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

SARAH STODDARD and ELECTION INTEGRITY FUND,

Plaintiffs,

v.

CITY ELECTION COMMISSION of the City of Detroit, JANICE WINFREY, in her official capacity as Detroit City Clerk and chairperson of the City Election Commission, and WAYNE COUNTY BOARD OF CANVASSERS,

Defendants,

v.

DNC,

Defendant-Intervenor.
_____/

Case No. 20-014604-CZ
Hon. Timothy M. Kenny, Chief Judge

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DEFENDANT-INTERVENOR DNC'S
MOTION FOR SUMMARY DISPOSITION

Defendant-Intervenor DNC, by and through its attorneys, moves for summary disposition of Plaintiffs' Complaint pursuant to MCR 2.116(C)(8) because Plaintiffs' lawsuit is moot, Plaintiffs lack standing, and Plaintiffs have otherwise failed to state a claim upon which relief can be granted.

The DNC sought concurrence from opposing counsel pursuant to the local rules, and concurrence was denied, making this motion necessary.

Accordingly, for the reasons stated in the accompanying brief, the DNC requests that the Court grant this motion and dismiss the Complaint in its entirety with prejudice, closing the case.

Respectfully submitted,

Dated: December 15, 2020

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PROOF OF SERVICE

Scott Eldridge certifies that on the 15th day of December 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *Scott R. Eldridge*
Scott Eldridge

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DEFENDANT-INTERVENOR DNC'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

The 2020 election was hard fought, but now it is over. The votes have been cast. The results have been certified. The presidential electors have met and formally voted to award Michigan's electoral votes to Joe Biden.

Plaintiffs filed this lawsuit on November 4, 2020, raising alleged issues related to the tabulation of votes at the TCF Center absent voter counting board ("AVCB") in Detroit. Plaintiffs sought an order to halt the counting of certain ballots, to segregate such ballots, and to halt certification of the election results. At this point, Plaintiffs' lawsuit is truly moot. Even if it were not moot, it fails as a matter of law because Plaintiffs neither have standing nor present claims upon which relief can be granted. The Court should therefore grant summary disposition and dismiss Plaintiffs' Complaint with prejudice.

BACKGROUND

Plaintiffs filed this lawsuit on November 4, 2020, challenging certain alleged issues with regard to the tabulation of absentee ballots at the TCF Center AVCB in Detroit. On November 6, 2020, the Court issued an order denying Plaintiffs' motion for preliminary injunctive relief. *Stoddard v City Election Comm'n*, No. 20-014604-CZ (Mich Cir Ct, Nov 6, 2020) ("Order").

The Court found that Plaintiffs were unlikely to prevail on the merits of their claims for multiple reasons. Two are of particular relevance to this motion. Most importantly, the Court found that Plaintiffs had not pled any cognizable cause of action. Rather, they sought "discovery in hopes of finding facts to establish a cause of action." Order at 3. But because one cannot file a lawsuit to seek discovery to determine whether there is a claim one might file, injunctive relief was not available. *Id.* In addition, the Court found that Plaintiffs' allegations were based on a

misunderstanding of the relevant law. In particular, the Court found that the "plaintiffs misinterpret the required placement of major party inspectors at the absent voter counting board location." *Id.* at 2. The Court further found that MCL 168.765a(10) required that there be election inspectors at the TCF Center facility, that there were inspectors of both political parties at the facility, and that Plaintiffs provided no evidence that the statute had been violated. *Id.* at 2-3. The Court noted that Plaintiffs had several other avenues of seeking relief should they seek to pursue them. *Id.* at 3.

Since the Court issued its Order denying preliminary relief, Plaintiffs have taken no further action to pursue this lawsuit. Although Michigan has been subject to a blizzard of other litigation challenging its election results (none successful), Plaintiffs appear to have abandoned this action weeks ago. At the same time, they do not appear to have lost interest in the subject matter. Indeed, shortly after this Court denied Plaintiffs in this action preliminary relief, named Plaintiff Sarah Stoddard filed a separate lawsuit, featuring many of the same claims raised here, in *federal* court. See Compl, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 15, 2020) (Ex. 1). The DNC, along with the Michigan Democratic Party, moved to intervene in that case with an accompanying motion to dismiss. See Proposed Intervenor-Defs' Mot to Intervene, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (Ex. 2); Proposed Intervenor-Defs' Mot to Dismiss, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (Ex. 3). In the face of the motion to dismiss, Stoddard and her co-plaintiff promptly dismissed their action voluntarily. See Pls' Voluntary Dismissal, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (Ex. 4).

In the meantime, the post-election process ran its course. To the extent counting was not yet already complete, ballots were opened, segregated from their envelopes, and counted. On November 17, 2020, the Wayne County Board of Canvassers certified the county's election results.

On November 23, the Board of State Canvassers certified the statewide election results. The Governor thereafter issued the formal Certificate of Ascertainment and delivered it to the National Archives. Finally, on December 14, Michigan's presidential electors met and formally cast Michigan's electoral votes for Joe Biden. This was the final step in Michigan's electoral process. Michigan's 2020 presidential election is complete.[1]

Plaintiffs have not prosecuted this matter further, but they have not formally dismissed it either. Accordingly, the DNC moves the Court to formally dismiss Plaintiffs' defunct but pending claims. As noted above, the DNC reached out to Plaintiffs' counsel to determine whether Plaintiffs would agree to dismissal but was advised Plaintiffs would not agree. This motion follows.

LEGAL STANDARD

In ruling on a motion under MCR 2.116(C)(8), a court must accept all factual allegations as true and decide the motion on the pleadings alone. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-60; 934 NW2d 665 (2019) (citing *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5)). "A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint." *Id.* (citing *Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006)). A court may grant a motion under MCR 2.116(C)(8) when a claim is "so clearly unenforceable that no factual development could possibly justify recovery." *Id.* (citing *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004)). Plaintiffs cannot maintain this litigation under MCR 2.116(C)(8).

ARGUMENT

[1] The events described above are undeniably matters of common knowledge of which this Court may take judicial notice pursuant to MRE 201. See MRE 201 (providing that a court may take judicial notice of a fact that is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

I. Plaintiffs' requested relief is moot.

Michigan courts derive their authority from Const 1963, art 4. "It is well established that a court will not decide moot issues." *People v Richmond*, 486 Mich 29, 34, 782 NW2d 187 (2010); see also *In re Detmer/Beaudry*, 321 Mich App 49, 55; 910 NW2d 318 (2017), quoting *Warren v Detroit*, 471 Mich 941, 941-942; 690 NW2d 94 (2004) (MARKMAN, J., concurring) ("An 'essential element' of our courts' judicial authority is that the courts do 'not reach moot questions or declare rules of law that have no practical legal effect in a case.'"). "This is because it is the 'principal duty of this Court . . . to decide actual cases and controversies.'" *Richmond*, 486 Mich at 34, quoting *Federated Publications, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

Here, "an event [has] occur[ed] that makes it impossible for a reviewing court to grant relief," *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987). In fact, not just one but many such events have occurred. Taking them in reverse order, the presidential electors met and cast their votes, the Governor issued the formal Certificate of Ascertainment and delivered it to the National Archives, the Board of State Canvassers certified the statewide election results, and Wayne County long since opened ballots, segregated the ballots from their envelopes, counted them, and certified results.

Plaintiffs seek an order that "duplicated ballot should be served and segregated, and no further duplication of ballots should occur unless an inspector from each major party is present." Am Compl ¶ 16. Such relief is no longer available to Plaintiffs. Opened and commingled ballots (which are intentionally divorced from the voters who cast them to preserve the secrecy of the ballot) cannot now be identified to "segregate" them from the rest of the other ballots. Further, of course, results that have already been certified by law cannot now be "de-certified."

Because this Court cannot grant Plaintiffs the relief they seek, the case should be dismissed

as moot "without reaching the underlying merits." *In re Detmer/Beaudry*, 321 Mich App at 55, citing *Richmond*, 486 Mich at 35; see also *Donald J Trump for President*, No. 20-000225-MZ, slip op at 5 (denying motion seeking immediate cessation of absentee ballot counting as moot because "counting is now complete" and "it is impossible to issue the requested relief").

II. Plaintiffs lack standing to bring this claim.

Plaintiffs—Ms. Stoddard, a Michigan citizen, and EIF, a 501(c)(4) non-profit organization—lack standing to challenge alleged noncompliance with Michigan law in their effort to "protect the purity of Michigan elections." Am Compl ¶ 4. To determine whether Plaintiffs have standing, this Court must consider whether "the litigant has a special right that will be detrimentally affected in a manner distinct from the citizenry at large." *League of Women Voters v Sec'y of State*, --- NW2d ---, 2020 WL 423319, p *5 (2020) (Docket No. 350938), citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich. 349, 378; 792 NW2d 702 (2010). Here, Plaintiffs assert only a generalized grievance that could be shared by *any* Michigan citizen, and so they lack standing to bring this challenge.

Ms. Stoddard is not herself an election inspector; she is an election *challenger*. See Am Compl ¶ 4. Under Michigan law, only election inspectors are legally entitled to participate in the duplication process, and so Ms. Stoddard can claim no special right to participate in duplicating ballots. Similarly, EIF "credentialed" Ms. Stoddard, which simply allowed her to appear at the AVCB in the first place. See *id*. While Ms. Stoddard and EIF might have a genuine interest in ensuring the integrity of Michigan's elections, so does *every* Michigan citizen; Plaintiffs' claimed injury is nothing more than the generalized grievance that a law has—allegedly—not been followed. Neither Ms. Stoddard nor EIF has alleged that they have been injured in any way by the procedures at the TCF Center. But to seek relief, "a party must establish that they have special

damages different from those of others within the community." *Olsen v Chikaming Twp*, 325 Mich App 170, 193; 924 NW2d 889 (2018); see also *League of Women Voters*, 2020 WL 423319, p *6 (plaintiffs "must establish that they have been deprived of a personal and legally cognizable interest peculiar to them, individually, rather than assert a generalized grievance that the law is not being followed"). All Plaintiffs have identified in their suit is a generalized grievance, without any assertion of any particular harm to Ms. Stoddard or EIF. Plaintiffs therefore lack standing, and this Court need not proceed to the merits.

III. Plaintiffs fail to state a claim upon which relief can be granted.

The Court should also dismiss Plaintiffs' lawsuit because, as the Court previously found, "Plaintiffs' pleadings do not set forth a cause of action." Order at 2. Plaintiffs simply invited the Court to conclude that something improper occurred, without any factual allegations that would support this accusation. But complaints must have specific allegations, not general conclusions. See *Wemers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997) ("[A] complaint [must] be specific enough to reasonably inform the adverse party of the nature of the claims against him."); MCR 2.111(B)(1) (same). All Plaintiffs have here is a hunch that ballots might not have been duplicated correctly or that the process may have "invited" fraud. But "a hunch is not a basis upon which a court can grant declaratory and injunctive relief." *Duncan v Michigan*, 300 Mich App 176, 221; 832 NW2d 761 (2013). Moreover, none of the extensive litigation or intense scrutiny on Michigan's elections process in the weeks since Plaintiffs first filed this action has unearthed any credible evidence that the election was affected by fraud. Thus, not only have Plaintiffs failed to state a cognizable claim, there is no basis for finding that they credibly could state a claim (even if their Complaint were not so decidedly moot).

CONCLUSION

For the reasons stated, Defendant-Intervenor DNC respectfully submits that this Court should grant its motion for summary disposition and dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

Dated: December 15, 2020

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PROOF OF SERVICE

Scott Eldridge certifies that on the 15th day of December 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *Scott R. Eldridge*
Scott Eldridge

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ANGELIC JOHNSON and SARAH STODDARD, Plaintiffs, v. JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JEANNETTE BRADSHAW, in her official capacity as Chair of the Board of State Canvassers for Michigan, Defendants.	No. **COMPLAINT** [Civil Rights Action under 42 U.S.C. § 1983]

Plaintiffs Angelic Johnson and Sarah Stoddard (collectively referred to as "Plaintiffs"), by and through undersigned counsel, bring this Complaint against Defendants, their employees, agents, and successors in office, and in support thereof allege the following upon information and belief:

INTRODUCTION

1. Fair and honest elections are the lifeblood of our constitutional republic. Its survival depends upon it. Accordingly, the American people demand and deserve honest, fair, and transparent elections. They demand and deserve a process that ensures that their *legal* votes will count and that *illegal* votes will not. In fact, the Constitution requires it, and for good reason, as demonstrated further in this Complaint.

2. When the State legislature vests the right to vote for President in its people, as Michigan has done here, "the right to vote as the *legislature* has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added).

3. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. . . . It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush*, 531 U.S. at 104-05 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Permitting the counting of illegal votes creates the very debasement and dilution of the weight of a citizen's legal vote that the Fourteenth Amendment prohibits.

4. In Michigan, the Secretary of State, Jocelyn Benson, a registered Democrat, acting unilaterally and without legislative approval, flooded the electoral process for the 2020 general election with absentee ballots. This was accomplished by the Secretary of State's unilateral decision to send absentee ballot request forms to every household in Michigan with a registered voter (regardless of whether the voter was still alive or actually resided at that address) and to non-registered voters who were temporarily living in the State. Furthermore, the Secretary of State permitted online requests for absentee ballots without signature verification, thereby allowing for fraud in the process of obtaining an absentee ballot. These actions were not approved or authorized by the State legislature, and for good reason. Predictably, this flood of unauthorized, absentee ballots ensured the dilution of lawful votes and precipitated an unfair and dishonest 2020 general election, as the evidence adduced from the TCF Center in Detroit, Michigan proves.

5. There are a few exceptional cases in which the United States Constitution imposes a duty or confers a power on a particular branch of a State's government. Article II, section 1, clause 2 is one of them. It provides that "[e]ach State shall appoint, in such Manner as the

Legislature thereof may direct," electors for President and Vice President. Art. II, § 1, cl. 2. As the Supreme Court explained in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), this provision of the Constitution "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *Id*. at 27. A significant departure from the legislative scheme for appointing Presidential electors runs afoul of this constitutional mandate.

6. Not even the Michigan Constitution can confer extra authority on the Secretary of State to change or alter the election procedures established by the State legislature. *McPherson*, 146 U.S. at 35 (acknowledging that the State legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions"); *see also Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000).

7. And, perhaps most important for purposes of the current situation, the Secretary of State cannot rely on the declared pandemic as a rationale for circumventing the intent of the legislature and acting unilaterally to implement procedures that undermined the integrity of the 2020 general election. *Carson v. Simon*, No. 20-3139, 2020 U.S. App. LEXIS 34184, at *17-18 (8th Cir. Oct. 29, 2020) (holding that "the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid. However well-intentioned and appropriate from a policy perspective in the context of a pandemic during a presidential election, it is not the province of a state executive official to re-write the state's election code").

8. The rule of law, as established by the United States Constitution and the State legislature, dictates that the Secretary of State follow these rules. There is no pandemic exception. *See Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 2020 U.S. LEXIS 5187, at *13 (Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application for stay) ("'[T]he design of

electoral procedures is a legislative task,' including during a pandemic.") (internal citation omitted).

