EXHIBIT A

STATE OF MICHIGAN
IN THE SUPREME COURT

ANGELIC JOHNSON, *et al.*, Petitioners, v. JOCELYN BENSON, in her official capacity as Michigan Secretary of State, *et al.*, Defendants.	MSC No. 162286

***AMICUS CURIAE* BRIEF OF MICHIGAN STATE CONFERENCE NAACP**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the Michigan State Conference NAACP (Michigan NAACP). The Michigan NAACP has a significant interest in this action because Petitioners seek to disenfranchise more than 5.5 million Michigan citizens who voted in the November 3, 2020 election. Such disenfranchisement will directly affect the members of the Michigan NAACP whose votes will be invalidated if the Petition is granted. In addition, the Michigan NAACP has invested significant resources in voter education and outreach as part of its mission to enhance civic participation in vulnerable communities, especially Black communities that have historically been the target of voter suppression efforts. The extraordinary relief sought by Petitioners would undermine the NAACP's efforts by destroying trust in election systems in those communities, and will require Petitioners to divert and expend resources to rebuild that trust, and protect the right to vote.[1]

[1] This brief was not authored in whole or in party by counsel representing a party in this case, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. Other than *amicus curiae* and its counsel, no person made a monetary contribution to assist in preparation of this brief.

I. INTRODUCTION

During the 2020 General Election, in the midst of a deadly pandemic, over 5.5 million Michigan voters exercised their right, which is the highest level of turnout in the state in over 60 years. David Eggert, *Record 5.5M voted in Michigan; highest percentage in decades*, APNews (Nov. 5, 2020), https://apnews.com/article/record-votes-michigan-highest-turnout-1f7802d2a2e67966ba8ccb02e3d1cbed. This extraordinary collective act of civic participation is a testament to both the commitment of voters, and the hard work of election officials across the state who spent months planning, coordinating, and implementing complicated procedures to make sure voters could cast their ballots safely and effectively.

In this case, two Michigan voters seek to undo those remarkable efforts after-the-fact and disenfranchise every Michigan citizen. No other court in our nation has ever granted the type and scope of relief the Petitioners request here. The basis for this shockingly undemocratic request is a series of claims Petitioners could and should have asserted months before the election as well as spurious, unsubstantiated, and inadmissible evidence of purported election irregularities. Petitioners primarily support their claims through an "expert" report of someone who assuredly is not an expert, but rather a partisan political operative, and whose methodology and analyses are faulty and misleading. The hodge-podge of rumor and junk science Petitioners rely upon would not be enough to invalidate even a single vote, let alone the votes of all 5.5 million Michigan voters.

Petitioners filed this case in a brazen attempt to throw the election to their preferred candidate. In all, several dozen lawsuits have been filed across the country by President

Trump and his allies, including the Petitioners and their counsel, and not one has been successful in substantiating allegations of election improprieties or overturning the results of an election. This case should be seen as part of that larger frivolous effort, and like the others should be summarily dismissed.

II. PETITIONERS SEEK AN UNPRECEDENTED REMEDY UNAVAILABLE AS A MATTER OF LAW

Petitioners here seek extraordinary and unprecedented relief – nothing short of the disenfranchisement of millions of Michigan voters, negating the clear results of the November 3 election and throwing the selection of presidential electors into the Michigan legislature. This Court should decline to grant this relief.

First, the relief sought is simply unprecedented. Petitioners cite no case or other authority – because there is none – in which a state court has summarily ignored the duly certified results of a presidential election and voided the votes of millions of individuals to have the state legislature displace its own statutory framework and pick presidential electors. Not only is there no such authority in Michigan, either by statute or in the case law, but state and federal judges around the country have recently declined to award such relief based on similar claims. *See, e.g., Trump v. Pennsylvania*, 2020 WL 7012522 (3rd Cir. 11/27/20) (declining to grant leave to file an amended complaint seeking the "drastic remedy" of "throwing out millions of votes" and requiring the Pennsylvania legislature to select presidential electors); *Wood v. Raffensberger*, 2020 WL 6817513 (N.D.GA, 11/20/20) (" . . . Wood seeks an extraordinary remedy: to prevent Georgia's certification of the votes cast in the General Election, after millions of people had lawfully cast their

ballots. To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways. [Citations omitted]. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise over one million Georgia voters. Viewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or in law to grant him the relief he seeks").

