

STATE OF MICHIGAN
IN THE SUPREME COURT

ANGELIC JOHNSON, et al.
Petitioners,

Supreme Court Case No. _____

v

JOCELYN BENSON, et al.,
Respondents.

**PETITIONERS' BRIEF IN SUPPORT
OF PETITION FOR WRITS**

**IMMEDIATE RELIEF REQUESTED
BEFORE DECEMBER 8, 2020**

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**THIS ORIGINAL PROCEEDING INVOLVES A RULING THAT A PROVISION OF
THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE
GOVERNMENTAL ACTION IS INVALID**

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STATEMENT OF JURISDICTION

As an initial matter, Petitioners sue as an original action before this Honorable Supreme Court seeking extraordinary writs of mandamus, prohibition, and declaratory and injunctive relief together with such other further relief which this Court deems just and equitable. Resolution of the dispute involves the Separation of Powers under the Michigan Constitution between the Legislative and the Executive Branches. Elections are controlled at the state level by the Michigan Constitution which in turn delegates plenary authority to the Legislature.¹ The Board of State Canvassers is a constitutionally created board,² and the Secretary of State is an office of the Executive Branch. Both Respondents, however, have duties to implement and enforce the constitutional and legislative mandates regarding elections. These are not trivial requirements. In the present case, Petitioners submit that Respondents have taken unlawful actions beyond their constitutional and legislative authority and refused to take actions required to vouchsafe accuracy and integrity and to guard against fraud and irregularities in the 2020 general election despite their clear legal duties to act and equally clear limitations on their authority to act.

¹ See Section 4, Article 2, of the 1963 Constitution, which provides in subsection (2) as follows:

Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting....

Const. 1963, art 2, § 4 (emphasis added).

² Const 1963, art 2, § 7.

Jurisdiction is anchored to this Court’s inherent authority to issue prerogative and remedial writs such as mandamus and prohibition as retained by the Michigan Constitution:

Except to the extent limited or abrogated by article IV, section 6, or article V, section 2, the supreme court shall have general superintending control over all courts; *power to issue, hear and determine prerogative and remedial writs*; and appellate jurisdiction as provided by rules of the supreme court. . . .

Const 1963, art. 6, § 4 (emphasis added).

In addition, the Legislature has confirmed that this Court has acknowledged in MCL 600.212 that this Court has “all the powers and jurisdiction conferred upon it by the constitution and laws of this state,” which include jurisdiction and power to issue, hear, and determine original and remedial writs. MCL 600.217 provides:

The supreme court has jurisdiction and power to issue, hear, and determine writs of:

- (1) error,
- (2) habeas corpus,
- (3) mandamus,
- (4) quo warranto,
- (5) procedendo, and other original and remedial writs.

Petitioners recognize and acknowledge that the Legislature has provided that normally, “[a]n action for mandamus against a state officer shall be commenced in the court of appeals, or in the circuit court in the county in which venue is proper or in Ingham county, at the option of the party commencing the action.” MCL 600.4401(1). Petitioners further recognize that this Court has by rule provided that the Court of Appeals “may entertain an action for . . . (2) mandamus against a state officer.” MCR 7.203(C)(2). Petitioners further acknowledge that this Court has by rule provided that actions for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims and that all other actions for mandamus must be brought in the

circuit court unless a statute or rule requires or allows the action to be brought in another court. MCR 3.305. MCL 168.479, revised on December 28, 2018, subsequent to MCL 600.4401(1), expressly provides that “any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy *in the supreme court.*” (emphasis added).

MCR 7.303(B)(5) provides that this Supreme Court may exercise superintending control over a tribunal, here the Board of State Canvassers. Further, MCR 7.303(B)(6) provides that this Court may “exercise other jurisdiction as provided by the constitution or law.”

Petitioners respectfully submit that the present action could not be brought in either the Michigan Court of Appeals or the Court of Claims without foreclosing Petitioners’ claim and remedy under MCL 168.109, *et seq.* MCL 168.479, by law, provides special access to this Court to protect the integrity of the election process. This statute contemplates an original action before this Court to obtain specific relief and an appropriate remedy. MCR 7.316(A)(7) allows this Court to “enter other and further orders and grant relief as the case may require.” Here, immediate injunctive relief to stop any destruction of the November 3, 2020 returns is necessary in order for the Board of State Canvassers or a joint convention of the Michigan Legislature to appropriately address Petitioners’ concerns caused by Respondents’ determination to certify an incomplete and improperly certified canvass, as this Court directs. Under the circumstances described in the Petition, an original action filed in the Michigan Court of Appeals or Court of Claims would not timely provide or recognize the remedy sought by Petitioners.

Petitioners also respectfully submit that the resolution of the issues presented in this action are of immense significance to the State of Michigan and to the constitutional rights of its electors

to vote and to be assured of the accuracy and integrity of elections,³ and the resolution of these issues is extremely urgent and time sensitive. Indeed, time is of the essence, and it is imperative that this Court resolve, as a matter of first impression, the nature and scope of important constitutional rights under Article 2, §4 so that this Court can resolve whether the abuses alleged in this Petition violate the Separation of Powers proscribed by the United States and Michigan Constitutions or whether they affect the outcome of the 2020 general election. Initiating this action in the Court of Appeals, due to time constraints, would likely result in unnecessary interference with the election process due to efforts to preserve this Court's ability to effectuate a complete remedy following appeal or may result in effectively depriving this Court from being able to grant full and complete relief. In such circumstances, this Court has previously exercised its jurisdiction in an original action which the Court acknowledged should have been brought in the circuit court under the court rules. This Court reasoned:

Defendant questions the propriety of our taking jurisdiction of this case and suggests quo warranto as an adequate procedure to determine title to public office where there are disputed rulings on ballots such as are involved in this case. We are of the same attitude toward mandamus proceedings in such cases as we expressed in *Smith v Board of Canvassers*, 220 Mich 318, 321; 189 NW 856. Though the petition should have been presented to the circuit court for Wayne county, nevertheless we are willing to exercise jurisdiction in the instant case because we consider it of extreme urgency. The Constitution of this State, art. 7, § 4, clothes this court with power to issue the writ of mandamus. 3 Comp.Laws 1929, § 13535, Stat. Ann. § 27.29, makes further provision concerning such power. A brief discussion of the jurisdiction of this court in mandamus cases occurs in *Chemical Bank & Trust Co v Oakland County*, 264 Mich. 673, 678–680; 251 NW 395. The jurisdiction of this court to hear and determine mandamus cases brought against boards canvassing votes cast at public elections is too well settled to require detailed citation of cases.

³ Const 1963, art II, § 4.

McNally v Bd of Canvassers of Wayne Co, 316 Mich 551, 555–56; 25 NW2d 613 (1947); *see also Elliot v Secretary of State*, 295 Mich 245; 294 NW 171 (1940); *Belknap v Board of State Canvassers*, 95 Mich 155; 54 NW 696 (1893); *Double v McQueen*, 96 Mich 39; 55 NW 564 (1893).

Petitioners respectfully submit that this Court has jurisdiction to hear and decide this original action. The Michigan Constitution provides this Court the right to issue, hear, and determine prerogative and remedial writs. Mich Const 1963, art 6, § 4. Michigan Election Law specifically states that any person aggrieved by a determination of the Board of State Canvassers may bring an original petition requesting “mandamus or other appropriate remedy” to this Court. MCL 168.479. Additionally, mandamus provides the appropriate remedy when seeking to challenge and cure the decision of election officials, including Respondent Benson. *See, e.g., Attorney Gen v Bd Of State Canvassers*, 318 Mich App 242, 248–49, 896 NW 2d 485, 487–88 (2016).

