STATE OF MICHIGAN
IN THE SUPREME COURT

ANGELIC JOHNSON and LINDA LEE TARVER,

Petitioners,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State; JEANNETTE BRADSHAW, in her official capacity as Chair of the Board of State Canvassers for Michigan; BOARD OF STATE CANVASSERS FOR MICHIGAN; and GRETCHEN WHITMER, in her official capacity as Governor of Michigan,

Respondents.
_____/

Supreme Court No. 162286

STATE RESPONDENTS' ANSWER IN OPPOSITION TO PETITIONER JOHNSON AND TARVER'S PETITION FOR WRIT OF MANDAMUS

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COUNTER-STATEMENT OF JURISDICTION

Petitioners seek to invoke this Court's original jurisdiction to issue prerogative and remedial writs, such as a writ of mandamus. See Const 1963, art 6, § 4. Respondents disagree that this Court has jurisdiction over the petition, as will be explained in more detail in Argument I.A.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the petition for writ of mandamus should be dismissed where this Court lacks jurisdiction and where Petitioners' claims for relief are moot or barred by the doctrine of laches.

   Petitioners' answer: No.

   Respondents' answer: Yes.

2. Whether the petition for writ of mandamus must be dismissed where Petitioners have not met the requirements for granting mandamus relief.

   Petitioners' answer: No.

   Respondents' answer: Yes.

3. Whether Petitioners claims for declaratory relief should be rejected for failing to state a cognizable claim against any Respondent?

   Petitioners' answer: No.

   Respondents' answer: Yes.

INTRODUCTION

This case presents a host of jurisdictional issues and defects that support its prompt dismissal.

First, Petitioners attempt to invoke this Court's original jurisdiction by styling their filing as a petition for writ of mandamus. But this Court should decline jurisdiction where no statute or court rule provides Petitioners with direct access to this Court and where Petitioners are not truly seeking mandamus relief.

Second, Petitioners' claims and requested relief are moot where the results of the November 3 general election have been certified and the presidential electors certified to the federal government. And even if not moot, the doctrine of laches applies to bar the petition.

Third, even if this Court were to accept jurisdiction over the petition, the Petitioners have not met the factors necessary for granting mandamus relief.

And *fourth*, on the outside chance that this Court would exercise jurisdiction over the Petitioners' request for declaratory relief, their constitutional claims fail to state a claim upon which relief could be granted.

For these reasons, this Court should dismiss or deny the petition for writ of mandamus.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Petitioners, two individual voters, filed the instant petition for writ of mandamus and declaratory relief at 2:45 a.m. on Thanksgiving morning, along with 300 pages in exhibits, a brief in support, and a motion for immediate consideration. Petitioners named as Respondents Secretary Benson, Governor Whitmer, the Board

of State Canvassers and its chair, Jeanette Bradshaw. Petitioners' recycled claims are based on alleged acts of fraud and irregularities in the conducting of the November 3 general election, principally in Wayne County and with respect to the City of Detroit's election. For the most part, these are the same claims that have been rejected by other courts, and are ones that stem from basic misapprehension of the law and misunderstanding of facts. The scope of the petition makes it difficult to address every allegation, but Respondents make the following observations.

A. Petitioners' factual allegations

Petitioners "organize" their 275-paragraph petition into various categories of alleged irregularities or wrongdoing identified by Roman numerals I through XVII.

1. Most of Petitioners' allegations involve activity occurring during the City of Detroit's election.

The bulk of Petitioners' allegations, regardless of their description, deal directly with events that allegedly occurred at the TCF Center where the City of Detroit absent voter counting boards performed their duties, or that occurred at satellite clerk offices in Detroit, either before, on, or shortly after election day. These include categories I (Respondents' Failure to Allow Meaningful Observation), II (Summary of Malfeasance at TCF), IV (Forging Ballots on QVF), V (Changing Dates on Ballots), VI (Double Voting), VII (First Wave of New Ballots), VIII (Second Wave of New Ballots), IX (Concealing Malfeasance), X (Unsecured QVF Access), XI (Unsecured Ballots), XII (Breaking the Seal of Secrecy), and XIII (Statewide Irregularities Over Absentee Ballots). Nearly everything that Petitioners complain

of in these categories has been raised and rejected in various court proceedings that are still pending, including:

a. *Donald J. Trump for President, Inc, et al v Secretary of State*, Michigan Court of Appeals No. 355378.

