

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

CHERYL A. COSTANTINO and,  
EDWARD P. MCCALL, JR.,

Case No. 20-014780-AW

Plaintiffs,

Hon. Timothy M. Kenny

vs.

CITY OF DETROIT; DETROIT ELECTION  
COMMISSION; JANICE WINFREY, in her official  
capacity as the CLERK OF THE CITY and the  
Chairperson of the DETROIT ELECTION COMMISSION;  
CATHY M. GARRETT, in her official capacity as the  
CLERK OF WAYNE COUNTY; and the WAYNE COUNTY  
BOARD OF CANVASSERS,

Defendants,

and

MICHIGAN DEMOCRATIC PARTY,

Intervenor Defendant.

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**CITY OF DETROIT, CITY OF DETROIT ELECTION COMMISSION AND JANICE WINFREY’S RESPONSE TO MOTION FOR AUDIT**

1. The City of Detroit, the City of Detroit Election Commission and Janice Winfrey (collectively, the “City Defendants”) admit.

2. The City Defendants deny that Plaintiffs accurately interpret the Michigan Constitution. The Constitution provides, in relevant part, that “Every citizen of the United States who is an elector qualified to vote in Michigan shall have ... [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections.” Const. 1963, art. 2, § 4.

3. The City Defendants admit that Plaintiffs request the identified Order, but deny that Plaintiffs are entitled to the relief sought and deny that any of the Defendants in this action have the ability to perform a so-called “audit of the results of the November 2, 2020 election.”

4. The City Defendants deny that time is of the essence, because Plaintiffs delayed in seeking the requested relief, because Plaintiffs are not entitled to the relief they seek and

because their request for an audit was already deemed unworthy of preliminary injunctive relief by the Michigan Supreme Court.

5. The City Defendants can neither admit nor deny whether Plaintiffs sought concurrence from all Defendants.

WHEREFORE, for the reasons stated above and in the Brief submitted in support, the City Defendants respectfully request that Plaintiffs' Motion be denied in its entirety with costs awarded to the City Defendants.

December 2, 2020

Respectfully submitted,

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**BRIEF IN SUPPORT OF CITY OF DETROIT, CITY OF DETROIT ELECTION COMMISSION AND JANICE WINFREY’S RESPONSE TO MOTION FOR AUDIT**

**ARGUMENT**

Plaintiffs asked for an “audit” in their Motion for an *Ex-Parte* Temporary Restraining Order, Show Cause Order, and Preliminary Injunction. On November 13, 2020, this Court issued an Opinion and Order addressing that request and concluding that “MCL 168.31a governs the audit process.” Since the Opinion essentially answers Plaintiffs’ new request for an “audit,” the relevant language is quoted below, verbatim:

Plaintiffs contend they need injunctive relief to obtain a results audit under Michigan Constitution Article 2, § IV, Paragraph 1 (h) which states in part “the right to have the results of statewide elections audited, in such as manner as prescribed by law, to ensure the accuracy and integrity of the law of elections.” Article 2, § IV, was passed by the voters of the state of Michigan in November, 2018.

A question for the Court is whether the phrase “in such as manner as prescribed by law” requires the Court to fashion a remedy by independently appointing an auditor to examine the votes from the November 3, 2020 election before any County certification of votes or whether there is another manner “as prescribed by law.

Following the adoption of the amended Article 2, § IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least one race in each audited precinct. Although Plaintiffs may not care for the wording of the current MCL 168.31a, a results audit has been approved by the Legislature. Any amendment to MCL 168.31a is a question for the voice of the people through the legislature rather than action by the Court.

[...] Any unhappiness with MCL 168.31a calls for legislative action rather than judicial intervention.

Ex. 1. The Court of Appeals upheld that decision denying Plaintiffs' Application for Leave to Appeal. Ex. 2. The Supreme Court also upheld this Court's decision, denying the application for leave to appeal, "because we are not persuaded that the question presented should be reviewed by this Court." Ex. 3.

Yet, here we are again. Plaintiffs rely on Justice David F. Viviano's dissent, asserting that questions relating to citizens' audit rights remain unanswered. But, respectfully, this Court is not bound by a dissenting opinion.

In any event, this Court was correct in its initial ruling. If Plaintiffs disagree with the process adopted by the Legislature, their remedy lies with the Legislature. When the Constitution was modified to include the audit provision, the text specified that each citizen "has the right to have the results of the statewide elections audited, *in such a manner as prescribed by law*, to ensure the integrity and accuracy of elections." Const 1963 art 2, § 4, ¶1(h) (emphasis added). This was a clear statement that the right would not be open-ended, with each of the 10 million Michigan citizens empowered to compel an audit upon demand—10 million audits for each election.

After the Constitution was amended, the Legislature took up the constitutional directive to *prescribe by law* the manner of an election audit. 2018 PA 603, codified in MCL 168.31, was the legislative answer. The final Legislative Analysis of 2018 PA 603/Senate Bill 1238 contains

a concise description of the issue:

Proposal 3 of 2018 ... enumerated the following ... specific right[] related to voting: Statewide audit of election results.

Section 31a of the Michigan Election Law provides that Michigan's Secretary of State (SOS) "may" audit election precincts. Public Act 271 of 2012 required the SOS to develop an election audit program that detailed the documents to be inspected and procedures to be used during an election audit. The SOS announced in March 2018 that, following the November 2018 general election, the SOS and county clerks would audit 300 of Michigan's 4,800 precincts. Instead of an optional audit at the discretion of the SOS, Proposal 3 set forth the right for voters to have the results of statewide elections audited. Accordingly, the bill requires the SOS to prescribe the procedures for and to conduct election audits, including statewide election audits. The bill makes the optional training and certification of county clerks regarding random audits mandatory. Additionally, it requires that an election audit include an audit of the results of at least one race in each selected precinct and that a statewide audit include an audit of at least one statewide race or ballot question. It states that these audits are not be recounts and do not change certified election results.

