



October 26, 2022

Mary Clark
President
Michigan Association of Municipal Clerks
120 N. Washington Square, Suite 110A
Lansing, MI 48933

VIA EMAIL

Dear Ms. Clark:

Campaign Legal Center (“CLC”) writes to provide you with information regarding how Michigan municipal clerks’ can properly adjudicate frivolous challenges to voter eligibility under MCL §§ 168.512 and 168.733 to minimize the burden on election administration and protect the rights of voters, including important guidance on limitations imposed by federal law.¹ We respectfully request that you share this information with municipal clerks across the state.

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Consistent with that mission, we have worked with election officials across the nation to improve their administrative policies, protect the freedom to vote of citizens within their jurisdictions, and strengthen the democratic process.

¹ This letter is not legal advice; it is intended to present a summary of relevant Michigan and federal law.

To that end, CLC is concerned about the potential for mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.²

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing unnecessary disruption to the orderly administration of the 2022 elections—particularly in jurisdictions with fewer veteran election officials. Reminding municipal clerks of the rules for voter challenges and their responsibilities in dismissing challenges lodged without cause will ensure a fair and orderly election and will safeguard voters from intimidation.

To mitigate the potential harms to both voters and election administrators caused by such baseless challenges, CLC provides the election law summary below to support your development of uniform processes for adjudicating voter eligibility challenges, in compliance with the following requirements of Michigan and federal law.

I. Voter Challenges in Michigan

As you are aware, Michigan law permits challenges (1) to a voter’s registration before the election and (2) to a voter attempting to cast a ballot under certain circumstances. Such challenges are subject to various limitations, which we have detailed further below.

A. Pre-Election Challenges to Voter Eligibility

Michigan law allows voters to challenge other voters’ registrations. By only considering validly made challenges, rejecting challenges based on impermissible grounds, and adhering to the 30-day statutory requirement before cancelling any voter’s registration, clerks can avoid disenfranchising eligible voters and deter baseless challenges to registrations.

1. Challenge Submission

An elector in a given municipality may challenge the registration of another elector before voting begins *only* by submitting a written affidavit to the clerk of that municipality.³ In order to constitute a valid challenge, the affidavit must “specify the grounds upon which the challenged elector is disqualified.”

² See, e.g., Nick Corasaniti & Alexandra Berzon, *Activists Flood Election Offices with Challenges*, N.Y. Times (Sept. 28, 2022) <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html?action=click&module=RelatedLinks&pgtype=Article> (noting the recent wave of voter eligibility challenges in states such as Michigan, Georgia, and Texas).

³ MCL 168.512.

Furthermore, each challenge must be made at the at the individual voter level.⁴ As such, clerks may not consider batches of names submitted without individualized evidence about specific voters' ineligibility.

2. *Impermissible Bases for Challenges*

Even if a challenge is made following the correct procedure, certain frequently cited bases for pre-election challenges are impermissible and can thus be summarily rejected. These impermissible bases include:

- A voter's presence on the U.S. Postal Service National Change of Address database. Although a clerk's independent verification (not a third-party's claim) that a voter is on the NCOA list may be used as initial reliable evidence that a voter *might* have changed voting residency, the registration cannot be cancelled until the voter has failed to respond to a confirmation notice and has failed to vote for two federal elections.⁵
- A voter's inactive status. An inactive voter designation alone does not cancel a voter's registration, and inactive voters are eligible to vote.⁶
- The voter's Qualified Voter File includes a placeholder date. Some Qualified Voter Files include placeholder dates (for example 01/01/1900) for a voter's effective registration date, because the actual date predates the modern Qualified Voter File or is unknown. These placeholder dates do not affect that voter's eligibility and are not a valid basis for a challenge.⁷

3. *Decision and Processing*

Clerks may consider a pre-election challenge to a voter's registration once they have determined that the challenge has been made by written affidavit and offers individualized evidence of a voter's ineligibility not based on the NCOA database, inactive status, or placeholder date in the voter's Qualified Voter File.

