

No. 22O155, Original  
**In the Supreme Court of the United States**

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STATE OF TEXAS,

*Plaintiff,*

v.

COMMONWEALTH OF PENNSYLVANIA, STATE  
OF GEORGIA, STATE OF MICHIGAN, AND STATE  
OF WISCONSIN,

*Defendants*

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*ON MOTION FOR LEAVE TO FILE BILL OF  
COMPLAINT*

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**BRIEF OF *AMICUS CURIAE* CITY OF DETROIT  
IN SUPPORT OF DEFENDANTS**

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DAVID H. FINK\*

*\*Counsel of Record*

FINK BRESSACK

David H. Fink (P28235)

Darryl Bressack(P67820)

Nathan J. Fink (P75185)

38500 Woodward Ave., Suite 350

Bloomfield Hills, MI 48304

(248) 971-2500

dfink@finkbressack.com

dbressack@finkbressack.com

nfink@finkbressack.com

CITY OF DETROIT LAW

DEPARTMENT

Lawrence T. Garcia (P54890)

James D. Nosedá (P52563)  
2 Woodward Ave., 5<sup>th</sup> Floor  
Detroit, MI 48226  
(313) 237-5037  
garcial@detroitmi.goc  
nosej@detroitmi.gov

*Counsel for Amicus Curiae City of  
Detroit*

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**STATEMENT OF AMICUS INTEREST<sup>1</sup>**

Most of the “factual” allegations about Michigan in this lawsuit are derived from affidavits questioning the integrity of the processing and tabulation of absentee ballots by *amicus curiae*, the City of Detroit (the “City”), for the November 3, 2020 general election.

The City has a strong interest in defending against such claims and the spurious attacks made by Plaintiff in this matter. The allegations here are the same allegations the City successfully rebutted in state and federal courts in Michigan, including the Michigan Supreme Court. The claims were either deemed to be without merit or were determined to be unworthy of injunctive relief, including relief that could delay certification of election results.

The City also has a strong interest in ensuring that its residents are not disenfranchised based on false claims and mistaken legal theories.

The City is uniquely positioned to provide a factual response to the allegations, because even though Plaintiff tends to allege the processing and tabulation of ballots in Detroit was performed by Wayne County, in fact the processing and tabulation was done by the City, as required by Michigan law.

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<sup>1</sup> The City notified all parties, through the parties’ attorneys, of its intent to file this *amicus* brief more than ten days before its due date. *See* Rule 37.2(a). The City is filing this brief pursuant to Rule 37.4.

## SUMMARY OF ARGUMENT

Plaintiff makes very few “factual” allegations relating to Michigan, with all allegations of supposed fraud arising from debunked claims about the processing and tabulation of absent voter ballots by the City of Detroit (the “City”) in Hall E of the TCF Center, a convention center in downtown Detroit. Those sparse allegations are derived from three affidavits first submitted in *Costantino v. Detroit et al*, Wayne County Circuit Case No. 20-014780-AW, by Melissa Carone, Jessie Jacob and Zachary Larsen. The City submits this brief to address those allegations, because, contrary to Plaintiff’s averment that Wayne County processed and tabulated the ballots, the City did so. The City is therefore uniquely able to respond directly to the allegations.

The allegations have already been deemed not credible by the Chief Judge of Michigan’s Third Judicial District and deemed not worthy of injunctive relief by the Michigan Supreme Court in two separate cases. Re-stating the allegations here does not make them any more credible or more worthy of relief.

## ARGUMENT

Plaintiff's allegations of "electoral fraud" in Michigan are premised on allegations relating to supposed violations of state law during the City of Detroit's processing and tabulation of absentee ballots at the "absent voter counting boards" in the TCF Center. The allegations are also apparently offered in support of Plaintiff's theory that the election deviated from legislative enactment. The allegations are not true. The City fully complied with all applicable state law regarding the conduct of elections.

The same allegations have been presented to federal and state courts in Michigan at least nine times since the November election. In the cases that were not withdrawn before a ruling could be entered on the requested injunctive relief, the court either found the claims to be without merit or not worthy of an injunction. In fact, Michigan's Supreme Court has now considered the same allegations in two separate post-election lawsuits and both times concluded that the plaintiffs were not entitled to an injunction. *See Costantino v. Detroit*, No. 162245, 2020 WL 6882586 (Mich. Nov. 23, 2020) (City of Detroit Appendix "COD Appx.") 001-005); *Johnson v. Benson*, No. 162320, Opinion and Order (Mich. Dec. 9, 2020) (COD Appx. 006-025).

The claims made in all of these lawsuits make no sense. From 2016 to 2020, turnout in Detroit increased less

than turnout statewide, which certainly undermines suggestions that an unusually large number of ballots were counted in Detroit. In Detroit, 256,514 votes were cast in the presidential race, an increase of 9,145 compared to 247,369 in 2016. *See* COD Appx. 032. Statewide, 5,538,212 votes were cast in the Presidential Election, an increase of 738,928 compared to 2016 (Nationally, turnout increased by approximately 20 million votes). *Id.* The statistics hold true for the increase in Presidential Election Votes as a Percentage of 2016 Votes—Detroit increase: 3.7%; Statewide increase: 15.4%. *Id.*

When compared to 2016, President Trump gained a *higher* percentage of votes in Detroit in 2020, with Trump receiving 3.1% of the vote in 2016 and 5.0% in 2020. *Id.* There were also no anomalous differences in vote totals regarding votes for Republican Senate Candidate John James in Detroit in comparison to the rest of the state; as was the case statewide, James received a slightly higher percentage of votes than Trump in Detroit—Trump in Detroit: 5.0%, Trump Statewide: 47.9%; James in Detroit: 5.1%, James Statewide: 48.2%. *Id.* Trump carried Michigan in 2016 by fewer than 11,000 votes and lost the State in 2020 by more than 154,000 votes. In this context, conspiracy theories conjuring up the theft of hundreds of thousands of votes are fundamentally implausible



Ultimately, the evidence shows that there is no real dispute that the City complied with the directives of the Michigan Legislature. The City created an absent voter counting place—Hall E of the TCF Center—in compliance with M.C.L. § 168.765a; *see also* M.C.L. § 168.764d (Statute providing that the processing and tabulation of ballots in Michigan is done at local municipal level, not at the County level). The individual absent voter counting boards in Hall E were deemed separate precincts from the election day precincts, as permitted by M.C.L. § 168.569a for Michigan municipalities with 250 or more precincts. The City began the processing and tabulation of all absent voter ballots at 8:00 a.m. on election day consistent with the legislative directive in M.C.L. § 168.765a(8). The City ensured that no ballots received after 8:00 p.m. on election day were counted. The City verified the ballots before they were delivered to the TCF Center by comparing the signature on the ballot envelopes with those on file with the State as required by M.C.L. § 168.765a(6). Even though it is difficult to recruit Republican inspectors to work in the City of Detroit, the City ensured (in coordination with the Michigan Republican Party) that Republican inspectors were hired to work as inspectors at the TCF Center. M.C.L. § 168.765a(10) (“At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place ...”). And, despite the COVID-19 pandemic, the City ensured

that challengers affiliated with political parties and organizations had access to Hall E in compliance with M.C.L. § 168.765a(9).

### **I. Response to Michigan-Related Affidavits**

The affidavits Plaintiff relies on with respect to Michigan, were first submitted in *Costantino v. Detroit et al*, Wayne County Circuit Case No. 20-014780-AW, by Melissa Carone, Jessy Jacob and Zachary Larsen.<sup>2</sup> The trial court determined that the allegations were not credible. COD Appx. 059-71. The Michigan Court of Appeals and the Michigan Supreme Court considered plaintiffs' applications for interlocutory appeal on an expedited basis. Both courts denied the applications. *See Costantino*, 2020 WL 6882586 (COD Appx. 001-05). The allegations also re-surfaced in *Johnson v. Benson, supra*, where the Michigan Supreme Court again ruled that the plaintiffs were not entitled to injunctive relief. COD Appx. 006-025.

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<sup>2</sup> Plaintiff submits an affidavit from Andrew Miller, which was initially submitted in support of *Donald J. Trump for President Inc. v. Benson*, WD Mich. Case No. 1:20-cv-1083. That case was filed on November 11, 2020; however, it was voluntarily dismissed on November 19, 2020, shortly after the defendants submitted dispositive briefing. The Miller Affidavit does not make any allegations which could plausibly be construed as supporting any cause of action under the standard announced by this Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Therefore, that Affidavit is not addressed in this brief.

### A. Carone Affidavit

The Carone Affidavit is particularly inaccurate and troubling. The allegations are fantastical and were rebutted by elections expert Christopher Thomas. Mr. Thomas's knowledge of Michigan election law is unparalleled; he served in the Secretary of State Bureau of Election for 40 years beginning in May 1977 and ending in June 2017. Thomas Aff. ¶ 2 (COD Appx. 40-54). In June 1981, he was appointed Director of Elections and in that capacity implemented four Secretaries of State election administration, campaign finance and lobbyist disclosure programs. *Id.* Mr. Thomas was brought in to serve as Senior Advisor to Detroit City Clerk Janice Winfrey beginning in September 2020. *Id.* ¶ 1. In this capacity, he advised the Clerk and management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting boards, satellite offices and drop boxes, Bureau of Election matters and general preparation for the November 3, 2020 General Election. *Id.* Mr. Thomas was involved in nearly all aspects of the election in the City, including the processing and tabulation of absentee ballots at the TCF Center. *Id.*

As Mr. Thomas notes, Ms. Carone was not an Election Inspector, nor was she a challenger. *Id.* ¶ 18. She was a contract worker, hired by a third party to assist with occasional malfunctions of the tabulating machines. *Id.* She

has no known training in election law or procedures, and her affidavit and public statements have displayed a startling ignorance of how votes are counted. *Id.*

Ms. Carone believes that she saw evidence that ballots were counted more than once at the TCF Center. Her main allegation—that hundreds or thousands of ballots were counted twice or more—cannot possibly be true. *Id.* ¶ 19. She says she saw on a computer that 50 of the same ballots had been counted 8 times, and that she saw numerous similar instances “countless times” throughout the day. *Id.* If what she said were true, at the very least, 350 extra votes would show up for at least one absent voter counting board. *Id.* That did not occur. *Id.*

Indeed, if the Carone Affidavit were accurate, large numbers of extra votes would show up in “countless” precincts, causing many precincts to be “unbalanced” by hundreds or thousands of votes. *Id.* A mistake (or intentional act) like that would be caught very quickly on site. *Id.* It would also be quickly caught by the Detroit Department of Elections and the Wayne County Canvassing Board during the canvassing which occurs after every election as a matter of law. *Id.* A slight disparity or “unbalance” between the number of voters and the number of ballots occurs in essentially every election, especially in large cities, but nothing like the numbers she describes could possibly occur and be missed by the Department of Elections, the Election

Inspectors, the challengers and the Wayne County Board of Canvassers. *Id.* ¶ 11. Ms. Carone’s speculation was proven untrue when the canvasses of Wayne County and Detroit revealed that any unbalanced precincts or absent voter counting boards were unbalanced by a very small number of votes. COD Appx. 055-58; *see also* COD Appx. 029-32. In fact, as Mr. Thomas attests, the unbalance for the November election was caused by human errors in the records reflecting slightly more voters than ballots, not more ballots than voters as would be the result if Ms. Carone were correct. Thomas Aff. ¶ 12.

Ms. Carone’s misunderstanding of what she observed may stem from the fact that as a routine part of the tabulation process, ballots are often fed through the high-speed reader more than once. *Id.* ¶ 20. For instance, if there is a jam in the reader, all ballots in the stack may need to be pulled out and run through again. *Id.* Or, if there is a problem ballot in a stack—for instance, a ballot with stains, tears, stray markings or a ballot that should have been scanned for a different counting board—the problem ballot, and the several that were scanned by the high-speed machine after the problem was detected, will need to be re-scanned.<sup>3</sup> *Id.* At times, it will be most efficient to re-run several ballots, while at others, it will be more efficient to re-

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<sup>3</sup> If a ballot cannot be re-scanned, it is hand-duplicated by election inspectors.

scan the entire batch. *Id.* To an untrained observer it may appear that the ballot is being counted twice, however, the election worker will have cancelled the appropriate count on the computer screen. *Id.* Any operator error in the process would be identified during the canvass. *Id.* If not, the number of voters at the absent voter counting board would be dramatically different than the number of counted votes, something which did not occur. *Id.*

Ms. Carone’s speculation about 100,000 new ballots is also not possible. On Sunday, November 1, 2020, roughly 140,000 absent voter ballots were delivered to TCF for the Monday pre-processing; on Monday and Tuesday there were approximately 20,000 ballots delivered; and, on Wednesday at around 3-3:30 a.m., the final roughly 16,000 ballots were delivered. *Id.* ¶ 21. If 100,000 instead of 16,000 ballots had been delivered, Detroit’s total turnout would be 84,000 ballots more than what is publicly reported. *Id.* Again, a mismatch of that magnitude would have been caught at essentially every phase of the process. Ms. Carone’s reference to an announcement “on the news” of the discovery of 100,000 new ballots in Michigan appears to be based on a repeatedly debunked conspiracy theory in which a clerk in Shiawassee County accidentally typed in an extra 0 and quickly discovered and fixed the error.<sup>4</sup> Regardless of the

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<sup>4</sup> See, e.g., <https://www.factcheck.org/2020/11/clerical-error-prompts->

source of her confusion, there is no way 100,000 new ballots could have been surreptitiously brought to the TCF Center as she describes. Thomas Aff. ¶ 21.

The Chief Judge of the Michigan Third Judicial Circuit made the following factual findings about the Carone Affidavit:

Ms. Carone was contracted by Dominion Voting Services to do IT work at the TCF Center for the November 3, 2020 election. Ms. Carone, a Republican, indicated that she “witnessed nothing but fraudulent actions take place” during her time at the TCF Center. Offering generalized statements, Ms. Carone described illegal activity that included, untrained counter tabulating machines that would get jammed four to five times per hour, as well as alleged cover up of loss of vast amounts of data. Ms. Carone indicated she reported her observations to the FBI.

Ms. Carone’s description of the events at the TCF Center does not square with any of the other affidavits. There are no other reports of lost data, or tabulating machines that jammed repeatedly every hour during the count. Neither Republican nor Democratic challengers nor city officials substantiate her version of events. The allegations simply are not credible.

COD Appx. 065.

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unfoundedclaims-about-michigan-results/. Ms. Carone might have heard false rumors about ballots being delivered, when actually television reporters were bringing in wagons of audio-video equipment. Thomas Aff. ¶ 23. All ballots were delivered the same way— from the back of the TCF Hall E. *Id.*

## **B. The Jacob Affidavit**

The Jacob Affidavit—which also originated in the *Costantino* case—is the source of the allegations regarding so-called “back-dating” of ballots. But the allegations arise from Ms. Jacob not understanding what she was observing. Although Plaintiff refers to Ms. Jacob as a “whistleblower,” she was a furloughed employee from another City department, assigned to the Department of Elections for limited, short-term, purposes, in September 2020. Affidavit of Daniel Baxter ¶ 7 (COD Appx. 072-75). Despite her long tenure with the City of Detroit, her tenure with the Department of Elections was brief, and her responsibilities were limited. *Id.*

On Wednesday, November 4 it was discovered that the envelopes for some ballots that had been received prior to November 3 at 8 p.m., had not been received in the QVF. Thomas Aff. ¶ 27. The ballots would not scan into the EPB and were not on the supplemental paper list. *Id.* Upon reviewing the voters’ files in the QVF, Department of Elections staff found that the final step of processing receipt of the ballots had not been completed by the satellite office employees. *Id.* The last step necessary to receive a ballot envelope requires the satellite employee to enter the date stamped on the envelope and select the “save” button. *Id.* They failed to select “save”. *Id.*

A team of workers at the TCF Center was therefore



directed to correct those clerical errors by entering the date the ballots were received in the satellite office and selecting “save.” *Id.* ¶ 28. This action then placed the voter into the Absent Voter Poll List in the QVF so that the ballot could be processed and counted. *Id.* None of these ballots were received after 8:00 p.m. on election day. *Id.* Most were received on Monday, November 2<sup>nd</sup>, the busiest day for the satellite offices. *Id.* This issue was discussed with several Republican challengers at the TCF Center. *Id.* Two challengers were provided a demonstration of the QVF process to show them how the error occurred, and they chose not to file a challenge to the individual ballots. *Id.*

Indeed, it would have been impossible for any election worker at the TCF Center to count or process a ballot for someone who was not an eligible voter or whose ballot was not received by the 8:00 p.m. deadline on November 3, 2020. *Id.* ¶ 29. No ballot could have been “backdated,” because no ballots received after 8:00 p.m. on November 3, 2020 were ever at the TCF Center. *Id.*<sup>5</sup>

The Jacob Affidavit is also the source of the misinformation in Plaintiff’s BOC relating to signature verification. Ms. Jacob attests that while at the TCF Center,

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<sup>5</sup>Ms. Jacob alleges she was instructed by her supervisor to adjust the mailing date of absentee ballot packages being sent out to voters in September 2020. The mailing date recorded for absentee ballot packages would have no impact on the rights of the voters and no effect on the processing and counting of absentee votes.

she was instructed not to compare signatures on absentee ballots with those on file. Ms. Jacob, who had no prior experience as an Election Inspector, did not understand, or willfully ignores the fact, that signature verification had been completed by Department of Elections staff in a public process before any ballots were delivered to the TCF Center. Thomas Aff. ¶¶ 23-25. In compliance with Michigan law, the election workers verified the signatures on the ballots by comparing them to the signatures on file. *Id.*; see also M.C.L. § 168.765a(6). Michigan law permits a city clerk to verify the signatures on absent voter ballots before election day. See M.C.L. § 168.765a(6). Signature verification was not done at the TCF Center because it had already been done. Thomas Aff. ¶¶ 23-25.

The trial court addressed Ms. Jacob's allegations, stating as follow:

Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives.

Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been

reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of “pre-dating” ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*

COD Appx. 062.

### **C. The Larsen Affidavit**

Zachery Larsen was a Republican challenger at Counting Board 23 at the TCF Center. In his affidavit, Mr. Larsen raised an issue about return ballot envelopes where the barcode on the label would not scan and the voter’s name was not on the supplemental list. As Mr. Thomas confirms, Mr. Larsen was observing the correction of clerical errors, not some type of fraud. Thomas Aff. ¶ 35. In every election, clerical errors result in voters being left off the poll list, whether it is a paper poll list or the EPB. *Id.* These errors are corrected so that voters are not disenfranchised. *Id.*

Plaintiff attributes a nefarious purpose to Mr. Larsen’s observation of an election inspector typing the surname “Pope” into the EPB when there was already a person with that last name in the EPB. But, as explained by Mr. Thomas, at Counting Board 23, there are three people

with the last name Pope who voted in the election. *Id.* ¶ 36. One returned their ballot in October and therefore would have been in the EPB (since the information was downloaded from the QVF on Sunday November 1, 2020). *Id.* The two other voters with the last name of Pope voted on Monday, November 1, so their names would not be in the EPB. *Id.* Mr. Larsen apparently observed one of those voters being hand entered into the system, as was necessary if they were not already in the EPB. *Id.*<sup>6</sup>

The City conducted an internal inquiry with respect to Mr. Larsen's assertions regarding Counting Board 23. *Id.* ¶ 37. At that Counting Board, 2,855 ballots were tabulated with 2,856 associated envelopes. *Id.* Each envelope is associated with a validly registered voter and an application for an absent voter ballot. *Id.* The only voters whose names were manually typed into the system at that Counting Board were voters whose barcode did not bring up a ballot and whose name did not appear on the supplemental list, generally because the ballots were not received before the list was created. *Id.* Again, however, all such ballots had been verified before being delivered to the TCF Center, and

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<sup>6</sup> Any assertion that an inspector could have typed a name into the computer of someone other than the voter appearing on the envelope, would be false, because the voter was already in the EPB. Thomas Aff. ¶¶ 36-7. If the voter was already checked in, the inspector would not have the envelope with a ballot in it. *Id.*

date/time-stamped as having been received before 8:00 p.m. on Tuesday, November 3, 2020. *Id.*

Mr. Larsen asserted that he was prevented from re-entering Hall E of the TCF Center for a short period of time after he left for lunch on November 4, 2020. This is accurate, but legally irrelevant. There was a period of time during which Hall E became overcrowded. Thomas Aff. ¶ 41. No challengers were directed to leave, but, for safety reasons, for a short period of time, additional challengers were not allowed to enter until a challenger from their respective party or organization left. *Id.* During that time, each challenger organization, including Republican and Democrat, continued to have their challengers inside of Hall E. *Id.*; see also Affidavit of Lawrence Garcia (COD Appx. 076-78).

Mr. Larsen also stated that he was not given a full opportunity to stand immediately behind or next to an election inspector. In anticipation of viewing problems due to necessary social distancing to address COVID-19 concerns, large monitors were set up at each absent voter counting board. Thomas Aff. ¶ 38. Election inspectors were instructed to follow the same procedure for all challengers. *Id.* The Detroit Health Code and safety during a pandemic required maintaining at least 6-feet of separation. *Id.* This was relaxed where necessary for a challenger to lean in to observe something and then lean back out to return to the 6-foot

distancing. *Id.* The challengers could see and copy the names of each person being entered into the EPB. *Id.* If an inspector did not fully accommodate a challenger's reasonable request and the issue was brought to the attention of a supervisor, it was remedied. *Id.* Announcements were made over the public address system to inform all inspectors of the rules. *Id.* If what Mr. Larsen says is accurate, any inconvenience to him was temporary and had no effect on the processing or tabulation of ballots. *Id.*

The trial court ruled on Mr. Larsen's affidavit as well, concluding:

Plaintiffs rely heavily on the affidavit submitted by attorney Zachery Larsen. ... Mr. Larsen expressed concern that ballots were being processed without confirmation that the voter was eligible. Mr. Larsen also expressed concern that he was unable to observe the activities of election official because he was required to stand six feet away from the election workers. Additionally, he claimed as a Republican challenger, he was excluded from the TCF Center after leaving briefly to have something to eat on November 4<sup>th</sup>. He expressed his belief that he had been excluded because he was a Republican challenger.

Mr. Larsen's claim about the reason for being excluded from reentry into the absent voter counting board area is contradicted by two other individuals. Democratic challengers were also prohibited from reentering the room because the maximum occupancy of the room had taken place. Given the COVID-19 concerns, no

additional individuals could be allowed into the counting area. Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4th as efforts were made to avoid overcrowding.

Mr. Larsen's concern about verifying the eligibility of voters at the AVCB was incorrect. As stated earlier, voter eligibility was determined at the Detroit Election Headquarters by other Detroit city clerk personnel.

The claim that Mr. Larsen was prevented from viewing the work being processed at the tables is simply not correct. As seen in a City of Detroit exhibit, a large monitor was at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed. Mr. Jaffe confirmed his experience and observation that efforts were made to ensure that all challengers could observe the process.

