

**STATE OF MICHIGAN
IN THE SUPREME COURT**

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

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official
capacity as SECRETARY OF STATE,

Defendant-Appellee.

Supreme Court No.:
Court of Appeals No.: 355378
Court of Claims Case No.: 20-000225-MZ

**This appeal involves an emergency election
issue that has significant public interest
and the case is one by or against an officer
of the state in the officer's official capacity.**

ORAL ARGUMENT REQUESTED

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**APPLICATION FOR LEAVE TO APPEAL UNDER MCR 7.305
AND BRIEF IN SUPPORT OF MOTION FOR IMMEDIATE
CONSIDERATION UNDER MCR 7.311(E)**

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ORDER APPEALED

Donald J. Trump for President, Inc. (the Trump campaign), and Eric Ostergren, the Plaintiffs-Appellants, seek leave to appeal from the Court of Appeals' December 4, 2020, order denying their Application for Leave to Appeal and requested relief and from the Court of Claims' November 6, 2020, order denying Plaintiffs-Appellants' request for injunctive relief. The Court of Appeals' order is available at Appx. 1a. The Court of Claims' order is available at Appx. 3a.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under MCL 600.232 and MCR 7.303(B) and 7.305. The Court of Appeals entered its order on December 4, 2020. Appx. 1a-2a. This Application for Leave to Appeal is filed within 42 days of the entry of that order. See MCR 7.305(C)(2)(A). This appeal is timely because the Court of Claims issued its decision on November 6, the Court of Appeals issued a decision on December 4, and this appeal to this Court was filed on December 6.

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QUESTIONS PRESENTED

1. Whether Secretary of State Jocelyn Benson, as Michigan’s “chief election officer,” is the proper defendant who can grant the relief sought in Plaintiffs’ motion for emergency injunctive relief?

Plaintiffs say yes.
Defendant says no.

2. Whether Plaintiffs’ motion for emergency injunctive relief was rendered moot because the Court of Claims’ hearing was conducted after most of the absent voter ballots had been processed?

Plaintiffs say no.
Defendant says yes.

3. Whether Jessica Connarn’s affidavit describing her personal first-hand observations and including supporting evidence is hearsay?

Plaintiffs say no.
Defendant says yes.

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INTRODUCTION

Because Michigan Secretary of State Jocelyn Benson, who is Michigan's chief election officer, did not require the local election officials she supervises and directs to comply with Michigan election law when conducting this year's general election, President Trump's campaign committee and a Michigan citizen, voter, and designated challenger, Eric Ostergren, filed a complaint in the Michigan Court of Claims and requested an emergency motion for declaratory judgment. See Appx. 35a-53a. The case was assigned to Judge Cynthia Stephens.

Judge Stephens denied the Plaintiffs' motion for emergency injunctive relief for three reasons. *First*, Judge Stephens held, "the relief requested [can] not issue against the Secretary of State." Appx. 7a. This is so, Judge Stephens concluded, even though Secretary of State Benson is Michigan's "chief election officer" responsible for overseeing the conduct of Michigan elections, which includes the obligation to exercise supervisory authority over local election officials. *Second*, Judge Stephens denied the relief requested in the verified petition because Judge Stephens ruled the Jessica Connarn sworn affidavit was hearsay. See Appx. 5a-6a. *Finally*, Judge Stephens denied the Plaintiffs' motion because she concluded this matter is moot. Appx. 7a. Judge Stephens is wrong on all three points. The Plaintiffs bring this Application for Leave to Appeal under Rule 7.305 and their Motion for Immediate Consideration under Rule 7.311(E). Immediate consideration is sought because this concerns the conduct of the general election and the Electoral College meets on December 14.

STATEMENT OF THE MATERIAL PROCEEDINGS AND FACTS

There is a difference between a ballot and a vote. A ballot is a piece of paper. A vote is a ballot that has been completed by a citizen registered to vote who is eligible to cast a ballot and who cast that ballot in compliance with Michigan election law by, among other things, verifying

their identity and casting the ballot on or before Election Day. The Michigan election code provides detailed rules for the conduct of elections. The Michigan election code must be uniformly and equally followed by all Michigan election authorities so that all Michigan voters have an equal opportunity to cast a lawful ballot.

It is the task of Secretary Benson and Michigan election officials acting under her supervision and direction to assure that only ballots cast by individuals entitled to cast a vote are counted, that all ballots cast by lawful voters are counted, and that the election is uniformly and equally conducted in accord with the United States Constitution, Michigan's Constitution, and Michigan's election code.

A fraudulent ballot, if counted, negates a lawful vote cast by a Michigan citizen. Ballots that are ineligible to be counted will cancel out ballots eligible voters cast, effectively disenfranchising Michigan citizens who cast lawful votes. Challengers play an important role in assuring the transparency and integrity of elections. The role of challengers is so important that Michigan law provides it is a felony punishable by up to two years in state prison for any person to threaten or intimidate a challenger or prevent a challenger from exercising their rights or failing to provide a challenger with "conveniences for the performance of the[ir] duties." MCL 168.734.

Unfortunately, some local election jurisdictions, including Wayne County, did not conduct the general election as required by Michigan law. And Secretary of State Benson did not require local election jurisdictions to allow challengers to meaningfully observe the conduct of the election and the tabulation and tallying of ballots.

Among other violations of Michigan's election code, election officials in Wayne County refused to permit statutorily designated challengers from meaningfully observing the conduct of the election and the processing and tabulation of ballots. Some election officials pre-dated ballots

that were not eligible to be counted by altering the date the ballot was received. And challengers were not allowed to review any video recordings of the remote unattended ballot drop boxes. See verified complaint, Appx. 39a-40a.¹

The Plaintiffs brought this action in the Court of Claims asking the court to order Secretary Benson to direct local election officials and election inspectors to provide challengers meaningful access to observe the counting of absentee ballots. See Appx. 37a-39a ¶¶10-15. The Plaintiffs filed a verified complaint sworn and attested to by Eric Ostergren. Appx. 43a. See also MCR 600.6434(2). The complaint was supported with an affidavit and an exhibit. See Appx. 57a-59a. In her affidavit, Jessica Connarn swore that she personally witnessed a poll worker's distress because that poll worker was instructed to count ineligible ballots being tallied as lawful votes at the Detroit central counting board. Appx. 57a. The verified complaint explained that the counting board had excluded Republican challengers from being able to meaningfully observe the