On November 4, the Trump committee and an individual voter and Republican poll challenger filed a complaint in the Court of Claims generally alleging that insufficient numbers of Republican election inspectors or challengers were present at unidentified absent voter counting boards in the State, and that challengers were being denied access to surveillance videotapes of absent voter ballot drop boxes at the unidentified absent voter counting boards. (Ex. 1, Trump Comp.) The plaintiffs sought to halt the canvass. The Court of Claims denied the plaintiffs' motion for emergency declaratory or injunctive relief (Ex 2, Trump Order) and plaintiffs appealed to the Court of Appeals. The plaintiffs filed their brief on appeal on November 30. Defendant Benson recently filed a motion for summary disposition in the Court of Claims. This case still presents similar claims as to the presence or absence of challengers at absent voter counting boards.

b. *Stoddard, et al v Detroit Election Commission, et al,* Wayne Circuit Court No 20-014604.

Also on or about November 4, the Election Integrity Fund and a Republican challenger at TCF filed a complaint in Wayne Circuit Court against Detroit and Wayne County election officials alleging that a sufficient number of Republican election inspectors were not present at Detroit's absent voter counting board at TCF, and that ballots were being duplicated without the presence of Republican election inspectors. (Ex 3, Stoddard Complaint, w/o exhibits.) The plaintiffs sought

injunctive relief to stop the duplication of ballots without a Republican inspector being present. The circuit court denied the request for injunctive relief, concluding that plaintiffs' claims that thousands of ballots had been changed or falsified were speculative. (Ex 4, Stoddard Order.) The plaintiffs did not appeal, and their case remains pending in the circuit court.

c. *Constantino, et al v City of Detroit, et al*, Wayne Circuit Court No 20-014780.

On or about November 8, another lawsuit was filed in Wayne Circuit Court against City of Detroit and Wayne County election officials. Plaintiffs Cheryl Constantino and Edward McCall, voters and Republican challengers, alleged a litany of errors in the processing of AV ballots at TCF, including that; (a) defendants systematically processed and counted ballots from voters whose names failed to appear in the Qualified Voter File; (b) defendants instructed election workers to not verify signatures on absentee ballots, to backdate absentee ballots, and to process such ballots regardless of their validity; (c) election officials received late batches of ballots that were unsealed ballots without envelopes; (d) defendants instructed election workers to process ballots that appeared after the election deadline; (e) defendants systematically used false information to process ballots, such as using incorrect or false birthdays; (f) officials coached voters to vote for Joe Biden and the Democrat party; (g) unsecured ballots arrived at the TCF Center loading garage, not in sealed ballot boxes, without any chain of custody, and without envelopes; (h) defendants refused to record challenges to their processes and removed challengers from the site; (i) defendant election officials and workers

locked credentialed challengers out of the counting room so they could not observe the process; and (j) defendant election officials and workers allowed ballots to be duplicated by hand without allowing poll challengers to check if the duplication was accurate. (Ex 5, Constantino Complaint, pp 3-4.)

The plaintiffs requested injunctive relief, asking the state court to order the defendants to conduct an independent audit to determine the accuracy of the November 3 election; to prohibit the defendants from certifying the election results; and to issue an order voiding the election results. (*Id.*, p 20.) The circuit court denied the motion for injunctive relief on November 13. (Ex 6, Constantino Order.) The court concluded that the claims of fraud and improprieties lacked credibility and were often based on misunderstandings of the law and the actual processes that occurred at TCF, as demonstrated by the affidavit of Christopher Thomas, Michigan's former, longstanding Director of Elections. (*Id.*) Indeed, Mr. Thomas's 11-page affidavit carefully walks through and dispels the plaintiffs' claims. (Ex 7, Thomas Affidavit.)

The plaintiffs appealed the denial of their request for injunctive relief to the Court of Appeals, which denied relief,[1] and the plaintiffs then appealed to this Court. On November 23, this Court denied leave to appeal, with two justices writing separately. (Ex 8, Constantino MSC Order.) This case remains open and

[1] *See* Michigan Court of Appeals Docket No. 3553443, available at https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=162245&CourtType_CaseNumber=1.

pending before the Wayne Circuit Court. In fact, Justice Zahra suggested that the plaintiffs expedite resolution of their remaining issues before the Wayne Circuit Court. (*Id.*)

d. *King, et al v Benson, et al*, USDC-ED Mich No. 20-13134 (Parker, J.)

