

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

SARAH STODDARD and ELECTION
INTEGRITY FUND,

Plaintiffs,

v.

Case No. 20-014604-CZ

Hon. Timothy M. Kenny, Chief Judge

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
CANVASSERES,

Defendants,

v.

DNC,

[Proposed] Intervenor Defendant.

Edward D. Greim (MO #54034)
GRAVES GARRETT, LLC
Attorney for Plaintiffs
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
(816) 256-3181

Ian A. Northon (P65082)
RHOADES MCKEE PC
Attorney for Plaintiffs
55 Campau Ave NW #300
Grand Rapids, MI 49503
(616) 233-5169

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendants
P.O. Box 30736
Lansing, MI 48909
(517) 335-7659

Marc E. Elias (DC #442007)*
PERKINS COIE LLP
Attorneys for Proposed Intervenor
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

Kevin J. Hamilton (WA # 15648)*
PERKINS COIE LLP
Attorney for Proposed Intervenor
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
(206) 359-8000

Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorney for Proposed Intervenor
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 483-4918

**Pro hac vice motion forthcoming*

Mary Ellen Gurewitz (P25724)
CUMMINGS & CUMMINGS
Attorney for Proposed Intervenors
423 N Main St Ste 200
Royal Oak, MI 48067-1884
(248) 733-3405

**MOTION OF DNC
TO INTERVENE AS DEFENDANT**

Pursuant to Michigan Court Rule 2.209, DNC respectfully requests that it be permitted to intervene as a defendant in this matter.

In support, DNC relies on the attached brief. Attached as Exhibit A is DNC's proposed Answer to Plaintiffs' Verified Complaint for Emergency and Permanent Injunctive Relief, in accordance with Michigan Court Rule 2.209(C)(2). Also attached are the Affidavit of David Jaffe (Exhibit B) and a proposed Response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Relief (Exhibit C).

Pursuant to Local Rule 2.119(B)(2), counsel for Intervening Defendant sought the concurrence of counsel via email on November 5, 2020. Defendant's counsel concurred. Concurrence from Plaintiff's counsel was not obtained, making this motion necessary.

Proposed Intervenors ask the Court to promptly issue its ruling on this Motion.

I hereby certify that I have complied with all provisions of LCR 2.119(B) on motion practice.

Respectfully submitted,

Dated: November 5, 2020

s/ Scott R. Eldridge
Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorney for Proposed Intervenors
One Michigan Avenue, Suite 900
Lansing, Michigan 48933

(517) 483-4918

Marc E. Elias (DC #442007)*
PERKINS COIE LLP
Attorneys for Proposed Intervenor
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

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PERKINS COIE LLP
Attorney for Proposed Intervenor
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Seattle, Washington 98101
(206) 359-8000

Mary Ellen Gurewitz (P25724)
CUMMINGS & CUMMINGS
Attorney for Proposed Intervenors
423 N Main St Ste 200
Royal Oak, MI 48067-1884
(248) 733-3405

**Pro hac vice motion forthcoming*

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PROOF OF SERVICE

Scott Eldridge certifies that on the 5th day of November 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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EXHIBIT A

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**[PROPOSED] ANSWER TO FIRST AMENDED VERIFIED COMPLAINT FOR
EMERGENCY AND PERMANENT INJUNCTIVE RELIEF**

[Proposed] Intervenor-Defendant DNC, by and through its attorneys, submits the following Answer to Plaintiffs' Verified Complaint for Emergency and Permanent Injunctive Relief (the "Complaint"). DNC responds to the allegations in the Complaint as follows:

INTRODUCTION

1. DNC denies the allegations in Paragraph 1 as untrue.
2. Paragraph 2 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, DNC denies the allegations as untrue.
3. Paragraph 3 contains mere characterizations of the Plaintiffs' claims and the relief they seek to which no response is required. To the extent a response is required, DNC denies that

Plaintiffs have a legal basis for requesting or obtaining such relief. To the extent Plaintiffs' characterizations in this paragraph imply any factual allegations, DNC denies the allegations as untrue.

PARTIES

4. DNC is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 4 regarding Plaintiffs' factual backgrounds. Paragraph 4 otherwise contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, DNC denies the allegations as untrue.

5. Paragraph 5 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, DNC denies that defendants have the authority to enter the relief that defendants request.