Despite Mr. Larsen's claimed expertise, his knowledge of the procedures at the AVCB paled in comparison to Christopher Thomas'. Mr. Thomas' detailed explanation of the procedures and processes at the TCF Center were more comprehensive than Mr. Larsen's. It is noteworthy, as well, that Mr. Larsen did not file any formal complaint as the challenger while at the AVCB. Given the concerns raised in Mr. Larsen's affidavit, one would expect an attorney would have done so. Mr. Larsen, however, only came forward to complain after the unofficial vote results indicated his candidate had lost.

## **II. Response to Miscellaneous Detroit-Related Allegations**

Plaintiff makes additional miscellaneous allegations, including some which are not tied to any specific affidavit. Those allegations are similarly misplaced.

First, Plaintiff alleges that Wayne County election officials decided to not follow M.C.L. §§ 168.674 – 675. BOC ¶¶ 90-91. The referenced statutes relate to the appointment of election inspectors and vacancies in the position during an election. There is no factual allegation in the BOC, in any affidavit, or in any case filed in state court that could possibly implicate those statutory provisions.

Second, Plaintiff alleges that Michigan has strict signature verification requirements for absentee ballots, including that the “Elections Department” place a written statement or stamp on each ballot envelope indicating the signature was checked and verified. BOC ¶ 92. But, again, there is no factual allegation anywhere to suggest that this process was not followed. As stated in the affidavit of Chris Thomas, the process was followed.

Third, Plaintiff makes various allegations regarding the number of Wayne County Absent Voter Counting Boards, allegedly “unbalanced.” BOC ¶¶ 97-99. In fact, the minor imbalances in precincts and counting boards, accounting for a vanishingly small number of votes. In the



August 2020 election, 53.6% of Wayne County precincts and counting boards were *balanced*, while in November 2020, 71.9% were *balanced*. COD Appx. 029-31. The percentage of out-of-balance precincts, with an imbalance of 5 or more, was also lower in November 2020 than August 2020. *Id.* Jurisdictions throughout the State, including jurisdiction with far fewer voters than Detroit, also had out of balance precincts. None of this suggests impropriety or provided a reason to not certify. This occurs everywhere in every election because elections are run by human beings who make mistakes.

Fourth, Plaintiff alleges that the Wayne County Board of Canvassers certified the County's election results on November 17, 2020, supposedly under threat, and then "rescinded" their votes the following day. As was widely publicized, during the meeting, two Republican members of the Board were initially opposed to certification, asserting (incorrectly) they could not certify because some precincts in Detroit were slightly imbalanced (even though nearly all previous certifications, including certification of the results for Donald Trump in 2016, were made even though many more precincts were unbalanced in 2020). One member pondered out loud the idea of certifying the results for other jurisdictions in Wayne County, even though those jurisdictions also had precincts out of balance, some proportionately greater than Detroit. After an overwhelming

response to the proposed disenfranchisement in the public comments—which Plaintiff characterizes as “threats,” but all of which are part of the public record—the members of the Board unanimously certified the results. After the meeting was adjourned, President Trump called at least one of the Republican members and shortly after that call, both Republican members signed affidavits saying they wanted to rescind their votes. There is no statutory certification rescission by affidavit. *See* M.C.L. §§ 168.821-829. Once the County Board of Commissioners certified the results, the results were certified. *Id.*

Fifth, Plaintiff appears to assert there is a one in a quadrillion chance that absentee ballots would favor President-Elect Biden over President Trump. That conclusion is premised upon the flawed assumption that the universe of voters who cast ballots in person on election day is indistinguishable from those who choose to vote absentee. In a year in which the Republican President of the United States discouraged his supporters from voting absentee, while Democrats actively promoted absentee voting, the uncritical acceptance of the assumption that there is no difference in the populations of in-person voters versus those who vote absentee is patently wrong. The Defendants are certain to address the assertion in detail, but it should be noted that the claim is directly refuted by an expert report submitted by the *plaintiffs* in *Johnson v. Benson*, *supra*, the

Petition for Extraordinary Writ to the Michigan Supreme Court challenging the election. COD Appx. 079-82. The report discussed the survey results obtained by Mr. McLaughlin, stating, as follows:

Our national post-election survey conducted on November 2nd and 3rd clearly shows President Trump winning by 26-points (62% to 36%) among adults who voted in-person on election-day. Among adults who voted early in-person at a designated polling location, Joe Biden edged President Trump by 2-points (51% to 49%). However, among adults who voted early by mail, Joe Biden won by 28-points (63% to 35%). Our August and October surveys conducted in the battleground states told the same story of President Trump leading big among in-person, election-day voters while Joe Biden led by wide margins with early by mail voters.

COD Appx. 081; *see also* COD Appx. 040-54, Thomas Aff. ¶ 45 (Noting that consistent with prior elections, in November 2020, the initial results for absentee ballots in the State of Michigan were generally reported later than results for in-person voting.)<sup>7</sup>

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<sup>7</sup> For a case that seeks such extraordinary and unprecedented relief, Plaintiff is disturbingly careless in its factual representations to this court. For instance, the city of Detroit, not Wayne County, operates elections in its borders. *See* M.C.L. § 168.764d. Official results establish that Vice President Biden carried the state of Michigan by 154,188 votes, not by 146,007 votes. Thomas Aff. ¶ 43. In 2016, 1,277,405 Michiganders requested absentee ballots, not 587,618. *Id.* ¶ 44.

## CONCLUSION

The Court should DENY Plaintiff's Motion for Leave to File Bill of Complaint or DENY the Bill of Complaint.

Respectfully submitted,

DAVID H. FINK\*

*\*Counsel of Record*

FINK BRESSACK

David H. Fink (P28235)

Darryl Bressack(P67820)

Nathan J. Fink (P75185)

38500 Woodward Ave., Suite 350

Bloomfield Hills, MI 48304

(248) 971-2500

dfink@finkbressack.com

dbressack@finkbressack.com

nfink@finkbressack.com

CITY OF DETROIT LAW

DEPARTMENT

Lawrence T. Garcia (P54890)

James D. Nosedo (P52563)

2 Woodward Ave., 5<sup>th</sup> Floor

Detroit, MI 48226

(313) 237-5037

garcial@detroitmi.goc

nosej@detroitmi.gov

*Counsel for Amicus Curiae City of  
Detroit*

DECEMBER 10, 2020

## **APPENDIX**

950 N.W.2d 707 (Mem)  
Supreme Court of Michigan.

Cheryl A. COSTANTINO and Edward P. McCall, Jr., Plaintiffs-Appellants,  
v.  
CITY OF DETROIT, Detroit Election Commission, Detroit City Clerk, Wayne  
County Clerk, and Wayne County Board of Canvassers, Defendants-Appellees,  
and  
Michigan Democratic Party, Intervening Defendant-Appellee.

SC: 162245

|

COA: 355443

|

November 23, 2020

Wayne CC: 20-014780-AW

**Order**

On order of the Court, the motions for immediate consideration and the motion to file supplemental response are GRANTED. The application for leave to appeal the November 16, 2020 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Zahra, J. (concurring).

Plaintiffs ask this Court to “enjoin the Wayne County Canvassers certification of the November 2020 election prior to their meeting [on] November 17, 2020 at 3:00 p.m.” on the basis that “the audit [requested by plaintiffs pursuant to Const. 1963, art. 2, § 4(1)(h) ] needs to occur prior to the election results being certified by the Wayne County Board of Canvassers.” Plaintiffs contend that if “the results of the November 2020 election [are] certified ... Plaintiffs will lose their right to audit its results, thereby losing the rights guaranteed under the Michigan Constitution.” However, plaintiffs cite no support, and I have found none, for their proposition that an audit under Const. 1963, art. 2, § 4(1)(h)—which provides “[e]very citizen of the United States who is an elector qualified to vote in Michigan ... [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections”—must *precede* the certification of election results. Indeed, the plain language of Const. 1963, art. 2, § 4(1)(h) does *not* require an audit to precede the certification of election results. To the contrary, certified results would seem to be a *prerequisite* for such an audit. For how can there be “[t]he right to have the results of statewide elections audited” absent any results, and, further, what would be properly and meaningfully audited other than final, and presumably certified, results? See also *Hanlin v. Saugatuck Twp.*, 299 Mich. App. 233, 240-241, 829 N.W.2d 335 (2013) (allowing for a quo warranto action to be brought by a citizen within 30 days of an election in which it appears that a material fraud or error has been committed), citing *Barrow v. Detroit Mayor*, 290 Mich. App. 530, 802 N.W.2d 658 (2010); MCL 168.31a (which sets forth election-audit requirements and does not require an audit to take place before election results are certified); MCL 168.861 (“For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing.”).

Even so, while plaintiffs are not precluded from seeking a future “results audit” under Const. 1963, art. 2, § 4(1)(h), the certification of the election results in Wayne County has rendered the instant case moot to the extent that plaintiffs ask this Court to enjoin that certification; there is no longer anything to enjoin. While it is noteworthy that two members

of the board later sought to rescind their votes for certification, see LeBlanc, *GOP Canvassers Try to Rescind Votes to Certify Wayne County Election*, Detroit News (November 19, 2020) <<https://www.detroitnews.com/story/news/local/michigan/2020/11/19/gop-canvassers-attempt-rescind-votes-certify-wayne-county-vote/3775246001/>> (accessed November 23, 2020) [<https://perma.cc/2SS2-Y29V>], plaintiffs have nonetheless provided no support, and I have found none, for their proposition that this effects a “decertification” of the county’s election results, so it seems they presently remain certified. Cf. *Makowski v. Governor*, 495 Mich. 465, 487, 852 N.W.2d 61 (2014) (holding that the Governor has the power to grant a commutation, but does not have the power to revoke a commutation). Thus, I am inclined to conclude that the certification of the election by the Wayne County board has rendered the instant case moot—but only as to plaintiffs’ request for injunctive relief.

Nothing said is to diminish the troubling and serious allegations of fraud and irregularities asserted by the affiants offered by plaintiffs, among whom is Ruth Johnson, Michigan’s immediate past Secretary of State, who testified that, given the “very concerning” “allegations and issues raised by Plaintiffs,” she “believe[s] that it would be proper for an independent audit to be conducted as soon as possible to ensure the accuracy and integrity of th[e] election.” Plaintiffs’ affidavits present evidence to substantiate their allegations, which include claims of ballots being counted from voters whose names are not contained in the appropriate poll books, instructions being given to disobey election laws and regulations, the questionable appearance of unsecured batches of absentee ballots after the deadline for receiving ballots, discriminatory conduct during the counting and observation process, and other violations of the law. Plaintiffs, in my judgment, have raised important constitutional issues regarding the precise scope of Const. 1963, art. 2, § 4(1)(h)—a provision of striking breadth added to our Michigan Constitution just two years ago through the exercise of direct democracy and the constitutional initiative process—and its interplay with MCL 168.31a and other election laws. Moreover, the current Secretary of State has indicated that her agency will conduct a postelection performance audit in Wayne County. See Egan, *Secretary of State: Post-Election “Performance Audit” Planned in Wayne County*, Detroit Free Press (November 19, 2020) <<https://www.freep.com/story/news/politics/elections/2020/11/19/benson-post-election-performance-audit-wayne/3779269001/>> (accessed November 23, 2020) [<https://perma.cc/WS95-XBPG>]. This development would seem to impose at least some obligation upon plaintiffs both to explain why a constitutional audit is still required after the Secretary of State conducts the promised process audit and to address whether there is some obligation on their part to identify a specific “law” in support of Const. 1963, art. 2, § 4(1)(h) that prescribes the specific “manner” in which an audit pursuant to that provision must proceed.

In sum, at this juncture, plaintiffs have not asserted a persuasive argument that their case is not moot and that the entry of immediate injunctive relief is proper. That is all that is now before this Court. Accordingly, I concur in the denial of injunctive relief. In addition to denying the relief currently sought in this Court, I would order the most expedited consideration possible of the remaining issues. With whatever benefit such additional time allows, the trial court should meaningfully assess plaintiffs’ allegations by an evidentiary hearing, particularly with respect to the credibility of the competing affiants, as well as resolve necessary legal issues, including those identified in the separate statement of Justice VIVIANO. I would also have this Court retain jurisdiction of this case under both its appellate authority and its superintending authority under Const. 1963, art. 6, § 4 (stating that, with certain limitations, “the supreme court shall have general superintending control over all courts”). Federal law imposes tight time restrictions on Michigan’s certification of our electors. Plaintiffs should not have to file appeals following our standard processes and procedures to obtain a final answer from this Court on such weighty issues.

Finally, I am cognizant that many Americans believe that plaintiffs’ claims of electoral fraud and misconduct are frivolous and obstructive, but I am equally cognizant that many Americans are of the view that the 2020 election was not fully free and fair. See, e.g., Monmouth University Polling Institute, *More Americans Happy About Trump Loss Than Biden Win* (November 18, 2020) <[https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_111820/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111820/)> (accessed November 23, 2020) [<https://perma.cc/7DUN-CMZM>] (finding that 32% of Americans “believe [Joe Biden] only won [the election] due to voter fraud”). The latter is a view that strikes at the core of concerns about this election’s lack of both “accuracy” and “integrity”—values that Const. 1963, art. 2, § 4(1)(h) appears designed to secure.

In sum, as explained above, I would order the trial court to expedite its consideration of the remaining issues, and I would retain jurisdiction in order to expedite this Court’s final review of the trial court’s decision. But, again, because plaintiffs have

not asserted a persuasive argument that immediate injunctive relief is an appropriate remedy, I concur in the denial of leave to appeal and, by extension, the denial of that relief.

Markman, J., joins the statement of Zahra, J.

Viviano, J. (dissenting).

Plaintiffs Cheryl Costantino and Edward McCall seek, among other things, an audit of the recent election results in Wayne County. Presently before this Court is their application for leave to appeal the trial court's ruling that plaintiffs are not likely to succeed and therefore are not entitled to a preliminary injunction to stop the certification of votes by defendant Wayne County Board of Canvassers. See MCL 168.824; MCL 168.825. The Court of Appeals denied leave, and this Court has now followed suit. For the reasons below, I would grant leave to answer the critical constitutional questions of first impression that plaintiffs have squarely presented concerning the nature of their right to an audit of the election results under Const. 1963, art. 2, § 4(1)(h).

The constitutional provision at issue in this case, which the people of Michigan voted to add in 2018 through Proposal 3, guarantees to “[e]very citizen of the United States who is an elector qualified to vote in Michigan ... [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections.” *Id.* The provision is self-executing, meaning that the people can enforce this right even without legislation enabling them to do so and that the Legislature cannot impose additional obligations on the exercise of this right. *Wolverine Golf Club v. Secretary of State*, 384 Mich. 461, 466, 185 N.W.2d 392 (1971).

The trial court failed to provide a meaningful interpretation of this constitutional language. Instead, it pointed to MCL 168.31a, which prescribes the minimum requirements for statewide audits and requires the Secretary of State to issue procedures for election audits under Article 2, § 4. But the trial court never considered whether MCL 168.31a accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right.

In passing over this constitutional text, the trial court left unanswered many questions pertinent to assessing the likelihood that plaintiffs would succeed on the merits.<sup>1</sup> As an initial matter, the trial court did not ask what showing, if any, plaintiffs must make to obtain an audit. It appears that no such showing is required, as neither the constitutional text nor MCL 168.31a expressly provide for it. None of the neighboring rights listed in Article 2, § 4, such as the right to vote by absentee ballot, requires citizens to present any proof of entitlement for the right to be exercised. Yet, the trial court here ignored this threshold legal question and instead scrutinized the parties’ bare affidavits, concluding that plaintiffs’ allegations of fraud were not credible.<sup>2</sup> The trial court’s factual findings have no significance unless, to obtain an audit, plaintiffs were required to prove their allegations of fraud to some degree of certainty.

Wrapped up in this question is the meaning and design of Const. 1963, art. 2, § 4. Is it a mechanism to facilitate challenges to election results, or does it simply allow for a postmortem perspective on how the election was handled? To ascertain the type of audit the Constitution envisions, it is necessary to consider whether the term “audit” has a special meaning in the context of election administration. In this regard, we should examine the various auditing practices in use around the time Proposal 3 was passed. See Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations* (January 2014), p. 66 (“Different types of audits perform different functions.”). Some audits occur regardless of how close the election was. They simply review the election process to verify that procedures were complied with, rules were followed, and technology performed as expected. See *id.*; see also League of Women Voters, *Report on Election Auditing* (January 2009), p. 3 (“Post-election audits routinely check voting system performance in contests, regardless of how close margins of victory appear.”). For these process-based audits, it would not appear critical whether they occur before the election results are finally certified, as the audit is intended to gather information that could be used to perfect voting systems going forward.



Other audits, by contrast, aim to ensure accuracy in a specific election and enable alteration of results if necessary. The American Law Institute's recent *Principles of the Law, Election Administration*, drafted around the time Proposal 3 was passed, suggests that audits should be used in this manner:

[I]f an audit exposes a problem, the number of randomly sampled ballots can be increased in order to ascertain whether or not the problem is one that threatens the accuracy of the determination of which candidate is the election's winner. In an extreme case, when problems exposed by an audit were severe, the audit would need to turn into a full recount of all ballots in the election in order to provide the requisite confidence in the accuracy of the result (or, as necessary, to alter the result based on the findings of the audit-turned-recount). In those circumstances when the audit exposes no such problem, election officials ordinarily would be able to complete the audit prior to the deadline for certifying the results of the election; when, however, the audit reveals the necessity of a full recount, then a state—depending on how it chooses to structure the relationship between certification and a recount—either could delay certification until completion of the recount or issue a preliminary certification that is subject to revision upon completion of the recount. [ALI, *Principles of the Law, Election Administration* (2019), § 209, comment c.]

These audits, such as a risk-limiting audit, “are designed to be implemented before the certification of the results, and to inform election officials whether they should be confident in the results—or if they should bump the audit up to a full recount.” Pettigrew & Stewart, *Protecting the Perilous Path of Election Returns from the Precinct to the News*, 16 Ohio St. Tech. L. J. 587, 636 (2020) (“[Risk-limiting audits] conducted as part of the certification process currently provide the best mechanism through which the manipulation of election returns at the precinct level can be detected and, most importantly, remedied.”). A review of election laws conducted in early 2018 similarly recommended that audits be undertaken “after preliminary outcomes are announced, but before official certification of election results” because this allows for “correction of preliminary results if preliminary election outcomes are found to be incorrect.” Root et al., Center for American Progress, *Election Security in All 50 States: Defending America's Elections* (Feb. 12, 2018), available at <<https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/>>.

Whether the constitutional right to an audit may be utilized to uncover evidence of fraud to challenge the results of an election will also need to be addressed. In particular, how does the constitutional audit operate within our statutory framework and procedures for canvassing election returns, certifying the results, and disputing ballots on the basis of fraud? We have long indicated that canvassing boards’ role is ministerial and does not involve investigating fraud. See *McLeod v. State Bd. of Canvassers*, 304 Mich. 120, 7 N.W.2d 240 (1942); see also *People ex rel. Williams v. Cicott*, 16 Mich. 283, 311 (1868)<sup>3</sup> (opinion of Christiancy, J.) (noting that the boards, “acting thus ministerially,” are “often compelled to admit votes which they know to be illegal”); see generally Paine, *Treatise on the Law of Elections to Public Offices* (1888), § 603, p. 509 (“The duties of county, district, and state canvassers are generally ministerial.... Unless authorized by statute, they cannot go behind those returns.... Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal.”). The Board of State Canvassers has more of a role in investigating fraud in recounts, although we have held that it cannot exclude votes on this basis. See MCL 168.872 (providing that if the board conducting a recount suspects fraud occurred during the election, it can make an investigation that produces a report that is submitted to the prosecuting attorney or to the circuit judges of the county); *May v. Wayne Co. Bd. of Canvassers*, 94 Mich. 505, 512, 54 N.W. 377 (1893) (holding that the board could not exclude votes during a recount based on fraud). These holdings may suggest that evidence of fraud uncovered in an audit is not a barrier to certification and instead may only be used to challenge an election in quo warranto and other related proceedings. See *The People ex rel. Attorney General v. Van Cleve*, 1 Mich. 362, 364-366 (1850) (holding in a quo warranto proceeding that the certification “is but *prima facie* evidence” of the election results and that a party can “go behind all these proceedings[; that the party] may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding, or the person claiming the office”).

Consequently, it is imperative to determine the nature and scope of the audit provided for in Article 2, § 4, so we can determine when the audit occurs and whether it will affect the election outcome. These questions are important constitutional issues of first impression that go to the heart of our democracy and the power of our citizens to amend the Constitution to ensure the accuracy and integrity of elections. They deserve serious treatment. I would grant leave to appeal and hear this case on an expedited basis to resolve these questions.<sup>4</sup> For these reasons, I dissent.

## All Citations

950 N.W.2d 707 (Mem)

## Footnotes

- 1 The court also suggested that plaintiffs could seek a recount. But, with few exceptions, the relevant recount provisions can be invoked only by candidates for office, which plaintiffs here were not. Compare MCL 168.862 and MCL 168.879 (allowing candidates to request recounts) with MCL 168.880 (allowing any elector, in certain circumstances, to seek a recount of “votes cast upon the question of a proposed amendment to the constitution or any other question or proposition”).
- 2 The court's credibility determinations were made without the benefit of an evidentiary hearing. Ordinarily, an evidentiary hearing is required where the conflicting affidavits create factual questions that are material to the trial court's decision on a motion for a preliminary injunction under MCR 3.310. See 4 Longhofer, Michigan Court Rules Practice, Text (7th ed., 2020 update), § 3310.6, pp. 518-519. See also *Fancy v. Egrin*, 177 Mich. App. 714, 723, 442 N.W.2d 765 (1989) (an evidentiary hearing is mandatory “where the circumstances of the individual case so require”).
- 3 Overruled in part on other grounds by *Petrie v. Curtis*, 387 Mich. 436, 196 N.W.2d 761 (1972).
- 4 In doing so, I would consider the parties’ arguments regarding whether the matter is moot.

# Order

Michigan Supreme Court  
Lansing, Michigan

December 9, 2020

Bridget M. McCormack,  
Chief Justice

162286 & (3)(5)(6)(9)(10)

David F. Viviano,  
Chief Justice Pro Tem

ANGELIC JOHNSON and LINDA LEE  
TARVER,  
Petitioners,

Stephen J. Markman  
Brian K. Zahra  
Richard H. Bernstein  
Elizabeth T. Clement  
Megan K. Cavanagh,  
Justices

v

SC: 162286

SECRETARY OF STATE, CHAIRPERSON OF  
THE BOARD OF STATE CANVASSERS,  
BOARD OF STATE CANVASSERS, and  
GOVERNOR,  
Respondents.

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On order of the Court, the motions for immediate consideration are GRANTED. The petition for extraordinary writs and declaratory relief is considered, and it is DENIED, because the Court is not persuaded that it can or should grant the requested relief. The motions to intervene are DENIED as moot.