9. This case seeks to protect and vindicate fundamental rights. It is a civil rights action brought under the Fourteenth Amendment to the United States Constitution, Article II, section 1 of the United States Constitution, and 42 U.S.C. § 1983. Most important, this case seeks to restore the purity and integrity of elections in Michigan so that "We the people" can have confidence in their outcome and thus confidence that those who govern are doing so legitimately.

JURISDICTION AND VENUE

10. This action arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343.

11. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, by *Ex parte Young*, 209 U.S. 123 (1908), and by the general legal and equitable powers of this Court.

12. Plaintiffs' claim for an award of their reasonable costs of litigation, including attorneys' fees and expenses, is authorized by 42 U.S.C. § 1988, and other applicable law.

13. Venue is proper under 28 U.S.C. § 1391(b) because the Michigan Secretary of State and the Chair of the Board of State Canvassers for Michigan are located in this judicial district and all Defendants are residents of the State in which this district is located.

PARTIES

14. Plaintiff Angelic Johnson is an adult citizen of the United States and a resident of Macomb County, Michigan. Plaintiff Johnson is a member of Black Voices for Trump. She legally voted in the November 3, 2020 general election, and she was a poll challenger at the TCF Center.

15. Plaintiff Sarah Stoddard is an adult citizen of the United States and a resident of Wayne County, Michigan. She legally voted in the November 3, 2020 general election, and she was a poll challenger at the TCF Center.

16. Defendant Jocelyn Benson is the Michigan Secretary of State. As the Secretary of State, Defendant Benson is the State's "chief election officer" with supervisory control over local election officials in the performance of their election related duties, including supervisory control over the election officials and workers at the TCF Center.

17. Jeannette Bradshaw is the Chair of the Board of State Canvassers for Michigan. The Board of State Canvassers ("Board") is responsible for certifying Michigan election results. The Board's certification gives rise to the winning presidential candidate's selection of the 16 Michigan electors.

STATEMENT OF FACTS

18. The general election was held on November 3, 2020, and approximately 850,000 votes were reported as cast in Wayne County, Michigan. Wayne County is the most populous county in Michigan.

19. The TCF Center contained 134 Absent Voter Counting Boards ("AVCBs"), and it was the only facility within Wayne County authorized to count ballots.

20. Wayne County used the TCF Center in downtown Detroit to consolidate, collect, and tabulate all the ballots for the County.

Summary of Election Malfeasance

21. There were numerous issues of fraud and other illegal conduct occurring at the TCF Center and elsewhere during the November 3, 2020 general election.

22. On election day, election officials at the TCF Center systematically processed and

counted ballots from voters whose names failed to appear in either the Qualified Voter File ("QVF") or in the supplemental sheets. When a voter's name could not be found, the election worker assigned the ballot to a random name already in the QVF to a person who had not voted.

23. On election day, election officials within Wayne County instructed election workers to not verify signatures on absentee ballots, to backdate absentee ballots, and to process such ballots regardless of their validity.

24. After election officials announced the last absentee ballots had been received, another batch of unsecured and unsealed ballots arrived in trays at the TCF Center.

25. There were tens of thousands, if not more, of these late-arriving absentee ballots, and apparently every ballot was counted and attributed only to Democratic candidates.

26. Election officials at the TCF Center instructed election workers to process ballots that appeared after the election deadline and to falsely report that those ballots had been received before the November 3, 2020, deadline.

27. Election officials at the TCF Center systematically used false information to process ballots.

28. Many times, the election workers overrode the software by inserting new names into the QVF after the election and recording these new voters as having a birthdate of "1/1/1900," which is the "default" birthday.

29. On a daily basis leading up to the election, City of Detroit election workers and employees coached voters to vote for Joe Biden and the Democratic Party. These workers and employees encouraged voters to vote a straight Democratic Party ticket. These election workers and employees went over to the voting booths with voters to watch them vote and to coach them as to which candidate they should vote for.

30. Pamphlets promoting the Democratic Party were allowed within 100 feet, and even inside, the polls at the precincts within the City of Detroit.

31. Before and after the statutory deadline, unsecured ballots arrived at the TCF Center loading garage, not in sealed ballot boxes and with no chain of custody.

32. Election officials and workers at the TCF Center allowed ballots to be duplicated by hand without allowing poll challengers to check if the duplication was accurate. In fact, election officials and workers repeatedly obstructed poll challengers from observing. Election officials permitted thousands of ballots, if not more, to be filled out by hand and duplicated on site without oversight from poll challengers.

33. After poll challengers started discovering the fraud taking place at the TCF Center, election officials and workers locked credentialed challengers out of the counting room so they could not observe the process, during which time tens of thousands of ballots, if not more, were processed.

Suspicious Funding and Training of Election Workers

34. On September 22, 2020, the Detroit City Council approved a $1 million contract for the staffing firm P.I.E. Management, LLC to hire up to 2,000 workers to work the polls and to staff the ballot counting at the TCF Center. P.I.E. Management, LLC is owned and/or controlled by a Democratic Party operative.

35. A week after the contract was approved, P.I.E. Management, LLC began advertising for workers, stating, “Candidates must be 16 years or older. Candidates are required to attend a 3-hour training session before the General Election. The position offers two shifts and pay-rates: 1) From 7 am to 7 pm at $600.00; and 2) From 10 pm to 6 am at $650.” Consequently, these temporary workers were earning at least $50 per hour.

Forging Ballots on the QVF

36. Election officials were observed processing ballots at the TCF Center without confirming that the voter was eligible to vote.

37. Election officials were observed assigning ballots to different voters, resulting in a ballot being counted for a non-eligible voter by assigning it to a voter in the QVF who had not yet voted.

Changing Dates on Ballots

38. All absentee ballots that existed needed to be recorded by 9:00 p.m. on November 3, 2020. This had to be finished in order to have a final list of absentee voters who returned their ballots prior to 8:00 p.m. on November 3, 2020. To have enough time to process the absentee ballots, all polling locations were instructed to collect the absentee ballots from the drop-boxes once every hour on November 3, 2020.

39. On November 4, 2020, a City of Detroit election worker at the TCF Center was instructed to improperly pre-date the received date for absentee ballots as if they had been received on or before November 3, 2020. She was told to alter the information in the QVF to falsely show that the absentee ballots had been received in time to be valid. She estimates that this was done to thousands of ballots.

Double Voting

40. An election worker in the City of Detroit observed a large number of people who came to the polling place to vote in-person, but they had already applied for an absentee ballot. Election officials allowed these people to vote in-person, and they did not require them to return the mailed absentee ballot or sign an affidavit that the voter lost or "spoiled" the mailed absentee ballot.

41. This would permit a person to vote in person and also to send in his/her absentee ballot, thereby voting twice. This "double voting" was made possible by the fraudulent way in which election officials were counting and inputting ballots at the TCF Center.

42. This "double voting" fraud was exacerbated by the Secretary of State's absentee ballot scheme, as set forth further in this Complaint.

First Wave of New Ballots

43. At approximately 4:00 a.m. on November 4, 2020, tens of thousands of ballots, if not more, were suddenly brought into the counting room at the TCF Center through the back door.

44. These new ballots were brought to the TCF Center by vehicles with out-of-state license plates.

45. It was observed that all of these new ballots were cast for Joe Biden.

Second Wave of New Ballots

46. The ballot counters were required to check every ballot to confirm that the name on the ballot matched the name on the electronic poll list—the list of all persons who had registered to vote on or before November 1, 2020 (the QVF).

47. The ballot counters were also provided with supplemental sheets which had the names of all persons who had registered to vote on either November 2, 2020 or November 3, 2020.

48. The validation process for a ballot requires the name on the ballot be matched with a registered voter on either the QVF or the supplemental sheets.

49. At approximately 9:00 p.m. on Wednesday, November 4, 2020, numerous boxes of ballots were brought to the TCF Center. This was a second wave of new ballots.

50. Upon information and belief, election officials instructed the ballot counters to use the "default" date of birth of January 1, 1900, on all of these newly appearing ballots.

51. None of the names on these new ballots corresponded with any registered voter on the QVF or the supplemental sheets.

52. Despite election rules requiring all absentee ballots to be inputted into the QVF system before 9:00 p.m. on November 3, 2020, the election workers inputted all of these new ballots into the QVF, manually adding each voter to the list *after* 9:00 p.m.

53. Upon information and belief, the vast majority of these new ballots were entered into the QVF using the "default" date of birth of January 1, 1900.

54. These newly received ballots were either fraudulent or apparently cast by persons who were not registered to vote before the polls closed at 8:00 p.m. on November 3, 2020.

Concealing the Malfeasance

55. Numerous election challengers were denied access to observe the counting process by election officials at the TCF Center.

56. After denying access to the counting rooms, election officials at the TCF Center used large pieces of cardboard to block the windows to the counting room thereby preventing anyone from watching the ballot counting process.

Unsecured QVF Access

57. Whenever an absentee voter application or in-person absentee voter registration was finished, election workers at the TCF Center were instructed to input the voter's name, address, and date of birth into the QVF system.

58. The QVF system can be accessed and edited by any election processor with proper credentials in the State of Michigan at any time and from any location with Internet access.

59. This access permits anyone with the proper credentials to edit when ballots were sent, received, and processed from any location with Internet access.

60. Many of the counting computers within the counting room had icons that revealed that they were connected to the Internet.

Unsecured Ballots

61. A poll challenger witnessed tens of thousands of ballots, and possibly more, being delivered to the TCF Center that were not in any approved, sealed, or tamper-proof container.

62. Large quantities of ballots were delivered to the TCF Center in what appeared to be mail bins with open tops. See the photo of the TCF Center below:

63. These ballot bins and containers did not have lids, were not sealed, and did not have the capability of having a metal seal.

64. Some ballots were found unsecured on the public sidewalk outside the Department of Elections in the City of Detroit, reinforcing the claim that boxes of ballots arrived at the TCF Center unsealed, with no chain of custody, and with no official markings. A photograph of ballots found on the sidewalk outside of the Department of Elections appears below:

65. The City of Detroit held a drive-in ballot drop off where individuals would drive up and drop their ballots into an unsecured tray. No verification was done. This was not a secured drop-box with video surveillance. To encourage this practice, free food and beverages were provided to those who dropped off their ballots using this method.

Breaking the Seal of Secrecy

66. On multiple occasions, election officials at the TCF Center broke the seal of secrecy for ballots to check which candidates the individual voted for on his or her ballot, thereby violating the voter's expectation of privacy.

Absentee Ballot Fraud

67. Whenever a person requested an absentee ballot either by mail or in-person, that person was required to sign the absentee voter application.

68. When the voter returned his/her absentee ballot to be counted, the voter was required to sign the outside of the envelope that contained the ballot.

69. Election officials who process absentee ballots are required to compare the signature on the absentee ballot application with the signature on the absentee ballot envelope.

70. Election officials at the TCF Center instructed workers not to validate or compare signatures on absentee ballot applications and absentee ballot envelopes to ensure their authenticity and validity.

71. Michigan law requires absentee votes to be counted by election inspectors in a particular manner. It requires, in relevant part:

> (10) The oaths administered under subsection (9) must be placed in an envelope provided for the purpose and sealed with the red state seal. Following the election, the oaths must be delivered to the city or township clerk. Except as otherwise provided in subsection (12), a person in attendance at the absent voter counting place or combined absent voter counting place shall not leave the counting place after the tallying has begun until the polls close. Subject to this subsection, the

> clerk of a city or township may allow the election inspectors appointed to an absent voter counting board in that city or township to work in shifts. A second or subsequent shift of election inspectors appointed for an absent voter counting board may begin that shift at any time on election day as provided by the city or township clerk. However, an election inspector shall not leave the absent voter counting place after the tallying has begun until the polls close. If the election inspectors appointed to an absent voter counting board are authorized to work in shifts, at no time shall there be a gap between shifts and the election inspectors must never leave the absent voter ballots unattended. ***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***. A person who causes the polls to be closed or who discloses an election result or in any manner characterizes how any ballot being counted has been voted in a voting precinct before the time the polls can be legally closed on election day is guilty of a felony.

Mich. Comp. Laws § 168.765a (10) (emphasis added).

72. Pursuant to § 168.31 of the Michigan election law, the Secretary of State can issue instructions and rules consistent with Michigan statutes and the Constitution that bind local election authorities. Mich. Comp. Laws § 168.31. Likewise, pursuant to § 168.765a(13) of the Michigan election law, the Secretary can develop instructions consistent with the law for the conduct of Absent Voter Counting Boards ("AVCB") or combined AVCBs. "The instructions developed under [] subsection [13] are binding upon the operation of an absent voter counting board or combined absent voter counting board used in an election conducted by a county, city, or township." Mich. Comp. Laws § 168.765a(13).

73. The Secretary of State promulgated an election manual that requires the following:

> *Each ballot rejected by the tabulator must be visually inspected by an election inspector to verify the reason for the rejection.* ***If the rejection is due to a false read the ballot must be duplicated by two election inspectors who have expressed a preference for different political parties.*** *Duplications may not be made until after 8 p.m. in the precinct (place the ballot requiring duplication in the auxiliary bin). At an AV counting board duplications can be completed throughout the day. NOTE: The Bureau of Elections has developed a video training series that summarizes key election day management issues, including a video on Duplicating Ballots. These videos can be accessed at the Bureau of Elections web site at*

www.michigan.gov/elections; under "Information for Election Administrators"; Election Day Management Training Videos. Election Officials Manual, Michigan Bureau of Elections, Chapter 8, last revised October 2020.

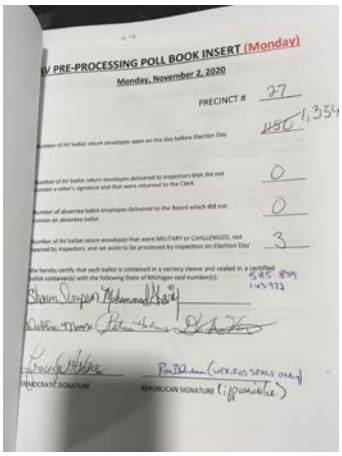
https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf (emphasis added).

74. Election officials at the TCF Center flouted § 168.765a in that there was not, at all times, at least one inspector from each political party at the absentee voter counting place. Rather, many tables were staffed by inspectors for only one party. Those inspectors alone were making decisions regarding the processing and counting of ballots.

75. This processing included the filling out of brand new "cure" or "duplicate" ballots. The process the election officials sanctioned worked in the following manner. When an absentee ballot was processed and approved for counting, it was fed into a counting machine. Some ballots were rejected—that is, they were a "false read"—because of tears, staining (such as coffee spills), over-votes, and other errors. In some of these cases, inspectors could personally and visually inspect the rejected ballot and determine what was causing the machine to find a "false read." When this happened, the inspectors could duplicate the ballot, expressing the voter's intent in a new ballot that could then be fed into the machine and counted.

76. Under § 168.765a and the Secretary of State's controlling manual, as cited above, an inspector from each major party must be present and must actually sign to show that they approve of the duplication.

