STATE OF MICHIGAN
IN THE SUPREME COURT

ANGELIC JOHNSON, et al,

Petitioners,

v.

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, et al.

Defendants,

DNC Services Corporation/Democratic National Committee and Michigan Democratic Party,

Proposed Intervenors.

MSC No. 162286

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DNC SERVICES CORPORATION/DEMOCRATIC NATIONAL COMMITTEE AND MICHIGAN DEMOCRATIC PARTY'S BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRITS & DECLARATORY RELIEF

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This Court lacks original jurisdiction to hear this mandamus action. Michigan law is clear that actions for mandamus against state officers must originate in the Court of Appeals or the Court of Claims. Michigan Court Rules provide that "[a]n action for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims," and that "[a]ll other actions for mandamus must be brought in the circuit court unless a statute or rule requires or allows the action to be brought in another court." MCR 3.305(A); see also MCR 7.203(C)(2) (conferring original jurisdiction on the Court of Appeals for actions involving "mandamus against a state officer"). Likewise, MCL 600.6419(1)(a) provides that the Court of Claims, as a trial court, has jurisdiction over extraordinary writs against state officers. See *O'Connell v Director of Elections*, 316 Mich App 91, 97; 891 NW2d 240 (2016).

This Court has specifically interpreted MCR 3.305 to "provide[] that complaints for mandamus may not be considered by the Supreme Court if a lower court has jurisdiction," unless some other provision of law precludes review by a lower court. See *LeRoux v Secy of State*, 465 Mich 594, 606-07; 640 NW2d 849 (2002). Petitioners point to MCL 168.479(1), but that provision is part of a chapter of the Michigan Election Law governing initiatives and referenda, see MCL 168.471-168.488, and does not allow a plaintiff to challenge the Board of State Canvassers' certification of an election result. MCL 168.479(1) affords no basis for invoking this Court's original mandamus jurisdiction as to the Secretary of State or the Governor.

QUESTIONS PRESENTED

I. Does this Court have original jurisdiction to hear this Petition?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

II. Are Petitioners entitled to mandamus relief?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

III. Are Petitioners' claims barred by the equitable doctrine of laches?

Proposed Intervenors' answer: "Yes."

This Court should answer: "Yes."

IV. Is most of Petitioners' requested relief moot?

Proposed Intervenors' answer: "Yes."

This Court should answer: "Yes."

V. Do Petitioners have standing to bring their claims?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

VI. Do Petitioners state a viable due process claim?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

VII. Do Petitioners state a viable equal protection claim?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

VIII. Do Petitioners state a viable Electors Clause claim?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

IX. Do Petitioners present evidence that is admissible and credible?

Proposed Intervenors' answer: "No."

This Court should answer: "No."

INTRODUCTION

The people of Michigan have spoken. More than 5.5 million Michiganders—a new record—cast their votes in races up and down the ballot. Their votes have since been received, processed, and canvassed by a dedicated team of election officials and volunteers, operating under intense scrutiny in the midst of a public health crisis. Each of Michigan's 83 counties then certified its results, and the Board of State Canvassers (the "Board") accordingly certified the statewide total, consistent with its clear legal duty. The deadline provided for under Michigan state law for recount requests has now passed, and no state-level candidate has requested such a recount. See MCL 168.879(c). The Governor has prepared and executed the Certificate of Ascertainment recognizing a slate of Michigan electors for President-elect Joe Biden, and delivered it to the National Archivist in Washington, DC, as required under federal law. 3 USC 6. The federal "safe harbor" date, which gives conclusive effect to a state's electoral votes if they are determined by that date, is only four days away—December 8, 2020. 3 USC 5. And within a period of weeks, President-elect Biden, Vice President-elect Harris, and a slate of winning candidates from across the political spectrum in Michigan will assume the offices to which they were duly elected.

Apparently dissatisfied with this outcome, Petitioners filed this suit, eager to sow doubt about the results of the election. But their claims, like the baseless allegations of fraud still being made daily by their standard-bearer and party leaders, are divorced from the reality of the successful—indeed, heroic—administration of this election by state and local officials. On the basis of a meritless and previously resolved challenge to the overall absentee ballot system and recycled, entirely unsupported, and mostly already debunked allegations of electoral malfeasance, Petitioners seek extraordinary and unprecedented relief from this Court, including the complete disenfranchisement of 5.5 million Michiganders.

This Court should deny the Petition for several reasons. As a threshold matter, this Court

does not have original jurisdiction over this action even if it were properly seeking a writ of mandamus. Nor have Petitioners met the standard to obtain mandamus relief. Furthermore, most of Petitioners' requested relief is moot, and all of their claims—challenging actions that took place months and weeks ago—are barred by laches, a doctrine carrying particular force in the election context. Each of these jurisdictional bars precludes this Court's adjudication of the Petition.

In other words, Petitioners do not belong in this Court in the first place. But in any event, their claims fail as a matter of law. They have not stated cognizable due process and equal protection claims, and their Electors Clause claim fails because Defendant Jocelyn Benson, the Secretary of State (the "Secretary"), acted consistently with the Michigan Legislature's electoral scheme—as the Michigan Court of Appeals already held. See *Davis v Sec'y of State*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 354622), 2020 WL 5552822, at *7. Finally, the so-called "evidence" Petitioners put forward is neither admissible nor credible.

Ultimately, the Petition is part of a broader and deeply troubling national effort to use the judiciary to cast doubt on the outcome of the general election. Although it is styled as a mandamus action (in an effort to skip straight to this Court), the Petition does not seek an order directing any state officer to perform a ministerial, statutorily-required action, but rather demands *this Court's* unprecedented intervention to reverse the outcome of an election where voting concluded more than a month ago and results have been certified for more than ten days. Every other court confronted with lawsuits of this ilk has properly rejected them. This Court should do the same and deny the Petition.

STATEMENT OF FACTS

I. Other Post-Election Lawsuits

Despite widespread acknowledgement that no fraud occurred, see, e.g., Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, NY TIMES (Nov 10,

2020)[1]; *Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees*, Cybersecurity & Infrastructure Sec Agency (Nov 12, 2020)[2] ("The November 3rd election was the most secure in American history."), multiple lawsuits have been filed in Michigan over the course of the past month, in an attempt to sow confusion and cast doubt on the legitimacy of the election—including a lawsuit filed by Petitioner Angelic Johnson in the US District Court for the Western District of Michigan almost three weeks ago. All have failed. In Johnson's federal case, for example, which featured many of the same claims raised here, the plaintiffs sought to enjoin the State from certifying Michigan's results "until an independent audit to ensure the accuracy and integrity of the election is performed" or some other judicially imposed review was completed. See Compl, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 15, 2020) (App'x 1). Proposed Intervenors moved to intervene with an accompanying motion to dismiss, see Proposed Intervenor-Defs' Mot to Intervene, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 27); Proposed Intervenor-Defs' Mot to Dismiss, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 46). In response, the *Johnson* plaintiffs promptly dismissed their action voluntarily, see Pls' Voluntary Dismissal, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 84). Although she and her fellow

[1] Available at https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html.

[2] Available at https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election. Under MRE 201(b), the Court may take judicial notice of certain adjudicative facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Additionally, under MRE 201(e), "judicial notice of facts may be taken at any stage of the proceedings including at the appellate level." *Cobb v Parks*, ___Mich App ___; ___ NW2d ___ (2019) (Docket No. 342774), 2019 WL 3437007, at *5 n 2, *appeal denied*, 941 NW2d 621 (Mich, 2020). Michigan courts have previously recognized that information on publicly available websites, such as government websites, may be judicially noticed. *See id.*

plaintiffs dropped the federal lawsuit in the face of that motion to dismiss, Johnson now turns to this Court to attempt to undo the State's certification of its election results.