**STATEMENT IDENTIFYING THE DECISION FROM WHICH THIS PETITION
ARISES AND ITS DATE OF ENTRY**

On November 23, 2020, Respondents Board of State Canvassers (“Board”) rushed to certify returns that failed to comply with Michigan Election Law. Respondents’ knew that the determination was a rubber stamp to illegal ballots and certification of the results was improper—they possessed two sworn affidavits from member of the Wayne County Board of Canvassers stating so. See generally, Affidavits of William C. Hartmann and Monica Palmer, **Appendix** 17-22 and 23-25. In Wayne County alone, 14,000 votes were “found” after election day and tabulated—changing the results of a county-wide judicial race. 71% of absentee voter county boards were imbalanced, and the official results of these boards failed to comply with MCL 168.765a as the reporting results do not correspond with the voter’s precinct and the absent voter counting boards did not report their results in connection with registered voters.

These serious concerns represent just three of Petitioners’ mounting evidence that the Respondents’ canvass was incomplete. See Petitioners’ Demand Letter to Board, **Appendix** 199-204. Respondents simply ignored these irregularities that rendered its canvass incomplete. Michigan Election Law requires that the Board of State Canvasser must determine whether the returns and certifications are properly certified and, when they are not, the Board of State Canvassers is statutorily required to continues its proceedings until the Board is able to insure the results of the canvass. The Board has until forty days after the election to certify the results and fulfill its statutory duty. Since Respondents’ certification failed to follow Michigan Election law, its determination to certify should be voided at the earliest possible time, and this Court should enter an order requiring that the Michigan Legislature convene a joint convention to analyze and audit the election returns and verify the election results prior to the State’s deadline to report the results to the US Secretary of State and Congress under federal law.

Petitioners also challenge Respondent Benson's decision to refuse to conduct an independent audit before statewide certification. See Affidavits of Hartmann and Palmer, **Appendix** 19 at ¶¶12-13 and 25 at ¶¶22-23. Two of the Wayne County canvassers only certified in reliance on this promise, which was quickly reneged or clarified in public statements by Respondent Benson.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER RESPONDENTS VIOLATED MICHIGAN ELECTION LAW BY CERTIFYING AN INCOMPLETE CANVASS THAT WAS WITHOUT PROPER CERTIFICATION FROM WAYNE COUNTY.

Petitioners answer, "Yes."

Respondents will likely answer, "No."

- II. WHETHER RESPONDENTS VIOLATED MICHIGAN ELECTION LAW BY FLOODING THE GENERAL ELECTION WITH ILLICIT ABSENTEE BALLOTS, IGNORING LEGISLATIVE ANTI-FRAUD MANDATES SUCH AS SIGNATURE REQUIREMENTS, AND PREVENTING BIPARTISAN INSPECTIONS AT ABSENT VOTER COUNTING BOARDS WHEN DUPLICATING OR TABULATING BALLOTS.

Petitioners answer, "Yes."

Respondents will likely answer, "No."

- III. WHETHER THE NATURE AND SCOPE OF ARTICLE 2, §4 REQUIRES A MEANINGFUL AUDIT BEFORE MICHIGAN'S ELECTORS MAY BE SEATED.

Petitioners answer, "Yes."

Respondents will likely answer, "No."

- IV. WHETHER RESPONDENTS VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND DUE PROCESS UNDER *BUSH V GORE* AND ITS PROGENY.

Petitioners answer, "Yes."

Respondents will likely answer, "No."

- V. WHETHER PAYMENTS FROM PRIVATE SOURCES DIRECTLY TO CITIES IN VIOLATION OF FEDERAL ELECTION LAW UNDERMINED THE CIVIL LIBERTIES OF PETITIONERS OR CAUSED DISPARATE IMPACT AND DISPARATE TREATMENT OF LAWFUL VOTES IN FAVOR OF UNLAWFUL VOTES.

Petitioners answer, “Yes.”

Respondents will likely answer, “No.”

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Introduction

Fair and honest elections are the lifeblood of our constitutional republic.⁴ Its survival depends upon it. Accordingly, Michigan voters demand and deserve honest, fair, and transparent elections. They demand and deserve a process that ensures that their *legal* votes will count and that *illegal* votes will not. The Michigan and United States Constitutions demand it.

Petitioners Angelic Johnson and Dr. Linda Lee Tarver legally voted in the November 2020 general election in the State of Michigan. These women believed their votes would matter and would be counted as a full vote protected by the Fourteenth Amendment of the United States Constitution, the Michigan Constitution, and Michigan Election Law. Unfortunately, it appears they were wrong. Respondents' failure to follow the statutory provisions of Michigan Election Law robbed them of that right.

The Michigan Secretary of State, Respondent Jocelyn Benson, a registered Democrat, acting unilaterally and without legislative approval, flooded the electoral process for the 2020 general election with absentee ballots. This was accomplished by the Secretary of State's misguided efforts to send absentee ballot request forms to every household in Michigan with a registered voter (regardless of whether the voter was still alive or actually resided at that address). Furthermore, the Secretary of State permitted online requests for absentee ballots without signature verification, thereby allowing for fraud in the process of obtaining an absentee ballot. These

⁴ In her analysis for the majority, Justice Kelly reminds us that “[a]lthough we colloquially call ourselves a ‘democracy,’ we are not. We are a constitutional *republic* in which we, as Michigan citizens, elect our representatives to local and state legislative bodies to enact our laws. This republican form of government is guaranteed to us in the United States Constitution.” *Stand Up v Secy of State*, 492 Mich 588, 599; 822 NW2d 159, 163 (2012).

actions were not approved or authorized by the State legislature, and for good reason. Predictably, this flood of unauthorized, absentee ballots ensured the dilution of lawful votes and precipitated a glut of unlawful votes causing an unfair and dishonest 2020 general election, as the evidence adduced from election day at the TCF Center and elsewhere throughout Michigan proves.

II. Although the Election Abuses Outlined in the Petition are Unprecedented, this Court Has Recently Warded Off Similar Threats to the Separation of Powers in *Stand Up v Secretary of State*.

In 2012, this Court dealt with a sensitive pre-election dispute that put pressure on Michigan’s republican form of government. The tree of liberty bent, but it did not break. Like in *Stand Up v Secretary of State, supra*, this Court should demand that mandatory statutes be followed. This protects not only the branches but the root of liberty. And like in *Stand Up v Secretary of State*, “This [petition] concerns a big constitutional issue, even though its focus is something as small” In *Stand Up*, a petition signed by over 200,000 people turned on whether the headings satisfied strict statutory requirements that the petition heading be in “14–point boldfaced type[.]” “As technical as this appears, the rule of law is implicated here because this issue concerns the constitutional foundation of how we govern ourselves.” *Stand Up v Secy of State*, 492 Mich 588, 598–99.

But in a broader sense, this action about technicalities over mandatory signatures and related statutory violations is not about the wisdom of Petitioners’ voting preferences—nor the preferences of Respondents, “nor is it about ‘the people’s right to vote.’ The fact is, the people *have voted*” *Stand Up v Secy of State*, 492 Mich 588, 622 (Young and Zahra, JJ, concurring). The people have already popularly elected the very Legislature who passed Michigan Election Law and who made these statutory requirements mandatory, not permissive. “*The sole question before us*,” therefore, is whether Respondents followed the law in carrying out the general election

on November 3, 2020. If so, then the election should stand. If not, then the election must be invalid, in whole or part. This is the “core issue in a *constitutional republic* like ours.” *Id* at 622 (Young and Zahra, JJ, concurring).