77. Rather than following this controlling mandate, the AVCB was allowing a Democratic Party inspector only to fill out a duplicate. Republicans would sign only "if possible." A photograph evidencing this illicit process appears below:



78. The TCF Center election officials allowed hundreds or thousands of ballots to be "duplicated" solely by the Democratic Party inspectors and then counted in violation of Michigan election law.

79. According to eyewitness accounts, election officials at the TCF Center habitually and systematically disallowed election inspectors from the Republican Party to be present in the voter counting place and refused access to election inspectors from the Republican Party to be within a close enough distance from the absentee voter ballots to see for whom the ballots were cast.

80. Election officials at the TCF Center refused entry to official election inspectors from the Republican Party into the counting place to observe the counting of absentee voter ballots. Election officials even physically blocked and obstructed election inspectors from the Republican Party by adhering large pieces of cardboard to the transparent glass doors so the counting of absent voter ballots was not viewable.

81. Absentee ballots from military members, who tend to vote Republican in the general elections, were counted separately at the TCF Center. These ballots were supposed to be the last ones counted, but there was another large drop of ballots that occurred during the counting of the military absentee ballots. All (100%) of the military absentee ballots had to be duplicated

by hand because the form of the ballot was such that election workers could not run it through the tabulation machines used at the TCF Center. The military absentee ballot count at the TCF Center occurred when the Republican challengers and poll watchers were kicked out of the counting room.

82. Michigan election law (Mich. Comp. Laws §168.765(5)), requires City Clerks to post the following absentee voting information anytime an election is conducted which involves a State or federal office:

> a. The clerk must post before 8:00 a.m. on Election Day: 1) the number of absent voter ballots distributed to absent voters 2) the number of absent voter ballots returned before Election Day and 3) the number of absent voter ballots delivered for processing.
> b. The clerk must post before 9:00 p.m. on Election Day: 1) the number of absent voter ballots returned on Election Day 2) the number of absent voter ballots returned on Election Day which were delivered for processing 3) the total number of absent voter ballots returned both before and on Election Day and 4) the total number of absent voter ballots returned both before and on Election Day which were delivered for processing.
> c. The clerk must post immediately after all precinct returns are complete: 1) the total number of absent voter ballots returned by voters and 2) the total number of absent voter ballots received for processing.

83. Upon information and belief, the clerk for the City of Detroit failed to post by 8:00 a.m. on "Election Day" the number of absentee ballots distributed to absent voters and failed to post before 9:00 p.m. the number of absent voter ballots returned both before and on "Election Day."

84. According to Michigan Election law, all absentee voter ballots must be returned to the clerk before polls close at 8 p.m. Mich. Comp. Laws § 168.764a. Any absentee voter ballots received by the clerk after the close of the polls on election day should not be counted.

85. Michigan allows for early counting of absentee votes before the closings of the polls for large jurisdictions, such as the City of Detroit and Wayne County.

86. Poll challengers observed election workers and supervisors writing on ballots

themselves to alter them, apparently manipulating spoiled ballots by hand and then counting the ballots as valid, counting the same ballot more than once, adding information to incomplete affidavits accompanying absentee ballots, counting absentee ballots returned late, counting unvalidated and unreliable ballots, and counting the ballots of "voters" who had no recorded birthdates and were not registered in the QVF or in any supplemental sheets.

87. Upon information and belief, receiving tens of thousands more absentee ballots in the early morning hours after election day and after the counting of the absentee ballots had concluded, without proper oversight, with tens of thousands of ballots attributed to just one candidate, Joe Biden, confirms that election officials failed to follow proper election protocols and Michigan election law.

Flooding the Election with Absentee Ballots

88. Michigan does not permit "mail-in" ballots *per se*, and for good reason: mail-in ballots facilitate fraud and dishonest elections. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 256, 263 (5th Cir. 2016) (observing that "mail-in ballot fraud is a significant threat—unlike in-person voter fraud," and comparing "in-person voting—a form of voting with little proven incidence of fraud" with "mail-in voting, which the record shows is far more vulnerable to fraud").

89. Nonetheless, Defendant Benson's absentee ballot scheme, as set forth in this Complaint, achieved the same purpose as mail-in ballots, contrary to Michigan law. Moreover, this scheme was put in place because it was understood that Republican voters were more likely to vote in-person by large numbers. To counter this, Defendant Benson had to create a scheme to permit mail-in voting, resulting in the challenged absentee ballot scheme which favored Democratic voters over Republican voters.

90. In her letter accompanying her absentee ballot scheme, Defendant Benson stated,

"You have the right to vote by mail in every election." Playing on the fears created by the current pandemic, Defendant Benson encouraged voting "by mail," stating, "During the outbreak of COVID-19, it also enables you to stay home and stay safe while still making your voice heard in our elections."

91. The Michigan legislature set forth detailed requirements for absentee ballots, and these requirements are necessary to prevent voter fraud because it is far easier to commit fraud via an absentee ballot than when voting in person. *See, e.g., Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) ("Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting"). Michigan law specifically provides the following:

> (1) Subject to section 761(3), at any time during the 75 days before a primary or special primary, but not later than 8 p.m. on the day of a primary or special primary, *an elector may apply for an absent voter ballot*. *The elector shall apply in person or by mail* with the clerk of the township or city in which the elector is registered. The clerk of a city or township shall not send by first-class mail an absent voter ballot to an elector after 5 p.m. on the Friday immediately before the election. Except as otherwise provided in section 761(2), the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. An application received before a primary or special primary may be for either that primary only, or for that primary and the election that follows. An individual may submit a voter registration application and an absent voter ballot application at the same time if applying in person with the clerk or deputy clerk of the city or township in which the individual resides. Immediately after his or her voter registration application and absent voter ballot application are approved by the clerk or deputy clerk, the individual may, subject to the identification requirement in section 761(6), complete an absent voter ballot at the clerk's office.
>
> (2) Except as otherwise provided in subsection (1) and subject to section 761(3), at any time during the 75 days before an election, but not later than 8 p.m. on the day of an election, *an elector may apply for an absent voter ballot*. *The elector shall apply in person or by mail with the clerk of the township, city, or village in which the voter is registered*. The clerk of a city or township shall not send by first-class mail an absent voter ballot to an elector after 5 p.m. on the Friday immediately before the election. Except as otherwise provided in section 761(2), the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. An individual may submit a voter registration application and an absent voter ballot application at the same time if applying in person with the clerk or deputy clerk of the city or township

> in which the individual resides. Immediately after his or her voter registration application and absent voter ballot application are approved by the clerk, the individual may, subject to the identification requirement in section 761(6), complete an absent voter ballot at the clerk's office.
> (3) An application for an absent voter ballot under this section may be made in any of the following ways:
> (a) By *a written request* ***signed*** *by the voter*.
> (b) On an absent voter ballot application form *provided for that purpose by the clerk of the city or township*.
> (c) On a federal postcard application.
> (4) *An applicant for an absent voter ballot* ***shall sign*** *the application*. Subject to section 761(2), *a clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application*. A person shall not be in possession of a signed absent voter ballot application except for the applicant; a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application.
> (5) The clerk of a city or township shall have absent voter ballot application forms *available in the clerk's office* at all times and shall furnish an absent voter ballot application form to anyone *upon a verbal or written request.*

Mich. Comp. Laws § 168.759 (emphasis added).

92. The Secretary of State's absentee ballot scheme led to the Secretary of State sending millions of absentee ballot requests to individuals who did *not* request them. The Secretary of State sent absentee ballot requests to every household in Michigan with a registered voter, no matter if the voter was still alive or actually resided at that address. The Secretary of State also sent absentee ballot requests to non-residents who were temporarily living in Michigan, such as students who were not registered voters in Michigan.

93. Moreover, the Secretary of State's absentee ballot scheme permitted individuals to request absentee ballots online and without the required signature of the requestor.

94. As a result of the absentee ballot scheme, and as the Secretary of State intended, the election process was flooded with absentee ballots, many of which were fraudulent.

95. The Secretary of State's absentee ballot scheme invited the fraudulent use of absentee ballots and promoted such illicit practices as ballot harvesting.

96. The Secretary of State's absentee ballot scheme violated the checks and balances put in place by the Michigan legislature to ensure the integrity and purity of the absentee ballot process and thus the integrity and purity of the 2020 general election.

97. The abuses permitted by the Secretary of State's ballot scheme were on full display at the TCF Center, and because this absentee ballot scheme applied statewide, it undermined the integrity and purity of the general election statewide.

Irreparable Harm to Plaintiffs and All Legal Voters

98. Plaintiffs voted for the Republican Party candidates during the 2020 general election. Specifically, Plaintiffs voted for Donald J. Trump for President and John James for the United States Senate. But for the unlawful acts set forth in this Complaint, President Trump would have won Michigan's 16 electoral votes and John James would have been elected to the United States Senate, thereby promoting Plaintiffs' political interests.

99. The unlawful acts set forth in this Complaint have caused, and will continue to cause, Plaintiffs irreparable harm.

100. Based on the above allegations of fraud, statutory violations, and other misconduct, it is necessary to order appropriate relief, including, but not limited to, enjoining the certification of the election results pending a full and independent investigation, ordering a recount of the election results, voiding the election and ordering a new election as permitted by law, or voiding the illicit absentee ballots to remedy the fraud.

101. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested here is granted.

FIRST CLAIM FOR RELIEF

(Due Process—Fourteenth Amendment)

102. Plaintiffs hereby incorporate by reference all stated paragraphs.

103. By reason of the aforementioned acts, policies, practices, procedures, and/or customs, created, adopted, and enforced under color of State law, Defendants have deprived Plaintiffs of the right to due process guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

104. The right of qualified citizens to vote in a State election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966); *see also Reynolds*, 377 U.S. at 554 ([“The Fourteenth Amendment protects the] the right of all qualified citizens to vote, in state as well as in federal elections.”).

105. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it “is preservative of other basic civil and political rights.” *Reynolds*, 377 U.S. at 562.

106. Voters have a right to cast a ballot in an election free from the taint of intimidation and fraud, and confidence in the integrity of our electoral processes is essential to the functioning of our constitutional republic.

107. Included within the right to vote, secured by the Constitution, is the right of qualified voters within a State to cast their ballots and have them counted if they are validly cast. The right to have the vote counted means counted at full value without dilution or discount.

108. Every voter in a federal election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.

109. Invalid or fraudulent votes debase and dilute the weight of each validly cast vote.

110. The right to an honest count is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.

111. Practices that promote the casting of illegal or unreliable ballots, or fail to contain basic minimum guarantees against such conduct, such as the Secretary of State's absentee ballot scheme, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

112. The Due Process Clause of the Fourteenth Amendment protects the right to vote from conduct by State officials which undermines the fundamental fairness of the electoral process.

113. Separate from the Equal Protection Clause, the Fourteenth Amendment's Due Process Clause protects the fundamental right to vote against the disenfranchisement of a State electorate.

114. When an election process reaches the point of patent and fundamental unfairness, as in this case, there is a due process violation.

115. As a result, the right to vote, the right to have one's vote counted and the right to have one's vote given equal weight are basic and fundamental constitutional rights incorporated in the Due Process Clause of the Fourteenth Amendment.

116. Defendants have a duty to guard against the deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or election tampering. The Secretary of State failed in her duty, and if the Board of State Canvassers certifies the 2020 general election, it will have failed in its duty.

117. The actions of election officials and the Secretary of State's absentee ballot scheme have caused the debasement and dilution of the weight of Plaintiffs' votes in violation of the Due Process Clause of the Fourteenth Amendment.

118. As a direct and proximate result of Defendants' violation of the Due Process Clause, Plaintiffs have suffered irreparable harm, including the loss of their fundamental constitutional rights, disparate treatment, and dilution of their lawful votes, entitling them to declaratory and injunctive relief.

SECOND CLAIM FOR RELIEF

(Equal Protection—Fourteenth Amendment)

119. Plaintiffs hereby incorporate by reference all stated paragraphs.

120. By reason of the aforementioned acts, policies, practices, procedures, and/or customs, created, adopted, and enforced under color of State law, Defendants have deprived Plaintiffs of the equal protection of the law guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

121. The actions of election officials and the Secretary of State's absentee ballot scheme have caused the debasement and dilution of the weight of Plaintiffs' votes in violation of the equal protection guarantee of the Fourteenth Amendment.

122. As a direct and proximate result of Defendants' violation of the Equal Protection Clause, Plaintiffs have suffered irreparable harm, including the loss of their fundamental constitutional rights, disparate treatment, and dilution of their lawful votes, entitling them to declaratory and injunctive relief.

THIRD CLAIM FOR RELIEF

(Article II, section 1, clause 2)

123. Plaintiffs hereby incorporate by reference all stated paragraphs.

124. By reason of the aforementioned absentee ballot scheme created, adopted, and enforced by the Secretary of State under color of State law and without legislative authorization, Defendant Benson violated Article II, section 1, clause 2 of the United States Constitution and 42 U.S.C. § 1983.

125. As a direct and proximate result of Defendant Benson's violation of the United States Constitution, Plaintiffs have suffered irreparable harm, including the loss of their fundamental constitutional rights, disparate treatment, and dilution of their lawful votes, entitling them to declaratory and injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

A) to declare that Defendants violated Plaintiffs' fundamental constitutional rights as set forth in this Complaint;

B) to declare the Secretary of State's absentee ballot scheme unlawful;

C) to enjoin Defendants from finally certifying the election results and declaring winners of the 2020 general election until an independent audit to ensure the accuracy and integrity of the election is performed. To perform the audit, Plaintiffs request the appointment of a special master to investigate all claims of fraud in Wayne County, specifically including claims of fraud at the TCF Center, and to verify and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme throughout the State. The special master may issue a recommendation, including a recommendation with findings that illegal votes can be separated from legal votes to determine a proper tabulation, or that the fraud is of such a character that the correct vote cannot be determined;

D) alternatively, to enjoin Defendants from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to review and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme;

E) alternatively, to enjoin Defendants from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to independently review the election procedures employed at the TCF Center;

F) alternatively, to enjoin Defendants from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to review and certify the legality of all absentee ballots submitted in Wayne County;

G) to award Plaintiffs their reasonable attorney fees, costs, and expenses pursuant to 42 U.S.C. § 1988 and other applicable law;

H) to grant such other and further relief as this Court should find just and proper.

Respectfully submitted,

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EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELIC JOHNSON and SARAH STODDARD, Plaintiffs, v. JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JEANNETTE BRADSHAW, in her official capacity as Chair of the Board of State Canvassers for Michigan, Defendants.	CIVIL ACTION Case No. 1:20-cv-01098-JTN-PJG Hon. Janet T. Neff

PROPOSED INTERVENOR-DEFENDANTS' MOTION TO INTERVENE

EXPEDITED CONSIDERATION REQUESTED

Proposed Intervenor-Defendants DNC Services Corporation/Democratic National Committee and Michigan Democratic Party ("Proposed Intervenors") seek to participate as intervening defendants in the above-captioned lawsuit to safeguard the substantial and distinct legal interests of themselves, their member candidates, and their member voters, which will otherwise be inadequately represented in the litigation. For the reasons discussed in the memorandum in support, filed concurrently herewith, Proposed Intervenors are entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, Proposed Intervenors request permissive intervention pursuant to Rule 24(b).

