because their lawsuit is frivolous and vexatious.

Last, Defendants assert that Plaintiffs should be sanctioned for bringing this frivolous lawsuit for two principal reasons: (1) it was knowingly delayed and (2) its pleadings are devoid of legal merit. For the reasons detailed herein, this lawsuit warrants this Court's sua sponte imposition of sanctions. However, should the Court request it, Defendants will file a motion for sanctions.

MCR 1.109(E)(5) provides in relevant part:

> (5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> ***

> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a document is signed contrary to these principles, sanctions must be imposed:

> (6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> (7) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCR 1.109(E)(6) provides that a trial court may impose sanctions "on the motion of a party or on its own initiative." *See also Bradley v. Frye-Chaiken*, No. 164900, 2024 WL 3551258, at *12 (Mich. July 26, 2024), *reh'g denied*, 10 N.W.3d 652 (Mich. 2024). MCL 600.2591 also provides for an award of costs for a frivolous filing, which is defined as:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.

First, Plaintiffs brought this lawsuit with knowledge that its claims are delayed, with no other purpose but to harass and injure Defendants. MCL 600.2591(a)(i). Plaintiffs were already on notice from another decision by this Court that their claims are untimely. (Ex D, *Republican National Committee,* et al*., v. Benson,* et al., Court of Claims No. 24-000148-MZ, p 21, Opn &

Ord, 10/3/24.) Despite having been put on such notice, Defendants brought this lawsuit for the improper purposes of harassing and injuring Defendants.

Plaintiffs brought this lawsuit on October 8, 2024, demanding that Defendant Benson issue new "directives and guidance to local election officials," "update[e] all necessary voter registration forms," and, most extreme of all, fashion a process to "[r]eject the ballots cast by overseas voters," after clerks have already received such ballots. (Compl, p 16, ¶¶ D-E.) In the alternative, Plaintiffs demand that Defendants "segregate ballots cast by overseas voters who have never resided in Michigan," a demand that would require designing a new statewide process and training thousands of election officials in it. (Compl, p 17, ¶ E.)

Any reasonable investigation into Michigan's timelines for voting should have led Plaintiffs to understand that such relief is impossible at this stage. According to state law, ballots must be available for delivery to military and overseas voters by the 45th day before the election. MCL 168.759a; Const, art 2, § 4; 52 USC 20302. This year, that date was September 21, 2024. Since that date, absentee ballots had been sent to military and overseas voters. Put simply, this lawsuit was brought in the middle of an ongoing election.

To make matters worse, Plaintiffs are already on notice that it is too late to file this lawsuit. In an action filed by the same Plaintiffs less than one month ago, this Court issued an order on October 3rd holding, in relevant part, that Plaintiffs did "delay in bringing [that] action." (Ex D, *Republican National Committee,* et al*., v. Benson,* et al., Court of Claims No. 24-000148-MZ, p 21, Opinion and Order dated October 03, 2024.) That action was brought on September 18 in connection with another provision of MCL 168. (*Id.*) This Court aptly explained that "[a]lthough 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." (*Id.*)

If this Court held that an action challenging a long-standing practice brought on September 18, 2024 was delayed, then surely an action brought nearly three weeks later, on October 8, is also delayed. Plaintiffs must know this, as the Court of Claims issued its order in the prior matter on October 3, the week before Plaintiffs filed this lawsuit. (Ex D, *Republican National Committee,* et al*., v. Benson,* et al., Court of Claims No. 24-000148-MZ, p 26, Opinion and Order dated October 03, 2024.)

Due to Plaintiffs' delays, Defendants had only 16 business hours to respond to Plaintiffs' complaint—this despite Plaintiff RNC having issued a press release about this matter *two days* before even serving the Defendants. In such a critical period of the election, Defendants spent precious time staving off Plaintiffs' meritless attacks. But Plaintiffs have been on notice about delay since this Court's October 3rd order. Yet they filed this suit anyway. Plaintiffs continue to file new lawsuits despite being told "no" by this Court. This pattern must stop. Plaintiffs' repeated eleventh-hour actions have burdened the Secretary of State and threatened to interfere with election procedures.

Second, Plaintiffs' claims are frivolous because they are devoid of legal merit. MCL 600.2591(a)(iii). For the reasons previously explained, there are several ways in which Plaintiffs' claims lack legal merit. First, the merits of their claims are beyond the reach of this Court because those claims are barred by Michigan's Court of Claims Act, MCL 600.6431(1), the equitable defense of laches, and Plaintiffs' failure to demonstrate standing. But even if their claims were within this Court's reach, it is clear that those claims are meritless. As previously explained, Plaintiffs have challenged longstanding instructions that simply restate the Michigan

Election Law, instructions that are well within the Secretary's authority to make. *O'Halloran v Secretary of State,* __ Mich __, 2024 WL 3976495, at *8 (Mich. Aug. 28, 2024). Moreover, the constitutional provision on which Plaintiffs rely grants the Legislature the authority to define residence for voting purposes. Worse yet, Plaintiffs did not bother to note that the Michigan Constitution's six-month residency requirement was deemed unconstitutional nearly a half century ago. *See* OAG 1977-1978, No 5356 (August 23, 1978) and *Dunn*, 405 US at 360. Plaintiffs have no credible sources of authority or legal bases for their arguments.

Plaintiffs' claims were not brought in good faith and are simply part of an effort to harass Defendants through the filing of meritless lawsuits. Without consequences, it is certain that Plaintiffs' vexatious conduct will never cease. This Court should therefore sanction Plaintiffs and award Defendant Secretary Benson costs and fees incurred in defense of Plaintiffs' meritless lawsuit.

**CONCLUSION AND RELIEF REQUESTED**

For these reasons, Defendants Secretary of State Jocelyn Benson and Director of Election Jonathan Brater respectfully request that this Honorable Court grant their motion for summary disposition and dismiss the complaint in its entirety and order any other relief the Court determines to be appropriate under the circumstances, including an award of costs, fees, or other sanctions as the Court deems appropriate.

Respectfully submitted,

*/s/Erik A. Grill*

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Dated: October 14, 2024

**PROOF OF SERVICE**

Erik A. Grill certifies that on October 14, 2024, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via MiFILE.

*/s/Erik A. Grill*
Erik A. Grill