STATE OF MICHIGAN
IN THE SUPREME COURT

PHILIP M. O'HALLORAN, M.D., BRADEN GIACOBAZZI, ROBERT CUSHMAN, PENNY CRIDER, and KENNETH CRIDER,

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

RICHARD DEVISSER, MICHIGAN REPUBLICAN PARTY, and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

_____/

Supreme Court Case No. 164955

Court of Appeals Case No. 363503

Court of Claims Case No. 22-000162-MZ

BRIEF OF PROPOSED AMICI CURIAE CITIZENS UNITED, CITIZENS, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION IN OPPOSITION TO STATE DEFENDANT'S REQUEST FOR STAY PENDING APPEAL

Court of Appeals Case No. 363503

Court of Claims Case No. 22-000164-MZ

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The appeal involves a ruling that a provision of the constitution, a statute, rule or regulation, or other state governmental action is invalid.

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STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and *amici* in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Petitioner, *Percoco v. United States*, No. 21-1158 (U.S. Sept. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Petitioners, *Moore, et al. v. Harper, et al*, No. 21-1271 (U.S. Sept. 6, 2022); Brief of Citizens United and Citizens United Foundation as *Amici Curiae* in Support of Respondent, *Sec. and Exch. Comm'n v. Cochran*, No. 21-1239 (U.S. Jul. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research, and informing and educating the public on the proper

[1] No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization founded to educate the American public on the value of having principled leadership at all levels of government.

SUMMARY OF THE ARGUMENT

Over a century ago, Justice Brandeis wrote "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis Brandeis, *Other People's Money and How Bankers Use It* (1914), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v. Consistent with Justice Brandeis' counsel, the Michigan Legislature provided that interested parties, including "a political party," "an incorporated organization or organized committee of citizens interested in the adoption or defeat of a ballot question being voted for or upon at the election," and an incorporated organization or organized committee of citizens "interested in preserving the purity of elections and in guarding against the abuse of the elective franchise, may designate challengers as provided in this act." MCLA § 168.730(1). This statute aims to inspire confidence in Michigan's elections by shining sunlight on Michigan's electoral process, allowing both the winners and losers of any given election to rest assured that electoral outcomes are driven by the will of the voters, not intentional or unintentional procedural chicanery.

The Michigan Bureau of Elections' manual undercuts this statutory objective by imposing unnecessary and unjustified restrictions upon Michigan election challengers. Michigan Bureau of Election, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers* (May 2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/01vanderroest/SOS_ED_2_CHALLENGERS.pdf?rev=96200bfb95

184c9b91d5b1779d08cb1b&hash=2CE1F512E8D7E44AFAF60071DD8FD750 ("May 2022 Manual"). Worse, it does so without going through the proper processes to give the people of Michigan an opportunity to weigh in with their opinion. Accordingly, the Court of Claims reached the correct outcome: the Michigan Bureau of Elections exceeded its authority with respect to several provisions of the May 2022 Manual.

In response, some, such as the Clerk of the City of Detroit, argue that this Court should stay the Court or Claims' ruling. Doing so would be a mistake. *See* Brief of Proposed Amicus Curiae Janice M. Winfrey, in her Official Capacity as Clerk of the City of Detroit, in Support of State Defendants' Request for Stay Pending Appeal, *O'Halloran, et al. v. Benson, et al.*, Supreme Court Case No. 164955 (Oct. 28, 2022) ("City of Detroit Brief"). First, the Court of Claims got the law right – the Bureau of Elections exceeded its authority. Second, the public interest favors a transparent election process, which is best served by rejecting the Bureau's *ultra vires* restrictions and doing so without delay. Third, the City of Detroit understates the benefits of the Court of Claims ruling and overstates the potential downsides.

ARGUMENT

I. The Public Interest Favors Transparency in Election Administration

The public interest favors transparency in elections. Transparency promotes confidence in the integrity of elections. When Republicans can look over the shoulder of Democrat election officials, Democrats can look over the shoulder of Republican election officials, and both can look over the shoulder of unaffiliated workers, citizens of Michigan can be confident that neither party is gaining an unfair advantage in the election through administrative mistake, misfeasance, or malfeasance.

