KRISTINA KARAMO, PHILIP O'HALLORAN, MD, BRADEN GIACOBAZZI, TIMOTHY MAHONEY, KRISTIE WALLS, PATRICIA FARMER, ELECTION INTEGRITY FUND AND FORCE,

      Plaintiffs,

v

JANICE WINFREY, in her official capacity as Detroit City Clerk, CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

      Defendants.

No. 22-012759-AW

HON. TIMOTHY M. KENNEY

ATTORNEY GENERAL DANA NESSEL'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' POST-HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs challenge to the procedures the City of Detroit will use to process absent voter ballots and operate its absent voter ballot counting boards comes at the proverbial "eleventh hour." Reminiscent of the frivolous attacks leveled at the City and its election workers regarding the November 2020 presidential election, Plaintiffs claims are grounded in misinterpretations of the law and a lack of understanding as to how the law and procedures are implemented in real time. To be fair, the election laws can be complex. But all the more reason Plaintiffs should have done their homework first, rather than filing last-minute, indecipherable pleadings requesting sweeping changes to the City's procedures on the eve of an election. Indeed, the hearing in this matter demonstrated Plaintiffs' misconceptions.

But there can be no confusion that Plaintiffs' motion for injunctive relief must be denied. Laches applies to bar their claims, or at least the emergency injunctive relief they request, where Plaintiffs have offered no credible reason for their delay in filing suit. And where the City Defendants are plainly prejudiced by this request for relief that would disrupt well-established procedures with no realistic time to train workers differently.

And even if laches did not apply, Plaintiffs have not demonstrated any likelihood of succeeding on the merits of their claims. As explained in Defendants' brief and in the Attorney General's brief below, the City of Detroit's procedures comply with Michigan's election laws. Indeed, they are the same or similar procedures used by jurisdictions all over the state—yet only the City of Detroit and its' voters have been targeted. This Court should deny relief.

COUNTER-STATEMENT OF FACTS

Amicus Attorney General Nessel accepts and incorporates the facts as set forth in the brief filed by the City of Detroit Defendants.

ARGUMENT

I.   **Plaintiffs' motion must be denied where they fail to establish the necessary factors for granting a preliminary injunction.**

Plaintiffs allege that numerous procedures the City of Detroit will follow in processing

absent voter ballots and operating its absent voter counting board violate Michigan's Election

Law, MCL 168.1 *et seq.* While Plaintiffs are wrong as to each and every one of their claims for

the reasons stated in the City of Detroit's brief, because some of the claims implicate state

election officials, and the relief Plaintiffs' request potentially seeks to disenfranchise thousands

of citizens, the Attorney General offers the following arguments in support of the City of Detroit.

A.   **Factors to be balanced in deciding a motion for injunctive relief.**

A preliminary injunction is extraordinary relief and "should issue only in extraordinary

circumstances." *Mich State Emps Ass'n v Dep't of Mental Health,* 421 Mich 152, 157, 158

(1984); *Mich Coal of State Emp Unions v Civil Serv Comm'n,* 465 Mich 212, 226 n11 (2001).

This relief serves only one purpose – "to preserve the status quo pending a final hearing,

enabling the rights of the parties to be determined without injury to either party." *Pharm*

Research & Mfrs of Am v Dep't of Cmty Health, 254 Mich App 397, 402 (2002). In order to

obtain a preliminary injunction, plaintiffs must prove that: (1) they are likely to prevail on the

merits; (2) they will be irreparably harmed if an injunction is not issued; (3) the harm to plaintiffs

absent an injunction outweighs the harm that an injunction would cause the Defendant(s); and (4)

there will be no harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n*

v Detroit, 482 Mich 18, 34 (2008); *MSEA v Dep't of Mental Health*, 421 Mich 152, 157-158

(1984).

When seeking injunctive relief, plaintiffs have the burden of proof on each of these

factors. *Detroit Fire Fighters Ass'n*, 482 Mich at 34; MCR 3.310(A)(4).

B.   Plaintiffs' claims are barred by the doctrine of laches.

As an initial matter, and one that resolves this case (or at least the request for injunctive relief), Plaintiffs' claims are barred by laches. "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Charter Twp of Lyon v Petty*, 317 Mich App 482, 490 (2016) (quotation marks and citation omitted). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id.* (citation omitted). To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. *Id.* (citations omitted).

Here, the Court must presume that laches applies to bar Plaintiffs' claims. MCL 691.1031 expressly provides that "[i]n all civil actions brought in any circuit court of this state affecting elections, dates of elections, . . . ballots or questions on ballots, there shall be a *rebuttable presumption of laches* if the action is commenced less than 28 days prior to the date of the election affected." (Emphasis added.) Plaintiffs filed their lawsuit on October 26—only 13 days before the November 8 general election. As a result, Plaintiffs bear the burden of rebutting the presumption that laches bars their claims.

But Plaintiffs have failed in their burden. In their motion for a preliminary injunction, Plaintiffs state that their "lawsuit has been prepared expeditiously after the plaintiffs learned both that their challenges filed on August 2, 2022 (and others) were ignored and that the Detroit Clerk was training election workers to violate the law again. This discovery occurred very recently as in days before this filing." (Plfs' Mot, ¶ 6.) Plaintiffs make a similar statement in their brief.

(Plfs' Brf, PDF page 8.)[1] Although they also state that the "violation has occurred previously and so there is a reasonable expectation that the violations will occur again BUT for action." (*Id*.) Indeed, a review of Plaintiffs' complaint and motion reveal that most of the purported practices of which Plaintiffs complain are longstanding, and have been employed in prior elections, including in November 2020 and the August 2022 primary, such as the signature verification process for absent voter ballots, Detroit's use of absent voter counting boards, and its use of high-speed scanners and adjudication software. Plaintiffs' arguments that they only just discovered that Detroit will use these same procedures in the November 8 election is unpersuasive to say the least. Plaintiffs simply have not been diligent in bringing these claims.

Further, the significant delay by Plaintiffs in raising their claims and pressing their motion for injunctive relief has prejudiced the ability of the City of Detroit Defendants to respond or even to comply with the expansive (and outlandish) injunction Plaintiffs request. It is too late to change these critical processes now and retrain the thousands of election workers, including election inspectors, Detroit has appointed to administer the election.

In *New Democratic Coal v Austin*, 41 Mich App 343, 356-357 (1972), the Court of Appeals observed in that apportionment election case:

> We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections. Courts can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election officials. In this case to grant the relief requested by the plaintiffs would seriously strain the election machinery and endanger the election process. [citation omitted.]

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[1] Plaintiffs did not include page numbers on their brief, so a reference to the page number of the brief as opened as a PDF is used here.

Federal courts have also long recognized that delays in bringing a challenge to election rules and procedures are inevitably prejudicial and pose special risks. *See, e.g.*, *Republican Nat'l Comm v Democratic Nat'l Comm*, ___US ___, 140 S Ct 1205, 1207 (2020) (per curiam); *Purcell v Gonzalez*, 549 US 1, 4-5 (2006)(per curiam). See also *Crookston v Johnson,* 841 F3d 396, 398 (CA 6, 2016).

Here, the relief Plaintiffs seek, although still somewhat unclear despite their November 1 filing, would constitute a deviation from the City of Detroit's established procedures and the procedures upon which all its election staff have been trained. Indeed, Mr. Daniel Baxter testified that it would be difficult if not impossible to retrain election staff. Such a disruption would plainly cause chaos on Election Day and potentially result in the disenfranchisement of Detroit voters. Under these circumstances, laches plainly bars Plaintiffs' claims or at the least their request for preliminary injunctive relief.

C. **Plaintiffs fail to demonstrate a substantial likelihood of success on the merits on their claims.**

Although Plaintiffs lodge numerous confusing or indecipherable claims against the operation of the City of Detroit's absent voter counting board, the Attorney General addresses the following claims that implicate state election officials or processes.

1. **The City of Detroit's procedures for reviewing voter signatures on absent voter ballot return envelopes complies with the law.**

In their Restatement of Relief filed November 1, 2022, Plaintiffs argue that the boards of election inspectors are the ones charged with performing signature verification and that challengers must also have the opportunity to observe and challenge voter signatures. (Plfs' Restatement, ¶ iii, pp 3-4.) Plaintiffs further assert that Detroit's use of the Relia-Vote system, which automates envelope sorting and assists election inspectors in performing a manual, visual signature comparisons is unlawful. (*Id*.) But these arguments are without merit.

a. **Statutes governing signature review on absent voter ballot applications and absent voter ballot return envelopes.**

Section 759 of the Michigan Election Law generally prescribes the process for applying for an absent voter ballot. In order to receive an absent voter ballot, a voter must submit an application for a ballot to his or her local clerk. MCL 168.759(2). And an "elector shall apply in person or by mail with the clerk" of the township or city in which the elector is registered. *Id.* Voters with driver licenses or state personal identification cards may also apply online using the Department of State's portal for applying for an absent voter ballot.[2] The Election Law requires voters to sign their applications for an absent voter ballot in order to receive a ballot. MCL 168.759, 168.761.

Subsection 761(1) provides that if a voter's signature on his or her absent voter ballot application "agrees with the signature for the person contained in the qualified voter file or on the registration card as required by subsection (2)" the clerk shall issue a ballot to the voter. MCL 168.761(1). Subsection 761(2) requires that city or township clerks compare the signatures on absent voter ballot applications to the voters' signatures in the qualified voter file (QVF) or on the master registration card:

> *The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot.* Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, the city or township clerk shall compare the signature appearing on the application for an absent voter ballot to the signature contained on the master card. [MCL 168.761(2) (emphasis added.)]

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[2] See Department of State, Bureau of Elections, available at Michigan Online Absent Voter Ballot Application (state.mi.us). Voters using the online process utilize their electronic signatures on file with the Department of State to sign their online application. (*Id*.) Upon receiving the electronic application, the local clerks compare the voter's signature to the voter's signature in the QVF. This process was recently upheld by the Court of Claims in *Davis v Benson*, Court of Claims No. 20-000196.

Thus, under the law voter signatures on absent voter ballot applications are compared by the local clerks against the QVF upon receipt of the application. If the signatures sufficiently agree, the voter is provided an absent voter ballot either by mail or in person. If the voter obtains an absent voter ballot in person from the clerk, the voter must also show identification at that time. MCL 168.761(6).

The law likewise requires that voters sign their absent voter ballots otherwise their ballots will not be counted. See MCL 168.761(4), 168.764a.[3] After the absent voter ballot is completed, it must be returned to the clerk or his or her assistants by mail, in person, or via ballot drop box by the voter or another authorized person. See MCL 168.764a, 168.764b. The clerk must then "safely keep" the unopened absent voter ballots until election day. MCL 168.765(1).

On election day, the absent voter ballots are either delivered to the election inspectors[4] in the relevant precincts, MCL 168.765(2), or to absent voter ballot counting boards, if the jurisdiction uses counting boards, MCL 168.765a(1), (6). But in either case, the city or township clerk will have already reviewed the absent voter's return envelope and compared the voter's signature to his or her signature in the QVF or on the registration card. Section 766(2) provides:

> The qualified voter file must be used to determine the genuineness of a signature on an envelope containing an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file. If the qualified voter file does not contain a digitized signature of an elector, or is not accessible to the clerk, *the city or township clerk shall compare* the signature appearing on an envelope containing an absent voter ballot to the signature contained on the master card. [MCL 168.766(2) (emphasis added).]

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[3] The voter's signature appears on the back side of the return envelope as part of a required statement. MCL 168.761(4).

[4] Precinct election inspectors are appointed under MCL 168.673a-168.677 and include members from both major political parties.

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This process is reflected in the provisions relating to the processing of absent voter ballots at counting boards:

> Subject to section 764d, absent voter ballots received by the clerk before election day must be delivered to the absent voter counting board by the clerk or the clerk's authorized assistant at the time the election inspectors of the absent voter counting boards report for duty, which time must be established by the board of election commissioners. Except as otherwise provided in section 764d, absent voter ballots received by the clerk before the time set for the closing of the polls on election day must be delivered to the absent voter counting boards. Except as otherwise provided in section 765(6), absent voter ballots must be delivered to the absent voter counting boards or combined absent voter counting boards in the sealed absent voter ballot return envelopes in which they were returned to the clerk. *Written or stamped on each of the return envelopes must be the time and the date that the envelope was received by the clerk and a statement by the clerk that the signatures of the absent voters on the envelopes have been checked and found to agree with the signatures of the voters on the registration cards or the digitized signatures of voters contained in the qualified voter file as provided under section 766.* [MCL 168.765a(6) (emphasis added).]

If the clerk determines that the signatures do not agree, and that determination is made after 8 p.m. on the day before the election "the clerk shall mark the envelope 'rejected' and the reason for the rejection and shall place his or her name under the notation. An envelope marked 'rejected' must not be delivered to the absent voter counting board or combined absent voter counting board but must be preserved by the clerk until other ballots are destroyed in the manner provided in this act." MCL 168.765a(6). If the determination is made before that time, the clerk must give notice to the voter of the determination and the voter has an opportunity to cure his or her signature. *Id*.

All absent voter ballots that are ultimately delivered to the counting boards under § 765a(6) are then "process[ed] in as nearly as possible the same manner as ballots are processed in paper precincts." MCL 168.765a(8).

As noted above, in jurisdictions that do not use counting boards the returned absent voter ballots are sent to in-person voting precincts for tabulation:

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Before the opening of the polls on election day or as soon after the opening of the polls as possible, the clerk shall deliver the absent voter ballot return envelopes *to the chairperson or other member of the board of election inspectors in the absent voter's precinct*, together with the signed absent voter ballot applications received by the clerk from any voters of that precinct and the clerk's list or record kept relative to those absent voters. [MCL 168.765(2).][5]

But again, before ballots are sent to the precinct, the clerk of the jurisdiction has already compared the signature on the absent voter ballot return envelope to the voter's QVF signature under § 766(2) and determined the signatures agree or do not agree. If the clerk determines that the signatures do not agree, the clerk completes the statement on the return envelope to that effect. And while not entirely plain from the statutes, the clerk generally does not send mismatched signature envelopes to the precinct for review. Rather, the clerk sends only matching absent voter ballot return envelopes to the precinct along with the corresponding absent voter ballot applications. MCL 168.675(2), 168.766(2).

Under § 766(1), the precinct election inspectors are authorized to examine the signature on the absent voter ballot return envelopes received from the clerk "to see that the person has not voted in person, that he or she is a registered voter, *and that the signature on the statement agrees with the signature on the registration record*." MCL 168.766(1)(a) (emphasis added). If the precinct inspectors determine that the signature on the ballot return envelope ("statement") does not agree with the voter's QVF signature, the ballot is rejected and preserved. MCL 168.767.

Thus, in contrast to the process provided for with respect to absent voter counting boards, precinct inspectors processing absent voter ballots in paper precincts may review signatures on

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[5] Smaller jurisdictions with fewer absent voter ballots often choose to have absent voter ballots counted at in-person voting precincts, rather than establishing a counting board under §§ 764d and 765a.

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absent voter ballot return envelopes delivered to them by the clerk. Plaintiffs are simply wrong in their reading of the law. Election inspectors at absent voter counting boards are not authorized to re-verify signatures on absent voter ballots at absent voter counting boards.

Further, contrary to Plaintiffs' argument the law does not provide challengers with any right to "challenge signatures" at absent voter counting boards, or anywhere else for that matter. (Plfs' Restatement, ¶ iii, pp 3-4.) Plaintiffs cite MCL 168.798a for this proposition, but that statute simply states that the "public" can "observe" the "proceedings" at a "counting center." *Id.* It has nothing to do with challengers or challenges. The rights of challengers to make challenges are controlled by other statutes. See MCL 168.733(1)(c)-(d), MCL 168.727(1). None of these statutes expressly permit a challenger to challenge a voter's signature on an absent voter ballot. And express permission would be required since a voter's digitized signature – the signature against which the voter's handwritten signature must be compared – is considered confidential information. See MCL 168.509gg(1)(f) (exempting digitized signatures from disclosure under freedom of information act). In other words, challengers cannot be given access to a voter's digitized signature. Only clerks (and their staff) and election inspectors have been authorized to review a voter's digitized signature.

Finally, with respect to the City of Detroit's use of the Relia-Vote system, Mr. Thomas explained that system and clarified that it is the clerk staff that perform the manual, visual signature comparison, and the comparison is done between the signature on the absent voter ballot and the voter's signature in the QVF, as required by law. Since the clerk is performing the proper comparison the process does not violate MCL 168.766. It is true that the Election Law does not expressly provide for the use of such automated systems to sort received absent voter ballot envelopes; but neither does the law prohibit it (the Election Law also does not expressly

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provide for the use of automatic letter openers). Further, because the Relia-Vote system does not constitute an "electronic voting system" for purposes of the Election Law, the Board of State Canvassers was not required to approve it for use in the State. See MCL 168.794(f), 168.795, 168.795a. Nevertheless, the Bureau of Elections worked closely with the City of Detroit to ensure that its implementation and use is consistent with the Election Law. Plaintiffs' arguments as to these issues are thus without merit.

      b.   The law does not, and never has, required the promulgation of signature-matching standards before clerks may perform signature comparisons.

In their Restatement of Relief filed November 1, 2022, Plaintiffs argue that there is "no standard rule promulgated for signature comparison and therefore no ability to fulfill the requirements for signature comparison pursuant to MCL 168.761(2)." (Plfs' Restatement, ¶ i, p 2.) They argue the Court must "fashion a 'standard' or require that the other alternative methods of identification be required to ensure secure access and that only legal ballots are cast." (*Id*.)

But none of the statutes discussed above require the Secretary of State to promulgate a rule providing standards for performing signature comparisons on absent voter ballot applications or absent voter ballot return envelopes. See, e.g., MCL 168.31(2) (requiring the promulgation of rules for uniform standards for petition signatures).

Under § 21 of the Election Law, the Secretary of State is "the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Similarly, under § 31, the Secretary of State "shall"; "(a) . . . issue instructions and promulgate rules . . . for the conduct of elections . . . [and] (b) [a]dvise and direct local election officials as to the proper methods of conducting elections. . . ." MCL 168.31(a)-(b). The Secretary must also provide various training and

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accreditation opportunities for local election officials, including election inspectors. See MCL 168.31(j)-(m).

Pursuant to this authority, the Secretary, through the Bureau of Elections, has offered optional guidance to local clerks and election officials with respect to the signature review process for absent voter ballot applications and absent voter ballot return envelopes, and steps to take following a signature mismatch on an application or on a return envelope. (See Ex A, April 2021 Signature Guidance.) Clerks are presently not mandated to utilize the specific guidance for comparing signatures on absent voter ballot applications or ballots due to a prior court decision. (*Id*.) In the case of *Genetski et al v Benson et al*, Court of Claims No. 20-000216, the Court of Claims concluded that the version of the signature-matching guidance at issue there had to be promulgated as a rule because the clerks were mandated to follow the guidance. The Bureau of Elections modified the guidance – the same guidance attached here – consistent with the opinion to reflect that clerks are not mandated to follow the guidance. Although not obligated to pursue rulemaking, in July of 2021, the Department of State initiated rulemaking under the administrative procedures act, MCL 24.201 *et seq.*, to promulgate signature matching standards.[6] The Legislature has declined to take any action on the rule set, so by default the rules will be eligible for filing with the Secretary of State in December 2022. See MCL 24.245a(7).

So, Plaintiffs are correct that there is presently no promulgated rule providing for signature matching standards, but the law does not require such rules to be promulgated. The Bureau has offered guidance for performing signature matching, which the City of Detroit and other jurisdictions may utilize to perform their duties under § 761(2). Contrary to Plaintiffs' allegations there simply is no violation of the law and thus no grounds for requiring this Court to

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[6] See Pending Rule Set 2021-61 ST, available at ARS Public - RFR Transaction (state.mi.us).

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fashion a standard or impose some type of identification requirement with respect to the thousands of absent voter ballots already cast by Detroit voters. Plaintiffs' arguments are simply without merit.

