



September 30, 2024

VIA EMAIL

Dear Michigan Clerks and Election Directors:

Campaign Legal Center (CLC) writes to provide you with information regarding how Michigan's 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

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.

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

In recent election cycles, partisan actors have relied on faulty databases to bring hundreds of thousands of challenges to voter eligibility across the nation.³ These

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

² See, e.g., Nick Corasaniti & Alexandra Berzon, *Trump's Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html> (noting the recent wave of voter eligibility challenges in states such as Georgia, Michigan, and Nevada); David Gilbert, *Election Deniers are Ramping Up Efforts to Disenfranchise Voters*, Wired (Jul. 31, 2024), <https://www.wired.com/story/election-deniers-efforts-disenfranchise-voters>.

³ See Robyn Sanders & Alice Clapman, *Protections Against Mass Challenges*, Brennan Ctr. for Just. (July 17, 2024), <https://www.brennancenter.org/our-work/research-reports/protections-against-mass-challenges-voter-eligibility>. One common database is Eagle AI, which experts

databases attempt to match voter registration records with publicly available information, but that information is almost always incomplete or out of date, making the database matches unreliable.⁴ They also often improperly flag registered voters with the same name as ineligible individuals, voters who are temporarily staying in another place but remain qualified at the address at which they are registered, and households where some but not all residents have moved.⁵ As a result, mass challenge lists almost always include significant numbers of eligible voters who should not be removed from the rolls.⁶

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 2024 elections. We recognize that many election offices have lost their most experienced officials because of threats and volatility in the wake of the 2020 election and that this will be the first presidential election for new staff. We hope this letter will assist you as you provide guidance to your staff and volunteers regarding the rules for voter challenges and their responsibilities in dismissing challenges without cause, allowing your office to ensure a fair and orderly election, safeguard voters from intimidation, and minimize administrative disruption.

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 likely aware, Michigan law permits challenges (1) to a voter's registration before the election⁷ and (2) to a voter attempting to cast a ballot under certain circumstances.⁸ 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 voter's registrations. By only considering validly made challenges that comply with the law, 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.

have criticized for its frequent identification of eligible voters as ineligible. *See* Alice Clapman & Andrew Garber, *A New Antidemocracy Tool*, Brennan Ctr. for Just. (Sept. 5, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/new-antidemocracy-tool>.

⁴ *See* Sanders & Clapman, *supra* note 3.

⁵ *See id.*

⁶ *See id.*

⁷ *See* MCL 168.512.

⁸ *See id.* 168.727.

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 stating that the challenged elector is not qualified to vote.⁹ In order to constitute a valid challenge, the affidavit must “specify the grounds upon which the challenged elector is disqualified.”¹⁰ For a challenge to a voter’s eligibility to be valid, the challenger must state that the challenger *knows* that the challenged voter is ineligible and must state why.¹¹ If a challenger merely knows of some reliable information that the voter may have changed addresses, that is insufficient to satisfy this first-hand knowledge requirement.¹² **Bulk challenges based solely on either door-to-door canvassing or change-of-address data from the U.S. Postal Service National Change of Address (NCOA) database do not meet the first-hand knowledge requirement and must be rejected.**

Furthermore, each challenge must be made at the individual voter level.¹³ As such, clerks may not consider batches of names submitted without individualized evidence about specific voters’ alleged ineligibility.

2. Invalid Challenges

Even if a challenge is made following the correct procedure, certain frequently cited types of information supporting pre-election challenges are invalid. Challenges relying on the following information can be summarily rejected:

- A voter’s presence on the NCOA 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.¹⁴
- A voter’s inactive status. An inactive voter designation alone does not cancel a voter’s registration, and inactive voters are eligible to vote.¹⁵

⁹ *Id.* 168.512.

¹⁰ *Id.*

¹¹ Michigan Bureau of Elections, *Election Officials Manual Addendum: Voter Registration Cancellation, Challenge, Correction* 6 (Sept. 2024), <https://www.michigan.gov/sos/-/media/Project/Websites/sos/01mcalpine/Addendum-Voter-Registration-Cancellation-Challenge-Correction.pdf?rev=2bd6b821b8bb48d19b89b145bfe97f76&hash=07EBFB5521344A8C2B6DF3C4F0DB1AE0> [hereinafter Manual Addendum].