6. Paragraph 6 contains mere characterizations, legal contentions, and conclusions to which no response is required.

BACKGROUND

7. DNC admits the allegations in Paragraph 7.

8. Paragraph 8 contains mere characterizations, legal contentions, and conclusions to which no response is required.

9. Paragraph 9 contains mere characterizations, legal contentions, and conclusions to which no response is required.

10. Paragraph 10 contains mere characterizations, legal contentions, and conclusions to which no response is required.

COUNT I: INJUNCTIVE RELIEF

11. DNC denies the allegations in Paragraph 11 as untrue.

12. DNC admits that there are two situations that require the duplication of ballots. In the first, a ballot must be duplicated if it is damaged in such a way that it cannot go through the tabulator. For example, ballots which are torn or stained might need to be duplicated. In the second, all of the military and overseas ballots had to be duplicated. In both situations, two inspectors would examine the original ballot and make the same marks on the duplicate. They would then call for a Republican and Democratic challenger to observe the original and the duplicate to ensure that the duplicate was accurate.

13. Paragraph 13 contains mere characterizations, legal contentions, and conclusions to which no response is required.

14. DNC denies the allegations in Paragraph 14 as untrue.

15. DNC denies the allegations in Paragraph 15 as untrue.

16. Paragraph 16 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, DNC denies the allegations as untrue.

WHEREFORE, DNC respectfully requests that this Court:

- A. Deny that Plaintiffs are entitled to any relief;
- B. Dismiss the Complaint in its entirety, with prejudice; and
- C. Grant such other and further relief as the Court may deem just and proper.

Dated: November 5, 2020

Respectfully submitted,

s/ Scott R. Eldridge
Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorney for Proposed Intervenors
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 483-4918

Marc E. Elias (DC #442007)*
PERKINS COIE LLP
Attorneys for Proposed Intervenor
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

Kevin J. Hamilton (WA # 15648)*
PERKINS COIE LLP
Attorney for Proposed Intervenor
1201 Third Avenue, Suite 4900
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CUMMINGS & CUMMINGS
Attorney for Proposed Intervenors
423 N Main St Ste 200
Royal Oak, MI 48067-1884
(248) 733-3405

**Pro hac vice motion forthcoming*

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PROOF OF SERVICE

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s/ *DRAFT*
Scott Eldridge

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EXHIBIT B

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IN THE THIRD JUDICIAL CIRCUIT COURT
COUNTY OF WAYNE**

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Case No.
Hon.

CITY ELECTION COMMISSION of
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JANICE WINFREY, in her official
Capacity as Detroit City Clerk and
Chairperson of the City Election
Commission,

Defendants.

DECLARATION OF DAVID JAFFE

I, David Jaffe, am competent to testify herein, and make this declaration based upon my personal knowledge, and if sworn as a witness would testify as follows:

1. I am an attorney and was credentialed to serve as a challenger for the Michigan Democratic Party and I was asked to monitor and oversee the Democratic Party challengers in the absent voter counting board in Detroit.
2. The Detroit Elections Department absent voter counting board was located in the TCF Center in Detroit, Michigan. Within the larger counting board structure there were 134 separate counting boards, each of them containing a number of the 503 Detroit election precincts.
3. I was present to observe and monitor the process on Monday, November 2, Tuesday, November 3 and Wednesday, November 4, 2020.

4. The Republican and Democratic Parties each have the right to have challengers present and other organizations are allowed to request the authority to appoint challengers. I have been advised that The Election Integrity Fund was authorized to have challengers in Detroit, as were several other organizations.
5. Each organization was allowed to have one challenger per counting board and on all three days there were challengers from the Democratic and Republican Parties and the Election Integrity Fund (EIF). I did not see many challengers from other organizations.
6. It was my observation that the Republican and EIF challengers were working together, and in one instance when there were too many Republican challengers I saw a Republican remove her Republican credential and put on an EIF credential.
7. At nearly all times there were more Republican and EIF challengers than Democratic challengers, although the room was very large and crowded and it is difficult to estimate the precise numbers of each. I would estimate that for most of the time on November 3 and 4 there were in excess of 100 challengers for each of the Republican and EIF organizations and often less than 100 for the Democratic Party.
8. At one point in the afternoon of November 4, the elections officials determined that each of these three organizations had too many challengers and directed that some of the challengers leave the room.
9. At all times, the challengers who were present had the opportunity to observe the work of the elections inspectors.
10. There are two situations that require the duplication of ballots. In the first, a ballot must be duplicated if it is damaged in such a way that it cannot go through the tabulators. For example, ballots which are torn or stained might need to be duplicated. In the second, all of

the military and overseas ballots had to be duplicated because they were on forms that could not go through the tabulator, or that the tabulators could not read. The same procedure was followed in each instance.

