

STATE OF MICHIGAN
IN THE SUPREME COURT

ANGELIC JOHNSON, et al.,

Supreme Court No. 162286

Petitioners,

v

JOCELYN BENSON, et al.,

Respondents.

**BRIEF *AMICUS CURIAE* OF
EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND**

ORAL ARGUMENT NOT REQUESTED

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Date: December 3, 2020

STATEMENT OF QUESTION ADDRESSED

- I. If Petitioners establish their allegations of illegality with regard to the November 2020 General Election, does this Court have authority to invalidate some or all ballots cast in that election?

Petitioners answer:	Yes
Respondents presumably answer:	No
<i>Amicus curiae</i> answers:	Yes

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INTRODUCTION AND STATEMENT OF INTEREST

Amicus curiae Eagle Forum Education and Legal Defense Fund is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than 35 years, *amicus* consistently has defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community, *amicus* long has supported making elections at all levels honest by requiring positive identification for voters, cleaning up registration rolls, and enforcing ballot security. It also has submitted a brief *amicus curiae* to the Supreme Court of the United States in *Republican Party of Pennsylvania v Boockvar*, No. 20-542, relating to the Presidential election in that State.

Eagle Forum Education and Legal Defense Fund in this brief will discuss various remedies this Court has authority to grant in the event it finds the Petition meritorious in whole or in part.¹

FACTUAL BACKGROUND

The Petition, its accompanying exhibits, and supporting Brief suggest wrongdoing in connection with Michigan's 2020 General Election that is breathtaking in scope: instances of widespread fraud, forgery, double-voting,

¹ Consistent with the spirit of MCR 7.312(H)4), which applies to *amicus* briefs in calendar cases, no counsel for a party authored this brief in whole or in part, nor did any party or its counsel (nor any other person other than *amicus*, its members or its counsel) make a monetary contribution intended to fund its preparation or submission.

concealment, intimidation, and numerous other types of misconduct. Among other things, Petitioners allege and offer evidence that at least 508,016 ballots, or more than 9 percent of all those cast statewide, “were unlawful and did not conform to established Michigan Election Law.” Petition, ¶ 42 & Appx. 278-300 (Expert Reports of Matthew Braynard and Dr. Qianying “Jennie” Zhang).

Petitioners request a broad array of relief from this Court, aimed generally at attempting to rectify the results of the alleged illegalities. Petition, pp 52-54; Brief, pp 45-47. Their Brief concludes by alleging that Respondents’ actions not only constitute an abuse of their official positions under color of law, but violate Petitioners’ civil liberties “in such stark ways that the Court can and should nullify the General Election, in whole or in part, until an audit can ensure the accuracy and integrity” of the vote. Brief, p 47.

Assuming Petitioners can establish the illegality they allege with regard to the election’s conduct, this Court is well within its authority to grant that form of relief.

ARGUMENT

- I. **This Court long has recognized that wrongdoing, including official failures to comply with election law, may require the invalidation of votes up to and including an entire election.**

“The authority of the people is exercised through *elections*, by means of which they select and appoint the legislative, executive, and judicial officers,

to whom shall be entrusted the powers of government.” 1 Cooley, Constitutional Limitations (1st ed), p 598 (emphasis in original). Michigan’s Constitution directs that the Legislature, except as otherwise provided by the State or Federal Constitutions, “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 franchise*, and to provide for a system of voter registration and absentee voting....” Const 1963, art 2, § 4 (emphasis added). As noted in the Address to the People, that provision revised the 1908 Constitution and vests the Legislature with “full authority over election administration” subject only to other constitutional provisions and Federal law. 2 Official Record, Constitutional Convention 1961, p 3366.

As Madison noted, humans are not angels – otherwise government would be unnecessary. The Federalist No. 51 (Madison) (Rossiter ed, 1961), p 319. And as Solomon observed, there is nothing new under the Sun. 2 *Ecclesiastes* 1:9 (Revised Standard). Thus, this Court 130 years ago, in recounting the birth of voter-registration laws at the dawn of Statehood decades earlier, described widespread electoral abuses that tainted Michigan’s elections even then:

Frauds in elections produced the necessity of the registry laws; but these were not found sufficient to prevent the frauds and abuses which became so notorious that other means were found necessary to preserve the purity of elections. Fraudulent tickets were issued,—fraudulent in that they purported to be the regular party tickets, but in reality contained the name of some of the

candidates of the opposite political party,—and thus voters were deceived into voting for candidates not of their choice, and contrary to their intention. The preparation and distribution of ballots by party agents furnished an excuse for large assessments upon candidates. Voters were supplied with tickets, and accompanied to the polls, by party agents, to see that the tickets furnished were deposited in the boxes. Voters became the subject of bargain and sale, and the purchaser accompanied the voter to the polls to see that the infamy was consummated by the deposit of the vote placed in his hands. Drunken men were taken to the polls, supported by their fellows. The voting places were overcrowded, and in this way voters were kept from the polls or deterred from voting. “Workers” were employed, and paid by candidates and party managers to peddle tickets; and not always were they employed for their most commendable qualifications, or from the most worthy motives. Secret organizations met on the night previous to election, and furnished their members with “vest-pocket” tickets,—a proceeding foreign to the spirit of our government. Intimidation of voters was openly charged under the system under which employers could stand in close proximity to the polls, and distinguish what ticket their employes voted....Such are some of the abuses that grew up under the old system, rendering a reform absolutely necessary to secure fair and honest elections, good government, and the perpetuity of our institutions. To such an extent have these abuses been carried that one of the eminent counsel for relator felt justified in asserting in his brief that “fraud in elections has become a fine art and corruption of voters a profession;” and the governor of the state in his message in January, 1889, made it the subject of earnest and special comment. [*Common Council of City of Detroit v Rush*, 82 Mich 532, 538-540; 46 NW 951 (1890), citing Senate Journal 1889, p 18].