¹² *Id.*

¹³ Letter from Jonathan Brater, Dir., Mich. Bureau of Elections, to Mich. Clerks & Election Dirs. (Feb. 12, 2024), https://content.govdelivery.com/attachments/MISOS/2024/02/12/file_attachments/2781012/Letter%20to%20Clerks%2002_12_2024.pdf [hereinafter 2024 Brater Letter]; *see also* Letter from Jonathan Brater, Dir., Mich. Bureau of Elections, to Mich. Clerks & Election Dirs. (July. 29, 2022), https://content.govdelivery.com/attachments/MISOS/2024/02/12/file_attachments/2781012/Letter%20to%20Clerks%2002_12_2024.pdf [hereinafter 2022 Brater Letter] (July 29, 2022, letter attached on p. 5-6).

¹⁴ *Id.*; *see also* 52 U.S.C. 20507(c)-(e) (National Voter Registration Act of 1993).

¹⁵ MCL 168.509r.

- The fact that 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.¹⁶

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 based on first-hand knowledge. Pre-election challenges based on the NCOA database, inactive status, or the presence of a placeholder date in the voter’s Qualified Voter File must be summarily rejected.¹⁷

Upon receiving a valid written affidavit, clerks must notify the challenged voter by certified or registered mail.¹⁸ The challenged voter then has 30 days after the mailing is sent to indicate their eligibility to vote by either oath or affidavit.¹⁹ 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.²⁰

In the event that the Michigan General Election is less than 30 days after the date of the challenge, 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 2024 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.²¹ Sustaining challenges that would result in the systematic cancellation of numerous voters’ registration based on the same data sources could also violate the NVRA if conducted within the 90-day window.²² **Even if a clerk is able to independently verify the NCOA change-of-address data used in a bulk challenge, they may not rely on it to initiate the process of cancelling a voter’s registration during the 90-day period before the general election.**²³

B. Challenges Made in the Polling Place

Michigan law likewise has detailed procedures in place to govern the use and adjudication of polling place challenges.²⁴ Clerks can protect against chaos,

¹⁶ 2022 Brater Letter.

¹⁷ *See id.*; 2024 Brater Letter.

¹⁸ MCL 168.512.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 52 U.S.C. § 20507(c)(2)(A).

²² *See, e.g., Arcia v. Fla. Sec’y of State*, 772 F.3d 1335 (11th Cir. 2014).

²³ *Id.*

²⁴ *See* MCL 168.512.

disruption, and wrongful disenfranchisement by ensuring that their local boards of election inspectors strictly enforce these procedures at polling places.

1. *Requirements for Making a Polling Place Challenge*

In addition to designated polling place challengers,²⁵ both election inspectors and voters not credentialed as challengers are able to challenge voters in their own precinct.²⁶ These challenges are “treated and resolved identically to a challenge made by a credentialed challenger.”²⁷

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.²⁸ These challenges must be made when the voter arrives to vote in person to the challenger liaison.²⁹ A polling place challenger thus may not submit batches or lists 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;
- The person is not a 30-day resident of city or township in which they are attempting to vote as of election day.³⁰

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.³¹

As with pre-election challenges to a voter’s registration, 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.³²

²⁵ 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. Only two challengers from the same credentialing organization may be present at a single precinct conducting in-person voting on Election Day. 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. See MCL 168.732; 168.733; see also Michigan Bureau of Elections, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* 3-7 (Sept. 2024), <https://www.michigan.gov/sos/elections/voting/-/media/8ACA8241951848F7B482A73E73F466E3.ashx> [hereinafter *Challenger Manual*].

²⁶ MCL 168.733.

²⁷ *Challenger Manual* at 15.

²⁸ MCL 168.733.

²⁹ *Challenger Manual* at 9-10; 13-14.