Ex. 4, House Fiscal Agency, Legislative Analysis, Senate Bill 1238 as enacted Public Act 603 of 2018 (Feb 13, 2019). The bill was enacted, as 2018 PA 6013, stating:

The secretary of state shall prescribe the procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures. The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.

The Secretary of State complied with the requirement. This satisfied the Constitutional mandate.

Plaintiffs' Motion must be denied for an additional reason. Even if Plaintiffs' were correct, the City and County are not the correct parties against whom to pursue the relief sought.

The Constitutional amendment is clear:

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

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(h) The right to have *the results of statewide elections audited*, in such manner as prescribed by law, to ensure the accuracy and integrity of elections.

Const 1963 art 2, § 4, ¶1(h) (emphasis added). Thus, whatever right a Michigan elector has to have an audit conducted relates only to “the results of statewide elections.” There is no constitutional right for a citizen to demand the results in individual cities or counties to be audited. The City of Detroit, like Wayne County, does not have the ability, or any legal right, to conduct a statewide audit.<sup>1</sup>

In light of this Court’s prior ruling and the denial of Plaintiffs’ Application for Leave to Appeal, and in light of the Plaintiffs’ failure to present any new facts or legal basis for the relief requested, the instant motion is frivolous, and the City Defendants ask that Plaintiffs be sanctioned and ordered to pay costs and attorney fees.

Since November 4<sup>th</sup>, Donald J. Trump for President, Inc., and its allies have been repeatedly filing frivolous suits in this Court, the Michigan Court of Claims, the Michigan Supreme Court, and the United States District Courts for the Eastern and Western Districts of Michigan. These suits have been endorsed by the national leadership of the Republican Party, and it is clear that otherwise legitimate judicial processes are being manipulated to support a dangerously false narrative. There is not a shred of evidence of fraud in this election, and there is no colorable claim for the relief sought. The constant drumbeat of seemingly-legitimate legal filings sends a false message that something nefarious occurred in this election. This court has an opportunity to correct the public record and label this motion and this lawsuit for what it is—a

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<sup>1</sup> The City Defendants fully concur with the Response filed by the Wayne County Defendants. The Secretary of State, not the County or the City, conducts election audits.

frivolous abuse of this court's processes and a tremendous waste of public funds.

**CONCLUSION**

For the reasons stated above, Plaintiffs' Motion must be denied in its entirety.

Respectfully submitted,

December 2, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 2, 2020, I electronically filed the foregoing paper with the Clerk of the court using the MiFile system and e-mailed copies to all counsel of record.

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# **EXHIBIT 1**

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

Cheryl A. Costantino and  
Edward P. McCall, Jr.  
Plaintiffs,

Hon. Timothy M. Kenny  
Case No. 20-014780-AW

City of Detroit; Detroit Election  
Commission; Janice M. Winfrey,  
in her official capacity as the  
Clerk of the City of Detroit and  
the Chairperson and the Detroit  
Election Commission; Cathy Garrett,  
In her official capacity as the Clerk of  
Wayne County; and the Wayne County  
Board of Canvassers,  
Defendants.

\_\_\_\_\_ /

**OPINION & ORDER**

At a session of this Court  
Held on: November 13, 2020  
In the Coleman A. Young Municipal Center  
County of Wayne, Detroit, MI

PRESENT: Honorable Timothy M. Kenny  
Chief Judge  
Third Judicial Circuit Court of Michigan

This matter comes before the Court on Plaintiffs' motion for preliminary injunction, protective order, and a results audit of the November 3, 2020 election. The Court having read the parties' filing and heard oral arguments, finds:

With the exception of a portion of Jessy Jacob affidavit, all alleged fraudulent claims brought by the Plaintiffs related to activity at the TCF Center. Nothing was alleged to



have occurred at the Detroit Election Headquarters on West Grand Blvd. or at any polling place on November 3, 2020.

The Defendants all contend Plaintiffs cannot meet the requirements for injunctive relief and request the Court deny the motion.

When considering a petition for injunction relief, the Court must apply the following four-pronged test:

1. The likelihood the party seeking the injunction will prevail on the merits.
2. The danger the party seeking the injunction will suffer irreparable harm if the injunction is not granted.
3. The risk the party seeking the injunction would be harmed more by the absence an injunction than the opposing party would be by the granting of the injunction.
4. The harm to the public interest if the injunction is issued. *Davis v City of Detroit Financial Review Team*, 296 Mich. App. 568, 613; 821 NW2nd 896 (2012).

In the *Davis* opinion, the Court also stated that injunctive relief "represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* at 612 fn 135 quoting *Senior Accountants, Analysts and Appraisers Association v Detroit*, 218 Mich. App. 263, 269; 553 NW2nd 679 (1996).

When deciding whether injunctive relief is appropriate MCR 3.310 (A)(4) states that the Plaintiffs bear the burden of proving the preliminary injunction should be granted. In cases of alleged fraud, the Plaintiff must state with particularity the circumstances constituting the fraud. MCR 2.112 (B) (1)

Plaintiffs must establish they will likely prevail on the merits. Plaintiffs submitted seven affidavits in support of their petition for injunctive relief claiming widespread voter

fraud took place at the TCF Center. One of the affidavits also contended that there was blatant voter fraud at one of the satellite offices of the Detroit City Clerk. An additional affidavit supplied by current Republican State Senator and former Secretary of State Ruth Johnson, expressed concern about allegations of voter fraud and urged “Court intervention”, as well as an audit of the votes.

In opposition to Plaintiffs’ assertion that they will prevail, Defendants offered six affidavits from individuals who spent an extensive period of time at the TCF Center. In addition to disputing claims of voter fraud, six affidavits indicated there were numerous instances of disruptive and intimidating behavior by Republican challengers. Some behavior necessitated removing Republican challengers from the TCF Center by police.