11. I witnessed the duplication process as follows: The duplication process always involved three elections inspectors working together. One elections inspector would read out the votes on the original ballot; the second elections inspector would mark the duplicate ballot as indicated by the first elections inspector. The third elections inspector would observe and listen to be sure that the duplicate ballot accurately reproduced the original. The elections inspectors allowed one challenger from each of the Democrats and the Republicans, and one inspector from a separate group such as Election Integrity Fund, to be at the table and observe the process, attempting to preserve social distancing while giving the challengers a chance to verify the duplication. In many cases they would complete the duplication with the challengers at a six foot distance, and then let the challengers move closer to observe the original and the completed duplicate to insure that the duplicate was accurate. I witnessed this happening repeatedly, most often with the military ballots, as there were more of them to be duplicated.
12. The inspectors would then put the original ballot into a separate envelope and the duplicate would be put with the other ballots to be tabulated. The inspectors would not place the duplicated ballot with the other ballots to be tabulated until both a Republican and a Democratic challenger had confirmed the accuracy of the duplication.
13. Once the ballots are tabulated there is no way to identify the ballots which have been duplicated or to segregate them from the other ballots. They are all comingled.

14. There were generally four or five elections inspectors at each table and there were supervisors who were constantly monitoring the work to insure that it was being done in compliance with the required law and procedure. The supervisors were also frequently called upon to prevent the Republican and EIF challengers from harassing, intimidating, and interfering with the work of the elections inspectors.

FURTHER DECLARANT SAYETH NOT.

Dated: November 5, 2020



DAVID JAFFE

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EXHIBIT C

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Attorney for Plaintiffs
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Kansas City, Missouri 64105
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55 Campau Ave NW #300
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1201 Third Avenue, Suite 4900
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MILLER CANFIELD
Attorney for Proposed Intervenor
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 483-4918

Mary Ellen Gurewitz (P25724)
CUMMINGS & CUMMINGS

Attorney for Proposed Intervenors
423 N Main St Ste 200
Royal Oak, MI 48067-1884
(248) 733-3405

**[PROPOSED] RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY RELIEF**

INTRODUCTION

The votes have been counted. Absentee ballots have been received, processed, and canvassed. Indeed, *every* major news outlet has called Michigan for former vice president Joe Biden. Apparently dissatisfied with the choice of the people of Michigan, Plaintiffs filed this suit, eager to sow doubt about the results of the election and delay certification.

This Court can and should promptly deny this motion. Plaintiffs have shown no likelihood of success on the merits because they lack standing to bring this claim and have not even attempted to identify the irreparable harm they will suffer in the absence of an injunction. Nor have Plaintiffs provided this Court with *any* proof of wrongdoing or fraud; instead, they merely offer conclusory statements in their complaint. Most importantly, the public interest strongly counsels against an injunction, which would delay election results, add unnecessary chaos, and burden election officials who are doing their best to manage a general election during a global pandemic.

This lawsuit is just one more distraction advanced by parties attempting to disrupt the timely and orderly completion of the democratic process. Emergency relief should be denied, and the certification of Michigan's returns should proceed.

BACKGROUND

At the time Plaintiffs filed their motion for temporary restraining order, Michigan absent voter counting boards ("AVCBs") had been counting absent voter ballots for nearly two full days.

By the time the Court reads this opposition to Plaintiffs’ motion, at least 98 percent of Michigan’s statewide vote totals will have been publicly reported.

In Michigan, poll workers, known as “election inspectors,” are registered Michigan voters whom the local clerk has found has “a good reputation” and “sufficient education and clerical ability” to perform the duties of an election inspector. MCL 168.677. Election inspectors shoulder the burden of ensuring polling places and counting boards are running smoothly while also overseeing precise tasks, such as duplication of ballots, as might be necessary when a ballot cannot be read by a machine or when a military and overseas ballot needs to be transcribed into a ballot a machine can read. Jaffe Decl. ¶ 10.

