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BILL ANALYSIS



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Senate Bills 590 and 591 (as introduced 10-17-23)

Sponsor: Senator Mary Cavanagh

Committee: Elections and Ethics

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INTRODUCTION

The bills would establish the legal process and grounds by which a candidate for office, the Governor, the Attorney General (AG), or the Secretary of State (SOS) could contest the certification of an election. A plaintiff could contest on the grounds that 1) the defendant did not receive the largest number of votes eligible to be counted in that election or that 2) fraud or error occurred in the canvass or returns of votes. A plaintiff would have to file an action with the Court of Claims for elections canvassed by the Board of State Canvassers, or else with an appropriate circuit court. The plaintiff would have to submit to the court the plaintiff's initial pleading, as well as an affidavit verifying the truth of the facts supporting the claim. A plaintiff could not seek any preliminary injunctive relief. The defendant would have to file either a motion to dismiss or an answer to the initial pleading.

Any party to an action under the bills could request leave from the court to inspect election materials *only* for the purpose of preparing for trial. After trial of an action, the court would have to issue a written decision and final judgment as soon as practicable; however, the court could not issue an order that prevented the standard certification of an election or a recount. A court's decision could be appealed, but for a presidential election, an appeal would have to conclude before presidential electors convened in December.

FISCAL IMPACT

Unless a plaintiff prevailed in court, Senate Bill 590 would require the plaintiff to reimburse the reasonable costs to any public office for providing access to any election materials pursuant to a court order, and thus have no additional costs to the State or local governments. In cases in which a plaintiff prevailed in court, the State and local governments thus would incur costs in providing any court ordered materials to the plaintiff. Those costs are indeterminate and would depend on the actual number of plaintiffs successfully challenging the outcome of an election. Additionally, costs would vary by local jurisdiction, depend on the materials provided to the plaintiff, and would have to be incurred by the local jurisdiction.

Senate Bills 590 and 591 would have an indeterminate fiscal impact on State courts, local courts, and the AG. Any complaints filed pursuant to the bills would be heard in either the Court of Claims or the appropriate circuit court. As the bills appear to narrow the procedural scope of election challenges, it's possible the bills would create a cost savings for State and local courts, as well as the AG, by providing strict procedures to dismiss frivolous complaints.

MCL 168.13 et al. (S.B. 590)
600.4501 et al. (S.B. 591)

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CONTENT

Senate Bill 590 would add Chapter XXXIA (Contesting Elections) to the Michigan Election Law to do the following:

- Allow a candidate for office, the Governor, the AG, and the SOS to contest an election based on vote totals or the presence of fraud.
- Require an action contesting the certification of an election canvassed by the Board of State Canvassers to be filed in the Court of Claims.
- Require an action contesting the certification of an election canvassed by another board to be filed in the circuit court of the county in which the office at issue was located.
- Prescribe the process and deadlines for filing an action contesting an election.
- Prohibit a plaintiff from seeking, and the court granting, any preliminary injunctive relief.
- Require a plaintiff to attach to the initial pleading an affidavit that set forth specific facts known to the plaintiff that supported the truth of the facts alleged.
- Prescribe the process and deadlines for filing an answer to the initial pleading or a motion to dismiss.
- Allow any party to an action contesting the certification of an election to request leave from the court to inspect certain election materials for the purpose of preparing for trial.
- Require, after a trial of an action, the court to issue a written decision and final judgment as soon as practicable; however, the court could not issue an order that prevented the standard certification of an election or a recount.
- Prescribe the timeline of the appeal process.
- Prohibit an action contesting an election to impede election-related responsibilities of the Board of State Canvassers and the Governor and require an appeal of an action to conclude before presidential electors met in December.

Senate Bill 591 would amend the Revised Judicature Act to do the following:

- Prohibit a person from bringing an action for quo warranto (a challenge of applicable authority) that related to the outcome of an election for presidential and vice-presidential electors.
- Grant the Court of Claims the power to hear and determine an action contesting the certification of an election as prescribed in **Senate Bill 590**.

The bills are tie-barred. Senate Bill 590 also is tie-barred to Senate Bill 529, which would amend the process of canvassing and certifying election results in the Michigan Election Law to align with the Federal Electoral Count Reform Act.

Senate Bill 590

Chapter XXXIA

The bill would allow a candidate for an office to contest the certification of an election. In addition, the Governor, Attorney General, and SOS would be authorized to contest an election.