Proposed Intervenors respectfully request that the Court set an expedited schedule regarding this motion to intervene to allow for their participation in any briefing schedules and hearings that are held. Otherwise, Proposed Intervenors' substantial constitutional rights are at risk

of being severely and irreparably harmed, as described more fully in the memorandum in support of this motion.

WHEREFORE, Proposed Intervenors request that the Court grant them leave to intervene in the above-captioned matter and to file their proposed motion for extension of time to file a responsive pleading (Ex. 1) and either their motion to dismiss (Ex. 2) or, in the alternative, their pre-motion conference request (Ex. 3).

Dated: November 18, 2020.

Respectfully submitted,

/s/ *Scott R. Eldridge*

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*Admission pending

CERTIFICATE OF SERVICE

Scott R. Eldridge certifies that on the 18th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

/s/ *Scott R. Eldridge*
Scott R. Eldridge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELIC JOHNSON and SARAH STODDARD, Plaintiffs, v. JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JEANNETTE BRADSHAW, in her official capacity as Chair of the Board of State Canvassers for Michigan, Defendants.	CIVIL ACTION Case No. 1:20-cv-01098-JTN-PJG Hon. Janet T. Neff

PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Proposed Intervenor-Defendants DNC Services Corporation/Democratic National Committee ("DNC") and Michigan Democratic Party ("MDP," and together, "Proposed Intervenors") move to intervene as defendants in this lawsuit. Through this action, Plaintiffs seek to disrupt Michigan's lawful certification of ballots, based on nothing more than rank speculation, questionable evidence, and fundamentally flawed legal claims. Proposed Intervenors represent a diverse group of Democrats, including elected officials, candidates, members, and voters. Plaintiffs' requested relief—wholesale disenfranchisement of more than 5 million Michiganders—threatens to deprive Proposed Intervenors' individual members of the right to have their votes counted, undermine the electoral prospects of their candidates, and divert their limited organizational resources. Proposed Intervenors' immediate intervention to protect those interests is warranted.

Per Rule 24(c) and this Court's Information and Guidelines for Civil Practice § IV(A)(1), attached are a proposed motion for extension of time to file a responsive pleading (Ex. 1), proposed motion to dismiss (Ex. 2), and proposed pre-motion conference request (Ex. 3).

II. BACKGROUND

A. The Election

On November 3, 2020, Michiganders voted in one of the most scrutinized elections in recent history, one that yielded record turnout amid an ongoing pandemic. Despite unprecedented levels of observation and supervision, tall tales of phantom fraud have spread widely in the weeks since election day, including in Michigan, where current tallies have President-elect Joe Biden leading by nearly *150,000 votes*. *See Michigan Election Results*, N.Y. Times, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-michigan.html (Nov. 18, 2020). The *Detroit Free Press* has reported that "Michigan has been no stranger to election-related falsehoods." *Clara Hendrickson* et al., *Michigan Was a Hotbed for Election-Related Misinformation: Here Are 17 Key Fact Checks*, Detroit Free Press (Nov. 9, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/11/09/misinformation-michigan-16-election-related-fact-checks/6194128002. The paper has also debunked rumors spread on social media and elsewhere, *see id.*—including several among the allegations in Plaintiffs' complaint. *See* Compl., ECF No. 1.

Indeed, although Plaintiffs' allegations are rife with stories of fraud undertaken by election workers at TCF Center, where Detroit's absentee ballots were processed, this impression could not be further from the truth. More than 100 Republican election challengers[1] observed the vote

[1] Election "challengers" are volunteers appointed by political parties or other organized groups who can observe the tabulation of absentee ballots and make challenges under certain

tabulation on election day, *see* Aff. of David Jaffe ("Jaffe Aff.") ¶ 7 (attached as Ex. 4), and Donna MacKenzie, a credentialed challenger, attested that "there were many more Republican Party challengers than Democratic Party challengers" when she observed the count on November 4. Aff. of Donna M. MacKenzie ("MacKenzie Aff.") ¶ 6 (attached as Ex. 5).[2] David Jaffe, another credentialed challenger at TCF Center who observed the processing of ballots on November 2, 3, and 4, has attested to his "perception that all challengers had a full opportunity to observe what was going on and to raise issues with supervisors and election officials." Jaffe Aff. ¶ 10. Ms. MacKenzie further attested that "the ballot counting process was very transparent," that challengers "were given the opportunity to look at ballots whenever issues arose," and that "[t]here were more than enough challengers to have observers at each table." MacKenzie Aff. ¶¶ 4–5, 7.

While Mr. Jaffe and his fellow challengers—Democratic and Republican alike—"observed minor procedural errors by election inspectors," they "called those errors to the attention of supervisors, and were satisfied that the supervisors had corrected the error and explained proper procedure to the election inspectors." Jaffe Aff. ¶ 12. Indeed, Mr. Jaffe "spoke with several Republican challengers who expressed their view, and in a couple of cases their surprise, that there

circumstances. *See, e.g.*, Mich. Comp. Laws §§ 168.730, 168.733. Challengers are *not* permitted to "make a challenge indiscriminately," "handle the poll books . . . or the ballots," or "interfere with or unduly delay the work of the election inspectors." *Id.* § 168.727(3). "Election inspectors," by contrast, are the poll workers appointed by local clerks who perform the tabulation duties. *See id.* § 168.677.

[2] Proposed Intervenor-Defendant Michigan Democratic Party submitted the attached affidavits of David Jaffe, Donna MacKenzie, and Joseph Zimmerman along with its opposition to the plaintiffs' motion for preliminary relief in *Costantino v. City of Detroit*, No. 20-014780-AW (Mich. Cir. Ct. Nov. 11, 2020), another challenge to Wayne County's vote tabulation and election returns currently pending in state court. The court in that case credited the testimony offered in these affidavits in denying the plaintiffs' requested relief. *See Costantino v. City of Detroit*, No. 20-014780-AW, slip op. at 12 (Mich. Cir. Ct. Nov. 13, 2020) (attached as Ex. 16); *see also Costantino v. City of Detroit*, No. 355443 (Mich. Ct. App. Nov. 16, 2020) (denying motion for peremptory reversal and application for leave to appeal) (attached as Ex. 17).

were no material issues in the counting." *Id.* Although Mr. Jaffe "received very few reports of unresolved issues from Democratic challengers," he "did receive many reports of conduct by Republican or" Election Integrity Fund ("EIF") "challengers that was aggressive, abusive toward the elections inspectors," and "clearly designed to obstruct and delay the counting of votes." Jaffe Aff. ¶ 13; *see also id.* ¶¶ 18, 20, 22–25, 30; MacKenzie Aff. ¶¶ 21–22. And although election officials attempted to maintain social distancing and other preventative measures to curb the potential transmission of COVID-19, Mr. Jaffe "observed that Republican and EIF challengers repeatedly refused to maintain the mandated distance from the elections inspectors." Jaffe Aff. ¶¶ 17–19. Consequently, some "Republican or EIF challengers were removed from the room after intimidating and disorderly conduct, or filming in the counting room in violation of the rules." *Id.* ¶ 24.

Mr. Jaffe concluded that "while some of the Republican challengers were there in good faith, attempting to monitor the procedure, the greater number of Republican and EIF challengers were intentionally interfering with the work of the elections inspectors so as to delay the count of the ballots and to harass and intimidate election inspectors." *Id.* ¶ 25. Indeed, Joseph Zimmerman, a credentialed challenger on behalf of the Lawyers Committee for Civil Rights Under Law, observed Republican challengers "discussing a plan to begin challenging every single vote on the grounds of 'pending litigation'" and then "repeatedly challenging the counting of military ballots for no reason other than 'pending litigation.'" Aff. of Joseph Zimmerman ¶ 20 (attached as Ex. 6).

B. The Lawsuits

Despite widespread acknowledgement that virtually no fraud occurred, *see, e.g.*, Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. Times (Nov. 10, 2020), https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html,

various lawsuits have been filed in Michigan in an attempt to sow confusion and cast doubt on the legitimacy of the election—including an action filed in state court by Sarah Stoddard, one of the Plaintiffs here. There, Ms. Stoddard, joined by EIF, sought to delay certification of Wayne County's election results based on some of the same allegations of fraud now rehashed in Plaintiffs' complaint. *See* Verified Compl. for Emergency & Permanent Injunctive Relief, *Stoddard v. City Election Comm'n*, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 4, 2020) (attached as Ex. 7); First Am. Verified Compl. for Emergency & Permanent Injunctive Relief, *Stoddard v. City Election Comm'n*, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 5, 2020) (attached as Ex. 8). On November 6, the Third Judicial Circuit Court for Wayne County denied their motion for injunctive relief. Chief Judge Timothy M. Kenny explained:

> This Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified. . . .
>
> A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.

Stoddard v. City Election Comm'n, No. 20-014604-CZ, slip op. at 4 (Mich. Cir. Ct. Nov. 6, 2020) (attached as Ex. 9).

Other challenges to Michigan's election procedures and results have been similarly rejected as having no legal or factual merit. On election day, the Michigan Court of Claims denied an emergency motion to increase, at the eleventh hour and without any legal justification, the number of challengers allowed at the Oakland County vote center. *See Polasek-Savage v. Benson*, No. 20-000217-MM, slip op. at 3 (Mich. Ct. Cl. Nov. 3, 2020) (attached as Ex. 10). The following day, Donald J. Trump for President, Inc. (the "Trump Campaign") sought an immediate cessation of the counting of absentee ballots based on allegations of insufficient oversight. *See* Verified Compl.

for Immediate Declaratory & Injunctive Relief, *Donald J. Trump for President, Inc. v. Benson*, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 4, 2020) (attached as Ex. 11). The Michigan Court of Claims denied the Trump Campaign's emergency motion for declaratory relief, concluding that it was unlikely to succeed on the merits and that, even "overlooking the problems with the factual and evidentiary record," the matter was moot because "the complaint and emergency motion were not filed until approximately 4:00 p.m. on November 4, 2020—despite being announced to various media outlets much earlier in the day." *Donald J. Trump for President, Inc. v. Benson*, No. 20-000225-MZ, slip op. at 5 (Mich. Ct. Cl. Nov. 6, 2020) (attached as Ex. 12). The Trump Campaign has since sought an appeal, *see* Mot. for Immediate Consideration of Appeal Under MCR 7.211(C)(6), *Donald J. Trump for President, Inc. v. Benson*, No. 20-000225-MZ (Mich. Ct. App. Nov. 6, 2020) (attached as Ex. 13), but has failed to correct numerous filing defects as requested by the Michigan Court of Appeals over a week ago, *see* Appellate Docket Sheet, *Donald J. Trump for President, Inc. v. Benson*, No. 355378 (Mich. Ct. App.) (attached as Ex. 14).[3]

MDP was granted intervention in yet another challenge to Wayne County's returns in the state court. *See Costantino v. City of Detroit*, No. 20-014780-AW, slip op. at 2 (Mich. Cir. Ct. Nov. 11, 2020) (attached as Ex. 15). On November 13, the court denied the plaintiffs' motion for preliminary injunction. After carefully reviewing the plaintiffs' affidavits and explaining why their vague allegations of suspicious conduct at TCF Center were unreliable, Chief Judge Kenny concluded that the "[p]laintiffs' interpretation of events is incorrect and not credible." *Costantino*

[3] The Trump Campaign has also raised similar claims in a recently filed action in this Court. *See* Compl. for Declaratory, Emergency, & Permanent Injunctive Relief, *Donald J. Trump for President, Inc. v. Benson*, No. 1:20-cv-01083-JTN-PJG (W.D. Mich. Nov. 11, 2020), ECF No. 1. Another group of voter plaintiffs also brought an action in this Court that raised a vote-dilution claim similar to Plaintiffs', but that action was voluntarily dismissed within five days of filing. *See* Notice of Voluntary Dismissal, *Bally v. Whitmer*, No. 1:20-cv-01088-JTN-PJG (W.D. Mich. Nov. 16, 2020), ECF No. 14.

v. City of Detroit, No. 20-014780-AW, slip op. at 2–10, 13 (Mich. Cir. Ct. Nov. 13, 2020) (attached as Ex. 16). He then observed that

> [i]t would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. . . .
>
> 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.

Id. at 11–12. The Michigan Court of Appeals denied the plaintiffs' motion for peremptory reversal and application for leave to appeal, *see Costantino v. City of Detroit*, No. 355443 (Mich. Ct. App. Nov. 16, 2020) (attached as Ex. 17), and the plaintiffs have sought review before the Michigan Supreme Court, *see* Pls./Appellants' Appl. for Leave to Appeal, *Costantino v. City of Detroit*, No. 162245 (Mich. Nov. 17, 2020) (attached as Ex. 18).

Plaintiffs here have filed yet another baseless complaint intended to disrupt the democratic process, and Proposed Intervenors move to intervene. DNC is a national political committee as defined in 52 U.S.C. § 30101 that is, among other things, dedicated to electing candidates of the Democratic Party in Michigan. MDP is the Democratic Party's official state party committee in Michigan, and its mission is to elect Democratic Party candidates to offices across Michigan, up and down the ballot. Both seek intervention on their own behalf and on behalf of their members, candidates, and voters.

III. STANDARD OF LAW

The requirements for intervention under Rule 24 "should be 'broadly construed in favor of potential intervenors.'" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991)).

To intervene as of right under Rule 24(a), the proposed intervenor must show that "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir. 1999)).

"Permissive intervention has a less exacting standard than mandatory intervention and courts are given greater discretion to decide motions for permissive intervention." *Priorities USA v. Benson*, 448 F. Supp. 3d 755, 759–60 (E.D. Mich. 2020) (citing *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)). "On a timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The interest of the intervenors, for the purposes of permissive intervention, only needs to be "distinct" from the defendants, regardless of whether it is "substantial." *Pub. Interest Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 800 (E.D. Mich. 2020) (quoting *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018)).

IV. ARGUMENT

A. Proposed Intervenors are entitled to intervene as of right.

1. The motion to intervene is timely.

First, this motion is timely. Courts consider the following factors when deciding whether a motion to intervene is timely:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to

> promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall, 226 F.3d at 472–73 (quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). "No one factor is dispositive, but rather the determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *Zelman*, 636 F.3d at 284.

Proposed Intervenors' motion is timely. It follows only 3 days after Plaintiffs filed their complaint, and before any significant action in the case has occurred. *See Priorities USA*, 448 F. Supp. 3d at 763 (concluding that it was "difficult to imagine a more timely intervention" where legislature moved to intervene twenty days after lawsuit was filed without being formally noticed). Proposed Intervenors seek to intervene to protect against irreparable harm to themselves and to safeguard their members' fundamental rights. This is unquestionably a "legitimate" purpose, and this is a case where "the motion to intervene was timely in light of the stated purpose for intervening." *Kirsch v. Dean*, 733 F. App'x 268, 275 (6th Cir. 2018) (quoting *Linton ex rel. Arnold v. Comm'r of Health & Env't*, 973 F.2d 1311, 1318 (6th Cir. 1992)). Nor is there any plausible risk of prejudice to other parties if intervention is granted. Proposed Intervenors are prepared to follow any briefing schedule the Court sets and participate in any future hearings or oral arguments, without delay. Finally, there are no unusual circumstances that should dissuade the Court from granting intervention.