¹ See also affidavits in support of complaint filed in the U.S. District Court for the Western District of Michigan in *Donald J. Trump for President, Inc., et al. v. Benson, et al.*, No. 1:20CV1083 (W.D. Mich. filed Nov. 11, 2020), Exhibit 1, ECF No. 1-1 (Deluca aff. ¶¶7-9, 16-18; Langer aff. ¶3; Papsdorf aff. ¶3; Frego aff. ¶9; Downing aff. ¶¶2-9, 11, 15, 22; Sankey aff. ¶¶5-8; Ostin aff. ¶¶5-7; Cavaliere aff. ¶3; Cassin aff. ¶4; Rose aff. ¶18; Zimmerman aff. ¶8; Langer aff. ¶3; Poplawski aff. ¶3; Henderson aff. ¶7; Fuqua-Frey aff. ¶5; Ungar aff. ¶4; Eilf aff. ¶¶9, 17; Jeup aff. ¶¶6-7; Tietz aff. ¶¶9-18; McCall aff. ¶¶5-6; Arnoldy aff. ¶¶5, 8-9) (regarding Republican challengers not being admitted to ballot counting boards). See also *id.* (Pettibone aff. ¶3; Kinney aff., p. 1; Wasilewski aff., p. 1; Schornak aff. ¶¶18-19; Dixon aff., p. 1; Kolanagireddy aff., p. 1; Kordenbrock aff. ¶¶3-4; Seidl aff., p. 1; Kerstein aff. ¶4; Harris aff. ¶3; Sitek aff. ¶4) (regarding lack of bipartisan teams of election workers duplicating ballots). See also *id.* (A. Seely aff. ¶15; Wasilewski aff., p. 1; Schornak aff. ¶13; Brunell aff. ¶¶17, 19; Papsdorf aff. ¶3; Spalding aff. ¶¶8, 11; Antonie aff. ¶3; Daavettala aff., p. 3; Atkins aff. ¶3; Harris aff. ¶3; Sherer aff. ¶21; Drzewiecki aff. ¶¶5-6; Klamer aff. ¶4; Rauf aff. ¶¶9-14; Roush aff. ¶¶5-7; Kinney aff. ¶5) (regarding ballot numbers not matching ballot envelopes and challengers thereto ignored). See also *id.* (Henderson aff. ¶8) (regarding counting table of election workers having lost eight ballot envelopes). See also *id.* (Meyers aff. ¶3, 4, 7) (regarding ballot drop box). See also affidavits submitted in support of complaint in *Costantino, et al. v. City of Detroit, et al.*, No. 20-014780-AW (Wayne County Circuit Court filed Nov. 8, 2020).

processing of absentee ballots and that challengers were not allowed to observe the video surveillance of remote unattended ballot drop boxes. Appx. 35a ¶2, 37a ¶11, 39a ¶16.

The verified complaint and motion seeking emergency relief was filed November 4, the day after the general election when the Wayne County central counting board was still processing absent voter ballots. This case was assigned to Judge Cynthia Stephens. Judge Stephens held a hearing on November 5 and issued an opinion and order on November 6. Judge Stephens denied the Plaintiffs' emergency motion for declaratory judgment. See Appx. 3a. The Plaintiffs immediately filed an emergency appeal. Appx. 13a. On December 4, the Court of Appeals, in a two-to-one decision held that the "action by the Michigan State Board of Canvassers clearly rendered plaintiff's claims for relief moot" and Michigan law "requires plaintiff to pursue its fraud allegations by way of a recount of the ballots cast in Wayne County." Appx. 2a. "Because plaintiff failed to follow the clear law in Michigan relative to such matters," the Court of Appeals concluded, "their action is moot." *Id.* Judge Meter dissented and wrote, "[t]he issues are not moot because state electors have not yet been seated, the Electoral College has not yet been assembled, and Congress has not yet convened to consider whether to exercise its powers under Art. 2, Sec. 1 and Am 20. *Id.* "Further," Judge Meter stated, "plaintiff's prayer for segregation of absentee ballots has, on information, not yet been ordered by defendant Secretary of State. Also, the right of plaintiff to election inspectors and to observe video of ballot drop boxes is self-evident under state law, thus entitling plaintiff to, at the least, declaratory relief." *Id.*

An absent voter ballot, unlike a ballot cast in person, is not cast by an eligible voter who presents himself or herself at the polling place and validates their bona fides as an eligible voter with identification confirmed by a bipartisan team of election officials who also confirm the individual is an eligible registered voter whose name is in the poll book. Rather, an absent voter

ballot is delivered to the election inspectors by mail or by being deposited in an unattended remote ballot drop box.

Michigan's election code vests Secretary of State Jocelyn Benson, as Michigan's "chief election officer," with the responsibility to direct and oversee Michigan counties', townships', and villages' conduct of elections. Michigan's election code contains a host of provisions intended to prevent fraudulent or ineligible ballots from being counted. Michigan election law also requires that challengers be allowed to observe the casting, processing, and certification of ballots and that the remote and unattended ballot drop boxes be secure and monitored by video. Because Secretary Benson did not require local election officials to allow challengers to meaningfully observe the conduct of the election and the video surveillance of the remote, unattended ballot drop boxes, the Plaintiffs brought this action.

STANDARD OF REVIEW

Plaintiffs filed an "emergency motion for declaratory relief under MCR 2.605(D)." Appx. 3a. This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Id.* (citing *Groncki v Detroit Edison*, 453 Mich 644, 649; 557 NW2d 289 (1996)). See also *Michigan Alliance for Retired Americans v Secretary of State*, 2020 Mich App LEXIS 6931, *12 (Oct. 16, 2020) ("[t]his Court reviews de novo a trial court's decision on a motion for summary disposition in an action seeking declaratory relief.") (citing *League of Women Voters of Michigan v Secretary of State*, 2020 Mich App LEXIS 709, *7 (Jan. 27, 2020)). Constitutional issues and issues of statutory construction are reviewed de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001) ("this case

presents a constitutional question which we review de novo”); *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003) (“This case presents an issue of statutory interpretation...which we review de novo.”) (citing *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002)).

Although this Court generally reviews “a trial judge’s evidentiary decisions for an abuse of discretion,” *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790, 794 (2016), this Court “review[s] de novo whether the trial judge properly interpreted and applied the rules of evidence to the facts.” *Mitchell v Kalamazoo Anesthesiology*, 321 Mich App 144, 154; 908 NW2d 319 (2017) (citing *Elher*, 499 Mich at 21; and *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007)). “An error of law may lead a trial court to abuse its discretion...” *Donkers*, 277 Mich App at 369 (quoting *Gawlik v Rengachary*, 270 Mich App 1, 8; 714 NW2d 386 (2006)). “A trial judge abuses his or her discretion when the judge selects an outcome that is outside the range of principled outcomes.” *Mitchell*, 321 Mich App at 153-54 (citing *Elher*, 499 Mich at 21).

ARGUMENT

I. **Jocelyn Benson, as Michigan’s Secretary of State and “Chief Election Officer,” is the proper defendant.**

A. **Secretary of State Jocelyn Benson is Michigan’s “Chief Election Officer” required to enforce Michigan election law in a uniform and equal manner throughout the state.**

Michigan’s Legislature entrusted the conduct of elections to three administrative bodies who report to the Secretary of State: a “board of inspectors,” a “board of county canvassers,” and the “board of state canvassers.” The board of inspectors, among its other duties, canvasses the ballots and compares the ballots to the poll books. See MCL 168.801. “Such canvass shall be public and the doors to the polling places and at least 1 door in the building housing the polling places and giving ready access to them shall not be locked during such canvas.” *Id.* The members

of the board of inspectors (one from each party) are required to seal the ballots and election equipment and certify the statement of returns and tally sheets and deliver the statement of returns and tally sheet to the township or city clerk, who shall deliver it to the probate court judge, who will then deliver the statement of returns and tally sheet to the “board of county canvassers.” MCL 168.809. “All election returns, *including poll lists, statements, tally sheets, absent voters’ return envelopes bearing the statement required [to cast an absentee ballot] ... must be carefully preserved.*” MCL.168.810a and 168.811 (emphasis added).