After analyzing the affidavits and briefs submitted by the parties, this Court concludes the Defendants offered a more accurate and persuasive explanation of activity within the Absent Voter Counting Board (AVCB) at the TCF Center.

Affiant Jessy Jacob asserts Michigan election laws were violated prior to November 3, 2020, when City of Detroit election workers and employees allegedly coached voters to vote for Biden and the Democratic Party. Ms. Jacob, a furloughed City worker temporarily assigned to the Clerk’s Office, indicated she witnessed workers and employees encouraging voters to vote a straight Democratic ticket and also witnessed election workers and employees going over to the voting booths with voters in order to encourage as well as watch them vote. Ms. Jacob additionally indicated while she was working at the satellite location, she was specifically instructed by superiors not to ask for driver’s license or any photo ID when a person was trying to vote.

The allegations made by Ms. Jacob are serious. In the affidavit, however, Ms. Jacob does not name the location of the satellite office, the September or October date these

acts of fraud took place, nor does she state the number of occasions she witnessed the alleged misconduct. Ms. Jacob in her affidavit fails to name the city employees responsible for the voter fraud and never told a supervisor about the misconduct.

Ms. Jacob's information is generalized. It asserts behavior with no date, location, frequency, or names of employees. In addition, Ms. Jacob's offers no indication of whether she took steps to address the alleged misconduct or to alter any supervisor about the alleged voter fraud. Ms. Jacob only came forward after the unofficial results of the voting indicated former Vice President Biden was the winner in the state of Michigan.

Ms. Jacob also alleges misconduct and fraud when she worked at the TCF Center. She claims supervisors directed her not to compare signatures on the ballot envelopes she was processing to determine whether or not they were eligible voters. She also states that supervisors directed her to "pre-date" absentee ballots received at the TCF Center on November 4, 2020. Ms. Jacob ascribes a sinister motive for these directives. Evidence offered by long-time State Elections Director Christopher Thomas, however, reveals there was no need for comparison of signatures at the TCF Center because eligibility had been reviewed and determined at the Detroit Election Headquarters on West Grand Blvd. Ms. Jacob was directed not to search for or compare signatures because the task had already been performed by other Detroit city clerks at a previous location in compliance with MCL 168.765a. As to the allegation of "pre-dating" ballots, Mr. Thomas explains that this action completed a data field inadvertently left blank during the initial absentee ballot verification process. Thomas Affidavit, #12. The entries reflected the date the City received the absentee ballot. *Id.*



The affidavit of current State Senator and former Secretary of State Ruth Johnson essentially focuses on the affidavits of Ms. Jacob and Zachery Larsen. Senator Johnson believed the information was concerning to the point that judicial intervention was needed and an audit of the ballots was required. Senator Johnson bases her assessment entirely on the contents of the Plaintiffs' affidavits and Mr. Thomas' affidavit. Nothing in Senator Johnson's affidavit indicates she was at the TCF Center and witnessed the established protocols and how the AVCB activity was carried out. Similarly, she offers no explanation as to her apparent dismissal of Mr. Thomas' affidavit. Senator Johnson's conclusion stands in significant contrast to the affidavit of Christopher Thomas, who was present for many hours at TCF Center on November 2, 3 and 4. In this Court's view, Mr. Thomas provided compelling evidence regarding the activity at the TCF Center's AVCB workplace. This Court found Mr. Thomas' background, expertise, role at the TCF Center during the election, and history of bipartisan work persuasive.

Affiant Andrew Sitto was a Republican challenger who did not attend the October 29<sup>th</sup> walk-through meeting provided to all challengers and organizations that would be appearing at the TCF Center on November 3 and 4, 2020. Mr. Sitto offers an affidavit indicating that he heard other challengers state that several vehicles with out-of-state license plates pulled up to the TCF Center at approximately 4:30 AM on November 4<sup>th</sup>. Mr. Sitto states that "tens of thousands of ballots" were brought in and placed on eight long tables and, unlike other ballots, they were brought in from the rear of the room. Sitto also indicated that every ballot that he saw after 4:30 AM was cast for former Vice President Biden.

Mr. Sitto's affidavit, while stating a few general facts, is rife with speculation and guess-work about sinister motives. Mr. Sitto knew little about the process of the absentee voter counting board activity. His sinister motives attributed to the City of Detroit were negated by Christopher Thomas' explanation that all ballots were delivered to the back of Hall E at the TCF Center. Thomas also indicated that the City utilized a rental truck to deliver ballots. There is no evidentiary basis to attribute any evil activity by virtue of the city using a rental truck with out-of-state license plates.

Mr. Sitto contends that tens of thousands of ballots were brought in to the TCF Center at approximately 4:30 AM on November 4, 2020. A number of ballots speculative on Mr. Sitto's part, as is his speculation that all of the ballots delivered were cast for Mr. Biden. It is not surprising that many of the votes being observed by Mr. Sitto were votes cast for Mr. Biden in light of the fact that former Vice President Biden received approximately 220,000 more votes than President Trump.

Daniel Gustafson, another affiant, offers little other than to indicate that he witnessed "large quantities of ballots" delivered to the TCF Center in containers that did not have lids were not sealed, or did not have marking indicating their source of origin. Mr. Gustafson's affidavit is another example of generalized speculation fueled by the belief that there was a Michigan legal requirement that all ballots had to be delivered in a sealed box. Plaintiffs have not supplied any statutory requirement supporting Mr. Gustafson's speculative suspicion of fraud.

Patrick Colbeck's affidavit centered around concern about whether any of the computers at the absent voter counting board were connected to the internet. The answer given by a David Nathan indicated the computers were not connected to the

internet. Mr. Colbeck implies that there was internet connectivity because of an icon that appeared on one of the computers. Christopher Thomas indicated computers were not connected for workers, only the essential tables had computer connectivity. Mr. Colbeck, in his affidavit, speculates that there was in fact Wi-Fi connection for workers use at the TCF Center. No evidence supports Mr. Colbeck's position.