Most recently, on November 25, several individual voters and Republican Party electors filed a complaint for declaratory and injunctive relief and a motion for a temporary restraining order in the federal court against Secretary Benson, Governor Whitmer, and the Board. As here, these plaintiffs allege the same litany of perceived irregularities in Detroit's election. And as here, the plaintiffs assert that the Defendants violated the Electors Clause of the U.S. Constitution by failing to conduct the November 3 general election in accordance with the election laws enacted by the Michigan Legislature; violated the Equal Protection Clause by causing the debasement or dilution of the plaintiffs' votes by failing to comply with Michigan's election laws; and violated the plaintiffs' substantive due process rights by diluting their votes through the counting of unlawful or illegal votes. (*King* Complaint, w/o exs.) The plaintiffs in that case ask the court to direct the Defendants to de-certify the election results; enjoin the Governor from sending the electors certificates; order the Governor to certify results the President Trump won the election; impound voting machines and software; order the rejection of various ballots; and declare other various forms of relief. *Id.* The injunction motion remains pending in that court.

2. Few of Petitioners' allegations pertain directly to Respondents.

The petition contains few allegations pertaining to Respondents, and Petitioners do not make any specific factual allegations of wrongdoing as to Governor Whitmer, the Board, or Chair Bradshaw.

With respect to Secretary Benson, in category XIV (Flooding the Election with Absentee Ballots was improper), Petitioners allege that the Secretary implemented an unlawful "absentee ballot scheme" that was contrary to law, favored Democrats, and perhaps resulted in fraudulent ballots being cast. (Pet, ¶¶ 160-170.) The "scheme" that Petitioners refer to is the Secretary's mailing of applications for absent voter ballots conducted this past Spring, and the Secretary's development of an online platform for requesting an absent voter ballot. (*Id.*) Both processes were already the subject of so far unsuccessful litigation challenges.

Briefly, to provide context, in November of 2018, the people of Michigan enshrined in Michigan's Constitution no-reason absentee voting, and the right of voters to choose to request an application for an absent voter ballot by mail or in person and the right to choose to return a voted ballot by mail or in person. Const 1963, art 2, §4(1)(g). The statutory processes for exercising those rights are principally set forth in MCL 168.759 and 168.761.

In May of 2020, the Secretary of State mailed unsolicited *applications* for absent voter ballots to all registered voters in Michigan at their last address of registration, *except* to voters in jurisdictions in which local clerks indicated that they would conduct their own mailing. The City of Detroit was one jurisdiction that

conducted its own mailing to its registered voters. Voters who received the Secretary's mailing were free to use the application or discard it and apply for a ballot using some other format. The Secretary's mailing was challenged in three consolidated cases filed in the Court of Claims, where the Secretary prevailed before that court. (Ex 9, Davis Opinions.) The Court of Appeals affirmed, concluding in a published decision that it was within Secretary Benson's constitutional and statutory authority to mail the unsolicited applications to registered voters. See *Davis v Secretary of State*, unpublished opinion of the Court of Appeals, issued September 16, 2020 (Docket No 354622), 2020 WL 5552822 at *6. An appeal from the Court of Appeals' opinion remains pending before this Court.[2]

In June of this year, the Department of State implemented an online platform that permitted registered voters who possessed a Michigan driver's license or state identification card, to apply for an absent voter ballot online using the voter's electronically stored signature. In August, the Election Integrity Fund filed a lawsuit in the Court of Claims alleging that the online process violated MCL 168.759 by not requiring a contemporaneous handwritten signature from the voter and requested injunctive relief. (Ex 10, Election Integrity Complaint.) The court denied the motion for a preliminary injunction based on the doctrine of laches, (Ex

[2] *See* Michigan Supreme Court Case No. 162007, docket sheet available at https://courts.michigan.gov/opinions_orders/case_search/Pages/default.aspx?SearchType=1&CaseNumber=354622&CourtType_CaseNumber=2.

11, Election Integrity opinion), no appeal was taken, and the case remains pending in the Court of Claims.

Thus, the actions Petitioners allege to be part of an illegal "scheme" are the subject of pending litigation. And the Secretary's mailing of the unsolicited absent voter ballot applications has been held lawful—contrary to Petitioners' allegations.

Although not tied to a Respondent, in category XV, entitled "Expert Analysis of these statutory violations revels [sic] widespread inaccuracies and loss of election integrity," Petitioners set forth a statistical analysis performed by purported "experts" as to absent voter ballots requested and/or cast in the November election. (Pet, ¶¶ 171-198.) But at least part of this analysis appears to be based on the presumption that it was unlawful for the Secretary to mail unsolicited absent voter ballot applications to registered voters, and/or that it was unlawful for a registered voter to use that unsolicited application to request a ballot from the voter's local clerk.[3] Neither is true under the Court of Appeals' decision in *Davis*.

