

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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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 SECRETARY OF STATE  
FOR THE STATE OF MICHIGAN, 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 No. 164955  
Court of Appeals No. 363503  
Court of Claims No. 22-000162-MZ

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

Supreme Court No. 164956  
Court of Appeals No. 363505  
Court of Claims No. 22-000164-MZ

**BRIEF OF AMICI CURIAE LOCAL ELECTION OFFICIALS IN SUPPORT OF  
DEFENDANTS-APPELLANTS' EMERGENCY APPLICATION FOR LEAVE TO  
APPEAL AND REQUEST FOR STAY PENDING APPEAL**

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October 31, 2022

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**STATEMENT OF QUESTION PRESENTED**

1. Whether the Court of Appeals erred in denying the Secretary of State's and Director of Elections' emergency motion for a stay pending appeal?

Appellants' answer:       Yes.

Appellees' answer:       No.

*Amici's* answer:       Yes.

**STATEMENT OF INTEREST**

*Amici* are the local election officials of Eaton, Ingham, Saginaw, Washtenaw, and Wayne Counties.<sup>1</sup> As election officials, *amici*'s primary duty is to ensure the right to vote of all eligible citizens in their jurisdictions. *Amici*'s responsibilities include oversight of all federal, state, and local elections. Duties also include the programming, printing, and distributing of ballots and the coordination of the canvass of federal, state, and local elections. Most pertinent here, *amici* are responsible for training election workers and responding to challenges and other objections lodged on Election Day.

As the local administrators of all elections in Michigan, *amici* have a significant interest in the outcome of this case as well as ensuring certainty about our roles and responsibilities on Election Day 2022. *Amici* have trained staff and election workers (sometimes more than once) on the guidance provided in "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (hereinafter, the "2022 Manual"). With one week until Election Day, *amici* cannot effectively retrain all election workers or reverse all instructions previously provided that relate to the 2022 Manual. Accordingly, *amici* request that the Supreme Court issue the stay sought by Secretary Benson to ensure the orderly administration of this year's general election.

**INTRODUCTION**

The 2020 election cycle saw allegations of unprecedented abuses of process and ceaseless, baseless questioning of the integrity of the elections across this country. Michigan was not spared

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<sup>1</sup> Pursuant to MCR 7.312(H)(3), *amici curiae* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *amici* and their counsel, make a monetary contribution intended to fund the preparation or submission of the brief. A list of all *amici* is attached as Appendix A.

from this disorder. These transgressions against our electoral process reached their peak in the attack on the U.S. Capitol on January 6, 2021.

Following that election cycle, Michigan Secretary of State Jocelyn Benson issued the 2022 Manual to address growing concerns about the misuse of the elections challenger process to intimidate voters, disenfranchise voters through undue delay, cause chaos and confusion in polling places and counting centers, and unfairly call the integrity of elections into question without basis. The 2022 Manual includes straightforward updates intended to empower local election officials to guard against such subversion. This guidance aligns with Michigan law and falls squarely within the Secretary's broad authority.

Challengers play an important role in ensuring confidence in the integrity of our elections, but their role is intended to be modest. Challenges can only be mounted with specific information about an individual's eligibility to vote. MCL 168.733(1)(c)-(d), 168.727(1). The bases for these challenges are narrow. However, there are groups in Michigan seeking to break the challenge process wide open by challenging hundreds of voters at a time. In fact, several *amici* received challenges relating to large numbers of voters in advance of the primary elections this past August. *Amici* also have seen unprecedented numbers of applications for credentialing organizations.<sup>2</sup> The clear goal is to overwhelm local elections officials—many of whom are part-time administrators—and sow doubt about the electoral process. The 2022 Manual empowers local election officials to maintain order and to ensure voting rights. The 2022 Manual does not alter the rights or opportunities of legitimate challengers to raise questions about voter registration when they are

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<sup>2</sup> For example, Washtenaw County received applications from 7 organizations this October, which far exceeded the typical 1–2 applicants per cycle. In Wayne County, 9 organizations have registered and been approved to appoint challengers.



acting in good faith and relying on actual information. It is sensible guidance that enables election officials to do their jobs better.

