STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KRISTINA KARAMO,
Candidate for MI Secretary of State,

PHILIP O'HALLORAN,
MD Poll Challenger,

Case No: 22-012759-AW
Hon. Timothy M. Kenny

BRADEN GIACOBAZZI
Poll Challenger,

TIMOTHY MAHONEY,
Poll Watcher,

KRISTIE WALLS,
Detroit Election Worker,

PATRICIA FARMER,
Detroit Resident Taxpayer,

ELECTION INTEGRITY FUND AND FORCE,
A Michigan non-profit corporation
Plaintiffs,

-vs-

JANICE WINFREY,
In her official capacity as Detroit City Clerk,

CITY OF DETROIT BOARD OF ELECTION INSPECTORS, In their official capacity,

Defendants

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PLAINTIFFS' FINDINGS OF FACT, CONCLUSIONS OF LAW AND REQUEST FOR RELIEF

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Plaintiffs come to this Honorable Court seeking declaratory relief, injunctive relief, and mandamus relief related to the processes associated with absentee voting in the City of Detroit. Despite the fact that the complaint was filed thirteen (13) days before the election, Defendants were put on notice when several of the Plaintiffs filed challenges addressing these very same issues, following the August 2, 2022 Primary Election. The court in consideration of the relief requested in the emergency motion and the short time until the General election declared that the proofs would be limited to testimony about the procedures that affect the November 8, 2022, General Mid-term Election. The ruling was discussed in chambers and both parties consented to the strategy to timely resolve focused issues. The court asked for a restatement of the relief requested and a list of witnesses in order of presentation, and an exchange of documents, and exhibits that would either be relied upon or offered as exhibits.

The focus on the upcoming election was agreed to by both parties. The court made it clear that witnesses (or questions) relating to *any* previous election presenting evidence of violations of the law would not be considered. The Defendant through their counsel has continued to claim there

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is no evidence of any violations of law. In fact, the preclusion of past violations by the court assures that result. Instead, the court took a more prudent approach which is supported by the Plaintiffs through their counsel to resolve this emergency case or controversy—the court limited testimony to officials Chris Thomas and David Baxter about the process and procedures that are being used to conduct the election. A third witness, George Azzouz was requested by the Plaintiff, related solely to the issue of 'effective monitoring of the drop boxes' as required by MCL 168.761d. Despite testimony by both Thomas and Baxter that was limited by personal knowledge and in which Chris Thomas suggested that the answers would be within the knowledge of George Azzouz, the court refused to hear from this witness.

The testimony was presented in one long day, Thursday, November 3, 2022. During pretrial conferences, all parties had a full and fair opportunity to discuss with the court the procedure that the court would use to resolve the emergency motion. Only one point of contention from the Plaintiffs was that the Court refused to order the Defendant to answer the complaint which would have, from the Plaintiffs' perspective, narrowed the issues with admissions or denials. The court ruled and the matter proceeded.

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The understanding of all parties was that Plaintiffs would present testimony from the Detroit officials about the November 8, 2022 election processes and the equipment used to conduct the election, and then the Court would review the claimed violations of law and rule whether the procedures or equipment were in violation of the law. If so, then the court would consider an argument on how to remedy any violation.

On Thursday, November 3, 2022, the Defendant re-raised orally the defense of latches. This was *after* both sides had concurred in the process. The court in pretrial discussions had not scheduled testimony or argument on this oral claim. The Plaintiffs offered an explanation that the

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timing of the lawsuit was predicated on the fact that violations of election law and procedure had been filed by poll challengers on August 2, 2022, in accordance with the law and that the City of Detroit had not responded to a single challenge. The Plaintiffs further offered that recent election training materials had been received that revealed that the same processes and procedures were about to be used again by the city of Detroit.[1] Attorney Hartman stated that the materials had come into the possession of his clients immediately before filing the lawsuit. The Court did not schedule action on the verbal defense raised of latches and instead crafted a fair process to resolve the dispute with testimony on the equipment and procedures related only to the November 8, 2022 election.

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Limited testimony on procedures and equipment was presented; however, this is not due to the lack of information available but more so to the court's limitations on what Plaintiffs could offer for the instant motion concerning preliminary injunction. The court scheduled each side 30 minutes for an oral closing argument on November 4, 2022, at 8:30 am and required briefs by both parties (and any interested third parties) by 3:30 pm on November 4, 2022, indicating that a ruling would be forthcoming no later than Monday, November 7, 2022. The pre-processing of absentee ballots will begin on November 6, 2022, at 10:00 am. This is something that the court's general counsel already brought to light during one of the first hearings. Further, the court promised to make the Zoom recording available to assist in the writing of briefs; however, that was never done.

[1] Attorney Hartman stated that the election materials included a recorded video from training which was reported to him to be from training which was recorded by a person who attended and provided. The training videos were clarified that the training video was from David Jaffee, a Democrat Poll challenger who was training his volunteers to surveil and to interfere with Republican and Independent poll challengers. It was reported that a member of the Detroit Clerk's office was present. No testimony was offered, and the video was not presented in court. The written election training materials also included *CCB Inspector Training Course for November 8, 2022*, which contained a message from the Detroit Clerk on page 2 and a packet labeled City of Detroit Department of Elections November 8,, 2022 General Election Poll Worker Training Class. These were not offered as evidence but to show in pretrial discussions that there was a good faith basis in the timing of bringing the claim.

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ISSUE 1: The Requirements of MCL 168.761(2)

Signature Comparison of Absentee ballot Applications

MCL 168.761((2)

The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot.

Signature comparisons must be made with the digitized signature in the qualified voter file.

If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on the application for an absent voter ballot to the signature contained on the master card.

If before 8 p.m. on the day before election day the clerk of a city or township rejects an absent voter ballot application because the signature on the absent voter ballot application does not agree sufficiently with the signature on the master card or the digitized signature contained in the qualified voter file so as to identify the elector or because the elector failed to sign the absent voter ballot application, the city or township clerk shall as soon as practicable, but in no event later than 48 hours after determining the signatures do ***not agree sufficiently*** or that the signature is missing, or by 8 p.m. on the day before election day, whichever occurs first, notify the elector of the rejection by mail, telephone, or electronic mail.

Here, the testimony of Chris Thomas revealed that the clerk checked the ballot applications to determine if they 'agree sufficiently' to the QVF or Master Card. Thomas also reported that this process would be best discussed with Daniel Baxter. Daniel Baxter reported that the process was done 'by hand' comparison. He stated that Reli-vote was not used for signature comparisons for ballot *applications* only ballot envelopes. Both parties denied that any software from Konnech or Votem was used for any process affecting the November 2, 2022 election.