III. Small Factions Within the Executive Branch Cannot Usurp the Detailed Process Mandated by the Michigan Legislature.

In *Stand Up v Secretary of State*, this Court asked whether a group of about 200,000 signatories (a small group) could overturn a duly enacted statute. The short answer was only if the mandates of the Michigan Legislature were strictly followed. In a similar way, the Court must determine whether a small, but highly motivated faction of government officials will affect the entire state when they employ an absentee ballot scheme that violates Michigan Election Law. The answer must be “no.” In addition to improperly flooding the 2020 general election with absentee ballots by employing an unlawful mass mailing of unsolicited absentee ballot application requests. The expert analysis shows that that Secretary of State also sent unsolicited ballots. Respondents also ignored the plain language of the relevant statute that requires two signatures checks for absentee ballots, first to get the ballot, and second to cast that ballot, and that only permits applications by mail or in-person. Respondents are responsible for other serious statutory abuses too, include duplicating ballots without bipartisan oversight and playing ostrich to rampant irregularities and allegations of manifest fraud. This petition seeks to restore the purity, accuracy, and integrity of Michigan elections so that “We the people” can have confidence the election process and thus confidence that the outcomes and those who govern are doing so legitimately.

For the top of the ticket, this likely means that the Michigan Legislature will have to seat the State’s electors because of the strict “safe harbor” deadlines imposed under the United States Constitution and Electoral Count Act of 1887 (“ECA”) for the determination of controversy as to

appointment of electors.⁵ This Court should remind the Michigan Legislature of its duty to act accordingly, but likely has little else to do except take custody of the ballots and restrain the executive branch from acting contrary to the clear mandates required by the Separation of Powers and the United States Constitution.

As for the US Senate candidates and other down ballot candidates, this Court has more flexibility in demanding statutory compliance under its broad equitable powers and superintending control over all courts, including the power to issue, hear and determine prerogative and remedial writs. This Court should oversee an independent audit—or require the Michigan Legislature to take back this constitutional function—by ordering more targeted remedies based on the extent of the unlawful votes, including simply discounting illegal votes. As a last resort, if it must, this Court must order a new, fair election, or other tailored remedy to fit the abuse of process Respondents precipitated.

IV. Petitioners painstakingly detail a litany of statutory and constitutional abuses in their Petition.

Petitioners carefully outline several categories of clear statutory violations in paragraphs ¶¶39-235 of their emergency Petition for Extraordinary Writs. Summarized here, there are thirty-nine eyewitnesses who observed myriad statutory violations, especially the exclusion of bipartisan inspectors from AVCBs during the ballot processing and sensitive duplication process.

⁵ See generally, 3 USC 5 and Stephen A. Siegel, *THE CONSCIENTIOUS CONGRESSMAN'S GUIDE TO THE ELECTORAL COUNT ACT OF 1887*, 56 Fla L Rev 541, 542 (2004) (“Electoral vote counting is the oldest activity of the national government and among the oldest questions of constitutional law. It was Congress’s first task when a quorum appeared in the nation’s new legislature on April 6, 1789. It has happened every four years since then. Yet electoral vote counting remains one of the least understood aspects of our constitutional order.”) (internal citations omitted).

The former Secretary of State Ruth Johnson and many others, including whistleblowers and half the Wayne County Canvassers swore under penalty of perjury that the general election not only lacked accuracy and integrity, but that an independent audit is urgently needed to prevent manifest injustice.

Four experts analyzed the State's own preliminary data and related records to prove a shocking number of unlawful ballots or, in some cases, clearly illegal votes, without limitation:

Michigan Presidential Election Contest⁶
Margin +154,188

Type of Error*	Description	Margin
1. Unlawful Ballots	Unsolicited Ballots	<u>355,392</u>
2. Legal Votes Not Counted	Estimate of the minimum number of absentee ballots that the requester returned but were not counted	<u>(29,682)</u>
3. Illegal Votes Counted	Electors voted with no address	<u>35,109</u>
4. Illegal Votes Counted	Out of state residents voting in Michigan	<u>13,248</u>
5. Illegal Votes Counted	Double Votes	<u>317</u>
6. Illegal Votes Counted	Electors voted listing email only	<u>259</u>

⁶ See Braynard Decl. and Zhang Decl. **Appendix** 278-299, *May overlap.

7. Unlawful ballots	No signature required to obtain ballot	74,000
TOTAL		508,016

While there is likely overlap between some of these categories of unlawful ballots and illegal votes, what is apparent is that Petitioners' constitutional rights for accuracy and integrity cannot be satisfied without expedited—and meaningful—review of the election process, including an audit to ensure that all lawful votes have been counted and no illegal votes have diluted the outcome unfairly or corrupted the process to benefit a single party over another.

LAW AND ARGUMENT

I. Petitioners Satisfy the Legal Standard for Mandamus.

Petitioners seeking mandamus must establish four requirements:

- (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 that might achieve the same result.

Citizens Protecting Mich's Const v Sec'y of State, 280 Mich App 273, 284; 761 NW 2d 210, 219, *aff'd in part* 482 Mich 960, 755 NW 2d 157 (2008). Petitioners satisfy this standard.

First, as voters in the State of Michigan, Petitioners have the clear legal right to have their election officials, including Respondents, perform their duties in accordance with the United States and Michigan Constitutions and Michigan Election Law.

The Respondents here have each taken an oath to uphold and defend the Michigan Constitution. Part of their official roles is to supervise and ultimately certify the general election under Michigan Election Law. These tasks are not open-ended. Rather, under the US Constitution,

the Michigan Legislature has bounded the tasks and duties of Respondents to simply following the law as is now exists.

Second, Respondents had the clear legal duties to perform the act requested. Respondent Jocelyn Benson is the Michigan Secretary of State. As the Secretary of State, Respondent Benson is the State's "chief election officer" with supervisory control over local election officials in the performance of their election related duties, including supervisory control over the election officials and workers at the TCF Center. MCL 168.21. Secretary Benson holds the power to "direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b), 168.509n. Secretary Benson is responsible for "[e]stablish[ing] a curriculum for comprehensive training and accreditation of all [election] officials who are responsible for conducting elections." MCL 168.31(1)(j). Secretary Benson took an oath to support the United States and Michigan Constitution, Mich Const Art 11, § 1, and has a clear legal duty to enforce Michigan Election Law, the United States Constitution, and the Michigan Constitution. This clear legal duty involves no exercise of judgment or discretion. Secretary Benson is sued in her official capacity.

In turn, the Respondent Board was created pursuant to the Mich Const art 2, § 7 and is required to follow the United States and Michigan Constitutions and Michigan Election Law. MCL 168.22c requires the members of the Board to take the following oath prior to taking office: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of office." Mich Const art XI, § 1.

The Board is required to "canvass the returns and determine the result of all elections for electors of president and vice president of the United States, state officers, United States senators,

representatives in congress, circuit court judges, state senators, representatives elected by a district that is located in more than 1 county, and other officers as required by law.” MCL 841. Further, the Board shall record the results of a county canvass, but only upon receipt of a *properly* certified certificate of a determination from a board of country canvassers. *Id.* (emphasis added).

The Board is supposed to certify Michigan election results when appropriate. The Board’s certification prompts the winning presidential candidate’s selection of the 16 Michigan electors. But if the election process cannot be certified, then the task reverts back to the Michigan Legislature under MCL 168.846 and the United States Constitution.

Third, Respondents’ acts are ministerial as this Court has long held. See, e.g., *Petrie v Curtis*, 387 Mich 436, 438; 196 NW2d 761 (1972); see also, Order of November 23, 2020 in *Constantino, et al, v City of Detroit, et al*, Case Nos 162245 & (27)(38)(39)(collecting cases, *People ex rel. Attorney General v. Tisdale*, 1 Doug. 59 (1843); *People ex rel. Lake v. Higgins*, 3 Mich. 233 (1854); *People ex rel. Williams v. Cicott*, 16 Mich. 283 (1868).