At the eleventh hour, and well after local election officials had trained staff and election workers on the 2022 Manual, Plaintiffs-Appellees filed this lawsuit seeking to invalidate the 2022 Manual as a whole. Now, with one week remaining until Election Day, there is uncertainty about what instructions are applicable to the election challenger process. This type of uncertainty creates unnecessary problems in the administration of elections and may result in the denial of fundamental rights. *Amici* respectfully request that the Supreme Court stay the Court of Claims' injunction and allow our staffs to implement the 2022 Manual as already planned.

### **ARGUMENT**

In analyzing Defendants-Appellants' request for a stay of the Court of Claims' injunction, this Court applies a well-established four-part test. This Court must evaluate whether: (1) Defendants are likely to prevail on the merits; (2) Defendants will be irreparably harmed if a stay is not issued; (3) the harm to Defendants absent a stay outweighs the harm that the denial would cause Plaintiffs; and (4) there will be no harm to the public interest if a stay is issued. *See, e.g., Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34 (2008). All these factors augur in favor of the issuance of a stay. *Amici* incorporate Defendants-Appellants' arguments by reference and write separately to underscore the impacts of the injunction on the administration of these elections by local election officials.

#### **I. DEFENDANTS ARE LIKELY TO PREVAIL ON THE MERITS.**

*Amici* agree with and incorporate Defendants-Appellants' arguments as to the merits of Plaintiffs-Appellees' claims. The Court of Claims erred in both its failure to recognize the

Secretary's authority to implement the 2022 Manual as well as its dismissal of the laches argument, given the significant reliance of election officials on this guidance.

**A. The Court of Claims Failed to Recognize the Secretary's Authority.**

Time and again, the lower court's decision failed to recognize the clear authority that the Michigan Constitution and Legislature have provided to the Secretary to implement guidance documents such as the 2022 Manual. Michigan's Constitution and statutes make the Secretary of State the constitutionally designated chief elections officer of the state and vest in her broad authority to administer elections as well as ensure their fairness and security. *See* Const 1963, art 5, §§ 3, 9; *id.* art 2, § 4; MCL 168.21; *Davis v Sec'y of State*, 333 Mich App 588, 601 (2020).

Moving specifically to the credentialing form, Michigan law provides the Secretary with authority to "publish and furnish for the use in each election precinct before each state primary and election a manual of instructions that includes *procedures and forms for processing challenges*." MCL 168.31(1)(c) (emphasis added). This includes a template form for credentialing organizations to follow. It is hard to decipher (from *amici's* expert perspective) what problem anyone could have with the form: it simply requests that credentialed organizations include standard information such as name of the challenger, organizational name, and date of the election. Any burden is *de minimis*.

In addition, the Secretary is empowered to issue binding instructions for the operation of absent voter counting boards (AVCBs). MCL 168.765a(13). This power permits the Secretary to ban the possession of smart phones within the AVCBs. In an earlier era, no one would have blinked an eye at the banning of more cumbersome video and audio recording devices brought into an AVCB. The point is to avoid a problem before it starts, rather than jeopardizing compliance to the

good faith of individual challengers. The alternative too readily risks the necessary anonymity of voters.

The Court of Claims likewise erred in ruling that the Secretary’s guidance could not empower election officials to appoint challenger liaisons and, as a result, to limit challengers to interact with such liaisons. The Secretary has clear authority to issue instructions on the specific topics of processing challenges, MCL 168.31(1)(c), and conducting AVCBs, MCL 168.765a(13)—both of which are applicable here. Moreover, nothing in Michigan law prohibits an election inspector from directing a challenger to another election inspector to respond to the challenge. From *amici*’s experience, such a protocol empowers more senior elections officials to respond to challengers, which results in more timely responses and enables the more efficient operation of a polling place. The Secretary’s guidance is both wise and consistent with how many polling places have operated.

Finally, the grounds for challenging voter registration are narrow under MCL 168.727(1), and an election inspector is required to make a written report *only* of a challenge made properly under that provision. MCL 168.727(2). The distinction between “permissible” and “impermissible” challenges underscores the narrow ground for challenges in the first place. It also furthers the Legislature’s clear command to bar election challengers who “challenge indiscriminately and without good cause,” and prevent them from “interfere[ing] with and unduly” delaying the work of the election inspectors. MCL 168.727(3). Requiring a record of every baseless challenge, especially when intended to delay or harass election officials, serves no purpose other than to give bad faith challengers exactly what they want.

