STATE OF MICHIGAN
IN THE 7th CIRCUIT COURT

Michigan Republican Party and Republican, National Committee
Plaintiffs,

v

Davina Donahue, interim City Clerk, in her official capacity as a member of the City of Flint Board of Election Commissioners; William Kim, City Attorney, in his official capacity as a member of the City of Flint Board of Election Commissioners; Stacey Kaake, City Assessor, in her official capacity as a member of the City of Flint Board of Election Commissioners
Defendants.
_____/

Case No. 22-118123
Hon. Mark W. Latchana

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DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' REQUEST FOR A WRIT OF MANDAMUS

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I. INTRODUCTION AND BACKGROUND

Once again, outside entities have come to the City of Flint to supersede the decisions of local officials without any basis in law. This time, the Michigan Republican Party ("MRP") and the Republican National Committee ("RNC") (collectively, "Plaintiffs"), seek a writ of mandamus ordering the City of Flint's Board of Election Commissioners ("BEC") to appoint election inspectors more to Plaintiffs' liking for next Tuesday's General Election. Perhaps caring more about further sowing doubt into our democratic election system, Plaintiffs ignore significant jurisdictional and procedural hurdles which mandate immediate dismissal of their Complaint without consideration of the merits.

First, Plaintiffs' lack standing to bring challenges related to the appointment of election inspectors. By statute, the ability to bring challenges to the appointment of election inspectors rests solely with the County Chair of the local Republican Party. Second, Plaintiffs have failed to exhaust their administrative remedies. Third, the doctrine of laches bars Plaintiffs' claims because Plaintiffs filed their complaint a mere 11 days before Election Day, an insufficient amount of time to qualify, appoint, and train additional election inspectors.

Beyond these glaring failures, Plaintiffs' request for a writ of mandamus fails to show that (1) the BEC has such statutory authority; (2) the Clerk has a clear legal duty to appoint Plaintiffs' alleged election inspector applicants; (3) the alleged election inspector applicants are willing and available to serve; (4) the alleged election inspector applicants are actually qualified to serve; and (5) the alleged election inspector applicants are available and able to be adequately training in the next six (6) days. These failures, amongst other legal and factual infirmities, lead to the conclusion that Plaintiffs' request lacks any legal merit whatsoever and should be denied in its entirety.

Finally, not only should this Court deny mandamus, but this action should be dismissed pursuant to MCR §2.116(I) and the Court should award Defendants their reasonable costs and

attorney fees pursuant to MCL §600.2591. The use of these types of politically motivated lawsuits to create political theatre have no place in the judicial system.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

For the November 8, 2022 general election, the City of Flint has organized 54 election precincts and 6 absentee ballot counting boards ("AVCB"). The City of Flint's ("City") BEC is comprised of the City of Flint's City Clerk, City Attorney, and City Assessor, as specified in the applicable statute. *See* MCL §168.25.[2] On October 11, 2022, the BEC met, with interim City Clerk Davina Donahue[3] chairing the meeting, and with Chief Deputy City Attorney Joanne Gurley and Assessment Support Supervisor Tracey Weiss attending by designation. *See* **Ex. A: Affidavit of Interim City Clerk Davina Donahue**, at ¶3. After realizing that the lists of precinct and AVCB election inspectors had not been updated after the primary to include recently received applications, the BEC recessed until October 12, at which time it approved updated rosters of election inspectors for both the precincts and the AVCB. Ex. A, at ¶4. Those rosters were subsequently transmitted to the major party chairs, as required by statute. Ex. A, at ¶5.

[1] Plaintiffs' counsel is no stranger to baseless election lawsuits. Based in Washington, D.C., Mr. Spies represented defeated U.S. Senate Candidate John James before the Wayne County Board of Election Commissioners and in a lawsuit in Wayne County Circuit Court, claiming he had "very serious concerns" about the way the 2020 election was administered in Wayne County. During these challenges he claimed he saw "the mysterious appearance of ballots at the TCF Center that can't be accounted for." The defeat of his candidate was certified by the Board of State Canvassers and the lawsuit was dismissed.