Second, Petitioner's relief ignores the detailed statutory scheme enacted by the Michigan legislature itself for the conduct, canvass and certification of elections for all federal and state offices in Michigan, including the selection of presidential electors by popular vote. *See generally* MCL §§168.801-848 (governing canvass at precinct, county and state level); MCL §168.46 (requiring governor to certify results of election for presidential election to the U.S. Secretary of State). This process has been completed, and Governor Whitmer and Secretary of State Benson have signed the certificates of ascertainment for Michigan's 16 presidential electors. *See* Governor Gretchen Whitmer (@GovWhitmer), Twitter (Nov. 24, 2020) *https://twitter.com/GovWhitmer/status/1331282565311983625*. There is simply no basis to prevent the Governor and Secretary of State from carrying out the duty imposed on them by the Legislature.

Moreover, Michigan law also provides that only the losing candidate – not Petitioners here – has the opportunity to request a recount where the candidate has a "good faith belief that but for fraud or mistake, the candidate would have had a reasonable chance of winning the election." MCL §168.862. President Trump lost the state of Michigan by

over 150,000 votes, and never invoked §168.862 to demand a recount. *See* Office of Michigan Secretary of State, *2020 Michigan Election Results*, https://mielections.us/election/results/2020GEN_CENR.html, last accessed Dec. 3, 2020; Jonathan Oosting, *Trump's hopes sputter to end in Michigan. 'It's over, and they know it.'*, Bridge Michigan (Nov. 25, 2020), https://www.bridgemi.com/michigan-government/trumps-hopes-sputter-end-michigan-its-over-and-they-know-it. Again, there is simply no basis in law or equity for Petitioners to seek to overturn the results of an election where the losing candidate himself has failed to invoke the statutorily created procedure to raise issues concerning the election.

Third, the relief sought by Petitioners here would radically impinge not only on the statutory scheme of the Michigan legislature but also on the fundamental right to vote. Michigan has chosen to exercise its power under the Electors Clause by choosing the electors by popular vote. *See* MCL §§168.43, 45 (providing for the selection of presidential electors by registered voters on the general election date set by Congress). In *Bush v. Gore,* 531 U.S. 98 (2000) (*per curiam)* the Court noted that once the state legislature has established that presidential electors will be selected by popular vote, the fundamental right to vote is implicated. *Id. at* 104. This fundamental right to vote includes "the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). Petitioners' proposed relief would deprive voters in the November 3 election of this fundamental right to vote by replacing the legislature's carefully designed process for conducting, canvassing and certifying the results of the

election of presidential electors with a bespoke procedure involving investigations by a special master and the legislature itself.

Furthermore, Petitioners in effect would deprive the state of the safe harbor afforded by the Electoral Count Act ("EAC"), 3 U.S.C. §5, which provides that where a state chooses its presidential electors according to laws enacted prior to election day and certifies those results at least six days before the electoral college vote – this year the safe harbor date is December 8 – the results of the state's selection of electors are conclusive and cannot be questioned by Congress. Michigan's duly authorized executive officers have certified the election and qualified Michigan's electoral slate for this safe harbor protection. Petitioners – having waited more than three weeks after the election to bring their claims – have now asked this Court to order a massive review of the election with little more than a week to go before the safe harbor date. This is simply not practical - let alone fair to Michigan voters - and the Court should weigh the equities here in favor of allowing the state to take advantage of the safe harbor date. *See, e.g., Bush v. Gore,* 531 U.S. at 110 (declining to sanction a recount procedure that would not meet the safe harbor deadline).