CLEMENT, J. (*concurring*).

I concur in the Court's order denying the relief sought in this complaint. Indeed, I do so in large part due to the legal authority cited by Justice VIVIANO in dissent. It is undeniable that the legal authority in this area has not been the subject of much litigation, and therefore there is little caselaw on point. However, there are many *seemingly* apparent answers—many of which are discussed at some length by Justice VIVIANO—and when these answers are combined with the defects in petitioners' presentation of their case, I do not think it is an appropriate exercise of this Court's discretion to prolong the uncertainty over the legal status of this election's outcome. This Court routinely chooses not to hear cases which raise interesting and unsettled legal questions in the abstract when we conclude the case would be a poor practical vehicle for addressing those questions—which is my view of this case and these questions. Moreover, I believe it would be irresponsible to continue holding out the possibility of a judicial solution to a dispute that it appears must be resolved politically.

I think it is important at the outset to have a basic understanding of how elections in Michigan work. On Election Day, votes are cast. Once Election Day is over, the votes in each race are then counted at the precinct level. See MCL 168.801 ("Immediately on closing the polls, the board of inspectors of election in each precinct shall proceed to canvass the vote."). Those results are then forwarded to the county. See MCL 168.809. The results are then canvassed by the board of county canvassers, see MCL 168.822(1), which declares the winners of county and local races, MCL 168.826(1), while tabulating

the results of elections for various statewide and other races within that county and forwarding those results to the Board of State Canvassers, MCL 168.824(1) and 168.828. The Board of State Canvassers then canvasses the figures from around the state, MCL 168.842(1), tabulating the figures and declaring the winners of the various races that the Board of State Canvassers must manage, MCL 168.844 and 168.845. Once the canvassing is finished, the county clerk (for county and local offices) and the Secretary of State (for higher offices) issues a certificate of election to the named winners. MCL 168.826(2) and 168.845.

At no point in this process is it even proper for these individuals to investigate fraud, illegally cast votes, or the like. “[I]t is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical.” *McQuade v Furgason*, 91 Mich 438, 440 (1892). *After* a certificate of election is issued, it is possible to challenge whether it was issued to the right individual. Usually this is done via a court action seeking what is called a writ of “quo warranto.” See MCL 600.4501 *et seq.* There are debates at the margins about exactly how this process might work—as noted by Justice VIVIANO, there is some dispute about who has standing to maintain an action for quo warranto and whether it can commence before an allegedly wrongful officeholder takes office—but this is the basic outline: the votes are counted, a certificate of election is issued, and *then* we debate whether said certificate was issued to the wrong individual. This is because of the limited authority of the canvassing board to simply tally votes cast.

The duties of these [canvassing] boards are simply ministerial: their whole duty consists in ascertaining who are elected, and in authenticating and preserving the evidence of such election. It surely cannot be maintained that their omissions or mistakes are to have a controlling influence upon the election itself. It is true that their certificate is the authority upon which the person who receives it enters upon the office, and it is to him *prima facie* evidence of his title thereto; but it is only *prima facie* evidence. [*People ex rel Attorney General v Van Cleve*, 1 Mich 362, 366 (1850).]

It is in this context that I believe we must read petitioners’ complaint. At no point does their complaint ask that we declare that a particular slate of presidential electors was duly elected. Nor does their prayer for relief ask that we order the Secretary of State to perform an audit of this election under Const 1963, art 2, § 4(1)(h). Indeed, it is not entirely clear exactly what the nature of petitioners’ complaint even is; while MCR 2.111(B)(1) requires that a complaint lay out each “cause of action,” the complaint recites several vague counts (“Due Process,” “Equal Protection,” and “Article II, section 1, clause 2”) that are not recognized causes of action themselves. The only recognized cause of action is Count Four, which asks for “Mandamus and *Quo Warranto*.” These

certainly are recognized causes of action at common law, although they are distinct causes of action that are addressed to different problems. “[T]o obtain a writ of mandamus, the plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled and the defendants must have a clear legal duty to perform the same.” *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 666 (1988). Quo warranto, by contrast, is “the only way to try titles to office finally and conclusively . . .” *Lindquist v Lindholm*, 258 Mich 152, 154 (1932). Combining them makes it unclear what petitioners are asking this Court to *do*—command a public officer to perform a legal duty (and if so, which officer, and what duty?), or test title to office?<sup>1</sup> I believe this confusion is reflected in the fact that Justices VIVIANO and ZAHRA focus on the constitutional right to an audit that the petitioners do not actually ask for in their prayer for relief. Rather, the prayer for relief asks for a variety of essentially interim steps—taking control of ballots, segregating ballots the petitioners believe were unlawful, enjoining officials from taking action predicated on the vote counts—but does not ask for any actual electoral outcome to be changed. This only begins the problems with this proceeding.

Next, there is a problem of jurisdiction. There has, admittedly, never been litigation like this before in Michigan, so we have no precedents we can draw upon as a definitive resolution. However, the face of petitioners’ complaint strongly suggests there is a jurisdictional problem. The gist of petitioners’ complaint is that they are unsatisfied with the recent decision of the Board of State Canvassers to declare a winner in the election for presidential electors in Michigan. But this Court has no apparent jurisdiction to review this decision. As noted, the canvassing process is not the time to allege that an election was marred with fraud. Petitioners allege that sections of the Michigan Election Law, like MCL 168.479 and MCL 168.878, allow for decisions of the Board of State Canvassers to be challenged by a mandamus action in the Michigan Supreme Court. But these sections appear to be inapplicable—MCL 168.479 is in the chapter on initiative and referendum, where the responsibilities of the Board of State Canvassers are far more involved than merely tabulating votes, and MCL 168.878 is in the chapter on recounts, which is also not implicated here. Even if either statute were applicable here, there is no theory that the petitioners have put forward suggesting that the Board of State Canvassers failed to perform a legal duty it was obliged to perform. Instead, as noted by Justice VIVIANO, in this context the role of the canvassing board is ministerial, with no function other than to tabulate the votes cast and determine which candidate (or candidates) received the most votes. To the extent that petitioners are trying to revisit the determination of the Board of State Canvassers, it appears they cannot, at least absent the unlikely scenario of the board simply having performed its computations incorrectly, which is not alleged here.

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<sup>1</sup> Notably, none of the named defendants are alleged to be usurpers to any office, which indicates that plaintiffs have not satisfied the pleading requirements for a quo warranto action under MCL 600.4505(1).

Petitioners also ask that we enjoin respondents “from finally certifying the election results and declaring winners of the 2020 general election . . . .” As an initial matter, this would seem to be moot—it has been widely reported that this already has occurred. A “past event cannot be prevented by injunction.” *Rood v Detroit*, 256 Mich 547, 548 (1932). Even had that not happened, however, it does not appear that the law contemplates any role for the courts in this process. As noted by Justice VIVIANO, the ordinary process by which a Michigan election result can be challenged is via quo warranto proceedings. We have said

that you may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding, or the person claiming the office. And this is as it should be. In a republican government, where the exercise of official power is but a derivative from the people, through the medium of the ballot box, it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed, to be defeated by either the ignorance or the corruption of any board of canvassers. [*Van Cleve*, 1 Mich at 365-366.]

However, when the Board of State Canvassers must declare the winner of an election—as it must with presidential electors, MCL 168.46—the Legislature has, in MCL 168.846, apparently suppressed quo warranto proceedings and reserved to itself the prerogative of determining who the winner is. Such an arrangement is consistent with how disputes over elections to the United States Congress and the Michigan Legislature are resolved, see US Const, art I, § 5, cl 1; Const 1963, art 4, § 16, as well as the plenary authority that state legislatures have over the selection of presidential electors under federal law, see US Const, art II, § 1, cl 2; 3 USC 2.<sup>2</sup> As Justice VIVIANO observes, the language of MCL 168.846 was formerly in the Michigan Constitution of 1850. When it was, we observed that it

does not permit the regularity of elections to the more important public offices to be tried by the courts. It has provided that in all cases, where . . . the result of elections is to be determined by the Board of State Canvassers, there shall be no judicial inquiry beyond their decision. . . .

This provision was doubtless suggested by the serious difficulties

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<sup>2</sup> One could fairly question whether it is constitutional for MCL 168.846 to reserve to the Legislature the prerogative to settle disputes over elections to offices required by the Michigan Constitution—a Legislature inclined to abuse this power could conceivably nullify an election that the Michigan Constitution requires to be held. But the Michigan Constitution does not require that presidential electors be themselves popularly elected, and reserving final decision-making authority in the Legislature as to that specific office is consistent with federal constitutional and statutory law.

which would attend inquiries into contested elections, where the ballots of a great number of election precincts would require to be counted and inspected; and probably, also, to discourage the needless litigation of the right to the higher public offices at the instance of disappointed candidates where the public interest does not appear to require it. A legislative body can exercise a discretion in such cases, and could not be compelled to enter upon such an inquiry except upon a preliminary showing which the courts are not at liberty to require. [*People ex rel Royce v Goodwin*, 22 Mich 496, 501-502 (1871).]

These jurisdictional problems seemingly put to rest petitioners’ allegations about how absentee ballots were handled in this election. They ask that we “segregate any ballots counted or certified inconsistent with Michigan Election Law” and, in particular, “any ballots attributable to the Secretary of State’s absentee ballot scheme”—a reference to the Secretary of State’s decision to send out unsolicited absentee ballot applications to voters. Whatever the legality of this decision on the Secretary of State’s part, it does not appear that the courts are the proper forum for challenging the validity of *any* votes cast in the race for presidential electors (as well as some other offices). For those offices where it might be challengeable, the proper means would be a quo warranto action. That said, I would note that laches may apply here—the time to challenge this scheme may have been before the applications were mailed out (or at least before the absentee ballots were cast), rather than waiting to see the election outcome and then challenging it if unpalatable.

These jurisdictional concerns are not the only problem with this petition. Petitioners’ prayer for relief does not ask that we direct the Secretary of State to conduct an audit of this election, although their briefing does invoke the right to an audit under Const 1963, art 2, § 4(1)(h)—added to our Constitution two years ago as part of Proposal 18-3. To the extent that the petitioners are trying to get a writ of mandamus against the Secretary of State to perform an immediate audit under the constitutional language,<sup>3</sup> I

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<sup>3</sup> Justice VIVIANO says I am “mistaken in suggesting that petitioners here have not asked for an audit,” because petitioners’ complaint declares several times that the respondents “owe citizens an audit of election results that is meaningful and fair and to safeguard against election abuses.” In my view, asserting what citizens are owed is a far cry from demanding actual relief—particularly in light of the conceptual confusion that pervades this petition. The fact that Justice VIVIANO must patch together what the petitioners are apparently after by combining the petition’s allegations with its prayer for relief and the accompanying brief goes to show how weakly it is presented. Moreover, as noted by Justice VIVIANO, petitioners’ brief asks us to “enter an order requiring that the Michigan Legislature convene a joint convention to analyze and audit the election returns” or that this Court “should oversee an independent audit.” Given the nature of the writ of quo warranto, it is simply not a proper vehicle for receiving any audit-related relief. As

would note at the outset that they have apparently made a procedural misstep. Although the Michigan Constitution gives this Court jurisdiction over mandamus actions, see Const 1963, art 6, § 4 (stating that “the supreme court shall have . . . power to issue, hear and determine prerogative and remedial writs”), we have provided by rule that such actions must begin in either the Court of Appeals or the Court of Claims, MCR 3.305(A)(1). “Reasons of policy dictate that such complaints be directed to the first tribunal within the structure of Michigan’s one court of justice having competence to hear and act upon them.” *People v Flint Muni Judge*, 383 Mich 429, 432 (1970). This is why the court rule for original actions in our Court refers only to proceedings for superintending control, which extends to either the lower courts or certain other judicial entities, MCR 7.306(A)(1) and (2), not the executive branch. We have indicated a willingness to disregard such errors in the past, see, e.g., *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 555-556 (1947), but petitioners’ audit-related arguments begin in a bad position.

More importantly, there is no apparent purpose to which the audit sought by the petitioners can be put in light of the above-mentioned jurisdictional limits on the judiciary’s ability to revisit the outcome of this election. Given the apparent inability of canvassing boards to investigate fraud, there is a fundamental disconnect between petitioners’ allegations of fraud and their request for an audit. Justice ZAHRA “would have ordered an immediate evidentiary hearing before a special master for the purpose of ferreting out whether there is any substance to the very serious-but-as-yet-unchallenged allegations of irregularities and outright violations of Michigan Election Law that petitioners assert took place before the vote was certified . . .” But such an evidentiary hearing is unnecessary—in any event, those boards of canvassers had no authority to perform (or at least act on) such a factual investigation. Moreover, the boards have certified the results and certificates of election have been issued; it is difficult to see how any judicial proceeding could undo that process. I fail to see how those certification choices can be taken back any more than the Governor can take back a pardon once issued. Cf. *Makowski v Governor*, 495 Mich 465 (2014). This is not to say that certificates of election cannot be challenged; rather, it is to say that an election contest needs to take the form of a challenge to the certificate of election, rather than a challenge to the ministerial certification process.

There is also reason to believe that the right to an audit does not extend to changing the outcome of an election. The statute that implements the right to an audit

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noted, mandamus might be, at least to the extent that petitioners seek to compel the Secretary of State to perform a clear legal duty. But that would not extend to this Court’s performing said audit; nowhere in the law is it *this Court’s* legal duty to perform any audit. The same can also be said of the Legislature, which is in addition not even a named defendant in this action, so it is hard to imagine how we would order the Legislature to do anything even if that were *not* an assault on the separation of powers.



makes clear that it “is not a recount and does not change any certified election results.” MCL 168.31a(2). While one might argue that the statute does not completely vindicate the petitioners’ constitutional “right to have the results of statewide elections audited,” Const 1963, art 2, § 4(1)(h), it seems important to note that the Constitution provides that the audit shall be performed “in such a manner as prescribed by law,” *id.* There is a somewhat confusing internal contradiction in the constitutional text, as the audit right is the only one said to be “as prescribed by law,” but all of the rights in § 4(1) are said to be “self-executing.” However, I see nothing to be gained in judicial exploration of this tension and examination of the scope of the audit right conveyed in § 4(1)(h) if there is no purpose to which the results could be applied. Moreover, deferring to the audit right as it is expressed in MCL 168.31a(2) would be consistent with the outcome of the remainder of the cases that have come to us which implicate Proposal 18-3. While this Court has denied leave in each of these cases and thus has taken no institutional position, see MCR 7.301(E), the consistent result has been to unsettle the least amount of the Michigan Election Law as possible when provisions of it are challenged under Proposal 18-3. We have thus left in place the statutory deadline of 8 p.m. on Election Day for absentee ballots to be received and counted as well as certain statutory voter registration requirements, and denied a prior challenge seeking an audit outside the boundaries of MCL 168.31a. See *League of Women Voters v Secretary of State*, \_\_\_ Mich \_\_\_ (2020) (Docket No. 161671), denying lv from \_\_\_ Mich App \_\_\_ (2020), recon den \_\_\_ Mich \_\_\_ (2020); *Promote the Vote v Secretary of State*, \_\_\_ Mich \_\_\_ (2020) (Docket No. 161740), denying lv from \_\_\_ Mich App \_\_\_ (2020); *Priorities USA v Secretary of State*, \_\_\_ Mich \_\_\_ (2020) (Docket No. 161753), denying lv from \_\_\_ Mich App \_\_\_ (2020); *Costantino v Detroit*, \_\_\_ Mich \_\_\_ (2020) (Docket No. 162245). As I have been the only member of the Court in the majority on all of these cases and the instant case, I cannot speak for my colleagues, but for my own part I can say that a desire to unsettle as little of the Michigan Election Law as possible has animated my approach to these cases.

Petitioners’ remaining requests in their prayer for relief put them in the curious position of volunteers in defense of the Legislature’s needs. Thus, they ask that we “take immediate custody and control of all ballots, ballot boxes, poll books, and other indicia of the Election . . . to prevent further irregularities, and to ensure that the Michigan Legislature and this Court have a chance to perform a constitutionally sound audit of lawful votes.” But if the Legislature needs to seize records, it has some authority to do so, see MCL 4.541, and if it needs judicial assistance in this regard, it is free to ask us. They similarly ask that we “appoint a special master or committee from both chambers of the Michigan Legislature to investigate all claims of mistake, irregularity, and fraud at the TCF Center . . . .” But the separation of powers makes it unthinkable that we would direct the Legislature to convene a committee to investigate anything—that branch’s choice to investigate is its own.<sup>4</sup> For our part, there is no need for a special master to

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<sup>4</sup> Justice VIVIANO suggests the possibility that the “results of an audit could be used by petitioners to convince the Legislature to take up the matter and to prevail in that venue,”

investigate anything if it is not in service of a cause of action that the petitioners enjoy. As noted, during the vote-counting process, the question of fraud is not one that the canvassing boards can investigate; after the vote-counting is complete, the issue is one that must be raised in either a quo warranto proceeding or, as apparently is the case here, before the Legislature itself.

If the scope of the constitutional right to an audit that animates Justices ZAHRA's and VIVIANO's dissenting statements were squarely presented and likely to be dispositive, I would be open to hearing this case. But the scope of that right is not very well presented (as noted, it does not appear in petitioners' prayer for relief), it does not appear to be dispositive, and petitioners' complaint is marred by further problems besides these. Although we have no absolutely definitive answers for these questions, it appears very much that petitioners are erroneously seeking to make the investigation of fraud a part of the canvassing process, and doing so by invoking statutes (MCL 168.479, MCL 168.878) that do not purport to give the judiciary the jurisdiction they ask us to exercise, which is all the more a problem given that MCL 168.846 appears to make the Legislature the exclusive arbiter of who is the proper winner of a presidential election. Petitioners also gesture toward an audit right which MCL 168.31a indicates is too circumscribed to give them the outcome they seek, and even if MCL 168.31a is narrower than the constitutional audit right of Const 1963, art 2, § 4(1)(h), it remains the case that MCL 168.846 apparently makes the Legislature the arbiter of this dispute to the exclusion of the judiciary. Petitioners further ask that we enjoin actions that have already occurred (the certification of the winners of this election), that we retroactively invalidate absentee ballots whose issuance they did not challenge in advance of the election, and that we preserve evidence for the Legislature to review that it either can gather for itself or that it has not asked us to assist in preserving. I simply do not believe this is a compelling case to hear.

In short, even if this petition can be construed as requesting an audit, what it requests is beyond the bounds of MCL 168.31a; and even if petitioners received said audit, it appears that it could not be used to revisit the canvassing process, because MCL 168.846 apparently reserves to the Legislature rather than the judiciary the final say on who Michigan's presidential electors are. For us to scrutinize these admittedly unresolved questions further, we must do so on the strength of a petition we may not have jurisdiction to entertain and within the four corners of which it is not clear what actual cause of action it is pleading, what relief it is seeking, or on what theory it believes it is owed relief from the named defendants. In light of these myriad difficulties—only some of which implicate the apparent merits of the legal issues the petitioners attempt to

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but their success or failure before the Legislature is a political rather than a legal question. *Nobody* asserts that the right created by Const 1963, art 2, § 4(1)(h) entitles the petitioners to information on the schedule they prefer to try and persuade the Legislature to take action.

present to us—I consider it imprudent to hear this matter, a conclusion only amplified by my view that it is irresponsible to continue holding out the possibility of a judicial solution to a political dispute that needs to be resolved with finality. Petitioners’ complaint casts more heat than light on the legal questions it gestures toward, and would not help us in providing a definitive interpretation of the law in this area. I therefore concur with our order denying petitioners relief.

ZAHRA, J. (*dissenting*).

Just two years ago, through the exercise of direct democracy and the constitutional initiative process, the people of Michigan amended our Constitution to expand greatly how Michigan residents may exercise their right to vote. Among the additions to the Michigan Constitution effected by what was then known as Ballot Proposal 2018-3 (Proposal 3) were provisions that: (i) require the Secretary of State automatically to register to vote all Michigan residents conducting certain business with the Secretary of State, unless the resident specifically declines registration; (ii) allow same-day registration with proof of Michigan residency; and (iii) permit no-reason absentee voting. Critics of Proposal 3 argued that these changes would increase opportunities for voter fraud and weaken the integrity of the electoral process, thereby placing in doubt the accuracy and integrity of Michigan’s election returns.<sup>5</sup> Proponents responded that Proposal C would promote and ensure the accuracy and integrity of elections by constitutionally guaranteeing the right to audit the results.<sup>6</sup>

In the wake of the very next election cycle to follow the adoption of these sweeping election reforms of 2018, petitioners filed an original action in this Court under Const 1963, art 6, § 4 and MCL 600.217(3) “seeking extraordinary writs of mandamus, prohibition, and declaratory and injunctive relief.” In support of their claims, petitioners invoke MCL 168.479, which specifies that “any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.”<sup>7</sup> Petitioners

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<sup>5</sup> See Mack, *Michigan Approves Proposal 3’s Election Reforms*, MLive (updated January 29, 2019)

<[https://www.mlive.com/news/2018/11/hold\\_michigan\\_proposal\\_3s\\_elec.html](https://www.mlive.com/news/2018/11/hold_michigan_proposal_3s_elec.html)> (accessed December 8, 2020) [<https://perma.cc/A8Z9-B46G>].

<sup>6</sup> *Id.*

<sup>7</sup> Justice CLEMENT’s statement concurring in the Court’s order argues that MCL 168.479(1) does not confer jurisdiction in this Court to hear petitioners’ challenge because it is located in the chapter on initiatives and referenda. But the plain language of MCL 168.479(1) is broad: “[A]ny person who feels aggrieved by *any determination* made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court” (emphasis added).

request, among other things, appointment of a special master to investigate their claims of election irregularities and fraud and to “independently review the election procedures employed at the TCF Center and throughout the State,”<sup>8</sup> presumably pursuant to Const 1963, art 2, § 4(1)(h)—which was among the provisions added to the Michigan Constitution by Proposal 3 and which guarantees to “[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections.”

Based on the pleadings alone, a majority of the Court today denies petitioners’ requested relief through a short form order of denial that concludes the majority “is not persuaded that it can or should grant the requested relief.” I dissent from the summary dismissal of petitioners’ action, without ordering immediate oral argument and additional briefing. As pointed out in the statements of my colleagues, there are threshold questions that must be answered before addressing the substantive merits of petitioners’ claims. But rather than summarily dismissing this action because procedural questions exist, I would have ordered immediate oral argument and briefing to address these threshold questions, as well as the meaning and scope of implementation of Const 1963, art 2, § 4(1)(h).

The matter before us is an original action asking the Court to invoke the power of mandamus, superintending control, and other extraordinary writs to provide declaratory relief. As such, this matter should be distinguished from a typical application seeking leave to appeal from the Court of Appeals. Original actions are limited to a small class of cases particularly described in Const 1963, art 6, § 4. Original actions should, therefore, be afforded very close review, particularly when they raise matters under Michigan election law.