[2] The undersigned delegated all duties related to the BEC to Joanne Gurley, Chief Deputy City Attorney. City Assessor Stacey Kaake similarly delegated all duties related to the BEC to Tracey Weiss, Assessment Support Supervisor. Neither Ms. Kaake nor the undersigned took any part in the actions of the BEC related to the appointment of election inspectors.

[3] On September 30, 2022, Inez Brown retired after 25 years of service as the City Clerk for the City of Flint. The Flint City Council appointed Davina Donahue as interim City Clerk to serve out the remainder of Ms. Brown's term (October 1, 2022 to December 31, 2022).

For the purposes of this response, Defendants accept Plaintiffs' numbers as true, representing the appointment of election inspectors as of the dates the information was provided to Plaintiffs. As of October 31, 2022, the City Clerk's office has 868 election inspector applications on file, of which 148 indicated a Republican party affiliation (i.e., 17%). Ex. A, at ¶6. Furthermore, a review of the election training records of the City Clerk's office indicates that 368 persons have attended the required election inspectors training school, offered on 10 separate dates in 2022. Ex. A, at ¶7-8. No election inspector training schools are planned between now and the November 8 General Election. Ex. A, at ¶9.

Currently, after refining the previous lists of election inspectors and filtering out those individuals who have since applied, rescinded their applications, or have otherwise warranted a change of status, 296 individuals are scheduled to work at one of the City's election precincts and 33 individuals are scheduled to work on the City's AVCBs. Ex. A, at ¶10. Of those 259, or 78.7%, self-identified as Democrats and 68, or 20.7% self-identified as Republicans. Ex. A, at ¶11. At this time, the City Clerk's office is unaware of any other persons who are interested and willing to work as election inspectors for the November 8 general election who satisfy the statutory qualifications. Ex. A, at ¶12.

III. STANDARD OF REVIIEW

"The Legislature of this state is empowered to enact laws to promote and regulate political campaigns and candidacies." *Mich Educ Ass'n v Sec'y of State*, 489 Mich 194, 202, 801 NW2d 35, 39 (2011). Since the conduct of elections is entirely a creation of statute, determining whether a legal election-related duty exists requires application of the principles of statutory interpretation. In such circumstances, the Michigan Supreme Court directs that:

> When interpreting a statute, a court's duty is to give effect to the intent of the Legislature based on the actual words used in the statute. If the statutory language is clear and unambiguous, no further construction is

> necessary or permitted. The statute is enforced as written. It is the duty of the judiciary to interpret, not write, the law."

Twp of Casco v Sec'y of State, 472 Mich 566, 590-91, 701 NW2d 102, 115 (2005). In addition, "when the Legislature has expressly included language in one part of a statute and omitted this same language elsewhere in the provision, this inclusion and omission should be construed as intentional." *Four Zero One Assocs LLC v Dep't of Treasury*, 320 Mich App 587, 595, 907 NW2d 892, 896 (2017). Furthermore, "[a]lthough courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake. A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking." *Gleason v Kincaid*, 323 Mich App 308, 318, 917 NW2d 685, 691 (2018) (citation omitted).

IV. ANALYSIS

Michigan Election Law ("MEL"), 1954 PA 116, controls the conduct of elections in Michigan. Section 674 of the MEL addresses the appointment of election inspectors and directs that a board of election commissioners must appoint at least three (3) election inspectors in each precinct, at least five (5) days in advance of the date set for holding schools of instruction. MCL §168.674(1). Furthermore, Section 674 also states that "[t]he board of election commissioners shall appoint at least 1 election inspector from each major political party and shall appoint an equal number**, as nearly as possible,** of election inspectors in each election precinct from each major political party." MCL §168.674(2) (emphasis added).

