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

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

Plaintiffs,

v.

CITY OF DETROIT; DETROIT ELECTION COMMISSION; JANICE M. WINFREY, in her official capacity as the CLERK OF THE CITY OF DETROIT 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,

Defendant-Intervenor.

Case No. 20-014780-AW

Hon. Timothy M. Kenny, Chief Judge

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**Pro hac vice* motion forthcoming
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DEFENDANT-INTERVENOR MICHIGAN DEMOCRATIC PARTY'S
RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR AUDIT

Defendant-Intervenor Michigan Democratic Party opposes Plaintiffs' Motion for Audit ("Motion") and respectfully requests that this Court deny Plaintiffs' Motion with prejudice for the following reasons.

INTRODUCTION

Plaintiffs no longer have an active case. They initially commenced this lawsuit alleging large-scale voter fraud within the City of Detroit and sought to interpose a *pre*-certification election audit to prevent Defendants from continuing to count and, ultimately, from certifying the November 2020 Wayne County election results. This Court concluded that Plaintiffs' claims of fraud lacked credibility and denied that request. Now, long after the Board of State Canvassers certified the *statewide* election results, Plaintiffs are again requesting an audit, this time a *post*-certification audit – something not alleged in their complaint. The Board's formal certification renders Plaintiffs' initial claim moot, and the Secretary of State has already publicly announced her intent to conduct an audit, making their new request equally pointless.

Beyond its mootness, Plaintiffs' request suffers from numerous legal infirmities. First, Michigan law delegates the conduct of post-election audits solely to the Secretary of State, but the Secretary of State is not a party to this lawsuit. Second, granting Plaintiffs' motion would effectively amount to this Court issuing a writ of mandamus even though the Secretary of State's authority to conduct post-certification audits is within her discretion. For each of these separate reasons, Plaintiffs' Motion should be denied.

ARGUMENT

I. Plaintiffs Did Not Request a Post-Certification Audit in Their Complaint, and Any Such Request Is Moot.

The principal problem with Plaintiffs' Complaint is that it did not request the *post*-certification audit that Plaintiffs now seek but was instead principally focused with enjoining

certification, which has already occurred. Plaintiffs' original case was premised on the notion that a *pre*-certification audit and investigation was necessary to vindicate their rights. (See Compl ¶¶63-66, 72, 79, 89, 103; *id*. at p 20.) In their Complaint, Plaintiffs were clear that they were requesting that this Court "enjoin the certification of the election results pending a full investigation and court hearing, and to order an independent audit of the November 3, 2020 election to ensure the accuracy and integrity of the election." (Compl ¶66.) Their motion for a temporary restraining order relied on the same alleged pre-certification audit right. (See Pls' TRO Br at 6-7.) Plaintiffs have now modified that request and seek a post-certification audit in their Motion. (See generally Pls' Mot for Audit.) However, because Plaintiffs failed to request this relief in their Complaint, they should be precluded from seeking it now.[1]

Finally, even if all of the foregoing were not insurmountable problems, Plaintiffs' request for an audit is now moot as the statewide elections results were formally certified by the Board of State Canvassers on November 23, 2020 and the Secretary of State has already stated publicly that she intends to conduct an audit of the November general election, including a "performance audit" in Wayne County. See *Statement from Secretary of State Jocelyn Benson on Planned Audits to Follow Certification of the Nov. 3, 2020, General Election*, Mich Dept of State (Nov. 19, 2020)[2]; Paul Egan, Secretary of State: *Post-Election 'Performance Audit' Planned in Wayne County*, DETROIT FREE PRESS (Nov. 19, 2020).[3] See also *Barrow v Detroit Election Com'n*, 305 Mich App

[1] Any proposed amendment to rectify this deficiency would be futile under MCR 2.118 for all of the reasons explained in Sections II and III, *infra*, namely, that the Secretary of State is responsible for election audits under MCL 168.31a and is not a defendant here.

[2] Available at https://www.michigan.gov/documents/sos/SOS_Sstatement_on_Audits_708290_7.pdf.

[3] Available at https://www.freep.com/story/news/politics/elections/2020/11/19/benson-post-election-performance-audit-wayne/3779269001/.

649, 659; 854 NW2d 489 (2014) ("This Court's duty is to consider and decide actual cases and controversies…. An issue is [] moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy.") (internal quotation marks omitted). By certifying the statewide elections results, the Board of State Canvassers has rendered impossible the prayer for relief in Plaintiffs' complaint, which, coupled with the Secretary of State's announcement to conduct a post-certification audit, leaves no room for this Court to grant the relief requested in Plaintiffs' motion.