2. Proposed Intervenors have significant protectable interests that might be impaired by this litigation.

Second and third, Proposed Intervenors have significant cognizable interests that might, as a practical matter, be impaired by Plaintiffs' action. Intervenors "'must have a direct and substantial interest in the litigation' such that it is a 'real party in interest in the transaction which

is the subject of the proceeding.'" *Reliastar Life Ins. Co. v. MKP Invs.*, 565 F. App'x 369, 372 (6th Cir. 2014) (citation omitted) (first quoting *Grubbs*, 870 F.2d at 346; and then quoting *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005)). The Sixth Circuit has described this requirement as "rather expansive," *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), and one that courts should "construe[] liberally." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987). For example, an intervenor need not have the same standing necessary to initiate a lawsuit, and the Sixth Circuit has rejected the notion that Rule 24(a)(2) requires a "specific legal or equitable interest." *Mich. State AFL-CIO*, 103 F.3d at 1245. The burden of establishing impairment of a protectable interest is "minimal," *id.* at 1247, and an intervenor need only demonstrate that impairment is *possible*. *See Purnell*, 925 F.2d at 948. Moreover, the Sixth Circuit "has recognized that the time-sensitive nature of a case may be a factor in our intervention analysis," *Mich. State AFL-CIO*, 103 F.3d at 1247, and has found impairment of interest where the proposed intervenor "may lose the opportunity to ensure that one or more electoral campaigns in Michigan are conducted under legislatively approved terms that [the proposed intervenor] believes to be fair and constitutional." *Id.* at 1247.

Here, Proposed Intervenors have several legally cognizable interests that might be impaired by this lawsuit. First, Plaintiffs seek to disrupt the certification of lawfully cast ballots and cast doubt on the legitimacy of the election of Proposed Intervenors' candidates. Courts have often concluded that such interference with a political party's electoral prospects constitutes a legally cognizable injury. *See, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 (5th Cir. 2006) (recognizing that "harm to [] election prospects" constitutes "a concrete and particularized injury"); *Owen v. Mulligan*, 640 F.2d 1130, 1132 (9th Cir. 1981) (holding that "the potential loss of an election" is sufficient injury to confer Article III standing). Indeed, political parties—

including Proposed Intervenors—have been granted intervention in several recent voting cases on these grounds. *See, e.g., Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting intervention to state party and party committee where "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates" (quoting *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020))).

Moreover, Plaintiffs' requested relief of halting the certification process threatens Proposed Intervenors' members' right to vote. "[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." *United States v. Saylor*, 322 U.S. 385, 387–88 (1944). In turn, the disruptive and potentially disenfranchising effects of Plaintiffs' action would require Proposed Intervenors to divert resources to safeguard the timely certification of statewide results, thus implicating another of their protected interests. *See, e.g., Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (finding concrete, particularized harm where organization had to "redirect its focus" and divert its "limited resources" due to election laws); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding that electoral change "injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent new law), *aff'd*, 553 U.S. 181 (2008); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (finding standing where law "require[d] Democratic organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources"), *rev'd on other grounds sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc); *see also Issa*, 2020 WL 3074351, at *3 (granting intervention and citing this protected interest).

3. Proposed Intervenors' interests are not adequately represented by the current parties.

Finally, Proposed Intervenors' interests are not adequately represented by Plaintiffs or Defendants. "Although a would-be intervenor is said to shoulder the burden with respect to establishing that its interest is not adequately protected by the existing parties to the action, this burden 'is minimal because it is sufficient that the movant[] prove that representation *may* be inadequate.'" *Mich. AFL-CIO*, 103 F.3d at 1247 (alteration in original) (emphasis added) (quoting *Linton*, 973 F.2d at 1319). "The question of adequate representation does not arise unless the applicant is somehow represented in the action. An interest that is not represented at all is surely not 'adequately represented,' and intervention in that case must be allowed." *Grubbs*, 870 F.2d at 347. Where one of the original parties to the suit is a government entity whose "views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it," courts have found that "the burden [of establishing inadequacy of representation] is comparatively light." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (citing *Conservation Law Found. of New Eng., Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)).

Here, while Defendants have an interest in defending the actions of state and local officials, Proposed Intervenors have different objectives: ensuring that the valid ballot of every Democratic voter in Michigan is counted and safeguarding the election of Democratic candidates. Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *accord Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'"

(quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009))). That is the case here. Proposed Intervenors have specific interests and concerns—from their overall electoral prospects to the most efficient use of their limited resources—that neither Defendants nor any other party in this lawsuit share. *See Paher*, 2020 WL 2042365, at *3 (granting intervention as of right where proposed intervenors "may present arguments about the need to safeguard [the] right to vote that are distinct from [state defendants'] arguments"). As one court recently explained under similar circumstances,

> [w]hile Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors [including a state political party] are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures. As a result, the parties' interests are neither "identical" nor "the same."

Issa, 2020 WL 3074351, at *3 (citation omitted). Because Proposed Intervenors' particular interests are not shared by the present parties, they cannot rely on Defendants or anyone else to provide adequate representation. They have thus satisfied the four requirements for intervention as of right under Rule 24(a)(2). *See id.* at *3–4; *Paher*, 2020 WL 2042365, at *3.

B. Alternatively, Proposed Intervenors should be granted permissive intervention.

Even if Proposed Intervenors were not entitled to intervene as of right, permissive intervention is warranted under Rule 24(b). "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "Permissive intervention has a less exacting standard than mandatory intervention and courts are given greater discretion to decide motions for permissive intervention." *Priorities USA*, 448 F. Supp. 3d at 759–60. Proposed intervenors need only show that their interest is "'distinct' from the

defendants, regardless of whether it is 'substantial.'" *Pub. Interest Legal Found.*, 463 F. Supp. 3d at 800 (quoting *League of Women Voters*, 902 F.3d at 579).

Proposed Intervenors easily meet these requirements. First, their motion is timely and intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See* Part IV.A.1 *supra*. Moreover, Proposed Intervenors' interests are distinct and not adequately represented by the existing defendants. *See* Part IV.A.3 *supra*. And Proposed Intervenors will undoubtedly raise common questions of law and fact in opposing Plaintiffs' suit. In addition to challenging Plaintiffs' claims as a matter of law, *see* Ex. 2, Proposed Intervenors will also submit affidavits from election volunteers refuting the complaint's baseless allegations. *See, e.g.*, Exs. 4–6.

V. CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully ask this Court to grant their motion to intervene.

Dated: November 18, 2020.

Respectfully submitted,

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*Admission pending

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELIC JOHNSON and SARAH STODDARD,

Plaintiffs,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JEANNETTE BRADSHAW, in her official capacity as Chair of the Board of State Canvassers for Michigan,

Defendants.

CIVIL ACTION

Case No. 1:20-cv-01098-JTN-PJG

Hon. Janet T. Neff

PROPOSED INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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1. This Court should abstain in deference to ongoing state court proceedings.

2. The Eleventh Amendment bars Plaintiffs' claims because this Court cannot require state officials to conform to state law.

3. Plaintiffs lack both Article III and prudential standing to bring their claims.

4. Plaintiffs' claims are barred by the equitable doctrine of laches.

5. Plaintiffs' claims fail as a matter of law.

I. INTRODUCTION

In the two weeks following election day, various groups and individuals—unwilling to accept President-elect Joe Biden's victory in Michigan—have filed baseless lawsuits to cast doubt on the election's legitimacy. In this action, Plaintiffs ask the Court to delay the lawful certification of Michigan's returns, and therefore imperil the votes of more than 5.5 million Michiganders, based on recycled and entirely unsupported allegations of electoral malfeasance. They also seek to invalidate the State's absentee ballot process in its entirety—*after* Defendants and Michigan voters relied on that process for months and the State successfully administered the election using it.

This Court should dismiss Plaintiffs' complaint for several reasons. First, it should abstain from hearing this case in deference to ongoing state court proceedings implicating the same issues and allegations Plaintiffs raise here—including a state court case brought by Plaintiff Sarah Stoddard. Second, the Eleventh Amendment prohibits Plaintiffs' suit because a federal court cannot require state officials to conform to state law. Third, Plaintiffs' claims—challenging actions that took place months and weeks ago—are barred by laches, a doctrine carrying particular force in the election context. Fourth, Plaintiffs lack Article III standing to bring their claims, and further lack prudential standing to assert the Michigan Legislature's interests. Each of these jurisdictional bars precludes this Court's adjudication of Plaintiffs' suit.

Moreover, Plaintiffs' claims fail as a matter of law. They have not stated cognizable due process and equal protection claims, and their Electors Clause claim fails because Defendant Jocelyn Benson, the Secretary of State (the "Secretary"), acted consistently with the Michigan Legislature's electoral scheme—as the Michigan Court of Appeals already held, nothing in Michigan law prohibits the Secretary from providing voters with unsolicited absentee ballot

applications. *See Davis v. Sec'y of State*, No. 354622, 2020 WL 5552822, at *7 (Mich. Ct. App. Sept. 16, 2020). Finally, Plaintiffs' requested relief—an extraordinary judicial intervention into the State's democratic process—is neither justified by their claims nor proportionate to their purported injuries. Dismissal is therefore required.

Ultimately, Plaintiffs' lawsuit is empty political theater, part of a broader and deeply troubling national effort to use the judiciary to cast doubt on the outcome of the presidential election. Having failed to secure favorable rulings in state court, Plaintiffs turn to this forum with the same meritless claims. Every other court confronted with these efforts has properly rejected them. This Court should do the same and dismiss Plaintiffs' complaint.

II. BACKGROUND

On November 3, 2020, Michiganders went to the polls and voted for President-elect Biden by a statewide margin of 2.6 percent. In Wayne County, approximately 850,000 voters cast ballots. *See* Compl., ECF No. 1, ¶ 18.

A. State Court Lawsuits

Over the subsequent two weeks, various challenges to Michigan's election procedures and results have been filed in state (and federal) courts. One such case was brought in state court by Plaintiff Stoddard. There, Ms. Stoddard sought to delay certification of Wayne County's election results based on many of the same allegations she rehashes here. *See* Verified Compl. for Emergency & Permanent Injunctive Relief, *Stoddard v. City Election Comm'n*, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 4, 2020) (attached as Ex. 7); First Am. Verified Compl. for Emergency & Permanent Injunctive Relief, *Stoddard v. City Election Comm'n*, No. 20-014604-CZ (Mich. Cir.

Ct. Nov. 5, 2020) (attached as Ex. 8).[1] On November 6, the Third Judicial Circuit Court for Wayne County denied Ms. Stoddard's motion for injunctive relief. Chief Judge Timothy M. Kenny explained,

> This Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified. . . .
>
> A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.

Stoddard v. City Election Comm'n, No. 20-014604-CZ, slip op. at 4 (Mich. Cir. Ct. Nov. 6, 2020) (attached as Ex. 9).

Other similar challenges have likewise been rejected. On election day, the Michigan Court of Claims denied an emergency motion to increase the number of challengers at the Oakland County vote center. *See Polasek-Savage v. Benson*, No. 20-000217-MM, slip op. at 3 (Mich. Ct. Cl. Nov. 3, 2020) (attached as Ex. 10). The following day, Donald J. Trump for President, Inc. (the "Trump Campaign") filed an emergency motion for declaratory relief seeking an immediate cessation of absentee ballot counting based on allegations of insufficient oversight. *See* Verified Compl. for Immediate Declaratory & Injunctive Relief, *Donald J. Trump for President, Inc. v. Benson*, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 4, 2020) (attached as Ex. 11). The Michigan Court of Claims denied the motion, concluding that the Trump Campaign was unlikely to succeed on the merits and that, even "overlooking the problems with the factual and evidentiary record," the

[1] "When considering whether to grant a Rule . . . 12(b)(6) motion," the Court may consider "matters of public record (e.g. pleadings, orders and other papers on file in another action pending in the court; records or reports of administrative bodies; or the legislative history of laws, rules or ordinances) as long as the facts noticed are not subject to reasonable dispute." *Lozar v. Birds Eye Foods, Inc.*, 678 F. Supp. 2d 589, 599 (W.D. Mich. 2009) (quoting *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029, 1032 (E.D. Wash. 2009)).

matter was moot. *Donald J. Trump for President, Inc. v. Benson*, No. 20-000225-MZ, slip op. at 5 (Mich. Ct. Cl. Nov. 6, 2020) (attached as Ex. 12). The Trump Campaign has since sought an appeal, *see* Mot. for Immediate Consideration of Appeal Under MCR 7.211(C)(6), *Donald J. Trump for President, Inc. v. Benson*, No. 355378 (Mich. Ct. App. Nov. 6, 2020) (attached as Ex. 13), but has failed to correct numerous filing defects as requested by the Michigan Court of Appeals over a week ago, *see* Appellate Docket Sheet, *Donald J. Trump for President, Inc. v. Benson*, No. 355378 (Mich. Ct. App.) (attached as Ex. 14).[2]

On November 13, the Third Judicial Circuit Court denied a motion for preliminary injunction in another challenge to Wayne County's returns. *See Costantino v. City of Detroit*, No. 20-014780-AW, slip op. at 13 (Mich. Cir. Ct. Nov. 13, 2020) (attached as Ex. 16). After reviewing the plaintiffs' affidavits and explaining why their vague allegations of suspicious conduct at TCF Center were unreliable, Chief Judge Kenny concluded that the "[p]laintiffs' interpretation of events is incorrect and not credible." *Id.* at 2–10, 13. He then observed that

> [i]t would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. . . .
>
> 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.

[2] The Trump Campaign has raised similar claims in another recently filed action in this Court. *See* Compl. for Declaratory, Emergency, & Permanent Injunctive Relief, *Donald J. Trump for President, Inc. v. Benson*, No. 1:20-cv-01083-JTN-PJG (W.D. Mich. Nov. 11, 2020), ECF No. 1. Another group of voter plaintiffs also brought an action in this Court that raised a vote-dilution claim similar to Plaintiffs' claim, only to voluntarily dismiss it days later. *See* Notice of Voluntary Dismissal, *Bally v. Whitmer*, No. 1:20-cv-01088-JTN-PJG (W.D. Mich. Nov. 16, 2020), ECF No. 14.

Id. at 11–12. The Michigan Court of Appeals later denied the plaintiffs' motion for peremptory reversal and application for leave to appeal the circuit court's order, *see Costantino v. City of Detroit*, No. 355443 (Mich. Ct. App. Nov. 16, 2020) (attached as Ex. 17), and the plaintiffs have sought review before the Michigan Supreme Court, *see* Pls./Appellants' Appl. for Leave to Appeal, *Costantino v. City of Detroit*, No. 162245 (Mich. Nov. 17, 2020) (attached as Ex. 18).