Thus, §674 requires that a BEC appoint at least 3 inspectors for each precinct and at least 1 from each major political party. MCL §168.674(2). §674(1) also requires that the appointments occur no later than 5 days in advance of the date when training will be held. MCL §168.674(1).

Finally, under §674(2), the requirement that equal numbers of election inspectors be appointed from each major political party is limited by the clause, "as nearly as possible." MCL §168.674(2).

Section 677 of the MEL specifies that:

> [A] precinct election inspector must be a qualified and registered elector of this state, must have a good reputation, and must have sufficient education and clerical ability to perform the duties of the office. A person must not be appointed to a board of election inspectors unless the person has filed an application with a city or township clerk in that county where the individual wishes to serve as election inspector.

MCL §168.677(1). Section 677 also requires that the application be made, in the applicant's own handwriting, on a form approved by the State Director of Elections and include various specified information. MCL §168.677(2). Appointments of election inspectors who do not have a properly completed application on file in the City Clerks' office are void. MCL §168.674(1).

Election inspectors must also attend a "school of instruction." MCL §168.677(3). City Clerks may conduct their own training school. MCL §168.683. Election inspectors must either attend an election school in the preceding two years or pass an examination given by the election commission of the City. *Id.*

A. THE MRP AND THE RNC LACK STANDING BECAUSE THE LEGISLATURE HAS SPECIFIED THAT ONLY THE MAJOR PARTY COUNTY CHAIRS MAY CHALLENGE THE APPOINTMENT OF ELECTION INSPECTORS AND ONLY THROUGH A SPECIFIED ADMINISTRATIVE PROCESS

Notwithstanding Plaintiffs' conclusory allegations, they lack the standing necessary under Michigan law to bring a challenge relating to the appointment of election inspectors. The Michigan Supreme Court instructs that "a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372, 792 NW2d 686, 699 (2010). If a cause of action is not provided by law, a "litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that

will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id.*

White v Highland Park is instructive regarding who has standing to bring claims arising out of MCL §168.674(2). In *White* – as is the case here – the plaintiff relied on MCL §168.674(2) and asked the court to require that the Highland Park election commission appoint one or more Republican inspectors, despite Highland Park having received no Republican-affiliated applications. *White v Highland Park Election Comm'n*, 312 Mich App 571, 572, 878 NW2d 491, 491 (2015). The Michigan Court of Appeals agreed that White lacked standing, because the relevant statute "**explicitly gives the right to enforce the political party designations to the major political party county chairs** . . . which is consistent with other parts of the statute that allow those same county chairs to submit names on behalf of their parties to city election officials for use as election inspectors." *Id.* at 573 (emphasis added). The Court of Appeals further noted that that "the Legislature has created a form of public enforcement through an administrative appeal process, and has made that process **available only to county chairs of the major political parties**." *Id.* (emphasis added).

Here, this action has been brought not by the county chair of a major political party, but instead by the state and national parties themselves. *White* recognizes that the Legislature created an administrative appeal process to enforce MCL §168.674(2) but limited the availability of that process to the major party county chairs. Since the Legislature created a remedy, even if that remedy is limited, any special interest the MRP and RNC have is of little value in determining whether standing exists here. Without standing, Plaintiffs' suit cannot possibly succeed, and their requests for declaratory relief and mandamus should be denied on those grounds alone.

B. PLAINTIFFS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

Even assuming *arguendo* that Plaintiffs have standing to bring their claims, separate from the Genesee County Republican Party Chair, Plaintiffs' claims should be dismissed for failing to exhaust their administrative remedies. Michigan law is clear that when a statute provides for an administrative review process, such as under the MEL, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 54, 620 NW2d 546 (2000) (internal quotations and citations omitted). As noted by the Court of Appeals in *White*, "the Legislature has created a form of public enforcement through an administrative appeal process, and has made that process available only to county chairs of the major political parties." *White*, 312 Mich App at 573. The list of appointed election inspectors was finalized by the BEC on October 12. Yet neither Plaintiffs – nor the Genesee County Republican Chair – filed a challenge with the BEC within the time allowed and as permitted under Section 674 of the MEL.[4] As such, this Court lacks subject matter jurisdiction over this lawsuit and Plaintiffs' Complaint should summarily be dismissed.