Each county has a board of county canvassers, which is “responsible for canvassing the votes cast within the county [it] serve[s]. The Board members certify elections for local, countywide and district offices which are contained entirely within the county they serve. The Board members are also responsible for inspecting the county’s ballot containers every four years.” *Michigan Election Officials’ Manual*, p. 5. See also MCL 168.821, *et seq.*

After the board of inspectors completes its duties, the board of county canvassers is to meet at the county clerk’s office “no later than 9 a.m. on the Thursday after” the election. November 5, 2020 is the date for the meeting. MCL 168.821. The board of county canvassers has power to summon and open ballot boxes, correct errors, and summon election inspectors to appear. Among other duties and responsibilities, the board of county canvassers shall do the following provided in MCL 168.823(3).

The board of county canvassers shall correct obvious mathematical errors in the tallies and returns. The board of county canvassers may, if necessary for a proper determination, summon the election inspectors before them, and require them to count any ballots that the election inspectors failed to count, to make correct returns in case, in the judgment of the board of county canvassers after examining the returns, poll lists, or tally sheets, the returns already made are

incorrect or incomplete, and the board of county canvassers shall canvass the votes from the corrected returns. In the alternative to summoning the election inspectors before them, the board of county canvassers may designate staff members from the county clerk's office to count any ballots that the election inspectors failed to count, to make correct returns in case, in the judgment of the board of county canvassers after examining the returns, poll lists, or tally sheets, the returns already made are incorrect or incomplete, and the board of county canvassers shall canvass the votes from the corrected returns. When the examination of the papers is completed, or the ballots have been counted, they shall be returned to the ballot boxes or delivered to the persons entitled by law to their custody, and the boxes shall be locked and sealed and delivered to the legal custodians.

The county board of canvassers shall "conclude the canvass at the earliest possible time and in every case no later than the fourteenth day after the election," which this year is November 17. MCL 168.822(1). But, "[i]f the board of county canvassers fails to certify the results of any election for any office or proposition by the fourteenth day after the election as provided, the board of county canvassers shall immediately deliver to the secretary of the board of state canvassers all records and other information pertaining to the election. The board of state canvassers shall meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records from the board of county canvassers." MCL 168.822(2).

The Michigan board of state canvassers then meets at the Secretary of State's office the twentieth day after the election to announce its determination of the canvass "not later than the fortieth day after the election." For this general election this year those dates are November 23 and December 3, respectively. MCL 168.842. Michigan law provides the Secretary of State may

direct an expedited canvass of the returns for the election of electors for President and Vice President.

Jocelyn Benson is Michigan's Secretary of State and is the "chief election officer" responsible for overseeing the conduct of Michigan elections. MCL 168.21 ("The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act."); 168.31(1)(a) (the "Secretary of State shall ... issue instructions and promulgate rules ... for the conduct of elections and registrations in accordance with the laws of this state").

Local election officials must follow Secretary Benson's instructions regarding the conduct of elections. Michigan law directs Secretary Benson to "[a]dvice and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). See also *Hare v Berrien County Board of Election*, 373 Mich 526, 530-31; 129 NW2d 864 (1964); *Davis v Secretary of State*, 2020 Mich App LEXIS 6128, at *9 (Sep. 16, 2020). With regard to absent voter ballots, for example, this Court has recently recognized that Secretary Benson "has issued instructions to clerks to transmit a ballot to a voter by mail only where adequate time exists for the voter to receive the ballot by mail, vote, and return the ballot before 8:00 p.m. on election day." *Michigan Alliance for Retired Americans*, 2020 Mich. App. LEXIS 6931, at *5.

Secretary Benson is responsible for assuring Michigan's local election officials conduct elections in a fair, just, and lawful manner. See MCL 168.21; 168.31; 168.32. See also *League of Women Voters of Michigan v Secretary of State*, 2020 Mich App LEXIS 709, *3 (Jan. 27, 2020); *Citizens Protecting Michigan's Constitution v Secretary of State*, 322 Mich App 561, 566, 585-85; 922 NW2d 404 (2018), *aff'd* 503 Mich 42; 921 NW2d 247 (2018); *Fitzpatrick v Secretary of State*, 176 Mich App 615, 618-19; 440 NW2d 45 (1989). Secretary Benson directly oversees and

supervises the work of election inspectors, counting boards, the boards of county canvassers and the board of state canvassers. Secretary Benson is the official ultimately responsible for ensuring that challengers be permitted to meaningfully observe the canvassing process at all levels.

Secretary Benson agrees that “Michigan election law designates the Secretary of State as Michigan's ‘chief election officer’ with *supervisory control over local election officials in the performance of their election related duties.*”² See also *Powell v Benson*, No. 2:20CV11023 (E.D. Mich. May 19, 2020), ECF No. 31, Consent Decree ¶15 (“Defendant Secretary Benson is the chief election officer of the State of Michigan and has supervisory control over local election officials in the performance of their duties under the Michigan Election Law, MCL 168.1 *et seq.* In this capacity, she oversees Michigan’s absentee voting program and maintains and operates the Secretary of State’s voter information website.”).³

Secretary Benson’s website also states, “Jocelyn Benson is Michigan’s 43rd Secretary of State. In this role she is focused on ensuring elections are secure and accessible, and dramatically improving customer experiences for all who interact with our offices.”⁴ The website continues, “Benson is the author of *State Secretaries of State: Guardians of the Democratic Process*, the first major book on the role of the secretary of state in *enforcing election and campaign finance laws.*” *Id.* (emphasis added).

According to Secretary Benson’s website, “Michigan's elections system is administered by 1,603 county and local election officials making it the most decentralized elections system in the

² *Michigan’s Election System Structure Overview*, Secretary of State website at: https://www.michigan.gov/sos/0,4670,7-127-1633_8716-27476--,00.html (emphasis added).

³ Available at: https://www.michigan.gov/documents/sos/consent_decree_696315_7.pdf.

⁴ *Michigan Secretary of State Jocelyn Benson*, Secretary of State website at: https://www.michigan.gov/sos/0,4670,7-127-1640_9105---,00.html.

nation.”⁵ Michigan elections are run “primarily by more than 1,500 city and township clerks, with 83 county clerks also carrying significant responsibilities.” *Testimony of Jocelyn Benson Before the Committee on House Administration*, United States Congress (May 8, 2019), pp. 1-2.⁶ Requiring all candidates and voters to sue every local election jurisdiction in Michigan (as Judge Stephens apparently believed) is contrary to Secretary Benson’s acknowledged responsibility to enforce Michigan election law and oversee local election officials conducting the election under her supervision.