These actions remain ongoing.[3]

B. Plaintiffs' Complaint

Plaintiffs initiated their lawsuit on November 15—six months after the Secretary's announcement that absentee ballot applications would be distributed ahead of the November election, twelve days after election day, and ten days after the conclusion of vote tabulation in Michigan. Their complaint is premised on two general allegations: that the Secretary "act[ed] unilaterally and without legislative approval" when she proactively distributed absentee ballot applications to Michigan households, Compl. ¶¶ 4, 88–90, and that "[t]here were numerous issues of fraud and other illegal conduct occurring at the TCF Center and elsewhere during the . . .

[3] Similar lawsuits challenging President-elect Biden's victories in other states have been brought and rejected by courts. Some featured equal protection claims similar to Plaintiffs' claims here. *See generally, e.g.*, *Bognet v. Sec'y of Commonwealth*, No. 20-3214, 2020 WL 6686120 (3d Cir. Nov. 13, 2020) (affirming district court's denial of preliminary relief based on equal protection claim premised on vote dilution by purportedly illegal ballots); *Stokke v. Cegavske*, No. 2:20-cv-02046-APG-DJA (D. Nev. Nov. 6, 2020), ECF No. 27 (denying plaintiffs' motion for preliminary relief to halt ballot counting in Nevada); *Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections*, No. 2:20-CV-05533-PD (E.D. Pa. Nov. 5, 2020), ECF No. 5 (denying Trump Campaign's emergency motion to stop Philadelphia County Board of Elections from counting ballots); *In re Enf't of Election Laws & Securing Ballots Cast or Received After 7:00 P.M. on Nov. 3, 2020*, No. SPCV2000982-J3 (Ga. Super. Ct. Nov. 5, 2020) (denying Trump Campaign's petition to segregate certain ballots and noting that "there is no evidence the ballots referenced in the petition [were invalid]" and "there is no evidence that the [county election officials] failed to comply with the law") (attached as Ex. 20); *Kraus v. Cegavske*, No. 20 OC 00142 1B (Nev. Dist. Ct. Oct. 29, 2020) (denying Trump Campaign's challenge to vote-tabulation observation procedures and finding no evidence of fraud) (attached as Ex. 21).

election," *id.* ¶¶ 21–87. From these two general allegations, Plaintiffs derive three claims: Count I, which alleges that "Defendants have deprived Plaintiffs of the right to due process guaranteed by the Due Process Clause of the Fourteenth Amendment" by denying them the "right to cast a ballot in an election free from the taint of intimidation and fraud," *id.* ¶¶ 102–18; Count II, which claims that "[t]he actions of election officials and the Secretary of State's absentee ballot scheme have caused the debasement and dilution of the weight of Plaintiffs' votes in violation of the equal protection guarantee of the Fourteenth Amendment," *id.* ¶¶ 119–22; and Count III, which alleges that the Secretary's distribution of absentee ballot applications violated the Electors Clause of the U.S. Constitution, *id.* ¶¶ 123–25.

III. LEGAL STANDARD

Whether a party has Article III standing is a question of a court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017). "[W]here subject matter jurisdiction is challenged under Rule 12(b)(1)[,] . . . the plaintiff has the burden of proving jurisdiction in order to survive the motion." *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (emphasis omitted) (quoting *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986)).

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court presumes that all well-pleaded material allegations in the complaint are true, *see Total Benefits Plan. Agency v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008), but "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (quoting Fed. R. Civ.

P. 8(a)). Courts need not accept as true legal conclusions or unwarranted factual inferences. *See Total Benefits Plan.*, 552 F.3d at 434.

IV. ARGUMENT

A. Principles of federalism and comity strongly favor abstention.

At the outset, the Court need not reach the merits of Plaintiffs' claims to dismiss this lawsuit. Under well-established abstention principles, Plaintiffs' challenge to Michigan's administration of its election should proceed in state court. Plaintiffs seek to bypass both state law remedies—which are designed to address the types of election grievances Plaintiffs raise here—*and* unfavorable rulings in ongoing state court proceedings. The relief Plaintiffs seek calls for an extraordinary intrusion on state sovereignty by a federal court, and principles of federalism and comity counsel strongly in favor of, and may well require, adjudication of these claims through the well-established state law procedures for election contests. *See González-Cancel v. Partido Nuevo Progresista*, 696 F.3d 115, 120 (1st Cir. 2012) ("Where, as here, a plaintiff is aware of, yet fails to fully use, an adequate state administrative or judicial process to address a local election dispute, a claim that the election process created fundamental unfairness to warrant federal intervention cannot survive."); *see also Costantino*, slip op. at 10–12 (describing remedies under Michigan law for election challenges) (attached as Ex. 16).

Under the abstention doctrine set forth in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), federal courts should "avoid exercising jurisdiction in cases involving an ambiguous state statute that may be interpreted by state courts so as to eliminate, or at least alter materially, the constitutional question raised in federal court." *Lawrence v. Pelton*, 413 F. Supp. 3d 701, 709 (W.D. Mich. 2019) (quoting *Fowler v. Benson*, 924 F.3d 247, 255 (6th Cir. 2019)). This doctrine "acknowledges that federal courts should avoid the unnecessary resolution of federal constitutional

issues and that state courts provide the authoritative adjudication of questions of state law." *Brown v. Tidwell*, 169 F.3d 330, 332 (6th Cir. 1999) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985)). Abstention thus reflects the federal judiciary's "scrupulous regard for the rightful independence of the state governments," *Pullman*, 312 U.S. at 501, and is appropriate if the Court finds that (1) "state law is unclear," and (2) "a clarification of that law would preclude the need to adjudicate the federal question," *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). Both requirements are easily met here.

First, Plaintiffs' federal constitutional claims center on unresolved questions of state law. The complaint itself describes various provisions of the Michigan Compiled Laws. *See* Compl. ¶¶ 71–72, 82, 84, 91. Plaintiffs contend that the Secretary exceeded her authority by "chang[ing] or alter[ing] the election procedures established by the State legislature," *id.* ¶¶ 4–8, and that "[t]here were numerous issues of fraud and other illegal conduct occurring at the TCF Center and elsewhere during the November 3, 2020 general election," *id.* ¶ 21. Plaintiffs' allegations, at bottom, assert purported violations of Michigan's Election Code by the Secretary and local officials. Whether such violations occurred is a question of state law that a state court should adjudicate. As noted above, *these very same issues* are currently being litigated in state court, including by one of the Plaintiffs in this case.

Second, clarification of these state law issues would preclude the need to adjudicate the federal questions in this case. Indeed, with respect to Plaintiffs' Electors Clause claim, a state court has already provided clarification; the Michigan Court of Appeals held that "the authority and discretion afforded the Secretary of State by the constitution and state law permit defendant to send unsolicited absent voter ballot applications to all Michigan qualified registered voters." *Davis*, 2020 WL 5552822, at *7. Numerous other cases that allege near-identical instances of

fraud—on which Plaintiffs' due process and equal protection claims are premised—are pending in state court. If these state courts definitively interpret Michigan law, enforce state law procedures for adjudicating challenges to election results, and address the other questions Plaintiffs raise, then there would be nothing left for this Court to decide. Indeed, in the absence of a higher court decision, the decisions in *Davis*, *Stoddard*, *Costantino*, and *Trump* are dispositive and suggest that it is highly likely that any additional resolution of the state law questions will also be in Defendants' favor. *See West v. AT&T Co.*, 311 U.S. 223, 236–37 (1940) (federal courts are "not free to reject" rules of decision issued by state courts "merely because it has not received the sanction of the highest state court"). If Plaintiffs are incorrect that the alleged conduct violates Michigan law—*as state courts have already concluded*—then their claims cannot succeed.

In short, allowing Michigan courts to interpret these state law questions "may obviate the federal claims" and "eliminate the need to reach the federal question," and this Court should therefore abstain. *GTE N., Inc. v. Strand*, 209 F.3d 909, 921 (6th Cir. 2000).[4]

Moreover, *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), also counsels abstention. This doctrine encourages "abstention in favor of ongoing, parallel state proceedings in cases where 'considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' clearly favor abstention." *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 248 (4th Cir. 2013) (quoting *Colo. River*, 424 U.S. at 817). Here, the parallelism requirement is met because Plaintiff Stoddard is

[4] Another federal court facing similar claims related to this election concluded that abstention was proper, rejecting the plaintiffs' request "to find that state officials have wrongly interpreted state law" where "an alternative appropriately exists with the . . . state courts." *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 4920952, at *17 (W.D. Pa. Aug. 23, 2020) (quoting *Fuente v. Cortes*, 207 F. Supp. 3d 441, 452 (M.D. Pa. 2016)).

currently involved in a state court action that implicates the same issues of Michigan law. *See* Exs. 7–9.[5] The other relevant factors—including avoiding piecemeal litigation, the order and relative progress of the cases, the critical issues of state law at stake, and the adequacy of the state court to continue addressing these issues—also weigh heavily in favor of abstention. *See Preferred Care of Del., Inc. v. VanArsdale*, 676 F. App'x 388, 395 (6th Cir. 2017).

Finally, Plaintiffs' claims are precluded under *Burford* abstention, which is appropriate, as here,

> where timely and adequate state-court review is available and (1) a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the case at bar," or (2) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Caudill v. Eubanks Farms, Inc., 301 F.3d 658, 660 (6th Cir. 2002) (quoting *New Orleans Pub. Serv., Inc. v. Council*, 491 U.S. 350, 361 (1989)); *see also Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943). There can be no dispute that presidential elections implicate a vital area of state policy. The U.S. Constitution delegates *to the states* the responsibility for determining the "Manner" in which it appoints presidential electors. U.S. Const. art. I, § 4, cl. 1. Michigan therefore has a compelling interest in the orderly administration and certification of its election. Indeed, as Plaintiffs' complaint notes, Michigan has an extensive Election Code that provides for an orderly certification of election results. Accordingly, because the State has "primary authority over the

[5] Parallelism in this case is not defeated simply because the state court litigation does not raise identical claims; it is sufficient that the claims are "predicated on the same allegations as to the same material facts." *Romine v. Compuserve Corp.*, 160 F.3d 337, 340 (6th Cir. 1998). Nor does it matter that this case was filed by additional Plaintiffs; the Sixth Circuit has "never held that identity of parties is required for parallelism. In fact, [it has] held the opposite." *Healthcare Co. v. Upward Mobility, Inc.*, 784 F. App'x 390, 395 (6th Cir. 2019); *cf. Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 695 (7th Cir. 1985) (*Colorado River* doctrine cannot be evaded by naming additional parties).

administration of elections," *Hunter*, 635 F.3d at 232, abstention is proper—this case implicates an area where "the State's interests are paramount" and thus "would best be adjudicated in a state forum." *Caudill*, 301 F.3d at 660 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996)).

Plaintiffs should not be permitted to employ the federal courts in a transparent effort to relitigate the *same* claims that continue to fail in state court. This blatant "attempt to . . . avoid adverse rulings by the state court . . . weighs strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989).

B. The Eleventh Amendment bars Plaintiffs' claims.

The Eleventh Amendment bars this Court from issuing Plaintiffs' requested relief because a federal court cannot order state officials to conform to state law.

As the U.S. Supreme Court explained decades ago in *Pennhurst State School & Hospital v. Halderman*, "the principles of federalism that underlie the Eleventh Amendment" prohibit a federal court from granting "relief against state officials on the basis of state law, whether prospective or retroactive." 465 U.S. 89, 106 (1984); *see also In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 787 (6th Cir. 2017) ("If the plaintiff sues a state official under state law in federal court for actions taken within the scope of his authority, sovereign immunity bars the lawsuit regardless of whether the action seeks monetary or injunctive relief."). This is true even where state law claims are styled as federal causes of action. *See, e.g.*, *Balsam v. Sec'y of State*, 607 F. App'x 177, 183–84 (3d Cir. 2015) (holding that Eleventh Amendment bars state law claims even when "premised on violations of the federal Constitution"); *Massey v. Coon*, No. 87-3768, 1989 WL 884, at *2 (9th Cir. Jan. 3, 1989) (affirming dismissal of suit where "on its face the complaint states a claim under the due process and equal protection clauses of the Constitution,

[but] these constitutional claims are entirely based on the failure of defendants to conform to state law"); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1073 (C.D. Cal. 2020) (denying temporary restraining order in part because Fifth and Fourteenth Amendment claims were predicated on violations of state law); *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 626 (E.D. Pa. 2018) ("Even when voters attempt to 'tie their state law claims into their federal claims,' the Eleventh Amendment bars the state law claims." (quoting *Balsam*, 607 F. App'x at 183)).[6]

Although ostensibly cloaked as federal causes of action, each of Plaintiffs' claims ultimately—and exclusively—asks the Court to compel election authorities to do what Plaintiffs believe *Michigan* law requires. Counts I and II, Plaintiffs' due process and equal protection claims, both hinge on the alleged casting and counting of fraudulent ballots. *See, e.g.*, Compl. ¶¶ 111, 116, 121. But whether fraudulent ballots were tallied, and whether Defendants abided by their statutory responsibilities, are question of *state law*, not federal law; Michigan's Election Code provides the standards for whether ballots are lawfully voted and counted in Michigan, not any federal statute. Accordingly, this Court cannot "enjoin Defendants from finally certifying the election results and declaring winners of the 2020 general election until an independent audit . . . is performed," *id.* at 25, based on votes cast in alleged violation of state law without running afoul of the Eleventh Amendment. Indeed, these claims' lack of federal character is further revealed by the fact that Plaintiffs' theories of vote dilution and fundamental unfairness cannot give rise to federal causes of action under the Equal Protection and Due Process Clauses. *See, e.g.*, *Donald J. Trump for*

[6] The Third Circuit's decision in *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 2002), is instructive. There, the plaintiffs sued a state agency for declaratory and injunctive relief under the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Even though the plaintiffs' allegations nominally alleged violations of the SMCRA, the court found that once the state's regulatory system was approved, "jurisdiction for its administration and enforcement devolved on the state," and accordingly, "prospective relief vis-à-vis that program . . . is barred in federal court by the Eleventh Amendment." *Id.* at 325.

President, Inc. v. Boockvar, No. 2:20-cv-966, 2020 WL 5997680, at *43 (W.D. Pa. Oct. 10, 2020) (vote dilution "is not an equal-protection issue"); *see also infra* Part IV.E.2–3. Because Plaintiffs have not advanced legitimate federal vote-dilution or due process claims, and the actual substance of these claims is predicated on violations of state law, they are barred under *Pennhurst*.

Count III, Plaintiffs' claim under the Electors Clause, is precluded for the same reason. Plaintiffs' sole allegation is that the Secretary "created, adopted, and enforced" an "absentee ballot scheme . . . *without legislative authorization*." Compl. ¶ 124 (emphasis added). Though superficially an Electors Clause claim, the only legal issue raised by Count III is whether the actions undertaken by the Secretary—a *state official*—conflicted with *state law* enacted by the Michigan Legislature. Thus, the Eleventh Amendment also bars Count III.