C. LACHES BARS PLAINTIFFS' CLAIMS BECAUSE THEY FAILED TO EXERCISE "EXTREME DILIGENCE AND PROMPTNESS" NECESSARY TO REBUT THE STATUTORY PRESUMPTION

Again, even assuming *arguendo* that Plaintiffs have standing and were not required to exhaust administrative remedies, this action is barred by the doctrine of laches. 1969 PA 161 provides that "[i]n all civil actions brought in any circuit court of this state affecting elections,

[4] In addition to failing to exhaust administrative remedies, this challenge is untimely as explained further below. Section 674 requires that any challenge to the list of appointed election inspectors be made within four business days of the list being received by the County Chair. MCL §168.674(3). In this case, notice was received on Saturday, October 15 and a challenge was thus to be filed no later than Thursday, October 20th.

dates of elections, candidates, qualifications of candidates, ballots or questions on ballots, there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected." MCL §691.1031. "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Charter Twp of Lyon v Petty*, 317 Mich App 482, 490 (2016) (quotation marks and citation omitted). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id*. (citation omitted).

To invoke laches, the complaining party must normally establish prejudice because of the delay, and proving such prejudice is essential to the defense of laches. *Id.* However, in election-related matters, due diligence and prompt action are particularly important, and the passage of time has a particularly important effect. "It is well established that in election-related matters, ***extreme diligence and promptness are required***." *McClafferty v Portage Cty Bd of Elections*, 661 FSupp 2d 826, 839 (ND Ohio 2009) (emphasis added). In essence, the burden shifts when dealing with election law related issues and "**[t]he party challenging the election bears the burden of demonstrating that that they acted with the requisite diligence**." *Id.* (emphasis added).

Here, Plaintiffs' complaint was filed on October 28, 11 days before the November 8 general election. Their filing date is thus closer to the general election than to the beginning of the 28-day window during which laches is presumed. Furthermore, Defendants are seriously prejudiced by Plaintiffs' delay because the Flint City Clerk's office conducted its final election school of the year on Saturday, October 29. *See* Ex. A, at ¶8. Attendance at such training is required by statute. *See* MCL §168.683 ("An election inspector shall not serve in any election unless he or she has within

the last preceding 2 years either attended an election school or has passed satisfactorily an examination given by the election commission of the city or township in which appointed.").

By not filing their complaint until the evening before the last election school was scheduled (and by delaying service of their complaint until the weekend), there are now no schools scheduled that new election inspectors could attend. Either an additional school would have to be scheduled, constituting an administrative burden on the Flint City Clerk's office that may not be possible at this late date, or unqualified election inspectors would have to be appointed further justifying the application of laches here. Given all the preparation that must occur over the next seven days before the election, there is no time or staff available to conduct another day of election school.

Plaintiffs' failure to raise issues with Defendants in accord with the statutorily mandated deadlines has further prejudiced Defendants by bypassing the timeline set forth by statute. The MEL sets strict timelines for an administrative appeal regarding the appointment of election inspectors, requiring that such challenges be filed "not later than 4 business days following receipt of the board of election commissioners' notice of appointed election inspectors." MCL §168.674(3). The MEL further requires that the BEC respond to such challenges within 2 days. *Id.* In short, the Legislature clearly intended that challenges to the appointment of election inspectors were to be raised immediately and without delay.

