



**State Headquarters**  
2966 Woodward Avenue  
Detroit, MI 48201  
Phone 313.578.6800  
Fax 313.578.6811  
E-mail [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

**Legislative Office**  
115 West Allegan Street  
Lansing, MI 48933  
Phone 517.372.8503  
Fax 517.372.5121  
E-mail [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

**West Michigan Regional Office**  
1514 Wealthy St. SE, Suite 260  
Grand Rapids, MI 49506  
Phone 616.301.0930  
Fax 616.301.0640  
Email [aclu@aclumich.org](mailto:aclu@aclumich.org)  
[www.aclumich.org](http://www.aclumich.org)

July 1, 2020

*Via Electronic Mail to  
ADMcomment@courts.mi.gov*

Larry S. Royster, Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: Proposed Administrative Order Regarding Election-Related Litigation  
ADM File No. 2020-03

Dear Mr. Royster:

The ACLU of Michigan urges the Court not to adopt the proposed administrative order regarding election-related litigation. Should the Court decide to adopt an order, we recommend changes and/or alternatives, as set forth below.

### **Background**

Since 2008 this Court has issued directives, in the form of memoranda, prior to each presidential election regarding emergency procedures to be followed concerning election-related litigation. The Court has directed that upon the filing of a complaint regarding an election matter, immediate notification be made to the Supreme Court Clerk, the Michigan Director of Elections, and the Assistant Attorney General in the Elections Division. The Supreme Court Clerk was to be provided with information regarding the suit, including the name of the assigned judge and a statement of the issues. This Court would then decide whether the trial court should certify the controlling questions in conformity with MCR 7.308(A), and no order granting or denying relief could be entered by the lower court until it had received notification of this Court's decision regarding certification.

The Court is now considering the adoption of a similar administrative order regarding election-related litigation and has invited public comment.

### **The Certification Requirement Will Preclude Effective Relief and Usurp Lower Courts' Authority Over Local Matters**

The practical effect of this Court's prior directives regarding certification has been that most emergency election-day litigation has been delayed so as to preclude any effective remedy. If this Court determined that the matter was to be certified, then the lower court could not act. But even when the Court determined that the matter was not to be certified, the amount of time it took to

make that determination generally rendered lower court action irrelevant. The certification procedure in the proposed administrative order would likely have the same effect.

Election-day lawsuits raising emergency issues regarding election administration will often involve a discrete problem arising in an individual city or township. For example, there could be polling place closures, power failures, or other breakdowns in the processing of voters or ballots that could be remedied by an order from a circuit court in that jurisdiction. Although such local issues would seldom be of such public moment as to justify certification, they would require an expeditious remedy. Additionally, the circuit court having jurisdiction over that locality would be in the best position to consider the evidence and determine whether a court order would be warranted and efficacious. Problems of this nature require rapid resolution and rapid judicial action. The certification procedure that this Court has previously required, and is presently considering, would most often preclude such a rapid and necessary resolution.

In sum, because election-day emergencies often require swift judicial action at the local level and because circuit courts are best situated to act quickly and decisively in the first instance, we urge the Court to reject the administrative order as proposed.

### **The Scope of the Proposed Administrative Order Is Overbroad and Could Interrupt Ongoing Litigation**

In addition to the certification procedure causing delays and precluding effective remedies on Election Day, the order as proposed could hamper ongoing litigation. The proposed order pertains to all “election-related litigation” and “election matters.” There are currently pending in Michigan courts a number of lawsuits regarding election matters that could be unduly interrupted or delayed if the proposed order comes into effect at this time and is deemed to apply to such litigation. If the proposed order will prevent lower courts from ordering relief in all ongoing cases until the certification procedure is complete, there is a likelihood that significant election-related matters will not be timely resolved.

### **Alternatives to the Proposed Order Include Omitting the Certification Requirement, Limiting the Scope of the Order, Maintaining a Notification Requirement, and Providing for Expedited Appeals to the Supreme Court**

If the Court decides to adopt an order regarding election-related litigation, we recommend changes or alternatives as follows:

1. Omit the Certification Requirement. For the reasons stated above, we believe the certification requirement should be omitted.
2. Narrow the Scope of the Order. Also for the reasons stated above, the order should exempt ongoing litigation, or should be limited to litigation that is filed on or just before Election Day.
3. Maintain the Notification Requirement. We believe that many of the concerns animating the proposed order and the directives issued in prior elections can be satisfied through the proposed order’s requirement that the Supreme Court Clerk, State Director of Elections, and Assistant Attorney General in the Elections Division be notified of election-related

litigation. The Court will then be empowered, through its inherent and constitutional authority, to exercise superintending control over lower courts, or certify a question under MCR 7.308(A), when an urgent matter of statewide import comes to its attention, and the relevant state officers will be able to urge this Court to take action should they deem it necessary.

4. Add an Expedited Appeal Provision. Election-day litigation is always conducted in accordance with emergency procedures. Because time is of the essence in such cases, this Court's order could direct that any lower court orders, whether granting or denying relief, be immediately sent to this Court and that an appeal from the lower court order go directly to this Court rather than to the Court of Appeals.

Sincerely,



Dan Korobkin, Legal Director  
Sharon Dolente, Voting Rights Strategist  
American Civil Liberties Union of Michigan