

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

STEPHEN CARRA and ROBERT CUSHMAN
Plaintiffs

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

Case No. _____

Hon. _____

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**EMERGENCY MOTION FOR ISSUANCE OF A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

On an emergency basis, and for the reasons described in the brief that follows, the plaintiffs move this Court for issuance of a temporary restraining order and preliminary injunction. To ensure the rights of both candidates and election challengers who perform a vital role in ensuring open, fair, and transparent elections, relief must be granted sufficiently in advance of the general election on November 3, 2020 to allow the issuance of corrected directives to local election officials from the defendants.

BRIEF IN SUPPORT

This case calls upon the Court to protect the rights of a specialized team of professionals known as election challengers so that they can perform their vital role in ensuring fair, lawful, and transparent elections. The role of election challengers is created by statute. MCL 168.730. Political parties and other organized groups with an interest in the "purity of elections" and guarding against abuses are authorized to appoint election challengers to closely monitor both the voting process and the counting of ballots. *Id.* Once duly appointed and qualified, these credentialed persons are given a wide range of authority by the Michigan Election Law to closely monitor the election process. These rights and duties include:

A. Challengers 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. The 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. Be allowed to observe the manner in which the duties of the election inspectors are being performed. MCL 168.733(1)(b).

D. 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. Challenge an election procedure that is not being properly performed. MCL 168.733(1)(d).

F. 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 without handling each ballot as it is being counted. MCL 168.733(1)(g).

I. Keep records of votes cast and other election procedures as the challenger desires. MCL 168.733(1)(h).

J. Observe the recording of absent voter ballots on voting machines. MCL 168.733(1)(i).

Because election challengers play such a vital role in our democracy, our Legislature has even made it a felony to threaten, intimidate, or impede the work of an election challenger. MCL 168.734; MCL 168.733(4). In fact, there are only two reasons given by statute to support the expulsion of a challenger from a polling place: (1) if there is evidence that the election challenger is drinking alcoholic beverages; or (2) is engaging in disorderly conduct. MCL 168.733(3).

Defendant Benson is the “chief election officer of the state” and has “supervisory control over local election officials in the performance of their duties under the provisions of the [Michigan Election Law].” MCL 168.21. In that role, it is her mandatory duty to "advise and direct local election officials as to the proper methods of conducting elections" so that the entirety of the provisions contained in the Michigan Election Law, MCL 168.1 et seq, are followed. Defendant Brater is Benson's subordinate and has been appointed Director of the Michigan Bureau of Elections. In that role, Brater has been tasked by Benson, under her supervision, to in fact supervise and administer the election law.

On October 16, 2020, the defendants issued a written directive to local election officials outlining procedures for the upcoming November 3, 2020 general election (hereinafter the “2020 General Election Directives”). A copy of that document is attached as Exhibit A. In relevant part, they have directed - or at the very least permitted - local election officials to condition the presence of election challengers upon wearing a face mask. And then even while wearing a mask, a local election official may mandate and expressly command that election challengers remain socially distanced from election workers. The directive adopts the definition of "social distancing" promulgated by Robert Gordon, Director of the Michigan Department of Health and Human Services, in his October 9, 2020 order. Social distancing therefore means that an election challenger must maintain at least 6 feet of distance from another person including a poll worker. A copy of Director Gordon's October 9, 2020 order is attached as Exhibit B.

These directives render it impossible for an election challenger to fully execute their duties and exercise their rights under Michigan Election Law. As a threshold matter, and as described above, an election challenger can only be denied his or her right to inspect and challenge if he or she is consuming alcohol or acting disorderly. MCL 168.733(3). The statute does not provide for expulsion or impediment based on any other factor. But this case does not merely advance a technical challenge to the defendants' directive. More critically, an election challenger is not able to discharge his or her critical duty and right from a distance of six feet.

Plaintiff Cushman is a duly appointed election challenger who intends to serve in that role during the November 3, 2020 general election. Additionally, Plaintiff Cushman served in that role during the August 2020 primary election. As described in the verified complaint,¹ Plaintiff Cushman states that it was and will be very difficult to impossible to exercise his full rights from a distance of at least six feet. By way of specific example, from his own personal experience he states:

- A. It was very hard to impossible to read names in the poll books.
- B. It was impossible to tell whether the high-speed tabulator operator cleared the results before re-running the stack of ballots because of a jam of one ballot.
- C. It was hard to see and hear the adjudication process.
- D. It was very hard to impossible to observe computer screens which contain election data.
- E. It was very hard to impossible to observe the checking of each ballot for seal and to observe whether envelopes were signed and dated.

¹ A temporary restraining order may be granted based on facts shown by "a verified complaint." MCR 3.310(B)(1)(a).

And it is not just election challengers who recognize that they can't perform their statutory duties while socially distanced; local election officials know it too. Based on the defendants' directives, a local election official in the City of Detroit who was training poll workers rather gleefully describes how election challengers are to be impeded:

Election Official: They have to wear a mask and they have to stay six feet. That's important because they can come behind your table, but if you don't have six feet, they can't come back there. They cannot wear anything that signifies who they work for. It has to be on the card. So, they can't walk in with a party, or anything on, just like you can't on your mask, they can't either. Any questions?