Secretary Benson has agreed in a pending federal case, that it is not necessary to name as a separate defendant every one of (or even some of) Michigan’s eighty-three local election jurisdictions or Michigan’s more than 1,520 election officials. See *Daunt v. Benson*, No. 1:20CV522 (W.D. Mich. 2020), pending before Federal District Judge Jonker in the U.S. District Court for the Western District of Michigan. In *Daunt*, a Michigan registered voter did name local election jurisdictions in addition to Secretary Benson. Secretary Benson stipulated that, “Plaintiff and State Defendants agree that the County Defendants are not necessary parties to this litigation. Though the city and county clerks play a role, the Secretary of State has the ultimate responsibility for maintaining Michigan’s voter rolls.” ECF No. 27 (filed Sept. 17, 2020). The local election officials and jurisdictions were dismissed and the case proceeded against just Secretary Benson.

Despite Secretary Benson’s authority and responsibility as Michigan’s “chief election officer,” Judge Stephens denied the request for an injunction because “the day-to-day operation of an absent voter counting board is controlled by the pertinent city or township clerk” and “the relief

⁵ Available at: https://www.michigan.gov/sos/0,4670,7-127-1633_8716-27476--,00.html.

⁶ Available at: https://www.michigan.gov/documents/sos/SOS_Benson_Testimony_CHA_Hearing_05_08_19_654675_7.pdf.

requested [can] not issue against the Secretary of State, who is the only named defendant in this action....” Appx. 5a, 7a.

Judge Stephens denied the motion for emergency declaratory judgment, in part, because she concluded that the Plaintiffs “have not presented this Court with any statute making the Secretary of State responsible for maintaining a database of [ballot drop] boxes,” and because Judge Stephens believed Plaintiffs have not “directed the Court’s attention to any authority directing the Secretary of State to segregate the ballots that come from such drop-boxes, thereby undermining plaintiffs’ request to have such ballots segregated...and rendering it impossible for the Court to grant the requested relief against this defendant.” Appx. 6a-7a. Judge Stephens, thus, held that “the relief requested [can]not issue against the Secretary of State, who is the only named defendant in this action....” *Id.* at 7a.

But, less than a week earlier, on October 29, 2020, in *Carra*, Judge Stephens issued an order, acknowledged and cited in her opinion, that Secretary Benson was directed to require local election officials to provide poll challengers meaningful access provided the challengers wore face masks and practiced social distancing. Appx. 5a (“the Court notes that recent guidance from the Secretary of State, as was detailed in matter before this Court in *Carra et al v. Benson et al*, Docket No. 20-000211-MZ, expressly advised local election officials to admit credentialed election challengers, provided that the challengers adhered to face-covering and social-distancing requirements”). Judge Stephens’ order in *Carra v. Benson* directed Secretary Benson to instruct local election authorities to admit challengers. This is the precise relief, in part, these Plaintiffs requested in their emergency motion. In *Carra v. Benson*, Judge Stephens entered a Stipulated Final Order on November 10, 2020. The Order stated Secretary Benson “shall issue amended

written guidance to local election officials” regarding access of poll challengers and watchers.⁷ Judge Stephens’ order in *Carra* further provided Secretary Benson “shall provide this amended directive to local election officials in a manner most likely to ensure timely receipt.” Order of November 10, 2020 in *Carra v. Benson*. Judge Stephens Order further stated that it would be enforced through contempt of court proceedings. *Id.* Clearly in *Carra v. Benson*, Judge Stephens believed Secretary Benson was the proper defendant and that Judge Stephens had jurisdiction and authority to direct Secretary Benson to issue an amended directive to local election officials.

So why did Judge Stephens adopt a contrary holding here? There is no rational basis for doing so. Judge Stephens’ decision in this case is wrong. Judge Stephens’ decision is contrary to Michigan’s election code, contrary to Secretary Benson’s own declarations and contrary to Judge Stephens’ own prior decision in *Carra*. Accordingly, this Court should reverse the Court of Claims’ decision holding that the “relief requested [can]not issue against the Secretary of State....” Appx. 7a.

⁷ Judge Stephens’ amended order further provided:

“Challengers / Poll Watchers: Challengers and poll watchers have their rights and responsibilities established under law. Challengers and poll watchers are required to wear masks that cover their nose and mouth unless they cannot medically tolerate a face covering. Challengers and poll watchers who cannot medically tolerate a face covering should wear a face shield if possible. Election workers may require that challengers and poll watchers observe proper social distancing, meaning that challengers and poll watchers should maintain at least six (6) feet of distance between themselves and election workers, as much as possible. However, challengers may stand in closer proximity to election workers to have a challenge heard, observe the poll book, or perform other tasks established under law provided that these close personal interactions are as brief as reasonably possible. Once a challenge, observation, or other permitted task is complete, challengers and poll watchers should resume remaining six (6) feet away from voters and poll workers.

B. Michigan's election code provides for the critically important role of challengers as a bipartisan safeguard to secure free and fair elections.

Challengers provide the transparency and accountability to assure ballots are lawfully cast and counted as provided in Michigan's election code and voters can be confident the outcome of the election was honestly and fairly determined by eligible voters. Challengers representing a political party, candidate, or organization interested in the outcome of the election provide a critically important role in protecting the integrity of elections including the prevention of voter fraud and other conduct (whether maliciously undertaken or by incompetence) that could affect the conduct of the election. See MCL 168.730-738.

In her recent testimony before Congress, Secretary Benson emphasized the importance of protecting the bipartisan conduct of elections.

Although we all aspire to bipartisanship when it comes to strengthening our democratic institutions, election security is an area where we cannot afford to be divided. Without a functioning voting system, which the American people trust to deliver accurate results, we cannot maintain a representative democracy.

Despite the politically charged environment, I am encouraged by the bipartisanship and spirit of cooperation that exists among election officials in our state and across the country, particularly when it comes to election security.

*Testimony of Jocelyn Benson Before the Committee on House Administration,
United States Congress (May 8, 2019), p. 6.⁸*

Bipartisan measures protecting election integrity comprise a fundamental and significant part of the Michigan election code. For example, MCL 168.765a requires that absent voter counting boards be composed of bipartisan teams of election inspectors.

At all times, at least 1 election inspector from each major political party must be present at the absent voter counting place and the policies and procedures adopted by the secretary of state regarding the counting of absent voter ballots must be followed.

⁸ Available at: https://www.michigan.gov/documents/sos/SOS_Benson_Testimony_CHA_Hearing_05_08_19_654675_7.pdf.

