

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

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

Plaintiffs,

v.

**JOCELYN BENSON**, in her official  
capacity as the duly elected **SECRETARY  
OF STATE**, and **JONATHAN BRATER**, in  
his official capacity as the **DIRECTOR OF  
THE MICHIGAN BUREAU OF  
ELECTIONS**,

Defendants.

Supreme Court Case No. 166424

Court of Appeals Case No. 363503

Court of Claims Case 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.**

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

Plaintiffs,

v.

**JOCELYN BENSON**, in her official  
capacity as the duly elected **SECRETARY  
OF STATE**, and **JONATHAN BRATER**, in  
his official capacity as **DIRECTOR OF  
ELECTIONS**,

Defendants.

Supreme Court Case No. 166425

Court of Appeals Case No. 363505

Court of Claims Case No. 22-000164-MZ

**SUPPLEMENTAL AMICUS CURIAE  
BRIEF OF THE DEMOCRATIC  
NATIONAL COMMITTEE AND  
MICHIGAN DEMOCRATIC PARTY**

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**SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE  
DEMOCRATIC NATIONAL COMMITTEE AND MICHIGAN DEMOCRATIC PARTY**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I. A CHANGE IN THE GUIDANCE THIS CLOSE TO THE ELECTION WILL CAUSE UNNECESSARY HARM .....	2
A. Defendants and the Public, Including the MDP, Will Suffer if the Guidance Changes .....	3
B. Allowing the Current Guidance to Remain in Place Will Not Harm Plaintiffs.....	4
C. Michigan Courts Rightfully Hesitate to Upend the Status Quo this Close to an Election .....	4
II. THE CHALLENGER GUIDANCE IS CONSISTENT WITH MICHIGAN ELECTION LAW, WITHIN THE SECRETARY’S AUTHORITY, AND CONSISTENT WITH THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT.....	6
CONCLUSION.....	7

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Crookston v Johnson</i> , 841 F3d 396 (CA 6, 2016) .....	4, 5
<i>Davis v Sec’y of State</i> , 333 Mich App 588; 963 NW2d 653 (2020).....	6
<i>New Democratic Coal v Austin</i> , 41 Mich App 343; 200 NW2d 749 (1972).....	5
<i>O’Halloran v Sec’y of State</i> , 981 NW2d 149 (Mich, 2022).....	2, 5
<i>Purcell v Gonzalez</i> , 549 US 1; 127 S Ct 5; 166 L Ed 2d 1 (2006).....	4, 5
<i>Robinson v Callais</i> , 144 S Ct 1171 (2024).....	5
<b>Statutes</b>	
MCL 168.21 .....	6
MCL 168.759a .....	1
<b>Other Authorities</b>	
Const 1963, art 2, § 4.....	1, 6

## INTRODUCTION

The Democratic National Committee (“DNC”) and the Michigan Democratic Party (“MDP”) respectfully submit this supplemental amicus brief pursuant to the Court’s invitation in its Order dated May 29, 2024.<sup>1</sup>

The August 2024 primary election is now three months closer than when the parties completed initial briefing on the application, with a mere 17 days left before voting begins.<sup>2</sup> And at this point, five major elections (the 2022 and 2023 August and November elections and 2024 February presidential primary) have been conducted with the current challenger guidance in place. As set forth in the DNC and MDP’s amicus brief and demonstrated by the briefs and evidence submitted by Defendants and other amici curiae, that guidance has been effective in ensuring that challengers are able to make, and local clerks are able to process, lawful and legitimate challenges in an organized manner. At the same time, the guidance has also prevented the types of rampant abuse of the challenge process that occurred during the November 2020 election. Plaintiffs are aware of the impending election, yet they never sought expedited review in the Court of Appeals or in this Court.