The need for transparency is underscored by recent events involving malfeasance and alleged malfeasance by Michigan public officials. Less than two weeks ago, it was reported that

the elected clerk of Southfield pleaded no contest to charges that the clerk "remov[ed] 193 names from the absentee ballot list to cover up the discrepancy between the number of ballots in the box and the number on the tabulator" in connection with the 2018 election. *Detroit-Area Clerk Pleads No Contest in 2018 Election Case,* Associated Press (Oct. 20, 2022), https://apnews.com/article/detroit-elections-government-and-politics-b1f6d098dbb524c2af16726637f3f361. This plea came amid concerns of a broader culture of potential public corruption. To wit, in 2021, National Public Radio reported "Federal investigators . . . implicated much of Detroit's city hall in a corruption probe involving council members and their staffs," including two council members who pled guilty to corruption charges and resigned and two others whose homes were raided by the Federal Bureau of Investigation. Eli Newman, *Elected Officials in Detroit Face a Widening Federal Public Corruption Probe,* NPR (Oct. 20, 2021), https://www.npr.org/2021/10/20/1047532304/elected-officials-in-detroit-face-a-widening-federal-public-corruption-probe.

The Court of Claims' ruling promotes transparency in election administration. Even if a challenger's cell phone never leaves his or her pocket, the mere fact that it is there serves to increase the perception of fairness in elections. Similarly, the ability to raise concerns with any election officer promotes both the actual and perceived fairness in elections by ensuring that there are no concerns that "election liaisons" are dodging difficult or controversial complaints.

II. This Court Should Reject Calls to Stay the Court of Claims' Ruling Regarding the Possession of Cell Phones

The Bureau of Election's ban on possessing cell phones represents the sort of a "prophylaxis-upon-prophylaxis approach" the United States Supreme Court has criticized in other contexts. *See Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2009).

Nothing in the Michigan statutes prohibits challengers from possessing cell phones. Instead, the Bureau of Elections and its supporters, such as the authors of the City of Detroit Brief, justify the cell phone ban as a way to make it easier to enforce other limitations. To wit, in defense of the Bureau of Election's purported restriction, the City of Detroit Brief raises two basic arguments: 1) the cell phone ban helps prevent challengers from releasing prohibited information about the processing or tallying of votes until after the polls close; and 2) the cell phone ban helps prevent election inspectors from feeling intimidated. *See* City of Detroit Brief at 4 ("The Bureau of Election's instructions prohibiting possession of electronic devices at AVCBs during the sequestration period is intended to assure the integrity of the voting process (so that tallies of absent voter counts cannot be disclosed while in-person voting takes place) and, based on the facts described in Christopher Thomas' affidavit, to ensure the safety and security of election workers."). Both of these concerns are overstated.

Contrary to the City of Detroit Brief's suggestion, no one is asking election officials to know "whether any to the 400 challengers on their phones are ordering lunch, talking to their families, or relaying information to political operatives about what is going on in the hall." City of Detroit Brief at 6 (quoting Affidavit of Christopher Thomas at ¶ 18). This is because Michigan law already has strict penalties to deter improper communications.

Under Michigan law, "[a]n election inspector, challenger, or any other person in attendance at an absent voter counting place" is required to take an oath swearing or affirming that such person "shall not communicate in any way any information relative to the processing or tallying of votes that may come to me while in this counting place until after the polls are closed." MCLA § 168.765a(9). A person who violates this oath and "discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct

before the time the polls can be legally closed on election day is guilty of a felony." MCLA § 168.765a(10). A felony is, by definition, a serious crime, which serves to deter would-be lawbreakers.

Similarly, the City of Detroit argues that the cell phone ban helps prevent election officers from feeling intimidated. But this is speculative. Moreover, it relies on a subjective interpretation of events. No one particularly likes being questioned or criticized. Yet appropriately and respectfully questioning election officers' conduct is an essential part of what challengers are tasked with doing.

Finally, the Bureau of Elections and its supporters, such as the authors of the City of Detroit Brief, disregard the benefits associated with challengers possessing cell phones (and the associated harms if a stay is granted). For example, possessing cell phones allows election workers to coordinate day care and transportation, making it easier for people with diverse backgrounds to participate in the electoral process. Possessing cell phones facilitates a quick and effective response to any emergency that arises at a voting center, improving safety.