Other challenges to Michigan's returns—resting on unsubstantiated allegations like those asserted in this one—have been filed in federal court and similarly abandoned. See Compl for Declaratory, Emergency, & Permanent Injunctive Relief, *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG (WD Mich, Nov 17, 2020) (App'x 87); Verified Compl for Declaratory & Injunctive Relief, *Bally v Whitmer*, No. 1:20-cv-01088-JTN-PJG (WD Mich, Nov 11, 2020) (App'x 118). In the Trump Campaign's lawsuit, Proposed Intervenors were granted intervention. See *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG, slip op at 5 (WD Mich, Nov 17, 2020) (App'x 146). After the court set a briefing schedule on Proposed Intervenors' motion to dismiss, see *id.* at 6; see also Proposed Intervenor-Defs' Mot to Dismiss, *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG (WD Mich, Nov 14, 2020) (App'x 152)—which raised many of the same arguments that Proposed Intervenors now assert here—the Trump Campaign voluntarily dismissed its suit, see Notice of Voluntary Dismissal, *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG (WD Mich, Nov 19, 2020) (App'x 189). Similarly, in *Bally*, the plaintiffs voluntarily dismissed their complaint within a week of filing. See Notice of Voluntary Dismissal, *Bally v Whitmer*, No. 1:20-cv-01088-JTN-PJG (WD Mich, Nov 11, 2020) (App'x 190). The latest in this string of federal cases was filed last week and is even more frivolous and utterly implausible than the ones before it, asserting claims rooted in (among many other things) an alleged "criminal conspiracy to manipulate Venezuelan elections in favor of dictator Hugo Chavez." Compl for Declaratory, Emergency, and Permanent Injunctive Relief, *King v Whitmer*, No. 2:20-cv-13134-LVP-RSW (ED Mich, Nov 25, 2020) (App'x 193).

Still more lawsuits raising similar claims have been filed and rejected in state court. In addition to its federal case, the Trump Campaign brought suit in the Michigan Court of Claims, where it sought an immediate cessation of the counting of absentee ballots based on allegations of insufficient oversight. See Verified Compl for Immediate Declaratory & Injunctive Relief, *Donald J Trump for President, Inc v Benson*, No. 20-000225-MZ (Mich Ct Cl, Nov 4, 2020) (App'x 268). The Court of Claims denied the Trump Campaign's emergency motion for declaratory relief, concluding that it was unlikely to succeed on the merits and that, even "overlooking the problems with the factual and evidentiary record," the matter had become moot because "the complaint and emergency motion were not filed until approximately 4:00 p.m. on November 4, 2020—despite being announced to various media outlets much earlier in the day." *Donald J Trump for President, Inc v Benson*, No. 20-000225-MZ, slip op at 5 (Mich Ct Cl, Nov 6, 2020) (App'x 279). The Trump Campaign has since sought an appeal, see Mot for Immediate Consideration of Appeal Under MCR 7.211(C)(6), *Donald J Trump for President, Inc v Benson*, No. 355378 (Mich Ct App, Nov 6, 2020) (App'x 285), but inexplicably delayed for three weeks in correcting its numerous filing defects as requested by the Michigan Court of Appeals, see Appellate Docket Sheet, *Donald J Trump for President, Inc v Benson*, No. 355378 (Mich Ct App, Dec 4, 2020) (App'x 289).

Other challenges to Michigan's election procedures and results have been rejected as having no legal or factual merit. On election day, the Michigan Court of Claims denied an emergency motion to increase election oversight. See *Polasek-Savage v Benson*, No. 20-000217-MM, slip op at 3 (Mich Ct Cl, Nov 3, 2020) (App'x 291). And on November 6, the Third Judicial Circuit Court for Wayne County rejected an Election Integrity Fund-backed effort to delay certification of that County's ballots:

> This Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified. . . .

> A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.

Stoddard v City Election Comm'n, No. 20-014604-CZ, slip op at 4 (Mich Cir Ct, Nov 6, 2020) (App'x 294); see also *Stoddard v City Election Comm'n*, No. 20-014604-CZ, order (Mich Cir Ct, Nov 13, 2020) (App'x 298) (granting DNC's motion to intervene).

The Michigan Democratic Party was granted intervention in another challenge to Wayne County's returns in the Third Judicial Circuit Court. See *Costantino v City of Detroit*, No. 20-014780-AW, slip op at 2 (Mich Cir Ct, Nov 13, 2020) (App'x 300). On November 13, the court denied the plaintiffs' motion for a preliminary injunction. After reviewing affidavits reporting vague allegations of suspicious conduct at TCF Center and concluding that the "[p]laintiffs' interpretation of events is incorrect and not credible," the court observed that

> [i]t would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. . . .
>
> Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Costantino v City of Detroit, No. 20-014780-AW, slip op at 11-13 (Mich Cir Ct, Nov 13, 2020) (App'x 302). The Michigan Court of Appeals later denied the plaintiffs' motion for peremptory reversal and application for leave to appeal the circuit court's order, see *Costantino v City of Detroit*, No. 355443, slip op at 1 (Mich Ct App, Nov 16, 2020) (App'x 315), and this Court then denied plaintiffs' application for leave to appeal, see *Costantino v City of Detroit*, No. 162245, slip op at 1 (Mich, Nov 23, 2020) (App'x 316).

II. Michigan's Post-Election Procedures and Deadlines

Under Michigan law, the Board was required to canvass the results of the 2020 general election by November 23, 2020. MCL 168.842. The Board did so by a 3-0-1 vote, certifying the results "for the Electors of President and Vice President," among other offices. (App'x 323.) That evening, Governor Whitmer signed the Certificates of Ascertainment for the slate of electors for Joseph R. Biden and Kamala Harris. (App'x 325.) One of those certificates has already been transmitted to and received by the National Archives. (App'x 325.) There are no procedures availably under Michigan law to "de-certify" an election that has already been certified.

Under the federal statutory timetable unique to presidential elections, the Electoral College must meet on "the first Monday after the second Wednesday in December," 3 USC 7—this year, December 14. The federal "safe harbor" date, which gives conclusive effect to a state's electoral votes if they are determined by a certain date, occurs even earlier—this year, December 8. See 3 USC 5.

Michigan law also sets forth procedures to conduct an audit of an election. MCL 168.31a. The Secretary has already stated publicly that she intends to conduct an audit of the November general election, including a "performance audit" in Wayne County. See *Statement from Secretary of State Jocelyn Benson on Planned Audits to Follow Certification of the Nov 3, 2020, General Election*, Mich Dept of State (Nov 19, 2020)[3]; Paul Egan, Secretary of State: *Post-Election 'Performance Audit' Planned in Wayne County*, DETROIT FREE PRESS (Nov 19, 2020).[4]

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

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

Notably, Michigan law provides a clear mechanism for redress to a candidate who believes that an election outcome was altered by fraud. Specifically, MCL 168.879 permits a candidate to seek a recount by submitting a petition that "alleges that the candidate is aggrieved on account of fraud or mistake in the canvass of the votes by the inspectors of election or the returns made by the inspectors of election, or by a board of county canvassers or the board of state canvassers." MCL 168.879(b). To file such a petition, "[t]he candidate must be able to allege a good-faith belief that but for fraud or mistake, the candidate would have had a reasonable chance of winning the election. *Id.* Such a petition was due "not later than 48 hours following" the Board's November 23 certification of the results. The Trump Campaign did not seek a recount.

III. The Petition

Petitioners Angelic Johnson and Linda Lee Tarver ("Petitioners") filed this lawsuit on Thanksgiving Day, more than three weeks after Election Day, and days after the State's results had been certified. (See Petition ¶26.) Among other things, they seek to enjoin Defendants "from finally certifying the election results and declaring winners of the 2020 general election to the United States Department of State or United States Congress until after a special master can be appointed to review and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme." (Petition at pp 52-53.) They also seek to enable the Michigan Legislature to appoint President Trump's electors in place of the Biden electors selected by the people of Michigan. (Petition at pp 52-53.) Even if this Court has jurisdiction, there is no clear legal duty for any one or more of the Defendants to perform the tasks Petitioners demand to justify a writ of mandamus.