Last, again not specific to any Respondent, in category XVI, entitled "Flooding the Election with Private Money also Violates Federal Law and Raises the Appearance of Impropriety," Petitioners allege that millions in secret, private money was funneled into Michigan to support Democratic strongholds and to support illegitimate activities, and that the acceptance and use of such money

[3] Petitioners at times refer to absent voter ballots as being sent out by the "state." However, city and township clerks mail or deliver absent voter ballots to registered voters within their jurisdictions. See MCL 168.761.

violates federal law and raise equal protection concerns. (Pet, ¶¶ 208-223.) Similar claims are set forth in category XVII, entitled "Private Money Improperly Flooded into Democratic Party strongholds." (*Id.*, ¶¶ 224-232.) These allegations refer to money granted by "CTCL" or the Center for Tech and Civic Life. Similar claims are already pending before the Court of Claims. On October 5, several voters filed a complaint for declaratory and injunctive relief against Secretary Benson alleging that she violated the Equal Protection Clause and the Purity of Elections Clause by not preventing local clerks from accepting grants from CTCL to purchase equipment and safety items for November election. (Ex 12, Ryan Complaint.) The court denied the plaintiffs' motion for emergency declaratory relief, (Ex 13, Ryan Order), no appeal was taken, and the case remains pending.

B. Overview of the Respondents' duties with respect to the canvassing and certification of the November 3 election results.

To address Petitioners' claims, it is helpful to review Respondents' duties with respect to the canvassing and certification of the November 3, 2020 general election results.

1. Board of State Canvassers[4]

As Petitioners' note, the Board is created by the Constitution, but its duties are provided for by statute. Const 1963, art 2, § 7. Relevant here, after the 83 counties complete their canvass, they submit to the Secretary of State a certified

[4] Although Petitioners have named Chair Bradshaw as a Respondent, she has no duties or authority to act separately or apart from the Board, aside from her administrative duty to chair the Board's meetings. See 1997 AACS, R 168.845.

copy of the county's statement of the votes. MCL 168.828. Upon receiving these items, the Secretary is to file and preserve them and "lay" them before the Board. MCL 168.843.

Under section 841, the Board has a duty to canvass the returns and determine the results of the election:

> The board of state canvassers *shall canvass the returns and determine the result of all elections for electors of president and vice president of the United States*, state officers, United States senators, representatives in congress, circuit judges, state senators and representatives elected by a district that is located in more than 1 county, and other officers as required by law. . . . [MCL 168.841(1) (emphasis added).]

Section 842 provides for the timing of the Board's canvass and certification:

> The board of state canvassers, *for the purpose of canvassing the returns and ascertaining and determining the result of an election, shall meet at the office of the secretary of state on or before the twentieth day after the election*. . . .The board has power to adjourn from time to time to await the receipt or correction of returns, or for other necessary purposes, *but shall complete the canvass and announce their determination not later than the fortieth day after the election.* The board may at the time of its meeting, or an adjournment of its meeting, canvass the returns for any office for which the complete returns have been received. [MCL 168.842(1) (emphasis added).]

Section 844 provides that the Board must examine the counties' statements and prepare a statement of the vote:

> The board of state canvassers *shall examine the statements received by the secretary of state of the votes cast in the several counties and prepare a statement* showing the total number of votes cast for all candidates for each office, the names of the persons for whom such votes were cast, the number of votes cast for each of such persons, the total number of votes cast on each constitutional amendment and proposition which may have been submitted, and the number of votes cast for and the number of votes cast against each such constitutional amendment and proposition. [MCL 168.844 (emphasis added).]

Finally, section 845 requires the Board to certify the correctness of its statement, certify the determinations as to who has been elected, and deliver these items to the Secretary of State:

> The members of the board of state canvassers *shall certify as to the correctness of the statement provided for in section 844* and subscribe their names to the statement. The members of the board of state canvassers *shall determine which persons have been duly elected to each office* . . . . The board shall certify the determinations and deliver the statement and certificate of determinations to the secretary of state. [MCL 168.845 (emphasis added).]

Consistent with these statutes, all 83 counties (including Wayne County) timely finished canvassing their results for all elections by Tuesday, November 17, see MCL 168.822(1), and reported their official results for state office races to the Secretary of State by the next day, see MCL 168.843. The Bureau of Elections, which assists the Board, examined the county statements and prepared a statement of the votes as required by section 844. These items were placed before the Board, which met on Monday, November 23—the twentieth day after the election. See MCL 168.842.[5] After a lengthy meeting, a majority of the Board voted to certify the results of the November 3 general election. (Ex 14, Board Draft Minutes; Ex 15, Excerpt of 11/23/20 Transcript.)