2. The City of Detroit's voting system and equipment complies with the law.

In their Restatement of Relief filed November 1, 2022, Plaintiffs appear to argue that the City of Detroit's use of adjudication software to process absent voter ballots that do not tabulate properly and the use of high-speed scanners to tabulate absent voter ballots is not authorized by law. (Plfs' Restatement, ¶ viii, p 5.) But Plaintiffs are incorrect.

Decades ago, Michigan's Legislature enacted provisions into the Michigan Election Law that clearly and expressly require that ballots be counted by a certified "electronic voting system." See, e.g., MCL 168.37, 795, 795a.[7] The Election Law provides that "a county clerk, in consultation with each city and township clerk in the county" will "determine which electronic voting system will be used in the county[.]" MCL 168.37a. The governing bodies for the local units of government are responsible for purchasing voting equipment. MCL 168.794a, 168.794b.

Before voting systems are purchased or used in Michigan, they are approved by the Board of State Canvassers, a bipartisan body that is assisted by the Bureau of Elections but is independent of the Michigan Secretary of State. Const 1963, art 7, 2, § 7, MCL 168.22. In 2017, the Board of State Canvassers approved three voting systems for use in Michigan,

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[7] An "electronic voting system" is defined as "a system in which votes are recorded and counted by electronic tabulating equipment." MCL 168.794(f). And "electronic tabulating equipment" means "an apparatus that electronically examines and counts votes recorded on ballots and tabulates the results." MCL 168.794(e).

including Dominion Voting Systems, as required by MCL 168.795a.[8] Prior to approval, the

systems were tested by one of the federal Election Assistance Commission accredited voting

systems test laboratories, and then were subject to rigorous Michigan-specific testing conducted

by the Bureau of Elections. Only after Board of State Canvassers approval did county clerks

determine which voting system would be used in their county. MCL 168.37, 168.795a.

Among dozens of other jurisdictions in Wayne County and across the State, the City of

Detroit uses the Dominion Voting Systems, Democracy Suite 5.5/5.5s Voting System, which is

the most recent tested and approved iteration of the system approved by the Board of State

Canvassers in 2017. The Democracy Suite 5.5/5.5s Voting System was tested and approved for

use in the State by the Board of State Canvassers in May 2019.[9] As noted in the attached

"Voting System Certification Evaluation Report, State Certification Testing, Dominion Voting

Systems, Democracy Suite 5.5/5.5s Voting System," this version of the system includes an

"adjudication" software feature. (Ex B, Report & Certification, p 2 of Report.) As the report

notes, while this feature is included in the system, it is an "optional" feature, feature[10], meaning

that a jurisdiction can choose to use this software feature or not. (*Id*.) And with respect to

hardware, the Democracy Suite 5.5/5.5s Voting System, including the adjudication software, is

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[8] See Board of State Canvassers Meeting Minutes, February 28, 2017, available at Feb-28-2017-BSC-Meeting-Minutes.pdf (michigan.gov).

[9] See Board of State Canvassers Meeting Minutes, May 23, 2019, available at Canvassers Meeting Minutes 05/23/19 (michigan.gov). The Board also approved de minimus changes to that version of the voting system at the same meeting. (*Id.*) Subsequent de minimus changes were approved in June 2020, see BSC 0682020 (michigan.gov), December 2021, see Dec-10-2021-BSC-Meeting-Minutes.pdf (michigan.gov), and July 2022, see July 21 2022 BSC Meeting Minutes (michigan.gov).

[10] Jurisdictions routinely choose to utilize different optional configurations of the certified voting system. For example, many large jurisdictions use high-speed scanners in absent voter counting boards, while small jurisdictions do not.

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designed for use with a precinct scanner (tabulator) or a high-speed, ballot scanner for use at an absentee counting board. (*Id.*, pp 3-4.)

As confirmed by the testimony of Mr. Chris Thomas at the November 3, 2022, hearing, the City of Detroit is utilizing the adjudication software feature and high-speed scanners for the operation of its absent voter counting boards. And as discussed above, both the adjudication software and the high-speed scanners have been tested and approved for use in Michigan. Mr. Thomas also testified regarding how the adjudication feature is used, which is consistent with the Election Law's provisions concerning errors on ballots, such as stray marks, overvotes, etc. See, e.g., MCL 168.803, 168.795(1)-(2). Accordingly, the City of Detroit's use of these features complies with Michigan's Election Law. See MCL 168.795a.

Plaintiffs also appear to argue that the City of Detroit is not properly preserving an audit trail by saving ballot images created through use of the adjudication software. (Plfs' Restatement, ¶ ix, p 6.) The Election Law requires that an electronic voting system provide an "audit trail." MCL 168.795(1)(k). An "audit trail" is defined as "a record of the votes cast by each voter that can be printed, recorded, or visually reviewed after the polls are closed." MCL 168.794(a). The law does not specifically require the retention of ballot images that a system may generate on election day as part of the audit trail, although a jurisdiction could choose to do so. Further, Plaintiffs appeared confused during the November 3 hearing when its counsel stated to the Court that the Secretary of State has previously directed jurisdictions to delete or destroy "audit logs" or "audit trails" after an election. The Secretary has never given such an

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instruction.[11] What Plaintiffs may be referring to is the Bureau of Elections' instruction post-election to delete voter information contained on the "electronic poll book."

The electronic poll book consists of software and data programming that is downloaded to a computer, usually a laptop, before an election and is used to process voters and generate precinct reports on election day for that particular election. MCL 168.668b, 168.735. It includes a list of registered voters for the jurisdiction, which includes sensitive voter information, such as a voter's date of birth. It does not contain any records of votes cast. Before a subsequent election, clerks are directed to print a paper copy of the poll book contents for retention, then delete the previous election's information from the electronic pollbook because it contains personal information and so that the old file is not accidentally accessed during the new election. After an election, a memorandum is sent out to all county clerks releasing security of election materials pertaining to the previous election. See MCL 168.847. The memorandum simply instructs that the electronic pollbook software and associated files must be deleted unless certain circumstances exist, as shown in the memorandum regarding the August 2022 election. (Ex C, August 2022 Memo.) The laws do not require that clerks retain a record in multiple formats. Because the information from the electronic pollbook is saved in paper form, state and federal retention laws are satisfied. See, e.g., 168.811, 168.799a, R. 168.790; 52 USC 20701 *et seq*.

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[11] Plaintiffs' counsel Mr. Hartman has made similar misleading claims in pleadings filed in another case as well. See, e.g., *Ickes et al v Whitmer, et al*, United States District Court No. 22-827 (WD Mich) (Maloney, J.) Indeed, Plaintiffs' counsel is making similar claims related to Detroit's use of adjudication software in that case. (Ex D, Plfs' Resp to Defs' Mot to Dis, ECF No. 22, PageID.1610-1611.) And this counsel has sent purported legal memorandums to local clerks around this State providing misleading advice regarding the use of electronic voting systems and encouraging clerks to "hand count" ballots in violation of the law. (Ex E, 10/28/22 BOE letter & Hartman Memo.)

To the extent Plaintiffs are referring to the deletion of programming used in an election, the answer is the same. Programming used in an election is retained by jurisdictions along with other materials in a sealed container from which they may be released and then preserved in a different approved container for the remainder of the state and federal retention periods. See R. 168.790(18), MCL 168.799a(4). This is explained in the memorandum that is sent to the county clerks releasing the security of these materials. (Ex C.) Thus, directly contrary to Plaintiff's counsel's inaccurate claim, programs used to conduct an election with electronic voting equipment are retained by election officials, including the City of Detroit, per Secretary of State instruction. Clerks retain this data and programming by downloading it from their tabulation equipment to an external drive. The drives are then stored/retained with the other election materials according to the applicable schedule. Programming is not (and cannot) be kept for record retention purposes on the actual voting equipment itself, i.e., the scanner (tabulator) or related equipment. Even if elements of programming for individual elections temporarily remains on tabulator hardware, software, or firmware for a given election, it cannot be retained in this format. This is because the tabulation equipment is used by local clerks in every election and the equipment must be specifically programmed for each and every election. When this occurs, previous programming is overwritten. If programming was required to be retained on the equipment itself, local clerks would have to purchase new tabulating equipment for every election. So, to the extent Plaintiffs are complaining about a perceived failure to preserve programming on equipment such arguments are predicated on a fundamental misunderstanding of the laws and the practical realities of record retention.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in the City of Detroit Defendants' brief, this Court

should deny Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

/s/Heather S. Meingast
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Dated: November 4, 2022

PROOF OF SERVICE

Heather S. Meingast certifies that on November 4, 2022, she served a copy of the above
document in this matter on all counsel of record and parties *in pro per* via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

KRISTINA KARAMO, PHILIP O'HALLORAN,
MD, BRADEN GIACOBAZZI, TIMOTHY
MAHONEY, KRISTIE WALLS, PATRICIA
FARMER, ELECTION INTEGRITY FUND AND
FORCE,

No. 22-012759-AW

    Plaintiffs,

HON. TIMOTHY M. KENNEY

v

**ATTORNEY GENERAL DANA
NESSEL'S AMICUS BRIEF
IN SUPPORT OF DEFENDANTS'
POST-HEARING BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION**

JANICE WINFREY, in her official capacity as
Detroit City Clerk, CITY OF DETROIT BOARD OF
ELECTION INSPECTORS, in their official capacity,

    Defendants.

_____

EXHIBIT A

Absent Voter Ballot Processing: Signature Verification and Voter Notification Guidance

The Michigan Election Law requires absent voter (AV) ballot applications to be signed for an AV ballot to be issued. It also requires election workers to verify that the signature on an AV ballot envelope matches the voter's signature in the Qualified Voter File (QVF) or the voter's signature on the AV ballot application for the ballot to be tabulated. The Michigan Election Law requires AV applications and ballots to be accepted unless the signature does not agree sufficiently with the voter's signature on file. MCL 168.761, 765a, 767.

This document provides guidance for:

(1) Reviewing signatures immediately upon receipt and providing voter notification

(2) Verifying the signature

(3) Curing missing or mismatched signatures

The signature verification guidance provided below is based on the process the Bureau of Elections uses to validate signatures on petitions filed with the Bureau.

(1) Timing of Signature Review and Notification

Clerks should review absent voter ballot applications and absent voter ballot envelopes as soon as possible upon receipt to determine whether a signature has been provided and whether the signature matches. If an AV application or ballot envelope is missing a signature, or if you determine that a signature does not match, inform the voter immediately using any and all contact information available. The Michigan Election Law, MCL 168.761, requires notification of the voter of a missing or mismatched signature within 48 hours of receipt of the application. If you have a phone number or e-mail address for the voter, call and e-mail the voter in addition to mailing the voter a notice informing the voter of the signature deficiency and the need to cure. **Beginning the Thursday before the election, the Bureau recommends clerks try to reach the voter the same day they receive the application or ballot (by phone and e-mail if possible) to allow as much time as possible to address the issue.**

For **AV applications**, inform the voter of the need to cure the signature deficiency and the voter's options for doing so:

- **Before 5 p.m. Friday before Election Day**, by mail/e-mail/fax/in person at the clerk's office.
- **Between 5 p.m. Friday and 4 p.m. Monday**, in person at the clerk's office.
- **After 4 p.m. on Monday,** vote at the precinct on Election Day.

For **AV ballots,** inform the voter of the need to cure the signature deficiency and the voter's options for confirming that the voter signed the ballot or providing a signature:

- **By 8 p.m. on Election Day,** the voter must confirm that the voter signed the ballot or provide a signature. Acceptable methods of providing a signature include a signed statement by mail, email, fax, or in-person at the clerk's office**.**

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(2) Guidance for Signature Verification

Clerks must determine whether the signature being validated agrees sufficiently with the signature on file. When the Bureau of Elections reviews petition signatures, signature review should begin with the presumption that the voter's signature is his or her genuine signature.

1. If there are any redeeming qualities in signature as compared to the signature on file, the Bureau of Elections treats the signature as valid. Redeeming qualities may include but are not limited to similar distinctive flourishes, more matching features than nonmatching features, and Examples 1-5 in the chart below.

2. The Bureau of Elections considers a voter's signature questionable only if it differs in multiple, significant, and obvious respects from the signature on file. The Bureau resolves slight dissimilarities in favor of the voter.

Voters should be encouraged to sign AV ballot applications and AV ballot return envelopes in a way that reasonably resembles the signature given for driver's license/state ID or voter registration purposes, so that the signature agrees sufficiently with the signature on file. When reviewing petition signatures that are not a perfect match with the signature on file, the Bureau of Elections considers several reasons that may cause an apparent mismatch when the signature is actually valid. The chart below explains how the Bureau determines whether a signature matches in these scenarios.

#	Defects in signature	BOE Determines
1.	Signature appears as if voter's hand is trembling or shaking, possibly due to a health condition or advancing age: *Catherine Metzger* versus *Catherine Metzger*	Valid signature
2.	Only part of the signature matches the signature on file such as only the first letters of the first and last name match, but rest of signature does not match: *J. D.* versus *Jane Doe* *J. Doe* versus *Jane Doe*	Valid signature
3.	Signature is partially printed but at the same time, partially matches the signature on file: *Alice Robinson* versus *Alice Robinson*	Valid signature
4.	Signature is a recognized diminutive of the voter's full legal name: *Bill Smith* versus *William Smith*	Valid signature
5.	Signature style has changed slightly over time: *Lucinda Jones* versus *Lucinda Jones*	Valid signature
6.	Signature is entirely printed but signature on file is entirely written in cursive: JAMES DAVIS versus *James Davis*	Questionable signature
7.	Signature differs in multiple, significant and obvious respects: *John Hancock* versus *John Hancock* versus *John Hancock*	Questionable signature
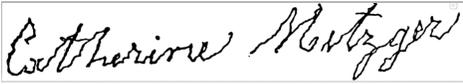
Legitimate Explanations for Nonmatching Signatures. The following list includes some possible explanations for signatures that do not match exactly, but keep in mind that other legitimate reasons may exist.

- The ballot application or return envelope signature may be written on an uneven surface, such as on top of other papers, a tablecloth, or other partially covered surface, which may cause the signature to appear creased or cause breaks or pauses in a cursive signature.

- The ballot application or return envelope signature or electronic signature on file could have been written in haste.

- The voter's medical condition or advancing age may cause the signature to be different.

- The electronic signature on file may be smaller or larger than the signature given on an AV ballot application or AV return envelope.

- The signature may have been written using a pen with a finer tip or one with fading ink as compared to the signature on file.

- Any other plausible reason given by the voter that satisfies the clerk when following up on a questionable signature.

(3) Curing Signature Discrepancies

Clerks should review for missing or questionable signatures, and notify voters of missing or questionable signatures, using the timeline and procedures specified in the "Timing of Signature Review and Notification" Section above. As noted, clerks should use any and all means of contacting voters available, including phone, e-mail, and mail. Written notice must always be issued. Sample written notices are included below. There are two sample notices; one to provide a signature for an application and one to provide a signature for a ballot. Clerks do not need to use these exact notices.

The clerk must retain proof of having provided written notice to the voter and any signed forms returned to the clerk for 22 months following the final certification of the election.

SAMPLE NOTICE TO VOTER WHO MUST PROVIDE APPLICATION SIGNATURE

Dear Voter,

Your **absent voter ballot application** will be REJECTED because of a missing signature or because of your signature did not match the signature on file. You WILL NOT BE ISSUED an absent voter ballot because of the signature discrepancy, unless you TAKE THE FOLLOWING ACTION:

* Sign this form and mail it back to the clerk's office at [address], fax it to [number], or scan/photograph and email this signed form to [email]. The form must be received by the Friday before the election in order for you to be mailed an absent voter ballot. If it Wednesday before the Election or later, come to the clerk's office in person if possible.

* You may visit the clerk's office at [address] and re-sign the application until 4 p.m. on the Monday before Election Day.

* If you do not cure the AV application by 4 p.m. on Election Day, you may still vote at the precinct on Election Day.

VOTER CERTIFICATE FOR PROVIDING APPLICATION SIGNATURE

I returned my absent voter ballot application to my clerk and I have been notified that my signature on the return envelope was either missing or did not seem to match the signature on file.

● I requested an absent voter ballot for the 2020 general election. I am the individual whose name appears on the absent voter ballot application.
● I am a United States citizen.
● I am qualified and registered to vote in the city or township to which I returned my absent voter ballot.

If you are unable to provide a signature that is similar to the signature on file, please check the box below.

[ ] My signature differs from the signature on file due to a medical condition, advancing age, or the number of years that have elapsed since I last provided a signature for driver's license/state ID or voter registration purposes.

SIGN HERE IN INK *(Power of attorney is not acceptable).*

Signature

Printed name

Date: _____ /_____ /_____ Address:_____
                              (number and street)   (city or township)   (zip code)

Date of Birth:_____(00/00/0000)

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SAMPLE NOTICE TO VOTER WHO MUST PROVIDE BALLOT SIGNATURE

Dear Voter,

Your **absent voter ballot** will be REJECTED because of a missing signature or because your signature did not match the signature on file. Your absent voter ballot WILL NOT BE COUNTED UNLESS YOU TAKE THE FOLLOWING ACTION:

* Until Friday before Election Day, you may make a written request that your absent voter ballot be "spoiled" and have a new ballot issued immediately. If it Wednesday before Election Day or later, come to the office in person if possible.

* You may sign this form and mail it back to the clerk's office at [address], fax it to [number], or scan/photograph and email it to [email], or deliver it to the clerk's office at [address] by 8 p.m. on Election Day.

* You may visit the clerk's office and re-sign the ballot envelope or provide a signature. You must re-sign by 8 p.m. on election day in order to have your ballot counted on Election Day.

* Alternatively, you may vote at the precinct on Election Day instead of voting an AV ballot.

VOTER CERTIFICATE FOR PROVIDING BALLOT SIGNATURE

I returned my absent voter ballot to my clerk and I have been notified that my signature on the return envelope was either missing or did not seem to match the signature on file. I hereby affirm, under penalty of perjury, that:

● I requested and returned an absent voter ballot for the 2020 general election. I am the individual whose name appears on the absent voter ballot return envelope that I returned to my city or township clerk's office.
● I am a United States citizen.
● I am qualified and registered to vote in the city or township to which I returned my absent voter ballot.
● I or another authorized individual delivered my ballot to the clerk's office.

If you are unable to provide a signature that is similar to the signature on file, please check the box below.

[ ] My signature differs from the signature on file due to a medical condition, advancing age, or the number of years that have elapsed since I last provided a signature for driver's license/state ID or voter registration purposes.

SIGN HERE IN INK *(Power of attorney is not acceptable).*

Signature

Printed name

Date: ____ /____ /____ Address:_____
(number and street)   (city or township)   (zip code)

Date of Birth:_____(00/00/0000)

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

KRISTINA KARAMO, PHILIP O'HALLORAN,
MD, BRADEN GIACOBAZZI, TIMOTHY   No. 22-012759
MAHONEY, KRISTIE WALLS, PATRICIA
FARMER, ELECTION INTEGRITY FUND AND   HON. TIMOTHY M. KENNEY
FORCE,

       Plaintiffs,   **ATTORNEY GENERAL DANA
                                            NESSEL'S AMICUS BRIEF
                                            IN SUPPORT OF DEFENDANTS'
v   POST-HEARING BRIEF IN
                                            OPPOSITION TO PLAINTIFFS'
JANICE WINFREY, in her official capacity as MOTION FOR A PRELIMINARY
Detroit City Clerk, CITY OF DETROIT BOARD OF   INJUNCTION**
ELECTION INSPECTORS, in their official capacity,

       Defendants.

_____

EXHIBIT B

Voting System Certification
Evaluation Report
State Certification Testing

Dominion Voting Systems
Democracy Suite (D-Suite) 5.5/5.5S Voting System

Michigan Department of State
Bureau of Elections
March 2019

Introduction

The Dominion Democracy Suite 5.5/5.5S Voting System was evaluated for certification by the State of Michigan on March 27 -28, 2019. This report summarizes the findings and observations of the Dominion Democracy Suite 5.5/5.5S voting system and its compliance with the requirements of the State of Michigan.

Dominion Voting Systems submitted their application and all required documentation including their Technical Data Package (TDP) along with their system ITA test report for the 5.5S modification to enable the transmission feature. The Dominion Democracy Suite 5.5/5.5S Voting System was tested against the Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0) and the 5.5S modification was tested by Pro V&V (VSTL Test Lab).