LEGAL STANDARD

Despite the Petition's myriad claims for relief, Petitioners acknowledge that the relief they request should be evaluated under the mandamus standard, as that is the writ they purportedly

seek.[5] (See Pets' Mandamus Br at p 21.) The party seeking a writ of mandamus must meet four requirements to obtain relief: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016) (internal quotation marks omitted); see also *McLeod v Kelly*, 304 Mich 120, 127; 7 NW2d 240 (1942) ("Writ of mandamus will issue to compel public officers and tribunals to perform their duties, when the right is clear and specific."). Petitioners here meet none.[6]

[5] Petitioners make a single reference to "quo warranto" in their petition. (Petition at p 51.) But Petitioners make no argument as to their entitlement to such relief. Quo warranto actions may only be "brought against persons for usurpation of office." MCL 600.4505; see also *Davis v Chatman*, 292 Mich App 603, 611-612; 808 NW2d 555 (2011) ("Quo warranto is the only appropriate remedy for determining the proper holder of a public office."). Petitioners' action—a challenge to the *entire election*, filed against state election officials—falls well outside the scope of this limited form of action.

[6] This Court has held that a private voter's right to seek election-related mandamus relief "is a matter within the discretion of the court." *Amberg v Welsh*, 325 Mich 285, 291; 38 NW2d 304 (1949), overruled in part on other grounds by *Wallace v Tripp*, 358 Mich 668, 101 NW2d 312 (1960). See also *Thompson v Secretary of State*, 192 Mich 512, 522, 159 NW 65 (1916) (noting that whether electors have "such interest as entitles them to institute [mandamus] proceedings . . . is a matter of discretion on the part of the court, and not of law," and holding that "[t]he relators are electors of this State interested in the proper administration of the law; and, under the circumstances of this case and the public importance of the questions raised, the objection to their instituting these proceedings will not be sustained"). To the extent that Petitioners seek relief other than mandamus, they lack standing because their interest in ensuring the integrity of Michigan's elections is shared by every Michigan citizen, and their interest in seeing their preferred candidates take office is shared by millions of Michiganders who voted for those same candidates. *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010) (holding that, to establish standing absent a cause of action provided by law or a declaratory judgment action, plaintiffs must prove a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large").

ARGUMENT

I. This Court lacks original jurisdiction over this mandamus action.

The Court should dismiss the Petition at the outset because Michigan law is clear that actions for mandamus against state officers must originate in the Court of Appeals or the circuit court. Michigan Court Rules provide that "[a]n action for mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims," and that "[a]ll other actions for mandamus must be brought in the circuit court unless a statute or rule requires or allows the action to be brought in another court." MCR 3.305(A); see also MCR 7.203(C)(2) (conferring original jurisdiction on the Court of Appeals for actions involving "mandamus against a state officer"). Likewise, MCL 600.6419(1)(a) provides that the Court of Claims, as a trial court, has jurisdiction over extraordinary writs against state officers. See *O'Connell v Director of Elections*, 316 Mich App 91, 97; 891 NW2d 240 (2016). This Court has interpreted MCR 3.305 to "provide[] that complaints for mandamus may not be considered by the Supreme Court if a lower court has jurisdiction," unless some other provision of law precludes review by a lower court. *LeRoux v Secy of State*, 465 Mich 594, 606-07; 640 NW2d 849 (2002). Petitioners have therefore not identified any basis upon which to invoke this Court's original jurisdiction.

Insofar as Petitioners attempt to rely on MCL 168.479(1), they are mistaken. That provision states that "any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court." It is part of a chapter of the Michigan Election Law governing *initiatives and referenda*—not presidential elections (or elections for any other office, for that matter). See MCL 168.471-168.488. Every case of which we are aware in which a plaintiff has invoked this provision appears to have correspondingly involved grievances related to the Board of State Canvassers' decisions on ballot initiatives or referenda. See, e.g., *Citizens Protecting Michigan's Constitution*

v Secy of State, 324 Mich App 561; 922 NW2d 404 (2018) (addressing initiative petition); *Stand Up for Democracy v Secy of State*, 297 Mich App 45, 61-62; 824 NW2d 220, *rev'd sub nom.*, 492 Mich 588; 822 NW2d 159 (2012) (addressing referendum); *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 506, n 2; 688 NW2d 847 (2004) ("We also note that the Legislature specifically protects the interest of petition signers and circulators in initiative and referendum situations. MCL § 168.479."). It is perhaps unsurprising, then, that Petitioners are unable to cite a single case in which this provision has been applied to allow a plaintiff to challenge the Board of State Canvassers' certification of the result for an elected office. (See Pets' Mandamus Br at p x.) Furthermore, MCL 168.479(1) on its face provides no basis for invoking mandamus jurisdiction as to the Secretary of State or the Governor, but only the Board.

Indeed, this Court has previously dismissed complaints for mandamus on grounds that the petitions should have been filed in the Court of Appeals pursuant to MCR 3.305. See e.g., *Callahan v Bd of State Canvassers*, 646 NW2d 470 (Mich, 2002) ("Application is in the nature of a complaint for mandamus against the Board of State Canvassers and the Secretary of State, which is properly filed in the Court of Appeals or the circuit court."); *Gillis v Bd of State Canvassers*, 552 NW2d 170 (Mich, 1996) ("The complaint for mandamus is considered, and it is DISMISSED because this mandamus action against the Board of State Canvassers and the Secretary of State is properly filed in the Court of Appeals or in circuit court."). In one of those cases, *Schwarzberg v Bd of State Canvassers*, 649 NW2d 73 (Mich, 2002), this Court addressed a provision similar to MCL 168.479(1) and concluded that, "[d]espite the language of MCL 168.552(12), a mandamus action against the Board of State Canvassers is properly filed in the Court of Appeals or the circuit court." Since the operative language of MCL 168.552(12)—"[a] person who filed a nominating petition with the secretary of state and who feels aggrieved by a determination made by the board

of state canvassers may have the determination reviewed by mandamus, certiorari, or other appropriate process in the supreme court"—is substantively identical to MCL 168.479(1)—"any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court"—the Court should reach the same conclusion here. The Court should dismiss Petitioners' mandamus petition for lack of jurisdiction.

II. Petitioners fail to meet the standard to obtain mandamus relief.

Even setting aside this Court's lack of original jurisdiction, Petitioners in this case have failed to clear the very high bar for mandamus relief. "A writ of mandamus is an extraordinary remedy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 519; 810 NW2d 95 (2011). "The plaintiff has the burden to demonstrate an entitlement to the extraordinary remedy of a writ of mandamus." *Secy of State*, 324 Mich App at 584 Petitioners have failed to carry that burden with respect to any of the elements they must meet to obtain mandamus relief.

A. Petitioners have not alleged or asserted an entitlement to a clear legal right owed to them by any of the Respondents for the relief they seek.

"A clear legal right is a right clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *League of Women Voters of Michigan v Secy of State*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 353654), 2020 WL 3980216, at *2, *app den* 946 NW2d 307 (Mich, 2020) (internal quotation marks omitted). Petitioners have failed to identify any cognizable legal right of which they have been deprived. They simply argue that they have a fundamental right to vote and "to cast their ballots and have them counted if they are validly cast." (See Petition ¶¶4-5, 242-45.) But Petitioners concede that they in fact *did* exercise that right to vote in the 2020 general election and do *not* allege that their ballots were not properly counted. (See Petition ¶¶31-

32.) To the extent that Petitioners attempt to rely on their right to seek an audit of election results under applicable law (see Petition ¶55), Petitioners again concede that Respondents are in the process of undertaking an audit (see Petition ¶135), and have pointed to no additional statutory or other legal right to an independent audit by this Court, or otherwise (see Petition at p 52).[7] Moreover, they do not have the right to seek a recount of the presidential race; only candidates for that office have that right, and none requested such a recount, the time for which has now passed. MCL 168.879. Finally, Petitioners have not alleged—nor could they allege—possessing any clear legal right to the appointment of a "special master or committee from both chambers of the Michigan Legislature to investigate all claims of mistake, irregularity, and fraud at the TCF Center and to verify and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme," nor a clear legal right to prevent certification of the election results pending such an investigation. (See Petition at p 53.)[8] Petitioners' general right to vote and to have their votes counted is therefore completely untethered from the relief they seek. Because Plaintiffs

[7] Insofar as Petitioners simultaneously seek an audit under Const 1963, art 2, § 4(1)(h), they have made reference to that provision only in passing (See Petition ¶¶4, 27, 55; Pets' Mandamus Br at pp xiv, 24-25), and, regardless, that constitutional provision provides voters with "the right to have the results of statewide elections audited" only "in such manner as prescribed by law." That "manner as prescribed by law" refers to MCL 168.31a, which the Legislature specifically amended after the adoption of Section 4(1)(h) to provide that "[t]he secretary of state shall prescribe the procedures for election audits . . . as required in section 4 of article II of the state constitution of 1963." MCL 168.31a(2); see also *Bisio v City of Vill of Clarkston*, ___ Mich ___;___ NW2d ___ (2020) (Docket No. 158240), 2020 WL 4260397, at *6 ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."). Petitioners do not purport to have followed any legally prescribed procedures, and, in any event, the Secretary has already stated publicly that she intends to conduct.