For all the reasons explained by Defendants and the amici in prior briefing, the guidance is consistent with the Michigan Election Law and within the Secretary’s power to promulgate without going through the formal rulemaking process under the Administrative Procedures Act. Simply put, consistent with the Michigan Election Law, the Secretary’s challenger guidance—

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<sup>1</sup> No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the amicus curiae, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> Electors can vote an absent voter ballot in person at their clerk’s office starting June 27, 2024. See Const 1963, art 2, § 4(1)(h). Military and overseas voters, however, can receive absent voter ballots as soon as June 22, 2024. See *id.* at § 4(1)(b); MCL 168.759a.

which has now been in place for years—works to make sure that the rights of both eligible voters and election challengers are respected and effectuated in an organized manner. To change course now—late into the 2024 primary and general election season—would disrupt orderly election administration and harm credentialing organizations and the public.

### **ARGUMENT**

#### **I. A CHANGE IN THE GUIDANCE THIS CLOSE TO THE ELECTION WILL CAUSE UNNECESSARY HARM.**

With only days left before ballots are cast in the August 2024 primary, the interests of certainty and predictability favor waiting until this year's election cycle is complete before potentially upending the procedures and guidance concerning the challenge process. Indeed, voting for the August primary begins June 27. Particularly given the chaos that ensued during the 2020 and 2021 elections when the guidance was not in place, correctly deciding this case and recognizing the Secretary's authority to issue the guidance is crucial. But so too is providing predictability and certainty to voters whose ballots are potentially subject to challenge; to election challenger credentialing organizations like the MDP and the Michigan Republican Party, who must train their challengers; and to local clerks who are charged with implementing and administering the election challenge system. The Court reached a similar conclusion in 2022 when issuing the initial stay of the Court of Appeals' decision. *O'Halloran v Sec'y of State*, 981 NW2d 149 (Mich, 2022). There is no reason to change course and allow disruption now, particularly considering that all parties have been operating effectively under the current stay. (See generally DNC/MDP 03/08/2024 Amicus Brief at 9-17 (describing effectiveness of challenger guidance during 2022-24 election cycles)).

**A. Defendants and the Public, Including the MDP, Will Suffer if the Guidance Changes.**

A change in the guidance now would cause severe disruption to the electoral process for the upcoming 2024 elections. That would leave the election challenge process vulnerable to the same disruption and abuse that occurred in November 2020. The Secretary would likewise have to provide revised guidance and training for hundreds of local clerks, who would in turn have to retrain thousands of election inspectors across the state. Consequently, it would be almost impossible to ensure that changes to the process would be implemented uniformly in the thousands of election precincts, clerk's offices, early voting sites, and absent voter counting boards.

Altering the guidance at this point also would have a significant impact on the MDP and other credentialing organizations that invest substantial resources in training volunteer election challengers and poll watchers across the state on challenge processes and procedures in accordance with the Secretary's clarifying guidance. Starting on June 13, 2024, the MDP plans to train hundreds of challengers for the August primary. (Ex. 1, Lockett Aff ¶5). If the Court strikes down the guidance, the Secretary of State will need to issue new guidance, the contours of which are unknown. Any delay in the issuance of this new guidance, or the absence of guidance if the Secretary is unable to issue new instructions, will require the MDP and all credentialing organizations to redirect considerable resources to update their challenger materials and retrain hundreds of volunteers. That scramble to redo training, potentially with no guidance, could result in conflicting challenger training across the state, injecting further uncertainty and the potential for disruption into the election process. With voting starting on June 27 for the August primary election, this poses an enormous burden to ensure that all challengers will be prepared properly if the existing guidance can no longer be applied. (Ex. 1, Lockett Aff ¶6).

