STATE OF MICHIGAN

COURT OF CLAIMS

DAN RYAN, PAUL DRISCOLL, JOELLEN M. PISARCZYK, and MYRON ZOLKEWSKY.

Plaintiffs,

v

JOCELYN BENSON,

Defendants.
_____/

OPINION AND ORDER REGARDING PLAINTIFFS' EMERGENCY MOTION FOR IMMEDIATE DECLARATORY JUDGMENT

Case No. 20-000198-MZ

Hon. Christopher M. Murray

This matter is before the Court on plaintiffs' October 7, 2020 emergency motion for immediate declaratory judgment under MCR 2.605.[1]

I. BACKGROUND

Plaintiffs bring this action against defendant Jocelyn Benson, Michigan's Secretary of State. As Secretary of State, defendant is "the chief election officer of the state and has supervisory authority over local election officials." *Citizens Protecting Michigan's Const v Secretary of State*, 324 Mich App 561, 566; 922 NW2d 404 (2018), citing MCL 168.21. In her

[1] Two quick procedural points. First, contrary to defendant's argument, an expedited or "emergency" motion for declaratory relief is permissible under the court rules. MCR 2.605(D). Second, plaintiffs' reply brief, consisting of 20 pages, although not in violation of the court rules, is excessive. Although LCR 2.119(C)(4) incorporates MCR 2.116(G)(1)(a)(iii), and that latter rule only applies to motions for summary disposition, given that rule and the expedited nature of this proceeding, the Court counsels plaintiffs from filing such lengthy reply briefs in the future.

role as chief election officer, defendant shall "[a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). Defendant shall also investigate the administration of election law and report suspected violations of the same to the state's attorney general. MCL 168.31(1)(h).

Plaintiffs' verified complaint alleges that defendant failed to exercise her duty to regulate the conduct of the 2020 general election by failing to prohibit partisan interest groups from funneling grant money to certain local jurisdictions. In particular, plaintiffs allege that a private organization with a partisan agenda, the Center for Tech and Civic Life (CTCL), awarded grants to a select group of Michigan election jurisdictions in an effort to influence the outcome of the November 3, 2020 general election. According to links provided by the parties to the CTCL grant application process, the grants can cover the cost of things like hand sanitizer, personal protective equipment for election officials, voter education, poll workers, and training for poll workers. The complaint alleges that these private funds have been used to pay for printing and distributing absentee ballots and for ballot drop-boxes. The ballot boxes allegedly secured by this funding do not, according to plaintiffs, comply with the requirements mandated by this state's election law.

Specifically, plaintiffs assert MCL 168.666(a) (explaining that the Secretary of State "shall furnish" certain items, including metal seals suitable for sealing ballot boxes "at state expense") and MCL 168.669(b) (requiring cities and township to provide, at their own expense, an approved ballot container) does not permit private organizations to fund the cost of conducting an election. Plaintiffs allege that defendant allowed CTCL to provide funding contrary to this election law, and also did so primarily in electoral jurisdictions that favor one political party over another. And by doing so, plaintiffs allege that defendant has improperly favored the voting rights of individuals based on political preference.

Plaintiffs ask the Court to declare that defendant violated Const 1963, art 2, § 4's "purity of elections" clause, as well as Const 1963, art 1, § 2 (equal protection), by allowing certain jurisdictions to accept private funds for use in the upcoming general election. Meanwhile, other jurisdictions that have not received grant funding must rely on taxpayer funding to conduct the election. Plaintiffs also allege a violation of this state's election law with respect to what they contend are improper absentee ballot boxes. Further, citing media reports, the complaint alleges that the CTCL sent money to the City of Lansing and the City of East Lansing, which those cities used to send absent voter ballot applications to voters. Plaintiffs ask that the Court enjoin defendant from allowing local jurisdictions to accept private funds from groups such as CTCL. Finally, plaintiffs ask the Court to issue a writ of mandamus compelling defendant to "require all contributions of private funds received by local election jurisdictions to be returned to the donor," or to have these purportedly illegal funds distributed on an "equal basis to all election jurisdictions in Michigan on a pro rata basis by the number of registered voters in each jurisdiction."

II. ANALYSIS

Plaintiffs have asked the Court for declaratory, injunctive, and mandamus relief, each of which require the exercise of significant discretion. See *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545; 904 NW2d 192 (2017); *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016); *Martin v Murray*, 309 Mich App 37, 45; 867 NW2d 444 (2015). As will be discussed below, given the numerous material factual disputes surrounding plaintiffs' allegations, the Court declines to exercise its discretion *at this time* to issue the requested relief, particularly with the general election fast approaching. But before addressing those two points that are dispositive of this emergency motion, the Court turns to two potentially dispositive defenses to the case: standing and laches.