The distinction between an *actual* federal claim under the Electors Clause and a state law claim masquerading as a federal claim (like Count III) becomes apparent when looking at other cases brought under the Electors and Elections Clauses.[7] In *Cook v. Gralike*, for example, the U.S. Supreme Court struck down a Missouri law that mandated a ballot designation for any congressional candidate who refused to commit to term limits after concluding that such a rule constituted a "'regulation' of congressional elections" under the Elections Clause. 531 U.S. 510, 525–26 (2001) (quoting U.S. Const. art. I, § 4, cl. 1). And in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld a law that delegated the redistricting process to an independent commission after reaffirming that "the Legislature" as used

[7] The Elections and Electors Clauses play functionally identical roles, with the former setting the terms for congressional elections and the latter implicating presidential elections. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"); *Foster v. Love*, 522 U.S. 67, 69 (1997) (referring to Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *Millsaps v. Thompson*, 259 F.3d 535, 538 (6th Cir. 2001) (same). Cases interpreting one therefore inform claims implicating the other.

in the Elections Clause includes "the State's lawmaking processes." 576 U.S. 787, 824 (2015). In these cases, the task of federal courts was to measure state laws against *federal* mandates set out under the Elections Clause—in the former, what is a "regulation"; in the latter, who is "the Legislature." No such federal question is posed here. Instead, the only issue presented in Plaintiffs' complaint is whether the Secretary followed the Election Code's absentee ballot provisions. No amount of hand-waving or ex post rationalization can change the fact that Count III, like Plaintiffs' other claims, is premised solely on violations of state law. All of their claims are therefore barred by the Eleventh Amendment.[8]

C. Plaintiffs lack standing.

Even if this Court does not abstain, this action should be dismissed because Plaintiffs lack both Article III and prudential standing to bring their claims.

The standing "inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To avoid dismissal on Article III grounds, a plaintiff must show (1) an injury in fact, meaning "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) a causal connection between the injury and the defendant's conduct, and (3) a likelihood that the

[8] Notably, federal courts regularly reject state law claims against state officials in litigation involving election administration. *See, e.g.*, *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360–61 (6th Cir. 2008) (*Pennhurst* bars claim that Secretary of State violated state election law); *Acosta*, 288 F. Supp. 3d at 628 (Eleventh Amendment bars Pennsylvania Election Code claims); *Veasey v. Perry*, 29 F. Supp. 3d 896, 922 (S.D. Tex. 2014) (Eleventh Amendment bars claim that state officials violated state constitution); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1358–59 (N.D. Ga. 2005) (same). This is unsurprising; federal and presidential elections in particular are *entirely* administered by the states, under rules proscribed by state law. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (U.S. Constitution "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint").

injury will be redressed by a favorable decision from the court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Additionally, prudential considerations require that "a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Int'l Union v. Dana Corp.*, 278 F.3d 548, 559 (6th Cir. 2002) (quoting *Warth*, 422 U.S. at 499).

1. Plaintiffs do not allege harms sufficient to satisfy Article III standing.

Plaintiffs lack Article III standing because they fail to allege any "concrete and particularized" injuries-in-fact. *Lujan*, 504 U.S. at 560–61. Plaintiffs do not allege that they were deprived of the right to vote, nor that they or *any* voter submitted an absentee ballot that was improperly rejected. *See Bognet v. Sec'y of Commonwealth*, No. 20-3214, 2020 WL 6686120, at *11 (3d Cir. Nov. 13, 2020). Instead, they assert only generalized grievances that do not satisfy Article III.

First, all three of Plaintiffs' claims are premised on the alleged injury of vote dilution—that "[i]nvalid or fraudulent votes debase and dilute the weight of each validly cast vote." Compl. ¶ 109; *see also id.* ¶ 121. But this purported injury of vote-dilution-through-unlawful balloting has been repeatedly rejected by federal courts as a viable basis for standing, and for good reason: any purported vote dilution somehow caused by counting allegedly improper votes would affect *all* Michigan voters, not just Plaintiffs, and therefore constitutes a generalized grievance that cannot support standing. *See, e.g.*, *Bognet*, 2020 WL 6686120, at *12–14 (rejecting similar vote-dilution injury as "paradigmatic generalized grievance that cannot support standing" (quoting *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *4 (W.D. Pa. Oct. 28, 2020))); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev.

Sept. 18, 2020); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015). Plaintiffs also suggest that they were injured by the allegedly "patent and fundamental unfairness" of the election, Compl. ¶ 114—a purported harm that is no less generalized, and no more particularized and concrete, than their vote-dilution injury.

Second, Plaintiffs claim they have suffered harm as a result of the alleged violation of the Electors Clause. *See id.* ¶ 125. That "injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government" that does not support standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (plaintiffs lacked standing to bring Elections Clause claim). And "[i]t is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where" the Supreme Court has found standing. *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 207–08 (1962)); *see also Bognet*, 2020 WL 6686120, at *13.

In short, Plaintiffs assert only generalized, unparticularized injuries and thus lack standing to bring their claims.

2. Plaintiffs' lack prudential standing to bring Count III.

Plaintiffs also lack prudential standing to bring their Electors Clause claim. "Even if an injury in fact is demonstrated, the usual rule"—applicable here—"is that a party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). Plaintiffs' Count III, by contrast, "rest[s] . . . on the legal rights or interests of third parties,'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499)—specifically, *the Michigan Legislature's* purported rights under the Electors Clause.

Plaintiffs assert that the Secretary violated the Electors Clause when she distributed

absentee ballot applications "without legislative authorization." Compl. ¶ 124; *see also id.* ¶ 4 (alleging that Secretary's "actions were not approved or authorized by the State legislature"). Plaintiffs, however, have no authority or standing to assert the rights of the Michigan Legislature. *See Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (per curiam) ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly."); *Bognet*, 2020 WL 6686120, at *7 (similar); *cf. Lance*, 549 U.S. at 442 (observing that U.S. Supreme Court's "decisions construing the term 'Legislature' in the Elections Clause [were] filed by a relator on behalf of the State rather than private citizens acting on their own behalf").[9] Plaintiffs are not the Michigan Legislature, and they have identified no "'hindrance' to the [Legislature's] ability to protect [its] own interests." *Kowalski*, 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). "Absent a 'hindrance' to the third-party's ability to defend its own rights, this prudential limitation on standing cannot be excused." *Corman*, 287 F. Supp. 3d at 572 (quoting *Kowalski*, 543 U.S. at 130). Count III should therefore be dismissed.[10]

D. Plaintiffs' claims are barred by the equitable doctrine of laches.

Plaintiffs' challenges to both the Secretary's "absentee ballot scheme," Compl. ¶ 89, and the purported "issues of fraud and other illegal conduct," *id.* ¶ 21, come too late and are barred by the doctrine of laches. "In this circuit, laches is 'a negligent and unintentional failure to protect

[9] Although *Corman* and *Lance* specifically concerned the Elections Clause only, the Elections and Electors Clauses are analogous. *See supra* note 7; *see also Bognet*, 2020 WL 6686120, at *7 (applying same standing analysis to Elections Clause and Electors Clause claims).

[10] The Third Circuit's recent opinion in *Bognet* is instructive. There, the plaintiffs—"four individual voters and a candidate for federal office"—brought similar challenges to Pennsylvania's election rules that the court denied because "they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses." *Bognet*, 2020 WL 6686120, at *7.

one's rights.'" *United States v. City of Loveland*, 621 F.3d 465, 473 (6th Cir. 2010) (quoting *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Id.* at 473 (quoting *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 320 (6th Cir. 2001)). Both requirements are easily met here.

The Secretary announced on May 19—six months ago—"that all registered voters in Michigan will receive an application to vote by mail in the August and November elections." *Benson: All Voters Receiving Applications to Vote by Mail*, Mich. Sec'y of State (May 19, 2020), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-529536--,00.html.[11] Her office launched its "online absentee voter application" on June 12. *Michigan Department of State Launches Online Absentee Voter Application*, Mich. Sec'y of State (June 12, 2020), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-531796--,00.html. Plaintiffs should have been aware of these plans well before election day—they certainly give no indication they were unaware—and they could and should have brought their related claims much earlier. Indeed, other plaintiffs challenged the Secretary's mailing of absentee ballot applications as early as *May 20*. *See* Pls.' Compl., *Cooper-Keel v. Mich. Sec'y of State*, No. 20-000091-MM (Mich. Ct. Cl. May 20, 2020) (attached as Ex. 19). Furthermore, the alleged "fraud and other illegal conduct occurring at the TCF Center and elsewhere" that forms the other basis for Plaintiffs' complaint happened on November 3 and 4, *see* Compl. ¶¶ 21–87, and yet Plaintiffs waited until November 15—*twelve days* after election day—

[11] The Court may take judicial notice of "'government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." *United States ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG (POR), 2009 WL 6597891, at *2 (S.D. Cal. Dec. 23, 2009)); *see also supra* note 1.

to bring this case. Again, suits with near-identical allegations were brought as early as election day itself, including one brought on November 4 by Plaintiff Stoddard. *See* Exs. 7–9.

Plaintiffs' delay was consequential. Now that the ballots have been opened, separated from their envelopes, and counted, any late-hour relief would be administratively infeasible, and if Plaintiffs' challenges were sustained, the votes of hundreds of thousands—perhaps millions—of Michiganders would be at risk through no fault of their own. That severe prejudice to both Defendants and voters would be contrary to fundamental principles of equity. *Cf. Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made."); *Crookston v. Johnson*, 841 F.3d 396, 398–99 (6th Cir. 2016) (noting that late-hour change to election procedures "would require nuanced policy decisions that no one should be making at the eleventh hour—absent a good explanation for the delay" and that "[w]hen an election is 'imminen[t]' and when there is 'inadequate time to resolve [] factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures" (second and third alterations in original) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006))).

Plaintiffs should not be permitted to lie in wait to gauge election results and file suit only after their preferred candidate does not prevail. "[T]he failure to require prompt pre-election action . . . as a prerequisite to post-election relief may permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc) (quoting *Toney v. White*, 476 F.2d 203, 209 (5th Cir. 1973)). Accordingly, "[c]ourts will consider granting post-election relief only where the plaintiffs were not aware of a

major problem prior to the election or where by the nature of the case they had no opportunity to seek pre-election relief," *Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979), even where parties allege far more egregious misconduct than Plaintiffs' vague allegations here. *See, e.g.*, *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss. 1985) (refusing to void election even where defendants conceded that districts were malapportioned because "to grant the extraordinary relief of setting aside an election . . . . would be to embrace the hedging posture" that courts have discouraged). This Court should therefore dismiss Plaintiffs' belated claims.

E. Plaintiffs fail to state a claim on which relief can be granted.

1. Plaintiffs' claims are not plausible.

Parties who seek relief from a federal court must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. While "the pleading standard that Rule 8 announces does not require 'detailed factual allegations,' [] it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). And although Rule 12(b)(6) requires that allegations be viewed in the light most favorable to the nonmovant, the nonmoving party must still meet the Rule 8 plausibility mandate.

Plaintiffs fail to satisfy this basic requirement. At heart, their complaint suggests a massive, coordinated effort among election officials and volunteers to perpetrate electoral fraud and swing a presidential election. *See* Compl. ¶¶ 21–87. And yet despite the presence of challengers like Plaintiffs—the existence of whom is referenced throughout the complaint—all Plaintiffs can produce to support their narrative of widespread malefaction are isolated allegations of perceived misconduct and allegedly suspicious activities, couched in vague terms without any specific

details, such as how many allegedly invalid ballots were counted, how many ballots were allegedly altered, and how many ballots were supposedly duplicated incorrectly.[12]

The U.S. Supreme Court has instructed that "[d]etermining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. 662, 679 (2009). It challenges both experience and common sense to accept Plaintiffs' overarching theory that widespread fraud occurred during the most scrutinized and observed election in modern history.[13] Under applicable pleading standards, this Court need not credit Plaintiffs' unwarranted factual inferences. Absent basic plausibility, Plaintiffs' complaint should be dismissed.

2. Plaintiffs have not pleaded a viable due process claim.

With Count I, Plaintiffs attempt to raise their allegations regarding fraudulent voting to the level of a due process violation, based on two apparent theories: that the casting of unlawful ballots diluted the value of Plaintiffs' votes, *see* Compl. ¶¶ 106–11, and that the election in Michigan

[12] Where, as here, the Complaint expressly alleges "fraud," Rule 9(b) requires pleading with "particularity." Notably, this pleading standard requires "[a]t a minimum" that allegations of fraud "specify the 'who, what, when, where, and how' of the alleged fraud." *Sanderson v. HCA-Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (quoting *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir.1997)); *see also id.* (concluding that plaintiffs failed to satisfy pleading standard where they included nothing "to alert the defendants 'to the precise misconduct with which they are charged and [to] protect[] defendants against spurious charges of immoral and fraudulent behavior'" (alterations in original) (quoting *United States ex rel. Clausen v. Lab'y Corp. of Am.*, 290 F.3d 1301, 1310 (11th Cir. 2002))); *Costantino*, slip op. at 2 (noting that "[i]n cases of alleged fraud, the Plaintiff must state with particularity the circumstances constituting the fraud" and denying challenge to Wayne County's returns where, as here, plaintiffs provided affidavits containing vague and unspecific allegations of misconduct) (attached as Ex. 16).

[13] *See Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees*, Cybersecurity & Infrastructure Sec. Agency (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election ("The November 3rd election was the most secure in American history."); *see also supra* notes 1 & 11 (courts may take judicial notice of government websites).

"reache[d a] point of patent and fundamental unfairness" that constituted a due process violation, *id.* ¶¶ 112–14. Ultimately, even if Plaintiffs' factual allegations were plausible, neither theory lends itself to a cognizable due process claim, and Count I should be dismissed.

As discussed below, vote dilution is a context-specific theory of constitutional harm premised on the Equal Protection Clause that applies only where plaintiffs allege their votes were devalued compared to similarly situated voters in other parts of the state. Plaintiffs do not explain how the alleged dilution of their votes constitutes a due process violation, and at any rate, they have failed to plead a cognizable vote-dilution claim. *See infra* Part IV.E.3. Accordingly, vote dilution is not a sound basis for Count I.

Plaintiffs' attempt to transform alleged violations of Michigan's Election Code into a "fundamental fairness" federal due process violation fares no better. Throughout their complaint, Plaintiffs allege various irregularities and suspicious activities in the tabulation of Wayne County's ballots. But "[t]he Constitution is not an election fraud statute," *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)), and it "d[oes] not authorize federal courts to be state election monitors." *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980); *see also Pettengill v. Putnam Cnty. R-1 Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1983) (per curiam) (finding no cases "which authorize a federal court to be the arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots"). Nor are voters constitutionally entitled to an election free from error. "[G]arden variety election irregularities do not violate the Due Process Clause, *even if they control the outcome of the vote or election*." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (emphasis added) (collecting cases). Even "a deliberate violation of state election laws by state election officials does not

transgress against the Constitution." *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) (quoting *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 342 (7th Cir. 1987)).

Instead, it is only where "a pervasive error [] undermines the integrity of the vote" that the Constitution is implicated. *Bennett*, 140 F.3d at 1227. As the Ninth Circuit explained after considering the cases where election irregularities rose to the level of constitutional violations,

> [a] general pattern emerges from all of these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.