**B. Enjoining the 2022 Manual at this Late Date Would Seriously Interfere with the Administration of the Election.**

The Court of Claims also did not appropriately evaluate Defendants' laches argument. Forcing the Bureau of Elections to rewrite or completely discard the 2022 Manual roughly two weeks before the election necessarily creates uncertainty and confusion. The Court of Claims' suggestion that this remedy is as simple as posting a PDF of revised guidance or forging ahead with no uniform challenger rules at all, *see* Opinion & Order at 27, overlooks the practical realities of election administration in Michigan and rewards Plaintiffs-Appellees for delaying until the month before the general election—and *after* the 2022 Manual had been used in the primaries—to bring their claims. There is no plausible excuse for their delay here.

Revocation or revision of the existing guidance just before the fast-approaching election would make its uniform and orderly administration impossible. In recognition of the reality that “[e]lections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws,” case law and common sense have long counseled courts to “reasonably endeavor to avoid unnecessarily precipitate challenges that would result in immense administrative difficulties for election officials.” *New Democratic Coalition v Austin*, 41 Mich App 343, 356–57 (1972); *see also Purcell v Gonzalez*, 549 US 1, 5–6 (2006) (per curiam). In other words, “[w]hen an election is imminent and when there is inadequate time to resolve factual disputes and legal disputes, courts will generally decline to grant an injunction to alter a State’s established election procedures.” *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016) (internal quotation marks omitted). This rule, often cited as the *Purcell* principle, is especially pertinent where, as here, Plaintiffs have offered “no reasonable explanation” for bringing suit so close to an election, *id.* at 398 (citing *Purcell*, 549 US at 5–6), and where a late-breaking change would cause “great confusion associated with [its] implementation” and affect

“the state’s entire voting methodology,” *see US Student Ass’n Found v Land*, 546 F3d 373, 387 (CA 6, 2008).

Here, the hundreds of clerks and thousands of election workers—at least one estimate puts it at 30,000 election workers statewide—who administer elections in Michigan have relied on the 2022 Manual’s guidance to establish uniform statewide election procedures since it was promulgated in May. *See* Defs.’ App. for Stay at 3. Clerks, election inspectors, and poll watchers already utilized the 2022 Manual in August’s primary elections—a fact of which Plaintiffs-Appellees were well aware at the time, *see id.* at 4—and have prepared for months to use it in the imminently approaching November election, *see id.* at 3–4. The 2022 Manual has served as a vital source of instructions and training materials for clerks, who have in turn used it to train thousands more election inspectors and poll watchers, *see id.* at 1, at considerable time and expense. Retraining these tens of thousands of election workers a mere handful of days before the election is not practically possible. Just in the past month alone, *amici* have spent hundreds of hours providing training to election workers. Even if retraining were possible, the unavoidable confusion over what rules may permissibly be applied would severely disrupt the orderly administration of the upcoming election. *See, e.g., Crookston*, 841 F3d at 399 (noting that election eve change of policy in manual promulgated by the Michigan Secretary of State that was used to train tens of thousands of poll workers would be “a recipe for election-day confusion for voters and poll workers alike”).<sup>3</sup>

It is for these very reasons that late-breaking changes to election rules such as those ordered by the Court of Claims are so strongly disfavored. Whether one considers this rule to be an

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<sup>3</sup> Indeed, the rule changes that Plaintiffs-Appellees seek to force would be more damaging than most, as uniform rules for vote challenge procedures are critically necessary.

expression of “laches, the *Purcell* principle, or common sense,” its prescription is clear: “the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.” *Crookston*, 841 F3d at 398. Plaintiffs-Appellees’ vague assertions of injury do not come close to being sufficiently powerful to justify the inevitable disruption caused by changing the rules for the election at so late a date, which would drastically harm the state and *amici*’s “compelling interest in the orderly process of elections,” *New Democratic Coalition*, 343 Mich App at 356–57.

## II. THE HARM TO DEFENDANTS SUBSTANTIALLY OUTWEIGHS ANY HARM TO PLAINTIFFS.

There is no indication of actual harm to Plaintiffs-Appellees from the 2022 Manual. *Amici* have received and processed a record number of applications for credentials. None of the 2022 Manual’s procedures impacts the ability of credentialed election challengers to play their important function. With a challenger liaison appointed, challengers remain able to lodge challenges to voter registration, as all grounds for challenge remain the same. Challengers are permitted to observe in the AVCBs. The credentialing forms demand no extraneous information. Overall, the 2022 Manual ensures the rights of challengers, facilitates the process for making challenges, and provides crucial guardrails to ensure that uniform rules are followed and that processes are not abused.