This Court also reads Mr. Colbeck's affidavit in light of his pre-election day Facebook posts. In a post before the November 3, 2020 election, Mr. Colbeck stated on Facebook that the Democrats were using COVID as a cover for Election Day fraud. His predilection to believe fraud was occurring undermines his credibility as a witness.

Affiant Melissa Carone was contracted by Dominion Voting Services to do IT work at the TCF Center for the November 3, 2020 election. Ms. Carone, a Republican, indicated that she "witnessed nothing but fraudulent actions take place" during her time at the TCF Center. Offering generalized statements, Ms. Carone described illegal activity that included, untrained counter tabulating machines that would get jammed four to five times per hour, as well as alleged cover up of loss of vast amounts of data. Ms. Carone indicated she reported her observations to the FBI.

Ms. Carone's description of the events at the TCF Center does not square with any of the other affidavits. There are no other reports of lost data, or tabulating machines that jammed repeatedly every hour during the count. Neither Republican nor Democratic challengers nor city officials substantiate her version of events. The allegations simply are not credible.



Lastly, Plaintiffs rely heavily on the affidavit submitted by attorney Zachery Larsen. Mr. Larsen is a former Assistant Attorney General for the State of Michigan who alleged mistreatment by city workers at the TCF Center, as well as fraudulent activity by election workers. Mr. Larsen expressed concern that ballots were being processed without confirmation that the voter was eligible. Mr. Larsen also expressed concern that he was unable to observe the activities of election official because he was required to stand six feet away from the election workers. Additionally, he claimed as a Republican challenger, he was excluded from the TCF Center after leaving briefly to have something to eat on November 4<sup>th</sup>. He expressed his belief that he had been excluded because he was a Republican challenger.

Mr. Larsen's claim about the reason for being excluded from reentry into the absent voter counting board area is contradicted by two other individuals. Democratic challengers were also prohibited from reentering the room because the maximum occupancy of the room had taken place. Given the COVID-19 concerns, no additional individuals could be allowed into the counting area. Democratic party challenger David Jaffe and special consultant Christopher Thomas in their affidavits both attest to the fact that neither Republican nor Democratic challengers were allowed back in during the early afternoon of November 4<sup>th</sup> as efforts were made to avoid overcrowding.

Mr. Larsen's concern about verifying the eligibility of voters at the AVCB was incorrect. As stated earlier, voter eligibility was determined at the Detroit Election Headquarters by other Detroit city clerk personnel.

The claim that Mr. Larsen was prevented from viewing the work being processed at the tables is simply not correct. As seen in a City of Detroit exhibit, a large monitor was

at the table where individuals could maintain a safe distance from poll workers to see what exactly was being performed. Mr. Jaffe confirmed his experience and observation that efforts were made to ensure that all challengers could observe the process.

Despite Mr. Larsen's claimed expertise, his knowledge of the procedures at the AVCB paled in comparison to Christopher Thomas'. Mr. Thomas' detailed explanation of the procedures and processes at the TCF Center were more comprehensive than Mr. Larsen's. It is noteworthy, as well, that Mr. Larsen did not file any formal complaint as the challenger while at the AVCB. Given the concerns raised in Mr. Larsen's affidavit, one would expect an attorney would have done so. Mr. Larsen, however, only came forward to complain after the unofficial vote results indicated his candidate had lost.

In contrast to Plaintiffs' witnesses, Christopher Thomas served in the Secretary of State's Bureau of Elections for 40 years, from 1977 through 2017. In 1981, he was appointed Director of Elections and in that capacity implemented Secretary of State Election Administration Campaign Finance and Lobbyist disclosure programs. On September 3, 2020 he was appointed as Senior Advisor to Detroit City Clerk Janice Winfrey and provided advice to her and her management staff on election law procedures, implementation of recently enacted legislation, revamped absent voter counting boards, satellite offices and drop boxes. Mr. Thomas helped prepare the City of Detroit for the November 3, 2020 General Election.

As part of the City's preparation for the November 3<sup>rd</sup> election Mr. Thomas invited challenger organizations and political parties to the TCF Center on October 29, 2020 to have a walk-through of the entire absent voter counting facility and process. None of Plaintiff challenger affiants attended the session.



On November 2, 3, and 4, 2020, Mr. Thomas worked at the TCF Center absent voter counting boards primarily as a liaison with Challenger Organizations and Parties. Mr. Thomas indicated that he “provided answers to questions about processes at the counting board’s resolved dispute about process and directed leadership of each organization or party to adhere to Michigan Election Law and Secretary of State procedures concerning the rights and responsibilities of challengers.”

Additionally, Mr. Thomas resolved disputes about the processes and satisfactorily reduced the number of challenges raised at the TCF Center.

In determining whether injunctive relief is required, the Court must also determine whether the Plaintiffs sustained their burden of establishing they would suffer irreparable harm if an injunction were not granted. Irreparable harm does not exist if there is a legal remedy provided to Plaintiffs.

Plaintiffs contend they need injunctive relief to obtain a results audit under Michigan Constitution Article 2, § IV, Paragraph 1 (h) which states in part “the right to have the results of statewide elections audited, in such as manner as prescribed by law, to ensure the accuracy and integrity of the law of elections.” Article 2, § IV, was passed by the voters of the state of Michigan in November, 2018.

A question for the Court is whether the phrase “in such as manner as prescribed by law” requires the Court to fashion a remedy by independently appointing an auditor to examine the votes from the November 3, 2020 election before any County certification of votes or whether there is another manner “as prescribed by law”.