Michigan absent voter counting boards, under the authority of Secretary Benson, did not comply with this statute. These boards were processing and tallying ballots without inspectors from each party being present. Former Detroit Director of Elections Daniel Baxter testified at the Michigan board of state canvassers' November 23 meeting that the law (MCL 168.765a) was not followed. Former Detroit Director of Elections Baxter testified that the Wayne County counting board proceeded to process and tally absent voter ballots without bipartisan teams. Board of state canvassers member Norman Shinkle questioned Former Director Baxter about the lack of Republican poll workers.

Norman Shinkle: Are you familiar with the law that says each major party should have one person of each party in every poll precinct?

Daniel Baxter: Yes, I am familiar with that.

Norman Shinkle: Okay, is it your opinion that we had 134 Republicans at the AB count board on election night?

Daniel Baxter: No there were not 134 Republicans at the Central Counting Board on November 2nd, 3rd, or the 4th.

Norman Shinkle: In your opinion, why wasn't the law followed in your opinion?

Daniel Baxter: Well, when we went to recruit Republican poll workers, we could not get the allotted number of poll workers to make sure that there were enough at each one of the tabulation stations – at each one of the central counting boards – and as such, we had to govern ourselves based upon standard operational procedures, which means that we continue to move forward with the tabulation of absentee ballots with the staff that we received, recruited, and trained.⁹

Michigan law also requires that challengers be allowed to observe and challenge the conduct of the election. A political party, incorporated organization, or organized committee of interested citizens may designate one “challenger” to serve at each counting board. MCL 168.730.

⁹ Video of November 23, 2020 meeting of Michigan Board of State Canvassers, available at: <https://www.youtube.com/watch?v=lytepDbGK5E>.

Michigan's election code provides that challengers shall have the following rights and responsibilities:

- a. An election challenger shall be provided a space within a polling place where they can observe the election procedure and each person applying to vote. MCL 168.733(1).
- b. An election challenger must be allowed opportunity to inspect poll books as ballots are issued to electors and witness the electors' names being entered in the poll book. MCL 168.733(1)(a).
- c. An election Challenger must be allowed to observe the manner in which the duties of the election inspectors are being performed. MCL 168.733(1)(b).
- d. An election challenger is authorized to challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector. MCL 168.733(1)(c).
- e. An election challenger is authorized to challenge an election procedure that is not being properly performed. MCL 168.733(1)(d).
- f. An election challenger may bring to an election inspector's attention any of the following: (1) improper handling of a ballot by an elector or election inspector; (2) a violation of a regulation made by the board of election inspectors with regard to the time in which an elector may remain in the polling place; (3) campaigning and fundraising being performed by an election inspector or other person covered by MCL 168.744; and/or (4) any other violation of election law or other prescribed election procedure. MCL 168.733(1)(e).
- g. An election challenger may remain present during the canvass of votes and until the statement of returns is duly signed and made. MCL 168.733(1)(f).
- h. An election challenger may examine each ballot as it is being counted. MCL 168.733(1)(g).
- i. An election challenger may keep records of votes cast and other election procedures as the challenger desires. MCL 168.733(1)(h).
- j. An election challenger may observe the recording of absent voter ballots on voting machines. MCL 168.733(1)(i).

Part of the county canvass process is "examin[ation of] the 'Challenged Voters' and 'Challenged Procedures' sections of the Poll Book" and absent voter ballot challenges. *Boards of County Canvassers Manual*, ch. 4, p. 13. Review of absent uniformed services voter or overseas

voter ballots was still ongoing when Judge Stephens held her November 5 hearing. Review of these ballots must be performed by bipartisan teams of election inspectors. See MCL 168.733. Challengers must be allowed to oversee the conduct of the election to assure transparency and public confidence in the conduct of the election. See *id.* The Michigan board of state canvassers is “responsible for approv[ing] voting equipment for use in the state, certify[ing] the result of elections held statewide” *Michigan Election Officials’ Manual*, p. 4. See also MCL 168.841, *et seq.*

Jessica Connarn is an attorney who was a Republican challenger at the TCF Center in Wayne County. Appx 73a. Jessica Connarn’s affidavit describes how an election poll worker (an election inspector) told Jessica Connarn that the poll worker “was being told to change the date on ballots to reflect that the ballots were received on an earlier date.” *Id.* ¶1. Jessica Connarn also provided a photograph of a note handed to her by the poll worker in which the poll worker indicated she (the poll worker) was instructed to change the date ballots were received. See *id.* at 73a-75a. Jessica Connarn’s affidavit demonstrates that poll workers in Wayne County were pre-dating absent voter ballots, so that absent voter ballots received after 8:00 p.m. on Election Day could be counted.

Secretary Benson failed to direct that local election officials must allow challengers to observe the video surveillance of remote, unattended ballot drop boxes. Michigan’s election code, MCL 168.932(f) prohibits “A person other than an absent voter,” and certain others, such as an immediate family member, from possessing and returning an absent voter ballot. See also *Michigan Alliance for Retired Americans*, 2020 Mich App LEXIS 6931, at *23-24 (“On balance, the ballot-handling restrictions pass constitutional muster given the State’s strong interest in preventing fraud.”). In prior litigation Judge Stephens invalidated this law that was intended to

prevent vote fraud and “ballot harvesting.” This Court overturned Judge Stephens finding that she did not have authority to modify the Michigan Legislature’s laws governing the conduct of the election. Ballot harvesting, which Michigan law forbids, and this Court upheld, is especially relevant to remote, unattended ballot drop boxes.

In October 2020, the Michigan Legislature amended Michigan’s election code to allow election authorities to establish remote unattended ballot drop-off boxes. See MCL 168.761d. A remote, unattended ballot drop box is equivalent to a polling place where a person can deposit a ballot. But, unlike a polling place, there is no validation that the individual depositing a ballot in the box is an individual who is qualified to cast a vote or to lawfully deliver a ballot cast by a lawful voter.

The Michigan Constitution’s “purity of elections” clause states, “the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.” Const. 1963, art 2, §4(2). “The phrase ‘purity of elections’ does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state.” *Barrow v Detroit Election Comm.*, 305 Mich App 649, 676; 854 NW2d 489 (2014). Michigan statutes protect the purity of elections by allowing ballot challengers and bipartisan election inspectors to monitor absentee ballots at counting boards and the video surveillance of remote, unattended ballot drop boxes. This did not happen because Secretary Benson did not direct that local election officials under her direction and authority make sure challengers could observe these aspects of the conduct of the election.

II. Judge Stephens wrongly dismissed Plaintiffs' action as moot.

Judge Stephens erroneously held this case has been mooted and relief unavailable because the counting of ballots “is now complete.” Appx. 7a. This action was filed on November 4, the day after the election when Wayne County was still processing ballots. Appx. 12a. While it may be true that by the time Judge Stephens held a hearing on the afternoon of November 5, the initial counting of absent voter ballots had been largely completed, the work of the election inspectors was still ongoing and the preliminary ballot tallies had not yet been provided to the Wayne County board of county canvassers. Additionally, at the time of the hearing, the overseas and military absent voter ballots had not yet been processed or tallied.