Attorney Hartman proffered an exhibit that had been provided to the court and counsel per the pretrial conference agreement in which there was a link to a video of the October 14, 2020 Detroit City Council Internal Operations Committee Meeting during which the IT Manager for the City of Detroit, Timothy Gaffne explains the expenditure of $186,624.00 which will be reimbursed by a grant from Center For Civic Living and a disbursement record for Konnech Contract No. 3045877 which was for software that was used to do signature comparisons of ballot applications up to 2000 per minute and was able to "pull" a file from the QVF. Several other contracts dating

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back to $143,000 in 2009 and four in 2020 were retrieved from the Web Archive site Wayback showing a relationship with Konnech significantly involved in Detroit Elections.

Both Thomas and Baxter reported that the Konnech relationship had been terminated. Mr. Baxter agreed it was for 'cause' but the election software and processes that Konnech has been involved with remain largely a mystery despite the American requirement for honest, open, and transparent government. The software that was used to track election workers, poll challengers and poll watchers and much, much more called Poll Chief is reportedly not going to be used in the November 8, 2022, election.

While the court accepted the word of the witnesses and did not permit an examination of the veracity of the claim, the recording of Timothy Gaffne should have been explored. The ruling by this court leaves open the question as to whether Konnech had access to pull Detroit Voter (or even statewide voter information from the QVF). It leaves open the issue of whether a software application has compromised the security of the Detroit election.

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The issue of Konnech as to signature comparison is closed for the emergency preliminary hearing but will be subject to discovery in the case at large. Plaintiffs accept the ruling as to the preliminary hearing but as stated would be preserving any offer of proof and considers it done herein.

Plaintiffs seek declaratory relief on what the lawful process is for determining whether the signature on a ballot application agrees sufficiently with the QVF (or Master Card). Plaintiffs have cited that the *Genteski v Benson* Court of Claims case NO 20-000216-MM[2] rejected the signature guidance of the secretary of state. Attorney Fink represented to the Court that internet sources had

[2] AKA Allegan Case

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reported that the Michigan Supreme reversed this case, but it appears as though the was a mistake between the signature comparison case and the poll challenger guidance case in which the Supreme Court only granted a stay of proceedings. This Court wisely instructed Attorney Hartman to proceed as the case was postured.

The absence of a lawful signature comparison standard is a real conundrum. The Secretary of State Benson has failed to engage in the required process for promulgating a rule under the administrative procedures act. However, the City of Detroit has clean hands on the lack of a standard and is tasked to make a determination on how to compare signatures.

The importance of a signature on a ballot application is critical when the application is presented online or by mail. As testified to by Mr. Thomas, the signature is how we control who has access to the ballot. The plaintiffs have consistently argued that access should permit all entitled to receive a ballot and protect those lawful votes from dilution or cancelation by a ballot unlawfully cast. The plaintiffs seek controlled access as *provided by the law.*

Attorney Hartman asked Mr. Thomas what the standard was under the guidance, and he reported that the updated guidance had removed the presumption of validity but had left the examples of the characteristics for comparison. Mr. Thomas also offered that there was supervision of the staff, but that staff made the determination. Mr. Baxter described a process in which the staff also made the determination under supervision.

A significant point is that there is no public oversight by pol challengers or poll watchers, but more troubling is that the decision is not recorded for either a supervisor, the state or the public

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to review the determinations that are made.[3] Therefore, the process is arbitrary and capricious and in violation of equal protection. In *Bush v. Gore, 531 U.S. 98 (2000),* the United States Supreme Court stated:

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. See, *e. g., Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). 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." *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964).

The Plaintiffs seek declaratory relief that this court determines as declaratory relief (1) that the decision in *Genteski v Benson* Court of Claims case NO 20-000216-MM is controlling on the requirement that the Secretary of State is required to promulgate a rule for the City of Detroit to use for signature comparisons, (2) that the current guidance by the Secretary of State is not sufficient for the reasons stated in *Genteski, supra*, (3) that without a legal standard that the process is arbitrary and capricious and violates Equal Protection.

The Plaintiffs in the practical recognition of where we are in the November 2022 Election Cycle modify their request for injunctive relief to request this Court to prohibit the use of ballot

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[3] It is worth noting that during oral argument on November 4, 2022, the court interrupted Attorney Taylor during her argument regarding Taylor's use of the phrase "poll watcher." It should be noted that this phrase was taken from the language in a manual produced and published by our Secretary of State. Specifically, the manual is titled: "The Appointment, Rights, and Duties of Election Challengers and **Poll Watchers**." Perhaps, if the court has issue with this phrase, those concerns should be addressed with the Secretary of State.

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applications received by mail or online without presenting identification for elections conducted AFTER the current election scheduled for November 8, 2022, UNTIL the Secretary of State promulgates a legal standard under the Administrative Procedures Act.

In deference to the testimony of Mr. Chris Thomas who stated during the cross-examination of Attorney Fink, that the absent voter process was now a mail-in vote process which was passed by an initiated act of 2018, this process is very new and should be reviewed by the court to determine whether it meets the legislative and Constitutional requirements. Plaintiffs further requests that this court order that the City of Detroit Clerk create a record of the signature comparison that is accessible to the public, supervisors, and the state. While this requirement is not explicitly stated in a statute, the requirements of 'audit capacity' in Section 301(a)(2) of HAVA and an 'audit trail' MCL 168.795(k) require some record of the determination of identity even with a lawful standard by a clerk acting without public oversight or continuous supervision.

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ISSUE 2: The Requirements of MCL 168.761D4

Effective Monitoring of Drop Boxes

MCL 168.761D(2) By October 20, 2022, if an absent voter ballot drop box is located outdoors, all of the following requirements apply:

(a) The drop box must be securely locked and bolted to the ground or to another stationary object.

(b) The drop box must be equipped with a single slot or mailbox-style lever to allow absent voter ballot return envelopes to be placed in the drop box, and all other openings on the drop box must be securely locked.

(c) For an absent voter ballot drop box that was not ordered or installed in a city or township before October 1, 2020, the city or township clerk must use video monitoring of that drop box **to ensure effective monitoring of that drop box**.

(d) The drop box must be in a publicly accessible, well-lit area with good visibility.

(e) The city or township clerk must immediately report to local law enforcement any vandalism involving the drop box or any suspicious activity occurring in the immediate vicinity of the drop box.

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This issue relates to what constitutes effective monitoring of the drop box. It was advocated by Attorney Fink that it is limited to preventing vandalism. Plaintiffs reject that and urges this court to consider that effective monitoring requires monitoring to prevent persons from injecting votes into the system in violation of law which infringes on the voting rights of Detroit citizens.