Plaintiffs admit that they received the list of election inspectors on October 15, 2022. Compl, at ¶25. The fourth business day for the City of Flint after that was Thursday, October 20. Plaintiffs did not contact the City about their concerns by letter until Friday, October 21. Compl, at ¶29. After filing their Complaint on Friday, October 28, Plaintiffs did not serve Defendants until Plaintiffs' counsel contacted the undersigned by email on Saturday, October 29.

In comparison, had the statutorily mandated timeline for challenging appointments been applied to this suit, Defendants would have had at least 19 days in which to implement any changes. Thus, due to Plaintiffs' lack of diligence, almost half of that time has been lost (almost two-thirds, if the time before a hearing can be held is included), making the development and implementation of any changes increasingly difficult if not outright impossible. Considering the statutory deadlines set forth in MCL §168.674(3) and (4), Plaintiffs' dilatory actions here cannot satisfy the standard of "extreme diligence and promptness" and laches should bar their claims.

In summary, Plaintiffs waited almost two weeks to file their complaint, on the eve of the final election school for election inspectors, and eleven days before the election. They did not commit to serving Defendants until three days after filing their Complaint, despite City Hall being located across the street from the courthouse, and despite having been in contact with the undersigned via email for weeks. These actions do not demonstrate "extreme diligence and promptness" and Plaintiffs have thus not rebutted the statutory presumption that laches applies to election-related matters for actions filed within 28 days of an election. Plaintiffs' claims are thus barred by laches and their request for declaratory relief and mandamus should be denied.

D. DECLARATORY RELIEF AND MANDAMUS IS UNAVAILABLE BECAUSE PLAINTIFFS DO NOT HAVE A CLEAR LEGAL RIGHT TO THE RELIEF SOUGHT, DEFENDANTS HAVE NO CLEAR LEGAL DUTY TO PERFORM, AND THE ACTS REQUESTED ARE NOT MINISTERIAL

Plaintiffs' request for declaratory relief and mandamus is without merit and constitutes nothing less than an invitation for the Court to usurp the Legislature's role in enacting statutes and create legal requirements out of thin air. This goes far beyond the statutory text and crosses the threshold into judicial usurpation of the Legislature's role. The rights and duties purportedly set forth in MCL 168.674(2), (5), and MCL 168.765a(2) that Plaintiffs ask the Court to recognize as "clear legal rights and duties" are nothing of the sort. Instead, they seek to create an affirmative duty for a BEC to take indeterminate and unspecified steps to achieve their desired balanced

appointments of election inspectors. No Michigan court has ever adopted such a reading of those statutes. Indeed, such a reading of the statute would render nugatory the limiting clause, "as nearly as possible," by creating an affirmative obligation on the part of municipal clerks to do almost anything that might conceivably make such a result possible. MCL §168.674(2).

Such an interpretation would contradict the understanding of the Court in *White*, where the Michigan Court of Appeals accepted a lower court's determination that a board of election commissioners does not violate MCL §168.674(2) if insufficient numbers of Republican-affiliated election inspectors submit applications. *White*, 312 Mich App at 572. Indeed, it not only requires that this court read the "as nearly as possible" language as creating an affirmative duty, but also requires ignoring the *lack* of such limiting language elsewhere in the statute. As previously identified, "when the Legislature has expressly included language in one part of a statute and omitted this same language elsewhere in the provision, this inclusion and omission should be construed as intentional." *Four Zero One Assocs LLC*, 320 Mich App at 595. Correctly read, the provision directing equal numbers of election inspectors in each precinct from the major political parties should be read as both less strict than the other requirements set forth in §674 as well as conditional, to be applied when appropriate as determined by a board of election commissioners.

Furthermore, Plaintiffs fail to explain how they satisfy the legal requirements for a writ of mandamus. Those requirements are clearly set forth in Michigan law:

> A writ of mandamus is an extraordinary remedy that will only be issued if (1) the party seeking the writ "has a clear legal right to the performance of the duty sought to be compelled," (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, that is, it does not involve discretion or judgment, and (4) no other legal or equitable remedy exists that might achieve the same result.