Following the adoption of the amended Article 2, § IV, the Michigan Legislature amended MCL 168.31a effective December 28, 2018. MCL 168.31a provides for the Secretary of State and appropriate county clerks to conduct a results audit of at least

one race in each audited precinct. Although Plaintiffs may not care for the wording of the current MCL 168.31a, a results audit has been approved by the Legislature. Any amendment to MCL 168.31a is a question for the voice of the people through the legislature rather than action by the Court.

It would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process, substitute its judgment for that of the Legislature, and appoint an independent auditor because of an unwieldy process. In addition to being an unwarranted intrusion on the authority of the Legislature, such an audit would require the rest of the County and State to wait on the results. Remedies are provided to the Plaintiffs. Any unhappiness with MCL 168.31a calls for legislative action rather than judicial intervention.

As stated above, Plaintiffs have multiple remedies at law. Plaintiffs are free to petition the Wayne County Board of Canvassers who are responsible for certifying the votes. (MCL 168.801 and 168.821 et seq.) Fraud claims can be brought to the Board of Canvassers, a panel that consists of two Republicans and two Democrats. If dissatisfied with the results, Plaintiffs also can avail themselves of the legal remedy of a recount and a Secretary of State audit pursuant to MCL 168.31a.

Plaintiff's petition for injunctive relief and for a protective order is not required at this time in light of the legal remedy found at 52 USC § 20701 and Michigan's General Schedule #23 – Election Records, Item Number 306, which imposes a statutory obligation to preserve all federal ballots for 22 months after the election.

In assessing the petition for injunctive relief, the Court must determine whether there will be harm to the Plaintiff if the injunction is not granted, as Plaintiffs' existing legal

remedies would remain in place unaltered. There would be harm, however, to the Defendants if the Court were to grant the requested injunction. This Court finds that there are legal remedies for Plaintiffs to pursue and there is no harm to Plaintiffs if the injunction is not granted. There would be harm, however, to the Defendants if the injunction is granted. Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Finally, the Court has to determine would there be harm to the public interest. This Court finds the answer is a resounding yes. Granting Plaintiffs' requested relief would interfere with the Michigan's selection of Presidential electors needed to vote on December 14, 2020. Delay past December 14, 2020 could disenfranchise Michigan voters from having their state electors participate in the Electoral College vote.

### Conclusion

Plaintiffs rely on numerous affidavits from election challengers who paint a picture of sinister fraudulent activities occurring both openly in the TCF Center and under the cloak of darkness. The challengers' conclusions are decidedly contradicted by the highly-respected former State Elections Director Christopher Thomas who spent hours and hours at the TCF Center November 3<sup>rd</sup> and 4<sup>th</sup> explaining processes to challengers and resolving disputes. Mr. Thomas' account of the November 3<sup>rd</sup> and 4<sup>th</sup> events at the TCF Center is consistent with the affidavits of challengers David Jaffe, Donna MacKenzie and Jeffrey Zimmerman, as well as former Detroit City Election Official, now contractor, Daniel Baxter and City of Detroit Corporation Counsel Lawrence Garcia.



Perhaps if Plaintiffs' election challenger affiants had attended the October 29, 2020 walk-through of the TCF Center ballot counting location, questions and concerns could have been answered in advance of Election Day. Regrettably, they did not and, therefore, Plaintiffs' affiants did not have a full understanding of the TCF absent ballot tabulation process. No formal challenges were filed. However, sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs' interpretation of events is incorrect and not credible.

Plaintiffs are unable to meet their burden for the relief sought and for the above mentioned reasons, the Plaintiffs' petition for injunctive relief is DENIED. The Court further finds that no basis exists for the protective order for the reasons identified above. Therefore, that motion is DENIED. Finally, the Court finds that MCL 168.31a governs the audit process. The motion for an independent audit is DENIED.

It is so ordered.

This is not a final order and does not close the case.

November 13, 2020

  
Hon. Timothy M. Kenny  
Chief Judge  
Third Judicial Circuit Court of Michigan

# **EXHIBIT 2**

**Court of Appeals, State of Michigan**

**ORDER**

Cheryl A Costantino v City of Detroit

Docket No. 355443

LC No. 20-014780-AW

Michael J. Riordan  
Presiding Judge

Cynthia Diane Stephens

Anica Letica  
Judges

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The motion for immediate consideration is GRANTED.

The motion for peremptory reversal pursuant to MCR 7.211(C)(4) is DENIED for failure to persuade the Court of the existence of manifest error requiring reversal and warranting peremptory relief without argument or formal submission.

The application for leave to appeal is DENIED.

  
\_\_\_\_\_  
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 16, 2020  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Chief Clerk

# EXHIBIT 3

# Order

Michigan Supreme Court  
Lansing, Michigan

November 23, 2020

Bridget M. McCormack,  
Chief Justice

162245 & (27)(38)(39)

David F. Viviano,  
Chief Justice Pro Tem

CHERYL A. COSTANTINO and EDWARD P.  
McCALL, JR.,  
Plaintiffs-Appellants,

Stephen J. Markman  
Brian K. Zahra  
Richard H. Bernstein  
Elizabeth T. Clement  
Megan K. Cavanagh,  
Justices

v

SC: 162245  
COA: 355443  
Wayne CC: 20-014780-AW

CITY OF DETROIT, DETROIT ELECTION  
COMMISSION, DETROIT CITY CLERK,  
WAYNE COUNTY CLERK, and WAYNE  
COUNTY BOARD OF CANVASSERS,  
Defendants-Appellees,

and

MICHIGAN DEMOCRATIC PARTY,  
Intervening Defendant-Appellee.

\_\_\_\_\_ /

On order of the Court, the motions for immediate consideration and the motion to file supplemental response are GRANTED. The application for leave to appeal the November 16, 2020 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

ZAHRA, J. (*concurring*).