EAC Certification Number: DVS-DemSuite5.5

Name of VSTL: Pro V&V

Voting System Software Components

System Components Tested	Version	Operating System	Comments
Election Event Designer (EED)	5.5.12.1	Windows 10 Pro	EMS
Election Data Translator (EDT)	5.5.12.1	Windows 10 Pro	EMS
Adjudication	5.5.8.1	Windows 10 Pro	EMS
ICX Application	5.5.10.25	Android 5.1 (ICX Prime) Android 4.4 (ICX Classic)	Accessible - VAT
ImageCast Voter Activation (ICVA)	5.5.12.1	Windows 10 Pro	Accessible - VAT
Results Tally and Reporting (RTR)	5.5.12.1	Windows 10 Pro	EMS - Accumulation

-**EMS Election Event Designer (EED)**– A client application that integrates election definition functionality together with ballot styling capabilities and represents the main pre-voting phase end-user application.

-**EMS Election Data Translator (EDT)** – End-user application used to export election data from election project and import election data into election project.

-**EMS Adjudication** – Represents the client component responsible for adjudication, including reporting and generation of adjudicated result files from ImageCast Central tabulators and adjudication of write-in selections from ImageCast Precinct, ImageCast X, and ImageCast Central tabulators. This client component is installed on both the server and the client machines. (*Note: The EMS Adjudication feature is optional*)

-**ImageCast Voter Activation (ICVA)** – Application installed on a workstation or laptop at the polling place that allows the poll workers to program smart cards for voters.

-**EMS Results Tally and Reporting (RTR)** – A client application that integrates election results acquisition, validation, tabulation, reporting and publishing capabilities and represents the main post-voting phase end-user application.

-**EMS Results Transfer Manager (RTM)** - Stand-alone application used to transfer result files from the remote locations to one or more central locations where the results can be tallied and reported on.

Hardware Components

System Components Tested	Version	Comments
ImageCast Precinct (ICP)	PCOS-320C PCOS-321C	Precinct Scanner (Tabulator) 320C No Internal Modem 321C Internal Analog Modem
ICP Ballot Box	BOX-330A (Dominion)	Ballot Box (Standard Dominion & Election Source MI Collapsible
ICX Tablet (Classic)	aValue 15" Tablet (SID-15V-Z37) (15.6 in. screen	Accessible – VAT (Voter Assist Terminal) Optional Accessible-Tactile Interface (ATI-USB) box version 1.10
ICX Tablet (Classic)	aValue 21" Tablet (SID-21V-Z37) (21.5 in. screen	Accessible – VAT Optional Accessible-Tactile Interface (ATI-USB) box version 1.10
ICX Tablet (Prime)	aValue 21" Tablet (HID-21V-BTX) (21.5 in. screen	Accessible – VAT Optional Accessible-Tactile Interface (ATI-USB) box version 1.10
ICC Scanner	Canon imageFormula DR-G1130	Highspeed – Central Count Scanner
ICC Scanner	Canon imageFormula DR-M160II	Highspeed – Central Count Scanner

-**ImageCast Precinct (ICP)** – The ICP is a precinct based optical scan paper tabulator with functionality including: ballot scanning, interpreting voter marks on the paper ballot and stores the ballots for tabulation when the polls are closed. The unit also allows for second chance voting offering voters the opportunity to correct mistakes (overvoting a contest, blank ballot and cross-over) or to cast the ballot as-is. The tabulation of paper ballots and Accessible Voting ballots cast by voters is performed when the polls are closed on the ICP. Results can be aggregated into RTR and the ICP prints a results report (totals tape) containing the results of the ballots cast before transmission.

-**ImageCast Central Count (ICC) Scanner** – The ICC is a high-speed, central count ballot scanner based on Commercial off the Shelf (COTS) hardware, with the custom-made ballot processing application software. It is used for high speed scanning and counting of paper ballots at an absentee counting board.

-ImageCast X (ICX) Ballot Marking Device (BMD) – The ICX consists exclusively of COTS available hardware and operating system, while the applications installed on the top customize its behavior as a BMD. The ICX is designed to perform the following functions: ballot review and second chance voting, accessible voting and ballot marking.

COTS Hardware

- Smart Cards: ACOS-6-64
- Printer: HP M402dn
- Printer: HP M402dne

COTS Software

- Google Text to Speech 3.11.12

System Overview

The D-Suite 5.5 Voting System is a paper-base optical scan voting system consisting of the following major components:

- Election Management System (EMS)
- Image Cast Central (ICC) – Highspeed Central Count System
- Image Cast Precinct (ICP) – Precinct Tabulator
- Image Cast X ballot marking device (BMD) – Accessible- VAT

The Democracy Suite 5.5S configuration includes the following system changes to the base 5.5 version to enable wireless transmission of unofficial results:

- Added Express Listener Server Configuration
- Listener and EMS RAS Server supported by SQL Server 2016 Standard and SQL Server 2016 Express
- RTM supported by Windows 10 Pro

Modem transmission of unofficial election results from ICP units via the following methods:

- PCOS cellular modeming
- PCOS analog modeming
- Results Transfer Manager (RTM)

Modem receiving of unofficial election results through the following methods:

- USB analog modem RAS configuration with ImageCast Listener and RTR (for use with the PCOS analog modems)
- ImageCast Listener (ICL) and RTR (for use with the PCOS cellular modems and RTM)

Additional Supported Languages

- Bengali
- Spanish

System Examination/Observations & Findings

The examination occurred on March 26-27, 2019 at the Richard H. Austin Building in Lansing. Bureau staff performed the testing along with the assistance of Dominion, GBS and Election Source representatives. A county and local clerk representative was also present for the testing. Two precincts from the following types of elections were tested:

- State Primary – 2016 QVF Data (Grand Ledge City)
- State General – 2016 QVF Data (Lansing City)
- Presidential Primary – 2016 QVF Data (Delta Township)

Michigan Ballot Production Standards were used to ensure the ballots met the requirements set forth by the Bureau of Elections for ballot layout.

Vendor performed EMS setup and ballot design for the three elections listed above. Vendor was required to perform a programming overview including import of the State EMS Export File into the EMS.

Y = Results matched state generated chart of predetermined results

Election	ICP Totals Tape	ICC Report	ICP Modemed Results
State Primary	Y	Y	Y
State General	Y	Y	Y
Presidential Primary	Y	Y	Y

The following functionality was tested:

- General Election (with Straight Party)
- Open Primary (3 party – 4 column ballot)
- Closed Primary (Presidential Primary – partisan and non-partisan ballot)
- Ballot Rotation (Precinct based rotation)
- Straight Party Voting (Used in General Election)

The examiners tested each piece of equipment using a pre-marked "test deck" of ballots and a Chart of Predetermined Results. Test Deck Ballots were marked by hand by Bureau staff using ballots provided by the vendor. Voted ballots were tabulated through the ICP (precinct ballot counter) and ICC (central tabulator). The tabulation reports from the ICP and the ICC were reviewed and were correct. ICX (Accessible) ballots were created (Position Test) and added to the ICP test deck with the adjusted position totals to ensure they were also being tabulated correctly by the ICP unit.

Tested Marking Devices: Sharpie brand markers (ultra-fine point), black ink

Summary Findings

The system performed as expected and all results matched. The speed of the ICP is still a concern with the tested times needed to process a ballot. A test was performed with images turned off on the ICP and it did

reduce the time needed to process a ballot by a few seconds.   The vendor has plans to work on this issue in future versions. The adjudication software (optional feature) was tested by Bureau staff running a few test scenario ballots and going through the onscreen adjudication process step by step with the vendor.

Electronic Transfer using Democracy Suite 5.5S

The Democracy Suite 5.5S Voting System shares the same base system of the EAC Certified Democracy Suite 5.5 (DVS-DemSuite5.5), with the modeming components enabled. Changes are outlined in the System Overview section.

The functionality for modem transmission was tested using both analog and cellular modems. The cellular modem utilized for testing was the eDevice CellGo 2G/3G modem which transferred tabulated results to the ImageCast Listener server. The analog modem transmission was tested with the internal modem transferring results to the ImageCast Listener. The Results Transfer Manager (RTM) application was used to transfer tabulated results to the ImageCast Listener Server.

Transmission Methods

The following result transmission methods were tested on the ICP

- PCOS cellular modeming (CellGo Wireless modem)
- PCOS analog modeming (Internal modem)
- Results going into Results Transfer Manager (RTM)

The following result transmission methods were tested on the ICC

- Results going into Results Transfer Manager (RTM)

Summary Findings

The modeming of unofficial results using Democracy Suite 5.5S was validated as part of the State Certification testing. Result reports were compared to the totals tape to ensure the transmission was accurate.

EMS Software Testing Procedures

Legal Requirements	Meets Requirements	Comments
Application Requirements		

Data Import

Import files and sample ballots (pdf format) for the three election types identified above will be provided to vendors by the Bureau of Elections (BOE) upon receipt of voting system certification application materials. Tests will be performed for Precincts 1 and 2 from each election type.

Legal Requirements	Meets Requirements	Comments
Import QVF E-wizard election data output file into EMS database	☒ Yes ☐ No	Election Data Translator (EDT) was used to convert the State EMS Export File.

Ballot Layout

Ballot layout must follow State of Michigan Ballot Production Standards:

https://www.michigan.gov/documents/sos/BallotStandards_517320_7.pdf

	Legal Requirements	Meets Requirements	Comments
	Ballot Layout Requirements		
1.	**Layout a closed presidential primary**		2016 QVF Data (Delta Township)
	Democratic ballot with a proposal, including an 'uncommitted' choice that does not rotate	☒ Yes ☐ No	
	Republican ballot with a proposal, including an 'uncommitted' choice that does not rotate	☒ Yes ☐ No	
	Nonpartisan ballot	☒ Yes ☐ No	
	Rotation	☒ Yes ☐ No	
2.	**Layout a primary election ballot** *(Must be capable of accommodating a multiple party partisan section)*		2016 QVF Data (Grand Ledge City)

	Partisan section	☒ Yes ☐ No	
	Nonpartisan section	☒ Yes ☐ No	
	Proposal section	☒ Yes ☐ No	
	Rotation	☒ Yes ☐ No	
3.	**Layout a general election ballot** *(Must include straight party race and functionality)*		2016 QVF Data (Lansing City)
	Partisan section	☒ Yes ☐ No	
	Nonpartisan section	☒ Yes ☐ No	
	Proposal section	☒ Yes ☐ No	
	Rotation	☒ Yes ☐ No	
4.	**Produce/Provide PDFs for Bureau approval and stubbed paper ballots to be used in testing**	☒ Yes ☐ No	

Tabulator Programming

The test process will include demonstration of all programming steps, including:

1.	**Create tabulator program for each ballot produced above**	☒ Yes ☐ No	
	Program for each precinct tabulator (Precincts 1 and 2)	☒ Yes ☐ No	
	Program for a central count (counting board) tabulator – (combined Precincts 1 and 2)	☒ Yes ☐ No	
2.	**Demonstrate/Create programming of device(s)**	☒ Yes	

	(tabulator, accessible and high-speed)	☐ No	
3.	**Insert memory device into tabulators and print zero tapes (Verify firmware version)**	☒ Yes ☐ No	
4.	**Use pre-produced ballots and programs to conduct standard logic and accuracy test (test deck to be created by BOE using standard rules)**	☒ Yes ☐ No	
5.	**Demonstrate voting process on precinct tabulator**	☒ Yes ☐ No	
6.	**Demonstrate write-in vote, tabulation and adjudication process**	☒ Yes ☐ No	

Legal Requirements	Meets Requirements	Comments
Application Requirements		

High-speed system support for Absentee Voter Counting Boards (AVCB)

NOTE: If vendor system does not have a separate High-speed component, a 3rd tabulator will be required to demonstrate AVCB functionality. The test process will include a single AVCB tabulator that allows for processing of both precinct 1 and 2 ballots on the same device.

1.	**Demonstrate how high-speed system will be programmed**	☒ Yes ☐ No	
2.	**Demonstrate tabulation process on High-Speed System**	☒ Yes ☐ No	
3.	**Demonstrate vote accumulation and reports showing:**		
	Precinct totals	☒ Yes ☐ No	
	AVCB totals	☒ Yes ☐ No	

Combined totals	☒ Yes ☐ No	

Accessible system (VAT) programming

1.	Create accessible voting device program in EMS without further data input or manipulation	☒ Yes ☐ No	
2.	Verify EMS software has synthesized voice available as standard option	☒ Yes ☐ No	Cepstral Voices 6.2.3.801 Google Text-to-Speech Engine 3.11.12
3.	Demonstrate voting process on accessible component(s)	☒ Yes ☐ No	David Foster was able to review and provide ADA feedback to Dominion
4.	Verify VAT ballots are accepted and tabulated correctly by the precinct tabulator	☒ Yes ☐ No	

Vote Accumulation/Unofficial Results Transfer

1.	Use the logic and accuracy test totals to transmit into vote accumulation software		
	Direct download	☒ Yes ☐ No	
	Modem transmission (dial up and cellular) – vendor provided environment	☒ Yes ☐ No	Analog and Cellular modeming were tested.
	Verify totals against numbers from totals tape	☒ Yes ☐ No	
	Cellular modem with active SIM card (if modem transmission is proposed)	☒ Yes ☐ No	
2.	Produce Michigan Standard Results File Format file	☒ Yes ☐ No	

Results Reporting

		Meets Requirements	Comments
3.	**Print result reports from each system** *Precinct tabulator, high-speed, and election management system (EMS)*		
	Zero reports	☒ Yes ☐ No	
	Precinct report	☒ Yes ☐ No	
	Canvass report	☒ Yes ☐ No	
	Audit report	☐ Yes ☐ No	NA
	% of voter turnout by split	☐ Yes ☐ No	NA

Additional items to be provided by the Vendor:

1.	All the necessary EMS software/firmware and hardware with which to conduct the testing	☒ Yes ☐ No	
2.	Update State equipment including EMS workstation and all software/firmware with new version	☐ Yes ☒ No	The ICX was updated at Certification Testing. EMS and ICP will be updated later.

Electronic Voting System Requirements

Legal Requirements		Meets Requirements	Comments
Application Requirements			
1.	EAC number assigned.	☒ Yes ☐ No	**DVS-DemSuite5.5**
2.	ITA test report received. MCL 168.795a(1)(a)	☒ Yes ☐ No	ITA Test Report for 5.5S and Full TDP for 5.5 was provided.
3.	Application fee received - $1500 for new system components, $500 for upgrades of system components. MCL 168.795a(2)(a)	☒ Yes ☐ No	Check is dated 3/4/2019

4.	New source code or changes to source code have been escrowed and made available to Bureau of Elections personnel. MCL 168.797c	☒ Yes ☐ No	3/15/2019
5.	**New Components:** File a report listing all states the components are approved for use in, how long the components have been in use, and any reports complied by users on performance. MCL 168.795a(2)(b)	☐ Yes ☐ No	NA
6.	**New Components:** File copies of all standard contracts and maintenance agreements used in conjunction with the voting system components. MCL 168.795a(2)(c)	☐ Yes ☐ No	NA
7.	**New Components:** State the number of voters each component of the voting system can process per hour in an election with 10 or fewer items to be voted on. MCL 168.795a(2)(e)(i)	☐ Yes ☐ No	NA
8.	**New Components:** State the number of voters each component of the voting system can process per hour in an election in which the ballot consists of the number of items typically voted on at a presidential general election. MCL 168.795a(2)(e)(ii)	☐ Yes ☐ No	NA

Legal Requirements	Meets Requirements	Comments
BSC Test Requirements		
1. Provides for secrecy except in the case of voters who receive assistance. MCL 168.795(1)(a)	☒ Yes ☐ No	
2. Permits voters to vote for all persons, offices and questions entitled. MCL 168.795(1)(b)	☒ Yes ☐ No	
3. Informs voter if he or she has overvoted an office and offers voter the opportunity to correct error before counting ballot. MCL 168.795(1)(b)	☒ Yes ☐ No	
4. Permits voters to vote for all candidates of a political party by a single selection or to vote a split or mixed ticket. MCL 168.795c	☒ Yes ☐ No	
5. Permits voter to vote for a party's presidential and vice-presidential candidates with a single vote. MCL 168.795(1)(c)	☒ Yes ☐ No	
6. Informs voter if he or she has cast a crossover vote in a partisan primary and offers voter the opportunity to correct error before counting ballot. MCL 168.795(1)(d)	☒ Yes ☐ No	

7.	Prevents voter from voting for the same person for the same office more than once. MCL 168.795(1)(7)	☒ Yes ☐ No	
8.	Rejects ballots which do not contain a valid vote. MCL 168.795(1)(f)	☒ Yes ☐ No	
9.	Suitably designed for purpose used; durably constructed; designed to provide for safety, accuracy, and efficiency. MCL 168.795(1)(g)	☒ Yes ☐ No	
10	Accommodates the needs of the elderly or persons with 1 or more disabilities. MCL 168.795(1)(h)	☒ Yes ☐ No	
11.	Accurately records and counts properly cast votes. MCL 168.795(1)(i)	☒ Yes ☐ No	
12.	Provides an audit trail. MCL 168.795(1)(j)	☒ Yes ☐ No	
13.	Provides an acceptable method for casting write-in votes. MCL 168.795(1)(k)	☒ Yes ☐ No	
14.	Allows for the accumulation of vote totals. MCL 168.795(1)(l)	☒ Yes ☐ No	
15.	Provides a method for rendering tabulating equipment inoperable if vote totals are revealed before the close of polls. MCL 168.795(2)	☒ Yes ☐ No	
16.	Presents a ballot printed or displayed in black type on a white surface. MCL 168.795b(1)	☒ Yes ☐ No	

Legal Requirements		**Meets Requirements**	**Comments**
17.	Allows for display of titles and candidates' names in vertical columns or in a series of separate pages; and display of the number of candidates to be voted for above or at the side of the names of candidates for each office. MCL 168.795b(1)	☒ Yes ☐ No	
18.	If there are more candidates for an office than can be printed or displayed in one column or on one page, ballot provides instruction that the list of candidates is continued on the following column, page or display. MCL 168.795b(1)	☒ Yes ☐ No	
19.	If system employs a physical ballot, ballot contains an attached, numbered, perforated stub. MCL 168.795b(2)	☒ Yes ☐ No	
20.	Distinguishes various parts of the ballot (partisan, nonpartisan, proposals) and different elections. If	☒ Yes ☐ No	

	practicable, presents each part on a separate page, column or display. MCL 168.795c		
21.	Can be tested as prescribed by law and the rules promulgated by the Secretary of State prior to and after an election to determine if the equipment will accurately count votes cast for all candidates and on all questions. MCL 168.798	☒ Yes ☐ No	
22.	Can print a zero tape or by other means provides a method of verifying the proper programming and that no ballots have yet been tabulated. MCL 168.797	☒ Yes ☐ No	
23.	Performs a program of self-diagnostics that allows election workers to verify the proper functioning of the equipment. MCL 168.797	☒ Yes ☐ No	
Field Test (New Precinct Components Only)			
1.	Has been evaluated under a field test designed to gauge election official reactions. MCL 168.795a(3)	☐ Yes ☐ No	NA
2.	Has been evaluated under a field test designed to gauge voter reaction, voter problems, and the number of voting stations required for efficient operation based on the vendor's statement per subsection (2)(e). MCL 168.795a(3)	☐ Yes ☐ No	NA
3.	Field test costs reimbursed or paid for by applicant. MCL 168.795a(2)(d)	☐ Yes ☐ No	NA

CERTIFICATION OF TESTING

This is to certify that the above-named voting system has successfully met all applicable criteria prescribed under Michigan election law and the Rules promulgated for the administration of electronic voting systems. Based on this certification, it is recommended that the above-named voting system be approved for the conduct of elections held in the State of Michigan.
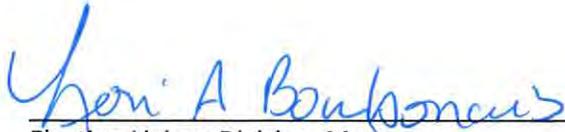
_____
Election Liaison Division, Manager

_____
Program Development Division, Analyst

Recommendation

The Dominion Democracy Suite 5.5/5.5S Voting System is recommended for certification. The system was evaluated and complies with the voting system requirements of the State of Michigan.