[8] Petitioners make passing reference to MCL 168.846, which they claim provides authority for the proposition that "if the election process cannot be certified, then the task reverts back to the Michigan Legislature." (Petition ¶7.) Petitioners' characterization is contrary to the plain text of the statute, which says no such thing. Regardless, Petitioners acknowledge that the 2020 general election has already been certified. Even under their own reading of MCL 168.846, there is nothing left for the Legislature to do.

have not established a clear legal right of which they have been deprived, the Court should deny the Petition.

B. Petitioners have also failed to allege that any Respondent has a "clear legal duty" that they were obligated to perform but failed to perform.

Relatedly, Petitioners fail to identify a clear legal duty on behalf of any Respondent named in their Petition. As to the Board and its Chairperson, Petitioners' allegations are opaque, at best: they allege only that the Board of State Canvassers is "required to 'canvass the returns and determine the result of all elections for electors of president and vice president of the United States . . .'" and to "record the results of a county canvass . . . upon receipt of a properly certified certificate of a determination from a board of country [sic] canvassers." (See Petition ¶36; Pets' Mandamus Br at pp 22-23.) But Petitioners concede that the Board has in fact fulfilled these duties and that "Respondent Board certified the election on Monday, November 23, 2020[.]" (See Application ¶26.) Moreover, here again, even if Petitioners had identified *some* clear legal duty (and they have not), they have not identified a clear legal duty necessary to justify the relief they seek—namely, a duty on behalf of any Respondent to postpone certification of the (already-certified) election results pending a full audit and fraud investigation by a legislative committee or special master. (See Application at pp 52-54; Pets' Mandamus Br at pp 45-47.) What is more, Petitioners ask this Court to issue an order directing Respondents to *de-certify* the election results. Respondents have no power to de-certify election results, let alone a legal duty *requiring* them to do so. Petitioners, certainly, have not identified any statutory or other authority establishing such a legal duty.

On the contrary, the State Board's duty to *certify* the results of the election was clear. The State Board's fundamental duty is to "canvass the returns and determine the result . . . for electors of president and vice president of the United States" and, upon making that determination, to

"immediately . . . deliver the properly certified certificate of determination to the secretary of state." MCL 168.841(1). The process for certifying the results is straightforward. Under Michigan law, the State Board "shall meet at the office of the secretary of state on or before the twentieth day after the election." MCL 168.842(1). In this election cycle, the State Board was required to meet and to consider certification of the election results for the Secretary of State no later than November 23, 2020, which it did. At the meeting of the State Board, the Secretary of State was required to "lay before the board the statements received by [her] of the votes given at such election in the several counties." MCL 168.843. She did. From these county statements, the State Board was required to prepare a single statement showing the total number of votes cast for each candidate. MCL 168.844. It did. The State Board was then required to "certify as to the correctness of the statement provided for in section 844 . . . and determine which persons have been duly elected to each office." MCL 168.845. It did. Finally, the Board was required to certify its determination and deliver the statement and its certificate of determinations to the Secretary of State. *Id.* It did. As the Michigan Supreme Court has expressly found, the State Board is "governed by the return" and has a clear legal duty "to certify the result of the election as shown by the returns." *McLeod*, 304 Mich at 127. The State Board fulfilled its duty, and nothing more was required or permitted. The State Board thus has no discretion to look beyond the ballot totals themselves, including to demand an audit of those returns. See *id.* ("It is the settled law of this state that canvassing boards are *bound by the return, and cannot go behind it*, especially for the purpose of determining frauds in the election," quoting *McQuade v. Furgason*, 91 Mich 438, 440; 51 NW 1073 (1892) (emphasis added)).

With respect to Governor Whitmer, Petitioners' application for mandamus alleges only that the Governor, "[a]s Michigan's chief executive, by statute, . . . will ostensibly transmit the State's

certified results to the US Department of State and Congress on or before December 8, 2020"—with no citation to any statute. (See Petition ¶38.) In fact, the Governor has a *duty* to "certify, under the seal of the state, to the United States secretary of state, the names and addresses of the electors of this state" "*[a]s soon as practicable* after the state board of canvassers has, by the official canvass, ascertained the result of an election as to electors of president and vice-president of the United States." MCL 168.46 (emphasis added); see also 3 USC 6 ("It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed"); MCL 168.102 ("It shall be the duty of the governor . . . to certify [a US Senator's] election or appointment to the president of the senate of the United States."). And she has actually, not ostensibly, already performed that duty. (App'x 325.)

Petitioners' complaint as to Secretary Benson fares no better, as Petitioners allege only that the Secretary "has a clear legal duty to enforce Michigan Election Law, the United States Constitution, and the Michigan Constitution." (See Petition ¶33; Pets' Mandamus Br at p 22.) Petitioners further allege generally that "Respondents have a duty to ensure the accuracy and integrity of the election" (Petition ¶¶239, 260, 266) and "a duty to guard against the deprivation of the right to vote through the dilution of validly case ballots" (Petition ¶254). This vague allegation falls far short of identifying the sort of clear legal duties that Michigan courts have required in order to grant mandamus relief. See *Secy of State*, 324 Mich App at 585 (concluding that Board of State Canvassers had clear legal duty under statute to "ascertain[] whether sufficient valid signatures support the petition and whether the petition is in proper form").

Petitioners have therefore failed to identify a clear legal duty on behalf of any Respondent—even if each is properly named in the petition—sufficient to support mandamus relief. See, e.g. *Hanlin v Saugatuck Tp*, 299 Mich App 233, 249; 829 NW2d 335 (2013) (affirming denial of mandamus relief where, "[n]otably, plaintiffs do not rely on any statute . . . to claim that the [County] Board of Canvassers violated a clear legal duty" by certifying election without conducting investigation into alleged irregularity); *Herp v Lansing City Clerk*, 164 Mich App 150, 161; 416 NW2d 367 (1987) (affirming denial of mandamus where "plaintiffs have not persuasively demonstrated that the city clerk had a clear legal duty to certify their petitions as sufficient under § 8b of the building authority act"); *Childers v Kent Co Clerk*, 140 Mich App 131, 136; 362 NW2d 911 (1985) (affirming denial of writ of mandamus where statute did not create clear legal duty for clerk to accept signatures on petition where there were defects in certificate of circulators). See also *Michigan Civil Rights Initiative v Bd of State Canvassers*, 268 Mich App 506, 519-20; 708 NW2d 139 (2005) (issuing order of mandamus directing Board of State Canvassers to certify initiative petition for placement on ballot since Board lacked statutory authority to investigate fraud).

C. Petitioners have failed to identify any ministerial act that they seek to have any Respondent perform.

Furthermore, Petitioners have entirely failed to identify any ministerial act that they seek to have any Respondent perform. The Court should deny Plaintiffs' petition for this reason as well.

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *League of Women Voters*, 2020 WL 3980216, at *2 (internal quotation marks omitted). Thus, "[i]f the act requested by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate." *Hanlin v Saugatuck Tp*, 299 Mich App 233, 248; 829 NW2d 335

(2013). Courts have found acts to be ministerial where, for example, a statute provides a clear directive that ballot language "shall" be certified if a particular number of signatures have been submitted or certain timing requirements are met. See, e.g. *Berry v Garrett*, 316 Mich App 37, 43; 890 NW2d 882 (2016) (finding that the action plaintiff sought to compel—the correction of ballots that inappropriately included certain candidates' names—was ministerial under a statute providing that the board "'shall correct such errors as may be found in said ballots'"); *Warren City Council v Buffa*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 354663), 2020 WL 5246664, at *4 (Mich Ct App, 2020), *app den* 947 NW2d 689 (Mich, 2020) (concluding that city clerk's duty to certify ballot language was ministerial where statue provided "that if proposed ballot language is certified to a local clerk by 4:00 p.m. on the twelfth Tuesday before the election, 'the clerk shall certify the ballot wording to the county clerk at least 82 days before the election,'" since statute "leaves no room for discretion").