Upon receiving a valid written affidavit, clerks must notify the challenged voter by certified or registered mail.⁸ The challenged voter then has 30 days after the mailing is sent to indicate their eligibility to vote by either oath or

⁴ Letter from Jonathan Brater, Dir., Mich. Bureau of Elections, to Mich. Clerks & Election Dirs. (July 29, 2022).

⁵ *Id.*

⁶ MCL 168.509r.

⁷ Letter from Jonathan Brater, Dir., Mich. Bureau of Elections, to Mich. Clerks & Election Dirs. (July 29, 2022).

⁸ MCL 168.512.

affidavit.⁹ Clerks may only cancel the challenged voter’s registration only *after* the 30 days have elapsed, and only then if the challenged voter fails to indicate their eligibility by oath or affidavit or if the challenged voter’s statements do not show them to be a qualified voter of the municipality.¹⁰

Because the 2022 Michigan General Election is in less than 30 days, pursuant to Michigan law, pre-election challenges to a voter’s eligibility can no longer result in a voter’s removal from the voter roll before the November 2022 general election. Moreover, the National Voter Registration Act (NVRA) prohibits the systematic removal of voters from the registration rolls on the grounds of a change in residence within 90 days of a federal election.¹¹ Sustaining challenges that would result in the cancellation of numerous voters’ registrations at this point could also violate the NVRA.

B. Challenges Made in the Polling Place

Michigan law has detailed procedures in place to govern the use of polling place challenges.¹² Clerks can protect against chaos, disruption, and wrongful disenfranchisement by ensuring that their local boards of election inspectors strictly enforce these procedures at polling places.

1. *Challenger Appointment and Qualifications*

A person may serve as a polling place challenger only if they are registered to vote in Michigan and are provided a challenger credential by a credentialing organization.¹³ Organizations intending to field challengers must apply to do so with the clerk of each county, city, township, or town in which the organization intends to field challengers. These applications must be filed “no less than 20 and no more than 30 calendar days prior to Election Day.”¹⁴ Because the 2022 Michigan General Election is in less than 20 days, clerks

⁹ *Id.*

¹⁰ *Id.*

¹¹ 52 U.S.C. § 20507(c)(2)(A).

¹² See MCL 168.512

¹³ Michigan Bureau of Elections, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*, 13 (May 2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750 (hereinafter *Challenger Appointment, Rights, and Duties*).

Credentialing organizations must be either (1) A political party eligible to appear on the ballot in Michigan; (2) An organized group of citizens interested in the passage or defeat of a ballot proposal being voted on at that election; (3) An organized group of citizens interested in preserving the purity of elections and guarding against the abuse of the elective franchise; or (4) An incorporated organization. *Id.* at 1.

¹⁴ *Id.* at 11.

should deny as untimely any new applications from organizations wishing to appoint challengers.¹⁵

Only two challengers from the same credentialing organization may be present at a precinct conducting in-person voting on Election Day.¹⁶ Under Michigan law, each challenger must present “evidence of [their] right to be present” at the polling place, including “[a]uthority signed by the recognized chairman or presiding officer” of the credentialing organization, the written name of the challenger, and the precinct number for the challenger’s assigned precinct.¹⁷

Each polling location should have an election inspector designated as “challenger liaison,” who will adjudicate challenges and serve as the only election official with whom challengers may communicate. Unless otherwise specified by the challenger liaison is normally the most senior member of the clerk’s staff present at the polling place.¹⁸

In addition to designated polling place challengers, both election inspectors and voters not credentialed as challengers are able to challenge voters in their own precinct.¹⁹ These challenges are “treated and resolved identically to a challenge made by a credentialed challenger.”²⁰

2. *Requirements for Making a Polling Place Challenge*

A challenger may challenge a voter’s eligibility only if the challenger has a good reason to believe the voter in question is not a lawfully registered voter.²¹ These challenges must be made when the voter arrives to vote in person. A polling place challenger thus may not submit batches of names to challenge.

There are only **four permissible bases** for challenges to a voter’s eligibility made in the polling place:

- The person is not registered to vote;
- The person is less than 18 years of age;
- The person is not a United States citizen;

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 7.

¹⁷ MCL 168.732.

¹⁸ Guide at 5.