In our time, Petitioners allege a sweeping range of abuses with regard to last month’s General Election. *See generally*, Petition and Brief. Some allegedly took place via 21st Century technology; others by old-fashioned methods that have existed since bullies first roamed the Earth. Assuming

(without advocating) that Petitioners can establish that wrongdoing, the question becomes, what may this Court do about it?

This Court long has recognized its authority to void ballots cast in violation of law. *People ex rel Foley v Kopplekom*, 16 Mich 342 (1868) involved a two-candidate race for Houghton County Sheriff. Though Franklin Township in that county had been organized two years earlier, it had never established a board of registration or voter register, contrary to state law directing their creation and mandating that election inspectors “shall not receive the vote of any person whose name is not written in the register.” 16 Mich at 343. Foley, who would have been elected Sheriff had the Franklin Township votes been counted but would have lost without them, brought a quo warranto action challenging the registration law’s constitutionality. Foley also argued that even if the law were valid, township voters should not have their votes invalidated, since they were only unable to register because officials had failed to create a registry. 16 Mich at 346.

After finding the registry act a permissible means of advancing the constitutional directive to “preserve the purity of elections, and guard against the abuses of the elective franchise,” *Id*, the Court held that all Franklin Township votes “were given and received in plain violation of the law, and were consequently void.” *Id* at 347. *Foley* thus stands for the proposition that where ballots are cast in violation of State election law, this Court may declare them void even on a large scale.

Similarly, in *Attorney General ex rel Seavitt v McQuade*, 94 Mich 439; 53 NW 944 (1892), the board of canvassers declared McQuade the winner of a two-district election for Ecorse Township clerk by a 340-331 margin. Seavitt, who carried the first district by 59 votes, alleged that District 2's 139-71 result for McQuade should be invalidated in full due to the "willful and fraudulent conduct" of its election-board chairman. That alleged misconduct included fraudulently accepting 13 ballots from unregistered voters and 75 ballots from people who had unlawfully shown their ballots after marking them; refusing to swear an inspector to mark ballots of incompetent voters; allowing third parties to accompany voters into the booth, and other irregularities. 94 Mich at 440-441.

Remanding for trial to determine whether the 13 unregistered votes and accompanying of voters into the booth had taken place, this Court held that if they did, it "tainted the vote of the whole precinct" and would justify invalidation of the precinct's vote. *McQuade*, 94 Mich at 444. As the Court noted,

When fraud on the part of the officers of election is established, the poll will not be rejected, *unless it shall prove impossible to purge it of the fraud*. When the result, as shown by the returns, is false and fraudulent, *and it is impossible to ascertain the actual vote from the other evidence in the case, the vote of such poll must be wholly rejected*. [*Id* at 443 (emphasis added)].

That rule remains good law. *See Rosenbrock v Sch Dist No 3, Fractional Twps of Williams & Monitor*, 344 Mich 335, 341-342; 74 NW2d 32 (1955) (citing *McQuade*).

Alternatively, this Court may place on Respondents (or any aligned Intervenor(s)) the burden of establishing the integrity of votes from jurisdictions in which Petitioners establish balloting as compromised. “Where the conduct of election officers is such as to destroy the integrity of their returns, and to avoid the *prima facie* character, due and adequate proof must be produced of each vote relied on by the respondent.” *McQuade*, 94 Mich at 444 (citation omitted). Failure to do so would justify the Court in throwing out election results of the entire jurisdiction:

It is of far more consequence to the people of this state and to the stability of our form of government that these provisions should be held mandatory than is the fact that occasionally the will of the people may be defeated by adhering to them, and rejecting the entire precinct so tainted with fraud. [*McQuade*, 94 Mich at 444].

Interpreting and applying pertinent provisions of Michigan’s Constitution is this Court’s “most solemn responsibility.” *Citizens Protecting Michigan’s Const v Sec of State*, 503 Mich 42, 54; 921 NW2d 247 (2018). Petitioners have raised serious issues arising under several constitutional (and statutory) provisions, going to the very heart of our ability to continue as a self-governing People. In the event this Court determines that the allegations have merit, its remedial powers are of a commensurately broad scope.

CONCLUSION/RELIEF REQUESTED

Democracy dies in darkness, including that created when pizza boxes are taped over the windows of vote-counting centers. Petitioners have alleged

fraud and irregularities with regard to Michigan's 2020 General Election on a massive scale. Should this Court determine that those allegations have merit, it is fully authorized to provide meaningful relief, up to and including nullification of the election in whole or in part.

Respectfully submitted,

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