Here, petitioners have presented a significant constitutional question pertaining to the process and scope of the constitutional right to an election audit—a right explicitly placed in our Constitution by the people themselves, in whom “[a]ll political power is

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Moreover, it would be strange to suggest that MCL 168.479(1) applies only to initiatives and referenda, as precisely that sort of limiting language is found not in MCL 168.479(1) but, rather, MCL 168.479(2), which provides in relevant part that any person who “feels aggrieved by any determination made by the board of state canvassers *regarding the sufficiency or insufficiency of an initiative petition . . .*” (emphasis added). Therefore, on the basis of the statutory text, I am not nearly as confident as Justice CLEMENT that MCL 168.479(1) does not confer jurisdiction in this Court to hear petitioners’ challenge. But to the extent we have questions about the Court’s jurisdiction, I would explore them at oral argument.

<sup>8</sup> Petition for Extraordinary Writs & Declaratory Relief, p 53.

inherent . . . .” Const 1963, art 1, § 1. Not only that, but Const 1963, art 2, § 4(1)(h) has remarkable resonance for the precise controversy now before this Court because, even when viewed in hindsight, it seems unlikely that the people of Michigan could have crafted language that would more directly address this circumstance than they have already done in ratifying this very provision. Accordingly, I believe we owe it to the people of Michigan to fully and completely review the claims asserted by petitioners. For this reason, I would have immediately ordered oral arguments and briefing to assess, as expeditiously as was practicable, whether petitioners are properly before this Court and, if so, both provide guidance as to the meaning and scope of the right to an audit under Const 1963, art 2, § 4(1)(h), and determine whether petitioners are entitled to any of the other relief they seek.

MARKMAN, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*).

For the second time in recent weeks, individuals involved in last month’s election have asked this Court to order an audit of the election results under Const 1963, art 2, § 4. See *Costantino v Detroit*, \_\_\_ Mich \_\_\_ (2020) (Docket No 162245). As in that case, petitioners here allege that election officials engaged in fraudulent and improper conduct in administering the election. In support of these claims, petitioners have submitted hundreds of pages of affidavits and expert reports detailing the alleged improprieties. Here, as in *Costantino*, I would grant leave to appeal so we can determine the nature and scope of the constitutional right to an election audit.<sup>9</sup> After all, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803). But I write separately to highlight the lack of clarity in our law regarding the procedure to adjudicate claims of fraud in the election of presidential electors.<sup>10</sup>

The case before the Court is no small matter. Election disputes pose a unique test of a representative democracy’s ability to reflect the will of the people when it matters most. See Foley, *Ballot Battles: The History of Disputed Elections in the United States* (New York: Oxford University Press, 2016), pp 17-18. But it is a test our country has survived, one way or another, since its inception. The Founding Fathers faced their share of contested elections, as have subsequent generations. See generally *id.*

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<sup>9</sup> Because of the time constraints imposed by federal law on the appointment of and balloting by federal electors, I would hear and decide this case on an expedited basis so that, if we accept petitioners’ interpretation of the constitutional right to an election audit, they will be able to exercise that right in a timely and meaningful manner.

<sup>10</sup> I do not address whether a claim of fraud could be adjudicated or investigated in the context of a recount.

But in the context of presidential elections, all these episodes pale in comparison to the contest of 1876, which resulted in challenges and changes that helped set the stage for the present dispute.<sup>11</sup> As with the current case, many of the ballot-counting contests in 1876 focused on the work of canvassing boards and the function of courts; they also involved the role of Congress itself, which created an electoral commission to adjudicate the dispute and help Congress select a victor. See Nagle, *How Not to Count Votes*, 104 Colum L Rev 1732 (2004) (reviewing books on the 1876 election); see also Ewing, *History and Law of the Hayes-Tilden Contest Before the Electoral Commission: The Florida Case, 1876-77* (Washington, DC: Cobden Publishing Co, 1910), pp 148-153 (discussing the litigation in Florida courts over the role of canvassing boards).

Among the modes for challenging the election in 1876 (and in the earlier election of 1872, among others) were lawsuits brought to obtain a writ of quo warranto. See Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla L Rev 541, 573 (2004). With no common-law action available to directly contest an election, Bickerstaff, *Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election*, 29 Fla St U L Rev 425, 431 (2002), the archaic writ of quo warranto became the tool in England and in this country to dispute an ostensibly successful candidate's right to office. *Conscientious Congressman's Guide*, 56 Fla L Rev at 570-571.<sup>12</sup> A quo warranto proceeding was instituted to "try titles to office" based on claims that the officeholder had wrongfully intruded into or usurped the office. See *Gildemeister v Lindsay*, 212 Mich 299, 303 (1920) (citation and quotation marks omitted); see also Cooley, *Constitutional Limitations* (5th ed), p 788 ("[T]he proper proceeding in which to try [challenges to election results] in the courts is by *quo warranto*, when no special statutory tribunal is created for the purpose.").

The problem, as the elections in the 1870s revealed, was that quo warranto actions were ill-suited to keep pace with the Electoral College: in the two presidential elections of that decade, none of the proceedings "even had their trial phase completed before the electors balloted." *Conscientious Congressman's Guide*, 56 Fla L Rev at 573. In response, Congress passed the Electoral Count Act in 1887. *Id.* at 542, 583. The statute encourages states to adopt procedures to try election contests involving presidential

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<sup>11</sup> As Justice COOLEY wrote of the 1876 election, "the country is thoroughly warned, that in any close election the falsification of the result is not so difficult that unscrupulous men are not likely to contemplate it," and the practice of relying on state determinations of the vote "makes the remedy exceedingly uncertain, if dishonest men, who have control of the State machinery of elections, shall venture to employ it to defeat the will of the people." Cooley, *The Method of Electing the President*, 5 Int'l Rev 198, 201 (1878).

<sup>12</sup> Quo warranto challenges date back to the middle ages. See Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278-1294* (Oxford: Clarendon Press, 1963), pp 1-6 (noting the king's extensive use of quo warranto in the thirteenth century).

electors. *Id.* at 585. As it currently stands, the results of any determination made under these procedures will be binding on Congress if the determination comes at least six days before the electors meet to vote. 3 USC 5.

Why is the history relevant now? Surely, one might think, after the passage of nearly 150 years our state has adopted efficient procedures to address election disputes, especially when the presidency is at stake. In many states, this is true. In almost all, postelection contests for legislative seats are ultimately decided by the legislatures themselves, although some states have provided for preliminary determinations by the courts or independent commissions. See Douglas, *Procedural Fairness in Election Contests*, 88 Ind L J 1, 5-8, 24-29 (2013); see also *Berdy v Buffa*, 504 Mich 876, 877-879 (2019) (noting that such provisions are commonplace and holding that they only apply to postelection contests of a challenged election result).<sup>13</sup> For disputed gubernatorial elections, a plurality of states have enacted legislation allowing the losing candidate to contest the election in court, either at the trial or appellate court level; others place the decision in the hands of the legislature or a nonjudicial tribunal. *Procedural Fairness*, 88 Ind L J at 9-20. Although only about 20 states have specific provisions for presidential-election disputes, parties often can bring these challenges under the state's general election-contest statutes. *Id.* at 29-34.<sup>14</sup>

Unfortunately, while the vast majority of states have adopted legislation creating a mechanism for the summary or expedited resolution of election contests, Michigan has not. Cf. Wyo Stat Ann 22-17-103 (requiring election contests to be expedited); NJ Stat Ann 19:29-5 (requiring summary proceedings); Neb Rev Stat 32-1110 (requiring summary proceedings with a hearing not later than 15 days after the “matter is at issue”). Indeed, as the controversies arising out of the 2020 general election have shown, there is rampant confusion in our state concerning the proper mechanism for contesting elections in general, and presidential elections in particular, on the basis of fraud. Much of the litigation so far this year has focused on the decisions of the canvassing boards. But “[w]e have long indicated that canvassing boards’ role is ministerial and does not involve investigating fraud.” *Costantino*, \_\_\_ Mich at \_\_\_; slip order at 6-7 (VIVIANO, J., dissenting) (collecting sources). There is simply no statutory framework for the boards to adjudicate fraud. And, strikingly, the Legislature has not, in any other statute, expressly provided a mechanism for determining disputes specific to presidential electors as envisioned in the Electoral Count Act.

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<sup>13</sup> The same is true of contests in congressional elections. See US Const, art 1, § 5.

<sup>14</sup> The American Law Institute has recently issued model frameworks for states to consider adopting in order to comprehensively regulate both election disputes in general and presidential-election disputes in particular. American Law Institute, *Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes* (2019), Parts II and III.

And thus, we remain one of the only states without any clear framework to enable and regulate election contests. See *Procedural Fairness*, 88 Ind L J at 10; Douglas, *Discouraging Election Contests*, 47 U Rich L Rev 1015, 1028 (2013).<sup>15</sup> Instead, our state has various elements that do not quite add up to a coherent system. As noted, our Legislature has codified the ancient writ of quo warranto. See MCL 600.4501 *et seq.* and MCR 3.306; see also MCL 168.861 (“For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing.”). Under these proceedings, the court can determine the “right of the defendant to hold the office.” MCL 600.4505. But these actions usually must be brought by the attorney general—only if she refuses can a private citizen seek leave of court to make the claim. MCL 600.4501. And our caselaw has suggested that to prevail in the action, the plaintiff must present evidence that he or she is entitled to the office. See *Marian v Beard*, 259 Mich 183, 187 (1932) (“The [quo warranto] suit by a citizen, on leave of court, is a private action, and, therefore, the plaintiff must allege in the information the facts which give him the right to sue. Such allegations necessarily include the . . . showing of title in plaintiff.”) (citations and comma omitted); *Barrow v Detroit Mayor*, 290 Mich App 530, 543 (2010) (noting caselaw). Our statutes and court rule do not specify when these actions can be brought, but traditionally they required the defendant to have assumed office; thus one commentator has concluded that our framework “effectively preclude[s] election contests . . .” *Discouraging Election Contests*, 47 U Rich L Rev at 1028; see also *Procedural Fairness*, 88 Ind L J at 11.<sup>16</sup> With respect to presidential electors, whose office exists for only a short period, it is not at all clear how a quo warranto action could timely form the basis for an effective challenge. Nonetheless, we have stated that “ ‘[t]he only way to try titles to office finally and conclusively is by quo warranto.’ ” *Simpliner v FitzGerald*, 300 Mich 537, 544-545 (1942), quoting *Frey v Michie*, 68 Mich 323, 327 (1888).

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<sup>15</sup> See also Developments in the Law, *Postelection Remedies*, 88 Harv L Rev 1298, 1303 n 22 (1975) (noting that, at the time, Michigan was one of “[f]our states [that] do not generally provide for election contests, but do make available the writ of quo warranto”); Nat’l Conference of State Legislatures, *After the Voting Ends: The Steps to Complete an Election* (October 28, 2020) (“Forty-four states have statutes pertaining to election contests. The states lacking such statutes are . . . Michigan . . .”) <<https://www.ncsl.org/research/elections-and-campaigns/after-the-voting-ends-the-steps-to-complete-an-election.aspx>> (last accessed Dec 8, 2020) [<https://perma.cc/5RQ7-UGR9>].

<sup>16</sup> The lead opinion in *In re Servaas*, 484 Mich 634, 643 n 15 (2009) (opinion of WEAVER, J.), suggested that quo warranto actions could be launched without regard to whether the defendant was currently in office. But as the dissenters cogently observed, quo warranto historically applied only “to claims that a public official is *currently* exercising invalid title to office.” *Id.* at 664 (MARKMAN, J., dissenting).



Despite the apparent exclusiveness of the quo warranto proceeding, MCL 168.846 provides that “[w]hen the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected.” This statute contains language that previously appeared in our 1850 Constitution as Article 8, § 5.<sup>17</sup> Under that constitutional provision, we held that the Legislature had “discretion” and that we could not require our coordinate branch to act. *People ex rel Royce v Goodwin*, 22 Mich 496, 502 (1871); see also *Dingeman v Bd of State Canvassers*, 198 Mich 135, 137 (1917) (“The legislature, bound by no hard and fast rule, may or may not, in its discretion, entertain contests.”). We further explained that the rationale for taking these disputes out of the courts was the “serious difficulties which would attend inquiries into contested elections, where the ballots of a great number of election precincts would require to be counted and inspected . . .” *Goodwin*, 22 Mich at 501; see also *Dingeman*, 198 Mich at 137 (“The determination of the legislature is a finality, and private parties, ambitious to fill these offices, or litigious in character, cannot compel action by the legislature or go

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<sup>17</sup> The statute and constitutional provision have interesting histories. As described by one law professor from the period, Const 1850, art 8, § 5 ended the prevailing practice of having “all contests concerning elections to office . . . decided by the courts.” Wells, *Reilly-Jennison: An Address to the People on the Recent Judicial Contest*, Detroit Free Press (March 27, 1883), p 4; see also University of Michigan, Michigan Law, *William P. Wells*, Faculty, 1874-1891 <[https://www.law.umich.edu/historyandtraditions/faculty/Faculty\\_Lists/Alpha\\_Faculty/Pages/WilliamPWells.aspx](https://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/WilliamPWells.aspx)> (accessed Dec 7, 2020) [<https://perma.cc/V2PS-Z8ET>]. But with the passage of this new constitutional section in 1850, “the power to decide election contests was taken away from the courts, in respect to the State officers named, and such other officers as the Legislature, by subsequent statutes, might add to the list.” Wells, *Reilly-Jennison*, p 4. This constitutional provision was carried over in the 1908 Constitution, see Const 1908, art 16, § 4. For some unknown reason, in 1917 the Legislature enacted the same substantive rule in statutory form. 1917 PA 201, chap XIX, § 12. It has remained there since and is now codified at MCL 168.846. See 1925 PA 351, part 4, chap XVI, § 11; 1954 PA 116, § 846. In the meantime, the voters amended the constitutional provision in 1935 so that the Legislature could prescribe rules by which the Board of State Canvassers would oversee election contests. See Ballot Proposal No. 1, 1935, amending Const 1908, art 16, § 4 (“In all cases of tie vote or contested election for any state office, except a member of the legislature, any recount or other determination thereof may be conducted by the board of state canvassers under such laws as the legislature may prescribe.”). At the convention that produced our current Constitution, the constitutional provision was considered to be “legislative in character” and thus was excluded altogether from the constitutional text. 1 Official Record, Constitutional Convention 1961, p 846 (Exclusion Report 2016). The convention committee that recommended the exclusion noted that statutes already governed this issue and the Legislature had authority over this area. *Id.*

elsewhere and secure delay in carrying out the recorded will of the electorate.”). As a result, in *Goodwin*, which involved a petition for a writ of quo warranto, we stated that this constitutional language “does not permit the regularity of elections to the more important public offices to be tried by the courts.” *Goodwin*, 22 Mich at 501. This rule has been followed in numerous cases, including in elections for the judiciary—but it has not been cited or discussed by this Court or the Court of Appeals in many decades.<sup>18</sup> But the Senate’s rules currently provide for these contests. Senate Rule 1.202(d) (February 12, 2019).<sup>19</sup>

The plain language of MCL 168.846, and the caselaw interpreting that language from our earlier constitutions, would appear to apply to contested presidential elections. And, since it is arguable whether quo warranto applies before a defendant assumes office, MCL 168.846 may offer the only route for contesting a presidential election before it becomes final.<sup>20</sup> But the statute does not provide for any definite or detailed procedures to determine election contests, as the Electoral Count Act appears to contemplate. 3 USC 5. Compare, e.g., Cal Election Code 16400 and 16401 (providing for contests of “any

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<sup>18</sup> See *Vance v St Clair Co Bd of Canvassers*, 95 Mich 462, 466 (1893) (“Contests respecting the title to that office [i.e., the circuit judgeship] must be made before the Legislature. That body finally determines the very matters which the board of canvassers in the present case propose to pass upon.”); *Dingeman*, 198 Mich at 136, 139 (“It is, and must be, conceded that the Constitution has vested in the legislature sitting in joint convention the power of finally determining the question who was elected to the office of circuit judge. . . . Running through all these cases is the rule, to my mind clear and distinct, that wherever by the organic law, whether Federal, State, or municipal, a tribunal is created to finally determine the right to an office, that tribunal is exclusive, and there, and there only, may the right to the office be tested. By the organic law of this State the legislature, sitting in joint convention, is made such tribunal as to the office here involved.”); see also *McLeod v Kelly*, 304 Mich 120, 126-127 (1942) (applying *Dingeman*); *Behrendt v Bd of State Canvassers*, 269 Mich 247, 248 (1934) (same); *Wilson v Atwood*, 270 Mich 317 (1935) (rejecting petition for leave to file quo warranto action regarding the office of Secretary of State when, under the constitutional provision in effect at the time, the Legislature did not properly meet in joint convention to hear the election contest).

<sup>19</sup> Although I did not locate any reference to this procedure in the Standing Rules of the House of Representatives or the Joint Rules of the House and Senate.

<sup>20</sup> The petitioners here have, in fact, recently filed a petition with the Legislature to obtain an election audit and other relief. See Feather, CW7 News, *Voters Petition Michigan Legislature to Audit Election Results, Call SOS Under Oath*, <<http://cw7michigan.com/news/local/voters-petition-michigan-legislature-to-audit-election-results-call-sos-under-oath>> (accessed December 7, 2020) [<https://perma.cc/PL2G-M3RV>].

election” and requiring it to be brought within 10 days “[i]n cases involving presidential electors”); Del Code Ann, tit 15, § 5921 (requiring “[a]ny person intending to contest the election of any one declared by the Governor to have been chosen an elector of President and Vice President” to file a declaration within 10 days of the Governor’s proclamation). And it is discretionary with the Legislature—they can take up the matter or not. *Dingeman*, 198 Mich at 137; compare Ark Code Ann 7-5-806(c) (requiring the Legislature to vote on whether “the prayers shall be granted” in various contested elections concerning executive offices). As things appear to stand, then, unless the Legislature can be convinced to review the matter, individuals alleging fraud in an election can obtain review, if at all, in a quo warranto action only when executive officials decline to initiate the action, only by leave of the court, and, mostly likely, only after it is too late to matter.

This backdrop makes the current case all the more important, as it involves a new tool for detecting fraud in elections. The voters in 2018 enacted sweeping changes to our election system. One of the new concepts introduced was an election audit. Article 2, § 4(1)(h) provides to “[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections.” *Id.* “The provision is self-executing, meaning that the people can enforce this right even without legislation enabling them to do so . . . .” *Costantino*, \_\_\_ Mich at \_\_\_; slip order at 4 (VIVIANO, J., dissenting), citing *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971). The Legislature has provided for these audits in MCL 168.31a, “which prescribes the minimum requirements for statewide audits and requires the Secretary of State to issue procedures for election audits under Article 2, § 4.” *Costantino*, \_\_\_ Mich at \_\_\_; slip order at 4 (VIVIANO, J., dissenting).

Petitioners here, like the plaintiffs in *Costantino*, seek to use this new right to obtain an audit of the election results.<sup>21</sup> With that audit in hand, they apparently hope to

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<sup>21</sup> Justice CLEMENT is mistaken in suggesting that petitioners here have not asked for an audit under Const 1963, art 2, § 4. In each of their claims for relief, petitioners state that “Respondents owe citizens an audit of election results that is meaningful and fair and to safeguard against election abuses.” They claim to be aggrieved because the Board of State Canvassers certified the election “without conducting an audit . . . .” Their prayer for relief asks us to collect the ballots and election materials so that “the Michigan Legislature and this Court [will] have a chance to perform a constitutionally sound audit of lawful votes[.]” If there was any lingering doubt, the petitioners’ brief here makes it clear, presenting as a numbered issue of “whether the nature and scope of article 2, § 4 requires a meaningful audit before Michigan’s electors may be seated.” For good measure, the brief asks the Court to “enter an order requiring that the Michigan Legislature convene a joint convention to analyze and audit the election returns . . . .” See also *id.* (“This Court should oversee an independent audit—or require the Michigan

find further support for their challenge to the election. As my dissent in *Costantino* explained, the nature of the right granted in Article 4, § 4(1)(h) is an important issue this Court should resolve. A full resolution involves answering many questions, such as whether MCL 168.31a “accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right” and whether the party seeking an audit must make some showing of entitlement, such as by presenting evidence of fraud. *Costantino*, \_\_\_ Mich at \_\_\_; slip order at 4-5.

But the core question this case and *Costantino* have presented is whether the petitioners are entitled to an audit in time for it to make any difference in their election challenges. In other words, is this right a means “to facilitate challenges to election results, or does it simply allow for a postmortem perspective on how the election was handled?” *Id.* at \_\_\_; slip order at 5. This gets to the heart of the struggle with these election disputes. The path for citizens of our state to raise serious claims of election wrongdoing, implicating the heart of our democratic institutions, is unclear and underdeveloped. This void in our law might suggest that the audit right in Article 2, § 4 was not intended to support election challenges. On the other hand, the very fact that the mechanisms for election challenges are so opaque might be a reason why the right to an audit is so critical. Moreover, to the extent the current system puts decisions in the hands of the Legislature, MCL 168.846, a timely audit might be essential for parties to convince the Legislature to entertain an election contest. And as I pointed out in *Costantino*, Article 2, § 4 was passed at a time when audits were increasingly viewed as a tool to measure the accuracy of election results so that recounts and other procedures could be employed if the audit uncovered problems. *Costantino*, \_\_\_ Mich at \_\_\_; slip order at 6.

Whatever the answer may be, the importance of the issue cannot be denied. Indeed, few topics so closely affect the maintenance of our democratic principles. As noted above, our laws governing election contests are underdeveloped in the context of the election of presidential electors. This uncertainty—particularly the lack of any laws that *clearly* govern the determination of presidential-election contests, although MCL 168.846 arguably applies—jeopardizes our ability to take advantage of the safe harbor in 3 USC 5, i.e., Congress’s guarantee to respect the state’s determination of election disputes over electors. For this reason, and perhaps even more importantly to provide our citizens with a coherent, fair, and efficient mechanism for adjudicating claims of fraud in the election of presidential electors, I respectfully urge the Legislature to consider enacting legislation creating such a mechanism.

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Legislature to take back this constitutional function . . .”). Short of a magical incantation, it seems to me that petitioners have done all they can to put the issue directly before the Court.

By closing the courthouse door on these petitioners, the Court today denies them any ability to have their claims fully considered by the judiciary.<sup>22</sup> That is because petitioners, rightly thinking that time is short, have filed this case as an original action in this Court. As a result, they have received no decision below and now will go without any answer. I believe it is incumbent upon the Court, in these circumstances, to provide

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<sup>22</sup> Justice CLEMENT declares it “irresponsible” for us even to consider the issues presented by this case. *Ante* at 1, 9. I would beg to differ. Considering jurisprudentially significant constitutional claims is our core responsibility. The fact that the claims arise in a high-profile case or one that may have national implications is no reason for us to shy away from our duty to decide them. As I have discussed at some length here (and in *Costantino*), our election contest laws are underdeveloped and unclear. That murkiness may explain why the petitioners here (and parties in related cases like *Costantino*) have had such difficulty navigating them. Justice CLEMENT appears to agree that the law is unsettled: her concurrence repeatedly hedges on every significant question in the case, and she ultimately concludes that she has “no absolutely definitive answers for” them. *Ante* at 8. So we have real work to do in this case to clarify the law in this area—work that only this Court can do.