Finally, Petitioners' reliance on EAC §2, 3 U.S.C §2 (erroneously cited as section 3) is misplaced. Section 2 provides that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." This provision is not a general license to overturn the results of a duly conducted and certified election by throwing the decision back to the legislature, but rather was designed to address specific situations where "any considerable number of

voters had been prevented from coming to the polls" due to a natural disaster or other emergency. *See* Morley, *Postponing Federal Elections Due To Election Emergencies*, 77 Wash. & Lee L. Rev. Online 179, 188-189 (2020) (discussing legislative history). Section 2 cannot justify the massive and unprecedented relief sought here.

In short, petitioners' requested relief is simply a pretext to overturn the will of the people of the State of Michigan and create an open ended and unauthorized process by which the legislature – and not the people – choose Michigan's presidential electors. There is simply no basis in law or equity for this Court to grant such a drastic and unprecedented remedy.

III. LACHES BARS THIS ATTEMPT TO NULLIFY AN ELECTION IN WHICH OVER 5.5 MILLION MICHIGAN CITIZENS VOTED

One of the extraordinarily disturbing aspects of this case is that two individuals seek to overturn the results of an election in which over 5.5 million Michigan citizens participated: *after* the vote, *after* the election has been certified and months *after* the Michigan Secretary of State announced she planned to send applications for absentee ballots to all registered voters, and allow voters to apply for absentee ballots online. In addition to the parties, the Court must consider the rights of the millions of voters, including members of the Michigan NAACP, whose absentee ballots were submitted in good faith reliance on the instructions of the state officials. As the Sixth Circuit observed, "to disenfranchise citizens whose only error was relying on state instructions . . . [is] fundamentally unfair." *Hunter v. Hamilton County Bd. of Elections*, 635 F. 3d 219, 243 (6th Cir. 2011); *See also Rosenbrock v. School Dist. No. 3*, 344 Mich. 335 (1955) ("To hold

that slight irregularities, for which the voters were not to blame, should invalidate the election, is contrary to public policy").

The equitable doctrine of *laches* "bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." *Amtrak v. Morgan,* 536 US 101, 121-22 (2002). In cases where, "because of the nature of the subject matter, absolute time limits must be observed, the law requires a speedy resort to the courts by those who wish to prevent or modify contemplated transactions or procedures." *Bigger v. City of Pontiac*, 390 Mich. 1, 4 (1973) citing to *O'Brien v. Skinner*, 409 U.S. 1240 (1972) (denying relief in election case because "effective relief cannot be provided at this late date."); *See also Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("any claims against the state [election] procedure [must] be pressed expeditiously) citing to *William v. Rhodes*, 393 U.S. 23, 34-35 (1968). In this case the vote has occurred. The votes have been counted. The count has been certified. It only remains for the designated presidential electors to confirm their votes for the winning candidates.

Laches exists when there is: (1) A delay in asserting a right or claim; (2) That delay was not excusable; and (3) Undue prejudice resulted. *Department of Public Health v. Rivergate Manor*, 452 Mich. 495, 507 (1956); *Dunn v. Minnema*, 323 Mich. 687, 656 (1945). *See also, Costello v. United States*, 365 US 265, 282 (1961). Furthermore, in challenges to the result of an election, courts must also consider "the detriment to the public." *Gallagher v. Keefe*, 232 Mich.App. 363, 369, (1997) citing to *Stokes v. Clerk Co. Bd. of Canvassers*, 29 Mich.App. 80, 87 (1970).