Petitioners identify no such ministerial act here. Rather, Petitioners offer only the generalized allegation that Respondents' obligation "to follow state and federal election law" is somehow "ministerial." (See Pets' Mandamus Br at p 23.) This broad conception of a ministerial act is at odds with well-established Michigan law. If anything, the cases cited by Petitioners (see Pets' Mandamus Br at p 23), undermine their position. For example, as Petitioners' cases establish, the Board does have a ministerial duty to certify the votes presented to them; the Board cannot look behind the curtain and inquire as to the accuracy of the count. See, e.g., *McLeod*, 304 Mich at 127. But Petitioners have not asked the Board to perform their ministerial duty. Instead, Petitioners' primary objective appears to be to *undo* the ministerial act the Board has already performed.

D. Mandamus is not the appropriate vehicle for the extraordinary and unprecedented disenfranchisement that Petitioners seek.

Finally, Petitioners cannot establish that no other remedy exists that might achieve the same relief they seek here.

Rather than asking the Court to direct the type of nondiscretionary activity within the scope of mandamus, the relief Petitioners seek is unprecedented and extraordinary: they ask this Court to "take custody and control of all ballots, ballot boxes, poll books, and other indicia of the Election"; to "segregate any ballots attributable to the Secretary of State's absentee ballot scheme"; and to "appoint a special master or committee from both chambers of the Michigan Legislature to investigate all claims of mistake, irregularity, and fraud at the TCF Center and to verify and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme"—without a *single citation to any authority allowing this Court to do so*. (Petition at pp 52-53.) Such judicial overreach would be breathtaking, requiring this Court to disenfranchise millions of voters, and would throw the electoral system into chaos.

To the extent Petitioners seek to investigate suspected fraud, the Election Code contains an explicit remedy: a recount. The relevant provision explains that an "aggrieved" *candidate*, meeting certain criteria, who can "allege a good-faith belief that but for fraud or mistake, the candidate would have had a reasonable chance of winning the election" in their own race can submit a petition for a recount. MCL 168.879(b). Such a petition for a recount must set "forth as nearly as possible the nature and character of the fraud or mistakes alleged and the counties, cities, or townships and the precincts in which they exist." MCL 168.879(f). Notably, a recount petition does not delay certification. Indeed, it may be filed within 48 hours after "the completion of the canvass of votes cast at an election." MCL 168.879(c).

Thus, Michigan election law sets forth a specific process to be used to address allegations of fraud and imposes certain requirements to invoke the process. No candidate has requested a recount and asserted a good faith, well-grounded basis to believe that "but for fraud or mistake, the candidate would have had a reasonable chance of winning the election." MCL 168.879(b). For good reason: there is no basis for such an assertion. And the statutory time for such a petition has now passed.

Petitioners are not actually asking for an order directing the Governor, the Secretary, or the Board to take a ministerial, statutorily required action. Rather, they are asking *this Court* to intervene in the election, to reverse its certified results, and to legislate an unprecedented plan to investigate Petitioners' baseless allegations of irregularities through appointment of a special master. (See Pets' Mandamus Br at 45-47; Petition at pp 52-54.) This is not the type of administrative function that can be vindicated through mandamus, and Petitioners cite no legal authority in support of their requested relief. Thus, while nominally seeking to "ensure the Separation of Powers" (Petition at p 52), Petitioners would instead trample Michigan's Constitution in an attempt to rewrite the election, overturn the results, and install their preferred candidates in office through judicial fiat. Petitioners have entirely failed to demonstrate an entitlement to mandamus relief.

III. Most of Petitioners' requested relief is moot.

Next, Petitioners' requested relief is moot. The Court should deny the petition for this reason as well.

Michigan courts derive their authority from Const 1963, art 4. "It is well established that a court will not decide moot issues." *People v Richmond*, 486 Mich 29, 34, 782 NW2d 187 (2010); see also *In re Detmer/Beaudry*, 321 Mich App 49, 55; 910 NW2d 318 (2017), quoting *Warren v Detroit*, 471 Mich 941, 941-942; 690 NW2d 94 (2004) (MARKMAN, J., concurring) ("An 'essential

element' of our courts' judicial authority is that the courts do 'not reach moot questions or declare rules of law that have no practical legal effect in a case.'"). "This is because it is the 'principal duty of this Court . . . to decide actual cases and controversies.'" *Richmond*, 486 Mich at 34, quoting *Federated Publications, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

Here, "an event [has] occur[ed] that makes it impossible for a reviewing court to grant relief," *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987)—namely, the Michigan State Board of Canvassers already certified the statewide election results (see Petition ¶26), and the Governor already issued the formal Certificate of Ascertainment and delivered it to the National Archives (see App'x 325). Ballots, of course, have also already been opened, segregated from their envelopes, and counted. (See generally Petition ¶¶39-130.) While Petitioners seek an order requiring Defendants to "segregate[e] any ballots attributable to the Secretary of State's absentee ballot scheme," and an order "enjoin[ing] Respondents from finally certifying election results" (Petition at pp 52-54), such relief is no longer available to Petitioners. Opened and commingled ballots (which are intentionally divorced from the voters who cast them to preserve the secrecy of the ballot) cannot now be identified to "segregate" them from the rest of the other ballots, and results that have already been certified by law cannot now be "de-certified."

Because this Court cannot grant Petitioners such relief, the case should be dismissed as moot "without reaching the underlying merits." *In re Detmer/Beaudry*, 321 Mich App at 55, citing *Richmond*, 486 Mich at 35; see also *Donald J Trump for President*, No. 20-000225-MZ, slip op at 5 (denying motion seeking immediate cessation of absentee ballot counting as moot because "counting is now complete" and "it is impossible to issue the requested relief") (App'x 279).

No exception to dismissal of a moot case applies here. Although the certification of election results is certainly "an issue of public significance," the issues are not "likely to recur," *Richmond*,

486 Mich at 34. Even under Petitioners' characterization, they involve factual concerns about this particular election. Nor are they likely to "evade judicial review." *Richmond*, 486 Mich at 34. Notwithstanding Petitioners' own dilatoriness in bringing this case, state and federal courts—including this Court—have had the opportunity to consider issues raised in the Petition. For all of these reasons, this Court should deny the Petition as moot.

IV. Petitioners' claims are barred by the equitable doctrine of laches.

Even if the Court had jurisdiction, Petitioners could somehow satisfy the necessary elements of a mandamus petition, and their claims were not moot, their claims would be barred by laches.

Petitioners' challenges to the Secretary's "absentee ballot scheme" (Petition ¶161), the private funding to help local jurisdictions run a general election in a global pandemic (Petition ¶¶208-232), and purported "issues of mistake, fraud, and other malfeasance at the TCF Center" (Petition ¶69), come far too late. Laches is an equitable doctrine, "based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff." *Attorney Gen v PowerPick Club*, 287 Mich App 13, 51; 783 NW2d 515 (2010). A party asserting laches must show (1) "a lack of due diligence on the part of the plaintiff," (2) resulting in "prejudice to the defendant." *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 503-504; 608 NW2d 105 (2000). Both requirements are easily met here.

The Secretary announced on May 19—over six months ago—"that all registered voters in Michigan will receive an application to vote by mail in the August and November elections." *Benson: All Voters Receiving Applications to Vote by Mail*, Mich Sec'y of State (May 19, 2020).[9] Her office launched its "online absentee voter application" on June 12. *Michigan Department of*

[9] Available at https://www.michigan.gov/sos/0,4670,7-127-1640_9150-529536--,00.html.

State Launches Online Absentee Voter Application, Mich Sec'y of State (June 12, 2020).[10] Petitioners were on notice of these plans well before election day—they certainly give no indication they were unaware—and they could and should have brought their related claims much earlier. Indeed, other plaintiffs challenged the Secretary's mailing of absentee ballot applications as early as *May 20*. See Pls' Compl, *Cooper-Keel v Mich Sec'y of State*, No. 20-000091-MM (Mich Ct Cl, May 20, 2020) (App'x 328). And in any event, the Michigan Court of Appeals expressly rejected this claim in September. See *Davis*, 2020 WL 5552822, at *7.