2. The Secretary of State

Secretary Benson is an elected, constitutional officer. Const 1963, art 5, § 21.

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[5] See Board of Canvassers meeting notice and materials for 11/23/20 meeting available at https://www.michigan.gov/documents/sos/11232020_Mtg_Notice__Materials_708509_7.pdf.

Section 21 of the Michigan Election Law makes the Secretary the "chief election officer" and she "shall have supervisory control over local election officials in the performance of their duties under the provisions of this act." MCL 168.21. Further, under § 31, the Secretary "shall": "(a). . . issue instructions and promulgate rules . . . for the conduct of elections . . . in accordance with the laws of this state," and "(b) [a]dvise and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(a)-(b) (emphasis added).

With respect to certification, as noted above, the Secretary is essentially the filing official for county canvassing documents. See MCL 168.828, 168.843. Under section 845, the Secretary receives the statement and certification of determinations from the Board, preserves those items, and delivers certificates of determination to each person elected. MCL 168.845. The Secretary has performed these duties in connection with the Board's certification of the results on November 23.

The Secretary also "may authorize the release of all ballots, ballot boxes, voting machines, and equipment after 30 days following" the Board's certification in a precinct other than a precinct in which a recount has been filed or "[a] court of competent jurisdiction has issued an order restraining interference with ballots, ballot boxes, voting machines, and equipment." MCL 168.847.[6] At this time, the Secretary is aware of one state office recount affecting Eaton County and 11 local

[6] Notably, the Secretary of State does not generally have possession of these records or materials. Rather, the local clerks retain possession of all their election-related material and equipment.

recounts affecting Kalamazoo, Mason, Shiawassee, Leelanau, Eaton, Chippewa, Oceana, Manistee, and Midland Counties, each of which must be completed within 30 days of certification, MCL 168.875, and which currently prohibit release of the items described in section 847.

Finally, the Secretary also has a duty to conduct audits of election results after certification of the statewide results by the Board. As amended by Proposal 3, article 2, § 4(1)(g) provides that "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have … (h) [t]he right to have *the results of statewide elections audited*, in such a manner *as prescribed by law*, to ensure the accuracy and integrity of elections." (Emphasis added). The Legislature amended the audit statute in the Michigan Election Law after Proposal 3.

MCL 168.31a(2), as amended by 2018 PA 603, provides:

> The secretary of state *shall prescribe the procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures.* The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. *An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results*. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section. [Emphasis added.]

The italics represent language added by the 2018 amendment.

Based on the above statutes, post-election audits cannot begin until certification is complete and until recounts are concluded, because records needed to conduct audits cannot be released until that time. The State and counties will be conducting procedure audits of in-person voting precincts; the State will conduct audits of absent voter counting boards and a statewide risk-limiting audit. Audits will begin after recounts are completed next week and will continue through January 2021.

3. The Governor

Governor Whitmer is an elected, constitutional officer in whom "[t]he executive power is vested[.]" Const 1963, art 5, §§ 1, 21. She has one duty with respect to the certification of the election results—she must send a Certificate of Ascertainment regarding the presidential electors to the appropriate federal official and to the individual electors:

> As 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, the governor shall certify, under the seal of the state, to the United States secretary of state,[7] the names and addresses of the electors of this state chosen as electors of president and vice-president of the United States. The governor shall also transmit to each elector chosen as an elector for president and vice-president of the United States a certificate, in triplicate, under the seal of the state, of his or her election. [MCL 168.46.]

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[7] Although Michigan's statute continues to refer to the U.S. Secretary of State, the Certificate of Ascertainment is sent to the Archivist of the United States under 3 USC 6.

Here, Governor Whitmer sent the Certificate of Ascertainment for the slates of presidential electors to the Archivist for the United States on November 23, the same day the Board certified the results. (Ex 16, Certificate of Ascertainment).