A. There was a Delay

There was inarguably a delay. While the Complaint alleges that the Secretary of State sent unsolicited absentee ballots to every household in Michigan with a registered voter, Complaint ¶ 168, the Complaint neglects to mention that on May 19, 2020, *six months ago*, the Secretary of State publicly announced that she was going to do so for both the upcoming August primary and for the November general election. Todd Spangler, *Secretary of State: All Michigan voters will get absentee ballot applications at home*, Detroit Free Press (May 19, 2020), https://www.freep.com/story/news/politics/elections/2020/05/19/all-michigan-voters-get-absentee-ballot-applications-in-mail/5218266002/. President Trump tweeted (inaccurately) about the Secretary of State's announcement within a day or two thereafter. Then, in late May, three separate state court challenges to the Secretary's action were filed, none of which included the Petitioners or their counsel. Petitioners remained on the sidelines throughout the litigation, failing to move to intervene or file an amicus brief as the trial court and the Court of Appeals upheld the Secretary's action. *Davis v. Benson*, No. 354622, opinion (Mich. Ct. App. Sept. 16, 2020). Instead, they belatedly raise them now, three weeks after Election Day.

Similarly, Petitioners challenge the availability of an online application for absentee ballots, which the Secretary of State announced in June 2020, *five months ago*. In September, a group of plaintiffs, this time represented by several of Petitioners' counsel in this case, filed a lawsuit challenging the Secretary's action. *Election Integrity Fund v.*

Benson, No. 20-000169-MM (Mich. Ct. Claims). But Petitioners sat on their claims for months, waiting until after the election to raise them for the first time.

B. The Delay was not Excusable

A delay of this magnitude was clearly inexcusable. Given the wide publicity of the Secretary's actions, and that hundreds of thousands of their fellow citizens relied on the Secretary's action to exercise their vote, Petitioners knew, or with the exercise of due diligence should have known, of the procedures now being challenged. If the Petitioners in good faith believed that the notification to Michigan registered voters of their rights to apply for an absentee ballot, and provision of an efficient online system for applying was improper during a pandemic when crowded in-person voting reasonably threatened public health, they had a chance to bring that to the attention of the courts well in advance of the primary election. They certainly should have brought their claim prior to the General Election. If they wanted to prevent the Secretary of State's planned notification or the online system for requesting absentee ballots, they had an absolute duty to bring their claims immediately so that the state officials would have the opportunity to take corrective action or the judiciary would have a reasoned opportunity to hear and consider their claims.[2]

[2] The Michigan NAACP advised voters of their right to apply for absentee ballots throughout this election cycle. Michigan NAACP was far from the only organization to do so. Among those groups advising voters of their rights to apply for absentee ballots was the Trump Campaign. Julie Mack, *Trump Terms Mail-In Ballots a 'Scam' but his Michigan Campaign is Promoting Absentee Voting*, MLive (September 27, 2020) https://www.mlive.com/public-interest/2020/09/trump-terms-mail-in-ballots-a-scam-but-his-michigan-campaign-is-promoting-absentee-voting.html ("'To clarify, the President, the Trump Campaign, the Republican National Committee and the Michigan Republican Party do support absentee voting,' said Christ Gustafson, spokesman for the Trump Campaign in Michigan. 'But what we do oppose is the Democrats' effort to undermine the

C. The Prejudice is Clear and Overwhelming

As an initial matter, the Petitioners' delay results in prejudice to the Defendants. While the Petitioners waited to assert their claims the Defendants planned, coordinated, and expended resources to conduct the 2020 General Election in accordance with their understanding of Michigan election law, successfully defended that understanding against several legal challenges, and allowed hundreds of thousands of Michigan voters to rely on that understanding when exercising their right to vote. Petitioners' failure to assert their claims until now, when the challenged actions are effectively irreversible, threatens the Defendants' interest in the validity of an election it spent significant time, energy and resources conducting. *Kay*, 621 F.2d at 813 ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made."). Petitioners' delay undoubtedly causes significant prejudice to the Defendants.

More important, Petitioners' delay in asserting their claims would be severely detrimental to the over 5.5 million eligible Michigan voters who lawfully cast ballots during the 2020 General Election. Petitioners explicitly acknowledge that they seek to throw out the Presidential choice of every voter in Michigan, and instead have the legislature determine electors for the state of Michigan. Petitioner Brief in Support of Pet.