On the other hand, the harm to Defendants as well as local election administrators if the lower court’s injunction stands is substantial. As mentioned above, election officials have already expended significant time, effort, and expense in implementing the 2022 Manual and all other training for the election. For example, Delta Township estimates that its staff spent more than 50 hours in overall instructional time in just the past month. In Lansing, staff spent about 45 hours not including preparation of materials. The total number of hours skyrockets to 1,200 when all of the election workers’ time is factored in as well. Workers are trained and prepared to utilize the

2022 Manual when addressing election challenges. To change course at this late hour would result in significant confusion and disruption to orderly operations.

### **III. THERE WILL BE SIGNIFICANT HARM TO THE PUBLIC INTEREST IF A STAY IS NOT ISSUED.**

The 2022 Manual plays an important function in ensuring uniformity and fairness in this year's election. There are several groups intending to disrupt election processes by impermissibly challenging large swaths of voters, causing chaos at the polling places, and potentially violating the anonymity of absentee ballots. *Amici* have seen unprecedented levels of groups organizing to serve as challengers. The 2022 Manual provides *amici* and other local election officials with guidance and direction to help address these threats. The public interest will be harmed without the issuance of a stay.

In advance of Election Day, clerks have observed a significant increase in the number of organizations registering to credential challengers. For example, in Canton Township, nine separate organizations have registered to credential election challengers.<sup>4</sup> But it is not just the sheer numbers that are alarming. Based on public statements and published materials, it appears that many of these groups may intend to launch broad attacks on registered voters without basis.<sup>5</sup> One such organization, Michigan Citizens for Election Integrity, published an article stating that to trust Detroit election inspectors is to trust a “snake.”<sup>6</sup> Another, Michigan’s Election Integrity Force

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<sup>4</sup> As another example, Ingham County has received applications from six credentialing organizations—six more than the usual volume.

<sup>5</sup> This misconduct began at the Detroit AVCB two years ago. During the 2020 election, challengers repeatedly brought baseless challenges and harassed election workers. They repeated their attempts to intimidate election workers during the 2021 primaries. *See, e.g.*, Affidavit of D. Jaffe, Ex. 2 to Amicus Brief of the Michigan Democratic Party in the Court of Appeals, at ¶¶ 6–9.

<sup>6</sup> Michigan Citizens for Election Integrity, *Detroit Election Officials – Trusting a Snake!* (July 31, 2022), <https://mc4ei.com/detroit-election-officials-trusting-a-snake/>.

(also known as the Election Integrity Fund), claims that there was “a massive amount of evidence of rampant, systemic election fraud”<sup>7</sup> in 2020 and explains that it is committed to encouraging “the process of decertification of fraudulent elections.”<sup>8</sup> The group filed a lawsuit in September 2022 seeking to decertify the 2020 election in Michigan. It is anticipated that these groups, as well as others with similar views, will organize, train, and send challengers next week to polling places and AVCBs for the 2022 general election. Given their repeated, public expression of distrust of Michigan’s election inspectors and voters, it is likely that clerks will be inundated with challenges. The 2022 Manual offers an important means of addressing efforts to subvert the election.

The concern for coordinated, illegitimate challenges designed to derail, rather than protect, election proceedings is evident from challengers’ behavior at the Detroit AVCB in 2020. In a surreal display that was broadcast nationwide, challengers flooded the Detroit counting board the night of Election Day and for days after. Challengers chanted political slogans while election inspectors attempted to process ballots, refused to remove full face masks when asked by law enforcement, banged on windows, and continuously screamed at election staff and other challengers in a clear effort to derail the process and intimidate participants.<sup>9</sup> Many of these

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<sup>7</sup> Election Integrity Fund and Force. *Evidence* (last visited Oct. 31, 2022), <https://electionintegrityforce.com/pages/evidence>.

<sup>8</sup> Election Integrity Fund and Force. *About* (last visited Oct. 31, 2022), <https://electionintegrityforce.com/pages/about>.