Specifically, the Plaintiffs request that the court review MCL 168.761 which provides instructions and warnings that include a warning in all caps of unlawful possession of a ballot :

WARNING
PERSONS WHO CAN LEGALLY BE IN POSSESSION OF AN ABSENT VOTER BALLOT ISSUED TO AN ABSENT VOTER ARE LIMITED TO THE ABSENT VOTER; A PERSON WHO IS A MEMBER OF THE ABSENT VOTER'S IMMEDIATE FAMILY OR RESIDES IN THE ABSENT VOTER'S HOUSEHOLD AND WHO HAS BEEN ASKED BY THE ABSENT VOTER TO RETURN THE BALLOT; A PERSON WHOSE JOB IT IS TO HANDLE MAIL BEFORE, DURING, OR AFTER BEING TRANSPORTED BY A PUBLIC POSTAL SERVICE, EXPRESS MAIL SERVICE, PARCEL POST SERVICE, OR COMMON CARRIER, BUT ONLY DURING THE NORMAL COURSE OF HIS OR HER EMPLOYMENT; AND THE CLERK, ASSISTANTS OF THE CLERK, AND OTHER AUTHORIZED ELECTION OFFICIALS OF THE CITY OR TOWNSHIP. ANY OTHER PERSON IN POSSESSION OF AN ABSENT VOTER BALLOT IS GUILTY OF A FELONY.

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Further, in MCL 168.764 there is the instruction which is sent to every absentee voter about how to lawfully deliver a ballot to a drop box in section b which is limited to *personally*. There is no legal means to have any person drop more than one ballot into a drop box.

Step 5. Deliver the return envelope by 1 of the following methods:
(a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.
(b) Deliver the envelope **personally** to the office of the clerk, to the clerk, or to an authorized assistant of the clerk, or **to a secure drop box** located in the city or township.
(c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or an individual residing in the voter's household may mail or deliver a ballot to the clerk for the voter.
(d) You may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pick up the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered.

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Your absent voter ballot will then be picked up by the clerk or an election assistant sent by the clerk. All individuals authorized to pick up absent voter ballots are required to carry credentials issued by the clerk. If using this absent voter ballot return method, do not give your ballot to anyone until you have checked their credentials.

The limited testimony is that there was a camera on all 19 or 20 drop boxes in the City of Detroit. While there was an assumption and a statement made by Mr. Thomas that he assumed that the cameras were monitored 24/7 and that the recording was saved for a period of time he deferred to George Azzouz. We did not hear from this witness today and as the election for November 2022 will not be using drop boxes past next Tuesday, this modifies the relief requested.

Plaintiffs request declaratory relief that effective monitoring include a review of the depositing of absentee ballots to monitor against a person 'stuffing' multiple ballots at one time or depositing a solitary ballot multiple time. As the statute does not require real time monitoring, the monitoring can be of a recording.

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In recognition that the city of Detroit promotes honest, open and transparent government, the Plaintiffs request injunctive relief prospectively after the November 8, 2022 election to 1) stream the camera for public access to the video feed allowing the public to assist in monitoring; 2) to require that there is sufficient storage to preserve this duration of the drop boxes for the 24 months required for preservation of election records; and (3) to ensure that the recording is disclosed under FOIA to interested parties to review.

ISSUE 3: The Requirements of MCL 168.765-767

Absent Voter Envelope Signature Comparison

MCL 168.765 Absentee Counting Board

(6) …Written or stamped on each of the return envelopes must be the time and the date that the envelope was received by the clerk and a statement by the clerk that *the signatures of the absent voters on the envelopes have been checked and found to agree with the signatures of the*

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voters on the registration cards or the digitized signatures of voters contained in the qualified voter file **as provided under section 766**…

168.766 Marked ballot or absent voter ballot; verification.

(1) Upon receipt from the city or township clerk of any envelope containing the marked ballot or ballots of an absent voter, the board of inspectors of election shall verify the legality of the vote by doing both of the following:

(a) Examining the digitized signature for the absent voter included in the qualified voter file under section 509q or the registration record as provided in subsection (2) to see that the person has not voted in person, that he or she is a registered voter, and that the signature on the statement agrees with the signature on the registration record.

(b) Examining the statement of the voter to see that it is properly executed.

(2) *The qualified voter file must be used to determine the genuineness of a signature on an envelope containing an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file.* If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on an envelope containing an absent voter ballot to the signature contained on the master card.

168.767 Absent voters' ballots; illegal vote; rejection of ballot; marking; preservation.

Sec. 767.

If upon an examination of the envelope containing an absent voter's ballot or ballots, ***it is determined that the signature on the envelope does not agree sufficiently with the signature on the registration card or the digitized signature*** contained in the qualified voter file as provided under section 766 so as to identify the voter or if the board shall have knowledge that the person voting the ballot or ballots has died, or if it is determined by a majority of the board that such vote is illegal for any other reason, then such vote shall be rejected, and thereupon some member of the board shall, without opening the envelope, mark across the face of such envelope, **"rejected as illegal"**, and the reason therefor. The statement shall be initialed by the chairman of the board of election inspectors. Said envelope and the ballot or ballots contained therein shall be returned to the city, township or village clerk and retained and preserved in the manner now provided by law for the retention and preservation of official ballots voted at such election.

The process is Detroit as explained by Mr. Thomas is that the signature on the ballot envelope is scanned by the equipment called Reli-vote and then the signature is displayed adjacent to an image of the signature from the QVF. A clerk then accepts or rejects the signature and an acceptance of the signature results in the envelope being marked with the clerk's name and the date and time. Mr. Baxter informed the Court that the Reli-vote system was not approved by the State. Mr. Thomas stated that Reli-vote was to his knowledge unique to Detroit. Vendor

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information provided to Attorney Fink and the Court reflect that there is an alternative setting for automatic comparison, but the testimony was that manual comparison was used.

In the prior pleadings, Plaintiffs raised concerns about this equipment being connected to the QVF. Mr. Thomas described an exchange of information into and out of the QVF by the Reli-vote system. This novel system was acquired in 2020 according to Mr. Baxter and with the records provided to Attorney Fink from a grant from Center for Civil Living.

The controversy first relates to this equipment being added unilaterally by the City of Detroit with access to the QVF and without state or legislative approval. While it is recognized that no-excuse absentee ballots greatly increased the percentage of votes cast by methods other than in-person, solutions come with risks that the citizens of Michigan should have been able to have resolved by legislative process or at least by oversight by the State when access to the QVF data is granted to equipment.

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The controversy then continues with the requirements of MCL 168.766 which are abandoned by the City of Detroit per Mr. Thomas. Mr. Thomas presented that MCL 168.765 offered an absentee counting board an alternative or replacement process for the clerk to unilaterally adjudicate the signature. The doctrines of statutory construction do not permit that interpretation.

The statute should have expressly stated in MCL 168.766 the word UNLESS an absentee process is required.

Mr. Thomas supported his position with the ‘second chance’ requirements in MCL 168.765 which require the clerk to inform the voter and provide an opportunity until 8 pm on election day when the poll closes to come cure the signature defect. It should be noted that Mr. Baxter testified

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the obligation of the statute was met with a form letter while Mr. Thomas described efforts to obtain contact by calls and email address collection. While the issue of compliance with the 'second chance' provision is not before the court, the discrepancy in testimony is noted to the fact finder.