In addition, despite claiming she has not reached any “definitive answers,” Justice CLEMENT’s reasons for voting to deny are premised on certain conclusions regarding the nature of the right to an audit and other issues in the case. For example, she says “there is no apparent purpose to which the audit sought by the petitioners can be put in light of the above-mentioned jurisdictional limits on the judiciary’s ability to revisit the outcome of this election.” *Ante* at 6. This suggests that the audit right has no role to play in election contests because such contests cannot come before the courts. And because she believes the matter is for the Legislature, she sees no need to resolve the “tension” she perceives in the text of Article 2, § 4. *Ante* at 7. Of course, this conclusion overlooks the possibility that the results of an audit could be used by petitioners to convince the Legislature to take up the matter and to prevail in that venue. Baked into the concurrence’s rationales, then, are determinations about the scope and nature of the audit right, this Court’s jurisdiction, and the respective roles of the courts and Legislature—all of which are questions at the heart of the case and any of which is significant enough, in my opinion, to merit a full opinion from this Court. Thus, in professing not to answer any question in this case, Justice CLEMENT assumes the answer to a number of them. I would instead take direct aim at resolving these issues, but only after hearing the case.

guidance so that, no matter the outcome, the people are able to understand and exercise their constitutional rights in an effective and meaningful manner.<sup>23</sup> Accordingly, I dissent.

MARKMAN, J., joins the statement of VIVIANO, J.

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<sup>23</sup> In hearing the case, I would consider all matters necessary to reach a resolution, including whether this Court has jurisdiction to hear this original action or provide any or all of the relief requested. Because the Court has declined to hear this case, I, of course, reach no final conclusions on any of the issues addressed above.



t1209

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 9, 2020

A handwritten signature in black ink, appearing to read "Larry S. Royster".

Clerk



STATE OF MICHIGAN  
JOCELYN BENSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

-- NOTICE --

**YOU ARE HEREBY NOTIFIED THAT THE BOARD OF STATE CANVASSERS  
WILL CONDUCT A REMOTE MEETING ON NOVEMBER 23, 2020 AT 1:00 P.M.**

**--Posted November 20, 2020--**

The Board of State Canvassers (Board) will conduct a meeting on November 23, 2020 at 1:00 p.m. which will be held remotely due to the COVID-19 pandemic. A link to observe the meeting will be posted at: [www.Facebook.com/MichiganSOS](https://www.facebook.com/MichiganSOS).

Members of the public wishing to speak may do so in two different ways: (1) written comments which will be entered into the permanent public record for the meeting; and (2) speaking live to the Board.

Both written comments and requests to speak must be submitted via a signup form made available on the Department's website here: [https://www.michigan.gov/sos/0,4670,7-127-1633\\_41221---00.html](https://www.michigan.gov/sos/0,4670,7-127-1633_41221---00.html). **The link will become live at 1:00 p.m. on Sunday, November 22, 2020.**

Members of the public who wish to address the Board live will be invited to speak virtually based on the order in which the request is received. Each person who chooses to speak live will have up to 3 minutes to address the Board. These individuals can expect to receive information about how to log-on to the webinar via the email they provide in the sign-up form.

Included on the Agenda will be:

- Consideration of meeting minutes for approval (October 15, 2020 meeting).
- Canvass and Certification of the November 3, 2020 general election.
- Recording the results of the November 3, 2020 special election for the Michigan House of Representatives, 4<sup>th</sup> District, partial term ending 1/1/2021.
- Such other and further business as may be properly presented to the Board.

*/S/ Jonathan Brater*

Jonathan Brater, Secretary  
Board of State Canvassers

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People with disabilities needing accommodations for effective participation in this meeting should email [MDOS-Canvassers@Michigan.gov](mailto:MDOS-Canvassers@Michigan.gov) or contact the BOE at (517) 335-3234.



STATE OF MICHIGAN  
JOCELYN BENSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

**Meeting  
of the  
Board of State Canvassers**

**October 15, 2020**

**Called to order:** 1:03 p.m.

**Members present:** Jeannette Bradshaw - Chairperson  
Aaron Van Langevelde – Vice Chairperson  
Julie Matuzak

**Members absent:** Norman Shinkle

**Agenda item:** Consideration of meeting minutes for approval (September 24, 2020).

**Board action on agenda item:** The Board approved the minutes of the September 24, 2020 meeting as submitted. Moved by Matuzak; supported by Van Langevelde. Ayes: Bradshaw, Van Langevelde, Matuzak. Nays: None. Motion carried.

**Agenda item:** Consideration of recall petition submitted on September 25, 2020, Attorney General Dana Nessel by Chad Baase. The reason for recall printed in the heading of the petition is as follows:

Dana Nessel, on Thursday, August 06, 2020, Announced plans ramping up efforts to enforce Gov. Gretchen Whitmer's Executive Order 2020-148.

**Board action on agenda item:** The Board determined that the recall petition filed by Chad Baase on September 25, 2020, did factually and clearly state each reason for the recall of Attorney General Nessel. Moved by Van Langevelde; supported by Matuzak. Ayes: Bradshaw, Van Langevelde, Matuzak. Nays: None. Motion carried.



**Adjourned:** 1:49 p.m.

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Chair Bradshaw

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Vice-Chair Van Langevelde

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Member Matuzak

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Member Shinkle

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Date



STATE OF MICHIGAN  
JOCELYN BENSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

November 20, 2020

**CANVASS AND CERTIFICATION OF THE  
NOVEMBER 3, 2020 GENERAL ELECTION**

**STAFF RECOMMENDATION:** Staff recommends that the Board of State Canvassers certify the results of the November 3, 2020 general election. Staff's recommendation is based on the fact that all 83 counties in Michigan have certified their official results.

This memorandum also includes discussion of additional issues that have gained public attention before and during the county canvass process.

Unofficial Reporting Errors

As in past elections, some jurisdictions made errors in reporting unofficial results on Election Night. These errors are all attributable to human error in the operation of tools used to report unofficial results, did not affect the actual tabulation of votes, and were identified and corrected either prior to or during the county canvass.

Unofficial reporting errors occur when tabulator results – which are the totals scanned from hand-marked, paper ballots, and which are accurate – are not correctly or completely reported on unofficial election night reporting websites. These errors are always caught in the county canvass if not before, because the county canvass process involves reviewing all printed totals tapes from tabulators and comparing them to the unofficial results to identify any discrepancies.

These errors can happen for various reasons:

- (1) Local jurisdiction errors in transmitting unofficial data from tabulators to election management systems. For example, if a local jurisdiction accidentally did not transmit the unofficial results from one precinct or tabulator, or transmitted a precinct total twice.
- (2) County errors in adding results to unofficial reporting sites. For example, if a county did not properly export the unofficial results file received from a local jurisdiction, causing some precincts to not be included; or a made a data-entry error in reporting unofficial results.
- (3) In one case in Antrim County, a clerk made an error in programming election software that did not affect tabulation, but did cause candidate vote totals to be transposed in unofficial reported totals. All tabulators properly counted ballots. A fuller explanation of this incident is provided in the attached documents.

The Bureau of Elections did not identify unusual patterns in unofficial reporting; the examples identified were typical human error similar to that which has occurred in past elections. Nor did the Bureau determine that these human errors occurred only with the use of one voting system in Michigan. For example, in addition to the error in Antrim County, which uses Dominion Voting Systems, there were also publicly reported issues which occurred in Bay County,<sup>1</sup> which uses Election Systems & Software, and Oakland County,<sup>2</sup> which uses Hart Intercivic.

### Detroit Out-of-Balance Precincts

During the canvass of the August 2020 Primary Election, which the Board of State Canvassers certified, the Board discussed the Wayne County Canvass of election precincts in Detroit and noted that a significant number of precincts were out of balance.

If a precinct is in balance, meaning the number of ballots counted equals the number of names on the pollbook (or if the reason for the imbalance can be identified), the precinct can be recounted. A precinct can also be recounted even if it is not in balance, as long as the number of ballots in the ballot container matches the number ballots tabulated according to the tabulator tape.

A review of data from the November 2020 Wayne County Canvass showed a substantial improvement in the percentage of precincts that were in balance and recountable as compared both to the August 2020 Primary and the November 2016 General Election.

The Bureau of Elections compared out-of-balance precincts from August and November 2020 and determined both that a significantly higher percentage of precincts were recountable and, when precincts were out of balance, the imbalances were smaller in magnitude.

#### **Percentage of Precincts Balanced or Explained:**

August 2020: 53.6 % (539/1,006)

November 2020: 71.9% (458/637)

As noted above, balanced precincts or precincts where an imbalance can be explained<sup>3</sup> can be recounted. Additionally, precincts with unexplained imbalance between the vote total and the poll book can be recounted if the number of ballots in the container matches the number recorded. The additional number of out-of-balance but recountable precincts is typically not known until recounts occur and all containers are opened. Accordingly, in August 2020 at least 53.6% of precincts were recountable, whereas in November 2020 at least 71.9% are recountable.

The Bureau also reviewed out of balance precincts to determine how out of balance the precincts were. The Bureau found that the percentage of significantly out-of-balance precincts – those with an imbalance of 5 or more – was also lower in November 2020 than August 2020.

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<sup>1</sup> <https://www.abc12.com/2020/11/06/michigan-election-numbers-will-change-after-bay-county-ballots-werent-counted-properly/>

<sup>2</sup> <https://www.detroitnews.com/story/news/local/oakland-county/2020/11/06/oakland-county-commissioner-wins-technical-glitch-vote-totals/6186062002/>

<sup>3</sup> There are many legitimate reasons why the numbers may not match. For example, a voter may appear in the poll book but have voted a provisional envelope ballot that was not tabulated.

### **Percentage of Precincts with a Difference of 5 or More:**

August 2020: 8.1% (81/1,006)

November 2020: 5.7% (36/637)

Together, these figures indicate that Detroit did a substantially better job of balancing precincts in November when compared to August, and also that the recordkeeping errors related to out of balance precincts were of smaller scale in the November election when compared with August. This improvement is particularly notable given that:

- (1) Overall turnout in Detroit approximately doubled in November when compared with August.
- (2) The number of absent voter ballots approximately doubled when compared with August.
- (3) Multiple precincts were combined into absent voter counting boards in November (meaning poll books and vote totals were larger).

Collectively, these factors meant more ballots were cast, collected, and counted; more names had to be kept track of in poll books; and precincts were more difficult to balance. Despite these factors, Detroit improved on both of these metrics compared to November 2020.

The Bureau also compared November 2020 to November 2016 and found a substantial increase in the percentage of balanced or explained precincts compared to 2016, when there was a much closer margin in the Presidential race.

### **Percentage of precincts balanced or explained:**

November 2016: 41.8% (270/662)

- Presidential election margin: 10,704

November 2020: 71.9% (458/637)

- Presidential election margin: 154,187

### **Detroit Turnout and Claimed Irregularities**

The Bureau of Elections also examined Detroit's overall turnout and Presidential and Senate Election vote totals to determine if any of the claimed irregularities regarding Detroit's elections, even if verified, could have significantly impacted the outcome.

In litigation seeking to prevent Wayne County from certifying election results, allegations were made of irregularities in the processing of ballots in Detroit. Although the Wayne County Circuit Court determined that these claims did not give a credible overall account of the processing of ballots in Detroit,<sup>4</sup> the Bureau reviewed overall turnout data for Detroit to determine if any anomalous data tended to suggest irregularities in the outcome that would affect the Presidential election.

The Bureau found that turnout in Detroit increased less than other parts of the state when compared to 2016, that President Trump gained a higher percentage of votes in Detroit compared

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<sup>4</sup> <https://www.freep.com/story/news/local/michigan/detroit/2020/11/13/judge-rules-against-separate-audit-wayne-county-election/6272704002/>

to 2016, and that John James' performance in Detroit compared to Trump was similar to their relative performance statewide, tending to undermine the suggestion that irregularities affecting the outcome of the election occurred on any significant scale.

Overall, turnout in Detroit increased less than turnout statewide, which tends to undermine suggestions that an unusually large number of ballots were counted in Detroit. In Detroit, 256,514 votes were cast in the presidential race,<sup>5</sup> an increase of 9,145 compared to 247,369 in 2016.<sup>6</sup> Statewide, 5,538,212 votes were cast in the Presidential Election,<sup>7</sup> an increase of 738,928 compared to 2016<sup>8</sup> (Nationally, turnout increased by approximately 20 million votes).

**Increase in Presidential Election Votes as a Percentage of 2016 Votes:**

Detroit: 3.7% (9,145/247,369)

Statewide: 15.4% (738,928/4,799,284)

Additionally, when compared to 2016, President Trump gained a higher percentage of votes in Detroit in 2020, which tends to undermine suggestions that Trump votes were treated irregularly or not counted.

**Percentage of Trump Votes in Detroit:**

2016: 3.1% (7,682/247,369)

2020: 5.0% (12,889/256,514)

The Bureau also did not identify any anomalous differences in vote totals regarding James votes relative to Trump votes in Detroit in comparison to the rest of the state; as was the case statewide, James received a slightly higher percentage of votes than Trump in Detroit.

**Percentage of Votes in Detroit/Statewide:**

Trump Detroit: 5.0% (12,889/256,514)

Trump Statewide: 47.9% (2,649,852/5,538,212)

James Detroit: 5.1% (12,970/254,941)

James Statewide: 48.2% (2,642,222/5,479,687)

Additional Materials and Correspondence

The Board of State Canvassers received additional submissions from interested parties. These documents are enclosed in the Board Members packets.

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<sup>5</sup> <https://www.waynecounty.com/elected/clerk/election-results.aspx>

<sup>6</sup> <https://detroitmi.gov/sites/detroitmi.localhost/files/2018-05/official-results-nov-8-2016.pdf>

<sup>7</sup> [https://mielections.us/election/results/2020GEN\\_CENR.html](https://mielections.us/election/results/2020GEN_CENR.html).

<sup>8</sup> [https://mielections.us/election/results/2016GEN\\_CENR.html](https://mielections.us/election/results/2016GEN_CENR.html). Differences in reporting of write-in votes may affect these numbers slightly, but not on any significant scale.

The following persons nominated by the Democratic Party, each having received **2,804,039 votes** at the November 3, 2020 general election, were duly elected as Electors of the President and Vice President of the United States of America:

**Democratic Party Nominees: Joseph R. Biden, Kamala D. Harris**

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Chris Cracchiolo	5140 Arrowhead Ct., Williamsburg, MI 49690;
Timothy E. Smith	14883 Crescent St., 105, Grand Haven, MI 49417;
Blake Mazurek	3458 Olderidge Dr. NE, Grand Rapids, MI 49525;
Bonnie J. Lauria	3931 Mines Rd., West Branch, MI 48661;
Bobbie Walton	8412 Mapleview Dr., Davison, MI 48423;
Mark Edward Miller	122 Sydelle Ave., Kalamazoo, MI 49006;
Connor Wood	319 N. Bowen St., Jackson, MI 49202;
Robin Smith	3004 Andrea Dr., Lansing, MI 48906;
Walter C. Herzig III	320 Stratford Rd., Ferndale, MI 48220;
Carolyn Holley	727 White St., Port Huron, MI 48060;
Susan Nichols	44099 Deep Hollow Cir., Northville, MI 48168;
Steven Rzeppa	2985 Anna Ct., Trenton, MI 48183;
Helen Moore	8335 Indiana, Detroit, MI 48204;
Micheal Kerwin	17517 Birchcrest, Detroit, MI 48221;
Chuck Browning	20091 Herzog Dr., Rockwood, MI 48173; and
Marseille Allen	4442 Jena Ln., Flint, MI 48507.

Votes received by other candidates for the office of Elector of the President and Vice President of the United States of America are as follows.

The following persons nominated by the Republican Party each received **2,649,852 votes**:

**Republican Party Nominees: Donald J. Trump, Michael R. Pence**

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John Haggard	9375 Pearl Ave., Charlevoix, MI 49720
Kent Vanderwood	5183 Olsen Springs Ct., Wyoming, MI 49509
Terri Lynn Land	7955 Byron Station Ct., Byron Center, MI 49315
Gerald Wall	10581 Eastridge Ct., Roscommon, MI 48653
Amy Facchinello	8351 Oxford Ln., Grand Blanc, MI 48439
Rose Rook	50842 County Road 665, Paw Paw, MI 49079
Hank Choate	11670 Culver Rd., Cement City, MI 49233
Mari-Ann Henry	895 Pinery Blvd., Lake Orion, MI 48362
Clifford Frost	2629 Irma, Warren, MI 48092
Stanley Grot	11927 Hiawatha Dr., Shelby Twp., MI 48315
Marian Sheridan	7259 White Oak Dr., West Bloomfield, MI 48234
Timothy King	1573 Mollie St., Ypsilanti, MI 48198
Michele Lundgren	55 Peterbro, Apt. 101, Detroit, MI 48201
Mayra Rodriguez	8 Carmel Ln., Grosse Pointe Farms, MI 48236
Meshawn Maddock	1150 S. Milford Rd., Milford, MI 48381
Kathy Berden	4040 Mushroom Rd., Snover, MI 48472

The following persons nominated by the Libertarian Party each received **60,381 votes**:

**Libertarian Party Nominees: Jo Jorgensen, Jeremy Cohen**

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David Holmer	909 High St., Manistee, MI 49660
Alexander Avery	613 Cricklewood St. SW, Wyoming, MI 49509
Vicki Hall	11002 Stegman Forest Ct. NE, Rockford, MI 49341
Richard Hewer	13449 190 <sup>th</sup> St., Big Rapids, MI 49307
Angela Thornton	15223 Ripple Dr., Linden, MI 48451
Rafael Wolf	1418 Elkerton Ave., Kalamazoo, MI 49048
James Lewis Hudler	17165 Fahrner Rd., Chelsea, MI 48118
Jon Elgas	5533 Shady Knoll Ct., Howell, MI 48843
Greg Stempfle	2615 Hyland St., Ferndale, MI 48220
Jim Fulner	22100 Armada Ridge Rd., Armada, MI 48005
Joseph LeBlanc	14425 Robinwood Dr., Plymouth, MI 48170
Claranna Gelineau	264 Dwight St., Trenton, MI 48183
Andrew Chadderton	30005 Malvern St., Westland, MI 48185
Scott Avery Boman	4877 Balfour Rd., Detroit, MI 48224
Connor Nepomuceno	6 S. Main St., Apt. 1, Clarkston, MI 48346
Andy Evans	7770 Galbrath Rd., Cheboygan, MI 49721

The following persons nominated by the Green Party each received **13,718 votes**:

**Green Party Nominees: Howie Hawkins, Angela Walker**

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Stephen Boyle	1 E. Montana, Apt. 9, Detroit, MI 49203
Destiny Clayton	24346 Cloverlawn St., Oak Park, MI 48237
Jean-Michel Creviere	2951 Riley Ridge Rd., Holland, MI 49424
Frank Foster, Jr.	3443 E. Pierson Rd., Flint, MI 48506
Jennifer Kurland	19207 Five Points, Redford, MI 48240
Melissa Noelle Lambert	1333 E. Gaylord, Mt. Pleasant, MI 48858
John Anthony La Pietra	611 N. Linden St., Marshall, MI 49068
Robin Laurain	4106 Bridgeport St., Lansing, MI 48911
Daniel Martin-Mills	1817 Mills Ave., N. Muskegon, MI 49445
Jessica McCallie-Arquette	7408 Hungerford Lk. Dr., Big Rapids, MI 49307
Louis Novak	3926 Clippert St., Dearborn Hts., MI 48125
Jeffery Jon Rubley II	3936 Rivers Point, Monroe, MI 48161
Rick Sauermilch	134 Curry St., Ironwood, MI 49938
Amanda Slepr	2903 S. Meadowlark Dr., Mt. Pleasant, MI 48858
N. J. Sparling	28539 Grobbel, Warren, MI 48092
Marcia Squier	22935 Lake Blvd., St. Clair Shores, MI 48082

The following persons nominated by the U.S. Taxpayers Party each received **7,235 votes**:

**US Taxpayers Party Nominees: Don Blakenship, William Mohr**

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Mary Sears	53410 Pontiac Rd., Hancock, MI 49930
Christine Schwartz	1924 Elizabeth Ln. W, Jenison, MI 49428
William Mohr II	1665 Twenty Mile Rd., Kent City, MI 49335
Doug Levesque	1525 Alta Vista Dr., Owosso, MI 48867
Patrick Lambert	5630 Cedar Lk. Rd., Oscoda, MI 48750
Aaron Nichols	33298 US 12, Burr Oak, MI 49030
Edward J. Sanger	4119 Thackin Dr., Lansing, MI 48911
Victoria Monroe	6384 Woodcrest Ridge, Clarkston, MI 48346
Lester Townsend	15264 Rudland, Roseville, MI 48066
Christopher Rudy	3225 S. Shoreview Dr., Ft. Gratiot, MI 48059
William A. Kohn, Jr.	43656 Laurelwood Dr., Canton, MI 48187
Paul Stahl	2161 Strohm, Trenton, MI 488183
Marc Sosnowski	8488 Kinloch St., Dearborn Hts., MI 48127
Cecile A. Harrierty	176 Vendome Rd., Grosse Pte. Farms, MI 48236
Robert Gale	5003 Sheffield Ct., Sterling Hts., MI 48310
Gerald Van Sickle	31 N. Tippy Dam Rd., Wellston, MI 49689

The following persons nominated by the Natural Law Party each received **2,986 votes**:

**Natural Law Party Nominees: Rocky De La Fuente, Darcy Richardson**

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Connie Tewes	7720 6 Mile Bridge Rd., Manistee, MI 49660
Mary Schutt	3355 Lake Shore Dr., Muskegon, MI 49441
Dan Royer	4861 Ridgeline Dr. NE, Grand Rapids, MI 49525
Paul A. Natke	4050 S. Meridian Rd., Mt. Pleasant, MI 48858
Shelly L. Reynolds	5501 S. Belsay Rd., Grand Blanc, MI 48439
Donald Meyer	2701 Hemlock Ave., Portage, MI 49024
Gene Capatina	8719 Wellington, Northville, MI 48168
Ramzi Masri-Elyafaoui	505 Albert Ave., E. Lansing, MI 48823
Jacob Schlau	1907 Rosemont Rd., Berkeley, MI 48072
James Radatz	3542 N. River Rd., Ft. Gratiot, MI 48059
Daniel S. Smith	960 McDonald Dr., Northville, MI 48167
Mark Moylan	4501 Helen St., Dearborn, MI 48126
Guy Purdue	6980 N. Farmington Rd., Westland, MI 48185
Nicholas Malzone	38010 Eric Ct., Farmington Hills, MI 48355
Robert Forreider	4965 Draper Cir., Plymouth, MI 48170
Daniel B. Smith	960 McDonald Dr., Northville, MI 48167