II. MCL 168.31a Vests Responsibility for the Conduct of Post-Election Audits in the Secretary of State.

Beyond the fact that there is no longer any case for this Court to decide, Plaintiffs' request also seeks relief from the wrong official. In their Motion, Plaintiffs request "that this Honorable Court immediately order the Wayne County Clerk to conduct a results audit." (Pls' Audit Br at 6.) But Plaintiffs point to no provision of the Michigan Election Code giving county clerks the authority to decide whether to conduct a post-election audit. Rather, Section 31a of the Election Code – upon which Plaintiffs rely – makes clear that the Secretary of State is ultimately responsible for conducting the audit, with the assistance of county clerks under her "supervis[ion]." MCL 168.31a(2) ("The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures."). Nothing in this section gives county clerks the ability to initiate or conduct an audit other than at the Secretary's direction. See *Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.") (internal quotation marks omitted). But the Secretary of State is a not a party to this lawsuit. Because a necessary party is not before the Court, the Court cannot order the relief Plaintiffs seek. See MCR 2.205; cf. *Taylor v Sturgell*, 553 US 880, 884; 128 S Ct 2161, 2166-67 (2008) ("It is a principle of general

application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

To the extent Plaintiffs point to the "self-executing" provision in article 2, section 4(1)(h) of the Michigan Constitution "to have the results of statewide elections audited…," Plaintiffs would have this Court read out of the Constitution the clause immediately qualifying the audit right: "*in such a manner as prescribed by law*." Mich Const 1963, art 2, sec 4(1)(h) (emphasis added). That "manner as prescribed by law" refers to MCL 168.31a, which the Legislature specifically amended after the adoption of Section 4(1)(h) to provide that "[t]he secretary of state shall prescribe the procedures for election audits … as required in section 4 of article II of the state constitution of 1963." MCL 168.31a(2); see also *Bisio v City of Vill of Clarkston*, --- NW2d ----, 2020 WL 4260397, at *6 (Mich, July 24, 2020) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."). In other words, as this Court correctly recognized in its November 13, 2020, Opinion and Order denying Plaintiffs' motion for a temporary restraining order:

> 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 project. 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.

(November 13 Op & Order at 10-11.)

Plaintiffs' alternative construction of Section 4(1)(h) is untenable. Under Plaintiffs' reading, every voter could simply demand that any and every city, county, and state election official independently conduct an audit after every election, bypassing the Legislature's will that post-certification audits are to be conducted at the direction, and under the supervision, of the

Secretary of State. Such an interpretation would unnecessarily create a multiplicity of audits while imposing an immense drain on state and local resources and causing mass confusion, as it would leave unanswered the key question of which official would have authority to audit which jurisdiction. Fortunately, this Court need not tangle with those issues, as the Legislature has already made a clear choice: the Secretary of State, with the assistance of county clerks, is responsible for conducting post-election audits under Section 4(1)(h). See MCL 168.31a; 2018 Public Act 603 (amending MCL 168.31a after adopting of constitutional amendment adding Section 4(1)(h)).

In sum, because MCL 168.31a vests responsibility for post-election audits solely with the Secretary of State, who is not a Defendant here, Plaintiffs' request to order the Wayne County Clerk to conduct an audit is improper and should be denied.

III. Plaintiffs' Motion for Audit Actually (and Improperly) Seeks a Writ of Mandamus Against the Secretary of State.

Given that the Secretary of State is the only election official who can fulfill Plaintiffs' request for an audit, Plaintiffs' Motion in substance seeks a writ of mandamus directing the Secretary (a non-party) to conduct such an audit. See *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-92; 822 NW2d 254 (2012) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.") (internal quotation marks omitted). In addition to the fundamental problem that Plaintiffs have failed to request such relief or join the Secretary as a defendant, Plaintiffs have not carried their extremely heavy burden to demonstrate an entitlement to mandamus.

Specifically, the party seeking the "extraordinary remedy" of mandamus must demonstrate that four conditions are met: "(1) the party seeking the writ has a clear, legal right to performance

of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists, legal or equitable, that might achieve the same result." *O'Connell v Dir of Elections*, 317 Mich App 82, 90-91; 894 NW2d 113 (2016) (internal quotation marks omitted). On the third element, "[a] ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *League of Women Voters of Michigan v Sec'y of State*, --- NW2d ----, 2020 WL 3980216, at *2 (Mich Ct App, 2020), *app den* 946 NW2d 307 (Mich, 2020) (internal quotation marks omitted).

Here, even assuming that Plaintiffs could meet the other elements for mandamus relief (which they cannot), the Legislature has entrusted the performance of election audits to the Secretary's discretion. Section 168.31a is clear: "In order to ensure compliance with the provisions of this act, after each election the secretary of state *may* audit election precincts." MCL 168.31a (emphasis added). Michigan courts have long construed the term "may" as permissive, rather than mandatory. See, e.g. *Browder v Intl Fid Ins Co*, 413 Mich 603, 612; 321 NW2d 668, 673 (1982) ("A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole."); *Davis v Sec'y of State*, --- NW2d ----, 2020 WL 5552822, at *7 (Mich Ct App, September 16, 2020) (interpreting the term "may" in another provision of the Michigan Election Law to be permissive). Since the act Plaintiffs seek to compel is within the discretion of the Secretary of State, their request should be denied for that additional reason.

CONCLUSION

For the reasons stated, Defendant-Intervenor Michigan Democratic Party respectfully submits that this Court should deny Plaintiffs' Motion for Audit.

Respectfully submitted,

Dated: December 2, 2020

s/Scott R. Eldridge

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PROOF OF SERVICE

Scott Eldridge certifies that on the 2nd day of December 2020, he served a copy of the above document in this matter on all counsel of record and parties via the MiFile/TrueFiling system.

s/ *Scott R. Eldridge*
Scott Eldridge