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Senate Bill 529 (as enacted)  
Sponsor: Senator Jeremy Moss  
Senate Committee: Elections and Ethics  
House Committee: Elections

**PUBLIC ACT 269 of 2023**

Date Completed: 1-3-24

**RATIONALE**

In December 2022, Congress passed the Electoral Count Reform and Presidential Transition Improvement Act (ECRA), which updated the procedures through which presidential electors are selected and their votes counted. Specifically, the Act identified each state's governor, unless a different executive was specified in the laws or constitution of a state in effect on election day, as responsible for issuing and submitting the Certificate of Ascertainment identifying that state's electors. It required that each state's Certificate of Ascertainment contain a security feature. With the 2024 presidential election approaching, it was suggested that the electoral process in the Michigan Election Law be amended to align with Federal law.

**CONTENT**

**The bill amends the Michigan Election Law to do the following:**

- **Require the Senate Majority Leader, Senate Minority Leader, Speaker of the House of Representatives, and House Minority Leader to each submit the name of one individual as a nominee for each position on the Board of State Canvassers (the Board) that is vacant or up for reappointment.**
- **Modify the date by which the State central committee of a major political party and the majority and minority leaders in the Senate and House of Representatives must submit their nominees for the Board to the Governor from the 10th of January to the 15th in an odd-numbered year.**
- **Require the Governor to issue a Certificate of Ascertainment for election results that contained a security feature at least six days before the electors meet.**
- **Require the electors to meet on the first Tuesday after the second Wednesday in December instead of the first Monday after the second Wednesday.**
- **Require the Governor to issue superseding Certificates during a recount of a presidential election.**
- **Prescribe the right of and procedure for an affected presidential or vice-presidential candidate to appeal to the Michigan Supreme Court for a recount if a superseding Certificate represents an altered winner of the election.**
- **Modify the deadline by which a candidate may file a counter petition or an objection to a recount petition with the Secretary of State (SOS) from 4 PM of the seventh day after the original recount petition is filed to 48 hours after the filing of a recount petition.**
- **Require the Board to convene a hearing to consider objections to a recount petition within four calendar days, instead of five, after the deadline for filing objections.**
- **Authorize the Secretary of the Board, instead of the SOS, to call a meeting of the Board within 20 days after the primary election to canvass election results.**
- **Authorize the Secretary of the Board, instead of the SOS, to appoint the day for an expedited canvass, if applicable.**

- **Require an electoral tie to be broken by the drawing of lots.**
- **If a board of county canvassers fails to certify the results of any election by the 14th day after an election, require the Board to meet within 20 days after the election, instead of 10, to make the necessary determinations and certify the election results.**
- **Allow a ballot label to include an option for straight-ticket voting (STV).**

The bill will take effect February 13, 2024.

#### Board of State Canvassers Nominations

The Board of State Canvassers has four members, two from each of the two political parties that received the greatest number of votes in the last election for SOS. Board members serve four-year terms. The terms are staggered so that the term of one of the first political party's seats and one of the second political party's seats expires in February of each odd-numbered year.

Currently, the State central committee of each major political party must submit to the Governor the names of three individuals as nominees for each position that is up for reappointment that the major political party is entitled to. The bill amends the date of submission from the tenth day of January in an odd numbered year to the fifteenth day of January.

The bill also requires the Senate Majority Leader, Senate Minority Leader, Speaker of the House of Representatives, and House Minority Leader to each submit the name of one individual as a nominee for each position that is up for reappointment that the official's major political party is entitled to. If an office of a member of the Board becomes vacant, the bill also requires the majority or minority leaders in the Senate and House of Representatives who represent the same major political party as the vacating member of the Board to submit the name of one individual as a nominee for the vacant position by the tenth day following the date of vacancy.