The duties of the clerk in MCL 168.765 to check the signature at the time the ballot is returned and to provide a second chance is not the final or only determination. The Plaintiff reads these statutes to require the board of election inspectors which is represented by inspectors from both major party affiliations (self-declared) and under oath to discharge their duty to agree—and that poll watchers have the opportunity to observe and poll challengers, when appropriate, may level a challenge in good faith.

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Identity and qualifications of the person who presents an absentee ballot is important to protect the security of the election and the rights of voters to controlled access to the box. Plaintiffs desire that all eligible voters cast a lawful vote and all unlawful votes be excluded. The identify provision provides that an absentee voter can present an id or obtain by mail with a signature; however, a more stringent process is required when the voter casts the ballot. In-person there is an id or an affidavit. By absentee, there is a determination made as to whether the identity has been established by a signature.

Clerks and election inspectors are not handwriting experts. There is a process that requires agreement AND public oversight in the statute. It cannot be read out as being inapplicable to absentee counting boards. It must be read in as a final 'second' verification. The first process done by a clerk is driven by securing the second chance in a timely manner and the second appears to be driven by a bi-partisan process with public oversight. It should be noted that the consequence of deciding a signature does not match is that the ballot is rejected as illegal pursuant to MCL

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168.767. The unopened envelope is preserved but the ballot does not get counted as a challenged ballot. Therefore, the stakes are high.

It should be noted that the new amendments to the election code that permit pre-processing will now have the ballot separated from the envelope in a two-day process wherein there is an opportunity to inspect the signature in a lawful manner. An alternative holding would merely provide that the ballot arrives in a secrecy envelope and instead of a transparent process we have all of the identity requirements done behind closed doors without an audit trail.

Plaintiffs request declaratory relief that 1) the Reli-vote system is not authorized by the legislative process or the approval of the board of state canvassers. This unique and non-conforming system has been described as having benefits but there are also risks-security risks-associated with adding this to the QVF system. 2) the signature on an absentee ballot must be both checked on arrival by the clerk pursuant to MCL 168.765 and then rechecked by the board of election inspectors pursuant to MCL 168.766 and that this is done during the pre-processing before removal of the ballot from the envelope.

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The Plaintiffs seek additional declaratory relief that this court determines as declaratory relief (1) that the decision in *Genteski v Benson* Court of Claims case NO 20-000216-MM is controlling on the requirement that the Secretary of State is required to promulgate a rule for the City of Detroit to use for signature comparisons, (2) that the current guidance by the Secretary of State is not sufficient for the reasons stated in *Genteski, supra*, (3) that without a legal standard that the process is arbitrary and capricious and violates Equal Protection.

In practical recognition of where we are in the November 2022 Election Cycle, the Plaintiffs modify their request for injunctive relief to request this Court to preclude absentee votes

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from being cast unless the person has presented identification (as an early AFTER the current election scheduled for November 8, 2022, UNTIL the Secretary of State promulgates a legal standard under the Administrative Procedures Act. The duty is on the Secretary of state to cure the standard for signature comparison by participating in the Administrative Procedures Act.

ISSUE 4: The Requirements of MCL 168.767

Board of Election Inspectors-Rejection Process

168.767 Absent voters' ballots; illegal vote; rejection of ballot; marking; preservation.

Sec. 767.

If upon an examination of the envelope containing an absent voter's ballot or ballots, ***it is determined that the signature on the envelope does not agree sufficiently with the signature on the registration card or the digitized signature*** contained in the qualified voter file as provided under section 766 so as to identify the voter or if the board shall have knowledge that the person voting the ballot or ballots has died, or if it is determined by a majority of the board that such vote is illegal for any other reason, then such vote shall be rejected, and thereupon some member of the board shall, without opening the envelope, mark across the face of such envelope, **"rejected as illegal"**, and the reason therefor. The statement shall be initialed by the chairman of the board of election inspectors. Said envelope and the ballot or ballots contained therein shall be returned to the city, township or village clerk and retained and preserved in the manner now provided by law for the retention and preservation of official ballots voted at such election.

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The process provides for the board to make a determination of the legality of the vote by majority vote. Issues would be that the voter has died as provided in the statute. Another issue is that a challenger may claim that the person has moved out of the jurisdiction and provide proof such as a current voter registration in Iowa that the vote is illegal. The board has the authority to determine if a ballot is illegal during the review of the identify and qualifications of the voter. The only testimony related to the fact that Detroit does not provide a board of election inspectors at the AVCB. The discussion with Mr. Thomas centered around the fact that his interpretation of the law was that this process was for precincts in other jurisdictions who handle absentee votes. That is

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non-sensical as why the process would differ—but if it does then there is a significant equal protection issue.

Pursuant to MCL 168.765(8) which requires that the absentee counting board "process the ballots and returns in as nearly the same manner as possible as ballots are processed in paper ballot precincts.

The Plaintiffs seek declaratory relief that there must be a board of election inspectors at the AVCB and that this board is authorized to reject a ballot as provided by this statue. In practical recognition of where we are in the November 2022 Election Cycle, the Plaintiffs modify their request for injunctive relief to request that this goes into effect **after** the November 8, 2022 election.

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ISSUE 5: The Requirements of MCL 168.765(5)

Posting the metrics

MCL 168.765(5) has posting requirements. The court limited testimony of the fact that in the past as to the availability of this information. Attorney Fink did not dispute the law was required and Detroit would comply. However, neither the court nor Mr. Fink let me ask Mr. Thomas about the compliance. At issue is the requirement that the information be posted by a certain time. This is critical to secure against both actual and claimed insertion of additional ballots being found. The statute provides an extra hour after the polls close to take an inventory and post the number. The issue is that the statue is vague. It provides discretion on the posting or 'otherwise making public' and this vagueness coupled with the court precluding inquiry still leaves the public without any idea where to look for the 'otherwise public' information. The Secretary of State has provided a form that most jurisdictions post in the clerk's office. The defendant seeks declaratory relief that the 'otherwise public requirement' is vague and that the court instructs with injunctive relief that the City of Detroit should identify the method in which they will comply so the public can timely find this information.

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ISSUE 6: The Requirements of MCL 168.765-797a[4]

Mismatched and Detached Ballots

168.797a Instruction in method of voting on electronic voting system; use of ballot processed through electronic tabulating equipment; procedure; detached stub; spoiled ballot; processing of challenged voter ballot; removal of ballot.

Sec. 797a.

(1) Before entering the voting station, each elector shall be offered instruction in the proper method of voting on the electronic voting system. If the elector needs additional instruction after entering the voting station, 2 election inspectors from different political parties may, if necessary, enter the voting station and provide the additional instructions.