The following persons nominated by write-in candidates Brian T. Carroll and Amar Patel each received **947 votes**:

**Write-Ins: Brian T. Carroll, Amar Patel**

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Michael Maturen	3296 E. Clemens Rd., Harrisville, MI 48740
Robert Clark II	3705 Whispering Woods, Muskegon, MI 49444
Jason Kennedy Duncan	1741 NE Lyon St., Grand Rapids, MI 49503
Paul L. DuBois	1570 Arrowhead Tr., W. Branch, MI 48661
Timothy Doubblestein	5007 Cedar Lk. Rd., Apt. 5, Oscoda, MI 48750
Jason Gatties	57556 Nishnabe Myewen St., Dowagiac, MI 49047
Lucy Ellen Moye	14 Foxtail Ln., Hillsdale, MI 49242
Lloyd A. Conway	726 Ridgewood Ave., Lansing, MI 48910
Linnaea Joyce Licavoli	22225 Alexander St., St. Clair Shores, MI 48081
Tsai-Yi Watts	21543 Tangel Dr., Macomb, MI 48044
John Henry Svoboda	587 Trombley Dr., Troy, MI 48083
Benjamin Setterholm	2812 Page Ave., Ann Arbor, MI 48104
Brandon Barry Mullins	30505 Louise St., Westland, MI 48185
Daniel Patrick Meloy	560 Parkview Dr., Apt. B4, Detroit, MI 48214
Elisa J. Kolk	237 Roland St., Belleville, MI 48111
Matthew James Williams	210 Hoehn Ct., Dimondalee, MI 48821

The following persons nominated by write-in candidates Jade Simmons and Claudeliah J. Roze each received **88 votes**:

**Write-Ins: Jade Simmons, Claudeliah J. Roze**

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Cecilia Lester	122 Sibben St., Apt. B, Manistee, MI 49660
Tyler Prough	5870 Kalamazoo Ave. SE, Kentwood, MI 49508
James Ryans	2001 Village, Grand Rapids, MI 49506
Chelsea Slocum	1705 Chestnut St., Cadillac, MI 49601
Raymond Hall	229 Crosby St., Flint, MI 48503
Dana Morris	111 Mary St., Hartford, MI 49057
Janasia Johnson	8821 Mikado Dr., New Port, MI 48166
Terrel Boyd	900 Long Blvd., No. 339, Lansing, MI 48911
Constance Clay	26555 Rosewood St., Roseville, MI 48066
Erika Couch	23206 Merlene, Macomb, MI 48042
Tyrone Pickens	17495 Cedar Lk. Cir., Northville, MI 48168
Karalyn Schubring	2503 Packard St., Apt. R, Ann Arbor, MI 48104
Michele Coleman	3790 Sturtevant St., Detroit, MI 48206
Grant Philson	9900 Yorkshire, Detroit, MI 48224
Jherrard Hardeman	31190 Huntley Sq. W, Apt. 512, Beverly Hills, MI 48025
Gertrude Taylor	6065 30 <sup>th</sup> St., Detroit, MI 48210

The following persons nominated by write-in candidates Tom Hoefling and Andy Prior each received **32 votes**:

**Write-Ins: Tom Hoefling, Andy Prior**

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Mark A. Aungst	6848 County Rd. 612, Grayling, MI 49738
Scott Suchecki	1321 Kinney Ave. NW, Grand Rapids, MI 49534
Richard Nagel	9299 Pheasant Trl. NE, Rockford, MI 49341
Mark Zimmerman	1345 E. Monroe Rd., Apt. E, Midland, MI 48642
Justin Phillips	9105 Burning Tree Dr., Grand Blanc, MI 48439
Kimberly Cleveland	229 E. State St., Mendon, MI 49072
Daniel Richard Cleveland	433 Pioneer Dr., Litchfield, MI 49252
Kurt Richards	308 North Ct., Howell, MI 48843
Georgia S. Halloran	25702 Crimson Ct., Warren, MI 48089
Dawne Worden	4597 Millis Rd., N. Branch, MI 48461
Kim Millard	18345 University Park Dr., Livonia, MI 48152
Alan G. Sides	23345 Redman Ct., Brownstown, MI 48183
DaWone Allison	Cowan Rd. Apt. 108, Westland, MI 48185
Samuel Denson	1601 Robert Bradby Dr., Apt. 1208, Detroit, MI 48207
Joshua Ohlman	31 Oak Opening, Delton, MI 49046
Suzanne M. Stuu	123 Bonny St., Battle Creek, MI 49037

The following persons nominated by write-in candidates Kasey Wells and Rachel Marie Wells each received **5 votes**:

**Write-Ins: Kasey Wells and Rachel Marie Wells**

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Sandra Murrell	50 Larry Joe Dr., Mio, MI 48647
Ronald Klett	11166 Winter Dr., Zeeland, MI 49464
Andrew Colclasure	627 W. Hanover St., Marshall, MI 49068
Charity Archer	11130 215 <sup>th</sup> Ave., Big Rapids, MI 49307
Paul Atkins	2352 Elm Rd., Flint, MI 48473
Shiquita Reed	1318 March St., Kalamazoo, MI 49001
Mark Jeffrey	7451 Eckert Rd., Concord, MI 49237
Brian W. Gibbs, Jr.	835 N. Chestnut, Lansing, MI 48906
William W. Brown	4634 Parent, Warren, MI 48092
Patricia Gorzelski	1025 Park Dr., Columbiaville, MI 48421
Anthony Jackson	P.O. Box 871, Canton, MI 48187
Jeremy Mortensen	6 Rockland Ct., Ann Arbor, MI 48108
Justen Grieve	5905 Globe, Westland, MI 48189
Shiesha Davis	5236 Kensington, Detroit, MI 48224
Matthew Shepard	2264 Ellsworth Rd., Perry, MI 48872
Miranda Ames	835 N. Chestnut, Lansing, MI 48906



STATE OF MICHIGAN  
JOCELYN BENSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

November 7, 2020

**Isolated User Error in Antrim County Does Not Affect Election Results,  
Has no Impact on Other Counties or States**

The error in reporting unofficial results in Antrim County Michigan was the result of a user error that was quickly identified and corrected; did not affect the way ballots were actually tabulated; and would have been identified in the county canvass before official results were reported even if it had not been identified earlier. This further explanation of the issue is based on the Bureau of Elections' preliminary review of the issue. The County Clerk and County Board of Canvassers will be able to provide any further detail during the ongoing county canvass.

Antrim County uses the Dominion Voting Systems election management system and voting machines (tabulators), which count hand-marked paper ballots. Counties use election management systems to program tabulators and also to report unofficial election results.

After Antrim County initially programmed its election software for the November Election, the county identified in October two local races where the ballot content had to be updated. The county received updated programming from its election programming vendor, Election Source. The updated programming correctly updated the election software for the county.

When the software was reprogrammed, the County also had to update the software on all of the media drives that are placed in tabulators to ensure tabulators communicate properly with the election management system. The county did update the media drives that went into the tabulators with the corrected local races, but did not update the media drives on the tabulators for the rest of the county. Because the Clerk correctly updated the media drives for the tabulators with changes to races, and because the other tabulators did not have changes to races, all tabulators counted ballots correctly.

However, because the county did not update the media drives for the tabulators that did not have changes to races, those tabulators did not communicate properly with the County's central election management system software when the county combined and reported unofficial results. Every tabulator recorded ballots correctly but the unofficial reports were erroneous.

These errors can always be identified and corrected because every tabulator prints a paper totals tape showing how the ballots for each race were counted. After discovering the error in reporting the unofficial results, the clerk worked diligently to report correct unofficial results by reviewing the printed totals tape on each tabulator and hand-entering the results for each race, for each precinct in the county.

Again, all ballots were properly tabulated. The user error affected only how the results from the tabulators communicated with the election management system for unofficial reporting. Even if the error had not been noticed and quickly fixed, it would have been caught and identified

during the county canvass when printed totals tapes are reviewed. This was an isolated error, there is no evidence this user error occurred elsewhere in the state, and if it did it would be caught during county canvasses, which are conducted by bipartisan boards of county canvassers. The Antrim County Canvass is currently ongoing, and the Board of County Canvassers and County Clerk will be able to provide any further necessary details during the course of the county canvass.

As with other isolated user errors that have occurred in the reporting of unofficial results both in this and previous elections, this is not the result of any intentional misconduct by an election official or because of software or equipment malfunctioning or failing to work properly. Municipal and county clerks are dedicated public servants who work hard and with integrity. Sometimes they make honest mistakes, and when they do there are many checks and balances in the election system to ensure they can be identified and corrected so that the official results reflect the complete, accurate count of all votes.

Additional information

<https://www.dominionvoting.com>

<https://www.cisa.gov/rumorcontrol>

**AFFIDAVIT OF CHRISTOPHER THOMAS**

Being duly sworn, Christopher Thomas, deposes and states the following as true, under oath:

1. I have served as a Senior Advisor to Detroit City Clerk Janice Winfrey since September 2020. In this capacity I advise the Clerk and management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting board, satellite offices and drop boxes, Bureau of Elections matters and general preparation for the November 3, 2020 General Election. I was involved in nearly all aspects of the election in the City, including the processing and tabulation at the TCF Center.

2. I served in the Secretary of State Bureau of Election for 40 years beginning in May 1977 and finishing in June 2017. In June 1981, I was appointed Director of Elections and in that capacity implemented four Secretaries of State election administration, campaign finance and lobbyist disclosure programs.

3. In 2013, I was appointed to President Barack Obama's Commission on Election Administration and served until a final report was submitted to the President and Vice-President in January 2014.

4. I am a founding member of the National Association of State Election Directors and served as its president in 1997 and 2013.

5. I have reviewed the Motion for Leave to File Bill of Complaint ("Motion"), the proposed Bill of Complaint ("BOC") and attached Declarations. This Affidavit addresses some of the factual errors in those documents.

6. In November 2020, City of Detroit absentee ballots were counted at 134 absent voter counting boards in Hall E of the TCF Center, a large convention center in downtown Detroit.

Contrary to several statements made by the Plaintiff, the City of Detroit tabulates absentee ballots for Detroit voters, not the County of Wayne.

7. The City of Detroit is the only jurisdiction in the State of Michigan that is eligible to tabulate absent voter ballots by ballot style rather than by physical precinct. By law, jurisdictions with 250 or more precincts (Detroit is the only such jurisdiction in Michigan) may tabulate by ballot style. So, absent voter ballots in the City of Detroit are tabulated by absent voter counting boards, not by precincts.

8. A Detroit counting board is not the same as a precinct. A precinct has geographic dimensions that allow it to be shown on a map. A Detroit counting board by comparison is an aggregate of 1 or more precincts with the same ballot style. A ballot style is defined by its political geography, and encompasses ballots for which all offices, candidates, and proposals are the same. Detroit has 501 physical precincts that operate in various building locations across the city on election day. These 501 precincts do not count absent voter ballots on election day; they only counted ballots of voters who appeared at the precinct polling place marked a ballot and inserted it into a precinct tabulator. Absent voter ballots for voters who reside in the precincts are tabulated by absent voter counting boards, most of which include absent voter ballots of voters from several precincts. The absent voter ballots from Detroit's 501 precincts are distributed among 134 absent voter counting boards, depending on the ballot style.

9. According to Plaintiff, "the TCF was the only facility within Wayne County authorized to count ballots for the City of Detroit." (BOC ¶95). That is not correct. The TCF Center was the only facility within Wayne County authorized to count absentee ballots for the City of Detroit. Votes cast at polling places on election day were counted at those polling places, not at the TCF Center.

10. Plaintiff asserts, based upon the Cicchetti Declaration, that there were 174,384 absentee ballots in Wayne County "not tied to a registered voter." (BOC at ¶97). Mr. Cicchetti clearly misunderstood whatever statistics he is referencing. His statement "174,384 absentee ballots out of 566,694 ballots tabulated (about 30.8%) were counted without a registration number for precincts in the City of Detroit" is apparently based upon his belief that absent voter ballots could only be reported as related to specific physical precincts. As noted above, however, the City of Detroit absent voter ballots are counted by ballot styles, meaning the counting boards do not correspond to a specific precinct as most have ballots from multiple precincts. The Wayne County Clerk reports the 134 absent voter counting boards separate from the precincts. No registration number is included because the percentage turnout of a counting board containing several different precincts has no meaning and is not directly related to the specific precincts. Thus, there is no requirement to report registration totals of the various precincts within each counting board. In fact, there is no legal requirement to report voter registration numbers for any precincts or counting boards. There were over 174,000 absentee ballots counted at the TCF Center, but they were not counted "without a registration number." Every ballot counted had a corresponding application executed by a registered voter in the City of Detroit. They were counted with a rigorous process of verification and tabulation.

11. There is reference to Wayne County and Detroit precincts, being "unbalanced," a situation which occurs when the number of votes does not match the number of ballots in the precincts. This is generally the result of human error and occurs in each election cycle, especially in more populated areas throughout the country. The minor imbalances in precincts and counting boards in Wayne County and Detroit for the November general election accounts for a vanishingly small number of votes. In the

August 2020 election, 53.6% of Wayne County precincts and counting boards were *balanced*, while in November 2020, 71.9% were *balanced*. The percentage of out-of-balance precincts, with an imbalance of 5 or more, was also lower in November 2020 than August 2020, with 8.1% being out of balance by more than 5 in August and 5.7% out of balance by 5 or more in November.

12. The City of Detroit had 501 precincts and 134 absent voter counting boards. Less than 36% of the total were out of balance. A counting board is out of balance if there are: (1) more ballots than voters or (2) more voters than ballots. In total 591 voters and ballots account for the imbalances. When voters and ballots are separated there are 148 more names than there are ballots, meaning that out of 174,384 votes there are 148 more names in the poll books than there are ballots. The imbalance is .0008 (eight ten-thousandths of a 1%). Of the 94 out of balance counting boards, there are 87 counting board with an imbalance of 11 or fewer voters/ballots; within the 87 counting boards, 48 are imbalanced by 3 or fewer voters/ballots. There are seven counting boards with higher imbalances that range from 13 more ballots to 71 fewer voters. Jurisdictions throughout the State, including jurisdictions with far fewer voters than Detroit, also had out of balance precincts. Indeed, the predominantly white jurisdiction of Livonia had a higher percentage of precincts out of balance than the predominantly African American City of Detroit. Nevertheless, in discussions at the Wayne County Canvassing Board one canvassing board member proposed the certification of all jurisdictions in Wayne County other than Detroit. None of the out of balance statistics suggest impropriety or provided a reason to not certify. This occurs everywhere in every election because elections are run by human beings who make mistakes.



13. On November 2, 3 and 4, 2020, I worked at the TCF Center absent voter counting boards primarily as liaison with challenger parties and organizations. I provided answers to questions about processes at the counting board tables, resolved disputes about process and directed leadership of each organization or party to adhere to Michigan Election Law and Secretary of State procedures concerning the rights and responsibilities of challengers. I have reviewed the claims in this case.

14. It is clear from the affidavits and the claims made by Plaintiff that the witnesses identified—Melissa Carone, Jessy Jacob and Zachary Larsen—do not understand absent voter ballot processing and tabulating. The affidavits of those witnesses were first submitted in *Costantino v. Detroit et al*, Wayne County Circuit Case No. 20-014780-AW. I submitted Affidavits to the Michigan courts in response to the affidavits of those witnesses.

15. A few basics about how the vote count is managed helps explain some of the misunderstandings of the witnesses. The Qualified Voter File (QVF) is a statewide vote registration file and was not available to counting boards. E-pollbook (EPB) is a computer program used in election day precincts to create the poll list of voters casting ballots. Supplemental poll lists contain names of voters who cast an absent voter ballot on Sunday, Monday and Tuesday. At the processing tables no ballots are scanned. A poll list is not used to confirm whether any specific voter's ballot is counted.

16. To increase the accuracy of the poll list, the Detroit Department of Elections employed the Michigan Secretary of State EPB to assist in creating the poll list. For each of the absent voter counting boards, the EPB held all the names of voters who requested an absent voter ballot by mid-afternoon Sunday, November 1. The download on Sunday was necessary to prepare

for the pre-processing granted by a recently enacted state law that allows larger municipalities to process ballots, but not to tabulate them, for 10 hours on Monday.

17. Absent voter ballots received Sunday after the download to EPB, all day Monday until 4 p.m. and Tuesday by 8:00 p.m. were not in the EPB. They would be added either by manually entering the voter names into the EPB or on supplemental paper poll lists printed from the QVF.

18. The affidavit of Mellissa Carone is particularly inaccurate and troubling. She was not an Election Inspector, nor was she a challenger. She was a contract worker, working for Dominion Voting Systems, to assist with occasional malfunctions of the tabulating machines. She has no known training in election law or procedures, and her affidavit and public statements have displayed a startling ignorance of how votes are counted.

19. Ms. Carone believes that she saw evidence that ballots were counted more than once at the TCF Center. Her main allegation—that hundreds or thousands of ballots were counted twice—cannot possibly be true. She says she saw on a computer that 50 of the same ballots had been counted 8 times, and that she saw numerous similar instances “countless times” throughout the day. She does not say she saw multiple scans; just that she saw the numbers on various scanners. If what she said were true, at the very least, 350 extra votes would show up for at least one absent voter counting board, resulting in that board being grossly out of balance. According to her affidavit, large numbers of extra votes would show up in “countless” precincts. However, a mistake like that would be caught very quickly on site. What Ms. Carone thinks she saw would also be caught by the Detroit Department of Elections and the Wayne County Canvassing Board during the canvassing which occurs after every election as a matter of law. A slight disparity between the number of voters and the number of ballots might occur, but nothing like the numbers

she describes could possibly occur and be missed by the Department of Elections, the Election Inspectors, the challengers and the Wayne County Board of Canvassers.

20. Ms. Carone's misunderstanding of what she observed may stem from the fact that as a routine part of the tabulation process, ballots are often fed through the high-speed reader more than once. For instance, if there is a jam in the reader, all ballots in the stack may need to be pulled out and run through again. Or, if there is a problem ballot (e.g., stains, tears, stray markings, ballot from a different counting board, etc.) in a stack, the problem ballot, and the several that were scanned by the high-speed machine after the problem was detected, will need to be re-scanned. At times, it will be most efficient to re-run several ballots, while at others, it will be more efficient to re-scan the entire batch. To an untrained observer it may appear that the ballot is being counted twice, however, the election worker will have cancelled the appropriate count on the computer screen. Any human error in the process would be identified during the canvass. If not, the number of voters at the absent voter counting board would be dramatically different than the number of counted votes.

21. Ms. Carone's speculation about 100,000 new ballots is also not possible. On Sunday, November 1, 2020, roughly 140,000 absent voter ballots were delivered to TCF for the Monday pre-processing; on Monday and Tuesday there were approximately 20,000 ballots delivered; and, on Wednesday at around 3-3:30 a.m., the final roughly 16,000 ballots were delivered. If 100,000 instead of 16,000 ballots had been delivered, Detroit's total turnout would be 84,000 ballots more than what was reported. Her reference to an announcement "on the news" of the discovery of 100,000 new ballots in Michigan appears to be based on a repeatedly debunked conspiracy theory in which a clerk in Shiawassee County accidentally typed in an extra 0 and quickly discovered and fixed the error, *See, e.g.,* <https://www.factcheck.org/2020/11/clerkal->

error-prompts-unfoundedclaims-about-michigan-results/. Regardless of the source of her confusion, there is no way 100,000 new ballots could have been surreptitiously brought to the TCF Center as she describes.

22. Ballots are delivered to the TCF Center after they are processed at the Department of Elections main office on West Grand Boulevard. On election day, ballots are received from the post office and the satellite offices. It takes several hours to properly process ballots received on election day. Ms. Carone might have heard false rumors about ballots being delivered, when actually television reporters were bringing in wagons of audio-video equipment. All ballots were delivered the same way— from the back of the TCF Hall E.

23. Plaintiff is using the Affidavit of Jessy Jacob to assert that signatures on absentee ballots were not verified. The Affidavit, however, demonstrates nothing more than that Ms. Jacob did not understand the process. She states that “[w]hile I was at the TCF Center, I was instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file.” Ms. Jacob, who had no prior experience as an Election Inspector, did not understand that signature verification had occurred before any ballots were delivered to the TCF Center.

24. Michigan law permits a city clerk to verify the signatures on absent voter ballots before election day. Inspectors at absent voter counting boards do not verify the signatures on the return ballot envelopes. Before ballots were delivered to the TCF Center for counting, Department of Elections staff complete the verification process. Staff may use a voter’s signature on an application that was previously verified by the QVF to verify the voter’s signature on the ballot envelope, or the staff may use the voter’s signature in the QVF to make the comparison

25. The BOC asserts that "Wayne County made the policy decision to ignore Michigan's statutory signature-verification requirement for absentee ballots." (BOC at ¶93) There is no basis for this claim. Under Michigan law, the verification is done at the City, not the County level, and the City of Detroit followed strict procedures to verify signatures.

26. The ballots delivered to the TCF Center had been verified by the Detroit City Clerk's staff prior to delivery in a process prescribed by Michigan law. Thus, when Jessy Jacob states that she "was instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file" it was because that part of the process had already been completed by the City Clerk's satellite office staff in compliance with state law.

27. The Affidavit of Jessy Jacob is also used to support the allegations of ballots being "back-dated." It is once again clear that the allegations arise from the fact that Ms. Jacob did not understand what she was observing. On Wednesday, November 4 it was discovered that there had been an operator error at the satellite offices with respect to the verification of a relatively small number of ballots. While the ballot envelopes had been initialed as having been verified and stamped as having been received prior to November 3 at 8 p.m., the election worker[s] had not completed the final clerical step of selecting the "save" button in the computer system. Thus, those ballots would not scan into the EPB at the TCF Center and were not on the supplemental paper list.

28. A team of employees was directed to correct those clerical errors by entering the date the ballots were received in the satellite office and selecting "save." The date of receipt was not being backdated; it was being noted in the system. Completing this clerical step placed the voter into the Absent Voter Poll List in the QVF so that the ballot could be processed and counted.

Again, none of these ballots were received after 8:00 p.m. on election day. Most were received on Monday, November 2nd - the busiest day for the satellite offices. Two challengers were provided a demonstration of the QVF process to show them how the error occurred, and they chose not to file a challenge to the individual ballots.

29. It would have been impossible for any election worker at the TCF Center to count or process a ballot for someone who was not an eligible voter or whose ballot was not received by the 8:00 p.m. deadline on November 3, 2020. No ballot could have been "backdated," because no ballots received after 8:00 p.m. on November 3, 2020 were ever at the TCF Center. No voter not in the QVF or in the "Supplemental Sheets" could have been processed, or "assigned" to a "random name" because no ballot from a voter not in one of the two tracking systems, was brought to the TCF Center.