Currently, if the State central committee of a major political party fails to submit its nominations within the prescribed time period, the Governor must appoint to the Board an individual who was formerly elected as a State officer as a member of the appropriate major political party and who is still affiliated with it. Under the bill, this provision also would apply if the majority or minority leaders in the Senate and House of Representatives fail to submit their nominees.

If the individual selected by the Governor declines to serve, the Governor may appoint another individual nominated by the major political party, which, under the bill, includes the nominees selected by the majority or minority leaders in the Senate and House of Representatives.

#### Certificate of Ascertainment

Currently, as soon as practicable after the Board has, by the official canvass, ascertained the result of a Presidential election, the Governor must certify, under the seal of the State, to the United States Secretary of State, the names and addresses of the electors of the State chosen as electors of the President and Vice President of the United States.

The bill requires the Governor to issue a Certificate that does all the following:

- Sets forth the names of the electors appointed and the canvass or other determination of the number of votes given or cast for each individual.

- Bears the seal of the State.
- Contains at least one security feature, as determined by the Governor, for the purpose of verifying the authenticity of the Certificate; the secure components of any security feature used are confidential and not subject to disclosure under the Freedom of Information Act.

The bill requires a Certificate to be issued at least six days before the date on which the electors for the President and Vice-President meet. Under the Law, the electors convene at 2 PM on the first Monday after the second Wednesday in December following the elector's election. Instead, the bill modifies this to the first Tuesday after the second Wednesday in December.

Immediately after issuing the Certificate, the Governor must transmit the Certificate to the Archivist of the United States. The Governor also must transmit to each elector chosen for President and Vice President of the United States six duplicate-originals of the Certificate on or before the date on which the electors convene.

#### Certificates of Ascertainment During a Recount Petition

Under the bill, the fact that a recount petition has been filed, or that a recount is pending, has no effect on the Governor's authority or responsibility to issue a Certificate as required above; however, if a mandatory recount of all precincts in the State is required by Law<sup>1</sup>, the Governor cannot issue the Certificate until the completion and certification of the recount or until 3 PM on the sixth day before the date on which the electors for President and Vice President of the United States are to convene, whichever occurs first.

If the recount is completed and certified before 3 PM on the sixth day before the date on which the electors for President and Vice President of the United States are to convene, the Certificate must reflect the certified result of that recount. If the recount is *not* completed and certified before 3 PM on the sixth day before the date on which the electors for President and Vice President of the United States are to convene, the Certificate must reflect the original certification of the results of the election.

If a recount is completed by 11:59 PM on the second day before the date on which the electors for President and Vice President of the United States are to convene, and the result of that recount, as certified by the Board, alters the winner of the presidential election as reflected on the Certificate, an affected candidate for President or Vice President of the United States may have the certification reviewed by the Michigan Supreme Court, or may seek other judicial relief from the Michigan Supreme Court related to the certification, including an order directing the Governor to issue an updated Certificate that reflects the updated and certified results of the presidential election.

An action to have the Michigan Supreme Court review the certification must be filed with the Court within 24 hours after the certification of the completed recount. A plaintiff filing an action in the Court must request an expedited hearing and request that the Court issue an order granting any judicial relief by 4 PM on the day before the date on which the electors for President and Vice President of the United States are to convene. If the Court issues an order by the day before the date on which the electors are to convene that requires the Governor to issue an updated Certificate consistent with the certified results of the recount, the Governor must issue that updated Certificate before the date on which the electors are to convene.

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<sup>1</sup> The Law requires a recount of all precincts to be performed if the Board certifies that a statewide primary or election has been determined by a vote differential of 2,000 votes or fewer.

If a recount is completed by 11:59 PM on the second day before the date on which the electors for President and Vice President of the United States are to convene, and the result of that recount, as certified by the Board, alters the winner of the presidential election as reflected on the Certificate, and the Michigan Supreme Court does not issue an order as described above before 4 PM on the day before the date on which the electors are to convene, the Governor must issue an updated Certificate that reflects the updated and certified results of the presidential election, as determined by the recount and certified by the Board, no later than 11:59 PM on the day before the date on which the electors are to convene.