Similarly, the funding from the Center for Technology and Civic Life ("CTCL") to help local jurisdictions attempting to conduct a general election during a global pandemic was announced well before the election. Indeed, Petitioner Tarver herself—along with some of the same lawyers from the Amistad Project of the Thomas More Society who bring this suit—brought a federal challenge to CTCL funding in Michigan in *September*. See Compl for Injunctive and Declaratory Relief, *Election Integrity Fund v City of Lansing*, No. 1:20-cv-00950-PLM-RSK (WD Mich, Sept 29, 2020) (App'x 336) (alleging CTCL funding violated HAVA and the Elections Clause, among other provisions). The US District Court for the Western District of Michigan denied Tarver's motions for temporary restraining order and preliminary injunction, holding that plaintiffs had not established a likelihood of success on their claims. See *id.*, 2020 WL 6605987 (WD Mich, Oct 19, 2020) (denying motion for preliminary injunction); *id.*, 2020 WL 7705985 (WD Mich, Oct 2, 2020) (denying motion for temporary restraining order). Petitioners have thus been well-aware of such funding since September at the very latest.[11]

[10] Available at https://www.michigan.gov/sos/0,4670,7-127-1640_9150-531796--,00.html.

[11] Many other courts also rejected similar claims before the election. See, e.g., *Texas Voters All v Dallas Cty*, No. 4:20-CV-00775, 2020 WL 6146248, at *4 (ED Tex, Oct 20, 2020) (denying motion for preliminary injunctive relief based on, among other things, failure to establish both

Finally, the alleged "issues of mistake, fraud, and other malfeasance at the TCF Center" (Petition ¶69), that form the other bases for the Petition allegedly occurred on November 3 and 4 (see, e.g., Petition ¶¶93, 98), and yet Petitioners waited until November 26—more than three weeks after election day—to bring this case. Again, suits with near-identical allegations were brought as early as election day itself. (See App'x 268-322.) And Petitioner Johnson filed a lawsuit asserting the same allegations on November 15. See Compl, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 15, 2020) (App'x 1).

Plaintiffs' delay was consequential. The ballots have been cast, opened, and counted, and the results have been certified. (See Petition ¶26.) This lawsuit has thus been brought not at the eleventh hour but at the thirteenth hour. Any belated relief granted now would be administratively infeasible, and if Petitioners' challenges were sustained, the votes of millions of Michiganders would be discarded. That severe prejudice to both Defendants and voters would be contrary to fundamental principles of equity, barring Petitioners' claim. *PowerPick Club*, 287 Mich App at 51.

The Pennsylvania Supreme Court, confronted with a similar issue last week, soundly rejected a petition to enjoin Pennsylvania from certifying its election results based on a challenge to mail-in voting which could have been brought before the election. See *Kelly v Commonwealth*,

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standing and likelihood of success on the merits); *see also Pennsylvania Voters All v Ctr Cty*, No. 4:20-CV-01761, 2020 WL 6158309, at *1 (MD Pa, Oct 21, 2020), *aff'd* (CA 3, Nov 23, 2020); *Iowa Voter All v Black Hawk Cty*, No. C20-2078-LTS, 2020 WL 6151559, at *5 (ND Iowa, Oct 20, 2020) (denying motion for preliminary injunctive relief based on failure to establish likelihood of success on the merits); *Minn Voters Alliance v City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *8 (D Minn, Oct 16, 2020) (denying motion for preliminary injunctive relief based on failure to establish standing); *South Carolina Voter's Alliance v Charleston Cty*, No. 2:20-3710-RMG (DSC, Oct 26, 2020) (denying motion for preliminary injunctive relief based on, among other things, failure to establish likelihood of success on the merits); *Georgia Voter All v Fulton Cty*, No. 1:20-CV-4198-LMM, 2020 WL 6589655, at *1-2 (ND Ga, Oct 28, 2020) (denying motion for temporary restraining order).

No. 680 MAP 2020, 2020 WL 7018314, at *1 (Pa, Nov 28, 2020). The Pennsylvania Supreme Court did so on the basis of laches, noting the utter lack of diligence on behalf of the Petitioners who "commence[d] this litigation [mere] days before the county boards of election were required to certify the election results," as well as the "substantial prejudice arising from Petitioners' [delay] . . ." which could "result in the disenfranchisement of millions of Pennsylvania voters." *Id.* at 3. The Pennsylvania Supreme Court's decision echoed a long line of both federal and state decisions which have refused to allow plaintiffs to lie in wait to gauge election results and file suit only after their preferred candidate does not prevail. "[T]he failure to require prompt pre-election action . . . as a prerequisite to post-election relief may permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." *Toney v White*, 488 F2d 310, 314 (CA 5, 1973) (en banc), quoting *Toney v White*, 476 F2d 203, 209 (CA 5, 1973); see, e.g., *Hart v King*, 470 F Supp 1195, 1198 (D Haw, 1979) ("Courts will consider granting post-election relief only where the plaintiffs were not aware of a major problem prior to the election or where by the nature of the case they had no opportunity to seek pre-election relief."); *Tucker v Burford*, 603 F Supp 276, 279 (ND Miss, 1985) (refusing to void election even where defendants conceded that districts were malapportioned because "to grant the extraordinary relief of setting aside an election . . . . would be to embrace the hedging posture" that courts have discouraged).

Because it would now be profoundly inequitable and prejudicial to grant Petitioners' requests, this Court should dismiss Petitioners' belated claims as barred by laches. See *Badon v Gen Motors Corp*, 188 Mich App 430, 436; 470 NW2d 436 (1991).

V. Petitioners' claims fail as a matter of law.

A. Petitioners have not pleaded a viable due process claim.

With Count I, Plaintiffs attempt to raise their allegations regarding alleged illegal or

fraudulent voting to the level of a due process violation, based on two theories: that the casting of unlawful ballots diluted the value of Plaintiffs' votes (see Petition ¶¶ 245-247), and that the election in Michigan "reache[d a] point of patent and fundamental unfairness" that constituted a due process violation (Petition ¶252). Ultimately, even if Plaintiffs' factual allegations were plausible, neither theory would support a cognizable due process claim, and Count I should be dismissed.

As discussed below, vote dilution is a context-specific theory of constitutional harm premised on the Equal Protection Clause that applies only when plaintiffs allege their votes were devalued compared to similarly situated voters in other parts of the state. Petitioners do not explain how the alleged dilution of their votes constitutes a due process violation, and at any rate, they have failed to plead a cognizable vote-dilution claim. Accordingly, vote dilution is not a sound basis for Count I.

Plaintiffs' attempt to transform alleged violations of Michigan's Election Code into a "fundamental fairness" due process violation fares no better. "The Constitution is not an election fraud statute," *Minn Voters Alliance v Ritchie*, 720 F3d 1029, 1031 (CA 8, 2013), and voters are not constitutionally entitled to an error-free election. *Powell v Power*, 436 F2d 84, 88 (CA 2, 1970) ("[T]he due process clause . . . offer[s] no guarantee against errors in the administration of an election."); see also *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013) ("The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart."). Indeed, even "a deliberate violation of state election laws by state election officials does not transgress against the Constitution." *Shipley v Chi Bd of Election Comm'rs*, 947 F3d 1056, 1062 (CA 7, 2020), quoting *Kasper v Bd of Election Comm'rs*, 814 F2d 332, 342 (CA 7, 1987). At a minimum, a plaintiff claiming a violation of due process must allege "*significant*

disenfranchisement that results from a change in the election procedures." *Bennett v Yoshina*, 140 F3d 1218, 1227 (CA 9, 1998) (emphasis added).