30. Jessy Jacob alleges she was instructed by her supervisor to adjust the mailing date of absentee ballot packages being sent out to voters in September 2020. The mailing date recorded for absentee ballot packages would have no impact on the rights of the voters and no effect on the processing and counting of absentee votes. Any adjustment to mailing date was done to more accurately reflect the date the ballot would be mailed, which in many cases was done on a date after the day the application was processed.

31. Michigan Election Law requires clerks to safely maintain absent voter ballots and deliver them to the absent voter counting board. There is no requirement that such ballots be transported in sealed ballot boxes. To my knowledge, they are not sealed by any jurisdiction in Michigan in a ballot box prior to election day. Employees bring the ballot envelopes to the TCF Center, which is consistent with chain of custody. The only ballots brought to TCF that are not in envelopes are blank ballots used to duplicate ballots when necessary.

32. At no time after ballots were delivered to TCF on Sunday, November 1, did any ballot delivery consisted of "tens of thousands of ballots".

33. Contrary to the affidavit of Jessy Jacob, there is no legal requirement that all absent voter ballots be recorded in the QVF by 9:00 p.m. on November 3, 2020.

34. The QVF has a high level of security and limitation on access to the file. For example, it is not true (as claimed by Jessy Jacob) that a person with QVF credentials in one city is able to access data in another city's file within the QVF. That is not possible.

35. In his affidavit, Zachery Larsen raises an issue about return ballot envelopes where the barcode on the label would not scan and the voter's name was not on the supplemental list. He was observing the correction of clerical errors, not some type of fraud. In every election, clerical errors result in voters being left off the poll list, whether it is a paper poll list or the EPB. These errors are corrected so that voters are not disenfranchised. Michigan law ensures that voters are not disenfranchised by clerical errors.

36. Mr. Larsen also states that he saw an inspector at Counting Board 23 type into the computer system a name other than that of the voter appearing on the envelope because the voter was already in the EPB. But, if the voter were already checked in, the inspector would not have the envelope with a ballot in it. Mr. Larsen asserts he saw the name "Pope" typed into the EPB when there was already a person with that last name in the EPB. But, at Counting Board 23, there are three people with the last name Pope who voted in the election. One returned their ballot in October and therefore would have been in the EPB (since the information was downloaded from the QVF on Sunday November 1, 2020). The two other voters with the last name of Pope voted on Monday, November 1, so their names would not be in the EPB. Mr. Larsen apparently observed

one of those voters being hand entered into the system, as was necessary if they were not already in the EPB.

37. The City has conducted an internal inquiry with respect to Mr. Larsen's assertions regarding Counting Board 23. At that Counting Board, 2,855 ballots were tabulated with 2,856 associated envelopes. Each envelope is associated with validly registered voters and applications for absent voter ballots. The only voters whose names were typed into the system at that Counting Board were voters whose barcode did not bring up a ballot and whose name did not appear on the supplemental list. All such ballot envelopes were signed, verified and date/time-stamped as having been received before 8:00 p.m. on Tuesday, November 3, 2020.

38. Mr. Larsen also objects that he was not given a full opportunity to stand immediately behind or next to an election inspector operating the EPB laptop computer. In anticipation of viewing problems due to necessary social distancing to address COVID-19 concerns, large monitors were set up at each absent voter counting board. Moreover, election inspectors were instructed to follow the same procedure for all challengers. The Detroit Health Code and safety during a pandemic required maintaining at least 6-feet of separation. This was relaxed where necessary for a challenger to lean in to observe something and then lean back out to return to the 6-foot distancing. The challengers could see and copy the names of each person being entered into the EPB. If an inspector did not fully accommodate a challenger's reasonable request and the issue was brought to the attention of a supervisor, it was remedied. Announcements were made over the public address system to inform all inspectors of the rules. If what Mr. Larsen says is accurate, any inconvenience to him was temporary and had no effect on the processing of ballots.

39. It is clear also that Mr. Larsen did not operate through the leadership of his challenger party, because the issues he brings forward were by and large discussed and resolved



with the leadership of their challenger party. The leadership on numerous occasions would ask me to accompany them to a particular counting board table to resolve an issue. I would always discuss the issue with counting board inspectors and their supervisors and the challengers. Mr. Larsen appears to have failed to follow this protocol, which was established in a meeting with challenger organizations and parties on Thursday, October 29, 2020 at the TCF Center where a walk-through of the entire process was provided. Indeed, in the *Costantino* matter, counsel for plaintiffs acknowledged that Mr. Larsen had not attended that meeting.

40. Mr. Larsen makes some allegations relating to ballots without "secrecy sleeves," but many ballots were returned without the secrecy sleeves. Michigan law does not invalidate ballots returned without a secrecy sleeve.

41. In mid-afternoon on Wednesday, November 4, 2020, I observed that few challengers were stationed at the counting board tables. Rather, clusters of 5, 10 or 15 challengers were gathered in the main aisles at some tables. I conducted a conversation with leaders of the Republican Party and Democratic Party about the number of challengers in the room and their locations. It became clear that more than 134 challengers were present for these organizations. No one was ejected for this reason, but access to Hall E was controlled to ensure that challenger organizations had their full complement and did not exceed the ceiling any further than they already had. Challengers were instructed to sign out if they needed to leave Hall E. For a short period of time—a few hours—because there were too many challengers in Hall E for inspectors to safely do their jobs, new challengers were not allowed in until a challenger from their respective organization left the Hall. However, each challenger organization, including Republican and Democrat, continued to have their challengers inside of Hall E.

42. I am not aware of any valid challenge being refused or ignored or of any challengers being removed because they were challenging ballots. Ballot challengers are part of the electoral process in Michigan and were fully able to participate in the process at the TCF Center.

43. The description of the Biden/Trump votes in Michigan is incorrect. (BOC at ¶77) Based upon the certified totals, Vice President Biden received 2,804,040 votes, and President Trump received 2,649,852 votes, for a margin of 154,188 votes.

44. The statement that “only 587,618 Michigan voters requested absentee ballots” in 2016 (BOC at ¶88) is not correct; Dr. Cicchetti acknowledges that the number is 1,277,405, in his Declaration (Declaration ¶17). *See also* [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Michigan\\_-\\_EAVS\\_2016\\_Data\\_Brief\\_-\\_508.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Michigan_-_EAVS_2016_Data_Brief_-_508.pdf).

45. During my employment with the Secretary of State, the Bureau of Elections compiled unofficial results from the 83 counties, adding county totals only after the ballots are tabulated in a county. The real “election night reporting” is done by the county clerks. The county clerks compile results from cities and townships in their respective counties. In Michigan, there are over 1,500 cities and townships. Typically, precinct results are the first returns to be publicly posted on county clerk websites. These returns begin appearing within an hour after the 8 p.m. closing of the polls and continue until nearly complete around midnight. Absent voter ballot results are slower to appear on county websites. Some jurisdictions will report partial mail ballot returns after 8 p.m.; however, most jurisdiction do not report mail ballot returns until all tabulation is completed. In election years before 2020, the bulk of mail ballots were reported between midnight and 5 a.m. The mail ballots for November 2020 continued to be reported well into Wednesday with some final results being reported on Thursday.

46. In conclusion, upon reviewing the various affidavits and statements made by Plaintiff, I can readily conclude based upon my own knowledge and observation that there was no fraud, or even unrectified procedural errors, associated with processing of the absentee ballots for the City of Detroit.

I affirm that the representations above are true.

Further, Affiant sayeth not.

Date: December 10, 2020

  
CHRISTOPHER THOMAS

Subscribed and sworn to before me  
this 10th day of December, 2020.

  
KIMBERLY S. HUNT, Notary Public  
County of Macomb

My Commission Expires: 08/08/24

Acting in the County of Macomb

Notarized using electronic/remote technology

Notary located in Macomb County, State of Michigan

Signatory located in BERRIEN County, State of MICHIGAN

KIMBERLY S. HUNT  
NOTARY PUBLIC, STATE OF MI  
COUNTY OF MACOMB  
MY COMMISSION EXPIRES Aug 8, 2024  
ACTING IN COUNTY OF MACOMB

## **NOVEMBER 3, 2020 Summary of Canvass Report**

I would like to acknowledge the hard work and dedication of the canvass assistants. The historic AV turnout along with the challenges conducting a canvass during a pandemic and with threats made to the canvass that required law enforcement surveillance 24 hours a day made it difficult. I'd like to thank Sheriff Benny Napoleon and his Deputies for the dedication and professionalism in making sure the canvassers felt safe to conduct the business of the canvass. I would also like to thank Wayne County Clerk Cathy M. Garrett for providing canvassers with lunch each day so they wouldn't have to venture out the building.

Wayne County has 1,115 precincts, of which 134 are Detroit Absentee Counting Boards.

### **Our canvass included 981 precincts:**

478 Out-County Election Day Precincts

478 Out-County Absent Voter Precincts

503 City of Detroit Election Day Precincts

134 City of Detroit Absent Counting Boards

### **Provisional Report:**

478 Provisional Envelopes ballots - 30 Valid and 448 Invalid

28 provisional affidavit Ballots

3,997 voters not in possession of picture ID

### **Plus/Minus Report: Out County:** Attached

### **Retabulated 17 Election Day and 48 Absentee precincts:**

Detroit Election Day: 80, 180, 120, 315, 268, 220, 252, 318, 423, 376, 65,189, 207, 392, 422

AVCB: 37, 85, 44, 13, 52, 77, 89, 62, 25, 54, 28, 48, 122, 45, 52, 5, 49, 41, 36, 38, 33, 57, 58,

Ecorse: AV pct. 1E,1R 2, 4

Hamtramck: AV pct. 2

Harper Woods: AV pct. 5

Highland Park: AV pct. 2,3

Inkster: AV pct. 4-2, 2-1

Lincoln Park: Av pct. 2, 12, 14, 18, 20

Livonia: Election Day 20A & 21A. Absentee pct: 10A, 34B, 34C, 19A, 14A, 34B, 35A

Northville City: AV pct 1

Trenton: AV pct. 4, 7

WAYNE COUNTY  
CANVASS BOARD

PLUS/MINUS  
CHECK LIST

NOVEMBER 3, 2020  
GENERAL ELECTION

				ELECTION DAY PRECINCTS												ABSENTEE PRECINCTS										
				BAL	EXPLAINED					UNEXPLAINED						BAL	EXPLAINED					UNEXPLAINED				
#	ED Pct	AV Pct	COMM	0	1	2	3	4	5+	1	2	3	4	5+		0	1	2	3	4	5+	1	2	3	4	5+
1	15	15	Allen Park	13	2											7						5	3			
2	2	2	Belleville	2												2										
3	48	48	Dearborn	32	8	2	3			2	1					18	5	3	1			13	6	2		
4	27	27	Dearborn Hts	19						3		2		2		12	7	5				2	1			
5	4	4	Ecorse	3	1																				4	
6	5	5	Flat Rock	3	2											2						3				
7	10	10	Garden City	7	3											10										
8	2	2	Gibraltar	2												1						1				
9	2	2	Grosse Pointe City	2												1	1									
10	5	5	G. P. Farms	5												5										
11	7	7	G. P. Park	7												7										
12	2	2	G. P. Shores	2												2										
13	6	6	G. P. Woods	4						1	1					3						3				
14	7	7	Hamtramck	7												4						2		1		
15	6	6	Harper Woods	2	4											4	2									
16	6	6	Highland Park	5						1						2	1					2	1			
17	11	11	Inkster	8	1					2						8						1			2	
18	12	12	Lincoln Park	7	3			1		1						7	3	1							1	
19	44	44	Livonia	32	5					4	3					14						13	6	3	2	6
20	5	5	Melvindale	3	1						1							2		1	2					
21	1	1	Northville City	1												1										
22	4	4	Plymouth City	4												3	1									
23	5	5	River Rouge	2	1					1	1					2						2	1			
24	4	4	Riverview	1	2		1									4										
25	2	2	Rockwood	2												2										
26	12	12	Romulus	10	1					1						12										

WAYNE COUNTY  
CANVASS BOARD

PLUS/MINUS  
CHECK LIST

NOVEMBER 3, 2020  
GENERAL ELECTION

				ELECTION DAY PRECINCTS											ABSENTEE PRECINCTS										
				BAL	EXPLAINED					UNEXPLAINED					BAL	EXPLAINED					UNEXPLAINED				
#	ED Pct	AV Pct	COMM	0	1	2	3	4	5+	1	2	3	4	5+	0	1	2	3	4	5+	1	2	3	4	5+
27	11	11	Southgate	11											6	2	2				1				
28	23	23	Taylor	12	7					2	1	1			17	1	1				4				
29	7	7	Trenton	4	2	1									6	1									
30	6	6	Wayne	4	2										2	3						1			
31	39	39	Westland	36	1					2					21	2					14	1	1		
32	6	6	Woodhaven	6											6										
33	10	10	Wyandotte	7	3										6						3		1		
34	12	12	Brownstown Twp	12											12										
35	40	40	Canton Twp	33	6					1					20						15	4	1		
36	4	4	Grosse Ile Twp	3	1										1	2				1					
37	6	6	Huron Twp	6											6										
38	12	12	Northville Twp	11	1										12										
39	12	12	Plymouth Twp	11	1										12										
40	20	20	Redford Twp	16	2					2					6						6	4	1	2	1
41	6	6	Sumpter Twp	5	1										2		1				3				
42	10	10	Van Buren Twp	7	3										10										
	478	478	Total OUT-CITY	369	64	3	4	1	0	23	8	3	0	2	278	31	15	1	0	2	95	28	10	4	14
43	503	134	Detroit	332	57	18	8	3		52	19	4	5	5	39	0	1	0	0	0	22	18	11	12	31
			Total Detroit																						
	981	612	TOTAL COUNTY-WIDE	701	121	21	12	4	0	75	27	7	5	7	317	31	16	1	0	2	117	46	21	16	45

Detroit CB 33, 57 and 58 had zeros on the statement of votes, results did not get to the County as well, what we understand is a secondary path on the scanner's computer for those CBs at TCF was pointing to the wrong path/place on the computer, so those 3 Counting Boards results were not sent to the adjudication station computers, but were in a queue so to speak. Detroit discovered it after the canvass started, however, since the statement of votes also had zero, we requested the ballot containers, verified the seals, and then re-tabulated all three AVCBs. There was also a Detroit export file that did not get sent to the County and another export that the County received late in the night but it failed to load into the Election Management System. Those were loaded and matched to poll book statement of votes. There were also, 2 Highland Park Absentee pcts that were reported in the Election Day counting group because of a setting on the card, this was corrected at canvass and proofed against the statement of votes tabulator tape. The canvass requires communities to deliver their tabulator media along with their returns on election night, the canvass then manually reads the cards into the canvass Election management System computer, which is not connected to the internet or wireless at all (360 air gap), it's a good check and balance to identify any transmission issues or human error dealing with sending or uploading result exports that may have occurred on election night.

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Cheryl A. Costantino and  
Edward P. McCall, Jr.  
Plaintiffs,

Hon. Timothy M. Kenny  
Case No. 20-014780-AW

City of Detroit; Detroit Election  
Commission; Janice M. Winfrey,  
in her official capacity as the  
Clerk of the City of Detroit and  
the Chairperson and the Detroit  
Election Commission; Cathy Garrett,  
In her official capacity as the Clerk of  
Wayne County; and the Wayne County  
Board of Canvassers,  
Defendants.

\_\_\_\_\_ /

**OPINION & ORDER**

At a session of this Court  
Held on: November 13, 2020  
In the Coleman A. Young Municipal Center  
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny  
Chief Judge  
Third Judicial Circuit Court of Michigan

This matter comes before the Court on Plaintiffs' motion for preliminary injunction, protective order, and a results audit of the November 3, 2020 election. The Court having read the parties' filing and heard oral arguments, finds:

With the exception of a portion of Jessy Jacob affidavit, all alleged fraudulent claims brought by the Plaintiffs related to activity at the TCF Center. Nothing was alleged to



have occurred at the Detroit Election Headquarters on West Grand Blvd. or at any polling place on November 3, 2020.

The Defendants all contend Plaintiffs cannot meet the requirements for injunctive relief and request the Court deny the motion.

When considering a petition for injunction relief, the Court must apply the following four-pronged test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk the party seeking the injunction would be harmed more by the absence an injunction than the opposing party would be by the granting of the injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2nd 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” *Id.* at 612 fn 135 quoting *Senior Accountants, Analysts and Appraisers Association v Detroit*, 218 Mich. App. 263, 269; 553 NW2nd 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) states that the Plaintiffs bear the burden of proving the preliminary injunction should be granted. In cases of alleged fraud, the Plaintiff must state with particularity the circumstances constituting the fraud. MCR 2.112 (B) (1)

Plaintiffs must establish they will likely prevail on the merits. Plaintiffs submitted seven affidavits in support of their petition for injunctive relief claiming widespread voter

fraud took place at the TCF Center. One of the affidavits also contended that there was blatant voter fraud at one of the satellite offices of the Detroit City Clerk. An additional affidavit supplied by current Republican State Senator and former Secretary of State Ruth Johnson, expressed concern about allegations of voter fraud and urged "Court intervention", as well as an audit of the votes.

In opposition to Plaintiffs' assertion that they will prevail, Defendants offered six affidavits from individuals who spent an extensive period of time at the TCF Center. In addition to disputing claims of voter fraud, six affidavits indicated there were numerous instances of disruptive and intimidating behavior by Republican challengers. Some behavior necessitated removing Republican challengers from the TCF Center by police.

After analyzing the affidavits and briefs submitted by the parties, this Court concludes the Defendants offered a more accurate and persuasive explanation of activity within the Absent Voter Counting Board (AVCB) at the TCF Center.

Affiant Jessy Jacob asserts Michigan election laws were violated prior to November 3, 2020, when City of Detroit election workers and employees allegedly coached voters to vote for Biden and the Democratic Party. Ms. Jacob, a furloughed City worker temporarily assigned to the Clerk's Office, indicated she witnessed workers and employees encouraging voters to vote a straight Democratic ticket and also witnessed election workers and employees going over to the voting booths with voters in order to encourage as well as watch them vote. Ms. Jacob additionally indicated while she was working at the satellite location, she was specifically instructed by superiors not to ask for driver's license or any photo ID when a person was trying to vote.

The allegations made by Ms. Jacob are serious. In the affidavit, however, Ms. Jacob does not name the location of the satellite office, the September or October date these

acts of fraud took place, nor does she state the number of occasions she witnessed the alleged misconduct. Ms. Jacob in her affidavit fails to name the city employees responsible for the voter fraud and never told a supervisor about the misconduct.

Ms. Jacob's information is generalized. It asserts behavior with no date, location, frequency, or names of employees. In addition, Ms. Jacob's offers no indication of whether she took steps to address the alleged misconduct or to alter any supervisor about the alleged voter fraud. Ms. Jacob only came forward after the unofficial results of the voting indicated former Vice President Biden was the winner in the state of Michigan.

Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives. Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of "pre-dating" ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*

The affidavit of current State Senator and former Secretary of State Ruth Johnson essentially focuses on the affidavits of Ms. Jacob and Zachery Larsen. Senator Johnson believed the information was concerning to the point that judicial intervention was needed and an audit of the ballots was required. Senator Johnson bases her assessment entirely on the contents of the Plaintiffs' affidavits and Mr. Thomas' affidavit. Nothing in Senator Johnson's affidavit indicates she was at the TCF Center and witnessed the established protocols and how the AVCB activity was carried out. Similarly, she offers no explanation as to her apparent dismissal of Mr. Thomas' affidavit. Senator Johnson's conclusion stands in significant contrast to the affidavit of Christopher Thomas, who was present for many hours at TCF Center on November 2, 3 and 4. In this Court's view, Mr. Thomas provided compelling evidence regarding the activity at the TCF Center's AVCB workplace. This Court found Mr. Thomas' background, expertise, role at the TCF Center during the election, and history of bipartisan work persuasive.

Affiant Andrew Sitto was a Republican challenger who did not attend the October 29<sup>th</sup> walk- through meeting provided to all challengers and organizations that would be appearing at the TCF Center on November 3 and 4, 2020. Mr. Sitto offers an affidavit indicating that he heard other challengers state that several vehicles with out-of-state license plates pulled up to the TCF Center at approximately 4:30 AM on November 4<sup>th</sup>. Mr. Sitto states that "tens of thousands of ballots" were brought in and placed on eight long tables and, unlike other ballots, they were brought in from the rear of the room. Sitto also indicated that every ballot that he saw after 4:30 AM was cast for former Vice President Biden.

Mr. Sitto's affidavit, while stating a few general facts, is rife with speculation and guess-work about sinister motives. Mr. Sitto knew little about the process of the absentee voter counting board activity. His sinister motives attributed to the City of Detroit were negated by Christopher Thomas' explanation that all ballots were delivered to the back of Hall E at the TCF Center. Thomas also indicated that the City utilized a rental truck to deliver ballots. There is no evidentiary basis to attribute any evil activity by virtue of the city using a rental truck with out-of-state license plates.

Mr. Sitto contends that tens of thousands of ballots were brought in to the TCF Center at approximately 4:30 AM on November 4, 2020. A number of ballots speculative on Mr. Sitto's part, as is his speculation that all of the ballots delivered were cast for Mr. Biden. It is not surprising that many of the votes being observed by Mr. Sitto were votes cast for Mr. Biden in light of the fact that former Vice President Biden received approximately 220,000 more votes than President Trump.

Daniel Gustafson, another affiant, offers little other than to indicate that he witnessed "large quantities of ballots" delivered to the TCF Center in containers that did not have lids were not sealed, or did not have marking indicating their source of origin. Mr. Gustafson's affidavit is another example of generalized speculation fueled by the belief that there was a Michigan legal requirement that all ballots had to be delivered in a sealed box. Plaintiffs have not supplied any statutory requirement supporting Mr. Gustafson's speculative suspicion of fraud.

Patrick Colbeck's affidavit centered around concern about whether any of the computers at the absent voter counting board were connected to the internet. The answer given by a David Nathan indicated the computers were not connected to the

internet. Mr. Colbeck implies that there was internet connectivity because of an icon that appeared on one of the computers. Christopher Thomas indicated computers were not connected for workers, only the essential tables had computer connectivity. Mr. Colbeck, in his affidavit, speculates that there was in fact Wi-Fi connection for workers use at the TCF Center. No evidence supports Mr. Colbeck's position.

This Court also reads Mr. Colbeck's affidavit in light of his pre-election day Facebook posts. In a post before the November 3, 2020 election, Mr. Colbeck stated on Facebook that the Democrats were using COVID as a cover for Election Day fraud. His predilection to believe fraud was occurring undermines his credibility as a witness.

Affiant Melissa Carone was contracted by Dominion Voting Services to do IT work at the TCF Center for the November 3, 2020 election. Ms. Carone, a Republican, indicated that she "witnessed nothing but fraudulent actions take place" during her time at the TCF Center. Offering generalized statements, Ms. Carone described illegal activity that included, untrained counter tabulating machines that would get jammed four to five times per hour, as well as alleged cover up of loss of vast amounts of data. Ms. Carone indicated she reported her observations to the FBI.