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security of absentee ballots in other states like Nevada, where ballots themselves being mailed out willy-nilly. Michigan has appropriate safeguards in place to guard against fraud,' Gustafson said.")

For Writs, at p. 18-19.[3] There is no *post-hoc* remedy which justifies the arbitrary deprivation of the right of suffrage, which is a "fundamental" political right in a free democratic society. *Reynolds v. Sims*, 377 US 533, 561-62 (1964). *See also*, Mich. Const. art. II, sec. 1; Richard L. Hasen, "Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown", 62 Wash. & Lee L. Rev. 937 (2005) ("Courts should see it as in the public interest in election law cases to aggressively apply *laches* so as to prevent litigants from securing options over election administration problems.")

Michigan law clearly provides for the application of *laches* to election cases.[4] In *Bigger v. City of Pontiac*, 390 Mich. 1 (1973), this Court rejected a challenge to the validity

[3] Petitioners focused their grievances on the Presidential, and to a lesser extent, the U.S. Senatorial election. They do not however address how their request for relief, if granted, would affect the many other offices which were determined in the November 3 election. Consideration of this aspect makes clear the breathtaking scope of what the Petitioners seek. They want the Presidential election thrown out and their choice of Michigan's electors installed by fiat but are totally unconcerned with the will of the voters or the havoc their remedy would have on the people and government of the State of Michigan.

[4] While several courts have considered *quo warranto* actions filed post-election, those cases involved allegations of "fraud or error that 'might have affected the outcome of the election.'" *Barrow v. Detroit Mayor*, 290 Mich.App. 530, 543 (2010) quoting *Risk v. Lincoln Charter Twp. Bd. of Trustees*, 279 Mich.App. 389, 390 n.1 (2008). *Id*. at 543. Allegations of fraud must be plead with "particularity" and supported by "satisfactory proofs. *Barrow*, 290 Mich. App at 544; *Rosenbrock School Dist. No. 3*, 344 Mich. 335, 339 (1955). In contrast, the failure of election officials to comply with the technical requirements of statutory directives should not permit the disenfranchisement of voters, "when there is no reason to conclude that the will of a majority of those present and voting was thwarted." *Carnes v. Livingston County Bd. of Ed.*, 341 Mich. 600, 67 N.W.2d 795 (1954). Here, Petitioners attempt to disenfranchise 5.5 million voters on the basis of an alleged failure to comply with the technical requirements of Michigan law. In addition, the Petitioners' allegations fraud are generalized, unsupported, and, would not impact the outcome of the Presidential election. *See also* Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, APNews (Dec. 1, 2020), https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d.

of bonds issued to construct a domed stadium in the City of Pontiac. The plaintiff in that case waited just under three months to assert his claims in an original action before the Supreme Court, but *after* the City had already issued and sold the bonds in question. *Bigger*, 390 Mich. at 3. This Court noted that those who wished to avail themselves of the law when there are absolute time limits that must be observed (the absolute time limits of the bond sale process in *Bigger* is analogous to the rigid time schedule of Michigan's election law), must do so "in a manner which facilitates an orderly process of adjudication within the given time frame." *Id.* at 4. Had the plaintiffs in *Bigger* promptly commenced their case when the announcement that they complained against was made, there would have been adequate time. But, not having done so, *laches* applied:

> We are of the opinion that in cases of this kind, if the plaintiff fails to resort to the courts without delay (within the context of the time available for adjudication) the courts may refuse to entertain the case. This power is, of course, to be exercised cautiously, circumspectly and only in the kind of unusual situation with which we are now presented. In this case we are satisfied that the Circuit Judge exercised responsibility correctly and affirm his order of judgment dismissing the complaint.

Id. at 5. If a local bond issue is the kind of case to which *laches* applies because the voters and the bond purchasers are prejudiced by a delay, laches applies even more clearly to a challenge to a statewide election for President and other offices which had already been certified by the State Board of Canvassers when the case is filed.