¹⁹ MCL 168.727

²⁰ *Challenger Appointment, Rights, and Duties* at 15.

²¹ MCL 168.733.

- The person is not a 30-day resident of city or township in which they are attempting to vote as of election day.²²

To bring a permissible challenge, the challenger must cite one of the four permissible challenge bases listed above and explain the reason(s) the challenger holds that belief.²³

As with pre-election challenges to a voter’s registration, the presence of a voter’s address in the NCOA database, a voter’s inactive status, and the fact that the voter’s Qualified Voter File includes a placeholder date are not permissible bases for challenges and should thus not be considered by the challenger liaison.²⁴

Additional impermissible bases include a challenger’s mere “impression” that the voter may not be eligible to vote “due to the voter’s manner of dress, inability to read or write English, perceived race or ethnic background or need for assistance with the voting process” or “due to any physical or mental disability that the voter may have or is perceived to have.²⁵

3. Decision and Processing

Impermissible challenges: If the election inspector determines that a challenge is impermissible, they must not consider the challenge. They need only record the challenge and warn the challenger that their challenge is impermissible.²⁶

Permissible challenges: If a challenge to a voter’s ineligibility is deemed to be permissible based on one of the four permissible bases listed above, an election official must swear in the challenged voter, and ask them under oath to confirm that they meet the criteria to be eligible to cast a ballot.²⁷ The election official questioning the voter may only ask questions necessary to confirm that they meet the criteria disputed by the challenger.²⁸

If the voter confirms that they are eligible to vote, they must be given a challenged ballot and allowed to cast the ballot in the same manner as an

²² Letter from Jonathan Brater, Dir., Mich. Bureau of Elections, to Mich. Clerks & Election Dirs. (July 29, 2022).

²³ *Challenger Appointment, Rights, and Duties* at 12.

²⁴ Letter from Jonathan Brater, Dir., Mich. Bureau of Elections, to Mich. Clerks & Election Dirs. (July 29, 2022); *Challenger Appointments, Rights, and Duties* at 13.

²⁵ *Challenger Appointment, Rights, and Duties* at 12.

²⁶ *Challenger Appointments, Rights, and Duties* at 13.

²⁷ *Id.*

²⁸ *Id.*

unchallenged voter.²⁹ Election officials must record the challenge and the challenge’s outcome in both the electronic and written poll book.

A challenge may only be accepted if a challenger brings a permissible challenge and the voter then does not confirm that they are eligible to vote. In these rare cases, the voter may not cast a ballot.³⁰ These denials are automatically recorded in the poll book.³¹

II. Other Legal Requirements

As you know, both federal and Michigan law provide robust protection against voter intimidation and other forms of infringement on the fundamental right to vote. The process for responding to voter challenges—especially those conducted *en masse*—must therefore comply with all federal and state laws, as well as the U.S. Constitution. As such, we want to reiterate that all municipal clerks have the responsibility and discretion to protect Michigan voters from baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.

A. Racially Discriminatory Challenges

Organized challengers frequently target voters from marginalized communities in an attempt to intimidate or deter members of those communities from voting.³² Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment³³ and Section 2 of the Voting Rights Act³⁴ prohibit the use of voting practices that result in citizens being denied equal access to the democratic process on account of “race, color, or membership in a language minority group.”³⁵ Since these are often the exact groups targeted by discriminatory challenges, clerks and other local elections officials should consider carefully whether granting mass challenges brought before them would have the effect of unlawfully disadvantaging voters because of their race.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 15.

³² See, e.g., Nicolas Riley, Brennan Ctr. for Just., *Voter Challenges* 11-12 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.

³³ U.S. Const. amend XIV, § 1.

³⁴ 52 U.S.C. 10301

³⁵ See U.S. Dept. of Justice, *Guidance Under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, for Redistricting and Methods of Electing Government Bodies* (Sept. 1, 2021) <https://www.justice.gov/opa/press-release/file/1429486/download>.

B. Voter Intimidation

Baseless mass challenges to voter eligibility could constitute voter intimidation, since such challenges are often made in bad faith to deter eligible citizens—including members of historically marginalized groups—from voting. Such voter intimidation is illegal under both federal and Michigan law.