Ms. Carone's description of the events at the TCF Center does not square with any of the other affidavits. There are no other reports of lost data, or tabulating machines that jammed repeatedly every hour during the count. Neither Republican nor Democratic challengers nor city officials substantiate her version of events. The allegations simply are not credible.

Lastly, Plaintiffs rely heavily on the affidavit submitted by attorney Zachery Larsen. Mr. Larsen is a former Assistant Attorney General for the State of Michigan who alleged mistreatment by city workers at the TCF Center, as well as fraudulent activity by election workers. Mr. Larsen expressed concern that ballots were being processed without confirmation that the voter was eligible. Mr. Larsen also expressed concern that he was unable to observe the activities of election official because he was required to stand six feet away from the election workers. Additionally, he claimed as a Republican challenger, he was excluded from the TCF Center after leaving briefly to have something to eat on November 4<sup>th</sup>. He expressed his belief that he had been excluded because he was a Republican challenger.

Mr. Larsen's claim about the reason for being excluded from reentry into the absent voter counting board area is contradicted by two other individuals. Democratic challengers were also prohibited from reentering the room because the maximum occupancy of the room had taken place. Given the COVID-19 concerns, no additional individuals could be allowed into the counting area. Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4<sup>th</sup> as efforts were made to avoid overcrowding.

Mr. Larsen's concern about verifying the eligibility of voters at the AVCB was incorrect. As stated earlier, voter eligibility was determined at the Detroit Election Headquarters by other Detroit city clerk personnel.

The claim that Mr. Larsen was prevented from viewing the work being processed at the tables is simply not correct. As seen in a City of Detroit exhibit, a large monitor was

at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed. Mr. Jaffe confirmed his experience and observation that efforts were made to ensure that all challengers could observe the process.

Despite Mr. Larsen's claimed expertise, his knowledge of the procedures at the AVCB paled in comparison to Christopher Thomas'. Mr. Thomas' detailed explanation of the procedures and processes at the TCF Center were more comprehensive than Mr. Larsen's. It is noteworthy, as well, that Mr. Larsen did not file any formal complaint as the challenger while at the AVCB. Given the concerns raised in Mr. Larsen's affidavit, one would expect an attorney would have done so. Mr. Larsen, however, only came forward to complain after the unofficial vote results indicated his candidate had lost.

In contrast to Plaintiffs' witnesses, Christopher Thomas served in the Secretary of State's Bureau of Elections for 40 years, from 1977 through 2017. In 1981, he was appointed Director of Elections and in that capacity implemented Secretary of State Election Administration Campaign Finance and Lobbyist disclosure programs. On September 3, 2020 he was appointed as Senior Advisor to Detroit City Clerk Janice Winfrey and provided advice to her and her management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting boards, satellite offices and drop boxes. Mr. Thomas helped prepare the City of Detroit for the November 3, 2020 General Election.

As part of the City's preparation for the November 3<sup>rd</sup> election Mr. Thomas invited challenger organizations and political parties to the TCF Center on October 29, 2020 to have a walk-through of the entire absent voter counting facility and process. None of Plaintiff challenger affiants attended the session.



On November 2, 3, and 4, 2020, Mr. Thomas worked at the TCF Center absent voter counting boards primarily as a liaison with Challenger Organizations and Parties. Mr. Thomas indicated that he “provided answers to questions about processes at the counting board’s resolved dispute about process and directed leadership of each organization or party to adhere to Michigan Election Law and Secretary of State procedures concerning the rights and responsibilities of challengers.”

Additionally, Mr. Thomas resolved disputes about the processes and satisfactorily reduced the number of challenges raised at the TCF Center.

In determining whether injunctive relief is required, the Court must also determine whether the Plaintiffs sustained their burden of establishing they would suffer irreparable harm if an injunction were not granted. Irreparable harm does not exist if there is a legal remedy provided to Plaintiffs.

Plaintiffs contend they need injunctive relief to obtain a results audit under Michigan Constitution Article 2, § IV, Paragraph 1 (h) which states in part “the right to have the results of statewide elections audited, in such as manner as prescribed by law, to ensure the accuracy and integrity of the law of elections.” Article 2, § IV, was passed by the voters of the state of Michigan in November, 2018.

A question for the Court is whether the phrase “in such as manner as prescribed by law” requires the Court to fashion a remedy by independently appointing an auditor to examine the votes from the November 3, 2020 election before any County certification of votes or whether there is another manner “as prescribed by law”.

Following the adoption of the amended Article 2, § IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least

one race in each audited precinct. Although Plaintiffs may not care for the wording of the current MCL 168.31a, a results audit has been approved by the Legislature. Any amendment to MCL 168.31a is a question for the voice of the people through the legislature rather than action by the Court.

It would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process, substitute its judgment for that of the Legislature, and appoint an independent auditor because of an unwieldy process. In addition to being an unwarranted intrusion on the authority of the Legislature, such an audit would require the rest of the County and State to wait on the results. Remedies are provided to the Plaintiffs. Any unhappiness with MCL 168.31a calls for legislative action rather than judicial intervention.

As stated above, Plaintiffs have multiple remedies at law. Plaintiffs are free to petition the Wayne County Board of Canvassers who are responsible for certifying the votes. (MCL 168.801 and 168.821 et seq.) Fraud claims can be brought to the Board of Canvassers, a panel that consists of two Republicans and two Democrats. If dissatisfied with the results, Plaintiffs also can avail themselves of the legal remedy of a recount and a Secretary of State audit pursuant to MCL 168.31a.

Plaintiff's petition for injunctive relief and for a protective order is not required at this time in light of the legal remedy found at 52 USC § 20701 and Michigan's General Schedule #23 – Election Records, Item Number 306, which imposes a statutory obligation to preserve all federal ballots for 22 months after the election.

In assessing the petition for injunctive relief, the Court must determine whether there will be harm to the Plaintiff if the injunction is not granted, as Plaintiffs' existing legal

remedies would remain in place unaltered. There would be harm, however, to the Defendants if the Court were to grant the requested injunction. This Court finds that there are legal remedies for Plaintiffs to pursue and there is no harm to Plaintiffs if the injunction is not granted. There would be harm, however, to the Defendants if the injunction is granted. Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Finally, the Court has to determine would there be harm to the public interest. This Court finds the answer is a resounding yes. Granting Plaintiffs' requested relief would interfere with the Michigan's selection of Presidential electors needed to vote on December 14, 2020. Delay past December 14, 2020 could disenfranchise Michigan voters from having their state electors participate in the Electoral College vote.

### Conclusion

Plaintiffs rely on numerous affidavits from election challengers who paint a picture of sinister fraudulent activities occurring both openly in the TCF Center and under the cloak of darkness. The challengers' conclusions are decidedly contradicted by the highly-respected former State Elections Director Christopher Thomas who spent hours and hours at the TCF Center November 3<sup>rd</sup> and 4<sup>th</sup> explaining processes to challengers and resolving disputes. Mr. Thomas' account of the November 3<sup>rd</sup> and 4<sup>th</sup> events at the TCF Center is consistent with the affidavits of challengers David Jaffe, Donna MacKenzie and Jeffrey Zimmerman, as well as former Detroit City Election Official, now contractor, Daniel Baxter and City of Detroit Corporation Counsel Lawrence Garcia.

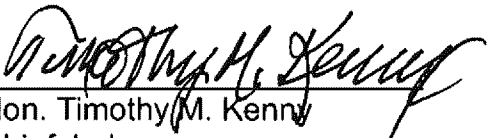
Perhaps if Plaintiffs' election challenger affiants had attended the October 29, 2020 walk-through of the TCF Center ballot counting location, questions and concerns could have been answered in advance of Election Day. Regrettably, they did not and, therefore, Plaintiffs' affiants did not have a full understanding of the TCF absent ballot tabulation process. No formal challenges were filed. However, sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs' interpretation of events is incorrect and not credible.

Plaintiffs are unable to meet their burden for the relief sought and for the above mentioned reasons, the Plaintiffs' petition for injunctive relief is DENIED. The Court further finds that no basis exists for the protective order for the reasons identified above. Therefore, that motion is DENIED. Finally, the Court finds that MCL 168.31a governs the audit process. The motion for an independent audit is DENIED.

It is so ordered.

This is not a final order and does not close the case.

November 13, 2020

  
Hon. Timothy M. Kenny  
Chief Judge  
Third Judicial Circuit Court of Michigan

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

**CHERYL A. COSTANTINO and,  
EDWARD P. McCALL, JR.,**

Case No. 20-014780-AW

Plaintiffs,

Hon. Timothy M. Kenny

vs.

**CITY OF DETROIT; DETROIT ELECTION  
COMMISSION; JANICE WINFREY, in her official  
capacity as the CLERK OF THE CITY and the  
Chairperson of the DETROIT ELECTION COMMISSION;  
CATHY M. GARRETT, in her official capacity as the  
CLERK OF WAYNE COUNTY; and the WAYNE COUNTY  
BOARD OF CANVASSERS,**

Defendants.

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**GREAT LAKES JUSTICE CENTER**

David A. Kallman (P34200)  
Erin E. Mersino (P70886)  
Jack C. Jordan (P46551)  
Stephen P. Kallman (P75622)  
5600 W. Mount Hope Hwy.  
Lansing, MI 48917  
(517) 322-3207  
*Attorneys for Plaintiffs*

---

**FINK BRESSACK**

David H. Fink (P28235)  
Darryl Bressack(P67820)  
38500 Woodward Ave., Suite 350  
Bloomfield Hills, MI 48304  
(248) 971-2500  
dfink@finkbressack.com  
dbressack@finkbressack.com  
*Attorneys for City of Detroit, City of Detroit  
Election Commission and Janice Winfrey*

**CITY OF DETROIT LAW DEPARTMENT**

Lawrence T. García (P54890)  
Charles N. Raimi (P29746)  
James D. Nosedá (P52563)  
2 Woodward Ave., 5<sup>th</sup> Floor  
Detroit, MI 48226  
(313) 237-5037  
garcial@detroitmi.goc  
raimic@detroitmi.gov  
nosej@detroitmi.gov  
*Attorneys for City of Detroit, City of Detroit  
Election Commission and Janice Winfrey*

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**AFFIDAVIT OF DANIEL BAXTER**

Being duly sworn, Daniel Baxter, deposes and states the following as true, under oath:

1. From 1985 until 2019, I was employed by the Detroit Department of Elections, with a two year hiatus, from 2013 to 2015, when I served as the Director of Elections for Montgomery County, Alabama.
2. From 2005 until 2019, except during my tenure at Montgomery County, I served as Director of the Detroit Department of Elections.
3. Since September 1, 2020, I have served as Special Project Election Consultant for the Detroit Department of Elections, charged with administering all activities associated with the Central Counting Board for the November 3, 2020 General Election.
4. I was present at the Central Counting Board at the TCF Center, where absentee ballots were counted on Monday, November 2, 2020 from 5:30 AM until after midnight; on Tuesday, November 3, 2020 from 6:00 AM until midnight; and on Wednesday, November 4, 2020, from 7:00 AM until Thursday, November 5, 2020, at 6:00 AM.
5. The Detroit Department of Elections completed its final count at or around 10:00 PM on Wednesday, November 4, 2020.
6. The Detroit Department of Elections has submitted its final count to the Wayne County Board of Canvassers.
7. Jessy Jacob was a furloughed employee from another City department, assigned to the Department of Elections for limited, short-term, purposes, in September, 2020. Despite her long tenure with the City of Detroit, her tenure with the Department of Elections was brief, and her responsibilities were limited.
8. Ms. Jacob helped support work at two Absentee Voting Satellite Locations.

9. Ms. Jacob's affidavit, dated November 7, 2020, suggests that she did not understand many of the processes that she observed, and for which she was not responsible.
10. During training, all staff were instructed that their primary responsibility when voters came to the satellite locations was to facilitate the services requested by the voter.
11. If a voter was interested in voting by absentee ballot, staff were instructed to issue the voter an application, verify the voter's identity through a form of identification approved by the State of Michigan and issue a ballot based on Department of Elections procedures.
12. Staff was also instructed that if a voter did not have appropriate proof of identity, the voter should not be turned away; instead, the voter was to be offered an Affidavit of Voter Not in Possession of Photo ID.
13. Staff was instructed that the Department of Elections is strictly non-partisan, meaning the Department and its employees do not offer opinions on candidates or on proposals.
14. If a voter was issued an absent voter ballot and then applied for a second ballot at a satellite office, the voter would be required to request in writing that the first ballot be spoiled. If that does not occur, the Qualified Voter File alerts the satellite staff that there is an absent voter ballot already issued. In order to prevent double voting, until the first ballot is canceled, a second ballot cannot be issued. In the event the first ballot is returned, it is verified in the Qualified Voter File and rejected as a duplicate.
15. After her work on the election was completed, Ms. Jacob was again furloughed.
16. Prior to the filing of this lawsuit, Ms. Jacob did not report any of the issues addressed in her affidavit to any of her supervisors.

I affirm that the representations above are true.

Further, Affiant sayeth not.

Date: November 11, 2020

  
DANIEL BAXTER

Subscribed and sworn to before me  
this 11th day of November, 2020.

  
Notary Public

County of: Wayne County  
My Commission Expires: 11/24/2021

  
CAROL J ALDRIDGE  
NOTARY PUBLIC, STATE OF MI  
COUNTY OF WAYNE  
MY COMMISSION EXPIRES Nov 24, 2021  
ACTING IN COUNTY OF



STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHERYL A. COSTANTINO and,  
EDWARD P. MCCALL, JR.,

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Plaintiffs,

Hon. Timothy M. Kenny

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5600 W. Mount Hope Hwy.  
Lansing, MI 48917  
(517) 322-3207  
*Attorneys for Plaintiffs*

---

FINK BRESSACK  
David H. Fink (P28235)  
Darryl Bressack(P67820)  
38500 Woodward Ave., Suite 350  
Bloomfield Hills, MI 48304  
(248) 971-2500  
dfink@finkbressack.com  
dbressack@finkbressack.com  
*Attorneys for City of Detroit, City of Detroit  
Election Commission and Janice Winfrey*

CITY OF DETROIT LAW DEPARTMENT  
Lawrence T. García (P54890)  
Charles N. Raimi (P29746)  
James D. Nosedá (P52563)  
2 Woodward Ave., 5<sup>th</sup> Floor  
Detroit, MI 48226  
(313) 237-5037  
garcial@detroitmi.goc  
raimic@detroitmi.gov  
nosej@detroitmi.gov  
*Attorneys for City of Detroit, City of Detroit  
Election Commission and Janice Winfrey*

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## **AFFIDAVIT OF LAWRENCE T. GARCIA**

Being duly sworn, Lawrence T. García, deposes and states the following as true, under oath:

1. For almost three years, I have served the City of Detroit as Corporation Counsel and as one of three commissioners on Detroit's Election Commission, as identified by the 2012 Detroit City Charter, Section 3-102.
2. From the morning of Tuesday, November 3, 2020 until roughly ten o'clock on the evening of Wednesday, November 4, 2020, I personally witnessed efforts to prepare, process and count absentee voter ("AV") ballots cast in the November 3, 2020 election by Detroiters.
3. I witnessed no irregularities in the processing of AV ballots cast in the recent election.
4. On Tuesday and Wednesday of this week, I spent at least 18 hours inside the Central Counting Board ("CCB") in Hall E of the TCF Center where AV ballots were counted.
5. During my time in the CCB, I personally recognized and spoke with election challengers from both the democratic and republican parties, as well as challengers who identified themselves as non-partisan, and I personally witnessed election inspectors fielding concerns from both republican and democrat election challengers.
6. All poll workers taking part in the recent election work were identified by name, as well as their stated political party preference in an official, poll worker list that was available for inspection and that was published to both the republican and democratic parties of Michigan well in advance of the AV ballot counting that took place this week.
7. Having been present at the CCB during all or most of the time at issue in this dispute, I do not see how any of the things alleged would tend to benefit one candidate to the exclusion of others – with the sole exception of the alleged, illegal delivery of late, false ballots, which I find incredible.

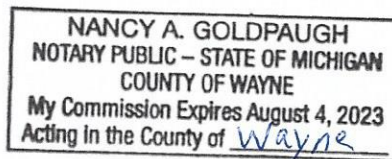
I affirm that the representations above are true.

Lawrence T. Garcia  
Lawrence T. Garcia

Subscribed and sworn to before me  
This 11<sup>th</sup> day of November 2020

Nancy A. Goldpaugh  
Notary Public  
County of Wayne, State of Michigan

My Commission Expires: 8-4-2023



### Declaration of John McLaughlin

I, John McLaughlin, declare that the following statements are true to the best of my knowledge and recollection:

1. I am the Chief Executive Officer and Partner of McLaughlin & Associates, a polling and strategic consulting firm.
2. I have worked professionally as a strategic consultant and pollster for over 35 years.
3. During this time, I have earned a reputation for helping some of America's most successful corporation and winning some of the toughest elections in the nation.
4. In 2016, I worked as an advisor and pollster for Donald Trump from the primaries through election day.
5. My political clients have included former Presidential candidates Steve Forbes, Fred Thompson, former California Governor Arnold Schwarzenegger, former Florida Governor Jeb Bush, former Georgia Governor Nathan Deal and 22 current and former U.S. Senators and 16 current Republican members of Congress.
6. Internationally, I have done work in Israel for Prime Minister Benjamin Netanyahu, for the Conservative Party in the United Kingdom, for former Conservative Prime Minister Stephen Harper of Canada and for Hungarian Prime Minister Viktor Orban in his 2018 landslide reelection.
7. I am founding partner of Opiniones Latinas, a public opinion research company dedicated to researching opinions of Latinos nationwide.

8. I have appeared on every major broadcast and cable channel, as well as prominent radio talk shows across America.

9. My articles have been published in a wide range of publications including National Review, Middle East Quarterly, Campaigns and Elections and The Polling Report.

10. My work has been recognized by winning Telly and PR Week Campaign Awards.

11. I am a graduate of Fordham College (B.A.) and hold an M.B.A. from Fordham University with concentrations in Finance and Quantitative Methods. I am a member of MENSA.

12. I have attached two of my documents to this declaration.

13. The first document, a true and correct copy which is attached as Exhibit A, is my November 11, 2020 report titled "Major Divergence Between In-Person Election-Day Votes and Early Mail Voters" based on my polling and analysis. I incorporate the contents of the attached report as if it were fully re-stated herein.

14. The second document, a true and correct copy which is attached as Exhibit B, is my August 2020 report titled "BATTLEGROUND STATES GENERAL ELECTION VOTERS" based on my polling and analysis. I incorporate the contents of the attached report as if it were fully re-stated herein.

I declare under penalty of perjury under the laws of Virginia that the forgoing is true and correct.

Dated: November 17, 2020

/s/electronically signed by John McLaughlin

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John McLaughlin

**From:** John McLaughlin

**Re:** Major Divergence Between In-Person Election-Day Votes and Early Mail Voters

**Date:** November 11, 2020

Our national post-election survey conducted on November 2<sup>nd</sup> and 3<sup>rd</sup> clearly shows President Trump winning by 26-points (62% to 36%) among adults who voted in-person on election-day. Among adults who voted early in-person at a designated polling location, Joe Biden edged President Trump by 2-points (51% to 49%). However, among adults who voted early by mail, Joe Biden won by 28-points (63% to 35%). Our August and October surveys conducted in the battleground states told the same story of President Trump leading big among in-person, election-day voters while Joe Biden led by wide margins with early by mail voters.

**National Post-Election Online Survey (n1000): November 2-3, 2020**

	<b>Total</b>	<b>Voted Election Day</b>	<b>Voted Early</b>	<b>In-Person Early</b>	<b>Mail Early</b>
Vote Trump	48%	62%	40%	49%	35%
Vote Biden	50%	36%	58%	51%	63%
<b>NET</b>	<b>-2</b>	<b>+26</b>	<b>-18</b>	<b>-2</b>	<b>-28</b>

	<b>Total</b>	<b>Vote Election Day</b>	<b>Vote Early</b>	<b>In-Person Early</b>	<b>Mail Early</b>
Republican	35%	45%	29%	37%	25%
Democrat	37%	26%	44%	39%	46%
Independent	28%	30%	27%	24%	29%
<b>NET</b>	<b>-2</b>	<b>+19</b>	<b>-15</b>	<b>-2</b>	<b>-21</b>

**Battleground Online Survey (n1200): October 14-16, 2020**

	<b>Total</b>	<b>Vote Election Day</b>	<b>Vote Early</b>	<b>In-Person Early</b>	<b>Mail Early</b>
Vote Trump	43%	57%	37%	46%	31%
Vote Biden	49%	33%	55%	47%	61%
<b>NET</b>	<b>-6</b>	<b>+24</b>	<b>-18</b>	<b>-1</b>	<b>-30</b>

	<b>Total</b>	<b>Vote Election Day</b>	<b>Vote Early</b>	<b>In-Person Early</b>	<b>Mail Early</b>
Republican	35%	43%	31%	39%	27%
Democrat	36%	31%	38%	29%	43%
Independent	29%	26%	31%	32%	30%
<b>NET</b>	<b>-1</b>	<b>+12</b>	<b>-7</b>	<b>+10</b>	<b>-16</b>

### Battleground Online Survey (n800): August 18-19, 2020

	<b>Total</b>	<b>Vote Election Day</b>	<b>Vote Early</b>	<b>In-Person Early</b>	<b>Mail Early</b>
Vote Trump	44%	62%	34%	46%	30%
Vote Biden	49%	31%	59%	47%	65%
<b>NET</b>	<b>-5</b>	<b>+31</b>	<b>-25</b>	<b>-1</b>	<b>-35</b>

	<b>Total</b>	<b>Vote Election Day</b>	<b>Vote Early</b>	<b>In-Person Early</b>	<b>Mail Early</b>
Republican	36%	47%	29%	34%	27%
Democrat	35%	25%	40%	36%	42%
Independent	30%	28%	31%	29%	32%
<b>NET</b>	<b>+1</b>	<b>+22</b>	<b>-11</b>	<b>-2</b>	<b>-15</b>

In the August battleground survey, virtually 9 in 10 voters agreed that it was important for their state and local government to provide in-person voting for the election. Two-thirds (65%) said it was “very” important. There was strong census across party lines.

*“HOW IMPORTANT DO YOU THINK IT IS FOR YOUR STATE AND LOCAL GOVERNMENT TO CONTINUE TO PROVIDE IN-PERSON VOTING FOR THE 2020 ELECTION?”*

	<b>Total</b>	<b>Republican</b>	<b>Democrat</b>	<b>Independent</b>
<b>Important</b>	<b>88%</b>	<b>94%</b>	<b>86%</b>	<b>85%</b>
Very	65%	78%	59%	55%
Somewhat	24%	17%	27%	29%
<b>Not Important</b>	<b>12%</b>	<b>6%</b>	<b>14%</b>	<b>16%</b>