Southfield Educ Ass'n v Bd of Educ of the Southfield Pub Sch, 320 Mich App 353, 378, 909 NW2d 1, 16 (2017) (*citing Barrow v Detroit Election Comm*, 305 Mich App 649, 661-662; 854 NW2d

489 (2014)). A plaintiff bears the burden of proving entitlement to a writ of mandamus. *Id.* (*citing Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004)).

Michigan law recognizes that "[a] ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Berry v Garrett*, 316 Mich App 37, 42, 890 NW2d 882, 885 (2016) (*citing Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013)). "[A] clear legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Hayes v Parole Bd.*, 312 Mich App 774, 778, 886 NW2d 725, 727 (2015) (internal citations omitted).

1. There is no legal duty for the BEC to appoint the persons listed in Plaintiffs' exhibit 5 as election inspectors

Section 674 does not create a clear legal right for the major political parties. Instead, it creates, at best, a legal right for the local *county chair* of a major political party. All notices required under Section 674 are directed to the major party's county chair. MCL §168.674(2), (4). The ability to challenge appointments is vested in the major party's county chair. MCL §168.674(3)-(4). As a result, the clear legal right here is vested not in the major parties, but rather in their respective county chairs.

However, even assuming *arguendo* that Plaintiffs have a clear legal right in general, they have failed to show that they have a clear legal right to the specific relief sought in their first request for relief – the appointment as election inspector of the persons listed in Exhibit 5 of their Complaint. The BEC's authority to appoint election inspectors is time limited by statute: ". . . in no case less than 5 days before the date set for holding schools of instruction . . ." MCL

§168.674(1). The final "schools of instruction" occurred in Flint on Saturday, October 29. *See* Ex. A, at ¶8. The BEC is thus statutorily time-barred from acting now and Plaintiffs have requested an act that Defendants do not have the legal ability to perform. Furthermore, while under MCL §168.674(5) the chair of the BEC has the authority to appoint election inspectors to fill vacancies, Plaintiffs have failed to establish that there is a vacancy or that the persons they submit are properly qualified applicants or election inspectors – as is also required by statute.

The ability of the BEC to appoint election inspectors is further limited to those individuals who are qualified to serve under §677 and who can satisfy the training requirements of §683. Plaintiffs have not shown that each of the persons listed in Exhibit 5 of their Complaint satisfies those requirements – that they have an application on file with the City Clerks' office, that they have attended the necessary training, and that they satisfy all other requirements. Plaintiffs have thus also failed to request something that Defendants have a clear legal duty to perform, because no clear legal duty to appoint election inspectors of dubious qualifications exists.

Furthermore, Plaintiffs cannot show that the act of appointing election inspectors is ministerial. Reviewing applications and determining whether the statutory requirements are met includes factors that clearly depend on an official's discretion or judgment. For example, an election inspector "must have a good reputation" and "must have sufficient education and clerical ability to perform the duties of the office." MCL §168.677(1). Exactly what satisfies those requirements is not set forth in the statute, and thus making those determinations a discretionary judgment that is not ministerial in nature.

Finally, any clear legal duty regarding balanced appointment of election inspectors is limited by the statutory language itself: "as nearly as possible." MCL §168.674(2). As previously noted, 68 of the 329, over 20% of the persons currently scheduled to work as election inspectors

for the November 8 General Election have self-identified as Republicans. *See* Ex. A, at ¶11. This is a *higher* percentage than the percentage of self-identified Republicans (17%) who have applications on file with the Flint City Clerk's office. *Id.*, at ¶6.

In *White*, neither the trial court nor the Court of Appeals blinked at having *zero* Republican-affiliated election inspectors, when the city of Highland Park received no applications from Republicans. *White*, 312 Mich App at 572. A similar standard should apply here. By any reasonable application of the phrase "as nearly as possible," maintaining a comparable partisan parity of appointed election inspectors compared to the applications on file should be deemed to satisfy the statutory requirement.

