

**THE STATE OF MICHIGAN
COURT OF CLAIMS**

DONALD J. TRUMP FOR PRESIDENT, INC.
and ERIC OSTERGREN,

Plaintiffs,

and

Democratic National Committee,

Intervening Plaintiff,

v.

JOCELYN BENSON, in her official capacity as
the Michigan Secretary of State,

Defendant.

Civil Action No. 20-000225-MZ

HON. CYNTHIA STEPHENS

Marc F. (Thor) Hearne II, #P40231
True North Law, LLC
112 S. Hanley Road, Suite 200
St. Louis, MO 63015
314-296-4000

Marc E. Elias (DC #442007)*
Kevin Hamilton (WA # 15648)*
Uzoma N. Nkwonta (DC #975323)*
PERKINS COIE LLP
Attorneys for Proposed Intervenors
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

Scott R. Eldridge (P66552)
MILLER CANFIELD
One Michigan Avenue, Suite 900
Lansing, Michigan 48933 (USA)
1.517.483.4918
eldridge@millercanfield.com

**Pro hac vice motion forthcoming*

**[11/04/2020] MOTION OF DNC
TO INTERVENE AS PLAINTIFF**

DNC respectfully requests that it be permitted to intervene as Plaintiff in this matter under Michigan Court Rule 2.209.

In support, DNC relies on the attached brief. Attached as Exhibit A is DNC's Proposed Complaint-in-Intervention, in accordance with Michigan Court Rule 2.209(C)(2).

Due to the urgency of this case, DNC asks the Court to promptly issue its ruling on this Motion. If this Motion is granted, Intervening Plaintiff will file immediately with the Court a properly verified complaint.

Respectfully submitted,

Dated: November 4, 2020

s/ Scott Eldridge

Scott R. Eldridge (P66452)

MILLER CANFIELD

One Michigan Avenue, Suite 900

Lansing, Michigan 48933 (USA)

1.517.483.4918

eldridge@millercanfield.com

Marc E. Elias (DC #442007)*

Kevin Hamilton (WA# 15648)*

Uzoma N. Nkwonta (DC #975323)*

PERKINS COIE LLP

Attorneys for Proposed Intervenors

700 Thirteenth Street NW, Suite 800

Washington, DC 20005

Telephone: (202) 654-6200

**Pro hac vice motion forthcoming*

PROOF OF SERVICE

Scott Eldridge certifies that on the 4th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ Scott Eldridge
Scott Eldridge

EXHIBIT A

**IN THE STATE OF MICHIGAN
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**[PROPOSED] VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

Intervenor-Plaintiff the Democratic National Committee (“DNC”) files this Verified Amended Complaint for Declaratory and Injunctive Relief against Defendant JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, and allege as follows:

NATURE OF THE CASE

1. Donald J. Trump for President, Inc. and Eric Ostergren (the “Trump Plaintiffs”) filed this lawsuit to obstruct the counting process. In it, the Trump Plaintiffs ask the Court to stop the counting of all mail ballots and segregate those ballots that have already been cast. They do so based on specious claims that their rights to observe are being obstructed, devoid of factual allegations to support such claims.

2. The right to observe election day activity and exercises its attendant power to challenge voters is created and defined by statute. *Trump for President v Boockvar*, No. 20-cv-

966, 2020 WL 5997680, at *67 (“[T]here is no individual constitutional right to serve as a poll watcher.”) (WD Pa, Oct. 10, 2020); *Pennsylvania Democratic Party v Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa, Sept. 17, 2020) (same); *Republican Party of Pennsylvania v Cortes*, 218 F Supp 3d 396, 413–14 (ED Pa 2016) (similar); Opinion and Order, *Polasek-Savage v Benson*, No. 20-000217-MM (Mich Ct Cl Nov 3, 2020) (similar); Order, *Kraus v Cegavske*, No. 20 OC 00142 (Nev Dist Ct, Oct. 29, 2020) *motion to stay denied*, No. 82018 (Nev Sup Ct, Nov. 03, 2020) (denying mandamus because petitioners including Donald J. Trump for President and others failed to cite any constitutional provision, statute, rule, or case that supports ... request” for increased access to mail ballot processing and counting).

3. Michigan law allows registered voters in Michigan to serve as challengers. Challengers shall not make a challenge indiscriminately and without good cause. MCL § 168.727(3). A challenger may not “interfere with or unduly delay the work of the election inspectors.” *Id.* In fact, it is a misdemeanor to challenge “a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters.” *Id.* A challenge does not prevent a ballot from being counted. See Michigan Department of State Bureau of Elections, *The Appointment, Rights and Duties of Election Challengers and Poll Watchers*, at 10, https://www.michigan.gov/documents/SOS_ED_2_CHALLENGERS_77017_7.pdf.