An updated Certificate issued by the Governor replaces and supersedes any prior Certificate issued, must be transmitted consistent with the requirements above for the Certificate, and must be conclusive with respect to the determination of electors for President and Vice President of the United States appointed by the State.

### Counter Recounts

If a candidate has filed a recount petition and paid the required deposit, the SOS must give notice of the recount petition to each opposing candidate within 48 hours after the filing of the petition. Currently, a candidate may file a counter petition in the same manner as the original petition not later than 4 PM of the seventh day after the original recount petition has been filed with the SOS. Within this timeframe, an opposing candidate also may file objections to the recount petition with the Board. The bill amends these deadlines to not later than 48 hours after the original recount petition is filed with the SOS.

The Board must convene a hearing to consider objections to a recount petition. Under the Law, not later than five business days following the meeting, the Board must rule on the objections. The bill amends this deadline to no later than four calendar days after the deadline for filing objections. It also deletes a provision prohibiting the Board from beginning a recount unless two or more business days had elapsed since the Board rules on the objections.

### Canvassing and Certification

The Law requires the SOS to call a meeting of the Board at the Secretary's office not later than 20 days after the primary election, during which the SOS has to certify to the chairman and secretary of the State central committee of each political party for the purpose of canvassing the returns and declaring the results of the primary election for the nomination of the candidates for such offices. The bill specifies that the Secretary of the Board is responsible for calling the meeting, which must take place as soon as practicable after the receipt of the returns from the boards of county canvassers, while the SOS is responsible for the certification. The bill removes the requirement that this meeting take place at the office of the SOS.

The Board must then proceed in the same manner in canvassing the returns and in certifying, recording, and determining results of a primary election for the nomination of candidates for United States Senator and Governor as is done in canvassing the returns in the case of the election of State officials. In canvassing the returns of a primary election for the nomination of candidates for the offices of representative in Congress, State senator, and representatives in the Legislature, the Board must proceed in the same manner as is done in canvassing the returns in case of the election of representatives in Congress in districts composed of more than one county.

The bill also specifies that it is the ministerial, clerical, and nondiscretionary duty of each board of county canvassers, and each of the members of a board of county canvassers, to certify election results based solely on the statements of returns from the election day precincts, early voting sites, and absent voter counting boards in the county and any corrected returns. It is the ministerial, clerical, and nondiscretionary duty of the Board of State Canvassers, and each of the members of the Board, to certify election results based solely on the certified statement of votes from counties. "To certify" means to make a signed, written statement.

#### Expedited Canvass and Tie-Breaking

Under the Law, if the unofficial election returns show that the election of electors of President and Vice President of the United States is determined by a vote differential between the first place and second place candidates of fewer than 25,000 votes, the SOS must direct the boards of county canvassers to canvass returns for electors of President and Vice President of the United States on an expedited schedule. The SOS may appoint the day for the Board to conduct the expedited canvass of the returns for electors of President and Vice President of the United States and determine the results of that election. The bill specifies that the Secretary of the Board, not the SOS, must appoint the day for the expedited canvass.

Under the Law, if two or more individuals are tied with the highest number of votes for any office, as canvassed by the Board, the Board is required to certify the result of the canvass and the Legislature is required to choose one of the candidates to fill the office. If the determination of the Board is contested, the Legislature decides which person is elected. The bill deletes these provisions, and instead, the tie must be resolved and the winner certified by the drawing of lots according to other provisions of the Law.<sup>2</sup>

#### Failure to Certify

Under the Law, if a board of county canvassers fails to certify the results of any election for any officer or proposition by the 14th day after the election, the board of county canvassers must immediately deliver to the Secretary of the Board all records and other information pertaining to the election. The Board must meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records from the board of county canvassers. Instead, under the bill, the Board must meet, make the necessary determinations, and certify the results not later than the 20th day after the election. Additionally, the bill requires the board of county canvassers and all other county staff necessary to complete the canvass to be always present during the completion of the canvass by the Board.