This Court should look to the recent decision of the Pennsylvania Supreme Court in *Kelly v. Commonwealth*, No. 68 MAP 2020 (November 28, 2020), dismissing claims similar to those raised here. In that case the plaintiffs sought to invalidate the ballots of millions of voters who utilized mail-in voting procedures established by Pennsylvania law.

The Court noted that: ". . .the petitioners advocated the extraordinary proposition that the Court disenfranchise all 6.9 million Pennsylvanians who voted in the General Election and instead direct the general assembly to choose Pennsylvania's electors." *Id. at 2.* The Court dismissed the petition for failure to file in a timely manner. There Pennsylvania's Supreme Court specifically held that the disenfranchisement of millions of voters is the sort of prejudice justifying dismissal due to *laches*.

The Pennsylvania Supreme Court placed great significance on the interests of the voters' collective will. This is consistent with long-standing Michigan law. *See Abbott v. Board of Canvassers of Montcalm County*, 172 Mich. 416, 419 (1912) ("an entire township should not be disenfranchised because of a mere omission of duty on the part of an inspector." No allegation has been made – nor could one be made – that the 5.5 million Michigan citizens who voted were parties to any fraud or improper activity. Time is critical. The voters' chosen electors must be allowed to cast their vote in the Electoral College. The prejudice to the people of this state that would be caused by entertaining these claims in the face of Petitioners' delay is so profound and so fundamental to our democracy that the doctrine of *laches* demands that they be dismissed.

IV. PETITIONERS' PURPORTED EXPERT REPORTS ARE INADMISSABLE

Petitioners rely heavily on the "expert" report of Matthew Braynard (the "Braynard Report"), as well as other "experts". Braynard is not an expert in the fields his report covers: political science, statistics, and surveys. Rather, he is a partisan political operative, whose substantial and ongoing connections to the Trump campaign strips his report of any

semblance of objectivity. Moreover, his superficial analyses are based on mischaracterizations of the databases from which his data is drawn, unscientific "surveys" based on unrepresentative samples, and flawed methodologies and extrapolations. Likewise, "expert" Dr. Qianying "Jennie" Zhang, has no expertise in survey methodology and her statistical conclusions are entirely dependent on unjustified assumptions about the representativeness and accuracy of the underlying data, which in this case translates to "garbage in/garbage out." Ultimately, the conclusions of Braynard and Zhang are speculation and unsupported lay opinions, completely divorced from a factual foundation. Petitioners do not meet their burden of satisfying the preliminary questions of expert qualifications, reliability and "fit" to the facts of the case required by this Court and the heightened standards of MRE 702. See generally *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 780-782 (2004).

First, Petitioners have not demonstrated that Braynard, or any of Petitioners' secondary experts are qualified to undertake the survey described in the Report, or to opine as to the inferential statistics in it. Braynard has not published a single peer-reviewed article in any relevant scientific field, and, as far as is known, has never been accepted as an expert by any court. (*See* Braynard Report at 4.) Similarly, Petitioners' expert Zhang is not an expert in survey methodology, and has, to our knowledge, never been accepted as an expert by any court. (*See* Zhang Report at 2.) Moreover, her analysis is entirely dependent on the assumption that Braynard's data constitutes a representative sample, and that respondents answered correctly. (*See* Zhang Report at 4.)

More to the point, Braynard is a political operative. After working for the 2016 Trump campaign, he has spent the past four years as Executive Director of an organization called Look Ahead America, working with over thirty other former Trump campaign staffers with the goal of registering and turning out likely Trump voters.