Id. at 1226–27; *see also id.* at 1227 n.3 (noting that wholesale disenfranchisement of "entire electorate [] when legally required election did not occur" and "outrageous racial discrimination" might rise to level of "fundamental[] unfair[ness]" (quoting *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978))). In other words, the sort of unconstitutional irregularity that courts have entertained consists of widescale disenfranchisement.

Plaintiffs' allegations fall far short of such an extreme circumstance. At best, they allege isolated instances of misconduct at the Wayne County tabulation center and a purported "scheme" by the Secretary that *en*franchised voters by expanding access to absentee voting. Even taken together, their allegations fall far short of the sort of systemic *dis*enfranchisement that might constitute a due process violation. Indeed, the Fifth Circuit *rejected* a due process claim based on a similar slew of alleged irregularities, including "complaints about missing signatures, ballots that should have been mailed rather than hand-delivered, and six fraudulent votes"—even though the contested ballots were enough to decide the election—explaining that such claims implicated only "'garden variety' election disputes" for which "states," not federal courts, "are primarily

responsible." *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985).[14] "[T]he due process clause . . . offer[s] no guarantee against errors in the administration of an election." *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970). Plaintiffs have simply not alleged "significant disenfranchisement" of the sort that could justify a due process claim based on the fundamental fairness of the election. *Bennett*, 140 F.3d at 1227. To the contrary, it is *Plaintiffs* who seek to negate the votes cast by hundreds of thousands, if not millions, of eligible Michigan voters; now that ballots have been tabulated and comingled, it would be seemingly impossible to identify and segregate challenged ballots, and under Plaintiffs' theory, *all* would therefore be at risk of rejection.

Finally, Plaintiffs' due process claim is precluded because there are adequate state law remedies to address their claims of voter fraud. "Where, as here, a plaintiff is aware of, yet fails to fully use, an adequate state administrative or judicial process to address a local election dispute, a claim that the election process created fundamental unfairness to warrant federal intervention cannot survive." *González-Cancel*, 696 F.3d at 120 (citing *Rosselló-González v. Calderón-Serra*, 398 F.3d 1, 16 (1st Cir. 2004)); *accord Griffin*, 570 F.2d at 1077 (noting that "even claims of official misconduct[] do not usually rise to the level of constitutional violations where adequate state corrective procedures exist"). Here, Plaintiffs are certainly aware of state judicial processes—Plaintiff Stoddard filed such a claim in Michigan state court. And state law further provides non-judicial remedies to address election issues. *See Costantino*, slip op. at 10–12 (describing remedies

[14] The Fifth Circuit and other courts thus have rejected constitutionalizing every election dispute. *See, e.g.*, *Gamza*, 619 F.3d at 453 ("If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a [constitutional] gloss."); *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) (rejecting theory that would "thrust" federal courts "into the details of virtually every election, tinkering with the state's election machinery" and "reviewing . . . for all manner of error and insufficiency under state and federal law").

under Michigan law for election challenges) (attached as Ex. 16). Given that, for example, Plaintiffs failed to petition the Wayne County Board of Canvassers, *see* Mich. Comp. Laws § 168.821, or seek an audit or recount, *see id.* §§ 168.31a, 168.871, Plaintiffs cannot now rely on a federal due process claim, and Count I should be dismissed.

3. Plaintiffs have not pleaded a viable equal protection claim.

Count II similarly fails to allege a cognizable equal protection claim. Plaintiffs' attempt to assert a under the theory of vote dilution fails as a matter of law.

Vote dilution is a viable basis for federal claims only in certain contexts, such as when laws structurally devalue one community's votes over another's. *See, e.g.*, *Bognet*, 2020 WL 6686120, at *11 ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."); *see also Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."). In these cases, which are grounded in the Equal Protection Clause, plaintiffs allege that their votes are systematically devalued as compared to similarly situated voters in other parts of the state. *See Reynolds*, 377 U.S. at 567–68.

Here, by contrast, Plaintiffs' vote-dilution claim is premised on the theory that the casting of unlawful ballots has "caused the debasement and dilution of the weight of Plaintiffs' votes." Compl. ¶ 121. But "[t]his conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 2020 WL 6686120, at *11. Indeed, Plaintiffs cannot identify a

single precedent adopting their theory.[15] This is unsurprising: the claim of vote dilution based on fears of potential fraud is speculative and applies to all voters equally, making it an ill-fit for an equal protection challenge. *Cf. Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020) ("All binding authority to consider the burdensome effects of disparate treatment on the right to vote has done so from the perspective of only affected electors—not the perspective of the electorate as a whole.").

As discussed in Part IV.E.2 *supra*, "[t]he Constitution is not an election fraud statute." *Minn. Voters All.*, 720 F.3d at 1031 (quoting *Bodine*, 788 F.2d at 1271). There is no authority for transmogrifying the vote dilution line of cases into a requirement that the federal judiciary micromanage election procedures and, in its zeal to enforce state election statutes, disenfranchise lawful voters based on a plaintiff's (speculative) voter fraud allegations. "That is not how the Equal Protection Clause works." *Bognet*, 2020 WL 6686120, at *11; *cf. Short v. Brown*, 893 F.3d 671, 677–78 (9th Cir. 2018) ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution.").[16] In fact, courts have routinely rejected

[15] *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), cited by Plaintiffs in their complaint, *see* Compl. ¶ 3, does not support their claim. In *Bush*, the U.S. Supreme Court considered "whether the use of standardless manual recounts" by some Florida counties in the aftermath of the 2000 presidential election violated the Equal Protection Clause. *Id.* at 103. In addition to being explicitly "limited to the present circumstances," the *Bush* Court addressed a situation where the counting of ballots lacked even "minimal procedural safeguards." *Id.* at 109. Here, by contrast, Michigan law provides those requisite safeguards—Plaintiffs themselves acknowledge this by citing to state law standards, *see* Compl. ¶ 86—and so *Bush* is inapposite. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), also cited by Plaintiffs, *see* Compl. ¶ 104, was a case about poll taxes that has nothing to do with Plaintiffs' theory of vote dilution. And, as discussed above, *Reynolds*, *see id.* ¶¶ 104–05, 111, concerned vote dilution in the context of malapportionment, *not* allegedly unlawful voting.

[16] Indeed, "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim

such efforts. *See Minn. Voters All.*, 720 F.3d at 1031–32 (affirming Rule 12(b)(6) dismissal of vote-dilution claim); *see also Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 827–28 (1st Cir. 1980) (per curiam) (rejecting challenge to purportedly invalid ballots because "case does not involve a state court order that *dis*enfranchises voters; rather it involves a [] decision that *en*franchises them—plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting"); *Boockvar*, 2020 WL 5997680, at *67–68 (rejecting Trump Campaign's equal protection challenge to poll-watcher restrictions grounded in vote-dilution theory because restrictions did not burden fundamental right or discriminate based on suspect classification); *Cortés*, 218 F. Supp. 3d at 406–07 (rejecting requested expansion of poll-watcher eligibility based on premise that voter fraud would dilute plaintiffs' votes).

Because Plaintiffs have not pleaded a cognizable vote-dilution claim, Count II—and, to the extent it is premised on vote dilution, Count I—should be dismissed.

4. Plaintiffs have not pleaded a viable Electors Clause claim.

Finally, Count III—Plaintiffs' claim under the Electors Clause, *see* Compl. ¶¶ 123–25—fails as a matter of law because, as the Michigan Court of Appeals has already held, the Secretary acted consistently with the authority lawfully delegated to her by the Michigan Legislature.

The Electors Clause vests authority in "the Legislature" of each state to regulate presidential elections. U.S. Const. art. II, § 1, cl. 2. The U.S. Supreme Court has held, however, that state legislatures can delegate this authority. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the

requiring scrutiny of the government's "interest" in failing to do more to stop the illegal activity.'" *Bognet*, 2020 WL 6686120, at *11 (quoting *Boockvar*, 2020 WL 5997680, at *46).

State has prescribed for legislative enactments" (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *Corman*, 287 F. Supp. 3d at 573 ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state." (quoting *Ariz. State Legislature*, 576 U.S. at 816)); *see also supra* note 7.

Thus, the issue Plaintiffs ask this Court to adjudicate is simply one of state law: whether the Secretary exceeded the statutory authority delegated by the Legislature. That questions falls within the province of state courts, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law."), and the Michigan Court of Appeals—considering the *very same* statutory arguments that Plaintiffs make here—has already held "that the authority and discretion afforded the Secretary of State by the constitution and state law permit defendant to send unsolicited absent voter ballot applications to all Michigan qualified registered voters." *Davis*, 2020 WL 5552822, at *7.[17]

The opinion of the Court of Appeals is controlling as a matter of law and, in any event, is correctly decided. *See West*, 311 U.S. at 237 ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."). The Secretary is "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." Mich. Comp. Laws § 168.21. As part of her statutorily delegated authority, the Secretary has the duty to "advise and direct local election

[17] This case is pending on application for leave to appeal to the Michigan Supreme Court. Nevertheless, even "a Supreme Court order *granting* leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." Mich. Ct. R. 7.215(C)(2) (emphasis added).

officials as to the proper methods of conducting elections." *Id.* § 168.31(1)(b). She "shall" also "[p]ublish and furnish" "specific instructions on assisting voters in casting their ballots." *Id.* § 168.31(1)(c). Moreover, the Secretary "shall," in her discretion, "[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations." *Id.* § 168.31(1)(e). Notably, Michigan Compiled Laws section 168.31 does not limit the duties of the Secretary to *only* delineated acts; instead, the Legislature has granted her discretionary authority to make decisions and determinations about which methods are proper, provided they are not contradicted or prohibited elsewhere in the state constitution or Michigan's Election Code. Contrary to Plaintiffs' assertion, Compl. ¶ 91, nothing in Michigan Compiled Laws section 168.759 prohibits the Secretary from providing voters with unsolicited absentee ballot applications. Nowhere does that provision reference the Secretary and, regardless, it states only that "[a]n application for an absent voter ballot under this section *may* be made in any of the following ways." Mich. Comp. Laws § 168.759(3) (emphasis added); *see also Davis*, 2020 WL 5552822, at *4–5.

The Michigan Court of Appeals' plain reading of Michigan law does not offend the Electors Clause, and Plaintiffs point to no authority that suggests otherwise. Plaintiffs claim that the Electors Clause requires state legislatures *alone* to prescribe the manner of elections. *See* Compl. ¶ 6 (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). But even setting aside the 128 years of intervening Supreme Court cases limiting the plenary power of state legislatures, *McPherson* itself explained that legislatures may delegate their authority under the Electors Clause. *See* 146 U.S. at 25 (noting that state legislatures may exercise authority under Electors Clause by "joint ballot or concurrence of the two houses, or according to such mode as designated"). Although the power delegated to state legislatures by the Electors Clause "cannot be

taken from" them, a legislature may "authorize the governor, or the supreme court of the state, or any other agent of its will" to satisfy its duties under the Clause. *Id.* at 34–35. *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam), also cited by Plaintiffs, *see* Compl. ¶ 6, does not state anything to the contrary.

In short, a legislature itself can delegate authority related to the regulation of presidential elections—as the Michigan Legislature delegated to the Secretary—without offending the Electors Clause. Plaintiffs' allegations do not plausibly allege an Electors Clause violation, and Count III must be dismissed.

F. Plaintiffs are not entitled to the relief they seek.

Even if this Court had jurisdiction over this matter (it does not), and Plaintiffs had pleaded plausible and cognizable claims (they have not), Plaintiffs would not be entitled to the extraordinary relief they seek. Plaintiffs ask this Court to enjoin Defendants from certifying Michigan's results "until an independent audit to ensure the accuracy and integrity of the election is performed" or some other judicially imposed review is completed. Compl. 25. This extraordinary request is not a proper remedy in this case.

As an initial matter, Michigan law does not contemplate the judicially imposed audit that Plaintiffs seek. Instead, Michigan Compiled Laws section 168.31a sets forth a process by which the Secretary may conduct an audit *after* an election is certified and any recounts are concluded.

Moreover, it is only in the rarest of circumstances that federal courts have prevented certification of election results, and only where the evidence established that there was a fundamental failure of the electoral process. *See Stein v. Cortés*, 223 F. Supp. 3d 423, 438 (E.D. Pa. 2016) (collecting cases). Plaintiffs' allegations do not constitute the systemic fraud or widescale disenfranchisement that might justify such drastic relief. Accordingly, because Plaintiffs' gambit to circumvent the will of the Michigan electorate "has no essential or important

relationship to the claim for relief," their prayer for relief reflecting this inordinate request should be dismissed or, in the alternative, stricken under Rule 12(f) as immaterial. *Rees v. PNC Bank, N.A.*, 308 F.R.D. 266, 271 (N.D. Cal. 2015) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)); *see also, e.g.*, *Williamsburg Commons Condo. Ass'n v. State Farm Fire & Cas. Co.*, 907 F. Supp. 2d 673, 680 (E.D. Pa. 2012) (granting motion to dismiss requested relief).

Even if Plaintiffs' allegations were true (they are not) and there were isolated and sporadic incidents in which Michigan's election laws were violated—not by the *voters*, but by election workers—this could not possibly justify the disenfranchisement of Michiganders that might result from a prolonged delay in certification. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597–98 (6th Cir. 2012) (concluding that rejection of ballots invalidly cast due to poll worker error likely violates due process); *United States v. Saylor*, 322 U.S. 385, 387–88 (1944) ("[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place."); *cf. Bognet*, 2020 WL 6686120, at *1 (considering election challenge "with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count"). Discarding the ballots of lawful Michigan voters that were not cast or tabulated pursuant to Plaintiffs' preferred procedures "would be both outrageous and completely unnecessary." *Stein*, 223 F. Supp. 3d at 442; *see also Gallagher v. N.Y. State Bd. of Elections*, No. 20-5504 (AT), 2020 WL 4496849, at *16 (S.D.N.Y. Aug. 3, 2020) (rejecting "grossly overinclusive" election scheme that would "not meaningfully advance the state interest at issue"). And this remedy would violate Michiganders' fundamental voting rights, including the Michigan Constitution's self-executing right to vote absentee, *see* Mich. Const. art. II, § 4(1)(g), which voters passed in 2018 by an overwhelming popular vote and took advantage

of in unprecedented numbers during this past election. Plaintiffs' prayer for relief should therefore be stricken or, in the alternative, dismissed. *See Rees*, 308 F.R.D. at 271.

V. CONCLUSION

For the foregoing reasons, Proposed Intervenor-Defendants DNC Services Corporation/Democratic National Committee and Michigan Democratic Party respectfully request that the Court dismiss Plaintiffs' complaint.

Dated: November 18, 2020.

Respectfully submitted,

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*Admission pending

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ANGELIC JOHNSON and SARAH STODDARD, Plaintiffs, v. JOCELYN BENSON, in her official capacity as Michigan Secretary of State; and JEANNETTE BRADSHAW, in her official capacity as Chair of the Board of State Canvassers for Michigan, Defendants.	No. 20-1098 Hon. Janet T. Neff

PLAINTIFFS' VOLUNTARY DISMISSAL

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Pursuant to Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure, Plaintiffs Johnson and Stoddard hereby voluntarily dismiss this action without prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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