Plaintiffs ask this Court to “enjoin the Wayne County Canvassers certification of the November 2020 election prior to their meeting [on] November 17, 2020 at 3:00 p.m.” on the basis that “the audit [requested by plaintiffs pursuant to Const 1963, art 2, § 4(1)(h)] needs to occur prior to the election results being certified by the Wayne County Board of Canvassers.” Plaintiffs contend that if “the results of the November 2020 election [are] certified . . . Plaintiffs will lose their right to audit its results, thereby losing the rights guaranteed under the Michigan Constitution.” However, plaintiffs cite no support, and I have found none, for their proposition that an audit under Const 1963, art



2, § 4(1)(h)—which provides “[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections”—must *precede* the certification of election results. Indeed, the plain language of Const 1963, art 2, § 4(1)(h) does *not* require an audit to precede the certification of election results. To the contrary, certified results would seem to be a *prerequisite* for such an audit. For how can there be “[t]he right to have the results of statewide elections audited” absent any results, and, further, what would be properly and meaningfully audited other than final, and presumably certified, results? See also *Hanlin v Saugatuck Twp*, 299 Mich App 233, 240-241 (2013) (allowing for a quo warranto action to be brought by a citizen within 30 days of an election in which it appears that a material fraud or error has been committed), citing *Barrow v Detroit Mayor*, 290 Mich App 530 (2010); MCL 168.31a (which sets forth election-audit requirements and does not require an audit to take place before election results are certified); MCL 168.861 (“For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing.”).

Even so, while plaintiffs are not precluded from seeking a future “results audit” under Const 1963, art 2, § 4(1)(h), the certification of the election results in Wayne County has rendered the instant case moot to the extent that plaintiffs ask this Court to enjoin that certification; there is no longer anything to enjoin. While it is noteworthy that two members of the board later sought to rescind their votes for certification, see LeBlanc, *GOP Canvassers Try to Rescind Votes to Certify Wayne County Election*, Detroit News (November 19, 2020) <<https://www.detroitnews.com/story/news/local/michigan/2020/11/19/gop-canvassers-attempt-rescind-votes-certify-wayne-county-vote/3775246001/>> (accessed November 23, 2020) [<https://perma.cc/2SS2-Y29V>], plaintiffs have nonetheless provided no support, and I have found none, for their proposition that this effects a “decertification” of the county’s election results, so it seems they presently remain certified. Cf. *Makowski v Governor*, 495 Mich 465, 487 (2014) (holding that the Governor has the power to grant a commutation, but does not have the power to revoke a commutation). Thus, I am inclined to conclude that the certification of the election by the Wayne County board has rendered the instant case moot—but only as to plaintiffs’ request for injunctive relief.

Nothing said is to diminish the troubling and serious allegations of fraud and irregularities asserted by the affiants offered by plaintiffs, among whom is Ruth Johnson, Michigan’s immediate past Secretary of State, who testified that, given the “very concerning” “allegations and issues raised by Plaintiffs,” she “believe[s] that it would be proper for an independent audit to be conducted as soon as possible to ensure the accuracy and integrity of th[e] election.” Plaintiffs’ affidavits present evidence to substantiate their allegations, which include claims of ballots being counted from voters whose names are not contained in the appropriate poll books, instructions being given to

disobey election laws and regulations, the questionable appearance of unsecured batches of absentee ballots after the deadline for receiving ballots, discriminatory conduct during the counting and observation process, and other violations of the law. Plaintiffs, in my judgment, have raised important constitutional issues regarding the precise scope of Const 1963, art 2, § 4(1)(h)—a provision of striking breadth added to our Michigan Constitution just two years ago through the exercise of direct democracy and the constitutional initiative process—and its interplay with MCL 168.31a and other election laws. Moreover, the current Secretary of State has indicated that her agency will conduct a postelection performance audit in Wayne County. See Egan, *Secretary of State: Post-Election “Performance Audit” Planned in Wayne County*, Detroit Free Press (November 19, 2020) <<https://www.freep.com/story/news/politics/elections/2020/11/19/benson-post-election-performance-audit-wayne/3779269001/>> (accessed November 23, 2020) [<https://perma.cc/WS95-XBPG>]. This development would seem to impose at least some obligation upon plaintiffs both to explain why a constitutional audit is still required after the Secretary of State conducts the promised process audit and to address whether there is some obligation on their part to identify a specific “law” in support of Const 1963, art 2, § 4(1)(h) that prescribes the specific “manner” in which an audit pursuant to that provision must proceed.

In sum, at this juncture, plaintiffs have not asserted a persuasive argument that their case is not moot and that the entry of immediate injunctive relief is proper. That is all that is now before this Court. Accordingly, I concur in the denial of injunctive relief. In addition to denying the relief currently sought in this Court, I would order the most expedited consideration possible of the remaining issues. With whatever benefit such additional time allows, the trial court should meaningfully assess plaintiffs’ allegations by an evidentiary hearing, particularly with respect to the credibility of the competing affiants, as well as resolve necessary legal issues, including those identified in the separate statement of Justice VIVIANO. I would also have this Court retain jurisdiction of this case under both its appellate authority and its superintending authority under Const 1963, art 6, § 4 (stating that, with certain limitations, “the supreme court shall have general superintending control over all courts”). Federal law imposes tight time restrictions on Michigan’s certification of our electors. Plaintiffs should not have to file appeals following our standard processes and procedures to obtain a final answer from this Court on such weighty issues.

Finally, I am cognizant that many Americans believe that plaintiffs’ claims of electoral fraud and misconduct are frivolous and obstructive, but I am equally cognizant that many Americans are of the view that the 2020 election was not fully free and fair. See, e.g., Monmouth University Polling Institute, *More Americans Happy About Trump Loss Than Biden Win* (November 18, 2020) <[https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_111820/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111820/)> (accessed November 23, 2020) [<https://perma.cc/7DUN-CMZM>] (finding that 32% of Americans “believe [Joe Biden] only won [the election] due to voter fraud”). The latter is a view that strikes at the core of

concerns about this election’s lack of both “accuracy” and “integrity”—values that Const 1963, art 2, § 4(1)(h) appears designed to secure.