(2) If the electronic voting system provides for the use of a ballot that is processed through electronic tabulating equipment after the elector votes, the elector shall transport the ballot to the ballot box, or other approved ballot container, without exposing any votes. An election inspector shall ascertain, by comparing the number appearing on the ballot stub with the number recorded on the poll list, that the ballot delivered by the voter is the same ballot that was issued to the elector. ***If the numbers do not agree, the ballot shall be marked as "rejected", and the elector shall not be allowed to vote.*** If the numbers agree, an election inspector shall remove and discard the stub. Except as otherwise provided in this subsection, the election inspector shall deposit the ballot in the ballot box or other approved ballot container. If electronic tabulating equipment that deposits the voted ballot into the ballot box or other approved ballot container is used at the precinct, the election inspector shall return the ballot to the elector, and the elector shall then deposit the ballot into the electronic tabulating equipment. The electronic tabulating equipment shall be arranged so that the secrecy of the ballot is not violated. If required for the proper operation of the electronic tabulating equipment, 2 election inspectors from different political parties may periodically open the equipment to rearrange voted ballots and may transfer voted ballots to another approved ballot container.

(3) **A ballot from which the stub is detached shall not be accepted by the election inspector in charge of the ballot box or other approved ballot container**. An elector who spoils his or her ballot may return it and secure another ballot. The word "spoiled" shall be written across the face of the ballot, and the ballot shall be marked and secured for later return.

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Chris Thomas testified that there is a process to research and determine if the ballot was inadvertently swapped with another member of the household. Further he described a process by which the ballot is treated as challenged. In both the case of a mismatched and detached ballot Plaintiffs demand that this court require the AVCB to comply as written.

[44] Previous pleadings erroneously cited this as 168.765

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No legal process was permitted to research and save a ballot. Despite the noble spirit behind the concept, the law must be followed. Clear instructions are provided to prevent a detachment. A process that permits a detached ballot to be cast would be unlawful

The Plaintiffs seek declaratory relief that the process as presented to be used would be violative of MCL 168.797a and to enter injunctive relief from any non-conforming process to permit the counting of a mismatched or detached ballot as a challenged ballot.

ISSUE 7: The Requirements of MCL 168.798b[5]

Duplication of Ballots

> **168.798a Separate counting center; direction and conduct of proceedings; method.**
> Sec. 798a.
> If a separate counting center is used, all proceedings shall be under the direction of the clerk or authorized assistants. The proceedings shall be conducted under observation by the public, but no persons except those authorized shall touch a ballot or return. Persons who engage in processing and counting of the ballots shall be deputized and take an oath that they will faithfully perform their assigned duties. **If a ballot is damaged or defective so that it cannot properly be counted by the electronic tabulating equipment, a true duplicate copy shall be made and substituted for the damaged or defective ballot. Each duplicate ballot shall be clearly labeled "duplicate", and shall bear a serial number, which shall be recorded on the damaged or defective ballot.**

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> MCL 168.798a provides for the duplication of ballots ONLY when the ballot is so damaged or defective that it cannot be properly counted by the electronic tabulating equipment, a true duplicate copy shall be made. There is no process to duplicate a ballot that was the wrong ballot type. There is no authorization to duplicate a military or overseas vote so that it can be counted by the device.
> MCL 168.798b specifically requires a hand count when it is impracticable to count the ballot on the voting system.

[55] Previous pleadings erroneously cited this as 168.765

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168.798b Electronic tabulating equipment; unofficial and official returns; manual count.

Sec. 798b.

Before the conduct of the official count, the clerk may conduct an unofficial count in order to provide early unofficial returns to the public. Upon completion of the count, the official returns shall be open to the public. The return of the electronic tabulating equipment, to which have been added the write-in and absentee votes if necessary, shall constitute, after being duly certified, the official return of each precinct or election district. **If it becomes impracticable to count all or a part of the ballots with tabulating equipment, the clerk may direct that they be counted manually, following as far as practicable the provisions governing the counting of paper ballots.**

The testimony of Chris Thomas covered this point. No other place could he lawfully provide duplication, yet it was used when the wrong ballot was sent. There was also testimony by Thomas about a situation in which a voter moves within a precinct that justified a ballot being duplicated—but the law handles this situation in another way. There is no reason for a person to have the wrong ballot style. Duplicating the ballot so that part of the votes may be cast is another extra-legislative solution. The law does not permit it and the proper means to modify the procedure is to seek legislative changes.

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There was a testimony that duplication is utilized in Military and overseas voters. The reason again appears to direct the ballot into the electronic voting system and to change the process when the law provides that these ballots could be counted by hand as it is impracticable for the to be counted by the voting system.

The Plaintiffs are also in favor of creating solutions however the rule of the law is that there must be authority granted by the legislature to create these solutions through political power. A single city in the state cannot use executive power to create or alter the processes passed by the legislature.

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The Plaintiffs seek to have declaratory relief limiting duplication to MCL 168.798a to defective and damaged ballots and to declare that a ballot that is cast by an overseas or military voter is not as a matter of law 'defective' because it cannot be scanned by the high-speed scanner and to enter injunctive relief limiting the use of duplication to the areas expressly permitted by law. The court may enter declaratory relief that counting an overseas or military vote on the tabulating equipment may be impracticable and require a hand count pursuant to MCL 168.798b. The Plaintiffs would seek an injunction on the duplication of the Military and Overseas ballots and require hand counting in conformity with the law.

ISSUE 8: The requirements of MCL 168.795a

State Certification Requirements of Voting System as Configured

168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.

Sec. 795a.

(1) An **electronic voting system shall not be used** in an election

unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state,

unless section 797c has been complied with, **and**

unless it meets 1 of the following conditions:

(a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.

(b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

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The law is unequivocal. It states that the voting system shall not be used UNLESS and there is a requirement that the requires an independent testing authority OR the manufacturer provide verification that the system meets the 'performance and test standards of the entity that no longer exists. Mr. Thomas stated that the system does not comply and he suggested that this law was outdated. The law remains on the books. His opinion is not controlling when the statute unequivocally states the system shall NOT BE USED UNLESS.

A discussion then ensued during Mr. Fink's questions on the cross seemed to indicate that Mr. Thomas was permitted to suggest that a better standard exists from the US Election Assistance. However, on redirect this court ruled that the Plaintiffs were not permitted to inquire on redirect into the following matters:

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Recognizing the Detroit Voting System as defined by HAVA has a configuration:

1) Is the system as configured certified by an accredited independent entity (called a Voting System Test Laboratory by the US EAC and NIST.?
2) If so what VSTL laboratory?
3) Is the system certified to the correct current performance standard from 2021 called the Voluntary Voting System Guideline (VVSG 2.0)?
4) If not, is there another standard that the Detroit configuration has been certified to?

The Courts ruling on relevance preventing inquiry into compliance with the federal requirements adopted by the State Plan filed with HAVA and the Public Act 91 of 2002 which made the requirements mandatory and no longer voluntary.