In addition to the $40,000 Petitioners paid him (Report at 4), Braynard has personally received over $600,000 on behalf of his "Voter Integrity Project.," *See* Voter Integrity Project, GiveSendGo Campaign, https://givesendgo.com/voterintegrity; Matt Braynard, Gab (Nov. 16, 2020), https://gab.com/mattbraynard/posts/105223610078696550, last accessed on Dec. 3, 2020 (noting Braynard's refusal to publicly disclose invoices for purported expenditures). The "Voter Integrity Project" includes both former Trump campaign staff and current White House staff, including a senior advisor to President Trump—and according to Braynard—is "in frequent communication" with the Trump campaign and legal team, to which he has been providing his research. Ellie Rushing and William Bender, *Pro-Trump 'voter integrity' group that is calling Pennsylvania voters has ties to White House*, Philadelphia Inquirer (Nov. 13, 2020), https://www.inquirer.com/politics/pennsylvania/voter-integrity-fund-pennsylvania-georgia-wisconsin-trump-2020-20201113.html; David Corn, *Former Trump Aide Challenging Vote Count Once Praised a Right-Wing Assassin*, Mother Jones (Nov. 13, 2020), https://www.motherjones.com/politics/2020/11/matt-braynard-trump/.

Braynard's analysis is also flawed at every step. Indeed, numerous academics have already flatly rejected Braynard's methodology and conclusions as "completely without merit" and found that reliance on his conclusions would be "irresponsible and unethical."

Francesca Paris, *Williams prof disavows own finding of mishandled GOP ballots*, BERKSHIRE EAGLE (Nov. 24, 2020), https://www.berkshireeagle.com/news/local/williams-prof-disavows-own-finding-of-mishandled-gop-ballots/article_9cfd4228-2e03-11eb-b2ac-bb9c8b2bfa7f.html.

Most important, Braynard's analysis violates a core principle of survey methodology: the sample surveyed must be representative of the population for which the surveyor intends to draw conclusions. *See, e.g.*, A. Lynn Phillips et. al., *What's Good in Theory May Be Flawed in Practice: Potential Legal Consequences of Poor Implementation of A Theoretical Sample*, 9 Hastings Bus. L.J. 77, 90–93 (2012) (discussing nonresponse and coverage biases in survey methodology). Braynard did not ensure a representative sample for his alleged voter survey. He simply instructed his staff to make phone calls to "a sample" of the voters on the list. (Braynard Report at 3, 7- 10). Braynard has in fact admitted that his investigation was not random, but rather "focus[ed] on areas with exceptionally high Democratic turnout." Ryan Briggs and Miles Bryan, *Former Trump staffer fishing for fraud with thousands of cold calls to Pa. voters is short on proof*, WHYY (Nov. 13, 2020), https://whyy.org/articles/former-trump-staffer-fishing-for-fraud-with-thousands-of-cold-calls-to-pa-voters-is-short-on-proof/. The sample was further biased by Braynard's staff, who reportedly left voicemails with individuals reported as having cast ballots in the General Election, asking for call backs if the voter did not cast a ballot. Rushing and Bender, *supra* 15.

In addition, Braynard failed to take basic steps to ensure respondents were providing accurate responses to his "survey". Braynard relied on a crude and unreliable technique for

verifying that respondents were the voters in question: simply matching their names to the registration record. (*See* Braynard Report at 6.) Braynard does not indicate he took any additional steps to verify voter identities to protect against false positives, including having the respondent confirm address or other demographic information. Braynard also fails to show that questions were designed to promote accurate responses. Proper formulation of questions is an essential component of accurate measurement, and even surveys with a representative sample, which this was not, can be undermined by ambiguous or biased questioning. Pew Research Center, *Questionnaire Design*, https://www.pewresearch.org/methods/u-s-survey-research/questionnaire-design/ last accessed Dec. 1, 2020. Applying for and submitting an absentee ballot can be confusing, especially for voters utilizing it for the first time, as many did in Michigan this November. In this context, poorly constructed questions carry the risk of soliciting inaccurate responses. Here, publicly available evidence suggests not only that questions were biased, but so were the questioners. Briggs and Bryan, *supra* 16 (reporting suspicious cold calls and voicemails and manipulative behavior by survey callers).