Applying these principles, courts have rejected due-process claims based on malfunctioning voting machines, *Hennings v Grafton*, 523 F2d 861, 864-65 (CA 7, 1975); miscounting votes and delayed arrival of ballots, *Gold v Feinberg*, 101 F3d 796, 801 (CA 2, 1996); mistakenly allowing non-party members to vote in a congressional primary, *Powell*, 436 F2d at 85; an allegedly inadequate state response to illegal cross-over voting, see *Curry v Baker*, 802 F2d 1302, 1316 (CA 11, 1986); mechanical and human errors when tallying votes, see *Bodine v Elkhart Cty Election Bd*, 788 F.2d 1270, 1272 (CA 7, 1986); technical errors in printing ballots, see *Hendon v NC State Bd of Elections*, 710 F2d 177, 182 (CA 4, 1983); and unintentionally misclassifying all votes at several precincts, resulting in the wrong candidate being declared the winner, see *Gamza v Aguirre*, 619 F2d 449, 451 (CA 5, 1980).

As the Ninth Circuit explained after considering the cases in which election irregularities rose to the level of constitutional due process violations,

> [A] court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.

Bennett, 140 F3d at 1226-1227. In other words, the sort of unconstitutional irregularities that courts have entertained under the Due Process Clause consist of widescale disenfranchisement. But the Petition does not allege disenfranchisement at all. To the contrary, it is *Petitioners*—whose votes have undisputedly been counted—who seek to negate the votes cast by millions of eligible Michigan voters. (See Petition at pp 52-54, asking this Court to ignore the duly certified vote of the electors, in favor of giving the Michigan Legislature "an opportunity . . . to pick Michigan's

electors."). For all of these reasons, Petitioners' due process claim must be dismissed.

B. Petitioners have not pleaded a viable equal protection claim.

Count II similarly fails to allege a cognizable equal protection claim. Petitioners allege that "[t]he actions of the election officials at the TCF Center and the Secretary of State's absentee ballot scheme have caused the debasement and dilution of the weight of Petitioners' votes." (Petition ¶259.) The rest of the Petition makes clear that what Petitioners are contesting here are the Defendants' alleged actions allowing for purportedly "illegal" votes to be cast. (See, e.g., Petition ¶3.)

This is not an equal protection injury. Vote dilution is a viable basis for an equal protection claim in certain contexts, such as when laws structurally devalue one community's votes over another's. See, e.g., *Bognet v Sec'y Commonwealth of Pa*, 2020 WL 6686120, at *11 ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."); *Reynolds v Sims*, 377 US 533, 563-564; 84 S Ct 1362; 12 L Ed 2d 506 (1964). But Plaintiffs' "conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 2020 WL 6686120, at *11; see also *Wood v Raffensperger*, No. 1:20-cv-4651, 2020 WL 6817513 at *8-10 (ND Ga, Nov 11, 2020) (concluding that vote-dilution injury of this kind is not "cognizable in the equal protection framework"). Indeed, "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law . . . into a potential [] equal-protection claim." *Bognet*, 2020 WL 6686120, at *11, quoting *Donald J. Trump for President, Inc. v Boockvar*, No. 2:20-CV-966, 2020 WL 5997680 at *46 (WD Pa, Oct 10, 2020).

At bottom, "the gravamen of an equal protection claim is differential governmental treatment." *Moore v Bryant*, 853 F3d 245, 250 (CA 5, 2017). Petitioners must thus allege they

"ha[ve] been treated differently from persons who are similarly situated." *Williams v Morton*, 343 F3d 212, 221 (CA 3, 2003). But Petitioners have not alleged they have been treated differently than similarly situated voters. Under similar circumstances, where other plaintiffs have alleged no such disparate treatment, courts have routinely, and appropriately, rejected vote dilution claims. See *Minn Voters Alliance*, 720 F3d at 1031- (rejecting vote dilution challenge to decision by election administrators to allow same-day registrants to vote before verifying their voting eligibility to satisfaction of plaintiffs); *Boockvar*, 2020 WL 5997680, pp *67-68 (rejecting equal protection challenge to poll watcher restrictions grounded in vote dilution theory because restrictions on voter challenges did not burden fundamental right or discriminate based on suspect classification); *Partido Nuevo Progresista v Perez*, 639 F2d 825, 827-828 (CA 1, 1980) (rejecting challenge to purportedly invalid ballots where "plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting").[12] Petitioners have also failed to state an equal protection claim.

[12] Petitioners also argue that Democratic-leaning cities received more funding from CTCL than Republican-leaning cities did. (See Petition ¶223, alleging CTCL funding "raises serious equal protection concerns.") In the claims for relief, however, Petitioners allege only that "[t]he actions of the election officials at the TCF Center and the Secretary of State's absentee ballot scheme have caused the debasement and dilution of the weight of Petitioners' votes" (Petition ¶259), not that the CTCL funding disbursement did so. In any event, such an allegation would still not state an equal protection violation. It is axiomatic that only government actors—not private actors—can violate the equal protection clause. *See Civil Rights Cases*, 109 US 3, 13; 3 S Ct 18, 22 (1883) (holding over a century ago that "prohibitions of the [Fourteenth] amendment are against State laws and acts done under State authority"). Here, Petitioners acknowledge that CTCL is a private organization that gave "private grants" to certain cities (Petition ¶¶86, 217), rendering any alleged equal protection violation toothless from the very start. Insofar as Petitioners attempt to allege that local officials engaged in illegal behavior in conjunction with funds from CTCL, they have not done so, and they have not named any local officials as Respondents in this case. In any event, Petitioners cite no authority suggesting that an equal protection violation lies unless all county or municipal governments in a state are allocated and utilize precisely the same amount of funding for election administration.

C. Petitioners have not pleaded a viable Electors Clause claim.

Count III—Petitioners' claim under the Electors Clause (see Petition ¶¶ 265) fails as a matter of law because the Petition alleges a violation of state law, not a violation of the Electors Clause, and, in any event, the Secretary acted consistently with the authority lawfully delegated to her by the Michigan Legislature.

As an initial matter, even assuming the Secretary had failed to comply in some way with statutory election procedures (which she did not), it is simply not the case that any such deviation automatically constitutes a violation of the Electors Clause because the election was not held in the "Manner" prescribed by the Legislature. Indeed, the distinction between an *actual* claim under the Electors Clause and a state law claim masquerading as an Electors Clause claim becomes clear after examining other cases brought under the Electors Clause or its companion, the Elections Clause.[13] In *Cook v Gralike*, for example, the Supreme Court struck down a Missouri law mandating a particular ballot designation for any congressional candidate who refused to commit to term limits after concluding that such a statute constituted a "'regulation' of congressional elections" under the Elections Clause. 531 US 510, 525-526; 121 S Ct 1029; 149 L Ed 2d 44 (2001), quoting US Const, art I, § 4, cl 1. And in *Ariz State Legislature*, the Supreme Court upheld a law that delegated the redistricting process to an independent commission after reaffirming that "the Legislature" as used in the Elections Clause includes "the State's lawmaking processes." *Ariz State Legislature*, 576 US at 824. In these cases, the task was to measure state laws against *federal* mandates set out under the Elections Clause—in the former, what is a "regulation"; in the latter,

[13] Although separate constitutional provisions, the Electors and Elections Clauses share "considerable similarity" and should be interpreted in the same manner. *Ariz State Legislature v Ariz Indep Redistricting Comm*, 576 US 787, 839; 135 S Ct 2656; 192 L Ed 2d 704 (2015) (Roberts, C.J., dissenting); see also *Bognet*, 2020 WL 6686120, at *7 (applying same test for standing under both Elections and Electors Clauses).

who is "the Legislature." No such question is posed here. Instead, the only issue presented in the Petition is whether Defendants followed Michigan election law.[14] Thus, *even if* this Court determined that Secretary Benson failed to follow state law, that still would not amount to a violation of the Electors Clause. Count III does not allege a violation of the Electors Clause and should therefore be dismissed.