In short, Plaintiffs have no clear legal right to have each person listed on their Exhibit 5 appointed as an election inspector in the City. There is also no clear legal duty for Defendants to appoint each person listed on Plaintiffs' Exhibit 5 as an election inspector, and such determinations are – at least in part – discretionary, because they involve the exercise of judgment by the City Clerk's office. Mandamus relief is thus not warranted as to their first request.

2. There is no clear legal duty to reassign Republican-affiliated election inspectors to the City's AVCB, to provide partisan balance regarding appointment of precinct chairpersons, or engage in active recruitment of inspectors from any party

Plaintiffs' second request for mandamus asks for the reassignment of Republican-affiliated election inspectors to the City's AVCB. While Plaintiffs cite to §679's general statement that "[s]ections 673a and 674 apply to the appointment of election inspectors to counting boards," they fail to show how those statutes create a clear legal duty for the BEC to reallocate 20 Republican-affiliated election inspectors from election precincts to the AVCBs. Indeed, doing so would itself violate the MEL, because MEL unequivocally requires that each precinct have at least one election inspector from each major political party. MCL §168.674(1).

Similarly, the MEL leaves the appointment of precinct chairpersons entirely to the discretion of the BEC. Indeed, the statute is entirely silent as to the partisan allegiance of precinct chairpersons. In contrast, the statute clearly directs that the BEC must appoint at last one election inspector from each major party and should – as nearly as possible – appoint equal numbers of election commissioners from each major political party. MCL §168.674(2). The statute's silence regarding precinct chairpersons speaks volumes – the omission by the Legislature of any partisan qualification for precinct chairperson is properly construed as intentional, and nothing in Michigan's principles of statutory interpretation provides a basis to read any such requirement into the statute. *See Four Zero One Assocs LLC*, 320 Mich App at 595.

In other words, no legally binding partisan qualifications for precinct chairperson exist, and so Plaintiffs do not ask this Court to enforce a clear legal duty but rather ask this Court to create a new standard that the Legislature did not include in the statutory language. Neither is there a clear legal duty for the BEC to engage in any affirmative actions to recruit additional Republican-affiliated election inspectors. Indeed, as the Michigan Court of Appeals upheld in *White*, a board of election commissioners does not violate MCL §168.674(2) if insufficient numbers of Republican representatives submit applications to be election inspectors and a municipality ends up appointing *no* Republican election inspectors as a result. *White*, 312 Mich App at 572.

Plaintiffs' second, third and fourth requested relief are thus without merit due to the complete lack of any clear legal duty warranting mandamus relief. Furthermore, Plaintiffs fail to explain how any of those requests could possibly be considered ministerial, when any of them would require the exercise of significant discretion and judgment by the BEC, its chair, or the staff of the City Clerk's office.

3. Plaintiffs' final request for mandamus fails to identify a single instance when a prospective Republican election inspector was "turned away"

Plaintiffs disingenuously imply that Ms. Boone, the City of Flint's election supervisor, turned away Republican-affiliated applicants, but their own allegations regarding such are either conclusory or nonspecific hearsay. Furthermore, their own letter dated October 21, attached as an exhibit to their Complaint, noted "that individual was directed by clerk staff to fill out and submit an application." In other words, viewed in the most favorable light to them, a single individual felt discouraged after being told that the City of Flint was – as is well known – a predominantly Democratic area, but was still told to fill out and submit an application.

While Plaintiffs' fifth request for mandamus relief refers to a clear legal duty under MCL §168.674(5), no such ministerial and clear legal duty exists. That statute provides that "[i]f a vacancy occurs in the office of chairperson or in the office of election inspector before election day, the chairperson of the board of election commissioners shall designate some other properly qualified applicant or election inspector . . . subject to this section." MCL §168.674(5). Plaintiffs have failed to allege or show that vacancies occurred, or that there were properly qualified Republican applicants or election inspectors who were not appointed to fill those vacancies. Nor have they shown how the application of §674(5) does not require the application of judgment or discretion and would thus be purely ministerial.