The Michigan Supreme Court recognizes that it “does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us *unless* the issue is one of public significance that is likely to recur, yet evade judicial review.” *Paquin v City of St. Ignace*, 504 Mich 124, 149; 934 NW2d 650 (2019) (quoting *Federated Publications, Inc. v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002)) (emphasis added).

A party seeking to dismiss an action as moot – especially one of such profound importance as the laws governing the conduct of elections – must satisfy a “heavy burden required to demonstrate mootness.” *Paquin*, 504 Mich at 131, n.4 (citing *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 255; 701 NW2d 144 (2005); see also *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc.*, 465 Mich 303, 306-307; 633 NW2d 357 (2001) (“[T]o get an appeal dismissed as moot, thus depriving a party seeking redress of a day in court, the party urging mootness on the court must make a very convincing showing that the opportunity for an appellate court to review the matter should be denied. Not surprisingly, it is rare for a court to grant such a motion.”)).

This election is still not over, and the Electoral College does not meet until December 14. Additionally, there are countless opportunities for the issues brought up in this case to arise again. As we all know, Michigan conducts a presidential election every four years, United States House of Representative elections occur every two years, and United States Senate elections every six years. Michigan state and local governments conduct their own elections even more frequently.

The “challenged action [will be] in its duration too short to be fully litigated prior to cessation or expiration.” *Paquin*, 504 Mich at 144. Here, the “challenged action” is preventing designated challengers from meaningfully observing the processing of absent voter ballots and from reviewing the video surveillance of remote unattended ballot drop boxes. This case was filed less than twenty-four hours after the Wayne County counting board began excluding challengers from the TCF Center, and the election inspectors continued counting without bipartisan teams and without allowing challengers to be present. This failure to comply within Michigan law cannot be litigated on Election Day or the day after it occurs. For this reason, *Paquin* and other cases recognized that an election ending does not make a case moot. *Gleason v Kincaid*, 323 Mich App 308, 316; 917 NW2d 685 (2018) (rejecting mootness argument on appeal because “the strict time constraints of the election process necessitate that, in all likelihood, such challenges often will not be completed before a given election occurs”); see also *Rosario v Rockefeller*, 410 US 752, 756 n.5 (1973) (noting that “[a]lthough the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is ‘capable of repetition, yet evading review.’”).

The Michigan Supreme Court in *Paquin* noted that there is some disagreement among courts about “whether the issue must be likely to recur as to the particular party involved in the case.” *Paquin*, 504 Mich at 145. The *Paquin* court appears to have adopted this requirement,

although with relaxed standards. Federal courts have done the same. See, e.g., *Moore v Ogilvie*, 394 US 814, 816 (1969) (applying the “capable of repetition, yet evading review” exception without examining the likelihood of the plaintiffs running for office in the future); *Merle v United States*, 351 F3d 92, 95 (3rd Cir. 2003) (holding that the case was not moot because it was reasonable to expect that the plaintiff would seek to run for office again); *Lawrence v Blackwell*, 430 F3d 368, 371 (6th Cir. 2005) (“[a]lthough Lawrence has not specifically stated that he plans to run in a future election, he is certainly capable of doing so, and under the circumstances it is reasonable to expect that he will do so.”). Secretary Benson has two years left in her current term and will be supervising and directing many elections during this time.

Judge Stephens was wrong to deny the Plaintiffs’ complaint and motion for emergency declaratory judgment to be moot. Likewise, this appeal is not moot.

III. Jessica Connarn’s sworn affidavit is not hearsay.

The Plaintiffs submitted a sworn affidavit executed by Michigan attorney Jessica Connarn in support of their motion. Jessica Connarn was a Republican challenger at the TCF Center in Wayne County where absent voter ballots were processed. Appx. 73a. Jessica Connarn’s affidavit describes how an election poll worker told Jessica Connarn that the poll worker “was being told to change the date on ballots to reflect that the ballots were received on an earlier date.” *Id.* ¶1. Jessica Connarn also presented physical evidence – a photograph of a note handed to her by the poll worker in which the poll worker indicated she (the poll worker) was instructed to change the date ballots were received. See *id.* at 73a-75a. Jessica Connarn attempted to speak with the poll worker again in order to get the poll worker’s name, photo, and additional information, but “upon returning to see if the poll worker was still at her location, I noticed the poll worker was moved up on to the adjudication stage where we were not able to communicate with her.” *Id.* at 74a ¶4.

Jessica Connarn's affidavit describes a first-hand experience Jessica Connarn had with a specific election official and included physical evidence (a written note) the election official gave Jessica Connarn. Jessica Connarn observed that poll workers were being told to change the dates on ballots and that when Jessica Connarn investigated the situation, she swore in her affidavit that she was "yelled at" and told to go away. Jessica Connarn's affidavit and the note are available at Appx. 73a-75a.

Judge Stephens believed Jessica Connarn's affidavit was "inadmissible as hearsay." Appx. 6a. Judge Stephens wrote that "plaintiffs have not presented an argument as to why the Court should consider the [supplemental evidence], given the general prohibitions against hearsay evidence." *Id.* Judge Stephens is wrong.

First, Jessica Connarn's affidavit is "relevant evidence." Michigan Rule of Evidence 401 provides, "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." And Rule 402 provides, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." Jessica Connarn swore she witnessed election officials in Detroit unlawfully predated and counting ballots that were not eligible to be counted as votes. Jessica Connarn's sworn statement is "relevant evidence" under Michigan's Rules of Evidence.

Second, Jessica Connarn's sworn statement describing the events she personally observed is not "hearsay." Judge Stephens erred when she refused to consider Jessica Connarn's affidavit. Michigan Rule of Evidence 801 defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted.” Furthermore, Michigan’s Rule of Evidence 803(1) and (2), provide “[t]he following are not excluded by the hearsay rule,” including “a statement describing an event or condition, or immediately thereafter, ... a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Michigan Rule of Evidence 803(24) provides, “ A statement ... having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interest of justice will best be served by the admission of the statement into evidence.”

Jessica Connarn swore that she observed an election official telling her that the election official was directed to pre-date and count ballots that were unlawfully cast after the election day deadline. Jessica Connarn also swore that the election official was crying and distressed because the election official was being asked to do something that was illegal. And Jessica Connarn swore the election official handed her a note saying the election official was directed to falsely pre-date absent voter ballot envelopes. The note the election official handed Jessica Connarn was attached as an exhibit to Jessica Connarn’s affidavit. This is not hearsay. This is first-hand personal testimony describing what Jessica Connarn witnessed.

Jessica Connarn’s affidavit was sworn “firsthand personal knowledge...of what she physically observed....” Appx. 17a (transcript p. 11). Judge Stephens was wrong to characterize Jessica Connarn’s affidavit as hearsay. This Court should review the Court of Claims’ decision de novo. See *Mitchell*, 321 Mich App at 153-54. See also Federal Rule of Evidence 801. Hearsay is a statement that meets two requirements – it must be a statement other than one made by the declarant while testifying at trial and it must be offered “to prove the truth of the matter asserted

in the statement.” See Federal Rule of Evidence 801(a) to (c). See also *Williamson v United States*, 512 US 594, 598-99 (1994) (holding that declarations such as those Jessica Connarn provided are not hearsay).