While Plaintiffs imply there was a lack of meaningful Republican Party oversight at the TCF Center, there were more than 100 Republican challengers at that location over the past two days. See *id.* ¶ 7. Indeed, at times the number of Republican challengers exceeded the maximum allowed by law, leading some Republican challengers to swap their Republican credentials for a credential from the Election Integrity Fund (“EIF”), a Plaintiff in this suit. See *id.* ¶ 6.

Contrary to Plaintiffs’ complaint, observers from inside the TCF Center confirm that election inspectors were not unilaterally duplicating ballots; instead, multiple election inspectors duplicated ballots in tandem, as required. See *id.* ¶ 11. And while Plaintiffs allege that the duplication process “invites fraud,” there are many fail safes built in. Election challengers like Ms. Stoddard are permitted to oversee this process. Indeed, at the TCF Center, challengers from both parties—including challengers credentialed by Plaintiff EIF—were invited to review duplicated ballots. See *id.* ¶ 12 (observer at TCF Center confirming that “the inspectors would not place the duplicated ballot with the other ballots to be tabulated until both a Republican and a Democratic challenger had confirmed the accuracy of the duplication”). There is thus no reason to believe that

any duplications involved error or fraud, rendering Plaintiffs’ requested relief wholly unnecessary. Additionally, now that duplicated ballots have been tabulated, it would likely be incredibly difficult, if not impossible, to determine which ballots which have been duplicated or to segregate them from other ballots; they are now commingled. See *id.* ¶ 13. For these reasons and those that follow, this Court cannot and should not grant the unnecessary relief that Plaintiffs seek.

ARGUMENT

Injunctive relief is an extraordinary remedy that should only issue when justice requires. *Davis v Detroit Fin Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012). In determining whether to grant this extraordinary remedy, the Court should consider four factors:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Id. at 613, quoting *Alliance for Mentally ill v Dep’t of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998). Plaintiffs have not shown that *any* of these factors weigh in their favor, and thus they are not entitled to a temporary restraining order.

A. Plaintiffs have shown no likelihood that their claims will prevail.

1. Plaintiffs lack standing to bring this claim.

As an initial matter, 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.” 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.

First, Ms. Stoddard is not herself an election inspector; she is an election *challenger*. See 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 simply “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. Indeed, 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”). But all Plaintiffs have identified in their suit is a generalized grievance, without any assertion of any particular harm to Ms. Stoddard or EIF.¹ Plaintiffs therefore lack standing, and this Court need not proceed to the merits.

¹ Indeed, the proper party to bring this suit—assuming there were one—would likely be an election inspector belonging to the Republican Party who could allege he or she was not permitted to participate in the duplication process. Ms. Stoddard has alleged no political preference, and EIF has described itself as a “non-partisan” organization, as it must to maintain its 501(c)(4) status. See *Frequently Asked Questions*, Election Integrity Fund, <https://electionintegrityfund.org/faq> (last visited November 5, 2020).

2. Plaintiffs have no evidence of fraud or wrongdoing.

Even if Plaintiffs had standing—and they do not—they have failed to present sufficient proof of noncompliance with Michigan law or any resulting harm arising from such alleged noncompliance. The only factual support for their claims is their verified complaint. But the complaint merely states that, “[o]n information and belief, Defendants are allowing hundreds or thousands of ballots to be ‘duplicated’ solely by the Democratic Party inspectors and then counted.” Compl. ¶ 15. Plaintiffs do not allege when this occurred, who saw it occur, or whether anyone raised the alleged issue with other election inspectors or clerks. Importantly, Plaintiffs do not state that election inspectors have been duplicating ballots fraudulently. And to the contrary, the only specific evidence in the record is from Mr. Jaffe, an attorney who was credentialed to observe the counting at the TCF Center, and who confirmed that challengers from both parties were invited to confirm that duplicated ballots were duplicated accurately before those ballots were tabulated. Jaffe Decl. ¶¶ 11-12.

Ultimately, Plaintiffs simply invite this Court to conclude that something improper occurred, but provide no evidence to 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 is a hunch that ballots might not be 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).