These problems in the design of Braynard's "survey" also undermine Zhang's analysis. Indeed, she admits as much, noting that her opinion is "predicated on the assumption that responders to [Braynard's] calls are a representative sample of the population of registered voters in the State and responded accurately to the questions during the phone calls." (See Zhang Report at 4.) Given that there is no evidence to draw either assumption, Zhang's entire analysis is flawed.

Apart from these basic problems in survey methodology, Braynard's Report is permeated with improper assumptions and misleading statements.[5] He supposedly compared data from the National Change of Address ("NCOA") database and voter data from other states provided by L2 Political with Michigan's voter data from L2 Political, "match[ing]" names from one list to the other. (Report at 8-10). But the NCOA database does not reflect changes in legal residency but rather changes in mailing address, making its use in comparison to voter registration records unreliable as an indicator of continued eligibility. *See, e.g., VOTER REGISTRATION – Information on Federal Enforcement Efforts and State and Local List Management*, U.S. Gov't Accountability Office Report (June 2019) at 48-49, https://www.gao.gov/assets/710/700268.pdf, last accessed on Dec. 3, 2020 ("[A]n indication of a change in address in NCOA data does not necessarily reflect a change in residence.").

Such a bare comparison of lists is highly likely to result in false positives, including identification of students, military personnel, and others who continue to reside and lawfully vote in Michigan while temporarily located elsewhere, as well as voters who share the same or similar names as individuals residing at other addresses. Further, voters who moved from between cities or townships in-state but did so within sixty days of Election

[5] Braynard states that he conducted an analysis of data from the state of Wisconsin, rather than Michigan. (*See* Braynard Report at 2.) While this appears to have been a typographical error, the numbers provided by Braynard contradict each other in several places in his Report, raising questions about veracity of the figures cited, and whether those figures relate to data from Wisconsin or Michigan. For instance, on p. 7 of his Report, Braynard states 139,190 individuals were identified as "having not returned an absentee ballot," while one page later he states 96,771 individuals were identified as "having not returned an absentee ballot." Compounding the confusion, Braynard states that the underlying data is described in "Exhibit 2", but the Petitioners did not provide any exhibits to his Report. (*See* Braynard Report at 6-10.)

Day (*i.e*. on or after September 4, 2020) continued to be eligible to vote at their former address in the November 3, 2020, election, either in person or by absentee ballot. *See* MCL § 168.507a(1). Moreover, voters who moved out of Michigan within thirty days of the election are permitted to cast absentee ballots for the Presidential contest in Michigan. 52 U.S.C. § 10502(e).

Similarly, Braynard misconstrues what the presence of a voter's name in a database may indicate about the voter. For example, Braynard examined voter data that purportedly identifies voters who were sent an absentee ballot but who failed to return it. (Report at 7-8.) But this list almost certainly includes voters whose ballots *were* returned but did not arrive until after the November 3, 2020 deadline and were therefore not counted, as well as voters who did not return their mailed ballot but instead voted in person.

In Michigan, a court's "gatekeeper role" is to "admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science." *Gilbert*, 470 Mich. at 782. Indeed, as *Gilbert* notes when adopting the federal *Daubert* standard, "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. *Id.* citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). But *ipse dixit* and junk science are all that Braynard and Petitioners have. Nowhere in his Report does Braynard provide details sufficient to identify the even the basic principles he applied and the methodology he employed, and every indication is that he employed the wrong

methodology and misunderstood the basic principles. His report is not worthy of consideration by this or any court. For the foregoing reasons, this Court should ignore Braynard's Report and the other "expert" reports that rely on the data. Further, the Court should not admit any of the other "expert" reports until the witnesses' credentials can be suitably examined and qualified under MRE 702 and *Gilbert*.

V. CONCLUSION

For the reasons set forth above, non-parties Michigan NAACP respectfully requests that this Court deny the Petition for original action.

Dated: December 3, 2020

Respectfully submitted,

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