United States Election Assistance Commission

Certificate of Conformance

VVSG 2005 VER. I

EAC CERTIFIED

Dominion Voting Systems
Democracy Suite 5.5

The voting system identified on this certificate has been evaluated at an accredited voting system testing laboratory for conformance to the *Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0)* . Components evaluated for this certification are detailed in the attached Scope of Certification document. This certificate applies only to the specific version and release of the product in its evaluated configuration. The evaluation has been verified by the EAC in accordance with the provisions of the EAC *Voting System Testing an*d *Certification Program Manual* and the conclusions of the testing laboratory in the test report are consistent with the evidence adduced. This certificate is not an endorsement of the product by any agency of the U.S. Government and no warranty of the product is either expressed or implied.

Product Name: Democracy Suite

Model or Version: 5.5

Name of VSTL: Pro V&V

EAC Certification Number: DVS-DemSuite5.5

Date Issued: September 14, 2018

Executive Director
U.S. Election Assistance Commission

Scope of Certification Attached

Scope of Certification

This document describes the scope of the validation and certification of the system defined above. Any use, configuration changes, revision changes, additions or subtractions from the described system are not included in this evaluation.

Significance of EAC Certification

An EAC certification is an official recognition that a voting system (in a specific configuration or configurations) has been tested to and has met an identified set of Federal voting system standards. An EAC certification is **not**:

- An endorsement of a Manufacturer, voting system, or any of the system's components.
- A Federal warranty of the voting system or any of its components.
- A determination that a voting system, when fielded, will be operated in a manner that meets all HAVA requirements.
- A substitute for State or local certification and testing.
- A determination that the system is ready for use in an election.
- A determination that any particular component of a certified system is itself certified for use outside the certified configuration.

Representation of EAC Certification

Manufacturers may not represent or imply that a voting system is certified unless it has received a Certificate of Conformance for that system. Statements regarding EAC certification in brochures, on Web sites, on displays, and in advertising/sales literature must be made solely in reference to specific systems. Any action by a Manufacturer to suggest EAC endorsement of its product or organization is strictly prohibited and may result in a Manufacturer's suspension or other action pursuant to Federal civil and criminal law.

System Overview:

The D-Suite 5.5 Voting System is a paper-based optical scan voting system with a hybrid paper/DRE option consisting of the following major components: The Election Management System (EMS), the ImageCast Central (ICC), the ImageCast Precinct (ICP), the ImageCast X (ICX) DRE w/ Reports Printer, ImageCast X (ICX) DRE w/ voter-verifiable paper audit trail (VVPAT), and the ImageCast X ballot marking device (BMD). The D-Suite 5.5 Voting System configuration is a modification from the EAC approved D-Suite 5.0 system configuration.

Language capability:
System supports Alaska Native, Apache, Bengali, Chinese, English, Eskimo, Filipino, French, Hindi, Japanese, Jicarilla, Keres, Khmer, Korean, Navajo, Seminole, Spanish, Thai, Towa, Ute, Vietnamese, and Yuman.

Democracy Suite 5.5 System Diagram
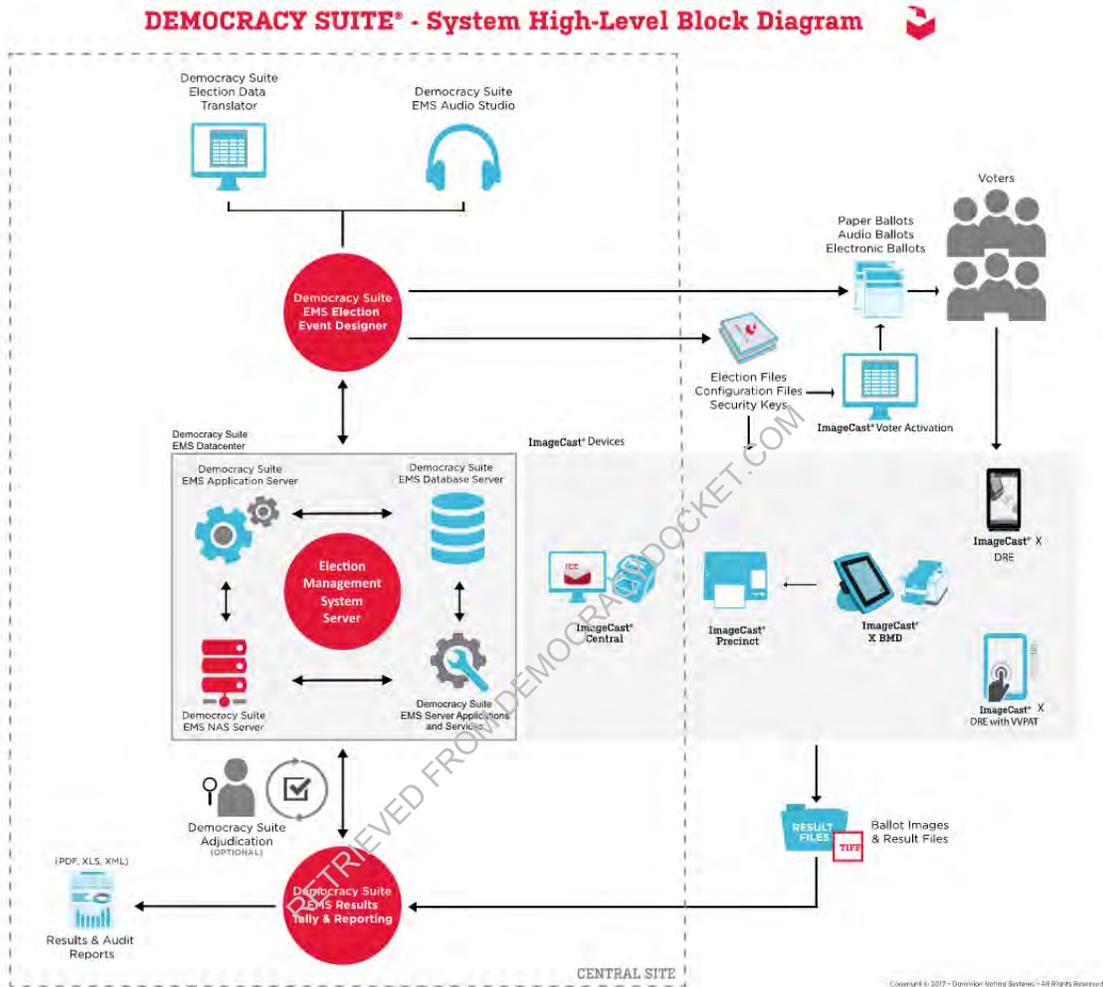
Components Included:

This section provides information describing the components and revision level of the primary components included in this Certification.

Voting System Software Components:

System Component	Software or Firmware Version	Operating System or COTS	Comments
EMS Election Event Designer (EED)	5.5.12.1	Windows 10 Pro	EMS
EMS Results Tally and Reporting (RTR)	5.5.12.1	Windows 10 Pro	EMS
EMS Application Server	5.5.12.1	Windows Server 2012 R2 Windows 10 Pro	EMS
EMS File System Service (FSS)	5.5.12.1	Window 10 Pro	EMS
EMS Audio Studio (AS)	5.5.12.1	Windows 10 Pro	EMS
EMS Data Center Manager (DCM)	5.5.12.1	Windows Server 2012 R2 Windows 10 Pro	EMS
EMS Election Data Translator (EDT)	5.5.12.1	Windows 10 Pro	EMS
ImageCast Voter Activation (ICVA)	5.5.12.1	Windows 10 Pro	EMS
EMS Adjudication (ADJ)	5.5.8.1	Windows 10 Pro	EMS
EMS Adjudication Services	5.5.8.1	Windows 10 Pro	EMS
Smart Card Helper Service (SCHS)	5.5.12.1	Windows 10 Pro	EMS
Election Firmware	5.5.3-0002	uClinux	ICP
Firmware Updater	5.5.3-0002	uClinux	ICP
Firmware Extractor	5.5.3-0002	uClinux	ICP
Kernel (uClinux)	5.5.3-0002	Modified COTS	ICP
Boot Loader (COLILO)	20040221	Modified COTS	ICP
Asymmetric Key Generator	5.5.3-0002	uClinux	ICP
Asymmetric Key Exchange Utility	5.5.3-0002	uClinux	ICP
Firmware Extractor (Technician Key)	5.5.3-0002	uClinux	ICP
ImageCast Central Application	5.5.3.0002	Windows 10 Pro	ICC
ICX Application	5.5.10.25	Android 5.1 (ICX Prime) Android 4.4 (ICX Classic)	ICX

Voting System Platform:

System Component	Version	Operating System or COTS	Comments
Microsoft Windows Server	2012 R2 Standard	Unmodified COTS	EMS Server SW Component
Microsoft Windows	10 Professional	Unmodified COTS	EMS Client/Server SW Component
.NET Framework	3.5	Unmodified COTS	EMS Client/Server SW Component
Microsoft Visual J#	2.0	Unmodified COTS	EMS Client/Server SW Component
Microsoft Visual C++ 2013 Redistributable	2013	Unmodified COTS	EMS Client/Server SW Component
Microsoft Visual C++ 2015 Redistributable	2015	Unmodified COTS	EMS Client/Server SW Component
Java Runtime Environment	7u80	Unmodified COTS	EMS Client/Server SW Component
Java Runtime Environment	8u144	Unmodified COTS	EMS Client/Server SW Component

System Component	Version	Operating System or COTS	Comments
Microsoft SQL Server 2016Standard	2016 Standard	Unmodified COTS	EMS Client/Server SW Component
Microsoft SQL Server 201 Service Pack 2	2016 SP1	Unmodified COTS	EMS Client/Server SW Component
Microsoft SQL Server 2016 SP1 Express	2016 SP1	Unmodified COTS	EMS Client/Server SW Component
Cepstral Voices	6.2.3.801	Unmodified COTS	EMS Client/Server SW Component
Arial Narrow Fonts	2.37a	Unmodified COTS	EMS Client/Server SW Component
Maxim iButton Driver	4.05	Unmodified COTS	EMS Client/Server SW Component
Adobe Reader DC	AcrobatDC	Unmodified COTS	EMS Client/Server SW Component
Microsoft Access Database Engine	2010	Unmodified COTS	EMS Client/Server SW Component
Open XML SDK 2.0 for Microsoft Office	2.0	Unmodified COTS	EMS Client/Server SW Component
Infragistics NetAdvantage Win Forms 2011.1	2011 Vol. 1	Unmodified COTS	EMS SW Platform
Infragistics NetAdvantage WPF 2012.1	2012 Vol. 1	Unmodified COTS	EMS SW Platform
TX Text Control Library for .NET	16.0	Unmodified COTS	EMS SW Platform
SOX	14.3.1	Unmodified COTS	EMS SW Platform
NLog	1.0.0.505	Unmodified COTS	EMS SW Platform
iTextSharp	5.0.5	Unmodified COTS	EMS SW Platform
OpenSSL	1.0.2K	Unmodified COTS	EMS SW Platform
OpenSSL FIPS Object Module	2.0.14 (Cert 1747)	Unmodified COTS	EMS SW Platform
SQLite	1.0.103.0	Unmodified COTS	EMS SW Platform
Lame	3.99.4	Unmodified COTS	EMS SW Platform
Speex	1.0.4	Unmodified COTS	EMS SW Platform
Ghostscript	9.04	Unmodified COTS	EMS SW Platform
One Wire API for .NET	4.0.2.0	Unmodified COTS	EMS SW Platform
Avalon-framework-cvs-20020806	20020806	Unmodified COTS	EMS SW Platform
Batik	0.20-5	Unmodified COTS	EMS SW Platform
Fop	0.20-5	Unmodified COTS	EMS SW Platform
Microsoft Visual J# 2.0 Redistributable Package – Second Edition (x64)	2.0	Unmodified COTS	EMS SW Platform
Entity framework	6.1.3	Unmodified COTS	EMS SW Platform
Spreadsheetlight	3.4.3	Unmodified COTS	EMS SW Platform
Open XML SDK 2.0 for Microsoft Office	2.0.5022.0	Unmodified COTS	EMS SW Platform
Open SSL	1.0.2K	Unmodified COTS	ICP
OpenSSL FIPS Object Module	2.0.10 (Cert 1747)	Unmodified COTS	ICP
Zlib	1.2.3	Unmodified COTS	ICP
uClinux	20070130	Modified COTS	ICP
Google Text-to-Speech Engine	3.11.12	Unmodified COTS	ICX SW
Zxing Barcode Scanner	4.7.5	Modified COTS	ICX SW
SoundTouch	1.9.2	Modified COTS	ICX SW
ICX Prime Android 5.1.1 Image	0405	Modified COTS	ICX SW
ICX Classic Android 4.4.4 Image	0.0.98	Modified COTS	ICX SW
OpenSSL FIPS Object Module	2.0.10 (Cert 2473)	Unmodified COTS	ICX SW Build Library
OpenSSL	1.0.2K	Unmodified COTS	ICC SW Build

System Component	Version	Operating System or COTS	Comments
			Library
OpenSSL FIPS Object Module	2.0.10 (Cert 1747)	Unmodified COTS	ICC SW Build Library
1-Wire Driver (x86)	4.05	Unmodified COTS	ICC Runtime SW
1-Wire Driver (x64)	4.05	Unmodified COTS	ICC Runtime SW
Canon DR-G1130 Driver	1.2 SP6	Unmodified COTS	ICC Runtime SW
Canon DR-G1130 TWAIN Driver	1.2 SP6	Unmodified COTS	ICC Runtime SW
Visual C++ 2013 Redistributable (x86)	12.0.30501	Unmodified COTS	ICC Runtime SW
Machine Configuration File (MCF)	5.5.10.20_20180806	Proprietary	ICX Configuration File
Device Configuration File (DCF)	5.4.01_20170521	Proprietary	ICP and ICC Configuration File

Hardware Components:

System Component	Hardware Version	Proprietary or COTS	Comments
ImageCast Precinct (ICP)	PCOS-320C	Proprietary	Precinct Scanner
ImageCast Precinct (ICP)	PCOS-320A	Proprietary	Precinct Scanner
ICP Ballot Box	BOX-330A	Proprietary	Ballot Box
ICP Ballot Box	BOX-340C	Proprietary	Ballot Box
ICP Ballot Box	BOX-341C	Proprietary	Ballot Box
ICX UPS Inline EMI Filter	1.0	Proprietary	EMI Filter
ICX Tablet (Classic)	aValue 15" Tablet (SID-15V)	COTS	Ballot Marking Device
ICX Tablet (Classic)	aValue 21" Tablet (SID-21V)	COTS	Ballot Marking Device
ICX Tablet (Prime)	aValue 21" Tablet (HID-21V)	COTS	Ballot Marking Device or Direct Recording Electronic
Thermal Printer	SII RP-D10	COTS	Report Printer
Thermal Printer	KFI VRP3	COTS	Voter-verifiable paper audit trail (VVPAT)
Server	Dell PowerEdge R630	COTS	Standard Server
Server	Dell PowerEdge R640	COTS	Standard Server
Server	Dell Precision T3420	COTS	Express Server
ICC Workstation HW	Dell OptiPlex 7440 All in One	COTS	
ICC Workstation HW	Dell OptiPlex 9030 All In One	COTS	
ICC Workstation HW	Dell OptiPlex 3050 All In One	COTS	
ICC Scanner	Canon imageFormula DR-G1130	COTS	Central Count Scanner
ICC Scanner	Canon imageFormula DR-M160II	COTS	Central Count Scanner
Client Workstation HW	Dell Precision T3420	COTS	
Client Workstation HW	Dell Latitude E7450	COTS	
Client Workstation HW	Dell Latitude e3480	COTS	
ICX Printer	HP LaserJet Pro Printer M402dn	COTS	
ICX Printer	HP LaserJet Pro Printer M402dne	COTS	
Monitor	Dell Monitor KM632	COTS	
Monitor	Dell Monitor P2414Hb	COTS	
Monitor	Dell Ultrasharp 24" Monitor U2414H	COTS	
CD/DVD Reader	Dell DVD Multi Recorder GP60NB60	COTS	
iButton Programmer	Maxim iButton Programmer DS9490R# with DS1402	COTS	
UPS	APC Smart-UPS SMT1500	COTS	
Network Switch	Dell X1008	COTS	

System Component	Hardware Version	Proprietary or COTS	Comments
Network Switch	Dell X1018	COTS	
Network Switch	Dell X1026	COTS	
Network Switch	Dell PowerConnect 2808	COTS	
Sip and Puff	Enabling Devices Sip and Puff	COTS	
Headphones	Cyber Acoustics ACM-70	COTS	
4-way Joystick Controller	S26	Modified COTS	
Rocker (Paddle) Switch	Enablemart #88906	COTS	
Footswitches	ABLENET Jelly Bean Twist 10033400	COTS	
CF Card Reader	IOGEAR SDHC/microSDHC 0U51USC410	COTS	
CF Card Dual-Slot Reader	Lexar USB 3.0	COTS	
CF Card Reader	Hoodman Steel USB 3.0 102015	COTS	
CF Card Reader	Lexar Professional CFR1	COTS	
CF Card Reader	Kingston FCR-HS4	COTS	
ATI	ATI handset	Proprietary	
ATI	ATI-USB handset	Proprietary	
ACS PC-Linked Smart Card Reader	ACR39U	COTS	

System Limitations

This table depicts the limits the system has been tested and certified to meet.

Characteristic	Limiting Component	Limit	Comment
Ballot positions	Ballot	292*/462**	Both
Precincts in an election	EMS	1000; 250	Standard; Express
Contests in an election	EMS	1000; 250	Standard; Express
Candidates/Counters in an election	EMS	10000; 2500	Standard; Express
Candidates/Counters in a precinct	Ballot	240*/462**	Both
Candidates/Counters in a tabulator	Tabulator	10000; 2500	Standard; Express
Ballot Styles in an election	Tabulator	3000; 750	Standard; Express
Ballot IDs in a tabulator	Tabulator	200	Both
Contests in a ballot style	Ballot	38*/156**	Both
Candidates in a contest	Ballot	240*/231**	Both
Ballot styles in a precinct	Tabulator	5	Both
Number of political parties	Tabulator	30	Both
"vote for" in a contest	Ballot	24*/30**	Both
Supported languages in an election	Tabulator	5	Both
Number of write-ins	Ballot	24*/462**	Both

* Reflects the system limit for a ballot printed in landscape.