C. Overview of Petitioners' claims.

Petitioners allege three constitutional violations. In Count I, Petitioners allege that the Secretary and the Board violated their substantive due process rights under the federal and state constitutions by failing to ensure a fair election process. (Pet, ¶¶ 238-256.) In Count II, Petitioners similarly allege that election officials at TCF and Secretary Benson, through her "absentee ballot scheme," violated their right to equal protection under the federal and state constitutions by failing to ensure a fair and equal election, which resulted in the dilution of their votes. (*Id.*, ¶¶ 258-263.) In Count III, Petitioners allege Secretary Benson violated the Electors Clause under the federal constitution by adopting and implementing her "absentee ballot scheme," which contravened statutes enacted by the Legislature. (*Id.*, ¶¶ 265-269.) As to each of these counts, Petitioners allege that the voters are entitled to an audit of the election results, and that Respondents failed in their duties, and that Petitioners "are entitled to mandamus to prevent further constitutional harm," along with "declaratory and injunctive relief." In Count IV, Petitioners vaguely refer to "mandamus" and "quo warranto" and assert that they "have no recourse to protect their civil liberties except through extraordinary relief from this Court." (*Id.*, ¶ 270.) Petitioners allege that they are aggrieved by the Board's to certify the election without conducting an audit and investigating allegations of fraud. (*Id.*, ¶ 274.)

For relief, Petitioners ask this Court to order that the Legislature be allowed to pick Michigan's electors; that the Court take control over various election-related materials, like ballots, and to segregate ballots; that the Court appoint a special master or committee from the Legislature to investigate the irregularities and determine lawful votes; that alternatively the Court enjoin certification of the election results until a special master can be appointed to review the alleged incidents at TCF; or alternatively that the Court enjoin certification of the election results until a special master can be appointed to review absentee ballots voted in Wayne County and across the State. (*Id*., Complaint, Prayer for Relief, pp 52-53.)

ARGUMENT

I. The petition for writ of mandamus should be dismissed where this Court lacks jurisdiction and where Petitioners' claims for relief are moot or barred by the doctrine of laches.

Respondents submit that the petition must be dismissed because this Court either lacks original jurisdiction to hear the petition or it should decline to exercise jurisdiction over the petition. The petition should also be dismissed because Petitioners' claims are moot or should be barred by the doctrine of laches.

A. This Court lacks jurisdiction over Petitioners' claims for mandamus and declaratory and injunctive relief.

Petitioners attempt to ground original jurisdiction in this Court by including a claim for mandamus relief against Respondents. (Pet, ¶¶ 20-28, 270-275.) But Petitioners' mandamus claims are a ruse and their petition should be dismissed.

The petition is not properly before this Court for two reasons.

1. No statute or court rule provides this Court with original jurisdiction over Plaintiffs' purported mandamus claim or their claims for declaratory and injunctive relief.

In this case, no statute or court rule provides Plaintiffs' with direct access to this Court as to their claims. Plaintiffs' are correct that this Court has the power and authority to issue, hear, and determine prerogative and remedial writs, including writs for mandamus. See Const 1963, art 6, § 4; MCL 600.217. See also *McNally v Bd of Canvassers of Wayne Cty*, 316 Mich 551, 555 (1947). But this Court's policy is "to adhere in all but extremely rare instances to the method of review of decisions of administrative agencies" provided by specific statutes or rules. *Superx Drugs Corp v State Bd of Pharmacy*, 375 Mich 314, 320 (1965). See also *Saginaw Valley Trotting Ass'n, Inc v Michigan Racing Comm'r*, 84 Mich App 564, 571 (1978).

Petitioners cite MCL 168.479, 168.878, and 168.110 in support of jurisdiction to petition directly to this Court for mandamus relief. Section 479(1) is the only statute that refers to an aggrieved person bringing a mandamus action directly in this Court. MCL 168.479(1). But section 479 is in Chapter 22 of the Michigan Election Law regarding initiatives and referendums and provides for review by mandamus of determinations made by the Board of State Canvassers as to petitions. See MCL 168.479(1)-(2).[8] It does not provide a vehicle for challenging the Board's certification of the election. Similarly, section 878 is in Chapter 33 of the

[8] MCL 168.552(12) provides similarly with respect to persons aggrieved by a decision of the Board related to nominating petitions.

Michigan Election Law pertaining to recounts, specifically to recounts conducted by the Board, and does not apply outside that Chapter. See MCL 168.878. Finally, Petitioners appear to reference sections 109 and 110 of Chapter 7 of the Michigan Election Law, which pertain to a contested election for U.S Senate, and authorizes this Court to issue restraining orders to protect the integrity of ballots. See MCL 168.109, 168.110. But these sections do not apply here either since Petitioners have not initiated a petition to contest the Senate election under these provisions. Further, the Revised Judicature Act in MCL 600.4401 contemplates that mandamus actions against state officers will be filed in the Court of Appeals. And the Court of Claims Act in MCL 600.6419(1)(a) contemplates that such actions will be filed in that court. Thus, no statute provides Petitioners with a right to seek mandamus relief in this Court in the first instance.