But Respondents cannot check their common sense at the door, nor can they contribute to the inaccuracy and loss of integrity that they are sworn to guard against. Fourth, no other remedy at law exists. If left to the passage of time, even a few weeks longer, Petitioners recently added constitutional right to an audit would be rendered meaningless by a perfunctory audit after inaccurate results were transmitted to the federal government. This would deprive Petitioners of their chosen candidates for president and US senate who are within the margin of unlawful ballots and illegal votes cast based on Petitioners experts’ analysis. This Court, therefore, must answer the questions of first impression whether the 2018 amendments to the Michigan Constitution require Respondents, in their ministerial capacity, to follow state and federal election law. And whether in executing their statutory and constitutional mandates whether Respondents may avoid

some statutes in favor of other policy choices at the risk of depriving Petitioners of their rights to an accurate election. The tension between Respondents ministerial tasks⁷—including their regretful precipitation of election abuse by not following clear statutes—and Petitioners self-executing constitutional rights to have their lawful votes counted without dilution by unlawful votes, leaves Petitioners without a remedy except for this Court’s authority under mandamus.

Furthermore, “[p]ublic policy requires that statutes controlling the manner in which elections are conducted be construed as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others.” *Santia v Bd of State Canvassers*, 152 Mich App 1, 6; 391 NW2d 504, 506 (1986) (citing *Lindstrom v Board of Canvassers of Manistee County*, 94 Mich 467, 469; 54 NW 280 (1893); *Groesbeck v Board of State Canvassers*, 251 Mich 286, 291–92; 232 NW 387 (1930)).

II. The United States and Michigan Constitutions Require that Respondents Carefully Follow the Law to Protect Fundamental Civil Liberties.

The Michigan Constitution provides: “All political power is inherent in the people.” Const 1963, art 1, § 1. In 2018, the people of this state exercised this power when they, as registered voters, amended the constitution by approving Proposal 3. As a result of the passage of Proposal 3, Const 1963, art 2, § 4 now provides in relevant part:

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

* * *

⁷ Contrast *May v Wayne Co Bd of Canvassers*, 94 Mich 505, 512 (1893)(during a recount, county board could not exclude fraudulent votes) and *People ex rel Attorney General v Van Cleeve*, 1, Mich 362, 364 (1850)(parties may go past the ballots for proof of the proper winner of an election).

(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.*

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes.

* * *

(2) Except as otherwise provided in this constitution or in the constitution or laws of the United States the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, *to preserve the purity of elections*, to preserve the secrecy of the ballot, *to guard against abuses of the elective franchise*, and to provide for a system of voter registration and absentee voting. . .

Const 1963, art 2, § 4 (emphasis added).

When the State legislature vests the right to vote for President in its people, as Michigan has done here, “the right to vote as the *legislature* has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v Gore*, 531 US 98, 104 (2000) (emphasis added). Indeed, “[t]he right to vote is a fundamental right, preservative of all rights.” *League of Women Voters v Brunner*, 548 F3d 463, 476 (CA 6, 2008) (internal quotations and citation omitted).

There is no question that Petitioners have a fundamental right to legally vote, that they exercised this right during the 2020 general election, and that the debasement or dilution of this right by government officials is a violation of the United States and Michigan Constitutions. As qualified electors, Petitioners have been harmed by Respondents, and this harm will continue absent relief from this Court. *See generally Stein v Thomas*, 672 F App'x 565, 568 (CA6, 2016) (“We hold that [a candidate] and [Michigan voter] have demonstrated Article III standing to bring this lawsuit” challenging state election procedures under the First and Fourteenth Amendment).

As the Commission on Federal Election Reform—a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, and cited extensively by the United States Supreme Court—observed, “the ‘electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.’” Building Confidence in U.S. Election, Report of the Commission on Federal Election Reform at 46 (Sept. 2005) (available at <<https://bit.ly/3dXH7rU>>, and referred to and incorporated herein by reference) (hereinafter, the “Carter-Baker Report”).

According to the Carter-Baker Report, mail-in voting is “the largest source of potential voter fraud.” Carter-Baker Report at 46. Many well-regarded commissions and groups of diverse political affiliation agree that “when election fraud occurs, it usually arises from absentee ballots.” Michael T. Morley, Election Emergency Redlines at 2 (Mar. 31, 2020) (available at <<https://ssrn.com/abstract=3564829>> or <<http://dx.doi.org/10.2139/ssrn.3564829>>, and referred to and incorporated herein by reference) (hereinafter, “Morley, Redlines”).

Such fraud is easier to commit and harder to detect. As one federal court put it, “absentee voting is to voting in person as a take-home exam is to a proctored one.” *Griffin v Roupas*, 385 F3d 1128, 1131 (CA 7, 2004); *see also id* at 1130-31 (voting fraud is a “serious problem” and is “facilitated by absentee voting”).

Courts have repeatedly found that mail-in ballots are particularly susceptible to fraud. As Justice Stevens noted, “flagrant examples of [voter] fraud . . . have been documented throughout this Nation’s history by respected historians and journalists,” and “the risk of voter fraud” is “real” and “could affect the outcome of a close election.” *Crawford v Marion Cnty Election Bd*, 553 US 181, 195-96 (2008) (plurality op of Stevens, J) (collecting examples). Similarly, Justice Souter observed that mail-in voting is “less reliable” than in-person voting. *Id* at 212, n4 (Souter, J.,

dissenting) (“[E]lection officials routinely reject absentee ballots on suspicion of forgery.”); *id* at 225 (“[A]bsentee-ballot fraud . . . is a documented problem in Indiana.”); *see also Veasey v Abbott*, 830 F3d 216, 239, 256 (CA 5, 2016) (en banc) (“[M]ail-in ballot fraud is a significant threat”—so much so that “the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting.”); *see also id* at 263 (“[M]ail-in voting . . . is far more vulnerable to fraud.”); *id* (recognizing “the far more prevalent issue of fraudulent absentee ballots”).

This risk of abuse by absentee or mail-in voting is magnified by the fact that “many states’ voter registration databases are outdated or inaccurate.” Morley, *Redlines* at 2. A 2012 study from the Pew Center on the States—which the US Supreme Court cited in a recent case—found that “[a]pproximately 24 million—one of every eight—voter registrations in the United States are no longer valid or are significantly inaccurate”; “[m]ore than 1.8 million deceased individuals are listed as voters”; and “[a]pproximately 2.75 million people have registrations in more than one state.” *See Pew Center on the States, Election Initiatives Issue Brief, “Inaccurate, Costly, and Inefficient: Evidence that America’s Voter Registration System Needs an Upgrade,”* (Feb 2012) (available at <<https://www.issuelab.org/resources/13005/13005.pdf>>, and referred to and incorporated herein by reference) (cited in *Husted v A Philip Randolph Inst*, 138 S Ct 1833, 1838 (2018)).

In sum, and as argued further below, the flooding of absentee ballots into the election process by the Secretary of State precipitated the widespread abuses in Wayne County and throughout the State, and it ultimately contributed to the violation of Petitioners’ rights to due process and equal protection protected by the Fourteenth Amendment and the Michigan Constitution. The Secretary’s absentee ballot scheme also directly violated Article II, section 1,

clause 2 of the U.S. Constitution. As set forth in the Petition, these executive branch officials and agencies failed to faithfully carry out the November general election. Respondents and their agents disregarded unambiguous Michigan statutes in the broad distribution of unsolicited ballots, failing to guard against unlawful vote harvesting, and permitting tabulation of absentee ballots without required signatures or bipartisan oversight when duplicating for Veterans and others. The Court should grant the requested relief accordingly.