Their final request for mandamus relief is thus as meritless as all their other requests because they have failed to identify a clear legal right to which the Plaintiffs are entitled and a clear legal duty to act applicable to Defendants, that is ministerial in nature.

V. CONCLUSION

Plaintiffs have no standing to bring this case, have failed to exhaust their administrative remedies, and they have failed to show how this action is not barred by the presumption of laches

that applies to election-related suits. Instead, Plaintiffs request the extraordinary remedy of mandamus, without identifying a clear legal right that they are entitled to by law and without identifying a ministerial, clear legal duty on the part of the Defendants. This Court should deny Plaintiffs' their requested relief, dismiss this action for lack of merit asserted pursuant to MCR §2.116(I), and award Defendants their reasonable costs and attorneys' fees in defending against this action pursuant to MCL§600.2591.

Respectfully submitted,

/s/ William Y. Kim
William Y. Kim (P76411)
City of Flint Department of Law

Date: November 1, 2022

EX A: DECLARATION OF DAVINA DONAHUE

1. My name is Davina Donahue and I was appointed by the Flint City Council as to serve as the interim City Clerk effective October 1, 2022.
2. As interim City Clerk, my duties include, among other things, the oversight and administration of the City's elections.
3. On October 11, 2022, the City of Flint's Board of Election Commissioners met. I chaired the meeting and in attendance were Chief Deputy City Attorney Joanne Gurley and Assessment Support Supervisor Tracey Weiss, both sitting by designation.
4. The meeting was recessed until the next day, at which time updated rosters of precinct and absentee ballot counting board election inspectors were approved by the Board.
5. The rosters were transmitted to the major party chairs.
6. As of October 31, 2022, the City Clerk's office has 868 election inspector applications on file, including 148 applications that indicate a Republican party affiliation.
7. As of October 31, 2022, records of the City Clerk's office indicate that 368 persons have attended an election inspector training in 2022.
8. In 2022, records of the City Clerk's office indicate that election inspector training schools were held on 7/21, 7/23, 9/24, 10/6, 10/8, 10/13, 10/15, 10/20, 10/22, 10/27, and 10/29.
9. No further election inspector training schools are scheduled for 2022. The Flint City Clerk's Office does not have the staff capacity to run another training school between now and Election Day.
10. As of October 31, 2022, on election day, 296 individuals are scheduled to work at one of the City's election precincts, and 33 individuals are scheduled to work the City's AVCBs
11. Of the individuals scheduled to work on election day, 259 are self-affiliated as Democrats and 68 are self-affiliated as Republicans.

12. The City Clerk's Office is unaware of any other persons who (1) are interested and willing to work as an election inspector for the November 8 general election, (2) have a properly completed application on file, and (3) have attended the necessary training.

13. I declare under the penalties of perjury that this declaration has been examined by me and that its contents are true to the best of my information, knowledge, and belief, as communicated to me by the staff of the City Clerks' Office and based on the records maintained by the staff of the City Clerk's Office.

Davina Donahue, Interim City Clerk

Date: 11/01/2022

STATE OF MICHIGAN
IN THE 7th CIRCUIT COURT

Michigan Republican Party and Republican, National Committee
Plaintiffs,

v

Davina Donahue, et al.
Defendants.
_____/

Case No. 22-118123
Hon. Mark w. Latchana

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_____/

CERTIFICATE OF SERVICE

I hereby certify that on **November 1, 2022**, I served the foregoing on Plaintiffs by emailing a courtesy copy of Plaintiffs and directing it be sent to Plaintiff by first class mail.

Respectfully submitted,

/s/ William Y. Kim **Date: November 1, 2022**
William Y. Kim (P76411)