Turning to the court rules, as Petitioners themselves recognize, they too direct Petitioners to the Court of Appeals or to the Court of Claims—not to this Court. MCR 3.305 provides that mandamus against a state officer may be brought in the Court of Appeals or the Court of Claims. MCR 3.305(A)(1). See also MCR 7.206(B); MCL 600.6419(1)(a). Petitioners point to MCR 7.303(B)(5) and 7.306(A), which provide that this Court has jurisdiction to exercise superintending control over a "lower court or *tribunal*." (Emphasis added). But the Board of State Canvassers is not a "tribunal." The term "tribunal" as used in a similar context has been interpreted to mean "administrative agencies which act in judicial or quasi-judicial proceedings." *Fort v City of Detroit,* 146 Mich App 499, 503 (1985); *Stabley*

v Shelby Twp Supervisor, 145 Mich App 497, 499-500 (1985); *Parshay v Buchkoe*, 30 Mich App 556, 559 (1971). The Board does not act in judicial or quasi-judicial proceedings. Accordingly, Petitioners should have brought their petition in the Court of Appeals or the Court of Claims.

Petitioners suggest that this case constitutes the "rare instance[ ]" in which this Court should exercise its original jurisdiction to issue a writ. But their argument on that front is based simply on the fact that this is an important election matter and time is of the essence. This is true of virtually all election-related litigation, but nonetheless plaintiffs routinely file and pursue their litigation as to the State in the appropriate court—the Court of Appeals or the Court of Claims. Both courts are fully capable of resolving claims expeditiously and have demonstrated that in the numerous election cases already resolved this year. Indeed, the court rules require the Court of Appeals to prioritize election cases. See MCR 7.213(C)(4). Filing first in a lower court preserves this Court's principal function to sit as an appellate court in review of lower court decisions. See, e.g, *Halbert v Michigan*, 545 US 605, 606 (2005) ("Of critical importance, the intermediate appellate court, unlike the Michigan Supreme Court, sits as an error-correction instance."), *id*. at 607, ("Michigan's Supreme Court, like the highest courts of other States, sits not to correct errors in individual cases, but to decide matters of larger public import."); *House of Representatives, et al v Governor*, Michigan Supreme Court Case No. 161377, June 4, 2020, Order denying leave,

(Clement, J., concurring) ("Further appellate review and development of the arguments will only assist this Court in reaching the best possible answers.")

This Court should conclude that it lacks jurisdiction over the petition for writ of mandamus or decline to exercise jurisdiction over the petition.

2. Petitioners are not actually seeking mandamus relief.

Although Petitioners purport to bring mandamus claims, they are not actually seeking mandamus relief. Michigan courts have recognized that "mandamus is the proper remedy for a party seeking to compel election officials to carry out their duties." *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 582-83 (2018), citing *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 716 (1970), aff'd 384 Mich 461 (1971).

A review of the petition and brief reveals that while Petitioners vaguely allege that the Secretary, Board, and Governor failed to perform unspecified duties, Petitioners are not seeking to compel Respondents to perform any election-related duties or any duties at all. See, e.g., *Ferency v Sec'y of State*, 139 Mich App 677, 683 (1984) ("this Court should look at the true nature of the relief requested"). Rather, Petitioners ask this Court to issue an order to:

> A) ensure the Separation of Powers and protect the accuracy and integrity of the November 2020 General Election by giving the Michigan Legislature an opportunity to finish its constitutionally-mandated work to pick Michigan's electors;
>
> B) take immediate custody and control of all ballots, ballot boxes, poll books, and other indicia of the Election from Respondents or their designees to prevent spoliation or destruction, to prevent further irregularities, and to ensure that the Michigan Legislature and this Court have a chance to perform a constitutionally sound audit of lawful votes;

> C) segregate any ballots counted or certified inconsistent with Michigan Election Law;
>
> D) declare that Respondent Benson violated Petitioners' fundamental constitutional rights as explained in this Petition;
>
> E) segregate any ballots attributable to the Secretary of State's absentee ballot scheme and declare the Secretary of State's absentee ballot scheme unlawful;
>
> F) appoint a special master or committee from both chambers of the Michigan Legislature to investigate all claims of mistake, irregularity, and fraud at the TCF Center and to verify and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme. The special master may recommend, including a recommendation with findings, that illegal votes can be separated from legal votes to determine a proper tabulation, or that the fraud is of such a character that the correct vote cannot be determined;
>
> G) alternatively, to enjoin Respondents or Governor Whitmer from finally certifying the election results and declaring winners of the 2020 general election to the United States Department of State or the United States Congress until a special master can be appointed to review and certify the legality of all absentee ballots ordered through the Secretary of State's absentee ballot scheme;
>
> H) alternatively, to enjoin Respondents from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to independently review the election procedures employed at the TCF Center;
>
> I) alternatively, to enjoin Respondents from finally certifying the election results and declaring winners of the 2020 general election until a special master can be appointed to review and certify the legality of all absentee ballots submitted in Wayne County and Statewide; . . . . [Pet., p 45, Statement of the Relief Sought.]
>
> The requested relief plainly does not sound in mandamus. Rather,