The bill also adds a provision prohibiting a ballot cast by an eligible elector from being rejected or otherwise not counted in a canvass, recount, or court order altering the certification of a canvassing board on the grounds that an election official failed to comply with a directive set forth in the Law unless that ballot is otherwise ineligible under the Act or Federal law.

#### Tabulation

Under the Law, the ballot label must not include a position by which a voter may by a single selection record a straight party ticket vote for all the candidates of one party. The bill amends this to allow STV (see **BACKGROUND**).

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<sup>2</sup> See MCL 168.852 for further detail.

## **BACKGROUND**

In July 2022, Promote the Vote, a coalition of Michigan organizations active in elections, circulated a petition proposing several constitutional amendments concerning voting rights. Among other amendments, the Proposal included a requirement that, if certified election results showed a tie between two or more candidates for any office, the winner would be selected through the drawing of lots under rules promulgated by the Board of State Canvassers. Promote the Vote submitted the petition to the Michigan Bureau of Elections after gathering enough signatures for the ballot initiative that became Proposal 22-2. Proposal 22-2 passed with 59.99% of the vote during the 2022 November general election.<sup>3</sup>

Currently, Michigan is one of six states that allow STV. Public Act 268 of 2015 abolished the use of STV in the State; however, in July 2016, a U.S. District Court decision found the abolishment of STV disproportionately affected African Americans and placed a preliminary injunction on enforcing the law for the 2016 election.<sup>4</sup> In September 2018, the U.S. Sixth Circuit of Appeals ordered the ban on STV to take effect. The plaintiffs appealed to the U.S. Supreme Court which denied a request to keep STV for the 2018 general election; however, in November 2018 voters passed Proposal 3, which amended the State Constitution to allow voters to vote STV in a partisan general election.<sup>5</sup>

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Aligning Michigan law with Federal law ensures that post-election processes are protected from manipulation. According to testimony before the Senate Committee on Elections and Ethics, gray areas in Federal election law, such as uncertainty about the vice president's role, were taken advantage of to question the legitimacy of the election. Michigan was one of several states whose results were scrutinized. The ECRA, and by extension the bill, clarify post-election procedures and streamline the verification of election results.

### **Opposing Argument**

States should determine electoral processes, not the Federal government. The imposition of the ECRA on Michigan, which the bill codifies, deprives Michigan of this ability.

**Response:** The ECRA provides states with an overarching electoral framework but allows them to make their own electoral decisions. For example, it identifies a state's chief executive as responsible for submitting the state's Certificate of Ascertainment. Generally, governors serve as their states' chief executives; however, the ECRA allows states to elect other officials to serve as chief executives. Instead, the bill prescribes the process of and timeline for submitting electoral slates. This responsibility is a Federal concern, as all 50 states must work together in a timely and equal fashion to elect the country's president and vice-president.

Legislative Analyst: Abby Schneider

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<sup>3</sup> "2022 Michigan Election results," Elections, Michigan Department of State. Retrieved on 4-11-23.

<sup>4</sup> "Straight-Ticket Voting", National Conference of State Legislatures. Retrieved on 9-26-23.

<sup>5</sup> "November 2018 Ballot Proposal 18-3", Senate Fiscal Agency.

## **FISCAL IMPACT**

The bill will have an indeterminate fiscal impact on the State and no fiscal impact on local units of government. The potential change in cost to the State, in the Executive Office, will be determined by the new Certificate of Ascertainment costs compared to the previous costs for the certificates. It is impossible to predict the cost change as some of the criteria is confidential. Should additional canvass Board meetings be required, the average total cost for a Board meeting can be up to \$3,000 per meeting. Included in that total cost is a per diem of \$75 per Board member.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.