³⁰ *Challenger Manual* at 11.

³¹ *Id.* at 12.

³² *Id.* at 11-13; *c.f.* 2022 Brater Letter at 1.

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.³³

2. *Decision and Processing*

Impermissible challenges: If the election inspector/challenger liaison determines that a challenge is impermissible, they must not evaluate the challenge.³⁴ Examples of impermissible challenges include: lack of photo ID, improper reasons outside of the four permissible reasons, non-specific challenges, or challenges that don’t include an explanation for their factual basis.³⁵ Generally, challenger liaisons are not required to record an impermissible challenge.³⁶ However, in circumstances where a challenger provides an explanation of the factual basis for their challenge, “an election inspector cannot decline to record on the basis that they believe the explanation provided is lacking or insufficient.”³⁷ Otherwise, challenger liaisons are empowered to determine whether a challenge is not permissible, such that they are not required to report it.³⁸ Additionally, challenger liaisons may warn the challenger that their challenge is impermissible.³⁹ Fundamentally, challenger liaisons “should prioritize the orderly and regular administration of the election process over noting an impermissible challenge.”⁴⁰

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.⁴¹ The election official questioning the voter may only ask questions necessary to confirm that they meet the criteria disputed by the challenger.⁴²

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 unchallenged voter.⁴³

³³ Challenger Manual at 12.

³⁴ *Id.* at 10.

³⁵ *Id.* at 12-13.

³⁶ *Id.* The validity of this directive in the 2022 Challenger Manual was upheld by the Michigan Supreme Court in *O’Halloran v. Sec’y of State*, No. 166424, 2024 WL 3976495, (Mich. Aug. 28, 2024).

³⁷ *O’Halloran*, 2024 WL 3976495 at *16.

³⁸ *Id.* (“In sum, while election inspectors have implicit authority to determine whether a challenge is one under MCL 168.727(1) such that they are required to report it, they cannot decline to report a challenge on the basis of their personal assessment of the validity or merit of the challenge.”)

³⁹ Challenger Manual at 12.

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 13-14.

⁴² *Id.* at 14.

⁴³ *Id.* at 13-14.

Election officials must record the challenge and the challenge’s outcome in both the electronic and written poll book.⁴⁴

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.⁴⁵ In these rare cases, the voter may not cast a ballot.⁴⁶ These denials are automatically recorded in the poll book.⁴⁷

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 in bulk—must therefore comply with all federal and state laws, as well as the U.S. Constitution. As such, all Michigan election officials have the responsibility 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.⁴⁸ Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment⁴⁹ and Section 2 of the Voting Rights Act⁵⁰ 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.”⁵¹ Because 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.

B. Voter Intimidation

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

⁴⁴ *Id.* at 14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 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.

⁴⁹ U.S. Const. amend XIV, § 1.

⁵⁰ 52 U.S.C. § 10301.

⁵¹ 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>.

crime.⁵² Additionally, several federal statutes impose civil liability for voter intimidation. 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.”⁵³ In 2016, a federal court determined that voter challenges that intentionally target geographic areas with a large percentage of racial or ethnic minorities and that had the purpose or effect of deterring qualified members of those minority groups from voting violated a court order in a case involving claims under Section 11(b).⁵⁴ Further, the U.S. Department of Justice has cautioned that challenges made with the intention of or that have the effect of intimidating a reasonable voter can violate Section 11(b).⁵⁵ And 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 their choice.⁵⁶

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.”⁵⁷ 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.”⁵⁸ 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.”⁵⁹

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.”⁶⁰ This duty includes “directing a challenger who violates these instructions to leave the polling place, early voting site, or absent voter ballot processing facility” and “requesting that the local clerk or local law enforcement remove the challenger.”⁶¹ Offenses meriting removal from the polling place or absent ballot voter processing facility include “repeated impermissible challenges” rising to the level of disorderly conduct.⁶²

To that end, each municipal clerk and local board of election inspector should review their duties and responsibilities to maintain a peaceful and orderly polling place and

⁵² 18 U.S.C. § 594.