A. RESPONDENTS, THROUGH ABDICATING THEIR DUTIES UNDER MICHIGAN ELECTION LAW, VIOLATED PETITIONERS' FUNDAMENTAL RIGHT TO VOTE UNDER THE DUE PROCESS CLAUSE.

The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment.⁸ *Harper v Va State Bd of Elections*, 383 US 663, 665 (1966); *see also Reynolds v Sims*, 377 US 533, 554 (1964) (stating that the Fourteenth Amendment protects the “the right of all qualified citizens to vote, in state as well as in federal elections”). The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it “is preservative of other basic civil and political rights.” *Reynolds*, 377 US at 562. Accordingly, voters have a “right to cast a ballot in an election free from the taint of intimidation and fraud,” *Burson v Freeman*, 504 US 191, 211 (1992), and “[c]onfidence

⁸ The Due Process Clause of the Michigan Constitution commands that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law.” Const 1963, art 1, §17; *see also* MCL 168.10. This constitutional provision is nearly identical to the Due Process Clause of the United States Constitution, *see* US Const, Am XIV, § 1. Accordingly, “[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.” *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013); *Quinn v State & Governor*, No. 350235, 2020 Mich App LEXIS 5941, at *7 (Ct App Sep 10, 2020).

in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v Gonzalez*, 549 US 1, 4 (2006) (*per curiam*).

“Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted” if they are validly cast. *United States v Classic*, 313 US 299, 315 (1941). “[T]he right to have the vote counted” means counted “at full value without dilution or discount.” *Reynolds*, 377 US at 555, n29 (quoting *South v Peters*, 339 US 276, 279 (1950) (Douglas, J., dissenting)).

“Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, *without its being distorted by fraudulently cast votes.*” *Anderson v United States*, 417 US 211, 227 (1974) (emphasis added); *see also Baker v Carr*, 369 US 186, 208 (1962). Invalid or fraudulent votes “debase[]” and “dilute” the weight of each validly cast vote. *See Anderson*, 417 US at 227.

“The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.” *Anderson*, 417 US at 226 (quoting *Prichard v United States*, 181 F2d 326, 331 (CA 6, 1950), *aff’d due to absence of quorum*, 339 US 974 (1950)).

“When an election process ‘reach[es] the point of patent and fundamental unfairness,’ there is a due process violation.” *Fla State Conference of NAACP v Browning*, 522 F3d 1153, 1183-84 (CA 11, 2008) (quoting *Roe v Ala*, 43 F3d 574, 580 (CA 11, 1995) (citing *Curry v Baker*, 802 F2d 1302, 1315 (CA 11, 1986))); *see also Griffin*, 570 F2d at 1077 (“If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may

be indicated and relief under § 1983 therefore in order.”); *Marks v Stinson*, 19 F3d 873, 889 (CA 3, 1994) (enjoining winning state senate candidate from exercising official authority where absentee ballots were obtained and cast illegally).

“[T]he right to vote, the right to have one’s vote counted, and the right to have one’s vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States.” *Black v McGuffage*, 209 F Supp 2d 889, 900 (ND Ill 2002) (holding that a state law that allows local election officials to impose different voting schemes upon some portions of the electorate and not others violates due process).

In *League of Women Voters*, the Sixth Circuit allowed the due process challenge to proceed based upon allegations of “non-uniform rules, standards, and procedures” that resulted in “massive disenfranchisement and unreasonable dilution of the vote.” *League of Women Voters*, 548 F3d at 478. The League supported these conclusions with specific factual allegations. *Id.*

Here, the evidenced adduced from witnesses at the TCF Center and elsewhere in Wayne County, as set forth above in the statement of facts, demonstrate widespread electoral abuses in the most populous county in Michigan that resulted in “massive disenfranchisement and unreasonable dilution of the vote” in violation of the right to due process protected by the Fourteenth Amendment and the Michigan Constitution.

Additionally, practices that promote the casting of illegal or unreliable ballots, or fail to contain basic minimum guarantees against such conduct, such as the Secretary of State’s absentee ballot scheme, violate the right to due process by leading to the dilution of validly cast ballots. *See Reynolds*, 377 US at 555 (“[T]he 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.”). The Due Process Clause protects the right to vote from such conduct by state officials which seriously undermines the fundamental fairness of the electoral process. *See League of Women Voters*, 548 F3d at 478 (“The Due Process Clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state’s voting system is fundamentally unfair.”); *Marks*, 19 F3d at 889; *Griffin v Burns*, 570 F2d 1065, 1077-78 (CA 1, 1978).

In sum, the widespread electoral abuses and voter fraud committed in Wayne County and by the Secretary of State’s unlawful absentee ballot scheme (*see infra*) debased and diluted Petitioners’ legal votes thus depriving them of the due process of law guaranteed by the Fourteenth Amendment and the Michigan Constitution. Justification for finding a due process violation and granting the requested relief stems from the US Supreme Court’s recognition that the right to vote in a free and fair election is one that is preservative of other basic civil and political rights. *See Black*, 209 F Supp 2d at 900 (quoting *Reynolds*, 377 US at 561-62 (“[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”)); *see also Yick Wo v Hopkins*, 118 US 356, 370 (1886) (“[T]he political franchise of voting . . . is regarded as a fundamental political right, because [*sic*] preservative of all rights.”).

B. RESPONDENTS VIOLATED RESPONDENTS’ FUNDAMENTAL RIGHT TO EQUAL PROTECTION.

“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. . . . 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.’’⁹ *Bush*, 531 US at 104-05 (quoting *Reynolds*, 377 US at 555). Consequently, an equal protection claim can be advanced in the election context without a suspect classification or invidious discrimination if the challenged practices effectively value one person’s vote over the vote of another or by diluting legal votes with illegal ones. See *Black*, 209 F Supp 2d at 899 (concluding that the petitioners have advanced an equal protection claim and noting that “[a]ny voting system that arbitrarily and unnecessarily values some votes over others” violates equal protection “[e]ven without a suspect classification or invidious discrimination”). “The right to vote includes the right to have one’s vote counted on equal terms with others.” *League of Women Voters*, 548 F3d at 476.

As the evidence demonstrates (*see supra*), the pervasive practices at the TCF Center operated to debase and dilute the value of legal votes, and they did so in a way that greatly favored the Democratic Party candidates over the Republican Party candidates in violation of the Equal Protection Clause. Similarly, the Secretary of State’s absentee ballot scheme was put in place because it was understood that Republican voters were more likely to vote in-person by large numbers. To counter this, Respondent Benson had to create an illegal scheme to permit mail-in voting, resulting in the challenged absentee ballot scheme which favored Democratic Party voters over Republican Party voters in violation of the Equal Protection Clause.

⁹ The Michigan Constitution demands the same thing of its officials: “[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.” Const 1963, art 1, § 2. Indeed, the Equal Protection Clause in the Michigan Constitution is coextensive with the Equal Protection Clause of the United States Constitution. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Equal protection applies when a state either classifies voters in disparate ways or unduly restricts the right to vote. *Obama for America v Husted*, 697 F3d 423, 428 (CA6, 2012); *Promote the Vote v Sec’y of State*, Nos. 353977, 354096, 2020 Mich App LEXIS 4595, at *39 (Ct App July 20, 2020).

C. RESPONDENT BENSON VIOLATED THE SEPARATION OF POWERS BY UNILATERALLY ENACTING CHANGES TO MICHIGAN ELECTION LAW WITHOUT LEGISLATIVE APPROVAL.

There are a few exceptional cases in which the United States Constitution imposes a duty or confers a power on a particular branch of a State's government. Article II, section 1, clause 2 is one of them. It provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. US Const, art II, § 1, cl 2. As the Supreme Court explained in *McPherson v Blacker*, 146 US 1, 35 (1892), this provision of the Constitution "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *Id.* at 27. A significant departure from the legislative scheme for appointing Presidential electors runs afoul of this constitutional mandate.