4. Nevertheless through this action, the Trump Plaintiffs ask this Court to rewrite Michigan’s challenger laws, under the auspices of a claim for an equal protection violation under the Constitution. The Trump Plaintiffs’ claims are meritless. Moreover, should the Trump Plaintiffs be successful in using this action to obstruct the timely and lawful counting of ballots in Michigan or to otherwise slow the certification of the election in any way, it is the Intervening Plaintiff and its members, voters, and candidates with whom it affiliates whose equal protection

rights would be violated. Thus, for the reasons and those that follow, Intervening Plaintiff files this Complaint in Intervention to protect itself against irreparable constitutional injury in these proceedings.

JURISDICTION AND VENUE

5. The DNC brings this action under Article I, § 2 of the Michigan Constitution and MCR 2.605.

6. This Court has jurisdiction over the subject matter of this action pursuant to Michigan Compiled Laws § 600.6419.

7. This Court has personal jurisdiction over the Defendant Secretary of State Jocelyn Benson, who is sued in her official capacity only.

8. Venue is proper in the Court of Claims pursuant to Michigan Compiled Laws § 600.6419, because this is a constitutional and declaratory claim against the Secretary of State.

9. This Court has the authority to enter a declaratory judgment pursuant to Michigan Court Rule 2.605. It has authority to enter an injunction under the Michigan Constitution. *Sharp v City of Lansing*, 464 Mich 792 (2001).

PARTIES

10. Intervening Plaintiff DNC is the national party committee of the Democratic Party, as that term is defined by and used in 52 U.S.C. § 30101, dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States including in Michigan. The DNC has members and constituents across the State, including eligible voters who submitted absentee ballots in the November 3 election, and whose ballots have yet to be counted. The DNC also supports and affiliates with candidates whose electoral prospects, as well

as the Democratic Party's electoral prospects as well, stand to be harmed by the Trump Plaintiffs' baseless litigation.

11. Defendant JOCELYN BENSON is the Secretary of State of Michigan and is sued in her official capacity. Secretary Benson is Michigan's chief elections officer and, as such, has "supervisory control over local election officials in the performance of their duties." Mich. Comp. Laws § 168.21. In that role, she is specifically responsible for "[a]dvis[ing] and direct[ing] local election officials as to the proper methods of conducting elections." *Id.* § 168.31(1)(b). Secretary Benson is also tasked with overseeing voter registration, *e.g.*, *id.* §§ 168.496, 168.509o, including the automatic registration of voters who conduct business with her office to obtain a driver's license or state identification card. *Id.* § 168.493a. She, personally and through the conduct of her employees, officers, agents, and servants, acted under color of State law at all times relevant to this action.

CLAIMS FOR RELIEF

COUNT I

Michigan Const., Art. I, § 2 Denial of Equal Protection

12. The DNC realleges and incorporate by reference all prior and proceeding paragraphs, as though fully set forth herein.

13. The right to vote is a "fundamental political right . . . preservative of all rights," *Reynolds*, 377 U.S. at 562 (quoting *Yick Wo*, 118 U.S. at 370), that is protected by the Michigan Constitution. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. at 35-36.

14. Article I, § 2 of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws."

15. Having adopted a system by which absentee voting is available to all voters, Michigan may not “by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Obama For Am v Husted*, 888 F Supp 2d 897, 910 (SD Ohio, 2012), *aff’d*, 697 F3d 423 (CA 6, 2012); *Bush v Gore*, 531 US 98, 104–05 (2000) (holding Equal Protection Clause applies to “the manner of [the] exercise [of voting]” and “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”).

16. All Michigan voters who cast lawful absentee ballots should have equal access to having their vote counted, which the Michigan Constitution provides.

17. The Trump Plaintiffs seek relief that would jeopardize this right. Segregating ballots treats some voters differently from others.

18. The State does not have even a legitimate, much less a compelling, interest in the disparate treatment of similarly situated voters. See *Obama for America*, 888 F Supp 3d 897, 910 (holding a state had no compelling interest in setting an in-person early voting deadline, which valued the rights of military voters over nonmilitary voters).

19. Any order by Defendant to stop the counting of ballot, as the Trump Plaintiffs demand, would amount to a violation of Michigan’s Equal Protection guarantee.

20. Absent relief, therefore, Michigan voters, including the DNC’s members, will be denied an equal opportunity to participate in Michigan’s elections.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

- (a) declaring that the counting of absentee ballots must continue;
- (b) declaring that any action by Defendant to stop the counting of ballots will result in a violation of Michigan’s Equal Protection Clause;

- (c) enjoining Defendant from issuing an order or instruction of any kind to stop the counting of ballots, as requested by the Trump Plaintiffs; and
- (b) granting such other and further relief as the Court deems just and proper.

Dated this 4th day of November, 2020.

Respectfully submitted,

/s/ Scott R. Eldridge

Scott R. Eldridge (P66452)

MILLER CANFIELD

One Michigan Avenue, Suite 900

Lansing, Michigan 48933 (USA)

1.517.483.4918

eldridge@millercanfield.com

Marc E. Elias (DC #442007)*

Kevin J. Hamilton (WA # 15648)*

Uzoma N. Nkwonta (DC #975323)*

PERKINS COIE LLP

Attorneys for Intervenors

700 Thirteenth Street NW, Suite 800

Washington, DC 20005

(202) 654-6200

Counsel for Plaintiffs

**Pro hac vice motion forthcoming*

VERIFICATION

“I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.”