B. Plaintiffs have not demonstrated irreparable injury.

To be entitled to a temporary injunction, Plaintiffs must establish the “indispensable requirement” of showing “particularized” irreparable harm. *Mich AFSCME Council v Woodhaven-*

Brownstown Sch Dist, 293 Mich App 143, 149; 809 NW2d 444 (2011). It follows that a litigant’s speculative assertions cannot demonstrate the type of harm necessary for the issuance of injunctive relief. *Pontiac Fire Fighters Union v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

Here, as with their lack of standing, Plaintiffs do not credibly demonstrate what irreparable harm they will suffer if an injunction is not issued. Instead, they simply claim that an alleged “violation of controlling election law will irreparably harm Plaintiffs, who have a right to expect Michigan law will be followed by the City of Detroit and Wayne County officials.” Mot. 4. Even if Plaintiffs were correct that duplication procedures were not precisely followed, a pure statutory violation, without more, does not give rise to irreparable harm to a Michigan citizen or nonprofit. See, e.g., *Davis v Detroit Fin Review Team*, 296 Mich App 563, 621; 821 NW2d 896 (2012) (in case where open records law was not followed, court noted that the “caselaw [] recognizes that when the record fails to indicate that a public body has acted in bad faith, there is no real and imminent danger of irreparable injury requiring issuance of an injunction”).

Because the irreparable injury inquiry asks what injury the *movant* will suffer, and not what general irreparable injury might occur to another party or another process, Plaintiffs have failed to establish irreparable injury, which is fatal to their motion for a temporary injunction. In any event, this Court should have no fear that any alleged deviation from procedures will result in irreparable “fraud,” as Plaintiffs claim. For all the reasons explained above, this fear is baseless. No injunction is needed to prevent any such harm.

C. The balance of the equities and the public interest weigh strongly against an injunction.

In their motion, Plaintiffs suggest that “Defendants will suffer no harm from injunctive relief other than any delay necessary to secure inspectors from the Republican Party.” Mot. 4-5.

But this cavalier characterization ignores the consequences of the delay Plaintiffs now urge, which would have a cascading effect and significantly disrupt the election in Michigan.

The State's election procedure relies on a series of carefully choreographed actions and deadlines following the initial vote tally. No more than two days after the election, the board of county canvassers meets and "then proceed[s] without delay to canvass the returns of votes cast." MCL 168.821–168.822. Expeditious completion of this step permits the board of state canvassers to complete their canvas by the twentieth day following the election. See MCL 168.841–168.842. In particular, the statutes contemplate the need for swift resolution of presidential contests. See MCL 168.842(2)–(3).

Despite the understandable need for swift completion of the canvass, Plaintiffs seek not merely a delay, but a *halt* in certification of results for an indefinite period of time.² See Mot. 5. The risk this poses to Defendants—and to the public—is a frustrating and costly delay that would cast a shadow over the presidential contest *and* threaten the county's ability to satisfy these statutorily mandated canvassing deadlines. The compounding delays that would result from Plaintiffs' requested relief are therefore not merely unnecessary, but also disruptive and damaging to the public's confidence in the election.

Ultimately, these practical concerns underscore the fundamental inappropriateness of the request Plaintiffs seek. Even though they have not yielded a *shred* of evidence of fraud, malintent, or any suspect behavior on the part of election officials, they ask this Court to not merely ensure compliance with the Secretary's guidance, but also order the segregation of ballots—

² Notably, under Plaintiffs' proposed resolution, the Republican Party would be able to indefinitely halt any certification if it simply affirmatively decided not to send election inspectors to assist in the duplication process. That is not and cannot be the resolution if there is a dispute as to duplication procedures.

unnecessarily—and to halt the certification of results. This dramatic overreaction would not serve to preserve the integrity of the election or ensure the accuracy of results; as discussed above, neither is in doubt. Instead, it would only yield a late-hour judicial intervention into a nearly completed count, throwing into doubt both the State’s timely completion of its canvass and the validity of its results. The public would not be served by such a result.

CONCLUSION

For the reasons stated, Proposed Intervenors respectfully submit that this Court should deny Plaintiffs’ Motion for a Temporary Injunction.

Dated: November 5, 2020

Respectfully submitted,

s/ Scott R. Eldridge
Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorney for Proposed Intervenors
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 483-4918

Marc E. Elias (DC #442007)*
PERKINS COIE LLP
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