Not even the Michigan Constitution can confer extra authority on the Secretary of State to change or alter the election procedures established by the State Legislature. *McPherson v Blacker*, 146 US 1, 35 (1892) (acknowledging that the State legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions"); *see also Bush v Palm Beach Cnty Canvassing Bd*, 531 US 70 (2000).

And perhaps most important for purposes of the current situation, the Secretary of State cannot rely on the declared pandemic as a rationale for circumventing the intent of the Legislature and acting unilaterally to implement procedures that undermined the integrity of the 2020 general election. *Carson v Simon*, No 20-3139, 2020 US App LEXIS 34184, at *17-18 (CA 8, Oct. 29, 2020) (holding that "the Secretary's attempt to re-write the laws governing the deadlines for mail-in ballots in the 2020 Minnesota presidential election is invalid. However well-intentioned and appropriate from a policy perspective in the context of a pandemic during a presidential election, it is not the province of a state executive official to re-write the state's election code"). In short,

there is no pandemic exception to this constitutional mandate. *See Democratic Nat'l Comm v. Wis State Legislature*, No 20A66, 2020 US LEXIS 5187, at *13 (Oct 26, 2020) (Kavanaugh, J., concurring in denial of application for stay) (“‘[T]he design of electoral procedures is a legislative task,’ including during a pandemic.”) (internal citation omitted).

Michigan does not permit “mail-in” ballots *per se*, and for good reason: mail-in ballots facilitate fraud and dishonest elections. *See Veasey*, 830 F3d at 256, 263 (observing that “mail-in ballot fraud is a significant threat—unlike in-person voter fraud,” and comparing “in-person voting—a form of voting with little proven incidence of fraud” with “mail-in voting, which the record shows is far more vulnerable to fraud”). Nonetheless, Respondent Benson’s absentee ballot scheme achieved the same purpose as mail-in ballots, contrary to Michigan law.

The Michigan Legislature set forth detailed requirements for absentee ballots, and these requirements are necessary to prevent voter fraud because it is far easier to commit fraud via an absentee ballot than when voting in person. *See Griffin*, 385 F3d at 1130-31 (“Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting”). Michigan law specifically provides the following:

(1) Subject to section 761(3), at any time during the 75 days before a primary or special primary, but not later than 8 p.m. on the day of a primary or special primary, *an elector may apply for an absent voter ballot. The elector shall apply in person or by mail* with the clerk of the township or city in which the elector is registered. The clerk of a city or township shall not send by first-class mail an absent voter ballot to an elector after 5 p.m. on the Friday immediately before the election. Except as otherwise provided in section 761(2), the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. An application received before a primary or special primary may be for either that primary only, or for that primary and the election that follows. An individual may submit a voter registration application and an absent voter ballot application at the same time if applying in person with the clerk or deputy clerk of the city or township in which the individual resides. Immediately after his or her voter registration application and absent voter ballot application are approved by the clerk or deputy clerk, the individual may, subject

to the identification requirement in section 761(6), complete an absent voter ballot at the clerk's office.

(2) Except as otherwise provided in subsection (1) and subject to section 761(3), at any time during the 75 days before an election, but not later than 8 p.m. on the day of an election, an elector may apply for an absent voter ballot. *The elector shall apply in person or by mail with the clerk of the township, city, or village in which the voter is registered.* The clerk of a city or township shall not send by first-class mail an absent voter ballot to an elector after 5 p.m. on the Friday immediately before the election. Except as otherwise provided in section 761(2), the clerk of a city or township shall not issue an absent voter ballot to a registered elector in that city or township after 4 p.m. on the day before the election. An individual may submit a voter registration application and an absent voter ballot application at the same time if applying in person with the clerk or deputy clerk of the city or township in which the individual resides. Immediately after his or her voter registration application and absent voter ballot application are approved by the clerk, the individual may, subject to the identification requirement in section 761(6), complete an absent voter ballot at the clerk's office.

(3) An application for an absent voter ballot under this section may be made in any of the following ways:

(a) By a written request **signed** by the voter.

(b) On an absent voter ballot application form *provided for that purpose by the clerk of the city or township.*

(c) On a federal postcard application.

(4) *An applicant for an absent voter ballot shall sign the application.* Subject to section 761(2), a clerk or assistant clerk **shall not deliver an absent voter ballot to an applicant who does not sign the application.** A person shall not be in possession of a signed absent voter ballot application except for the applicant; a member of the applicant's immediate family; a person residing in the applicant's household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application.

(5) The clerk of a city or township shall have absent voter ballot application forms *available in the clerk's office* at all times and shall furnish an absent voter ballot application form to anyone *upon a verbal or written request.*

MCL 168.759 (emphasis added).

Respondent Benson’s absentee ballot scheme directly violated the absentee ballot process established by the Michigan Legislature in several important and material ways. First, the absentee ballot applications were sent unsolicited to every household in Michigan without verifying whether: (1) the intended recipient(s) still resided at this location; (2) the intended recipient was alive; or (3) the intended recipient was actually qualified and eligible to vote in the 2020 general election. Second, Michigan law requires the “elector” to initiate the process. Per the statute, “*The elector shall apply . . .*” This makes sense. It limits improper harvesting and helps ensure that only those individuals who truly intend to vote by absentee ballot are the ones who actually seek out an application to do so. Third, the statute is clear: “The elector shall apply in person or by mail with the clerk of the township or city in which the elector is registered.” “Shall” is mandatory language. Per the statute, “in person” or “by mail” are the *only* authorized ways for an elector to apply for an absentee ballot. Yet, the Secretary of State permitted online applications and email applications both in direct violation of the law. Fourth, the statute permits “an absent voter ballot application form *provided for that purpose by the clerk of the city or township.*” It does not permit a partisan, Secretary of State to flood the electorate with “vote by mail” applications, as the Secretary has done here. And fifth, the statute clearly requires “*a written request signed by the voter.*” In fact, “*a clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application.*” It is not possible for a voter to sign an application online. The signature required is an actual signature and not a virtual signature. It is not possible to “sign” a computer keyboard (leaving aside the fact that the statute expressly prohibits online applications, and this is likely due to the fact that it is not possible to actually sign such an application).

Davis v Secretary of State, 2020 Mich App LEXIS 6128, (Sep 16, 2020), in which the court held that the authority and discretion afforded the Secretary of State permitted her to send

unsolicited absent voter ballot applications to registered voters throughout the State, does not alter this result for several reasons. First, the *Davis* court's conclusion was "that the authority and discretion afforded the Secretary of State by the constitution and state law permit the Secretary to send unsolicited absent voter applications to all Michigan *qualified* registered voters, as a means of implementing the mandates of Const 1963, art 2, § 4." *Id* at *18 (emphasis added). Here, the mass mailings were sent to every household, regardless of whether the *actual* recipient of the mailing was a "qualified" voter.