** Reflects the system limit for a ballot printed in portrait.

Functionality
2005 VVSG Supported Functionality Declaration

Feature/Characteristic	Yes/No	Comment
Voter Verified Paper Audit Trails		
VVPAT	YES	
Accessibility		
Forward Approach	YES	
Parallel (Side) Approach	YES	
Closed Primary		
Primary: Closed	YES	
Open Primary		
Primary: Open Standard (provide definition of how supported)	YES	
Primary: Open Blanket (provide definition of how supported)	YES	
Partisan & Non-Partisan:		
Partisan & Non-Partisan: Vote for 1 of N race	YES	
Partisan & Non-Partisan: Multi-member ("vote for N of M") board races	YES	
Partisan & Non-Partisan: "vote for 1" race with a single candidate and write-in voting	YES	
Partisan & Non-Partisan "vote for 1" race with no declared candidates and write-in voting	YES	
Write-In Voting:		
Write-in Voting: System default is a voting position identified for write-ins.	YES	
Write-in Voting: Without selecting a write in position.	NO	
Write-in: With No Declared Candidates	YES	
Write-in: Identification of write-ins for resolution at central count	YES	
Primary Presidential Delegation Nominations & Slates:		
Primary Presidential Delegation Nominations: Displayed delegate slates for each presidential party	YES	
Slate & Group Voting: one selection votes the slate.	YES	
Ballot Rotation:		
Rotation of Names within an Office, define all supported rotation methods for location on the ballot and vote tabulation/reporting	YES	Equal time rotation
Straight Party Voting:		
Straight Party: A single selection for partisan races in a general election	YES	
Straight Party: Vote for each candidate individually	YES	
Straight Party: Modify straight party selections with crossover votes	YES	
Straight Party: A race without a candidate for one party	YES	
Straight Party: "N of M race (where "N">1)	YES	
Straight Party: Excludes a partisan contest from the straight party selection	YES	
Cross-Party Endorsement:		
Cross party endorsements, multiple parties endorse one candidate.	YES	
Split Precincts:		
Split Precincts: Multiple ballot styles	YES	
Split Precincts: P & M system support splits with correct contests and ballot identification of each split	YES	
Split Precincts: DRE matches voter to all applicable races.	YES	

Feature/Characteristic	Yes/No	Comment
Split Precincts: Reporting of voter counts (# of voters) to the precinct split level; Reporting of vote totals is to the precinct level	YES	
Vote N of M:		
Vote for N of M: Counts each selected candidate, if the maximum is not exceeded.	YES	
Vote for N of M: Invalidates all candidates in an overvote (paper)	YES	
Recall Issues, with options:		
Recall Issues with Options: Simple Yes/No with separate race/election. (Vote Yes or No Question)	YES	
Recall Issues with Options: Retain is the first option, Replacement candidate for the second or more options (Vote 1 of M)	NO	
Recall Issues with Options: Two contests with access to a second contest conditional upon a specific vote in contest one. (Must vote Yes to vote in 2nd contest.)	NO	
Recall Issues with Options: Two contests with access to a second contest conditional upon any vote in contest one. (Must vote Yes to vote in 2nd contest.)	NO	
Cumulative Voting		
Cumulative Voting: Voters are permitted to cast, as many votes as there are seats to be filled for one or more candidates. Voters are not limited to giving only one vote to a candidate. Instead, they can put multiple votes on one or more candidate.	NO	
Ranked Order Voting		
Ranked Order Voting: Voters can write in a ranked vote.	NO	
Ranked Order Voting: A ballot stops being counting when all ranked choices have been eliminated	NO	
Ranked Order Voting: A ballot with a skipped rank counts the vote for the next rank.	NO	
Ranked Order Voting: Voters rank candidates in a contest in order of choice. A candidate receiving a majority of the first choice votes wins. If no candidate receives a majority of first choice votes, the last place candidate is deleted, each ballot cast for the deleted candidate counts for the second choice candidate listed on the ballot. The process of eliminating the last place candidate and recounting the ballots continues until one candidate receives a majority of the vote	NO	
Ranked Order Voting: A ballot with two choices ranked the same, stops being counted at the point of two similarly ranked choices.	NO	
Ranked Order Voting: The total number of votes for two or more candidates with the least votes is less than the votes of the candidate with the next highest number of votes, the candidates with the least votes are eliminated simultaneously and their votes transferred to the next-ranked continuing candidate.	NO	

Feature/Characteristic	Yes/No	Comment
Provisional or Challenged Ballots		
Provisional/Challenged Ballots: A voted provisional ballots is identified but not included in the tabulation, but can be added in the central count.	YES	
Provisional/Challenged Ballots: A voted provisional ballots is included in the tabulation, but is identified and can be subtracted in the central count	NO	
Provisional/Challenged Ballots: Provisional ballots maintain the secrecy of the ballot.	YES	
Overvotes (must support for specific type of voting system)		
Overvotes: P & M: Overvote invalidates the vote. Define how overvotes are counted.	YES	Overvotes cause a warning to the voter and can be configured to allow voter to override.
Overvotes: DRE: Prevented from or requires correction of overvoting.	YES	
Overvotes: If a system does not prevent overvotes, it must count them. Define how overvotes are counted.	YES	If allowed via voter override, overvotes are tallied separately.
Overvotes: DRE systems that provide a method to data enter absentee votes must account for overvotes.	N/A	
Undervotes		
Undervotes: System counts undervotes cast for accounting purposes	YES	
Blank Ballots		
Totally Blank Ballots: Any blank ballot alert is tested.	YES	Precinct voters receive a warning; both precinct and central scanners will warn on blank ballots.
Totally Blank Ballots: If blank ballots are not immediately processed, there must be a provision to recognize and accept them	YES	Blank ballots are flagged. These ballots can be manually examined and then be scanned and accepted as blank; or precinct voter can override and accept.
Totally Blank Ballots: If operators can access a blank ballot, there must be a provision for resolution.	YES	Operators can examine a blank ballot, re-mark if needed and allowed, and then re-scan it.
Networking		
Wide Area Network – Use of Modems	NO	
Wide Area Network – Use of Wireless	NO	
Local Area Network – Use of TCP/IP	YES	Client/server only
Local Area Network – Use of Infrared	NO	
Local Area Network – Use of Wireless	NO	
FIPS 140-2 validated cryptographic module	YES	

Feature/Characteristic	Yes/No	Comment
Used as (if applicable):		
Precinct counting device	YES	ImageCast Precinct
Central counting device	YES	ImageCast Central

Baseline Certification Engineering Change Orders (ECO)

ECO #	Component	Description
100306	ICP PCOS-320C & ICP PCOS-321C	Adjusted footprint of L1 surface mount inductor to improve fit of part.
100316	ICP PCOS-320C & ICP PCOS-321C	Added clip to hold the DSD cable in place to prevent pinching the cable during assembly and to improve the speed of the assembly process.
100323	ICP PCOS-320C & ICP PCOS-321C	Replaced side door hinge to eliminate pre-installation prep work that was required and reduce the cost of assembly.
COTS-1015	ICX Tablet (Classic)	New BIOS from manufacturer to provide power up when AC applied.

KRISTINA KARAMO, PHILIP O'HALLORAN,
MD, BRADEN GIACOBAZZI, TIMOTHY
MAHONEY, KRISTIE WALLS, PATRICIA
FARMER, ELECTION INTEGRITY FUND AND
FORCE,

      Plaintiffs,

v

JANICE WINFREY, in her official capacity as
Detroit City Clerk, CITY OF DETROIT BOARD OF
ELECTION INSPECTORS, in their official capacity,

      Defendants.

No. 22-012759

HON. TIMOTHY M. KENNEY

**ATTORNEY GENERAL DANA
NESSEL'S AMICUS BRIEF
IN SUPPORT OF DEFENDANTS'
POST-HEARING BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION**

EXHIBIT C

MEMORANDUM

DATE: August 22, 2022
TO: County Clerks
FROM: Michigan Department of State, Bureau of Elections
SUBJECT: Recounts; Release of Security

Please be advised of the following:

STATE RECOUNTS: The Board of State Canvassers completed its canvass of the August 2, 2022 primary election on Friday, August 19, 2022. The deadline for filing a petition for a recount with the Secretary of State elapsed today. The following recount request was received by the Secretary of State by the recount petition filing deadline:

- 34th State House District Republican Primary: Lenawee County

CONDUCT OF LOCAL RECOUNTS: Recounts requested for local offices and ballot questions that overlap the district listed above may not proceed until clearance is received through this office. Recounts requested for local offices that do not overlap the district listed above may proceed at this time.

DEADLINE FOR COMPLETION OF RECOUNTS: "All recounts shall be completed for a primary election not later than the twentieth day ... immediately following the last day for filing counter petitions or the first day that recounts may lawfully begin." MCL 168.875.

Since absent voter ballots must be available for the November 8, 2022 general election no later than September 24, 2020, all county canvassing boards are urged to complete any requested recounts no later than **Friday, September 9, 2022.**

CONDUCT OF POST-ELECTION AUDITS: If a county has chosen to conduct post-election audits and a recount has been requested involving a precinct that has been selected for a post-election audit, the audit may not begin until after the recount has been completed. All other post-election audits may proceed at this time.

RELEASE OF SECURITY: The security of ballots and election equipment is released as follows:

Ballots, programs and related materials: The security of all optical scan ballots, programs, test decks, accuracy test results, edit listings and any other related materials is released under the Rules for Electronic Voting Systems, R 168.790(18), as of September 18, 2022 except in those areas where local recounts extend beyond September 18, 2022. Optical scan ballots and materials involved in local recounts which extend beyond September 18 can be released by the Board of County Canvassers upon the successful completion of the recount.

E-Pollbook laptops and flash drives: The EPB software and associated files must be deleted from all devices by the seventh calendar day following the final canvass and certification of the election (August 26, 2022) unless a petition for recount has been filed and the recount has not been completed or the deletion of the data has been stayed by an order of the court or the Secretary of State. The EPB paper printout has already been produced and secured on election night. Jurisdictions should consult with city, township, or county counsel regarding any pending court orders, subpoenas, or records requests regarding these materials.

"EARLY RELEASE" OPTION IF NO STATE OR LOCAL RECOUNTS ARE PENDING: Michigan election law, MCL 168.799a(4), provides the following:

> "Unless a petition for recount has been filed and the recount has not been completed, ballots, ballot labels, programs, test results, and other sealed materials may be released from their original seal after 7 days following the final determination of the board of canvassers with respect to the election at which the ballots were voted. However, the released materials shall be secured and preserved for the time period required by this act and the rules promulgated by the secretary of state."

A jurisdiction that wishes to take advantage of the above retention procedures to free electronic voting equipment for the upcoming November 8 general election may break the seals on the materials any time after August 26, 2022 and then seal the materials in an approved ballot container through September 18, 2022. Programs contained on memory devices may be downloaded to other media during the transfer of the materials to free the memory devices for the upcoming election.

FEDERAL BALLOT RETENTION REQUIREMENT: If the office of President, U.S. Senator or U.S. Representative in Congress appears on the ballot (the office of U.S. Representative in Congress appeared on the August 2 primary ballot), federal law requires that all documents relating to the election -- including optical scan ballots and the programs used to tabulate optical scan ballots -- be retained for 22 months. To comply with the requirement, the Bureau of Elections recommends that optical scan ballots and the programs relating to federal elections be stored in <u>sealed ballot bags</u> in a secure place during the 22-month retention period. The documents subject to the federal retention requirement must not be transferred to ballot bags for extended retention until after they are released under Michigan election law as detailed in this memo.

<u>**Questions?**</u>

If you have any questions, please contact us via email at <u>elections@michigan.gov</u>, or by phone at (517) 335-3234 or (800) 292-5973.

KRISTINA KARAMO, PHILIP O'HALLORAN, MD, BRADEN GIACOBAZZI, TIMOTHY MAHONEY, KRISTIE WALLS, PATRICIA FARMER, ELECTION INTEGRITY FUND AND FORCE,

      Plaintiffs,

v

JANICE WINFREY, in her official capacity as Detroit City Clerk, CITY OF DETROIT BOARD OF ELECTION INSPECTORS, in their official capacity,

      Defendants.

No. 22-012759

HON. TIMOTHY M. KENNEY

ATTORNEY GENERAL DANA NESSEL'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' POST-HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
GRAND RAPIDS DIVISION

JASON ICKES, voter	
KEN BEYER, voter	
MACOMB COUNTY REPUBLICAN PARTY by its officers of the Executive Committee,	**Civil Action No. : 22-cv-00817**
	HON. PAUL L. MALONY
DONNA BRANDENBURG, US Tax Payers Candidate for the 2022 Governor of Michigan,	**MAG. PHILLIP J. GREEN**
ELECTION INTEGRITY FUND AND FORCE, a Michigan non-profit corporation, AND	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; CERTIFICATION**
SHARON OLSON, in her official capacity as the Clerk of Irving Township Barry County	
Plaintiffs,	
v.	
GRETCHEN WHITMER, in her official capacity as the Governor of Michigan, and	
JOCELYN BENSON, in her official capacity as Michigan Secretary of State	
MICHIGAN BOARD OF STATE CANVASSERS,	
Defendants.	

Daniel J. Hartman (P52632)	**HEATHER S. MEINGAST (P55439)**
Attorney for Plaintiffs	Erik A Grill (P64713)
PO BOX 307	**Bryan W. Beach (P69681)**
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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' TO MOTION TO
DISMISS; CERTIFICATION OF COMPLIANCE

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INTRODUCTION

This case is not about the 2020 election. The case is simply whether the electronic voting systems in Michigan are 'qualified" under Michigan law to run an election. The qualifications in the federal Help America Vote Act of 2022 are also set by the Michigan Election Code which is Public Act 116 of 1956 (MCL 168.1 et seq). In general, Michigan adopted the federal standards for a voting system provided by the US Election Assistance Commission.

The Secretary of State has failed to ensure that the machines were and are qualified to run the elections-a duty imposed on the Secretary of State by law.

The laws are designed to protect the purity of Michigan elections by meeting certain security and transparency standards.

While the defendants argue this case is about an attack on the legitimacy of the 2020 election it is a basic question seeking declaratory, injunctive, and mandamus relief on the issue of what is required by federal standards and Michigan law for an electronic voting system to be used to conduct a Michigan election.

STATEMENT OF FACTS

The facts are simple. The Michigan Secretary of State selected three manufacturers for counties to choose from for their voting systems. These were chosen and required to be used with a uniform configuration. There is a federal requirement that Michigan adopted that requires the machines meet or exceed the VVSG. The evidence of this is a certification provided after an accredited VSTL tests the voting system as configured against the VVSG standards. Michigan law requires additional certification and approval as permitted by federal law.

The Secretary of State has the duty to ensure compliance with federal law. There was non-compliance during the 2020 presidential election and there is about to be non-compliance in

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the Michigan 2022 Midterm Election on November 8, 2022. Nevertheless, the illegal use of the

machines did not stop the Governor and Michigan Board of Canvassers from certifying the

Michigan election results.

STATEMENT OF APPLICABLE LAW

The Help America Vote Act of 2002 defines a voting system as:

> **42 USC 15481.SEC. 301. VOTING SYSTEMS STANDARDS**
> **b) VOTING SYSTEM DEFINED**.—In this section, the term ''voting system'' means—
> (1) the total combination of mechanical, electromechanical, or electronic equipment
> (including the software, firmware, and documentation required to program, control, and
> support the equipment) that is used—
> > (A) to define ballots;
> > (B) to cast and count votes;
> > (C) to report or display election results; and
> > (D) to maintain and produce any *audit trail* information; and
> (2) the practices and associated documentation used—
> > (A) to identify system components and versions of such components;
> > (B) to test the system during its development and maintenance;
> > (C) to maintain records of system errors and defects;
> > (D) to determine specific system changes to be made to a system after the initial
> > qualification of the system; and
> > (E) to make available any materials to the voter (such as notices, instructions,
> > forms, or paper ballots).

Therefore, the voting system includes a *configuration* of software and hardware which is used to

not only to count votes and display results but to also "maintain and produce any *audit trail*

information". Part 2 of the definition of a voting system includes the practices and

documentation which are described by the plaintiff as '*certification'* and '*accreditation'*, in part.

Finally, the voting system includes materials given to voters from the ballot to instructions.

The voting system has REQUIREMENTS in section 301a2 for an "audit trail"

information.

> **42 USC 15481.SEC. 301**
> **a) REQUIREMENTS.**—Each voting system used in an election for Federal office shall
> meet the following requirements:

(2) AUDIT CAPACITY.— (A) IN GENERAL.—The voting system shall produce a record with an audit capacity for such system.
(B) MANUAL AUDIT CAPACITY.—
(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.
(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.
(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

The Help America Vote Act of 2002 (HAVA) then proceeds to create the US

election Assistance Commission to designate this agency to create voluntary standards

for the voting systems and a system of compliance by accrediting laboratories to certify

that the system as configured meets the current standards—this agency was created with

the obvious realization that the standards will evolve and need to be applied to a variety

of configurations.. The US EAC agency is complex, and we will discuss below its role.

HAVA also provides that these are minimum requirements and permits states to

enact stricter standards that are not inconsistent.

42 USC 15484.SEC. 304
MINIMUM REQUIREMENTS. The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title or any law described in section 906.

The applicable Michigan law that describes the requirements of an electronic voting

system are found at MCL 168.764a; MCL 168.795 and MCL 168.795a. These are requirements

that are not inconsistent and impose additional requirements. Specifically, MCL 168.795a states:

MCL 168.795a Electronic voting system; approval by board of state canvassers; conditions; approval of improvement or change; inapplicability of subsection (1); intent to purchase statement; instruction in operation and use; disapproval.
Sec. 795a.

(1) An electronic voting system **shall not be used** in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and unless it meets 1 of the following conditions:

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

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

Michigan law requires an additional series of steps. This includes approval by the board of state canvassers and one of two requirements listed in subparts (a) and (b). The national association of state election directors neither accredited an 'independent testing authority' nor established 'performance standards'. This law is therefore not complied with and its more restrictive requirements are not inconsistent with HAVA and as such are included in 42 USC 15484.SEC. 304 as requirements for the use of the voting system.

The US Election Assistance Commission has a defined process for both (a) <u>accreditation</u> of a Voting System Test Laboratory (VSTL) which is reduced to a written process in the manual VSTL 2.0 , and (b) standards for <u>certification</u> of a *configuration* of a voting system (hardware, software, audit trail, and instructions) which is reduced to writing in the Voluntary Voting System Guidelines (VVSG) of which the current version as of 2021 is version 2.0 but at the time of the 2020 election was VVSG 1.1. Michigan adopted the VVSG as a requirement at the time it accepted federal money and this is reflected in law which assigned the "duty" of compliance with the Help America Vote act to the Michigan Secretary of State in MCL 168.509n.

168.509n Secretary of state; duties.

The secretary of state is responsible for the coordination of the requirements imposed under this chapter, the national voter registration act of 1993, and the help America vote act of 2002

The Federal Register with all the other states and territories published the original

Michigan plan of HAVA compliance on March 24, 2004, but then Secretary of State Terri Land

submitted an amended state plan dated September 27, 2005, which was published on November

9, 2005. There is no evidence that this plan has been updated subsequently on the internet or

readily accessible records of the MI SOS or US EAC. On page 31 of the State Plan, the

document reads:

> IV. Voting System Guidelines and Processes How the State will adopt voting system guidelines and processes, which are consistent with the requirements of section 301. -- HAVA §254(a)(4)
> **Michigan has adopted legislation that mandates the implementation of a statewide, uniform voting system (PA 91 of 2002)**. **The voting system selected will meet the requirements of Section 301 of the Help America Vote Act,** including all accessibility requirements.
> It is important to note that Michigan adopted a *uniform* voting system which requires the

county to select from 1 of 3 election systems by manufacturers: Hart-Interactive, Dominion and

E S& S. The configuration is required to be uniform and to be certified by an accredited VSTL in

accordance with HAVA and Michigan law.

Voting System Test Laboratory Standards or VSTL. The EAC describes VSTL Voting

System Test Laboratories (VSTL) | U.S. Election Assistance Commission (eac.gov)

> Section 231(b) of the **Help America Vote Act (HAVA) of 2002** (42 U.S.C. §15371(b)) requires that the EAC provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards. Generally, the EAC considers for accreditation those laboratories evaluated and recommend by the **National Institute of Standards and Technology** (NIST) pursuant to HAVA Section 231(b)(1).
> However, consistent with HAVA Section 231(b)(2)(B), the Commission may also vote to accredit laboratories outside of those recommended by NIST upon publication of an explanation of the reason for any such accreditation.
> In order to meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The

procedural requirements of the program are established in the proposed information collection, the EAC **Voting System Test Laboratory Accreditation Program Manual**. Although participation in the program is voluntary, **adherence to the program's procedural requirements is mandatory for participants**. The procedural requirements of this **Manual will supersede any** prior laboratory accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's **Voting System Testing and Certification Program Manual** (OMB 3265-0019).

This is about accreditation. This is the authority granted by the EAC to a laboratory to test a system and provide a certificate that the voting system meets or exceeds minimum standards. The voting systems are certified by laboratories that are accredited.

Here are the rules of the accreditation. The procedural requirements are mandatory if a laboratory voluntarily participates. The Accreditation Program Manual (APM) supersedes prior accreditation requirements. The APM must be read in conjunction with the Certification Program Manual (CPM). This seems obvious that the accreditation means that the laboratory can apply the CPM to a voting system to test it for compliance before issuing a certification.

