

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

DONALD J. TRUMP, and
ERIC OSTERGREN

Plaintiffs,

v.

Case No.: 20-000225-MZ

Stephens

JOCELYN BENSON, in her official
Capacity as SECRETARY OF STATE

Defendants.

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COURT OF CLAIMS

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**PLAINTIFFS' NOVEMBER 4, 2020 EMERGENCY MOTION FOR
DECLARATORY JUDGMENT UNDER MCR 2.605(D)**

Donald J. Trump and Eric Ostergren ask this Court, under MCR 2.605(D) (applicable through MCL 600.6422 and LCR 2.119), for expedited consideration of their request for declaratory relief. A speedy hearing is necessary to avoid prejudice that will inevitably result if Secretary of State Jocelyn Benson continues her acts in violation of Michigan's Constitution and Election Code.

INTRODUCTION

Michigan law requires that absent voter ballots be processed by bipartisan teams. Michigan law also allows "challengers" to monitor the absentee ballot process and challenge ballots that do not meet Michigan's strict compliance with absent voting procedures. MCL 168.730-168.734.

In order to preserve the process of a fair and open election under the Michigan's Equal Protection and Purity of Elections clauses, these Michigan voters ask this Court to mandate that Secretary Benson order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and mandate that Secretary Benson order the immediate segregation of all ballots that are not being inspected and monitored as is required under law.

**JURISDICTION AND THE NATURE OF PLAINTIFFS'
CLAIMS AGAINST SECRETARY BENSON**

1. This Court has exclusive jurisdiction over these Michigan voters' declaratory judgment claim against Secretary Benson. Secretary Benson is deemed to be the "state or any of its departments or officers" as this phrase is defined by MCL 600.6419(1) and (7).

2. Michigan Court Rule 2.605(D) authorizes this Court to "order a speedy hearing of an action for declaratory relief" and to "advance it on the calendar." The legal issues presented herein warrant an expedited hearing.

3. Expedited consideration of this matter is needed because, by allowing local election jurisdictions to locate these ballot drop-off boxes without opportunity for challengers to observe the process, Secretary Benson violates her constitutional and statutory authority and damages the integrity of Michigan elections.

4. Secretary Benson is violating the Michigan Constitution and Michigan election law by allowing absent voter ballots to be processed and counted without bipartisan teams and without allowing challengers to observe this process.

5. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters – including the voters bringing this action – to participate in fair and lawful elections. These 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 right to do their job.

LAW AND LEGAL ANALYSIS

6. A general election is being held in the State of Michigan on November 3, 2020.

7. MCL 168.765a, regarding Absent Voter Counting Boards, where absentee votes are processed and counted, states in relevant part as follows:

At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

8. Michigan absent voter counting boards are not complying with this statute. These boards are being conducted without inspectors from each party being present.

9. Further, a political party, incorporated organization, or organized committee of interested citizens may designate one "challenger" to serve at each counting board. MCL 168.730.

10. An election challenger's appointed under MCL 168.730 has those responsibilities described at MCL 168.733.

11. An election challenger's legal rights are as follows:

- a. An election challenger shall be provided a space within a polling place where they can observe the election procedure and each person applying to vote. MCL 168.733(1).
- b. An election challenger must be allowed opportunity to inspect poll books as ballots are issued to electors and witness the electors' names being entered in the poll book. MCL 168.733(1)(a).
- c. An election Challenger must be allowed to observe the manner in which the duties of the election inspectors are being performed. MCL 168.733(1)(b).
- d. An election challenger is authorized to challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector. MCL 168.733(1)(c).
- e. An election challenger is authorized to challenge an election procedure that is not being properly performed. MCL 168.733(1)(d).
- f. An election challenger may bring to an election inspector's attention any of the following: (1) improper handling of a ballot by an elector or election inspector; (2) a violation of a regulation made by the board of election inspectors with regard to the time in which an elector may remain in the polling place; (3) campaigning and fundraising being performed by an election inspector or other person covered by MCL 168.744; and/or (4) any other violation of election law or other prescribed election procedure. MCL 168.733(1)(e).
- g. An election challenger may remain present during the canvass of votes and until the statement of returns is duly signed and made. MCL 168.733(1)(f).

- h. An election challenger may examine each ballot as it is being counted. MCL 168.733(1)(g).
- i. An election challenger may keep records of votes cast and other election procedures as the challenger desires. MCL 168.733(1)(h).
- j. An election challenger may observe the recording of absent voter ballots on voting machines. MCL 168.733(1)(i).

12. Michigan values the important role challengers perform in assuring the transparency and integrity of elections. For example, Michigan law provides it is a felony punishable by up to two years in state prison for any person to threaten or intimidate a challenger who is performing any activity described in Michigan law. MCL 168.734(4); MCL 168.734. It is a felony punishable by up to two years in state prison for any person to prevent the presence of a challenger exercising their rights or to fail to provide a challenger with “conveniences for the performance of the[ir] duties.” MCL 168.734.