In sum, as explained above, I would order the trial court to expedite its consideration of the remaining issues, and I would retain jurisdiction in order to expedite this Court’s final review of the trial court’s decision. But, again, because plaintiffs have not asserted a persuasive argument that immediate injunctive relief is an appropriate remedy, I concur in the denial of leave to appeal and, by extension, the denial of that relief.

MARKMAN, J., joins the statement of ZAHRA, J.

VIVIANO, J. (*dissenting*).

Plaintiffs Cheryl Costantino and Edward McCall seek, among other things, an audit of the recent election results in Wayne County. Presently before this Court is their application for leave to appeal the trial court’s ruling that plaintiffs are not likely to succeed and therefore are not entitled to a preliminary injunction to stop the certification of votes by defendant Wayne County Board of Canvassers. See MCL 168.824; MCL 168.825. The Court of Appeals denied leave, and this Court has now followed suit. For the reasons below, I would grant leave to answer the critical constitutional questions of first impression that plaintiffs have squarely presented concerning the nature of their right to an audit of the election results under Const 1963, art 2, § 4(1)(h).

The constitutional provision at issue in this case, which the people of Michigan voted to add in 2018 through Proposal 3, guarantees to “[e]very citizen of the United States who is an elector qualified to vote in Michigan . . . [t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections.” *Id.* The provision is self-executing, meaning that the people can enforce this right even without legislation enabling them to do so and that the Legislature cannot impose additional obligations on the exercise of this right. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466 (1971).

The trial court failed to provide a meaningful interpretation of this constitutional language. Instead, it pointed to MCL 168.31a, which prescribes the minimum requirements for statewide audits and requires the Secretary of State to issue procedures for election audits under Article 2, § 4. But the trial court never considered whether MCL 168.31a accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right.

In passing over this constitutional text, the trial court left unanswered many questions pertinent to assessing the likelihood that plaintiffs would succeed on the

merits.<sup>1</sup> As an initial matter, the trial court did not ask what showing, if any, plaintiffs must make to obtain an audit. It appears that no such showing is required, as neither the constitutional text nor MCL 168.31a expressly provide for it. None of the neighboring rights listed in Article 2, § 4, such as the right to vote by absentee ballot, requires citizens to present any proof of entitlement for the right to be exercised. Yet, the trial court here ignored this threshold legal question and instead scrutinized the parties' bare affidavits, concluding that plaintiffs' allegations of fraud were not credible.<sup>2</sup> The trial court's factual findings have no significance unless, to obtain an audit, plaintiffs were required to prove their allegations of fraud to some degree of certainty.

Wrapped up in this question is the meaning and design of Const 1963, art 2, § 4. Is it a mechanism to facilitate challenges to election results, or does it simply allow for a postmortem perspective on how the election was handled? To ascertain the type of audit the Constitution envisions, it is necessary to consider whether the term "audit" has a special meaning in the context of election administration. In this regard, we should examine the various auditing practices in use around the time Proposal 3 was passed. See Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations* (January 2014), p 66 ("Different types of audits perform different functions."). Some audits occur regardless of how close the election was. They simply review the election process to verify that procedures were complied with, rules were followed, and technology performed as expected. See *id.*; see also League of Women Voters, *Report on Election Auditing* (January 2009), p 3 ("Post-election audits routinely check voting system performance in contests, regardless of how close margins of victory appear."). For these process-based audits, it would not appear critical whether they occur before the election results are finally certified, as the audit is intended to gather information that could be used to perfect voting systems going forward.

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<sup>1</sup> The court also suggested that plaintiffs could seek a recount. But, with few exceptions, the relevant recount provisions can be invoked only by candidates for office, which plaintiffs here were not. Compare MCL 168.862 and MCL 168.879 (allowing candidates to request recounts) with MCL 168.880 (allowing any elector, in certain circumstances, to seek a recount of "votes cast upon the question of a proposed amendment to the constitution or any other question or proposition").

<sup>2</sup> The court's credibility determinations were made without the benefit of an evidentiary hearing. Ordinarily, an evidentiary hearing is required where the conflicting affidavits create factual questions that are material to the trial court's decision on a motion for a preliminary injunction under MCR 3.310. See 4 Longhofer, Michigan Court Rules Practice, Text (7th ed, 2020 update), § 3310.6, pp 518-519. See also *Fancy v Egrin*, 177 Mich App 714, 723 (1989) (an evidentiary hearing is mandatory "where the circumstances of the individual case so require").

Other audits, by contrast, aim to ensure accuracy in a specific election and enable alteration of results if necessary. The American Law Institute’s recent *Principles of the Law, Election Administration*, drafted around the time Proposal 3 was passed, suggests that audits should be used in this manner:

[I]f an audit exposes a problem, the number of randomly sampled ballots can be increased in order to ascertain whether or not the problem is one that threatens the accuracy of the determination of which candidate is the election’s winner. In an extreme case, when problems exposed by an audit were severe, the audit would need to turn into a full recount of all ballots in the election in order to provide the requisite confidence in the accuracy of the result (or, as necessary, to alter the result based on the findings of the audit-turned-recount). In those circumstances when the audit exposes no such problem, election officials ordinarily would be able to complete the audit prior to the deadline for certifying the results of the election; when, however, the audit reveals the necessity of a full recount, then a state—depending on how it chooses to structure the relationship between certification and a recount—either could delay certification until completion of the recount or issue a preliminary certification that is subject to revision upon completion of the recount. [ALI, *Principles of the Law, Election Administration* (2019), § 209, comment *c.*]

These audits, such as a risk-limiting audit, “are designed to be implemented before the certification of the results, and to inform election officials whether they should be confident in the results—or if they should bump the audit up to a full recount.” Pettigrew & Stewart, *Protecting the Perilous Path of Election Returns from the Precinct to the News*, 16 Ohio St Tech L J 587, 636 (2020) (“[Risk-limiting audits] conducted as part of the certification process currently provide the best mechanism through which the manipulation of election returns at the precinct level can be detected and, most importantly, remedied.”). A review of election laws conducted in early 2018 similarly recommended that audits be undertaken “after preliminary outcomes are announced, but before official certification of election results” because this allows for “correction of preliminary results if preliminary election outcomes are found to be incorrect.” Root et al, Center for American Progress, *Election Security in All 50 States: Defending America’s Elections* (Feb 12, 2018), available at <<https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/>>.