Cell phones are also a benefit in the specific election context. A challenger with a cell phone is a challenger who can double check online that they remember the rules correctly before making a challenge, reducing the potential for mistaken challenges. The mere potential for challengers to have cell phones also serves to limit the risk of bad behavior by election officials, such as improperly limiting challenger access to locations where they can observe the counting of ballots, by providing a credible means for election workers to document improprieties. *See generally* MCLA §§ 168.733(1) ("The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote."); (2) ("The board of election inspectors shall

provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots."); (4) ("A person shall not threaten or intimidate a challenger while performing an activity allowed under subsection (1).").

The Court of Claims correctly determined that the Bureau of Elections lacked authority to prohibit the possession of cell phones. For the reasons set forth above, staying that ruling would be neither costless nor in the public interest. The ruling of the Court of Claims should stand.

III. This Court Should Reject Calls to Stay the Court of Claims' Ruling Regarding Channeling Concerns Through a Designated Election Inspector

As with the ban on possessing cell phones, there is nothing in Michigan law that prohibits challengers from raising concerns with *any* election inspector.

The term "challenger liaison" does not appear anywhere in Michigan law. Instead, Michigan law states that challengers may "[b]ring to *an election inspector's* attention any of the following" four categories of concerns. MCLA § 168.733(1)(e) (emphasis added). The natural reading of this statutory text is, as the Court of Claims found, that challengers my raised concerns with *any* election inspector.

In response, the authors of the City of Detroit Brief claim that the Court of Claim's ruling is a "a recipe for chaos in polling places" because it might distract election inspectors in the performance of their duties and because election inspectors "are limited by training to the questions they can answer." City of Detroit Brief at 6-7 (quoting Affidavit of Daniel Baxter). Because election inspectors are allegedly limited by their training, the City of Detroit further claims "the public interest is . . . substantially harmed by the insurmountable burden the Order places on the City Clerk and Michigan election officials to re-train election workers just two weeks prior to the election." City of Detroit Brief at 7. These concerns defy common sense and reflect a willfully obtuse approach to the Court of Claim's ruling.

The City of Detroit Brief's concerns about retraining election inspectors are willfully obtuse. The expectation is not that each election inspector will be an expert in every nuance of Michigan election law. Instead, the expectation is that each inspector will answer questions to the level of their ability. In many cases, this will be sufficient to resolve concerns. In others, it may be necessary to elevate a question to a more knowledgeable official. The occasional necessity of the latter does not vitiate the convenience of the former. No additional training is required.

Moreover, the City of Detroit Brief's argument defies common sense and runs counter to the public interest. It is in the public interest to resolve election challenges as expeditiously as possible. Permitting election inspectors to answer simple questions facilitates the efficient resolution of potential disputes. As the City of Detroit Brief repeatedly asserts, certain locations, such as Huntington Hall, are rather large. There is no guarantee that a "challenger liaison" will be available to respond to concerns in a timely fashion. For example, he or she may be busy with another question or simply located across the room. In the meantime, there is a significant risk that election inspectors would continue to compound an initial error by repeating it. And consider the delay to the election process that will occur if the election inspectors must stop their work and wait for the "challenger liaison" to respond to a challenger inquiry? Such delay can only cause chaos to the election process.

Finally, the City of Detroit's arguments defy common sense by running the risk of absurd results. The Bureau of Election's May 2022 Manual purports to prohibit "[s]peak[ing] with or interact[ing] with election inspectors who are not the challenger liaison or the challenger liaison's designee, unless given explicit permission by the challenger liaison or a member of the clerk's staff." May 2022 Manual at 21. If interpreted strictly, this runs contrary to basic norms

of human interaction. For example, if an election inspector sneezes and a challenger responds "bless you," would they run the risk of expulsion? What about if two neighbors, one a challenger and one an election inspector, acknowledge each other?

The Court of Claims correctly determined that the Bureau of Elections lacked authority to prohibit challenges from speaking with election inspectors. For the reasons set forth above, staying that ruling would be contrary to the public interest. The ruling of the Court of Claims should stand.

CONCLUSION

For the foregoing reasons, the Court of Claims ruling concerning the possession of electronic devices and the ability for challengers to interact directly with election inspectors is correct and a stay of that ruling would be contrary to the public interest.

Respectfully submitted,

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