13. Local election jurisdictions locate ballot drop-off boxes without opportunity for challengers to observe the process, and as such Secretary Benson violates her constitutional and statutory authority and damages the integrity of Michigan elections.

14. Michigan law requires that ballot containers be monitored by video surveillance. See Senate Bill 757 at 761d(4)(c).

15. Secretary Benson is violating the Michigan Constitution and Michigan election law by allowing absent voter ballots to be processed and counted without allowing challengers to observe the video of the ballot boxes into which these ballots are placed.

16. Plaintiffs asks Secretary Benson to segregate ballots cast in these remote and unattended ballot drop boxes and, before the ballots are processed, removed from their verifying envelopes, and counted, allow designated challengers to view the video of the remote ballot box.

17. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters – including the voters bringing this action – to participate in fair and lawful elections. These 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 right to do their job.

18. Michigan's Constitution declares that “[n]o person shall be denied the equal protection of the laws” Const 1963, art 1, § 2.

19. This clause is coextensive with the United States Constitution's Equal Protection Clause. *Harville v. State Plumbing & Heating* 218 Mich. App. 302, 305-306; 553 N.W.2d 377 (1996). *See also Bush v. Gore*, 531 U.S. 98, 104 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, (1966) (“Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”)¹

20. Plaintiffs seek declaratory and injunctive relief requiring Secretary Benson to direct that election authorities comply with Michigan law mandating election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place.

21. The Michigan Constitution's “purity of elections” clause states, “the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective

¹ Most United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* §18.31(a) (2012 & Supp. 2015).

franchise, and to provide for a system of voter registration and absentee voting.” Const. 1963, art 2, §4(2).

22. “The phrase ‘purity of elections’ does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state.” *Barrow v. Detroit Election Comm.*, 854 N.W.2d 489, 504 (Mich. Ct. App. 2014).

23. Michigan statutes protect the purity of elections by allowing ballot challengers and election inspectors to monitor absentee ballots at counting boards.

24. Plaintiffs seek declaratory and injunctive relief requiring Secretary Benson to direct that election authorities comply with Michigan law mandating election inspectors from each party and allowing challengers access to video of ballot boxes before counting of relevant votes takes place.

25. MCL 168.765a, regarding Absent Voter Counting Boards, where absentee votes are processed and counted, states in relevant part as follows:

At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

26. Michigan absent voter counting boards, under the authority of Secretary Benson, are not complying with this statute. These boards are being conducted without inspectors from each party being present.

**IMMEDIATE ACTION AND AN EXPEDITED HEARING IS NECESSARY TO
RESOLVE THIS VIOLATION OF MICHIGAN ELECTION LAW**

27. Michigan Court Rule 2.605(D) authorizes this Court to “order a speedy hearing of an action for declaratory relief” and to “advance it on the calendar.” The legal issues presented herein warrant an expedited hearing.

28. Expedited consideration of this matter is necessary because Secretary Benson is acting outside her constitutional and statutory authority and damaging the integrity of the November 3, 2020 general election.

29. If Secretary Benson's actions stand, a dangerous precedent will be set that deprives the voters of Michigan of a fair election.

30. Accordingly, it is imperative that this Court schedule an expedited hearing on these Michigan voters' Emergency Motion for Declaratory Judgment because, absent immediate relief, Secretary Benson's actions outlined above and in the Plaintiffs' Complaint will harm the integrity of the November 3, 2020 general election, and will deny Plaintiffs and all Michigan voters the right to a fair election.

31. This Court should schedule an expedited hearing to address the merits of these Michigan voters' motion. In conjunction with their request for a "speedy hearing" under MCR 2.605(D), we ask this Court to schedule oral argument under Local Rule 2.119(A)(6).

CONCLUSION

The Trump for President campaign and this Michigan citizen and voter ask this Court to order "a speedy hearing" of this action and "advance it on the calendar" as provided by MCR 2.605(D), mandate that Secretary Benson order all counting and processing of absentee votes cease immediately until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box, and mandate that Secretary Benson order the immediate segregation of all ballots that are not being inspected and monitored as aforesaid and as is required under law.

Dated: November 4, 2020

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II

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Stephen S. Davis (*pro hac* pending)

Timothy Belz (*pro hac* pending)

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Defendants.

**BRIEF IN SUPPORT OF PLAINTIFFS' NOVEMBER 4, EMERGENCY MOTION FOR
DECLARATORY JUDGMENT UNDER MCR 2.605(D)**

For the reasons stated in the attached motion, Donald J. Trump and Eric Ostergren respectfully request that this Court grant their Emergency Motion for Declaratory Judgment under MCR 2.605(D).

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
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