The Motion for dismissal Plaintiff the Defendants attacked the claims that PRO V & V was not accredited as the plaintiff pled it was lapsed and defends the position on the fact that there was no "revocation" of accreditation. While there is a process for revocation which was not alleged to have occurred nor is it required when an accreditation lapses…the more relevant inquiry is what does the APM say about the DURATION of an accreditation. Is it one time and good forever until revoked as the defendants assert or imply? Is it good for a period and then it must be renewed or it expires, lapse and becomes unaccredited as the Plaintiffs claim?

In Section 1.3 of the APM 2.0 it describes the role of NIST:

1.3. Role of the National Institute of Standards and Technology. Section 231(b) (1) of HAVA requires that the National Institute of Standards and Technology "conduct an evaluation of independent, non-federal laboratories and shall submit to the Commission a list of those laboratories…to be accredited…." **Additionally, HAVA Section 231(c) requires NIST to monitor and review the performance of EAC accredited laboratories.** NIST has chosen its National Voluntary Laboratory Accreditation Program

(NVLAP) to carry out these duties. NVLAP conducts a review of applicant laboratories in order to provide a measure of confidence that such laboratories are capable of performing testing of voting systems to Federal standards. **Additionally, the NVLAP program monitors laboratories by requiring regular assessments. Laboratories are reviewed one year after their initial accreditation and biennially thereafter. The EAC has made NVLAP accreditation a requirement of its Laboratory Accreditation Program.** However, a NVLAP accreditation is not an EAC accreditation. EAC is the sole Federal authority for the accreditation and revocation of accreditation of Voting System Test Laboratories (VSTL).

In the highlighted areas of emphasis above it is clear working from the bottom up that the EAC has made the NVLAP accreditation a requirement its accreditation program. This is a pre-requisite. The NVLAP prerequisite is reviewed after one year and then biannually thereafter. At t his point the contents of the review is not discussed but the presence of the review after its one year of "initial accreditation" is clear that there is a one-year grant followed by two- year durations for the period of accreditation preconditioned upon an NVLAP having a 'measure of confidence that such laboratories are capable of performing testing of voting systems to Federal standards." Again, there is a review BEFORE renewal. Is this just s rule of the EAC? Nope..it a law passed by the legislature HAVA Section 231(c) which requires NIST to 'monitor and review the performance of EAC accredited laboratories."

While the accreditation of Pro V & V is a matter the court will have to decide as to the dominion systems that were present in 48 of Michigan Counties, there is no answer to the fact that 24 counties did not have even a certificate of compliance. The ES&S systems as configured in Michigan were not certified as meeting any VVSG standard. This renders the discussion of the accreditation of Pro V & V while important not controlling on the fact the 2020 election used the voting system in 24 countries without complying with the requirements of federal or state law. The debate about the other 48 counties that used dominion and accreditation is important but there is no response to the lack of certification by the ES& S systems.

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The Plaintiffs assert that the current configuration ALL of the voting systems in

Michigan is (1) not uniform as required by Michigan law and clearly designed to aid the

certification process (2) not certified as configured and that certification of another earlier

configuration is not compliant (3) not compliant with the requirements of MCL 168.794a which

requires an additional approval by the board of state canvassers of a system as meeting

performance standards which have not been established by either the manufacturer or an

accredited independent testing authority. Therefore, the Plaintiffs seek relief from future use of

voting systems that violate federal and state law.

ARGUMENT
   1. Whether the plaintiffs have standing on any of the claims in the complaint

The plaintiffs adopt and incorporate their response provided in the reply brief. ECF No. 15 Page

ID 27-33. The standing issue has been raised to avoid addressing the merit of the claim. There is

not even an attempt to claim that the ES&S systems were certified. The standing was discussed

thoroughly in the Reply Brief and further repeating is not required here. It is worth noting that

the Attorney General and Secretary of State have selectively asserted standing and when it suits

their political interests such as during the recent appeals from the Board of State Canvassers to

the Michigan Supreme Court as well as in other cases where there is a suit friendly to the

political position of the Michigan Secretary of State that the standing claims are not asserted.

   2. Whether the plaintiffs are barred by latches.

The doctrine of latches is an equitable doctrine is a legal defense which asserts that there has

been an unreasonable delay in pursuing the claim which has prejudiced the defendant to the point

it prevents them from defending the action.

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There was no unreasonable delay. The time period which has passed is not significant even to the 2020 remedy the defendant requests as the office term is still ongoing. As to the future elections, the matter is very timely filed. A common law *quo warranto* action brought by a candidate who claims that an election irregularity deprived them of office can timely bring a claim anytime during the office term There is no reason why when another person seeks to redress an election remedy that there is some magical timeline that would be shorter. As this is an equitable principle there is no precedents to point to as to the timeliness of this novel claim.

There is no evidence of prejudice in the present case. The records related to certification and accreditation (or lack thereof) as to 2020 still exist. The 2022 Midterm election is about to occur and there will be future elections. The determination if the Governor and Board of Canvassers may certify an election with an illegal voting system is very much able to be addressed without prejudice to the defense.

The Plaintiff incorporates his arguments from the reply brief in response herein. ECF 15 Pages 33-36.

3. Whether the plaintiffs statutory and constitutional claims are without merit
a. Equal Protection

The defendant reasserts the argument in the reply brief ECF No 15 Pages 36-38.

Further, the Plaintiff asserted on behalf of the voters Jason Ickes, Donna Brandenburg and Ken Beyer a violation of equal protection. In addition, candidate Donna Brandenburg sought prospective relief for the 2022 election with standing as a candidate. The equal protection claim is based squarely on *Bush v Gore, 531 US 98 (2000)* in which the Supreme Court held that a disparate vote counting procedure in different counties that tried to discern *"voter's intent"* was a violation of the Equal Protection Clause of the 14th Amendment. This triggered a requirement that each state legislatively define what a valid mark on a ballot was so that the process would

not be arbitrary and capricious. This was included in HAVA with the requirement that each state

have uniform requirements for what constitutes a vote.

42 USC 15481.SEC. 301. VOTING SYSTEMS STANDARDS.
(a) REQUIREMENTS.—Each voting system used in an election for Federal office shall meet the following requirements
(6) UNIFORM DEFINITION OF WHAT CONSTITUTES A VOTE.— Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

Michigan complied with a standard definition of what constitutes a mark as defined in

detail in MCL 168.803

> **168.803 Counting and recounting of votes; intent of voter; stray marks; instructions issued by secretary of state.**
> **(1) Except as otherwise provided in this act, the following rules govern the counting and recounting of votes:**
> **(a) If it is clearly evident from an examination of a ballot that the ballot has been mutilated for the purpose of distinguishing it or that there has been placed on the ballot some mark, printing, or writing for the purpose of distinguishing it, then that ballot is void and shall not be counted.**
> **(b) A cross, the intersection of which is within or on the line of the proper circle or square, or a check mark, the angle of which is within a circle or square, is valid. Crosses or check marks otherwise located on the ballot are void.**
> **(c) Marks other than crosses or check marks used to designate the intention of the voter shall not be counted.**
> **(d) A cross is valid even though 1 or both lines of the cross are duplicated, if the lines intersect within or on the line of the square or circle.**
> **(e) Two lines meeting within or on the line of the square or circle, although not crossing each other, are valid if it is apparent that the voter intended to make a cross.**
> **(f) A failure to properly mark a ballot as to 1 or more candidates does not alone invalidate the entire ballot if the ballot has been properly marked as to other candidates, unless the improper marking is determined to be a distinguishing mark as described in this subsection.**
> **(g) Erasures and corrections on a ballot made by the elector in a manner frequently used for this purpose shall not be considered distinguishing marks or mutilations.**
> **(h) A ballot or part of a ballot from which it is impossible to determine the elector's choice of candidate is void as to the candidate or candidates affected by that determination.**

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(i) A vote cast for a deceased candidate is void and shall not be counted, except that a vote cast for a candidate for governor who has died, and for whom a replacement has not been made, shall be counted for the candidate for lieutenant governor of that party.

(j) A ballot cast that is not counted shall be marked by the inspector "not counted", kept separate from the others by being tied or held in 1 package, and placed in the ballot box with the counted ballots.

(k) A vote shall not be counted for a candidate unless a cross or a check mark has been placed by the voter in the square before the space in which the name of the candidate has been printed, written, or placed.

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

There are clear instructions to the voter on how to mark the ballot. A voter which chooses to vote in person has the option of watching to ensure the ballot is accepted by the tabulator. Voting by absentee does not provide the voter the opportunity to correct an improperly marked ballot. There is no lawful means to alter the mark in adjudication to carry out the voter's intent and any effort to do so would be a violation of law. Alteration of the image or even duplication to remove stray marks is not permitted. A hand count of the ballot with a stray mark is permitted by MCL 168.798c

On information and belief, the software on the electronic voting system software allows the clerk to choose the standard for a "mark" by setting the pixel count range including a minimum number of pixels within the area to be marked during voting.

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As the legislature has not set a uniform standard for the adjudication to determine *voter's intent* or a standard for a pixel count that is uniform across Michigan this is an arbitrary and capricious process that violates equal protection.

However, the Dominion systems allow for adjudication…a process not authorized by law in Michigan which allows the arbitrary and capricious process of allowing election inspectors decide the voters intent. This illegal adjudication process is for sure happening in Detroit at the AVCB. Here is a video from 2017 of the Dominion CEO Eric Coomer explaining what the adjudication capability of Dominion. https://rumble.com/embed/v8upcz/

While the Defendants assert there is no violation of equal protection, there is whenever there is a denial of access to the ballot box, whenever the ballots are not counted as cast or when there is dilution of the vote. The amended complaint clearly establishes that there were both problems with counting votes as cast in Antrim County (discovered by hand recount) and Detroit (adjudication) as well as problems with ballot dilution based on the evidence presented in the film *2000 Mules.* However, the exact issue of using "voter intent" condemned in <u>*Bush v Gore,*</u> <u>supra</u>, is used in adjudication and the voting system's interpretation of a valid mark by pixel count is a setting in the control of a clerk.

b. 50 USC 20701

50 USC 70201 provides that the attorney general can bring federal criminal charges. This argument is without merit because the reference to the requirement for records retention was merely to inform the court of an already existing duty for record preservation that had both (1) been violated and (2) was about to lapse any further protections. No claim was made to enforce this rule as a criminal or civil matter. Instead, the request for relief as to record preservation was

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because the issue of fact as to compliance may come up as to whether Michigan complied with

the federal statutory requirements of the audit trail in the 2020 election.

Whether it is relevant who retains the records under Michigan law when the records necessary to demonstrate an audit trail for this lawsuit is relevant-especially when the Secretary of State has under threat of prosecution ordered the destruction of the digital audit logs from the tabulators.

The Secretary of State has ordered that the security, access and/or audit logs and possibly

ballot images that are on the removable thumb drives be erased seven (7) days after the

election. This violates Principle 15 of VVSG 2.0, the federal records retention laws 50

USC 20701, and is a felony under MCL 168.932c. This argument is not premised on the

Plaintiffs'ability to enforce these criminal violations but rather offered to show that the

this is willful misconduct that will remove the trial courts ability to review the audic

capacity and audit trail to understand both the accuracy of the election and compliance

with the federal VVSG standards. Why delete this information? What is being hidden?

  MCL 168.932 Prohibited conduct; violation as felony.

  A person who violates 1 or more of the following subdivisions is guilty of a felony:

(c) An inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or fraudulently make any entry, erasure, or alteration on any or all of those items, or permit any other person to do so.

While it is true that the responsibility is on the clerks, the Secretary of State used their authority under MCL 168.22 to order the destruction of the August 2, 2022, Primary Data on the removable disc drives.

  168.21 Secretary of state; chief election officer, powers and duties.
   The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.

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The plaintiffs seek the protection of the election data that would provide an audit trail as this information may be required to adjudicate the present lawsuit. The defendant incorporates the discussion from the Reply brief here.

c. Whether any claims of the plaintiff are barred by the 11th Amendment

The 11th Amendment is only a bar to a claim for money damages which was not sought except as to the violations of the civil rights under 1983. The 11th Amendment does not preclude declaratory relief, injunctive relief, or mandamus relief. The Defendants fail to itemize which claims are barred by the 11th Amendment and will not result in dismissal of the complaint. The Plaintiff realleges all arguments made in the reply brief here. ECF No 15 Page 38.

IV. Whether the plaintiffs are entitled to declaratory relief

This claims that there is no case or controversy and that the matters are not ripe. The case or controversy is most apparent with the clerk Sharon Olson who seeks guidance on the use of the machine which appears to be illegal in the conduct of her election. The guidance of the federal court related to the effect of non-compliance with the federal statute by the Michigan Secretary of State is critical. There is a case or controversy. Again, the ripeness argument seems absurd in that the Election for November 8, 2022 is days away at the writing of this brief and yet another election will occur with some counties in Michigan using voting systems in violation of federal and state law.

Conclusion

Defendant's motion to dismiss should be denied for the reasons stated herein.

Dated: 10/26/2022   /S/ Daniel J. Hartman
                                                     Daniel J. Hartman (P52632)

Certificate of Compliance with Type-Volume Limit and Typeface Requirements

1. This brief complies with the type-volume limitation of Local Rule 7.2(b)(ii) because, excluding the part of the document exempted by this rule, this brief contains less than 10,800 words. This document contains 4879 words.

2. This document complies with the typeface requirements of Local Rule 7.2(b)(ii) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 12-point Times New Roman.

DATED: 10/26/2022   /S/ Daniel J Hartman
                                                      Daniel J Hartman (P52632)

KRISTINA KARAMO, PHILIP O'HALLORAN,
MD, BRADEN GIACOBAZZI, TIMOTHY
MAHONEY, KRISTIE WALLS, PATRICIA
FARMER, ELECTION INTEGRITY FUND AND
FORCE,

       Plaintiffs,

v

JANICE WINFREY, in her official capacity as
Detroit City Clerk, CITY OF DETROIT BOARD OF
ELECTION INSPECTORS, in their official capacity,

       Defendants.

No. 22-012759

HON. TIMOTHY M. KENNEY

**ATTORNEY GENERAL DANA
NESSEL'S AMICUS BRIEF
IN SUPPORT OF DEFENDANTS'
POST-HEARING BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION**

EXHIBIT E

October 28, 2022

Dear Clerks:

The Bureau of Elections is aware that clerks have received a document, purporting to be a "Memorandum of Law," urging clerks to violate the Michigan Election Law and disregard the lawful determinations of Michigan's 83 county clerks by switching to "hand counting" ballots weeks before a statewide general election.

At the outset, it is important to understand that each clerk should seek legal advice from their own municipal or county legal counsel, not from outside parties claiming to offer a "legal opinion". Clerks and local and county legal counsel may in turn seek input from local government associations, including the Michigan Association of Municipal Clerks, Michigan Association of County Clerks, Michigan Townships Association, Michigan Municipal League, and Michigan Association of Counties. The Bureau of Elections, on behalf of the Michigan Secretary of State, has supervisory control over local election officials in the performance of their duties under the Michigan Election Law, and issues instructions and advises and directs clerks in the proper methods of conducting elections. MCL 168.31.

The Michigan Election Law includes the requirements enacted by our State Legislature governing the conduct of elections. Decades ago, the Michigan State Legislature enacted provisions of the Michigan Election Law that clearly and expressly require that ballots be counted by a certified electronic system. MCL 168.37, 795, 795a. The Michigan Election Law does not allow county or state officials to waive these requirements. Suggestions that local clerks may simply disregard the requirements of the Michigan Election Law if they choose to do so have no valid basis in law and put clerks at risk of willfully failing to perform duties required of them by law, which can carry criminal penalties. MCL 168.931(h).

Further, the Michigan Election Law clearly and expressly states that county clerks choose the voting systems for each county, in consultation with city and township clerks. Once the system is selected, the Michigan Election Law does not provide authority for city or township clerks to choose a different system or to refuse to use the system to tabulate ballots on election day. Specifically, MCL 168.37a states that "a county clerk, in consultation with each city and township clerk in the county" will "determine which electronic voting system will be used in the county[.]"

Before voting systems are purchased or used in Michigan, they are approved by the Board of State Canvassers, a bipartisan body that is assisted by the Bureau of Elections but is independent of the Michigan Secretary of State. In 2017, the Board of State Canvassers (BSC) approved the three voting systems for use in Michigan as required by MCL 168.795a. Prior to approval, the systems were tested by one of the Election Assistance Commission (EAC)-accredited voting

systems test laboratories (VSTL[1]), and then were subject to rigorous Michigan-specific testing conducted by BOE. Only after BSC approval did county clerks determine which voting system would be used in the county.

County clerks across the state consulted with their local clerks and determined which of the 3 certified voting systems would be used. The voting systems were implemented in 2017 and 2018 and have been in continuous use since. Since that time, the Bureau has tested and the Board of State Canvassers have approved software and hardware updates to each system as required by state law.

In addition to the initial testing and certification process, county and municipal clerks adhere to strict security and testing requirements for each election. Prior to this election, all clerks have or soon will conduct public accuracy testing using test ballots to ensure the tabulators are counting ballots as expected.

After pre-election testing and the election occurs, there are numerous post-election safeguards to ensure the tabulators properly counted paper ballots. Paper ballots are secured in approved, sealed storage containers. In each county, a bipartisan board of county canvassers verify that the tapes printed from each tabulator match the reported results and can identify and correct any errors as needed before certification. Following county and state certification, any candidate who believes the tabulators did not count paper ballots correctly can request a recount. Following that, municipal, county, and state election officials participate in post-election audits which include hand counts of paper ballots in numerous precincts across the state to verify that they were tabulated correctly.

Even after all of these processes, paper ballots are retained for 22 months following each federal election. Any individual who truly believes that tabulators do not count paper ballots correctly, and seeks to provide actual evidence for this belief, has had every ability to inspect paper ballots from past elections and show that ballots were tabulated improperly. As clerks are no doubt aware, nobody has come forth with such evidence.

Election officials have worked diligently and cooperatively over the last two years to prepare for a safe, secure, and impartial November 2022 election. This includes thorough and extensive protocols to ensure legally mandated electronic voting equipment is secure and programmed properly to tabulate ballots. After election day, election officials will follow required post-election protocols for the canvass, certification, recount, and audit of election results to further verify equipment functioned properly.

As noted above, you should consult carefully with your municipal or county legal counsel to evaluate the merits of any legal arguments you receive form outside entities. The November 2022 election must be conducted with certified electronic tabulators that count paper ballots, selected by county clerks for each county as required by law. Unfortunately, clerks have received numerous communications sharing false claims, misstatements of fact, and legal arguments that are baseless and incomprehensible. Unlike clerks, the individuals making these claims are not responsible for conducting elections under the requirements of the Michigan Election Law.

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[1] Past claims that VSTLs are not EAC-certified are false. For additional details, see my letter of July 28, 2022. Systems used in Michigan, like those in other states, were tested under Voluntary Voting System Guidelines (VSSG) standards. The EAC has approved a next-generation standard, VVSG 2.0, for future testing and certification, but that standard is not yet required for testing by the EAC or in any state.

Under these requirements, voting systems used in Michigan have been properly selected, purchased, certified, and tested, and are the lawful method of conducting the upcoming election. Please contact the Bureau of Elections if you have any additional questions regarding this matter. As always, thank you for your hard work and dedication to Michigan's voters, especially at this time.

Sincerely,

Jonathan Brater, Director
Bureau of Elections

MEMORANDUM OF LAW

TO: Local Election Clerks: City, Township, and County

DATE: 10/2/2022; Revised 10/18/2022

FROM: Daniel J. Hartman, JD
              Mi License #P52632
              Attorney at Law
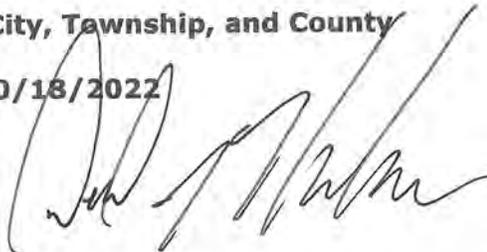
RE: Michigan Tabulator Use Requirements

The following contains legal advice and is the opinion of Daniel J. Hartman.

Legal issues are often raised and resolved with court determinations. The purpose of the opinion is to advise on a specific issue of law for the intended recipients. No attorney-client relationship is asserted.