**B. Allowing the Current Guidance to Remain in Place Will Not Harm Plaintiffs.**

By contrast, the harm to Plaintiffs from the current challenger guidance is nonexistent. Plaintiffs have trained or served as challengers and poll watchers under the existing challenger guidance for five major elections and several special elections. The guidance is designed to appropriately instruct election challengers, consistent with the Michigan Election Law, and to ensure protection of eligible voters' ability to effectuate their fundamental right to vote without undue interference while simultaneously allowing for legitimate challenges to proceed in an organized way. The provisions in the guidance simply channel legally permissible challenges; they do not tread new policy ground. Nothing in the challenger guidance prevents or interferes with the right of a challenger to assert any challenge permitted by the Michigan Election Law. To be sure, challengers who follow the law are allowed to make and pursue legally permissible challenges and exercise their rights to ensure that only eligible votes are counted.

If Plaintiffs truly believed that the challenger guidance was unlawful and relief was needed before the upcoming election, they could have sought to expedite proceedings before the Court of Appeals or before this Court. Tellingly, Plaintiffs never did so, instead allowing the full 2023 election cycle and portions of the 2024 cycle to elapse with the challenger guidance in place.

**C. Michigan Courts Rightfully Hesitate to Upend the Status Quo this Close to an Election.**

Courts have regularly declined to interfere with the laws and guidance governing elections when a decision would be issued too close to the election for officials and voters to adequately and fairly adapt to any changes. See *Crookston v Johnson*, 841 F3d 396, 398 (CA 6, 2016) (“Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.”), citing *Purcell v Gonzalez*, 549 US 1; 127 S Ct 5; 166 L Ed 2d 1 (2006) (per curiam)). As Justice Welch astutely put it when



this Court stayed the trial court’s decision earlier in this case, “[t]houghtful consideration and conclusive resolution by the judiciary are warranted on these important issues. But timing matters, especially when a lawsuit contests election procedures[.]” *O’Halloran*, 981 NW2d at 152 (Welch, J, concurring), citing *Purcell*, 549 US at 5-6; *Crookston*, 841 F3d at 398; see also *Robinson v Callais*, 144 S Ct 1171 (2024) (citing *Purcell* and granting stay in redistricting case where there was insufficient time to execute map-drawing process prior to election cycle).

Recognizing “the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws” and that “[t]he state has a compelling interest in the orderly process of elections,” courts in this state have for decades “reasonably endeavor[ed] to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials.” *New Democratic Coal v Austin*, 41 Mich App 343, 356-357; 200 NW2d 749 (1972); see also *Crookston*, 841 F3d at 399 (noting that change on eve of election 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”). The Court should apply those same principles here and refrain from altering the status quo just weeks before voting in the next election begins.

Even if Plaintiffs’ concerns about the validity of the Secretary of State’s guidance had merit—they do not—the current guidance should remain in place through the November election, to ensure that the full 2024 election cycle can be conducted in an orderly manner that the public can trust—just as the 2022 and 2023 election cycles were conducted.

**II. THE CHALLENGER GUIDANCE IS CONSISTENT WITH MICHIGAN ELECTION LAW, WITHIN THE SECRETARY'S AUTHORITY, AND CONSISTENT WITH THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT.**

Not only is changing the status quo at this late stage disruptive, but it is also unnecessary. As briefed by Defendants and amici, the current guidance is consistent with the Michigan Election Law and within the Secretary's power to issue outside the formal rulemaking process.

The Secretary of State, as the chief elections officer of the State of Michigan, has broad authority to secure and safeguard Michigan residents' "fundamental right to vote," as well as "to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, § 4(1)(a), § 4(2); MCL 168.21; see also *Davis v Sec'y of State*, 333 Mich App 588, 595-598; 963 NW2d 653 (2020) (recognizing scope of Secretary's authority and duties under Michigan Election Law and Constitution). That clear mandate to protect the fundamental right to vote must be "liberally construed," Const 1963, art 2, § 4, provides important context for this dispute. See, e.g., *Davis*, 333 Mich App at 602 ("We conclude that the Secretary of State's action in mailing an application that each registered voter was free to fill out and return, or not, fell within her authority as chief elections officer of the state and comported with her constitutional obligation to liberally construe Const. 1963, art. 2, § 4(1) to effectuate its purposes.").