Hearsay is a statement “offered in evidence to prove the truth of the matter asserted.” *People v Douglas*, 496 Mich 557, 573; 852 NW2d 587 (2014). See also MRE 801. “MRE 801(a) defines a statement for hearsay purposes as: (1) an oral or written assertion or, (2) nonverbal conduct of a person, if it is intended by him as an assertion. Crying can hardly be considered an oral or written assertion....” *People v Davis*, 139 Mich App 811, 812; 363 NW2d 35 (1984). “The record before us is void of any indication that the victim intended to make an assertion by her spontaneous act of crying. This is an instance of behavior so patently involuntary that it cannot by any stretch of the imagination be treated as a verbal assertion by the victim within the scope of MRE 801(a)(2).” *Id.* at 813. Jessica Connarn observed a distressed election inspector who was crying because she was directed to do something that was dishonest – pre-dating absent voter ballot envelopes and counting those ballots when the ballot was not eligible to be counted. This observation is not hearsay. *Id.*

Jessica Connarn’s first-hand personal observations of activity at the TCF Center and the statements of the election official are not hearsay. *People v Corridore*, 2019 Mich App LEXIS 3537, at *41 (June 27, 2019) (observations are not hearsay); *People v Silver*, 2015 Mich App LEXIS 1504, at *7 (July 28, 2015) (same).

Jessica Connarn’s affidavit provides her first-hand observations of events she personally observed and stated Jessica Connarn’s personal observations and her present sense impression and

statement of the events Jessica Connarn observed. This is not hearsay. MRE 801(a).¹⁰ Jessica Connarn's affidavit also presented physical evidence – the photograph Jessica Connarn took of the note written by an election official. See Appx. 73a-75a. Jessica Connarn affirms and swears to what she personally saw and heard. Jessica Connarn also swears she was “yelled at by the other poll workers” and told to leave. These are words Jessica Connarn heard and conduct of election officials that Jessica Connarn personally observed. Appx. 73a ¶2. See also MRE 801(c). Jessica Connarn also personally observed that the poll worker who handed her the note “was nearly in tears” because the election inspector had been directed by her superiors to pre-date absent voter ballot envelopes and count ballots that were not eligible to be counted. Appx. 73a ¶1. This observation is not hearsay. See *People v Davis*, 139 Mich App at 812-13 (“MRE 801(a) defines a statement for hearsay purposes as: (1) an oral or written assertion or, (2) nonverbal conduct of a person, if it is intended by him as an assertion. Crying can hardly be considered an oral or written assertion.... The record before us is void of any indication that the victim intended to make an assertion by her spontaneous act of crying. This is an instance of behavior so patently involuntary that it cannot by any stretch of the imagination be treated as a verbal assertion by the victim within the scope of MRE 801(a)(2).”). Jessica Connarn swore the poll worker “slipped me a note.” Appx. 73a ¶2. These are all first-hand, personal observations of conduct. Because Jessica Connarn's sworn personal, first-hand observations are not hearsay, Judge Stephens was wrong to deny the Plaintiffs' motion on the erroneous supposition that Jessica Connarn's sworn statement was “hearsay.” The U.S. Supreme Court in *Williamson*, 512 U.S. at 598, stated,

¹⁰ Furthermore, Jessica Connarn's statements were in an affidavit in support of a motion for emergency declaratory judgement. They were not an in-court statement subject to cross-examination. Judge Stephens should have convened a hearing and heard the testimony of Jessica Connarn and other witnesses. The affidavit and the verified complaint are sufficient to grant the emergency declaratory injunction.

The hearsay rule, Fed. Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements — the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine — are generally absent for things said out of court.

None of these hazards are present in the sworn statements made by Jessica Connarn, nor in the statement made by the election official who provided a hand-written note to Jessica Connarn.

CONCLUSION AND RELIEF SOUGHT

The conduct of the general election in Wayne County was a disaster. The Wayne County board of county canvassers found that more than seventy-one percent of the precincts did not balance. More than *seventy-one percent!* A precinct is out of balance when the number of ballots counted does not equal the number of names on the pollbook. Some precincts were out of balance by as many as six hundred votes. See testimony during Wayne County board of county canvassers on November 23, 2020. See note 9, *supra*. See also Appx. 169a (affidavit of William Hartmann ¶6). See also Appx. 174a (affidavit of Monica Palmer ¶7).

Two members of the Wayne County board of county canvassers, Chairwoman Monica Palmer and Member William Hartmann, voted to not certify the ballot tally. Chairwoman Palmer and Member Hartmann were personally harassed and threatened during the public comment portion of the meeting and received a number of threats against them and their family. Then, after a closed-door meeting in which the two Democratic members agreed to have Secretary Benson conduct an audit of Wayne County's election, Chairwoman Palmer and Member Hartmann agreed to certify the ballot tally. But Secretary Benson then said she would not conduct an audit of the Wayne County election. Chairwoman Palmer and Member Hartmann then withdrew their votes to certify the ballot tally. See Appx. 173a (affidavit of William Hartmann) and Appx. 176a

(affidavit of Monica Palmer). The matter then went to the board of state canvassers, where Vice-Chair Aaron Van Langevelde stated he understood his role was merely ministerial and he did not have the option of not certifying the Michigan state ballot tally. Another member, Norman Shinkle, would not vote to certify the ballot tally and abstained.¹¹

At a Michigan House of Representatives Oversight Committee hearing held on December 2, 2020, several witnesses described misconduct that occurred at the Wayne County central counting board at the TCF Center in Detroit.¹² Jessy Sunny Jacobs testified that Supervisor Carol Aldridge ordered Jacobs not to invalidate any ballots, not to look for deficiencies, and not to check signatures. When Jessy did any of these things, Aldridge became angry with her.¹³ Jacobs also testified that she put a sticky note on a ballot because it was an invalid ballot and that her supervisor wanted her to back-date the ballot. At the time, Daniel Baxter and Christopher Thomas were nearby, and Jacobs gave Baxter the ballot she had marked as invalid.¹⁴ Jacobs also testified that the director of elections, George Azus, gave her some ballots to work on and that Aldridge said instructed her not to write anything mark the ballots with post-it notes.¹⁵ Jacobs also testified that signatures on the ballot envelopes were totally different, but that when she showed this to Thomas, Thomas said to let it go, telling Jacobs, “why should we punish voters for processor’s mistakes.”¹⁶

¹¹ See November 23 meeting minutes, available at: https://www.michigan.gov/sos/0,4670,7-127-1633_41221---,00.html.

¹² YouTube RSB Network recording, available at: <https://www.youtube.com/watch?v=5LEbmQaMO5M>.

¹³ *Id.* at 1:13 (video time reference).

¹⁴ *Id.* at 1:15.

¹⁵ *Id.* at 1:22.