"Defendant" would mean the individual who is certified as the winner of an election contested under Chapter XXXIA. "Plaintiff" would mean an individual who files an action contesting the certification of an election.

Under the bill, the process described below would be the only means by which an individual could seek judicial relief from the certification of an election.

Contestation Process

A plaintiff could only contest the certification of an election on one of the following grounds:

- The defendant did not receive the largest number of votes eligible to be counted in that election.
- Fraud or error occurred in the canvass or returns of the votes cast at the election, and, absent that fraud or error, the defendant would not have received the largest number of votes eligible to be counted in that election.

An action contesting the certification of an election that was canvassed by the Board of State Canvassers would have to be filed in the Court of Claims.¹ An action contesting the certification of an election *not* canvassed by the Board of State Canvassers would have to be filed in the circuit court of the county in which the office at issue was located. If an action was filed in the wrong court, that court would have to immediately transfer the action to the correct court.

An action contesting the certification of an election would have to be filed with the appropriate court and served on the defendant and any other candidate listed on the ballot for that office between the certification date of the election being contested and five days after the certification of that election was complete. An action contesting the certification of a presidential election would have to be filed with the Court of Claims within two days after the certification of that election by the Board of State Canvassers was complete. To serve the initial pleading in an action contesting the certification of an election, the plaintiff would have to deliver a summons and a copy of the complaint to the defendant personally or send a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee.² If an action were not timely filed or served as provided, the court would have to dismiss that action with prejudice.

A plaintiff filing an action contesting an election would have to state in the plaintiff's initial pleading the grounds on which the contest was made and allege supporting facts with specificity, whether the plaintiff alleged that the defendant did not receive the highest number of votes eligible or that fraud or error occurred in the election canvass or return of votes. The plaintiff would have to attach to the initial pleading an affidavit that set forth specific facts known to the plaintiff that supported the truth of the facts alleged. If the plaintiff did not attach, file, and serve this affidavit, the action would not be considered filed or served.

In an action contesting the certification of an election, a plaintiff could not seek, and the court could not grant, any preliminary injunctive relief.

In an action contesting the certification of an election, the defendant would have to file an answer to the initial pleading within five days after being served with the pleading. In an action contesting the certification of a *presidential* election, the defendant would have to file an answer to the initial pleading within three days after being served with the pleading. A defendant's answer to an action would have to be an explicit admission or denial, a pleading of no contest, or a statement that the pleader lacked knowledge or information sufficient to

¹ Among other offices, the Board of State Canvassers canvasses the election of the electors of the President and Vice President of the United States, State officers, United States senators, representatives in Congress, circuit judges, and State senators and representatives elected by a district that is located in more than one county. For more information, see MCL 168.841.

² Michigan Court Rules (MCR) 2.105(A).

form a belief as to the truth of an allegation, which would have the effect of a denial.³ If a defendant failed to timely file an answer as required, the court would have to proceed *ex parte* (without a response from the defendant) to a trial. The court could not enter a default judgment based on the defendant's failure to file an answer.

In addition to filing an answer, a defendant could file a motion to dismiss the action within five days after service of the initial pleading. In an action contesting the certification of a *presidential* election, a defendant could file a motion to dismiss the action within three days after service of the initial pleading. A motion to dismiss could be based on any of the following grounds:

- The action was not filed timely or was improperly filed or served.
- The facts alleged in the initial pleading did not satisfy the requirements described above.
- The initial pleading contesting the certification of an election did not contain the affidavit required.

If a defendant filed a motion to dismiss, the plaintiff would have to file a response within five days after the motion to dismiss was filed. In an action contesting the certification of a *presidential* election, if a defendant filed a motion to dismiss, the plaintiff would have to file a response within two days after the motion to dismiss was filed.

The court could *sua sponte* (on a court's own motion) dismiss an action on any of the grounds listed above.

The court may alter any filing deadline for good cause. In an action contesting the certification of a *presidential* election, the court could not alter any filing deadline.

Inspection of Election Material

Under the bill, any party to an action contesting the certification of an election could request leave from the court to inspect election materials for the purpose of preparing for trial. "Election materials" would mean voter registration applications, absent voter ballot applications, election day identification applications, paper poll books, any list that includes electors who submit an absent voter ballot, and ballots.⁴ The court could not grant leave to inspect election materials unless the inspection of those election materials was reasonably related to valid claims and was proportional to the needs of the action. An order granting leave would have to include a protective order that provided for the following:

- Anything discovered during the party's inspection of the election materials could not be used for any purpose other than the election contest at issue.
- A party could not take custody of any election materials outside of the presence of the court, all other parties, and any election official required by Federal or State law to maintain custody of the election materials.