Second, insofar as the court in *Davis* claimed to have interpreted the controlling absentee ballot statutes to determine if the Secretary's actions complied, the court ignored the plain language of the statute and instead created "discretion" where none existed. The court's failure is further evidenced by its efforts to distinguish *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007), an earlier decided case that was not overruled and was thus binding precedent. *See* MCR 7.215(C)(2). According to the court in *Davis*:

Plaintiff cites *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007), to argue that MCL 168.759 precludes mailing unsolicited absentee voter applications to registered voters. We find however, as did the court below, that *Taylor* is inapposite to the facts of this case. In *Taylor*, the defendant city clerk, a candidate in the election, mailed unsolicited absentee voter ballot applications to approximately 150,000 of the 500,000 registered voters in Detroit. This Court explained that the defendant, as a municipal officer, had only those powers conferred by law, and that MCL 168.759(5) limited her authority and prohibited conduct beyond the scope of the statutory duties. *Id.* at 94-95. This Court concluded that the statute did not permit the defendant's mass mailing of absentee voter applications because "[t]o construe MCL 168.759 to permit Currie to distribute, in her official capacity, what amounts to propaganda at the city's expense is certainly not within the scope of Michigan election laws or the Michigan Constitution." *Id.* at 96-97. Here, however, defendant is not a candidate in the forthcoming election, nor has she limited her mailing of applications to a particular subset of voters. Consequently, *Taylor* has no application to the present case.

Davis, 2020 Mich App LEXIS 6128 at *12-13 (emphasis added).

This approach is wrong as a matter of law. When *interpreting* Michigan Election Law to determine whether the Secretary of State was permitted to employ her absentee ballot scheme, the Court may not “impose different policy choices than those selected by the Legislature.” *People v McIntire*, 461 Mich 147, 152-53; 599 NW2d 102 (1999) (internal quotations and citation omitted). Rather, the court “begin[s] by examining the plain language of the statute. Where that language is unambiguous, [the court] presume[s] that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. . . . [The court] must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may [the Court] look outside the statute to ascertain the Legislature’s intent.” *DiBenedetto v W Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000) (internal citations and quotations omitted). As demonstrated above, the Secretary’s absentee ballot scheme directly conflicts with the plain and unambiguous language of the statute. The holding in *Taylor* was that the power to mail unsolicited ballot applications to qualified voters is not permitted by the statute. The *Taylor* court’s conclusion is crystal clear: “As for whether the mass mailing of unsolicited ballot applications is implicitly authorized by statute, we conclude that it is not.” *Taylor*, 277 Mich App. at 95. Contrary to the *Davis* court’s conclusion, the *Taylor* holding wasn’t based on the partisanship of the elected official.

Third, *Taylor*, nonetheless, is not distinguishable on the facts. While the Secretary was not a candidate in the election, she was nevertheless using her office to promote the propaganda and strategy of the Democratic Party—her party—via the absentee ballot scheme. Per *Davis*, *Taylor* expressly rejected such partisanship by elected officials.

Fourth, the *Davis* court did not address the mandatory signature requirement set forth in the statute or the fact that the Secretary permitted online and email application requests in direct violation of the statute.

Finally, the *Davis* court did not address the issue of the Secretary's authority in the context of Article II, section 1, clause 2 of the US Constitution. In short, the court in *Davis* was wrong.

In sum, the Secretary of State's absentee ballot scheme directly violates Michigan law as set forth by the Michigan Legislature and thus violates Article II, section 1, clause 2 of the US Constitution, which grants plenary authority to the Michigan Legislature to determine the election process, including the process for absentee ballots.¹⁰ The Secretary of State's absentee ballot scheme resulted in the counting of illegal ballots in Michigan, thereby diluting and debasing Petitioners' legal votes in violation of their constitutional rights and thus causing irreparable harm.

In sum, enjoining Respondents from certifying the 2020 general election until an honest and independent audit and investigation can be completed will promote the public interest, and it will promote the interests of all parties. Michigan voters need to have confidence in the outcome of our elections and thus confidence that those who govern are doing so legitimately. Those who govern likewise need that confidence.

In the final analysis, the irreparable harm to Petitioners and, indeed, to all Michigan residents who voted legally in the 2020 general election, outweighs the harm to any candidate who may be officially declared the winner of a dishonest election. The public interest unquestionably favors the granting of the requested relief and so does the Michigan Constitution.

¹⁰ See also Section E below for a more complete analysis of the Michigan Legislature's plenary authority under the US Constitution.

D. RESPONDENT BOARD OF STATE CANVASSERS VIOLATED MICHIGAN ELECTION LAW BY CERTIFYING AN INCOMPLETE CANVASS THAT LACKED PROPER CERTIFICATION.

Respondent Board of State Canvassers (“Board”), created pursuant to the Mich Const art 2, § 7, is required to follow the United States and Michigan Constitutions, and Michigan Election Law. MCL 168.22c requires the members of the Board to take the following oath prior to taking office: “I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of office.” Mich Const art XI, § 1. The Board is required to “canvass the returns and determine the result of all elections for electors of president and vice president of the United States, state officers, United States senators, representatives in congress, circuit court judges, state senators, representatives elected by a district that is located in more than 1 county, and other officers as required by law.” MCL 168.841. Further, the Board shall record the results of a county canvass, but only upon receipt of a *properly* certified certificate of a determination from a board of county canvassers. *Id* (emphasis added).¹¹ The Board’s certification is not automatic, but shall be done upon completion of the canvass and when it is appropriate to do so under the law. Michigan Election Law recognizes that the Board should adjourn to ensure its certification is correct and lawful. *See* MCL 168.842 (“The board has power to adjourn from time to time to await the receipt or correction of returns, or for other necessary purposes, but shall complete the canvass and announce their determination not later than the fortieth day after the election.”). It violates Michigan Law to

¹¹ While not discussing this particular statute, the Michigan Court of Appeals has ruled that the use of the word “properly” under a different section of Michigan Election Law is far from nugatory. *Michigan Fair Budget Coal v Killeen*, 153 Mich App 370, 377–78, 395 NW 2d 325, 328–29 (1986) (stating that the “use of the word ‘properly’ evidences an intent of the Legislature that the board of county election commissioners not only determine that a proposed question is certified, but that it is indeed ‘properly’ certified”).

automatically certify a county canvass when two members of that county's Board of County Canvassers did not sign the certification and submitted affidavits that they only agreed to certification under duress, after receiving threats, and on the condition precedent that was later rescinded. Affidavit of Monica Palmer, **Appendix** 24; Affidavit of William Hartman; **Appendix** 18.

This Court defines duress as “when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.” *Hackley v Headley*, 45 Mich 569, 574, 8 NW 511, 512–13 (1881). A person can experience duress upon being threatened. *Id.* The Affidavits of Monica Palmer and William Hartman describe the receipt of physical threats, intimidation, and false accusations of racism. Affidavit of Monica Palmer, **Appendix** 24; Affidavit of William Hartman; **Appendix** 18.

Further, the affidavits describe that both Monica Palmer and William Hartman conditioned their certification of the election results upon an audit because of their concerns regarding the high percentage of imbalanced precincts and the lack of explanations for the imbalances. Both Palmer and Hartman thought that the returns required further canvassing and that this goal could be completed by a comprehensive and independent audit. Affidavit of Monica Palmer, **Appendix** 24; Affidavit of William Hartman; **Appendix** 18. However, after the meeting, Respondent Benson rejected the condition of the completion of an audit.

This Court defines condition precedent “as a fact or event that the parties intend must take place before there is a right to performance.” *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349–50, 605 N W 2d 360, 362 (1999). The affidavits describe that Palmer and Hartman conditioned their decision to certify the results upon the event of the audit being fulfilled. Therefore, the failure of the condition precedent taking place, the audit, voided their decision to

certify the election results. This is further evidence by the fact that both Palmer and Hartman refused to sign the certification once they were told the audit would not take place. Affidavit of Monica Palmer, Appendix 24; Affidavit of William Hartman; Appendix 18; *see also Knox v Knox*, 337 Mich 109, 118–19, 59 NW 2d 108, 112–13 (1953).