Whether the constitutional right to an audit may be utilized to uncover evidence of fraud to challenge the results of an election will also need to be addressed. In particular, how does the constitutional audit operate within our statutory framework and procedures for canvassing election returns, certifying the results, and disputing ballots on the basis of fraud? We have long indicated that canvassing boards’ role is ministerial and does not



involve investigating fraud. See *McLeod v State Bd of Canvassers*, 304 Mich 120 (1942); see also *People ex rel Williams v Cicott*, 16 Mich 283, 311 (1868)<sup>3</sup> (opinion of Christiancy, J.) (noting that the boards, “acting thus ministerially,” are “often compelled to admit votes which they know to be illegal”); see generally Paine, *Treatise on the Law of Elections to Public Offices* (1888), § 603, p 509 (“The duties of county, district, and state canvassers are generally ministerial. . . . Unless authorized by statute, they cannot go behind those returns. . . . Questions of illegal voting and fraudulent practices are to be passed upon by another tribunal.”). The Board of State Canvassers has more of a role in investigating fraud in recounts, although we have held that it cannot exclude votes on this basis. See MCL 168.872 (providing that if the board conducting a recount suspects fraud occurred during the election, it can make an investigation that produces a report that is submitted to the prosecuting attorney or to the circuit judges of the county); *May v Wayne Co Bd of Canvassers*, 94 Mich 505, 512 (1893) (holding that the board could not exclude votes during a recount based on fraud). These holdings may suggest that evidence of fraud uncovered in an audit is not a barrier to certification and instead may only be used to challenge an election in quo warranto and other related proceedings. See *The People ex rel Attorney General v Van Cleve*, 1 Mich 362, 364-366 (1850) (holding in a quo warranto proceeding that the certification “is but *prima facie* evidence” of the election results and that a party can “go behind all these proceedings[; that the party] may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding, or the person claiming the office”).

Consequently, it is imperative to determine the nature and scope of the audit provided for in Article 2, § 4, so we can determine when the audit occurs and whether it will affect the election outcome. These questions are important constitutional issues of first impression that go to the heart of our democracy and the power of our citizens to amend the Constitution to ensure the accuracy and integrity of elections. They deserve serious treatment. I would grant leave to appeal and hear this case on an expedited basis to resolve these questions.<sup>4</sup> For these reasons, I dissent.

<sup>3</sup> Overruled in part on other grounds by *Petrie v Curtis*, 387 Mich 436 (1972).

<sup>4</sup> In doing so, I would consider the parties’ arguments regarding whether the matter is moot.



b1117t

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 23, 2020

Clerk

# **EXHIBIT 4**



**Senate Fiscal Agency**  
P. O. Box 30036  
Lansing, Michigan 48909-7536

## BILL ANALYSIS



**Telephone: (517) 373-5383**  
**Fax: (517) 373-1986**

House Bill 6595 (Substitute S-1 as reported)  
Sponsor: Representative James A. Lower  
House Committee: Elections and Ethics  
Senate Committee: Elections and Government Reform

**CONTENT**

The bill would amend the Michigan Election Law to do the following:

- Specify that not more than 15% of the signatures used to determine the validity of a petition could be registered voters from any one congressional district.
- Require a person who filed a petition with the Secretary of State (SOS) to sort the petition so that signatures were categorized by congressional district.
- Specify that any signature obtained above the 15% limit would be invalid and not counted.
- Require the Board of State Canvassers to make an official declaration of the sufficiency or insufficiency of a petition no later than 100 days before the election at which the proposal was to be submitted.
- Require a person who felt aggrieved by a determination made by the Board regarding the sufficiency of an initiative petition to file a challenge to the Board's determination in the Michigan Supreme Court within seven business days after the date of the official declaration or within 60 days before the election.
- Require a petition to have a summary of that proposal that was not more than 100 words.
- Require the Director of Elections, if a person submitted a summary of that proposal to the Board of State Canvassers for approval, to prepare a summary of it.
- Require each petition to indicate at the top of the page whether the circulator of the petition was a paid signature gatherer or a volunteer signature gatherer.
- Specify that any signature obtained on a circulated petition that failed to meet all of the requirements regarding its size and format would be invalid.
- Require a petition circulator who was a paid signature gatherer to file an affidavit with the SOS that indicated as such before circulating a petition.
- Specify that any signature obtained by a petition circulator on a petition would be invalid and could not be counted if the circulator provided or used a false address or provided any fraudulent information on the certificate of circulator.
- Specify that any signature obtained on a petition that was not signed in the circulator's presence would be invalid and could not be counted.
- Prescribed a misdemeanor penalty for a circulator who knowingly made a false statement concerning his or her status as a paid signature gatherer or volunteer signature gatherer.

MCL 168.471 et al.

Legislative Analyst: Nathan Leaman

**FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Date Completed: 12-20-18

Fiscal Analyst: Joe Carrasco

[floor/hb6595](#)

Bill Analysis @ [www.senate.michigan.gov/sfa](http://www.senate.michigan.gov/sfa)

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.