Further, even if the Court did reach the underlying issue of state law presented here—that is, whether the Secretary acted outside the bounds of the statutory authority delegated to her by the Legislature—the Court would find she did not. Just this past month, the Michigan Court of Appeals—considering the *very same* statutory arguments that Petitioners make here—correctly held "that the authority and discretion afforded the Secretary of State by the constitution and state law permit defendant to send unsolicited absent voter ballot applications to all Michigan qualified registered voters." *Davis*, 2020 WL 5552822, at *7.[15]

This holding makes sense. The Secretary 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. As part of her statutorily delegated authority, the Secretary has the duty to "advise and direct local election officials as to the proper methods of conducting elections." *Id.* 168.31(1)(b). She "shall" also "[p]ublish and furnish" "specific instructions on assisting voters in casting their ballots." *Id.* 168.31(1)(c). Moreover, the Secretary "shall," in her

[14] Although Petitioners ask in their "Statement of Questions Presented" "whether respondents violated Michigan election law by flooding the general election with illicit absentee ballots" (Pets' Mandamus Br at pp xiv), they do not state a claim for relief under the Michigan Election Law on this question. In any event, this Court already has before it a pending application on this question, see Appellate Docket Sheet, *Davis v Sec'y of State*, No. 162007 (Mich, Dec 4, 2020) (App'x 364), and, as explained above, Petitioners' six-month delay in challenging a decision announced in May is barred by laches.

[15] This case is pending on application for leave to appeal to this Court. See Appellate Docket Sheet, *Davis*, No. 162007 (App'x 364).

discretion, "[p]rescribe and require uniform forms, notices, and supplies the secretary of state considers advisable for use in the conduct of elections and registrations." *Id.* 168.31(1)(e). Notably, Michigan Compiled Laws section 168.31 does not limit the duties of the Secretary to *only* delineated acts; instead, the Legislature has granted her discretionary authority to make decisions and determinations about which methods are proper, provided they are not contradicted or prohibited elsewhere in the state constitution or Michigan's Election Code. Contrary to Petitioners' assertion (see Petition ¶67), nothing in MCL 168.759 prohibits the Secretary from providing voters with unsolicited absentee ballot applications. Nowhere does that provision reference the Secretary and, regardless, it states only that "[a]n application for an absent voter ballot under this section *may* be made in any of the following ways." MCL 168.759(3) (emphasis added); see also *Davis*, 2020 WL 5552822, at *4-5.

The Secretary's interpretation of Michigan law does not offend the Electors Clause, and Petitioners point to no authority that suggests otherwise. While it is true that the Electors Clause vests authority in "the Legislature" of each state to regulate presidential elections, see US Const, art II, § 1, cl 2, the US Supreme Court has held that state legislatures can delegate this authority. See, e.g., *Ariz State Legislature*, 576 US at 807 (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the State has prescribed for legislative enactments," quoting *Smiley v Holm*, 285 US 355, 367 (1932)); *Corman v Torres*, 287 F Supp 3d 558, 573 (MD Pa, 2018) ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state," quoting *Ariz State Legislature*, 576 US at 816).

The case Petitioners cite to claim otherwise (see Petition ¶16, citing *McPherson v Blacker*, 146 US 1, 35; 13 S Ct 3; 36 L Ed 869 (1892)), does not help them. *McPherson* itself explained that legislatures may delegate their authority under the Electors Clause. Although the power delegated to state legislatures by the Electors Clause "cannot be taken from" them, a legislature may "authorize the governor, or the supreme court of the state, or any other agent of its will" to satisfy its duties under the Clause. 146 US at 34-35. *Bush v Palm Beach Co Canvassing Board*, 531 US 70; 121 S Ct 471; 158 L Ed 2d 366 (2000) (per curiam), also cited by Petitioners, (see Petition ¶16), does not state anything to the contrary. In short, a legislature itself can delegate authority related to the regulation of presidential elections—as the Michigan Legislature delegated to the Secretary—without offending the Electors Clause. Petitioners' claim should be dismissed.

D. Petitioners' "evidence" is not admissible or credible.

This Court need not reach the hundreds of pages of factual "evidence" that Petitioners lay out in their Appendix. Regardless, Petitioners' "evidence" is not admissible or credible, and does not remotely support the extraordinary relief Petitioners seek.

Petitioners rely primarily on fact witness affidavits that provide little to no admissible evidence. First of all, many of these affidavits are recycled from other post-election lawsuits. Of these, all that have been considered by courts have been found to be deficient and lacking in credibility. *Costantino v City of Detroit*, No. 20-014780-AW, slip op at 3-13 (Mich Cir Ct, Nov 13, 2020) (App'x 302) (finding deficiencies with affidavits of Jessy Jacobs, Ruth Johnson, Andrew Sitto, Daniel Gustafson, Melissa Carone, and Zachary Larsen—all six of which are re-submitted here, Pets' App'x Exs 1, 2, 3, 11, 22, 31—and finding that the "affiants did not have a full understanding of the TCF absent ballot tabulation process" such that their "interpretation of events is incorrect and not credible"). The others, too, are rife with hearsay and speculation. And none of Petitioners' affidavits "state[] with particularity" "the circumstances constituting fraud or

mistake," as is necessary to meet the pleading requirements for allegations of fraud or mistake. MCR 2.112(B)(1).

Petitioners also present four "experts," none of whom present credible evidence. For example, professed "expert" Matthew Braynard claims his company, "External Affairs, Inc.," found that Michigan's election results include "tens of thousands of individuals who were not eligible to vote or failed to record ballots from individuals that were" through analysis of government databases, cold calls to voters, and "social media research." (Pets' App'x 279-282.) However, his staff's "research" is described in only vague terms, and he does not provide the underlying data used to conduct his analysis.[16] This report is not even admissible under MRE 702; see *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010), citing *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004) ("This Court has stated that MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 113 S Ct 2786; 125 L Ed 2d 469 (1993)."). The same is true of Qianying "Jennie" Zhang's "expert report," which relies exclusively on Braynard's analysis. (Pets' App'x 290.)

Moreover, none of Petitioners' expert "reports" even purport to support Petitioners' claim that Respondents did not comply with Michigan law and thus that Petitioners are entitled to a writ of mandamus. Even Petitioners acknowledge that Braynard's and Zhang's analysis at *best* presents overlapping categories of voters that shed no light on actual occurrences of fraud. (See Pets' Mandamus Br at pp 20-21.) And James R. Carlson's report speaks only to whether private grants

[16] Braynard's "survey" has now been the basis for claims of fraud in the election across multiple states. As one actual expert who reviewed his work concluded, Braynard's survey is fundamentally flawed and fails to follow basic scientific principles of survey design. See Expert Report of Dr. Steven Ansolabehere, *King v Whitmer*, No. 2:20-cv-13134 (ED Mich, Dec 2, 2020) (App'x 371).

like those from CTCL are inconsistent with the federal Help America Vote Act. (Pets' App'x 245.) That question is inapposite to the Petition and has been rejected by federal courts. John McLaughlin Jonathan's report fares no better. Not only does he fail to disclose any of the data he relied upon to administer his national survey, but even at face value, his results say nothing more than that early and absentee voters tended to favor President-elect Biden. (Pets' App'x 302.)

Ultimately, all Petitioners offer is their implausible and unsupported hunch that there *might* have been fraud that *might* have undermined the election results. But "a hunch is not a basis upon which a court can grant declaratory and injunctive relief," *Duncan v Michigan*, 300 Mich App 176, 221; 832 NW2d 761 (2013), let alone mandamus relief.

VI. Petitioners are not entitled to the relief they seek.

Even if this Court had jurisdiction over this matter (it does not), and Petitioners had pleaded plausible and cognizable claims (they have not), and the relief sought was not moot and barred by laches (it is), Petitioners would *still* not be entitled to the extraordinary relief they seek, which is essentially the disenfranchisement of 5.5 million of their fellow Michiganders. See *United States v Saylor*, 322 US 385, 387-388; 64 S Ct 1101; 88 L Ed 1341 (1944) ("[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place.").

This remedy would violate Michiganders' fundamental voting rights, including the Michigan Constitution's self-executing right to vote absentee, see Const 1963, art 2, § 4(1)(g), which voters adopted in 2018 by an overwhelming popular vote and took advantage of in unprecedented numbers during this past election. It should go without saying that discarding the ballots of lawful Michigan voters that were not cast or tabulated pursuant to Petitioners' preferences "would be both outrageous and completely unnecessary." *Stein v Cortés*, 223 F Supp 3d 423, 442 (ED Pa, 2016).

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully ask this court to deny the Petition.

Dated this 4th day of December 2020.

Respectfully submitted,

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PROOF OF SERVICE

Scott Eldridge certifies that on the 4th day of December, 2020, he served a copy of the above document in this matter on all counsel of record and parties via the court's TrueFiling/MiFile system.

s/ *Scott R. Eldridge*
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