<sup>9</sup> Tresa Baldas, Kristen Jordan Shamus, Niraj Warikoo, M.L. Elrick, Joe Guillen, and Evan Petzold, ‘Get to TCF’: *What really happened inside Detroit’s ballot counting center*, Detroit Free Press (Nov. 6, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/11/06/tcf-center-detroit-ballot-counting/6173577002/>.



challengers claimed that the board, largely staffed by African American workers and counting votes cast predominantly by African American voters, was engaging in blatant fraud.

As recounted by the state’s former Director of Electors and Detroit’s former chief elections official, challengers at the Detroit ACVB in 2020 repeatedly used cell phones to unlawfully record, harass, and intimidate election workers, causing scenes of chaos and flashpoints for violence that these election officials expect to recur in 2022 due to the Court of Claims’ order. *See* Amicus Brief of Janice Winfrey, Clerk of the City of Detroit, filed in Court of Appeals, at 3–4. Indeed, following the Court of Claims’ opinion, partisan political operatives have encouraged their affiliated challengers to use cell phones to unlawfully record activities at AVCBs based on a flagrantly incorrect interpretation of the Court of Claims’ order that is flatly contradicted by its actual text. *Id.* at 5; *but see* Opinion & Order at 22 (“Nothing in this Court’s Opinion and Order should be read to permit a person to *use* an electronic device in a way that violates the Michigan Election Law. Our Legislature has made it a felony to communicate—in *any way* before the polls close—any information relative to the processing or tallying of votes”) (emphases in original). What is more, challengers remain particularly convinced that the Detroit counting board was a center of “election fraud,”<sup>10</sup> with Michigan Citizens for Election Integrity repeating these claims as recently as September 2022.<sup>11</sup> In the past few days, *amici* (and other election officials) have received repeated

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<sup>10</sup> Ali Swenson, *Video taken election night doesn’t show illegal activity in Detroit*, Associated Press (Feb. 8, 2021), <https://apnews.com/article/fact-checking-9961890106>.

<sup>11</sup> Patty McMurray, *THOUSANDS OF What Appear To Be ABSENTEE BALLOTS Are Loaded Into A Minivan With Indiana Plates At Detroit Satellite Voting Center Several Hours After Polls Closed On Election Day 2020 [VIDEO]*, 100percentfedup (Sept. 12, 2022), <https://100percentfedup.com/thousands-of-what-appears-to-be-absentee-ballots-are-loaded-into-a-minivan-with-indiana-plates-at-detroit-satellite-voting-center-several-hours-after-polls-closed-on-election-day-2020-video/#!/back>.

written demands that vote counting occur under “close video surveillance” to ensure that the public can watch the tabulation directly, all but assuring that the anonymity of voters is violated.

The examples are not limited to AVCBs. In the past week, the Michigan Conservative Coalition demanded that the Ingham County Clerk approve their credential following the Court of Claims’ order, even though the original denial had nothing to do with the subject matter of the lower court decision. *Amici* anticipate further baseless attacks should this Court not intervene. Only by issuing the requested stay can this Court prevent these opponents of Michigan’s democracy from willfully misconstruing the Court of Claims’ order in bad faith to facilitate further attacks on Michigan’s election officials, procedures, and laws.

\* \* \*

Rather than working to protect voters and to assist election inspectors in the conduct of their duties, a subgroup of Michigan challengers will likely work to disrupt the 2022 midterms. This is a grave threat to the work of election inspectors, to voters, and to Michigan more broadly. The 2022 Manual implements Michigan law to support election inspectors in responding to legitimate challenges and minimizing distracting and dangerous illegitimate challenges. Clerks need uniform, clear guidance and support from the State—and the 2022 Manual provides it.

**CONCLUSION**

For the foregoing reasons, *amici* request that the Supreme Court enter the stay requested by Defendants-Appellants and reinstate the 2022 Manual in advance of Election Day.

Respectfully submitted,

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**WORD COUNT STATEMENT**

This document complies with the type-volume limitation of MCR 7.212(B) because, excluding the parts of the document exempted, this amicus brief contains 3,586 words.

DATED: October 31, 2022

/s/ Bonnie G. Toskey  
Bonnie G. Toskey (P30601)

**APPENDIX A**

The following is a list of all amici who joined this brief:

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