A. STANDING

Defendant argues that plaintiff lacks standing. A litigant "may have standing . . . if the litigant has 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 Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). One injury alleged by plaintiffs is that their votes will be diluted or diminished. Defendant argues that plaintiff does not have a special injury or right that will be detrimentally affected in a manner that is different than the citizenry at large. In support, defendant cites cases concerning "vote dilution" and Article III standing in federal court, with some federal district courts explaining that generalized and speculative grievances of "vote dilution" will not suffice to confer standing. See, e.g., *Carson v Simon*, __ F Supp 3d __ (D Minn, 2020).

The difficulty with defendant's argument is that the *LSEA* Court held that Michigan standing jurisprudence is not coterminous with federal standing doctrine, *LSEA*, 487 Mich at 362, and thus the federal decisions under Article III provide no useful guidance. The standards for determining standing in a Michigan court are, for better or worse, much less stringent than the federal standard. *League of Women Voters of Michigan v Secretary of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos 350938 & 351073) (BOONSTRA, J., *concurring*) ("In sum, the restoration of the limited, prudential approach to standing in *Lansing Sch Ed Ass'n* made it *easier* to establish standing, or at least transformed the previously-existing *requirement* of standing into a *discretionary* consideration for the courts."). Here, because plaintiffs have a cause of action for a violation of the equal protection clause, and their rights could be substantially and

detrimentally affected differently than others within the general public,[2] they have standing to bring these claims.

B. LACHES

Plaintiffs' complaint is also not barred by laches, though one issue is. "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). "For laches to apply, inexcusable delay in bringing suit must have resulted in prejudice." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008).

Plaintiffs did not engage in an unreasonable delay in filing this action. In arguing otherwise, defendant directs the Court's attention to CTCL's website, but the information gleaned from that source does not support the application of laches. According to the website, jurisdictions were invited to apply for grants "beginning the week of Tuesday, September 8, 2020." Center for Tech and Civil Life, https://www.techandciviclife.org/our-work/election-officials/grants/ (accessed October 16, 2020). The website indicates that applications would be processed in "about two weeks." *Id*. Disbursement of funds would then ostensibly occur after approval is received. Based on this information,[3] and *assuming* the jurisdictions at issue applied on the first possible day, i.e., September 8, 2020, *presumably* the jurisdictions would have received decisions on their

[2] In their verified complaint plaintiffs allege that the counties in which they reside have not had access to the grant monies that other counties have, thus at least facially meeting this standard.

[3] Relying almost exclusively on what is contained on a website does not give the Court great confidence on what was required at the time any applications from Michigan jurisdictions were made.

applications, at the earliest, sometime around September 22, 2020.[4] Money would have *presumably* been awarded shortly after that, and any purchases of the at-issue equipment or other expenditures would have taken place sometime after that as well. Thus, the expenditures and purchases that are the subject of plaintiffs' complaint would have *most likely* occurred in late September or early October. However, all of this is uncertain because the parties have not provided the Court with more precise and reliable information.

Nevertheless, plaintiffs filed their complaint on or about October 5, 2020. Based on the above timeline, it is not immediately apparent—with one exception noted below—that plaintiffs unnecessarily delayed in bringing this action. And where defendant has raised the issue of laches but has otherwise failed to give the Court meaningful information to analyze the defense, the Court declines to conclude that the entire action should be dismissed based on laches.

However, this conclusion does not apply to plaintiffs' allegations about absent voter ballot applications being sent in the City of Lansing and the City of East Lansing. According to the media report cited in plaintiffs' complaint,[5] the mailing of these ballots was reported to the public on September 11, 2020.[6] It is possible that recipients of those applications filled them out, received their absent voter ballots, and returned them already. The decision to wait nearly a month after

[4] Despite raising laches as a defense, defendant has provided no information about when the applications were approved, or when grant money was awarded.

[5] Again, not the most trustworthy pieces of "evidence", if it can even be properly considered evidence as to the truthfulness of what is contained in the reports. *Baker v Gen Motors Corp*, 420 Mich 463, 511; 363 NW2d 602 (1984).

[6] Given the timeline noted above regarding applications to CTCL and the application process opening on or about September 8, 2020, it is not apparent whether Lansing and East Lansing even received CTCL funding for the absent voter ballot applications.

the applications were sent out, and potentially even after voters returned their ballots, suggests a lack of reasonable diligence. The Court notes that the complaint does not specify the specific relief sought with regard to these applications, if defendant was even involved[7] in sending them, or if the ballot applications were even secured with grant funding, given that they were sent to registered voters mere days after grant applications could even be submitted to the CTCL. Nevertheless, the Court concludes that any relief granted with respect to these would be prejudicial at this late stage, and that laches bars any claim arising out of the absent voter ballot applications.

