

**STATE OF MICHIGAN
IN THE SUPREME COURT**

DONALD J. TRUMP FOR
PRESIDENT, INC., and
ERIC OSTERGREN,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official
capacity as SECRETARY OF STATE,

Defendant-Appellee.

Supreme Court No.:
Court of Appeals No.: 355378
Court of Claims Case No.: 20-000225-MZ

This appeal involves an emergency election issue that has significant public interest and the case is one by or against an officer of the state in the officer's official capacity.

ORAL ARGUMENT REQUESTED

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**MOTION FOR IMMEDIATE CONSIDERATION OF APPEAL
UNDER MCR 7.311(E)**

President Trump's campaign committee and Eric Ostergren (the Plaintiffs) ask this Court to grant immediate relief under MCR 7.311(E) of the December 4 order of the Michigan Court of Appeals denying their application for leave to appeal the order of the Court of Claims. Immediate consideration is necessary because this case concerns the designation of those individuals Michigan selects to represent the State of Michigan and Michigan voters in the Electoral College on December 14. Michigan law provides that challengers monitor the conduct of the election and

observe (and where appropriate, challenge) the processing and tallying of absent voter ballots. See MCL 168.730-168.734.

A political party, incorporated organization, or organized committee of interested citizens may designate one “challenger” to serve at each counting board. MCL 168.730. An election challenger appointed under MCL 168.730 has those responsibilities described in MCL 168.733, including the opportunity to observe the manner in which the duties of the election inspectors are being performed and opportunity to challenge an election procedure that is not being properly performed. MCL 168.733(1)(b) and (d).

Secretary of State Jocelyn Benson did not direct local election officials (election inspectors) to allow challengers a meaningful opportunity to observe the processing and adjudicating of ballots, nor did Secretary Benson allow challengers to observe video recordings of remote unattended voter ballot drop off boxes.

The Plaintiffs brought suit in the Court of Claims asking the court to order Secretary Benson to order the local election officials under her jurisdiction and supervision to grant challengers an opportunity to meaningfully review the processing of ballots and to review the video surveillance of the remote ballot drop off boxes. The Court of Claims erred by denying this relief.

For reasons explained more fully in the accompanying brief, Judge Stephens wrongly believed this matter required the voters and challengers to adjudicate this issue by filing individual lawsuits in dozens of Circuit Courts against each of the 1,603 county and local election officials in Michigan. Judge Stephens failed to appreciate that Secretary of State Benson is the “chief election officer” responsible for overseeing the conduct of Michigan elections. MCL 168.21 (“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.”); 168.31(1)(a) (the “Secretary of State shall ... issue instructions and promulgate rules ... for the conduct of elections and registrations in accordance with the laws of this state”). Local election officials must follow Secretary Benson’s instructions regarding the conduct of elections. Michigan law provides that Secretary Benson “[a]dvice and direct local election officials as to the proper methods of conducting elections.” MCL 168.31(1)(b). See also *Hare v Berrien County Board of Election*, 373 Mich 526, 529-30; 129 NW2d 864 (1964); *Davis v Secretary of State*, 2020 Mich App LEXIS 6128, at *9 (Sep. 16, 2020). Thus, when Judge Stephens held “the requested relief could [not] issue against the Secretary of State,” Judge Stephens was wrong. See Appx. 7a. Secretary Benson is the proper party, and Secretary Benson is Michigan’s chief election officer responsible for overseeing the conduct of this election.

Judge Stephens was also wrong when she held this case was moot. Judge Stephens was wrong to believe this case was moot because the counting of ballots “is now complete.” Appx. 7a. This action was filed on November 4, the day after the election, when Wayne County was still processing ballots. See Appx. 12a. While it may be true that by the time Judge Stephens held a hearing on the afternoon of November 5, the initial counting of absent voter ballots had been largely completed, the work of the election inspectors was still ongoing and the preliminary ballot tallies had not yet been provided to the Wayne County board of county canvassers. Additionally, at the time of the hearing, the overseas and military absent voter ballots had not yet been processed or tallied. Thus, the premise upon which Judge Stephens concluded the litigation was moot was false.

Contrary to Judge Stephens’ order and contrary to Judge Borrello and Judge Krause of the Court of Appeals, this case is not moot. As Judge Meter explained in his dissent, “[t]he issues are

not moot because state electors have not yet been seated, the Electoral College has not yet been assembled, and Congress has not yet convened to consider whether to exercise its powers under Art. 2, Sec. 1 and Am. 20.” Appx. 2a.

This election is still not over, and the Electoral College does not meet until December 14. Additionally, there are countless opportunities for the issues brought up in this case to arise again. Michigan conducts a presidential election every four years, United States House of Representatives elections occur every two years, and United States Senate elections every six years. Michigan state and local governments conduct their own elections even more frequently. The Electoral College will meet on December 14. Therefore, this Court must immediately consider this appeal. As Judge Meter also stated, “plaintiff[s]’ prayer for segregation of absentee ballots has, on information, not yet been ordered by defendant Secretary of State. Also, the right of plaintiff[s] to election inspectors and to observe video of ballot drop boxes is self-evident under state law, thus entitling plaintiff[s] to, at the least, declaratory relief.” *Id.*

Secretary of State Benson violated the Michigan Constitution and Michigan election law by allowing ballots to be processed and counted without bipartisan teams of inspectors and by not ensuring that challengers from candidates and interested organizations have opportunity to meaningfully observe and challenge the processing of ballots as provided in Michigan election code 168.730, *et seq.* Secretary Benson’s actions and her failure to act have undermined the constitutional right of all Michigan voters – including the credentialed and qualified challenger bringing this action – to participate in fair and lawful elections. Michigan citizens’ constitutional rights are being violated by Secretary Benson’s failure to prevent unlawful ballots to be processed and her failure to ensure that statutorily-authorized challengers have a meaningful opportunity to observe and challenge the process.

Accordingly, we ask this Court to immediately consider this appeal and grant the declaratory relief requested.

Dated: December 7, 2020

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on December 7, 2020, he served the foregoing Motion for Immediate Consideration via email and by means of the Court's electronic filing system to Erik A. Grill, Assistant Attorney General, Civil Litigation, Elections, & Employment Division at grille@michigan.gov, and Heather Meingast, Assistant Attorney General, at meingasth@michigan.gov.

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