As Defendants offered compliance with the "better" federal compliance as an excuse for non-compliance with independent state requirements, this excuse shifts the burden of proving

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compliance to Plaintiffs to consider this excuse. The excuse was not established only suggested. In fact, as the case progresses there will never be any evidence that the Detroit system as configured for the AVCB was certified to the current standards by an accredited VSTL.

Plaintiffs merely seek declaratory relief declaring that the law in MCL 168.795a(1) is valid law; and that the voting system used in the AVCB is not in compliance with that law. No injunctive relief is sought before November 8, 2022 Election. The election must happen much like an offer of proof in a court and this issue will be handled in the full case.

It is important to note that Mr. Fink has repeatedly used derogatory language to insult counsel and the case even suggesting this action is frivolous knowing that the media is following the case. This rises to misconduct in light of a law on the book which is clearly not being followed as raised in the complaint and emergency motion. The remedy requires more time than permitted before November 8, 2022, but the requirement for judicial oversight is apparent.

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ISSUE 9: The requirements of MCL 168.795(k) and HAVA 3019a)(2)

The requirements of an audit trail

MCL 168.795 Electronic voting system; requirements; method for rendering electronic tabulating equipment inoperable; equipping each polling place with accessible voting device.

Sec. 795.

(1) An electronic voting system acquired or used under sections 794 to 799a must meet all of the following requirements:

(k) Provide an audit trail.

HAVA SECTION 301 (a) REQUIREMENTS. —Each voting system used in an election for Federal office shall meet the following requirements:

(2) AUDIT CAPACITY. — (A) IN GENERAL. —The voting system shall produce a record with an audit capacity for such system. (B) MANUAL AUDIT CAPACITY. —

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

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(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

Mr. Thomas described the audit trail that is present starting with the paper ballot. He also stated that the ballot images from the high-speed scanner[6] and the adjudication image after adjudication were preserved. Mr. Thomas agreed that the electronic audit logs, the security logs, the access logs, and the record of configuration were preserved. Mr. Thomas stated that the practice is to preserve these items for two years after the election as required by law. Mr. Fink did not dispute these representations were accurate either with Mr. Thomas or by bringing in a rebuttal witness.

In light of the representations that these records, at least with respect to November 8, 2022, the election will be generated and will be preserved. Plaintiffs do not require additional preliminary relief but requests that the court enter an order reflecting this representation will be followed. As the court did not receive proof as to the reason this was one of the twelve items brought to this court, the basis for this request is contained in the inability of the public in the past to confirm thru FOIA that the records exist or will be produced by the City of Detroit.

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ISSUE 10: HAVA Section 301(a)(6) and MCL 168.803(2)

The unauthorized Process of Adjudication

The Help America Vote Act requires:

Section 301 (a) (6) UNIFORM DEFINITION OF WHAT CONSTITUTES A VOTE. — Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

168.803 Counting and recounting of votes; intent of voter; stray marks; instructions issued by secretary of state.

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[6] Mr. Thomas stated that precinct tabulators have opted to not save the optical scanned images in the interest of speeding up the tabulation time. This is likely illegal but outside the scope of this lawsuit.

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Sec. 803.

(2) If an electronic voting system requires that the elector place a mark in a predefined area on the ballot in order to cast a vote, the vote shall not be considered valid unless there is a mark within the predefined area. A stray mark made within a predefined area is not a valid vote. In determining whether a mark within a predefined area is a stray mark, the board of canvassers or election official shall compare the mark with other marks appearing on the ballot. *The secretary of state shall issue instructions, subject to the approval of the board of state canvassers, relevant to stray marks to **ensure the fairness and uniformity of determinations** made under this subsection*. A secretary of state's instruction relevant to stray marks shall not be applied to a ballot unless the secretary of state issued the instruction not less than 63 days before the date of the election.

Adjudication is not authorized by statute or MISOS process per the admission of Chris Thomas. The claim that adjudication has always been done is not persuasive. Likewise, that other jurisdictions are violating the law so it should not be enforced in Detroit.

Adjudication as stated by Mr. Thomas is the '**manipulation of the ballot**". While the adjudication process as described was suddenly subject to a lack of knowledge about whether a vote can be altered to darken there was an admission that the ballot image that is actually counted is altered with an override button that permits the removal of a mark. The process of an inadvertent mark was described but the software permits the two election inspectors who 'declare' a party affiliation to work together to alter ballots. The number of ballots that are adjudicated is staggering in past elections but there is no way to predict how many will be 'manipulated' in the November 8, 2022 General election.

The image cast central software as configured by the state is not part of a 'uniform voting system' as required by MCL 168.37. The testimony was that jurisdictions had purchased this feature from the vendors. In an effort to seek safety in numbers, jurisdictions around the state were identified as using this illegal practice.

There is a very clear definition of what constitutes a mark defined in MCL 168.803(1). The law requires a determination of what constitutes a stray mark but does not authorize the ballot

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image to be adjusted by adjudication. The only process that would be permitted under the law is to hand count after determining the ballot contains a stray mark pursuant to MCL 168.798b as the use of the voting system to count that ballot would be impracticable.

The vendor Dominion (and others) offer adjudication the feature as an optional add-on to the Image Cast Central, there is no authorization for use of adjudication as a configuration under Michigan law. There is no process in the Michigan Secretary of State rules, instructions or guidance and there is no record of any approval by the board of state canvassers of this software configuration.

Attorney Fink argued that the recount of the paper would be the final say and therefore the original determination of a vote by counting an adjudicated ballot is not a problem. This argument is a fallacy especially when there are significant limits on the availability of a recount. The testimony was clear that on the election results that are reported the system counts the adjudicated, manipulated, or altered image.

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The court excluded the sales presentation by Eric Coomer in which he displays the features in under one minute despite the fact it was disclosed. It was a proper exhibit for cross-examination. Plaintiffs incorporate it here as an offer of proof.

The ability to change a ballot image at the adjudication station is violation of law.The fact that the device can be set to read pixel counts was not established on this record. That will be part of the total inquiry in the case in chief.

The Plaintiffs request declaratory relief that adjudication is not authorized in Michigan; that adjudication is a violation of the HAVA Section 301(a)(6); and that adjudication is a violation

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of MCL 168.803. Further, Plaintiffs request injunctive relief preventing adjudication from occurring in the November 8, 2022 election.

ISSUE 11: The requirements of MCL 168.795(2) and

The rejection requirement and

Instructions under HAVA 301(a)(1)(B)

168.795 Electronic voting system; requirements; method for rendering electronic tabulating equipment inoperable; equipping each polling place with accessible voting device.

Sec. 795.

(1) An electronic voting system acquired or used under sections 794 to 799a must meet all of the following requirements:

(a) Provide for voting in secrecy, except in the case of voters who receive assistance as provided by this act.

(b) Utilize a paper ballot for tabulating purposes.