Date:

[name]

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(202) 654-6200

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Lansing, Michigan 48933 (USA)
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**Pro hac vice motion forthcoming*

**[11/04/2020] BRIEF IN SUPPORT OF 11/04/2020 MOTION OF DNC
TO INTERVENE AS PLAINTIFF**

Intervening Plaintiff DNC moves to intervene as a plaintiff in this suit filed by Plaintiffs Donald J. Trump for President, Inc. and Eric Ostergren (together, the “Trump Campaign”). Through this lawsuit, the Trump Campaign seeks to disrupt the lawful counting of ballots in Michigan, which impairs DNC’s distinct and protectable legal interests. Specifically, any challenge or change to the State’s policy for public observation of the ballot tabulation process will unquestionably impact DNC’s operations and impair its constitutional rights. DNC’s immediate intervention to protect those interests is warranted.

Intervention is governed by Michigan Court Rule (“MCR”) 2.209:

(A) **Intervention of Right.** On timely application a person has a right to intervene in an action . . . (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless applicant’s interest is adequately represented by existing parties.

(B) **Permissive Intervention.** On timely application a person may intervene in an action . . . (2) when an applicant’s claim or defense and the main action have a question of law or fact in common.

“The rule for intervention should be liberally construed to allow intervention where the applicant’s interests may be inadequately represented.” *Neal v Neal*, 219 Mich App 490, 492 (1996); see also *State Treasurer v Bences*, 318 Mich App 146, 150 (2016).

Here, DNC readily satisfies the requirements for intervention of right under MCR 2.209(A). MCR 2.209(A)(3) requires “timely application, a showing that the representation of the applicant’s interests by existing parties is or may be inadequate, and a determination whether disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect his interests Its motion for intervention follows.” *Chvala v Blackmer*, unpublished opinion of the Court of Appeals, issued January 16, 2001 (Docket No 221317), 2001 WL 789526, p *2, (citing *Oliver v State Police Dep’t*, 160 Mich App 107, 115 (1987)).

First, its application is timely because it follows within hours of the filing of this suit, before any significant action has been taken. *See, e.g., Karrip v Cannon Tp*, 115 Mich App 726, 731 (1982).

Second, DNC possesses interests that will likely be impaired or impeded by this action. DNC is a national political committee as defined in 52 U.S.C. § 30101 that is, among other things, dedicated to electing local, state, and national candidates of the Democratic Party in Michigan. Specifically, DNC “contend[s] that [its] conduct, as well as that of [the Trump Campaign], [i]s intended to be regulated by [Defendant] and that [it is] subject to the same enforcement risks as” the Trump Campaign. *Associated Builders & Contractors v Wilbur*, unpublished opinion of the Circuit Court, issued December 15, 2000 (Docket No 00-2512-CL-L), 2000 WL 35737131, p *47 (contingently granting intervention). Like the Trump Campaign, DNC is a political party that has an interest in observing vote tabulation and ensuring the integrity of the election process. Because its ability to conduct such observation will be impacted by this suit, it has readily satisfied this requirement. Moreover, if the Trump Campaign successfully stops the tabulation, then the rights of DNC and its members—including the right to vote and the right to due process—will be violated.

Third, no current party adequately represents DNC’s interests. The Trump Campaign is indisputably opposed to DNC’s electoral performance in Michigan, while Defendant cannot be relied upon to safeguard DNC’s ability to observe the tabulation process on equal grounds as the Trump Campaign. *See, e.g., Estate of Lyle v Farm Bureau Gen Ins Co of Mich*, unpublished opinion of the Court of Appeals, issued September 19, 2019 (Docket No 343358), 2019 WL 4555993, p *7 (affirming intervention and noting that where “concern of inadequate representation

of interests exists, the rules of intervention should be construed liberally in favor of intervention” (quoting *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 762 (2001)).

In the alternative, DNC should be granted permissive intervention under MCR 2.209(B)(2). That rule provides for permissive intervention where a party timely files a motion and the party’s “claim or defense and the main action have a question of law or fact in common.” MCR 2.209(B)(2). “[T]he trial court has a great deal of discretion in granting or denying [permissive] intervention.” *Mason v Scarpuzza*, 147 Mich App 180, 187 (1985); *see also City of Holland v Dep’t of Nat Res & Envt*, unpublished opinion of the Court of Appeals, issued March 1, 2012 (Docket No. 302031), 2012 WL 676356, p *3. As discussed above, DNC’s motion is timely, and DNC is entitled to the same statutory right to observe the tabulation of votes as the Trump Campaign.

For the foregoing reasons, DNC respectfully asks this Court to grant its motion to intervene.

Respectfully submitted,

Dated: November 4, 2020

s/ Scott Eldridge
Scott R. Eldridge (P66452)
MILLER CANFIELD
One Michigan Avenue, Suite 900
Lansing, Michigan 48933 (USA)
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s/ Scott Eldridge
Scott Eldridge