A party would not be permitted to inspect any electronic voting system, electronic poll book, or any other materials that would jeopardize the SOS's or any clerk's ability to protect the security of the election at issue, any future election, or the qualified voter file.

The inspection of election materials would be the only form of discovery that the parties to an action contesting the certification of an election could conduct, and the parties to an action would be prohibited from engaging in private discovery.

³ MCR 2.111(C).

⁴ For information concerning election day identification applications, see MCL 168.523.

Trial of an Action

If a motion to dismiss an action contesting the certification of an election were not filed, or if a court denied a motion to dismiss an action contesting the certification, the court would have to hold a trial of that action as soon as practicable. In an action contesting the certification of a *presidential* election, the court would have to hold a trial of that action as soon as practicable, but within seven days after the action was filed. During this trial, the plaintiff would have to prove by clear and convincing evidence that the defendant did not receive the highest number of votes eligible to be counted in that election or that fraud or error occurred in the canvass or returns of votes cast at the election, and absent that fraud or error, the defendant would not have received the highest number of votes eligible to be counted in that election.

After a trial of an action, the court would have to issue a written decision and final judgment as soon as practicable. In an action contesting the certification of a *presidential* election, the court would have to issue a written decision and final judgment as soon as practicable, but within ten days after the action was filed. If a court issued an oral decision with an indication that a written decision would follow that oral decision, the court could enter final judgment upon issuing the oral decision.

In an action contesting an election, a court could not issue an order that prevented any of the following:

- The Board of State Canvassers or a board of county canvassers from certifying the results of an election as required under the Act.
- The Governor from issuing a Certificate of Ascertainment as required.
- The Board of State Canvassers or a board of county canvassers from performing a recount.

Unless the plaintiff prevailed in an action filed, the defendant would be entitled to actual costs and attorney fees from the plaintiff. The plaintiff also would have to reimburse the reasonable costs incurred by any public office, including the SOS and any county, city, or township office, for providing access to any election materials pursuant to a court-ordered inspection. A plaintiff who prevailed in an action could, if a court found the defendant engaged in fraud, recover actual costs and attorney fees from the defendant.

Appealing Judgement

Under the bill, if a court issued a final judgment granting any form of relief to a plaintiff, that judgment would be stayed until the expiration of time allowed for any party to file an appeal. If a court issued a final judgment granting any form of relief to a plaintiff and an appeal from that final judgment was filed, the judgment would be stayed until the conclusion of all appellate proceedings. An appellate court could alter the stay imposed for good cause.

If an appeal were filed from a judgment in an action contesting the certification of a *presidential* election, the appeal would have to be fully concluded by the day before the date the electors for President and Vice President convened.⁵

Additional Provisions

⁵ Currently, electors convene on the first Monday after the second Wednesday in December. Senate Bill 529 would change this to the first Tuesday after the second Wednesday in December.

The bill specifies that the Governor, Attorney General, SOS, and any candidate immediately concerned by an action could intervene in an action. Deadlines provided in the bill would apply regardless of whether they fell on a weekend or holiday.

The bill would prohibit an action contesting the certification of an election from delaying or affecting the following:

- The authority or responsibility of the Board of State Canvassers or a board of county canvassers to certify an election as required under the Law.
- The Governor's authority or responsibility to issue a certificate of ascertainment.
- The authority or responsibility of the Board of State Canvassers or a board of county canvassers to perform a recount as provided by the Law.

An action could not be considered to encompass an election audit.

Senate Bill 591

Among other things, the Revised Judicature Act prescribes the organization and jurisdiction of the State's courts. The bill would prohibit a person from bringing an action for quo warranto that related to the outcome of an election for electors of President and Vice-President of the United States.⁶

Currently, an action may be brought in the circuit court of a county of the State if it appears that material fraud or error has been committed in an election to decide a constitutional amendment, question, or proposition to the electors of the State or any a county, township, or municipality of the State. The bill would specify that this provision would not apply to, and would not authorize, an action relating to an election for public office.

The Act also prescribes the power and jurisdiction of the Court of Claims. The bill would grant to the Court of Claims the power to hear and determine an action contesting the certification of an election, as described in Senate Bill 590.

⁶ A writ of quo warranto is a common law remedy which is used to challenge a person's right to hold a public or corporate office. For more information, see www.law.cornell.edu.