C. MATERIAL FACTUAL DISPUTES

As to the remaining issues, it is certainly true that both MCL 168.666 and MCL 168.669 require public sources of funding for ballot boxes. However, plaintiffs have asked the Court to grant emergency relief without offering undisputed proof that: (1) ballot boxes were purchased with private grant money and (2), if they were, how many were purchased and by whom. Evidence on at least those issues would likewise help determine whether the state, by disparate treatment, valued one person's vote over another's, *Bush v Gore*, 531 US 98, 104-105; 121 S Ct 525; 148 L Ed 2d 388 (2000), as would evidence about the similarity between the counties receiving private funding and those that did not.[8] Thus, as to the statutory funding claim and equal protection claim as plead, plaintiffs have not identified the extent of the private funding (or really any verification,

[7] Nor does the complaint take stock of the recent decision affirming defendant's own ability to send absent voter ballot applications. See *Davis v Secretary of State*, __ Mich App __, __ ; __ NW2d __ (2020) (Docket No. 354622).

[8] In their reply brief plaintiffs quoted statements purportedly from defendant that could suggest that defendant *encouraged* private funding for certain parts of the state (the specific local jurisdictions outlined by plaintiffs), which *if true* could also be relevant to at least the equal protection claim.

outside of the allegations), and the allegations and limited evidence do not entitle them to the *immediate* relief requested.

The same holds true with respect to plaintiffs' claim rooted in the "purity of elections clause" contained within art 2, § 4. The "purity of elections clause embodies two concepts: " 'first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.' " *Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007), quoting *Socialist Workers Party v Secretary of State*, 412 Mich 571, 596; 317 NW2d 1 (1982) (further citation omitted). As explained in *Currie*, the phrase "requires . . . fairness and evenhandedness in the election laws of this state." *Id*. at 97.

Here, plaintiffs' claims are purportedly rooted in notions of "fairness and evenhandedness." As noted, plaintiffs quoted statements purportedly from defendant that could suggest that defendant encouraged private funding for the specific local jurisdictions outlined by plaintiffs (as well as for other states such as Ohio, Pennsylvania, Wisconsin and Arizona). Additionally, plaintiffs purport to quote defendant speaking about the "outcome" of the election when addressing the use of private funding of local election apparatus, which again, if true, could lend support to a purity of elections problem. But additional facts, and possibly fact-finding by the Court, is necessary before any legal conclusions can be made.

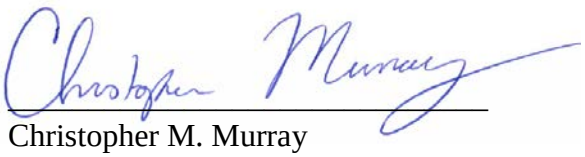
D. COURT INTERFERENCE WITH AN ON-GOING ELECTION

Aside from the material factual issues precluding the grant of the request for an immediate ruling on the merits, another important principle precludes the request for emergency relief. That principle is that, in the context of election-related litigation, courts must be ever-mindful of the

potential for prejudice resulting from court rulings in the days and weeks before an election. This principle has been stated years ago, *Purcell v Gonzalez*, 549 US 1, 4-5; 127 S Ct 5; 166 L Ed 2d 1 (2006), and repeatedly this year. *Republican Nat'l Comm v Democratic Nat'l Comm*, __ US __; 140 S Ct 1205; 206 L Ed 2d 452 (2020) (per curiam); *Andino v Middleton*, __ US __, __; __ S Ct __; __ L Ed 2d __ (U.S. Oct. 5, 2020) (KAVANAUGH, J., concurring in grant of stay); *Little v Reclaim Idaho*, __ US __, __; 140 S Ct 2616, 2616-17; __ L Ed 2d __ (2020) (ROBERTS, C.J., concurring in the grant of stay); *New Democratic Coalition v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972) (refusing to grant relief where doing so would "result in immense administrative difficulties for election officials" before an upcoming election). Voting is underway, drop-boxes (which are permissible under Michigan law) have allegedly already been dispersed in some parts of the state, and to interfere with that process when the election is less than three weeks away would be imprudent. As a result, the Court declines to grant any immediate relief. See *Purcell*, 549 US at 4-5. A scheduling order will soon issue.[9]

Plaintiffs' emergency motion for declaratory judgment is DENIED.

Date: October 16, 2020



Christopher M. Murray
Judge, Court of Claims

[9] These issues will likely not be moot after the election given the shortness of time to actually litigate these important issues. See, e.g., *Castner v Grosse Pointe Park*, 86 Mich App 482, 487; 272 NW2d 693 (1978) ("We will state only briefly that the present controversy is not moot, even though the primary election has since been held, since the issue raised is one that is capable of repetition yet may evade review for the reason that the time period between when nominating petitions are filed and the subsequent election held is normally too short to allow the case to progress fully through the appellate system.").