(c) Permit each elector to vote at an election for all persons and offices for whom and for which the elector is lawfully entitled to vote; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject all choices recorded on the elector's ballot for an office or a question if the number of choices exceeds the number that the elector is entitled to vote for on that office or question. Electronic tabulating equipment that can detect that the choices recorded on an elector's ballot for an office or a question exceeds the number that the elector is entitled to vote for on that office or question must be located at each polling place and **programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.**

(d) Permit an elector, at a presidential election, by a single selection to vote for the candidates of a party for president, vice-president, and presidential electors.

(e) Permit an elector in a primary election to vote for the candidates in the party primary of the elector's choice. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject each ballot on which votes are cast for candidates of more than 1 political party. Electronic tabulating equipment that can detect that the elector has voted for candidates of more than 1 political party must be located at each polling place and **programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.**

(f) Prevent an elector from voting for the same person more than once for the same office.

(g) Reject a ballot on which no valid vote is cast. Electronic tabulating equipment must be programmed to reject a ballot on which no valid vote is cast.

(h) Be suitably designed for the purpose used; be durably constructed; and be designed to provide for safety, accuracy, and efficiency.

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(i) Be designed to accommodate the needs of an elderly voter or a person with 1 or more disabilities.

(j) Record correctly and count accurately each vote properly cast.

(k) Provide an audit trail.

(l) Provide an acceptable method for an elector to vote for a person whose name does not appear on the ballot.

(m) Allow for accumulation of vote totals from the precincts in the jurisdiction. The accumulation software must meet specifications prescribed by the secretary of state and must be certified by the secretary of state as meeting these specifications.

(n) Be compatible with or include at least 1 voting device that is accessible for an individual with disabilities to vote in a manner that provides the same opportunity for access and participation, including secrecy and independence, as provided for other voters. The voting device must include nonvisual accessibility for the blind and visually impaired.

(2) Electronic tabulating equipment that counts votes at the precinct before the close of the polls must provide a method for rendering the equipment inoperable if vote totals are revealed before the close of the polls. **Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location** must be programmed to reject a ballot if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot, or if, in a primary election, votes are recorded for candidates of more than 1 political party.

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HAVA Section 301 (a) REQUIREMENTS. —Each voting system used in an election for Federal office shall meet the following requirements:

(1) IN GENERAL. —

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office—

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted. [7]

[7] This is the basis of second chance voting.

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(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, ***or a central count voting system (including mail-in absentee ballots and mail-in ballots***[8]), may meet the requirements of subparagraph (A)(iii) by—

(i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

(ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

The Help America Vote Act of 2002 created the 'second chance voting'. This was done with a requirement that a ballot marked in violation of the instruction would be rejected and the process would allow the voter to self-correct the ballot or to request the ballot be spoiled and replaced. An alternative method of compliance was required to prevent voters from losing the opportunity to have their ballot counted for voters who were 'absent' from the tabulator.[9] The absentee voter could have voted early, obtained a ballot by mail or by online, and returned the ballot by dropping it at the clerk's office, in a drop box, or mailing it back. However, the voter is not present to self-correct an error. The HAVA remedy was to require clear instructions as provided in Section 301(a)B. In fact, the instructions are part of the definition of a voting system regulated by the US Election Assistance Commission (HAVA Section 301(b)(2)(e) for compliance to the standards for certification.

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[6] The provision is the alternative education compliance provision for absentee boards—not punch systems as Mr. Thomas incorrectly stated the law

[9] Mr. Thomas said that absentee voter is a misnomer, but the term absentee means not present at tabulation as understood in current context.

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HAVA Section 301 (b) VOTING SYSTEM DEFINED.—In this section, the term ''voting system'' means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used— (

A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance; (C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, *instructions*, forms, or paper ballots).

The law does not provide for another person to correct a ballot that has been mismarked only an inadvertent mark referenced as a 'stray mark'. The adjudication system allows the 'photoshop-like' alteration of the image that is counted to either remove marks or make marks by overriding the ballot. Plaintiffs offered proof[10] in the Dominion sales video referenced in the complaint and provided it to the Defendant and the court. The witness Thomas claimed he lacked knowledge of the ability to add marks. The court had restricted evidence of the challenges that had been filed on August 2, 2022, at the primary and testimony form the witnesses that challenged this entire observed process. Regardless, there is an override button that alters the image and changes the determination of the ballot. Mr. Thomas did inform the court that the image cast central system permitted the counting of all contests on the ballot except the contest which is overvoted.

[10] The Court has the ability with an offer of proof to reconsider its earlier determination of relevance and consider the evidence which was offered.

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Under Michigan law, a ballot that is overvoted should not go to adjudication it must be rejected. This is the rule unless the board of election inspectors determines the ballot contains a stray mark at which it becomes impracticable. Then the lawful process is that the ballot must be counted by hand if that stray mark being disregarded eliminates the overvote. There is no lawful option to duplicate this ballot.

The legislative scheme considers the lack of a voters present and remedied lawful compliance with instruction. Whether the City of Detroit or Dominion prefers another way is not relevant to following the law as written.

Plaintiffs request that this court enter declaratory relief that a ballot that is overvoted when tabulated at the AVCB must be rejected pursuant to MCL 168.765(2). The board of election inspectors must review the ballot and determine if a 'stray mark' has caused the ballot to be rejected pursuant to MCL 168.803. In the event that this permits the ballot to be counted and the voting system will not count the ballot then the ballot will be hand counted pursuant to MCL 168.798b.

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Plaintiffs request that this court enter an injunction that all ballots that are tabulated at the AVCB be done so without adjudication and that the lawful process is followed. The election inspectors who work the adjudicators (20 pr shift) can make the determination of the stray mark and be retrained on the floor. In the event this court does not provide the relief requested, the defendant requests this court be informed of the number of ballots that are 'adjudicated' immediately after the ACVB election results are sent to the clerk's office for inclusion in the city results.

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In the event that the city of Detroit is compliant with the instruction requirements then no Detroit Voters will be disenfranchised by following the law as written.

ISSUE 12: The requirements of MCL 168.794(6) and MCL 168.733

Poll Challenger Access

168.733 Challengers; space in polling place; rights; space at counting board; expulsion for cause; protection; threat or intimidation.

Sec. 733.

(1) The board of election inspectors shall provide space for the challengers within the polling place that enables the challengers to observe the election procedure and each person applying to vote. A challenger may do 1 or more of the following:
(a) Under the scrutiny of an election inspector, inspect without handling the poll books as ballots are issued to electors and the electors' names being entered in the poll book.
(b) Observe the manner in which the duties of the election inspectors are being performed.
(c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.
(d) Challenge an election procedure that is not being properly performed.
(e) Bring to an election inspector's attention any of the following:
(i) Improper handling of a ballot by an elector or election inspector.
(ii) A violation of a regulation made by the board of election inspectors pursuant to section 742.
(iii) Campaigning being performed by an election inspector or other person in violation of section 744.
(iv) A violation of election law or other prescribed election procedure.
(f) Remain during the canvass of votes and until the statement of returns is duly signed and made.
(g) Examine without handling each ballot as it is being counted.
(h) Keep records of votes cast and other **election procedures as the challenger desires.**
(i) Observe the recording of absent voter ballots on voting machines.
(2) The board of election inspectors shall provide space for each challenger, if any, at each counting board that enables the challengers to observe the counting of the ballots. A challenger at the counting board may do 1 or more of the activities allowed in subsection (1), as applicable.
(3) Any evidence of drinking of alcoholic beverages or disorderly conduct is sufficient cause for the expulsion of a challenger from the polling place or the counting board. The election inspectors and other election officials on duty shall protect a challenger in the discharge of his or her duties.
(4) A person shall not threaten or intimidate a challenger while performing an activity allowed under subsection (1). A challenger shall not threaten or intimidate an elector while the elector is entering the polling place, applying to vote, entering the voting compartment, voting, or leaving the polling place.