The guidance plays an important function in ensuring uniformity and fairness in this year's elections. History has shown that without the current guidance, organized groups have disrupted the election through impermissible challenges, harassing election workers, and causing chaos at polling places and absent voter counting boards. (See generally DNC/MDP 03/08/2024 Amicus Brief at 3-9; ACLU of Mich/Promote the Vote 03/07/2024 Amicus Brief at 8-16). Voters have the right to cast a ballot without disruption or harassment. At the same time, election challengers

and credentialing organizations, along with local election officials and election inspectors, need guidance from the Secretary regarding how to effectively implement the challenge process set forth in the Michigan Election Law in an organized and efficient manner that allows challengers to raise permissible concerns. The existing challenger guidance accomplishes both goals.

### **CONCLUSION**

Revocation or revision of the existing challenger guidance just before the impending elections would make uniform and orderly election administration next to impossible and create needless disruption to a well-functioning challenge system already operating in compliance with the Michigan Election Law. The current guidance guards against disruption and empowers clerks and election workers to maintain order while allowing challengers to bring challenges in accordance with the law. Michiganders' fundamental right to vote is best served by preserving the status quo through the 2024 election cycle.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/Scott R. Eldridge

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Dated: June 10, 2024

**CERTIFICATE OF COMPLIANCE**

I certify that, in compliance with MCR 7.212(B), 7.312(H)(3), 7.312(A), and 7.305(A)(1), the foregoing brief contains 2,047 words, as counted using Microsoft Word's word count feature.

By: /s/Scott R. Eldridge  
Scott R. Eldridge (P66452)

# *Exhibit 1*

STATE OF MICHIGAN  
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**AFFIDAVIT OF THOMAS LUCKETT**

I, Thomas Lockett, being duly sworn, deposes and states as follows:

1. I am an adult of sound mind, have personal knowledge of the matters stated in this affidavit, and if called as a witness, could testify competently to the truth of the matters herein.

2. I have been employed as the Voter Protection Director of the Michigan Democratic Party (“MDP”) since January 2023. Prior to that, starting in April 2022, I worked as the Deputy Voter Protection Director for Election Administration for the MDP.

3. The MDP is the Democratic Party’s official state party committee for the State of Michigan. The MDP aims to ensure that the constitutional rights of its members, voters, and candidates are not impeded. For decades, the MDP has overseen election challenger programs. These programs include training and require designating and issuing credentials to election challengers.

4. Since August 2022, the MDP has trained election challenges using the guidance set forth in the Secretary of State’s manual, *The Appointment, Rights, and Duties of Election Challengers and Poll Watchers*, which was updated in March 2024.

5. The MDP plans to train hundreds of challengers for the August primary, with the training period to start June 13, 2024. Generally, challenger training for the August 2024 primary consists of 1-1.5 hours of instruction.

6. The MDP would have to invest significant resources updating and retraining volunteers to comply under any new guidance. With voting starting as soon as June 27 for the August primary election, this poses an enormous burden to ensure that all challengers will be prepared properly if there are changes. The MDP is also concerned that altering the status quo by revising the current guidance would interfere with its challengers’ ability to help facilitate an efficient election in which the public can place its trust.

FURTHER AFFIANT SAYETH NOT.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Executed this June 10, 2024

Name: Thos Cuyler Jr

Subscribed and sworn to before me  
this 10 day of June 2024.

Clinton Cuyler Jr  
Notary Public,  
My Commission Expires: Feb 16, 2029

CLINTON CUYLER JR  
NOTARY PUBLIC - STATE OF MICHIGAN  
COUNTY OF WAYNE  
My Commission Expires February 16, 2029  
Acting in the County of Wayne



**CERTIFICATE OF SERVICE**

I hereby certify that on June 10, 2024, I electronically filed the foregoing document with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record.

By: /s/Scott R. Eldridge  
Scott R. Eldridge (P66452)

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