¹⁶ *Id.* at 1:33.

Jacobs testified that she felt intimidated and harassed.¹⁷ Jacobs further testified that only Democratic poll workers processed absent voter ballots.¹⁸

Witness Melissa Carone testified that two vans pulled up late at night at the TCF Center at approximately 4:00 a.m.¹⁹ Carone testified that the vans were supposed to contain food, but the vans, in fact, brought ballots to the TCF Center.²⁰ Witness Hima Kolanagireddy testified that she observed stacks of ballots being counted several times and that this happened three-to-four times an hour.²¹ Kolanagireddy testified that an overcount resulted when poll workers re-scanned ballots because poll workers had the option to discard a ballot if it jammed in the tabulator and make it zero, but poll workers also had an option to continue and re-scan the ballot.²² When the poll worker chose to continue and put the ballots in the tabulator again, the tabulator would add and re-scan all of the ballots.²³ Kolanagireddy also testified that Democratic challengers were “agitators” whose only purpose was to intimidate Republican challengers.²⁴ Republican challengers were getting removed for not having a full face mask, not being six feet away, and having a phone out.²⁵ Kolanagireddy testified that when she wore the GOP tag, poll workers told her stay back six feet, but when she wore the non-partisan tag, the poll workers were respectful.²⁶

¹⁷ *Id.* at 1:22.

¹⁸ *Id.*

¹⁹ *Id.* at 1:47.

²⁰ *Id.*

²¹ *Id.* at 2:15.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 2:20.

²⁵ *Id.*

²⁶ *Id.* at 2:22.

Witness Andrew Sitto testified that he volunteered at the TCF Center and that, at 4:30 a.m., there was an announcement for a new shipment of ballots arriving.²⁷ Sitto witnessed former Detroit Elections Director Daniel Baxter carrying boxes of ballots from the rear of the basement to the counting tables. Each box had about 600 ballots.²⁸ Sitto testified that at 6:00 a.m., there was a shift change, and Daniel Baxter announced on the microphone that “this is what democracy is supposed to look like,” and everyone cheered.²⁹ Sitto also testified that there was an imbalance of Democratic and Republican poll workers on multiple shifts.³⁰ Sitto also testified that none of the duplicate ballots processed between 6:00 a.m. and 2:00 p.m. had votes for Trump. Sitto only saw one duplicate ballot with a vote for Trump during his time at the TCF Center.³¹ Sitto also testified that poll workers changed duplicate ballots to straight Democratic tickets and that every challenge he made was refused.³² Sitto witnessed poll workers making duplicates of duplicate ballots.³³ Sitto testified that he witnessed poll workers re-scanning ballots and double-counting of ballots that jammed in the tabulators.³⁴

Witness Col. Phil Waldron testified that the examination of the tabulations revealed a discrepancy in the forensic examination.³⁵ Col. Waldon found the discrepancies in the tabulation tapes in one machine, which did not meet with the standards of the federal election commission

²⁷ *Id.* at 2:24.

²⁸ *Id.*

²⁹ *Id.* at 2:26.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 2:27.

³³ *Id.* at 2:28.

³⁴ *Id.*

³⁵ *Id.* at 3:06.

and was far outside the limits of the 1 in 25,000 vote error rate.³⁶ Based on that, Col. Waldron, he would want to reexamine the other machines.³⁷ Col. Waldron further testified that the voting system is highly vulnerable, and that a USB drive is the easiest way to access the system and that Dominion machines all work off USB drives.³⁸

Monica Palmer, Chairwoman of the Wayne County board of county canvassers, testified at the hearing that the primary election resulted in 76% of the absentee precincts for the City of Detroit being un-recountable because the precinct counts were out of balance without explanation.³⁹ Palmer testified that she was present at the TCF Center on the night of the election. Palmer testified she saw five ballot containers with red labels, stating “do not use.”⁴⁰ The ballot containers were damaged, with welding on the back side not completed, which allowed for the sliding of paper in and out of the back of the containers.⁴¹ Palmer testified that the ballots in those will not be recountable and that the ballot chain of custody was broken.⁴² Palmer further testified that the board of county canvassers did not get the corrected statement of voters until thirteen days after the election.⁴³ The canvassing board was not provided with a written executive summary of the vote tally even though Palmer requested one.⁴⁴ The oral report showed that 71% of the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 3:18.

³⁹ *Id.* at 3:34.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 3:40.

⁴⁴ *Id.*

counting boards were unbalanced without explanation.⁴⁵ Palmer testified that she originally voted to not certify the Wayne County ballot tally because the board had less than twenty-four hours to get corrected voter lists and because going through 134 counting boards to examine those differences is insufficient time.⁴⁶ Palmer testified that she believed the canvassing board needed ten more days to reconcile those errors.⁴⁷

This is no way to conduct an election. Irrespective of the ultimate outcome of this presidential election and the election of the United States Senator to represent Michigan and the election of candidates in the other state and federal races on the November 3 general election ballot, the conduct of this election, especially in Wayne County, is an embarrassment to the State of Michigan and undermines the confidence Michigan citizens have in the integrity of Michigan elections. Kicking challengers and observers out of counting boards and denying challengers a meaningful opportunity to observe the conduct of the election and tallying of ballots further undermines confidence in the integrity of the election. If there is nothing to hide in the tallying of ballots, why prevent challengers from observing the processing and tabulating of ballots?

The complaint and motion President Trump's campaign committee and Eric Ostergren filed and the relief they seek is not moot. This Court is asked to reverse Judge Stephens' order denying the Plaintiffs' motion. This Court is asked to restore public confidence in Michigan elections by issuing a decision holding that Michigan's Secretary of State must assure the local election officials she oversees and supervises comply with Michigan's election laws and provide

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

challengers a meaningful opportunity to perform the important role Michigan law designates for challengers.

We ask this Court to find that Secretary Benson violated the Michigan Constitution and Michigan election law by allowing absent voter ballots to be counted without allowing challengers to observe the processing and tallying of the ballots and without allowing challengers to observe the surveillance video of the remote unattended ballot drop boxes. Secretary Benson's failure to supervise and direct the manner in which local election officials conducted the election undermines the constitutional right of all Michigan voters to participate in fair and lawful elections.

The Plaintiffs ask this Court to reverse Judge Stephens' decision and order that designated challengers must be granted meaningful access to observe and review the tabulation and processing of absent voter ballots. The Plaintiffs ask this Court to order that the Secretary of State direct the election officials she oversees and supervises to assure that challengers have the meaningful ability to observe the processing and tabulation of absent voter ballots and to allow challengers to observe the surveillance video recordings of remote unattended ballot drop boxes.

Dated: December 7, 2020

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on December 7, 2020, he served the foregoing Application for Leave to Appeal via email and by means of the Court's electronic filing system to Erik A. Grill, Assistant Attorney General, Civil Litigation, Elections, & Employment Division at grille@michigan.gov, and Heather Meingast, Assistant Attorney General, at meingasth@michigan.gov.

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