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The rules as stated in MCL 168.733 permit a poll challenger to observe the counting of the ballots. These access rights would include access to the platform in which there is the management of the election software, adjudication of quarantined ballots and control of the election software.

During the hearing, Mr. Thomas, and Mr. Baxter both stated an intention to prevent access to the platform. There was testimony that computer monitors would have screens open managing the election on the floor—including the capability to remove an entire packet of information from an ICC scanner if there is an error.

An effort to defy the law was justified by a claim that a person would attempt to access the server or unplug the system. This non-sensical argument of speculated harm defies the requirements for an election management system in the US Election Assistance Standards of performance to have a backup in the event of power failure. Access to the server is not required just to observe the screens of the person(s) 'managing' the election.

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MCL 168.974(d)

"Counting center" means 1 or more locations selected by the board of election commissioners of the city, county, township, village, or school district at which ballots are counted by means of electronic tabulating equipment or *vote totals are electronically received from electronic tabulating equipment and electronically compiled.*

The counting center, therefore, includes the platform at Huntington place, the city clerk's office where the election returns are gathered and reported to the county as well as the state area where all election returns are compiled.

Mr. Thomas agreed that access was permitted at the accumulation at the clerk's office on the 5th floor but limited it to a window. This does not comply with the law.

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168.734 Challengers; preventing presence, penalty.

Sec. 734.

Any officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

The Plaintiffs seek declaratory relief in that the poll challengers have access to observe the election procedures performed by the computers on the platform and access to observe the computer screens that accumulate and prepare the data from the precincts and AVCB for transfer to the county clerk's office.

Plaintiffs respectfully request injunctive relief that prohibits the denial of access of the poll challengers to these two critical counting board areas and processes.

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Lastly, Plaintiffs want to address Defendants misapplied assertions that the instant preliminary injunction is barred by laches. Defendant alleges that Plaintiffs' motion should be barred by laches; however, this argument fails. First, Plaintiff filed an emergency motion for preliminary injunction which included a brief. The parties appeared before Your Honor six (6) times within five (5) days. Second, Defendant filed a responsive pleading to Plaintiffs' restatement of relief requested. Not a single time within this pleading did Defendant plead laches. Lastly, the Court heard arguments multiple times prior to the evidentiary hearing and if laches truly barred the matter, then certainly Your Honor would not have set it for an evidentiary hearing. The fact that Defendant's never responded with this argument and the Court granting Plaintiffs' request for the hearing, this argument must fail. It is moot.

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Notwithstanding, if this Court finds that Defendant's argument is not moot, undersigned counsel draws Your Honor's attention to *Nykoriak v Napoleon*, 11 which states that "This doctrine applies to cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." (Internal citations omitted). Here, the testimony is clear there was no unexcused or unexplained delay in commencing this action. Specifically, the Plaintiffs in this suit filed multiple challenges following the August 2022 Primary Election. These challenges were properly filed pursuant to the statute, yet they were ignored. During the course of the evidentiary hearing, not once did Defendants or their witnesses deny this fact. Additionally, the statute puts Defendant on notice. The preliminary injunction addresses the failures of the City of Detroit Clerk to follow the law regarding the administration of the election. Moreover, due to this Court's consistent limiting of the information presented by the Plaintiffs', there was no direct testimony regarding the challenges that were filed addressing these issues. Had the Court allowed this testimony, the record would have been perfected regarding notice.

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"Generally, ' "[w]here the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot ... be recognized."" *Wayne Cnty. v Wayne Cnty. Ret. Comm'n*, 267 Mich App 230, 252; 704 NW2d 117, 129 (2005). (Internal citations omitted). Here, any alleged delay would not put the City in a worse condition because at a minimum, the city of Detroit has a duty to follow the law. It cannot be said that an injunctive requirement strict compliance with the statute would result in putting Defendant in a worse condition. That position would be nonsensical.

[11] 334 Mich App 370, 382–83; 964 NW2d 895, 903 (2020), *appeal denied*, 507 Mich 883; 954 NW2d 824 (2021).

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In the Wayne County case cited supra, the Court of Appeals addressed delay in filing:

> Even assuming that the County's delay in filing this action was unacceptably lengthy, we conclude that the trial court properly refused to apply the doctrine of laches to bar the County's lawsuit because there was no showing of prejudice to defendants. The County claimed that only employees of Wayne County were eligible to vote and seek election to the Retirement Commission under the applicable rules governing the Retirement System. As we have concluded above, the limitations on participation expressed in Act 90, the charter, and the retirement ordinance did not deny employees transferring their employment from Wayne County to the Authority the right to participate in their prior pension plans. Rather, these enactments made the participation of such transferring employees subject to the conditions of the Retirement System. One of the conditions of the charter, which was in existence at the time that the employees could elect to transfer their employment, precluded individuals not employed by Wayne County from seeking election to the Retirement Commission. Therefore, we conclude that seeking to apply this preexisting condition to Authority employees did not subject them to any *new* restrictions. It necessarily follows that transferring employees cannot claim prejudice from any delay in bringing this action.

Id. at 253–54.

Here, the Court should use a similar rational. There's no showing of prejudice when Plaintiffs are simply asking for the city to follow the law. Notwithstanding, laches isn't applicable and even if it was, it would not prevent Plaintiffs complaint from moving forward.

Throughout the course of this matter, it cannot be left unsaid that the lack of cordiality and professionalism on behalf of Defendant's counsels was staggering. It is understandable that both sides have strong feels about their respective positions; however, civility cannot and should not be abandoned in advancing those positions. From its inception, this has been about nothing but ensuring a full and fair election free from corruption and political puppeteering. As such, Plaintiffs humbly submit this brief containing its findings of fact, conclusions of law and request for relief.

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Wherefore, the Plaintiffs respectfully requests that this Honorable Court enter orders for injunctive relief keeping this election in conformity to law.

Respectfully Submitted,

/s/ Daniel J Hartman

Daniel J. Hartman (P52632)

/s/ Alexandria J. Taylor

Alexandria Taylor (P75271)

Dated: November 4, 2022

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