The opinion is dated and summarizes the law as of the date the opinion is written and is intended to advise the client or in this case the public. It is understood that there may be differing opinions by other lawyers and ultimately the issue may be decided in a court of law.

A legal opinion is intended to apply a body of law to a particular set of facts at a reference point in time. Upon approval, an opinion and or representation is available for a clerk seeking to have a court make the determination that the use of the electronic voting system is impracticable.

QUESTION PRESENTED:

Whether Michigan Election Law[1] mandates the use of an electronic voting system during the November 8, 2022 General Election to count votes? Is "Hand Counting" of ballots prohibited?

ANSWER: MCL 168.798b provides authority for the local election clerk to declare the use of the electronic voting system *impracticable* and to hand count. Regardless of this determination, there is no prohibition on a hand count of ballots by the clerk. There are grounds to declare the use of the electronic voting machine impracticable. A clerk may make the declaration and proceed or seek relief in the Circuit Court for declaratory relief. The discussion below will review all relevant laws and if an election clerk would like to seek emergency declaratory relief, then the clerk may contact _____.

---

[1] An examination of the Michigan Election Law Public Act 116 of 1954, as amended.

1

DISCUSSION

There are no Michigan court decisions from the Michigan Supreme Court or from the Michigan Court of Appeals that have resolved or considered the issue that is addressed in this memo.

I have reviewed several letters containing opinions from the Michigan Secretary of State Bureau of Elections Jonathon Brater which cite MCL 168.31; MCL 168.765 and MCL 168.765A as authority for his conclusion that the use of the tabulator is required by Michigan Law.

MCL 168.4 (h) "Uniform voting system" means the type of voting system that is used at all elections in every election precinct throughout the state. This definition implies *use* in the definition. The definition is not a law that requires *use* or set the terms and conditions of *use*. The definition clearly expresses limiting *use* to an authorized system and prohibiting the *use* of an unauthorized system.

Statutory Interpretation[2]

There is no need for a court to interpret statutes when they are plain and unambiguous.[3]

MCL 8.3 General rules of construction.
Sec. 3.

   In the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.

8.3a Approved usage; technical words and phrases.

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[2] https://sgp.fas.org/crs/misc/97-589.pdf This is a guide to the Legislative Interpretation of US Laws but is not specific to Michigan. This is a Michigan update that discusses recent cases but no exhaustive guide was found readily available. http://www.legintent.com/pa/Michigan.pdf And here is a general summary from another state that summarizes the general concepts applied in all states. https://isb.idaho.gov/wp-content/uploads/canons_w_commentary.pdf

[3] A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v. Gurwin*, 443 Mich. 59, 65; 503 N.W.2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co. v. Ward*, 460 Mich. 230; 596 N.W.2d 119 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v. Auto Club Ins. Ass'n.*, 448 Mich. 22, 27; 528 N.W.2d 621 (1995).

Sec. 3a.

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Michigan Courts have also established rules for a Michigan Court to use when interpreting statutes.

An examination of the Michigan Election Law Public Act 116 of 1954, as amended, on the issue stated above starts with consideration of the Bureau of Elections' opinion regarding the interpretation and provides "respectful consideration"-- but it is not binding on the court.[4] The intent of the Legislature from the "plain meaning" of the statute is controlling.[5] Plain meaning requires an examination of the words and language used in the statute as it is written looking first at definitions of words in the statute and then when undefined using the common dictionary meaning.[6] Adding words into a poorly written statute is not permitted even when seeking to find the intent of the legislature.

MCL 168.37 is located in Section III of the Michigan Election Code and captioned as the *Duties of the Secretary of State*. The description describes the duty to select a uniform system but DOES NOT mandate its use.

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[4] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97; 754 NW2d 259 (2008).
An agency's construction of a statute is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [Id. at 103, quoting *Boyer Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935).]

[5] *Houdek v Centerville Twp*, 276 Mich App 568, -2- 581; 741 NW2d 587 (2007).
"The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute's plain language If the meaning of a statute is clear and unambiguous, then judicial construction to vary the statute's plain meaning is not permitted."

[6] "The Legislature is presumed to have intended the meaning it plainly expressed." *Watson v Mich Bureau of State Lottery*, 224 Mich App 639, 645; 569 NW2d 878 (1997). Also, "unless explicitly defined in a statute, 'every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.'" *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001), quoting *Michigan State Bldg & Constr Trades Counsel, AFL-CIO v Director, Dep't of Labor*, 241 Mich App 406, 411; 616 NW2d 697 (2000). Because undefined terms must be given their plain and ordinary meanings, it is proper to consult a dictionary to define terms. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008).

MCL 168.37 Uniform voting system; advisory committee; selection; notice of selection; schedule for acquisition and implementation; repetition of process.

Sec. 37.

(1) *The secretary of state shall select a uniform voting system under the provisions of this section.* The secretary of state shall convene an advisory committee on the selection of the uniform voting system, whose membership represents county, city, and township election officials and other relevant organizations. In addition, the speaker and minority leader of the house of representatives and the majority and minority leaders of the senate may each appoint 1 advisory committee member.

(2) The secretary of state may conduct tests of a voting system in order to select the uniform voting system. The secretary of state shall not consider a voting system for selection as the uniform voting system unless the voting system is approved and certified as provided in section 795a. At the secretary of state's request, the board of state canvassers shall perform the approval and certification review, as provided in section 795a, of a voting system that the secretary of state wants to consider for selection as the uniform voting system.

(3) When the uniform voting system is selected or at an earlier time that the secretary of state considers advisable, the secretary of state shall notify each county, city, and township about the selection or impending selection of the uniform voting system. *A governmental unit that is notified under this subsection shall* **not** *purchase or enter into a contract to purchase a voting system other than the uniform voting system after receipt of the notice*.

(4) After selection of the uniform voting system, the secretary of state shall establish a schedule for acquisition and implementation of the uniform voting system throughout this state. The secretary of state may devise a schedule that institutes the uniform voting system over several election cycles. The secretary of state shall widely publicize the schedule and changes to the schedule. *If, however, a jurisdiction has acquired a new voting system within 8 years before the jurisdiction receives notice from the secretary of state under subsection (3), that jurisdiction is not required to acquire and use the uniform voting system until the expiration of 10 years after the date of the original purchase of the equipment.*

(5) If, after selection of the uniform voting system, the secretary of state determines that the uniform voting system no longer serves the welfare of the voters or has become out of date in regards to voting system technology, the secretary of state may repeat the process for selecting the uniform voting system authorized under this section.

(6) *This section does not apply until money is appropriated for the purpose of selecting, acquiring, and implementing the uniform voting system*. If federal money becomes available for the purposes described in this section, the secretary of state shall, and the legislature intends to, take the steps necessary to qualify for and appropriate that money for the purposes described in this section.

Under Section 37(1) the Secretary of State is mandated to select a uniform system. The use of the word shall relate to the selection of a system. This subsection also does not address the township or city clerks who run elections.

Under Section 37(3), this is a prohibition on the local jurisdiction from purchasing any voting system other than the uniform system after receipt of the notice. Therefore, there is only the uniform system available as no other can be purchased.

Under Section 37(4), this language describes the requirement that the Secretary of State establishes a "schedule: for acquisition and implementation of the uniform voting system throughout the state. It does reference in clause three that there is an express condition that exempts the jurisdiction from acquiring or using the uniform system.

Under Section 37(6), this 2002 statute is not effective until money is appropriated. A look outside at the big picture is that this entire statute is part of the Help America Vote Act (HAVA) from the federal government which wanted to standardize and centralize voting systems. The HAVA money did not become available until later.

MCL 168.37 does require the Secretary of State to act to establish a uniform system. It provides rules for the selection and the Secretary of State is to schedule implementation. It also makes the use of one of the uniform voting systems the only option for election officials--but it does not mandate the use of any system in the local jurisdiction.
MCL 168.37(4) : instead of making a requirement for jurisdictions to acquire and use it actually states a term upon which excludes them from acquisition and use.

MCL 168.37 (6) is very clear that this legislation is not effective until a future occurrence of appropriation. This appropriation has occurred and so MCL 168.37 became mandatory. On September 27, 2005, then Secretary of State Terry Land submitted the State Plan under Help America Vote Act but the actual selection of electronic voting systems by the county boards did not commence until 2017 and 2018 after approval by the state administrative board on January 24, 2017, for funding the purchase. Voting system purchase (michigan.gov)

The absence of specific requirements for a jurisdiction to participate cannot be inferred. As it is not expressly stated within MCL 168.37 then there is no mandatory provision for use of the voting system. However, if a system is used it must be one of the uniform voting systems.

When the rest of the Michigan Election Code is examined as to the "use" of the standardized electronic voting system are considered it will be clear that the local jurisdiction retains control over whether to use the system-but if a system is used then it must be the uniform system.

In conclusion, MCL 168.37 does not expressly require jurisdictions to use a uniform voting system. There is no definition of what the components of the 'system' are and whether the tabulator is included. The section is aimed at the Secretary of State who has the duty to offer the uniform system and restricts the choice of the jurisdiction to select a system FROM the uniform system options. It should be noted that there is evidence that certain clerks have attached non-conforming components in the form of software or hardware that is not part of the system approved by the SOS or board of canvassers. Three egregious examples would be the connection of the Reli-vote system in Detroit, the Konnech software to convert high-speed scanned images to the system in 2018, and the adjudication software module from Dominion. The addition of

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these components would violate the law as the system used is not uniform. This would distinguish the violation for having a non-uniform system versus the mandatory use of a system that is not required.

Let us examine what is part of the "Voting System"

2 USC 15481 Section 301(b) VOTING SYSTEM DEFINED.—In this section, the term "voting system" means—
 (1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—
  (A) to define ballots;
  (B) to cast and count votes;
  (C) to report or display election results; and
  (D) to maintain and produce any audit trail information; and
 (2) the practices and associated documentation used—
  (A) to identify system components and versions of such components;
  (B) to test the system during its development and maintenance;
  (C) to maintain records of system errors and defects;
  (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
  (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

MCL 168.688b

What does an express mandate look like in the law. This is offered to understand how clearly the intent of the legislature is to be expressed. This law makes the Electronic Pollbook mandatory. There is no discretion in the jurisdiction.

> **168.668b Electronic poll book software; timeline for processing voters and generating election precinct reports.**
> **Sec. 668b.**
> **(1) Each city or township *shall* use the electronic poll book software developed by the bureau of elections in each election precinct in the city or township on election day to process voters and generate election precinct reports.**

When viewing this section, it is easy to see a clear mandate. The legislature is unequivocal and states that the electronic poll book "SHALL" be used.

> **MCL 168.794a Electronic voting system; authorization; acquisition; abandonment; use; accuracy test; applicability of subsections (1) and (2).**

6

MCL 168.794a is the first section of the Election Code chapter XVIII HOLDING OF ELECTIONS under the Section Voting Machines MCL 168.790-799a.

***Please see the language as it differs from the mandatory language of **"shall"** in MCL 168.688b (Poll Book Mandatory Use to the permissive word **"may"** as used in MCL 168.794a(1).

Sec. 794a.

(1) Subject to this section, the board of commissioners of a county, the legislative body of a city or village, the township board of a township, or the school board of a school district, by a majority vote, _may_ authorize, acquire by purchase, lease, or otherwise, adopt, experiment with, or abandon an electronic voting system approved for use in this state in an election, and _may_ use the system in all or a part of the precincts within its boundaries, or in combination with other approved voting systems.

Sec. 794a.

(6) Subsection (1) <u>does not apply</u> to a county, city, village, township, or school district <u>after</u> the county, city, village, township, or school district receives the secretary of state's <u>notice under section 37.</u> [Clause #1]

The legislative body of the jurisdiction was empowered _to choose_ with permission to authorize, acquire by purchase, lease, adopt, experiment with, or abandon an electronic voting system approved for use. It is not mandatory even after approved for use.

Pursuant to MCL 168.794a(6) Subsection one no longer applies because of the notice under MCL 168.37 of the adoption of a uniform system. Therefore, the county board of commissioners, the city legislative body and the township board have no further say in the use of an electronic voting system under MCL 168.794a1.

Sec. 794a.

(6) Subsection (2) <u>shall apply</u> to a county, city, village, township, or school district <u>after</u> it receives the secretary of state's notice under <u>section 37</u> if, at the time of the notice, the county, city, village, township, or school district is <u>using an electronic voting system that is the same type as the uniform voting system.</u> [Clause #2]

MCL 168.794a provides in clause #1 that subsection 1 is limited until the SOS sends a notice under MCL 168.37 (The notice of adoption of a uniform system) BUT that clause #2 that subsection 2 shall apply AFTER the notice under MCLA 168.37 is sent to ally system using the uniform voting system. Therefore, Section 2 is an important limitation on use that PRESUPPOSES both that there is a uniform system and that the county is using the approved uniform electronic voting system. Now examine the restrictions:

7

Sec. 794a.

   (2) A new electronic voting system <u>shall not be used</u> at a general election in a county, city, or township <u>unless,</u> **in addition to the other requirements of this act,** all of the following requirements are met:

   (a) The county, city, or township purchases or otherwise acquires the electronic voting system 6 months or more before the next general election to be held in that county, city, or township.

   (b) The county, city, or township uses the electronic voting system at a primary, special, or other local election held in the county, city, or township before the general election.

MCL 168.494a(2) restricts the use of the electronic voting system. It uses the language that the electronic voting system SHALL NOT BE USED UNLESS it adds two new requirements that apply to a new system and have occurred. These are 'one and done' restrictions...but there is another phrase which is emphasized above.... "in addition to the other requirements of this Act"

What are the other requirements of this Act? It is any restriction contained in the Public Act 116 of 1954 as amended by The Election Code. Therefore, the plain language is that there are requirements that are PRECONDITIONS to the use of the electronic voting system EVEN after the system has been approved, purchased, and used. It is not limited to this section or it would have said "Section" instead of "Act".

MCLA 168.794a2 added two requirements for a new system. As discussed that clause is of no effect as it was a precursor for a new system. Let's examine the next subsections.

Sec. 794a.

   (3)   The appropriate board of election commissioners shall provide for an accuracy test of an electronic voting system in the manner *prescribed in rules promulgated by the secretary of state*. The secretary of state shall prescribe procedures for preparing test decks and conducting accuracy tests for electronic voting systems in this state.

   (4)   Before an election held in a county, city, township, village, or school district, the secretary of state may randomly select and test for accuracy an electronic voting system to be used by the county, city, township, village, or school district in that election. The secretary of state shall use the test decks prepared by the secretary of state to conduct the random tests allowed under this subsection.

MCL 168.794a(3) requires there be an accuracy test. It requires that the board of election commissioners 'provide' the test in the manner prescribed by rules that are promulgated by the Secretary of State. This is a process under the rules of the Administrative Procedures Act which allows a state agency to make procedural rules (not substantive law). It requires there be notice, publication, public comment and s a formal process by which an executive branch agency creates procedural rules when authorized by the legislature as done here. The rules are to include the preparation of test decks and for conducting an accuracy test for electronic voting systems. MCL
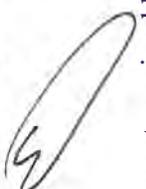
168.794a(4) provides that the Secretary of State may also test random jurisdictions and systems for accuracy.

It now requires that we turn briefly to the Administrative Rules. These are not statutes. They are numbered similarly because they refer to the code section. Therefore, the rule on Electronic Voting Systems is R 168.771 et seq…

Let us pause and examine the legislative history of MCL 168.794a which describes the promulgation of rules through a formal rulemaking process under the Administrative Procedures Act.

> **History:** Add. 1967, Act 155, Imd. Eff. June 30, 1967 ;-- Am. 1990, Act 109, Imd. Eff. June 18, 1990 ;-- Am. 1995, Act 261, Eff. Mar. 28, 1996 ;-- Am. 2002, Act 91, Eff. Apr. 9, 2002

If you click on the live link or review Public Act 91 of 2002 it will show that the requirement to promulgate rules for the electronic voting systems was added to the law in April 2002 after the federal Help America Vote Act of 2002-- at the same time the provisions that stated that the electronic voting system would take effect when the funding was provided…This 2002 rewrite of Michigan Law took 16 years to implement with the funding of purchasing approved voting systems but let us see if the Michigan Secretary of State ever promulgated new rules as REQUIRED by the law….

Rule 168.771 is now called Electronic Voting Systems when reviewed. Earlier this year these rules were called Use of Optical Scan Tabulators by Absentee Voters[7]…but what rules have been promulgated since 2002 or since 2018 to establish an accuracy test or preparation of a test deck? The Secretary of State appears just to have amended the title of the rules.

The Rules are from 1979. There were no new rules created. The old rules include an old friend "chad". R 168.771 (h) "Chad" means the scored rectangular portion of the ballot card which is punched out of the ballot card by the voter when casting a vote. There is even still a rule for a hanging chad.

R 168.783 Hanging chads.
Rule 13. (1) A ballot card with a hanging chad shall be processed by not less than
2 election inspectors of differing political party preference.
(2) A ballot card with a hanging chad shall be processed as follows:
(a) When a chad is found attached to the card by 1 or 2 corners, the chad shall
be removed by the inspector and the ballot card placed with the other ballot cards to be
tabulated.
(b) When a chad is found attached to the card by 3 corners, the number not
punched shall be circled on the original card. The original ballot card shall then be

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[7] https://casetext.com/regulation/michigan-administrative-code/department-state/elections-campaign-finance/use-of-optical-scan-tabulators-by-absentee-voters/use-of-optical-scan-tabulators-by-absentee-voters

placed in the envelope for "ORIGINAL BALLOT CARDS FOR WHICH DUPLICATES HAVE BEEN MADE FOR ANY REASON" and the duplicated ballot card, if made, placed with the other ballot cards to be tabulated. A chad hanging by 3 corners may be covered with a piece of correction tape instead of being duplicated. The original ballot card, after being corrected, shall be placed with the other ballot cards to be tabulated.
History: 1979 AC.

Another relic of a bygone era is R 168.771 (l) "Correction tape" means a tape designed solely for use in correcting errors on data processing cards. The whiteout correction tape and fluid is from a pre-digital age.

These crumbs from an old era is clear evidence that the rules relate to the manual punch card system and have not been updated. The logic and accuracy tests are from ancient technology by modern standards.

What does this say about the test deck: R 168.776 Preparation of official test deck. It is clear that this section besides indicating a 1979 effective date does not conform to Michigan Law. Therefore, the Secretary of State has neglected their duty to promulgate new rules for the deck to be used in the accuracy test. The guidance or instructions differ greatly and were without public notice, comment and the formal rulemaking process. Most alarmingly, this was a legislative mandate to the Secretary of State as a precursor for use of the electronic voting system pursuant to MCL 168.794(3). How can we use the electronic voting machine without the legislatively mandated administrative procedures promulgated rules that instruct on how to prepare a test deck?

R 168.777 Preliminary accuracy test and R 168.778 Accuracy test also are from 1979 and predate the modern digital era. Neither matches the requirements of any VVSG guideline created by the US Election Assistance Commission created from the HAVA act of 2020.

A serious question remains in that how is it practicable to use an electronic voting system that is required to use a test deck prepared by new rules promulgated that have not been promulgated? How do we follow an accuracy test that is from 1979 and predates the adoption of the electronic voting system by 39 years?

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Sec. 794a.
   (5) A board of election commissioners shall not use in an election an electronic voting system that has failed the most recent accuracy test performed on that voting system under this act. An electronic voting system may be used after any necessary corrections are made and an accuracy test is passed on the system.

MCL 169.494a(5) requires the board of election commissioners to NOT use the electronic voting system that has failed its most recent accuracy test. But then permits the use (not mandates the use) if the necessary corrections are made. While it is silent the question remains what if there is no valid accuracy test because there is no compliance with the law that required a formal rulemaking procedure to be used to create the accuracy test process and test deck of ballots? If

there is a failure of the valid test there may not be a failure but there is clearly not a passing…do we just ignore the rule of law?