Poll Worker: So if they're six feet back, they can't actually see.

Election Official: Exactly, unless they got really good vision or they brought their binoculars.

[Laughter]

Election Official: Six feet. That's the rule, right? And you are entitled to your six feet!

This training session was recorded and a complete copy is attached as Exhibit C. The quoted portion begins around 1:36:30. For ease of timely review, this recording is also accessible online at <https://youtu.be/kPFMOxdd3Bs> [this uploaded YouTube video is designated as unlisted and is only accessible by this direct link during the pendency of this case].

A court may, without advance written or oral notice to the defendants, issue a temporary restraining order. MCR 3.310(B).² It should do so when it clearly appears

² Upon filing, a copy of the verified complaint and motion will be provided by email to Defendants Benson (secretary@michigan.gov) and Brater (BraterJ@michigan.gov) at their listed official email address at the State of Michigan Contact Directory, see <http://www.state.mi.us/dit/Default.aspx>.

from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice. MCR 3.310(B)(1)(a). TROs, as the name implies, are indeed temporary and can only remain effective 14 days absent good cause shown. MCR 3.310(B)(3). Upon issuance, the court must set either a hearing on the earliest possible date or order the parties to show cause why the TRO should not become a preliminary injunction. A party seeking issuance of a TRO must also describe the efforts made to give notice of the request. MCR 3.310(B)(1)(b). By signature upon this document, the undersigned counsel does certify that every effort will be made to serve a copy of the complaint and this motion upon the defendants immediately upon filing. Upon service, proof will be promptly filed.

Preliminary injunctions are, in essence, a longer-term TRO that remain in effect throughout the pendency of a case (or until further order). They are authorized by MCR 3.310. Unlike TROs, a preliminary injunction may not be issued until either after hearing or following an order to show cause why a preliminary injunction should indeed not issue. While injunctive relief is indeed an extraordinary remedy to be ordered only when justice so requires, it is appropriate when there is no adequate remedy at law and there is a real and imminent danger of irreparable injury. See *In re Esquire Products International, Inc*, 136 Mich App 492, 495; 357 NW2d 77 (1984). When considering a request for a preliminary injunction, a court should evaluate the following four factors:

1. the likelihood that the party seeking the injunction will prevail on the merits;

2. the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued;
3. the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and
4. the harm to the public interest if the injunction is issued.

Alliance for Mentally Ill v Department of Community Health, 231 Mich App 647; 588 NW2d 133 (1998).

Applying this test, a preliminary injunction is both warranted and required. First, the plaintiffs have a strong if not certain chance of success on the merits. The 2020 General Election Directives as it applies to election challengers interferes with the duties and rights of said challengers as outlined in MCL 168.733. The Election Bureau Director and the Secretary “must apply the statute as written,” *Mich Ass’n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019), not what these defendants believe the statute “ought to” provide for, *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002).

Second, the plaintiffs and all those interested in maintaining transparent and fair elections will be irreparably harmed absent the issuance of an injunction. There is no remedy at law and no means to correct the election law violations prior to or after the election. See *Treasurer of the Comm. to Elect Gerald D. Lostracco v Fox*, 150 Mich App 617; 389 NW2d 446 (1986).

Third, it cannot be properly said that the defendants will be harmed by the issuance of an injunction. Defendant Benson and her designee Defendant Brater have

the statutorily imposed duty of ensuring that local election officials conduct the November 3, 2020 election in conformity with Michigan Election Law. As discussed, their current 2020 General Election Directives is violative of that law. Correcting that error while there is still time to do so - even if they are adverse to voluntarily doing so – is not harmful to them in any proper sense of the word.

Fourth, the real harm to the public is in not granting an injunction. The people of a democracy have no greater interest than ensuring that their elections are open, fair, transparent, and checked for accuracy. By denying them the services of election challengers, they are being robbed of a critical check on the system.

REQUEST FOR RELIEF

Plaintiffs CARRA and CUSHMAN respectfully request that this Court grant their motion and order the following relief:

- A. enter a temporary restraining order requiring the defendants to both 1.) withdraw their violative 2020 General Election Directives (and any similar written and oral directive) with respect to the portions permitting local election official to prevent fulfillment of the duties and responsibilities of election challengers by and through the imposition of physical distancing requirements rendering such activities very difficult to impossible, and 2.) withdraw any further similar direction to local election officials.

- B. Order the defendants to show cause why a preliminary and/or permanent injunction should not issue containing the terms outlined in the preceding paragraph in addition to a command that the defendants issue a timely revised

directive(s) to local election officials in compliance with MCL 168.733 and MCL 168.734.

C. Order any other relief necessary to protect the rights of election challengers so as to allow them to assist in assuring the integrity of our election.

Date: October 22, 2020



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