Federal law provides that anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote” in a federal election has committed a federal crime.³⁶ Additionally, several federal statutes impose civil liability for voter intimidation. For example, Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.”³⁷ And Section 2 of the Ku Klux Klan Act of 1871 makes it unlawful for “two or more persons to conspire to prevent by force, intimidation, or threat,” any voter from casting a ballot for the candidate of his or her choice.³⁸

Similarly, Michigan law criminalizes the use of “bribery, menace, or other corrupt means or device, either directly or indirectly” to “deter [an] elector from, or interrupt the elector from giving his or her vote at any election held in this state.”³⁹ Of particular note, Michigan law provides that “any person” bringing a pre-election voter qualification challenge “indiscriminately and without good cause or for the purpose of harassment, shall be guilty of a misdemeanor.”⁴⁰ Challengers bringing election day challenges against a “qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters” are likewise “guilty of a misdemeanor.”⁴¹

Each board of election inspectors “shall possess full authority to maintain peace, regularity and order” at their polling place and to “enforce obedience to their lawful commands” during the election and canvas of the votes after voting has closed.”⁴² This duty includes “directing a challenger who violates these instructions to leave the polling place, or absent voter processing facility” and “requesting that the local clerk or local law enforcement remove the voter.”⁴³ Offenses meriting removal from the polling place or absent ballot voter

³⁶ 18 U.S.C. § 594.

³⁷ 52 U.S.C. § 10307(b).

³⁸ 42 U.S.C. § 1985(3).

³⁹ MCL § 168.932.

⁴⁰ MCL § 168.512.

⁴¹ MCL § 168.727.

⁴² MCL § 168.678.

⁴³ *Challenger Appointment, Rights, and Duties* at 4.

processing facility include “repeated impermissible challenges” rising to the level of disorderly conduct.⁴⁴

To that end, each municipal clerk and local board of election inspectors should review their duties and responsibilities to maintain a peaceful and orderly polling place and be prepared to remove any challengers who fail to abide by Michigan law. Clerks and boards of election inspectors should also not hesitate to refer incidents of voter intimidation, including repeated impermissible voter challenges orchestrated by partisan outside groups, to the Michigan Attorney General’s Office⁴⁵ and U.S. Department of Justice (DOJ).⁴⁶

C. Uniform and Nondiscriminatory Standards

The Constitution requires that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.⁴⁷ For example, in the 2000 presidential election, the Supreme Court found unconstitutional a process by which Florida counties “used varying standards to determine what was a legal vote[.]”⁴⁸

Municipal clerks should work to eliminate any meaningful divergence among them in the standards and processes used to evaluate voter challenges in different municipalities and replace them with uniform standards and processes. By doing so, Michigan’s challenge voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the Constitution.⁴⁹

By ensuring compliance with the processes, requirements, and limitations of Michigan’s voter challenge laws, you can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. This summary of the relevant law should help you to prepare proactively to develop written procedures and policies for adjudicating such challenges and train your staff,

⁴⁴ MCL 168.733(3); *Challenger Appointment, Rights, and Duties* at 11.

⁴⁵ The Civil Rights & Elections Division of the Michigan Attorney General’s Office can be reached at 313-456-0200.

⁴⁶ The DOJ Civil Rights Division can be reached at 800-253-3931, and voter intimidation reports can be submitted online at <https://civilrights.justice.gov/report>. More information on DOJ’s resources to protect voting access can be found at <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote>.

⁴⁷ *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (finding that the lack of uniform standards across counties for when to count a ballot violates the Constitution’s Equal Protection Clause).

⁴⁸ *Id.* at 107.

⁴⁹ *Bush*, 531 U.S. at 104-05.

volunteers, and election inspectors on the requirements of Michigan and federal law applicable to voter eligibility challenges.

Please do not hesitate to reach out with any questions. We stand ready to assist you in upholding federal and state law and protecting Michiganders' freedom to vote.

Sincerely,

Jonathan Diaz

Senior Legal Counsel, Voting Rights

Campaign Legal Center

1101 14th St NW, Ste. 400

Washington, DC 20005

jdiaz@campaignlegalcenter.org