The current Secretary of State owns the responsibility for this failure. She was put on notice of the importance of rulemaking in _Genetski and MI REP Party v Benson and Brater_, Court of Claims 20-216-MM in an opinion dated 3/9/2021 in which the Michigan Secretary of State was told that they had failed to provide a rule pursuant to the APA for signature comparison—an omission that remains present for the 2022 Midterm Elections casting serious doubts on the validity of identification for absentee ballots.

The conclusion of MCL 168.794a is that there are requirements that make the use of the electronic voting device in Michigan 'impracticable' in that neither the rule for creating a test deck or an accuracy test procedure was promulgated since 2002 or even since the electronic voting system has been introduced in 2017-2018.

The experiment with these electronic voting machines thru one midterm and one general election must come to an end until the law is complied with, or we abandon the rule of law.

OTHER FAILURES BY BENSON TO MAKE RULES

168.797b Rules.
Sec. 797b.

    The secretary of state **shall** promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, **_governing the tabulation of ballots_**, certification of results, delivery of ballots and certified results, and sealing of devices and ballot boxes after the polls are closed.

History: Add. 1967, Act 155, Imd. Eff. June 30, 1967 ;-- Am. 1990, Act 109, Imd. Eff. June 18, 1990
Popular Name: Election Code

We are now 32 years past 1990 and while the 1979 Administrative rules dealt with the use of optical scan ballots by absentee voters[8] the law was updated in 1990 and there have been no rules promulgated since and especially since the major rewrite in 2002 and the constitutional amendment and resulting legislation from 2018.

MCL 168.795 "Other requirements" of the Election Code

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[8] https://casetext.com/regulation/michigan-administrative-code/department-state/elections-campaign-finance/use-of-optical-scan-tabulators-by-absentee-voters/use-of-optical-scan-tabulators-by-absentee-voters

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

Sec. 795.

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

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

(b) *Utilize a paper ballot for tabulating purposes.*

(c) Permit each elector to vote at an election for all persons and offices for whom and for which the elector is lawfully entitled to vote; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote.

Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject all choices recorded on the elector's ballot for an office or a question if the number of choices exceeds the number that the elector is entitled to vote for on that office or question.

Electronic tabulating equipment that can detect that the choices recorded on an elector's ballot for an office or a question exceeds the number that the elector is entitled to vote for on that office or question must be located at each polling place and programmed to reject a ballot containing that type of an error.

If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.

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

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

If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot.

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

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

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

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

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

(k) Provide an audit trail.

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

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

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

(2) Electronic tabulating equipment that counts votes at the precinct before the close of the polls must provide a method for rendering the equipment inoperable if vote totals are revealed before the close of the polls.

Electronic tabulating equipment that tabulates ballots, including absentee ballots, at a central location must be programmed to reject a ballot if the choices recorded on an elector's ballot for an office or a question exceed the number that the elector is entitled to vote for on that office or question, if no valid choices are recorded on an elector's ballot, or if, in a primary election, votes are recorded for candidates of more than 1 political party.

(3) Each jurisdiction in this state conducting an election shall equip each polling place with at least 1 accessible voting device as required under subsection (1)(n).

History: Add. 1967, Act 155, Imd. Eff. June 30, 1967 ;-- Am. 1990, Act 109, Imd. Eff. June 18, 1990 ;-- Am. 1992, Act 8, Imd. Eff. Mar. 10, 1992 ;-- Am. 1998, Act 21, Imd. Eff. Mar. 12, 1998 ;-- Am. 1999, Act 218, Eff. Mar.

10, 2000 ;-- Am. 2002, Act 91, Eff. Apr. 9, 2002 ;-- Am. 2004, Act 92, Imd. Eff. Apr. 26, 2004 ;-- Am. 2018, Act 127, Imd. Eff. May 3, 2018

The discussion of MCL 168.795 Requirements must start with an introduction to the requirements in MCL 168.794a which states that the "electronic voting system shall not be used at a general election in a county, city, or township unless, in addition to the *other requirements* of this act…This is followed with the clear language in MCL 168.795 which lists the requirements that the voting system MUST MEET ALL OF THE FOLLOWING REQUIREMENTS…

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

(k) Provide an audit trail.

These Michigan requirements follow the Federal requirements found in the Help America Vote Act of 2002 and found at 52 USC Ch. 209. Chapter III in *Section 21081 Voting systems standards* provides:

(a) Requirements

Each voting system used in an election for Federal office shall meet the following requirements:

(2) Audit capacity
(A) In general
The voting system shall produce a record with an audit capacity for such system.
(B) Manual audit capacity
(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.
(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.
(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

(5) Error rates

The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on October 29, 2002.

(6) Uniform definition of what constitutes a vote

Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

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MCL 168.795(1)(j) provides a requirement to record the vote 'correctly and count accurately as cast'. This is expressed in the federal law as an acceptable error rate of 1 per 125,000 ballots. * The requirement to have a ballot counted as cast is also required by the Equal Protection Clause. If the electronic voting system cannot meet this requirement then it is impracticable and cannot be used and it is the duty of the clerk to hand count. This will be discussed below.

MCL 168.795(1)(k) provides a requirement of an audit trail. This is expressed as the ability to have a manual paper audit trail. Looking into the requirements of the US EAC Voluntary Voting Systems Guidelines version 2.0 this means that there must be an audit trail that includes at a minimum:

- The voter registration card with signature
- The E-Poll book showing which voters cast ballot and manner in which the ballot was cast
- The paper ballots
- A copy (paper or digital copy) of the optically scanned image of the ballot which was generated by the optical scan
- A copy of the Cast Vote Record (with any other information) which shows that the optically scanned ballot was converted into the table by the tabulator correctly
- A copy of the tabulator tapes showing the total of votes per candidate and contest
- All spoiled and provisional ballots
- A copy of the official results called in Michigan Statement of Votes Cast
- The audit or security logs which indicate the machine as configured during the election, who had access to the system, internet connectivity and the percentage of ballot reversals or other scanning errors.

What has been learned from use of the FOIA requests is that the county and township clerks are either unable or unwilling to provide most of the audit trail records. Many clerks report having incomplete audit trail records. If as a clerk you can not provide the audit trail documents upon request after the election, then use of the electronic voting system is impracticable.

The error rate is only understood when either a hand count comparison is made, or the audit/security logs are examined. While there is much disinformation about the Antrim County case what is clear was that the voting system did not read the ballots as cast accurately. This problem has been repeated in DeKalb County Georgia in a Democrat primary and in Cherokee County Kansas on a proposal. Both changed the outcomes of the election—although the error does not have to change the outcome as the requirement is that the electronic voting system is accurate. Using the federal standard if we divide 6M ballots by 125,000 we get an acceptable error rate of only 48 ballots in the state of Michigan. In 2020 that was exceeded by Antrim County.

The audit logs of one county in Michigan during the August 2, 2022 Primary showed error rates of 1% to 88% which included ballot format image, ballot ID being unrecognizable,

ballot size exceeding expected ballot size, and scanner transport errors. The number of reversals ranged from 5% to 107% per tabulator. The information was gathered from the audit/security logs which are rarely produced for the public. The methodology replicates findings in other states. The methodology for a clerk to examine their own record is available all they have to do is produce the audit or security log from the tabulator and examine their own election data.

As to the uniform definition of what constitutes a vote, Michigan has a clear definition in the law about what constitutes a vote however the adjudication process used with some electronic voting systems, especially at absentee ballot counting boards is in violation as used.

AN ILLEGAL PROCESS: ADJUDICATION

An examination of the requirements of MCL 168.795(1) in subparts c and e have a similar language which provides for the rejection of an in-person cast ballot by the tabulator equipment and the opportunity that the voter is to be provided to spoil the defective ballot and be able to self-correct their error. The provisions are highlighted above. A ballot marked improperly is rejected and the voter is given a chance to self-correct on the spot.

Contrast section 2 of MCL 168.795 which requires the electronic voting system that counts absentee ballots to REJECT a ballot that is mismarked. There is no provision to correct provided to the absent voter but the ballot is rejected. There is no law or provision for adjudication or any other process to alter the ballot manually or digitally. The section applies to ballots counted at a central location

In Detroit at the ACB on August 2, 2022, many ballots which contained votes for candidates on two political parties were 'adjudicated'. This means that the scanning device created an optical image and election workers were able to digitally remove marks or digitally darken marks to decide what the voter's intent was when the ballot was mismarked. This process is a violation of law which required the ballot be rejected. This is part of the voting system as the software allows adjudication—a word that does not appear anywhere in law or administrative rule. The percentage of ballots that were adjudicated was staggering. The same illegal process was observed in 2020 during the general election.

The Election Officials' Manual Chapter 8 Absentee Ballot Election Day Processing is a 15-page guidance that does not provide for the adjudication of ballots that are required by MCL 168.795(2) to be rejected.

Some election clerks that do not use adjudication and instead rely on the ballot instructional language guidance[9] to fully inform the absentee voter with the current scheme may see many disenfranchised voters who file out their ballot in violation of the instructions. This promotion of absentee ballots means that the voter is unaware of whether their ballot is ever actually counted.

While it is important to note that there is one additional guidance "_Determining the validity of Ballot Markings by the Michigan Bureau of Elections_" issued 5.27.04 and revised January 2018

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[9] _Ballot Instructional Language_, updated May 28, 2019 Michigan Bureau of Elections

it provides a restatement of the law related to proper marking and what constitutes a 'stray mark' that causes the tabulator to reject a valid ballot. There is no adjudication. The law in MCL 168.799a(3) and MCL 168.803(2) is identical and covers counting and recounting of votes. There is no interpretation of a mismarked ballot available. A voter in person can spoil and remark and the absentee voter has their entire ballot rejected excepting the very limited provision of a stray mark.

All of the ballots which had adjudication are to be rejected. There is no altering of the digital image to correct the marks to reconcile the voter's intent. Although this process was used with poll workers from each party this is a violation of law especially when it was repeatedly done by staff from the clerks' office or the staff of the voting system. Even when the ballot was not altered the other contests on the ballot that were not mismarked were counted instead of rejecting the ballot as required by the plain language. This is a violation of law.

MCL 168.795a Other Requirements

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

Sec. 795a.

(1) *__An electronic voting system shall not be used__* in an election unless it is approved by the board of state canvassers as meeting the requirements of sections 794 and 795 and instructions regarding recounts of ballots cast on that electronic voting system that have been issued by the secretary of state, unless section 797c has been complied with, and unless it meets 1 of the following conditions:
  (a) Is certified by an independent testing authority *accredited by the national association of state election directors* **and** by the *board of state canvassers.*
  (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system *as meeting or exceeding the performance and test standards* referenced in subdivision (a) *in a manner prescribed by the board of state canvassers.*

(2) The vendor or representative seeking approval of an electronic voting system shall do all of the following:
  (a) Deposit with the secretary of state a nonrefundable application fee of $1,500.00 for a new voting system and a fee of $500.00 for an upgrade to any existing system.
  (b) File with the secretary of state a list of all states in which the voting system has been approved for use. This list shall state how long the system has been used in the state and shall disclose any reports compiled by any state or local government concerning the performance of the system. The vendor shall remain responsible for filing this information on an ongoing basis.
  (c) File with the secretary of state copies of all standard contracts and maintenance agreements used in connection with the sale of the voting system. All changes to standard contracts and maintenance agreements shall be filed with the secretary of state.
  (d) Pay the cost for any field test required by the board of state canvassers.

(e) State the number of voters each component of the voting system can process per hour under each of the following circumstances:

(i) An election in which there are 10 or fewer items to be voted on the ballot by each voter.

(ii) An election in which the ballot consists of the number of items typically voted on at a presidential general election in this state.

(3) The board of state canvassers shall conduct a field test of all new voting systems as part of the certification process. The field test shall involve Michigan electors and election officials in simulated election day conditions. The test shall be designed to gauge voter reaction to the system, problems that voters have with the system, and the number of voting stations required for the efficient operation of an election based upon the vendor's statement provided under subsection (2)(e).

(4) The board of state canvassers shall approve an electronic voting system for use in this state only if it meets the conditions of subsection (1) except that in an emergency situation that threatens the ability of a county, city, or township to conduct a scheduled election, the board of state canvassers may approve a correction of software or firmware after testing the software or firmware performance.

(5) If an electronic voting system is approved for use before January 1, 1997 by the board of state canvassers, it may be used in an election. However, if the electronic voting system has its software or firmware improved or changed, the system shall comply with the requirements of subsection (1).

(6) After an electronic voting system is approved, an improvement or change in the electronic voting system shall be submitted to the board of state canvassers for approval pursuant to this section. This subsection does not apply to the technical capability of a general purpose computer, reader, or printer to electronically record and count votes.

(7) A county, city, township, village, or school district shall file "an intent to purchase statement" with the secretary of state 30 days before any purchase agreement is made to purchase a new voting system. The secretary of state shall provide all information concerning the operation of the voting system in Michigan or any other state to the local unit of government within 25 days after receiving the "intent to purchase statement".

(8) The secretary of state shall instruct local election officials regarding the operation and use of an approved electronic voting system in order to carry out the purposes of sections 794 to 799a and the rules promulgated pursuant to sections 794 to 799a.

(9) If the board of state canvassers determines that an electronic voting system that was approved under subsection (1) no longer meets the requirements described in that subsection, the board of state canvassers may disapprove that voting system. An electronic voting system that has been disapproved by the board of state canvassers under this subsection shall not be used in an election, unless it is reapproved by the board of state canvassers under subsection (1).

History: Add. 1967, Act 155, Imd. Eff. June 30, 1967 ;-- Am. 1990, Act 109, Imd. Eff. June 18, 1990 ;-- Am. 1992, Act 8, Imd. Eff. Mar. 10, 1992 ;-- Am. 1995, Act 261, Eff. Mar. 28, 1996 ;-- Am. 1996, Act 583, Eff. Mar. 31, 1997 ;-- Am. 1998, Act 215, Imd. Eff. July 1, 1998
Popular Name: Election Code
Admin Rule: R 168.771 et seq. of the Michigan Administrative Code.

MCL 168.795a(1) is unequivocal in stating that an electronic voting system SHALL NOT BE USED UNLESS…

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The UNLESS requires:

- The board of state canvassers approves that it meets sections 794 and 795 which are discussed above. Please be aware that as the equipment configuration and software change it must be approved. None of the current systems as configured have any record of approval by the board of state canvassers.
- Instructions on recounting of ballots counted on electronic voting systems have been issued by the Secretary of State
- The placing of the electronic code into escrow pursuant to MCL 168.797c. There is no record that the current code is in escrow as used for each of the electronic voting systems being used
- The Electronic Voting System meets 1 of the following conditions:
  - (a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers.
  - (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers.

As to the certification requirement:

- the national association of state election directors does not accredit *any* independent testing authority-so this certification therefore cannot be met.
- There is no record that the board of state canvassers has 'accredited' any independent testing authority.
- There is no procedure for the board of state canvassers to 'accredited' an independent testing authority
- There is no performance test standards for certification that have been created by either the national association of state election directors or the board of state canvassers.
- There is no certification by a manufacturer of meeting the standards (which do not exist)
- There is no manner prescribed for the manufacturer to certify they meet standards which do not exist.

In summary the requirement which must be met in order to use the Electronic Voting System as to certification and accreditation as clearly stated in MCL 168.795a(1) has not been met so the use of the electronic voting system is impracticable.

This statute has not been repealed but it predates the US Election Assistance Commission which does have an accreditation process, a certification process, and test standards. The problem with substituting this is that it is not permitted by law. Further, all three systems in Michigan are not certified as meeting the standard VVSG 2.0 which is from 2021 and provides for the security and transparency of elections. Further, none of the configurations as they are in Michigan has been certified by any accredited independent laboratory. The configurations just were not submitted to be tested against the current standards.

168.798b Electronic tabulating equipment; unofficial and official returns; manual count.
Sec. 798b.

Before the conduct of the official count, the clerk may conduct an unofficial count in order to provide early unofficial returns to the public. Upon completion of the count, the official returns shall be open to the public.

The return of the electronic tabulating equipment, to which have been added the write-in and absentee votes if necessary, shall constitute, after being duly certified, the official return of each precinct or election district.

If it becomes *impracticable* to count all or a part of the ballots with tabulating equipment, **the clerk may direct that they be counted manually**, following as far as practicable the provisions governing the counting of paper ballots. [Emphasis Added]

The key word here is "impracticable" which is "unsuitable" as determined by the clerk

Dictionary.com

impracticable
[im-prak-ti-*kuh-buhl*

See synonyms for: impracticable / impracticability on Thesaurus.com

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Adjective
-not practicable; incapable of being put into practice with the available means: *an impracticable plan.*
-unsuitable for practical use or purposes, as a device or material.

The use of electronic voting machines is impracticable in the 2022 General Election and all ballots must be hand counted under the authority of MCL 168.798a

1. The Secretary of State has failed to promulgate rules in accordance with MCL 168.794(3) and there is no practicable method for doing a lawful accuracy test or preparing a test deck.
2. The inability to provide a full audit trail pursuant to MCL 168.795(1)(k) and 52 USC 21081(a)(5)
3. An excess error rate has been observed in Michigan in 2020 only discovered by a hand recount. The error rate exceeded the federal standard in 52 USC 2108(a)(3) and the rate of inaccuracy is enough to disqualify all devices that use the same code…All of them have similar code. This is compliant with MCL 168.795(1)(j)

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Dictionary.com

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[im-prak-ti-*kuh-buhl*]SHOW IPA
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4. None of the electronic voting systems as configured with hardware and software have a record of being 'approved' by the board of state canvassers as required by MCL 168.795a1 or the Voting system shall not be used.
5. The electronic voting systems are not certified to the current standards by an accredited independent testing authority as required under MCL 168.795a(1)
6. Changes have been made to the voting systems with hardware changes, software changes, setting changes and there have been changes of the voting system standards since the approval by the board of canvassers and there has been no testing of the system against the new standards by any Voting System Test Laboratory that is accredited by the US Election Assistance Commission. MCL 168.795a(5) expressly requires that changes to the system must comply with Section 1 which requires the system be certified as configured.
7. There is no evidence of board of state canvasser approvals as to any aspect of this legislation.

The legislature has allowed the election code to become a patchwork of changes that have rendered obsolete terms such as 'voting machines' for a description of the technology in primaries and 'electronic voting systems for the general election rules which were altered in 2002 and repealed in 2018.

NEVERTHELESS, the federal requirements of a voting system that are unmet requires that the clerks declare the three approved systems impracticable and instead count ballots by hand.

IF ANY CLERK WOULD LIKE A FREE CONSULTATION ON THE TOPICS CONTAINED PLEASE WRITE and email to MILawyerdanhartman@proton.me. I will be happy to discuss the law with any clerk or their attorney.
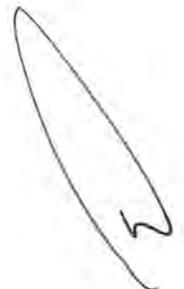
HAVA 42 USC 15481. SEC. 301. VOTING SYSTEMS STANDARDS.

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

(1) IN GENERAL.—

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

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

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

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

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

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

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

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

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

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

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

(2) AUDIT CAPACITY.—

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

(B) MANUAL AUDIT CAPACITY.—

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

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

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

PRIMARY ELECTIONS

Chapter 14 of the election law reads in two sections:

168.584 Voting machines authorized in primaries.
Sec. 584.

At all state, county, city, village and township primaries, ballots or votes *may* be cast, registered, recorded or counted by means of voting machines as hereinafter provided.

168.585 Primary elections; use of voting machines; supplementary ballots.
Sec. 585.

Any voting machine which is by law authorized to be used at a general election *may*, by the order of the board of supervisors of any county, the legislative body of any city, the township board of any township, or the village council of any village, be purchased and used therein at primary elections in like manner and to the same extent that such machines *may* be used at general elections...

Comment
The election law does not require them to be used in a primary; it also states that that the machines MAY be used at the general election

MCL is 168.780-799 is the section under conduct of elections that is defined as voting machines at general elections

It does not say shall use or otherwise mandate the use of "voting machines" but makes it permissive. While the August 2, 2022 primary is past, every single election clerk opted to use the 'voting machines'.

The term voting machines is also from an era that predates the 2002 election law code changes.
History: 1954, Act 116, Eff. June 1, 1955
Popular Name: Election Code