The Board is supposed to certify Michigan election results when appropriate. Here, it was not appropriate in light of Palmer’s and Hartman’s concerns regarding a 70-71% of absent voting counting boards resulting in a different number of recorded votes than the number of ballots in hand. Affidavit of Monica Palmer, Appendix 24; Affidavit of William Hartman; Appendix 18. Further, Wayne County’s canvass left imbalances unexplained. Affidavit of Monica Palmer, Appendix 24; Affidavit of William Hartman; Appendix 18. Indeed, Wayne County’s “find” of over 14,000 additional votes after the tabulation on election night leaves unanswered questions about the completion and legality of the canvass. *Roemer v Canvassers of City of Detroit*, 90 Mich 27, 51 NW 267 (1892); *Wayne County Candidate For Judge Wins By Slim Margin After More Votes Found* available at <https://detroit.cbslocal.com/2020/11/18/wayne-county-candidate-for-judge-wins-by-slim-margin-after-more-votes-found/>, last visited Nov. 25, 2020.

The Official Wayne County Results for the November 2020 election failed to comply with MCL 168.765a. The official results did not correspond with the voter’s precinct, and the absent voter counting boards did not report their results in connection with registered voters. Wayne County Official Results available at <https://www.waynecounty.com/elected/clerk/election-results.aspx>, last visited Nov. 25, 2020. These irregularities and absence of information required for the proper completion of the canvass, prevalent in Wayne County, did not occur in other counties in Michigan. For example, the Official Washtenaw County Results show how absentee

voting can be recorded pursuant to MCL 168.765a. The absentee voter's ballot tracks back to his/her precinct so the information pertaining to each precinct's returns are complete.¹²

Based upon the improper certification before them, Respondents failed to satisfy their duty by accepting an incomplete and improper canvass. The Board's rushed certification on the first day possible instead of using the 20 extra days provided by statute to get the job done correctly. This rash judgment prompts the winning presidential candidate's selection of the 16 Michigan electors. But when the election process cannot be certified, then the task reverts back to the Michigan Legislature under MCL 168.846 and the United States Constitution. Here, due to the malfeasance of Respondents and their determination to not *properly* certify the canvass under Michigan Election Law, the State of Michigan is left without enough time. In order to ensure Michigan does not lose its electors over Respondents soiling of the general election process, this Court should order that the canvass and questions pertaining to the election results be immediately analyzed by a joint convention of the Michigan Legislature.

E. THE MICHIGAN LEGISLATURE HAS PLENARY AUTHORITY TO CHOOSE THE PRESIDENTIAL ELECTORS, NOT THE EXECUTIVE BRANCH AFTER BOTCHING THE GENERAL ELECTION.

As a final matter, it is important to confirm that the Michigan Legislature has "plenary" (meaning "complete, entire, perfect, not deficient in any respect") authority to choose the Presidential electors. First, as stated above, Art II, Sec 1 of the US Constitution provides "[e]ach State shall appoint [the electors], in such Manner as the Legislature thereof may direct, US Const, art II, § 1, cl 2. The time for choosing the electors is set by Congress. Congress enacted 3

¹² See, e.g., Official Washtenaw County Results available at <https://electionresults.ewashtenaw.org/electionreporting/nov2020/indexprecinctreport.html>, last visited Nov. 25, 2020 (reporting absentee ballots pursuant to their proper precinct).

USC 1, which provides that the electors shall be chosen on the Tuesday after the first Monday in November every four years. Recognizing the State Legislature’s plenary authority, however, Congress adopted 3 USC 3, which provides that if the electors are not chosen on that day, the electors may be chosen on any subsequent day.

As set forth above, *Bush v Gore* unequivocally held that the State Legislature retains the authority to select the Presidential electors which the Legislature can take back at any time—even after having an election: “[T]here is no doubt of the right of the legislature to resume the power (to choose electors after granting the franchise to the voters) *at any time, for it can neither be taken away nor abdicated*” *Bush v Gore*, 531 US at 104 (quoting S Rep No 395, 43d Cong, 1st Sess, 9 (1874)).

Less than a month ago, the Eighth Circuit confirmed the State Legislature’s exclusive authority in issuing an injunction against the Minnesota Secretary of State from complying *with a State Court consent order governing the election of Presidential electors in Minnesota*:

By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the “Legislature” of each state. US Const art II, § 1, cl 2; *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) (“The constitution leaves it to the legislature exclusively[.]”). And this vested authority is not just the typical legislative power exercised pursuant to a state constitution. Rather, when a state legislature enacts statutes governing presidential elections, it operates “by virtue of a direct grant of authority” under the United States Constitution. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). Consequently, only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.

Simply put, the Secretary has no power to override the Minnesota Legislature. In fact, a legislature’s power in this area is such that it “cannot be taken from them or modified” even through “their state constitutions.”

Carson v Simon, 20-3139, 2020 WL 6335967, at *6 (CA 8, Oct 29, 2020).

Simply put, the State Legislature retains authority at any time to change the manner in which Presidential electors are selected up until the time of their selection. This Court should

affirm and thus remind the Michigan Legislature of its duty and help prevent further abuse by Respondents.

Lest there be any doubt, *Carson* described its analysis of this issue as “relatively straight forward.” *Id.* The dilemma, therefore, is not a legal one, but one of courage to act in the face of political pressure when choosing whether to obey or disobey the law—as it currently stands. No doubt that this weighty exercise of authority will inevitably enrage more than 70 million voters no matter what this Court or the Legislature decides. In the face of that reality, Petitioners would respectfully insist that this Court and those subject to its jurisdiction follow the laws as written, not as Respondents wish they had been written before this dispute arose.

STATEMENT OF THE RELIEF SOUGHT

Pursuant to MCR 7.316(A)(7), Petitioners ask this Court to issue an order to:

A) ensure the Separation of Powers and protect the accuracy and integrity of the November 2020 General Election by giving the Michigan Legislature an opportunity to finish its constitutionally-mandated work to pick Michigan’s electors;

B) take immediate custody and control of all ballots, ballot boxes, poll books, and other indicia of the Election from Respondents or their designees to prevent spoliation or destruction, to prevent further irregularities, and to ensure that the Michigan Legislature and this Court have a chance to perform a constitutionally sound audit of lawful votes;

C) segregate any ballots counted or certified inconsistent with Michigan Election Law;

D) declare that Respondent Benson violated Petitioners’ fundamental constitutional rights as explained in this Petition;

E) segregate any ballots attributable to the Secretary of State’s absentee ballot scheme and declare the Secretary of State’s absentee ballot scheme unlawful;

F) appoint a special master or committee from both chambers of the Michigan Legislature to investigate all claims of mistake, irregularity, and fraud at the TCF Center and to verify and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme. The special master may recommend, including a recommendation with findings, that illegal votes can be separated from legal votes to determine a proper tabulation, or that the fraud is of such a character that the correct vote cannot be determined;

G) alternatively, to enjoin Respondents or Governor Whitmer from finally certifying the election results and declaring winners of the 2020 general election to the United States Department of State or the United States Congress until a special master can be appointed to review and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme;

H) alternatively, to enjoin Respondents from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to independently review the election procedures employed at the TCF Center;

I) alternatively, to enjoin Respondents from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to review and certify the legality of all absentee ballots submitted in Wayne County and Statewide;

J) to grant such other and further relief as this Court should find just and proper.

Indeed, this Court should grant the Emergency Petition for Writs and Declaratory Relief and grant the relief sought because the Michigan election officials violated Michigan's election laws in material ways and obfuscated the ballot boxes, ballots, and other election indicia to prevent a meaningful audit now—or possibly at any time in the future.

Respondents' failures not only abused their official positions under color of law, but violated the civil liberties of Petitioners in such stark ways that the Court can and should nullify the General Election, in whole or part, until an audit can ensure the accuracy and integrity that Petitioners—and all citizens—were promised by their elected officials.

Respectfully submitted,

Dated: November 26, 2020

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