⁵³ 52 U.S.C. § 10307(b).

⁵⁴ See *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. CV 81-03876, 2016 WL 6584915, at *2 (D.N.J. Nov. 5, 2016).

⁵⁵ See *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act*, 52 U.S.C. § 20507, U.S. Dept. of Justice at 3 (Sept. 2024), <https://www.justice.gov/crt/media/1366561/dl> [hereinafter “DOJ Guidance”].

⁵⁶ 42 U.S.C. § 1985(3).

⁵⁷ MCL 168.932.

⁵⁸ *Id.* 168.512.

⁵⁹ *Id.* 168.727.

⁶⁰ *Id.* 168.678.

⁶¹ Challenger Manual at 4.

⁶² MCL 168.733(3); Challenger Manual at 10, 12.

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 Office⁶³ and U.S. Department of Justice (DOJ).⁶⁴

C. Uniform and Nondiscriminatory Standards

The U.S. Constitution and federal law require that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.⁶⁵ Under the U.S. Constitution, counties in the same state are prohibited from “us[ing] varying standards to determine what [i]s a legal vote” when processing ballots in presidential elections.⁶⁶ Similarly, the NVRA mandates that any voter registration list maintenance activity be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act[.]”⁶⁷ including “any list maintenance activity based on third party submissions.”⁶⁸ The U.S. Department of Justice has advised that numerous list maintenance methods commonly used in mass voter eligibility challenges might violate the NVRA, including “comparing voter files to outdated or inaccurate records or databases, taking action that erroneously affects a particular class of voters (such as newly naturalized citizens), or matching records based solely on first name, last name, and date of birth.”⁶⁹

The NVRA further mandates that election officials may not “systematically remove” ineligible voters from voter registration rolls within 90 days preceding an election for federal office.⁷⁰ According to the U.S. Department of Justice, this restriction “applies to list maintenance programs based on third-party challenges derived from any large, computerized data-matching process.”⁷¹

Local election officials should work to eliminate any meaningful divergence 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 voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the U.S. Constitution.⁷²

⁶³ The Civil Rights & Elections Division of the Michigan Attorney General's Office can be reached at 313-456-0200.

⁶⁴ 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://civilrights.justice.gov/voting-resources>.

⁶⁵ 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).

⁶⁶ *Id.* at 107.

⁶⁷ 52 U.S.C. § 20507(b).

⁶⁸ DOJ Guidance at 3.

⁶⁹ *Id.*

⁷⁰ 52 U.S.C. § 20507(b)(1).

⁷¹ DOJ Guidance at 4.

⁷² *Bush*, 531 U.S. at 104-05.

D. Removals Based on Change of Address

The NVRA strictly regulates the process for removing a registered voter from the voter registration rolls based on suspected change of address, including when removals are triggered by mass voter eligibility challenges.⁷³ Election officials may only remove a voter from the list of registered voters based on change in residence when: (1) the voter confirms in writing that they have moved outside of the jurisdiction; or (2) election officials have satisfied the process outlined in Section 8(d)(2) of the NVRA.⁷⁴ The United States Department of Justice has cautioned that “[a] third-party submission—such as a submission of another individual’s information via an online portal or a challenge based solely on public database information—is not confirmation by the registrant of a change of address.”⁷⁵ Consequently, **removing individuals from the list of registered voters due to suspected change of address on the basis of mass voter eligibility challenges alone likely violates the NVRA.**⁷⁶

* * *

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

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⁷³ See 52 U.S.C. § 20507(b); DOJ Guidance at 4-6.

⁷⁴ See 52 U.S.C. § 20507(b)-(d); DOJ Guidance at 4. The DOJ Guidance also provides detailed information on the requirements of Section 8(d)(2). Election officials may only remove a voter under Section 8(d)(2) of the NVRA if that voter: (1) does not vote in any election between the date the notice was sent and the second general election following the notice; and (2) does not respond to the notice. 52 U.S.C. § 20507(d)(2).

⁷⁵ DOJ Guidance at 4.

⁷⁶ *Id.* at 4-5.