Petitioners request that the Court issue declaratory relief that Respondents, or at least the Secretary, violated Petitioners' constitutional rights, and issue an injunction enjoining the Board from certifying the election and the Governor from certifying the electors, along with compelling action by nonparties, including this

Court. Petitioners' claims are claims for declaratory judgment under MCR 2.605(D), and their requested relief is the nature of an injunction under MCR 3.310. This Court does not have jurisdiction over claims for declaratory and injunctive relief (at least not without proper invocation of original jurisdiction). Such claims must be brought against the state in the Court of Claims. MCL 600.6419(1)(a). Because Petitioners' mandamus claims are not well-pled, the petition must be dismissed for this reason as well.

B. Petitioners' claims for relief are moot because any decision rendered here will have no practical effect.

Once an issue becomes moot, there is no longer an "actual controversy." See *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254 (2013) (explaining that "courts exist to decide *actual cases and controversies*," and "will not decide moot issues") (emphasis added); *People v Richmond*, 486 Mich 29, 35 (2010) (explaining that "a case is moot when it presents nothing but abstract questions of law which do not rest upon existing facts or rights") (internal quotation marks omitted). And it is well-established that Michigan Courts "do[ ] not reach moot questions or declare principles or rules of law that have no practical legal effect[.]" *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112 (2002), abrogated on other grounds in *Herald Co, Inc v E Michigan Univ Bd of Regents*, 475 Mich 463 (2006). It is " 'universally understood ... that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, ... or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.' " *Richmond,* 486 Mich at 34-

35, quoting *Anway v Grand Rapids Ry Co*., 211 Mich 592 (1920) (internal citation omitted). "However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review." *In re Application of Indiana Mich Power Co to Increase Rates,* 297 Mich App 332, 340 (2012). See also *Federated Publications, Inc*, 467 Mich at 112.

The purpose of this action appears to be an attempt to halt or prevent the Board from certifying the election and the Governor from certifying the electors. But, as explained above, both events have already occurred. The Board certified the results of the election on November 23 and the Governor sent the Certificate of Ascertainment the same day. No presidential candidate requested a recount within the time required by law. MCL 168.879(1)(c). The federal safe-harbor date is approaching in less than a week on December 8, and Michigan's electors will formally appear at the state Capitol to cast their votes on December 14, 2020. MCL 168.47; 3 USC 5, 7.

Because Respondents have already performed their duties, there does not appear to be any practical relief that can be entered against Respondents. Indeed, Petitioners ask the Court to enjoin Respondents from certifying the results, (Pet, Prayer for Relief, ¶¶ G, H, and I), but the results have already been certified. Petitioners request that the Michigan Legislature be given an opportunity to "finish its constitutionally mandate work to pick Michigan's electors." (*Id*., ¶ A.) But the voters of Michigan have already selected the electors, see MCL 168.42, 168.43, and that result was sent off to the appropriate official by the Governor. There is no

remaining role for the Legislature under applicable law it has long ago made clear the voters choose the electors. MCL 168.42.

Petitioners also ask the Court to take possession of election materials and segregate unlawful ballots from valid ballots. (Pet, Prayer for Relief, ¶¶ B, C, and E.) But there is no way to distinguish one voter's ballot from another now that the numbered tabs have been removed. The ballots are anonymous. There is no way to determine which absent voter ballots were voted by voters who used an application sent to them by the Secretary or filled out an application at their clerk's office.

Petitioners request that the Court "declare that Respondent Benson violated Petitioners' fundamental constitutional rights as explained in [the] Petition." (*Id.*, ¶ D.) Even if Petitioners could demonstrate that the Secretary violated their rights, such a decision would have no practical effect upon the parties. *Federated Publications, Inc.*, 467 Mich at 112. Further, Petitioners have not presented any facts upon which they could reasonably rely to claim that similar events will occur to either of the named Petitioners in the future, and any claim otherwise is purely speculative. This case is moot.

C. Petitioners' claims are barred by the doctrine of laches.

Even if Petitioners' claims are not moot, they should be dismissed based on laches. "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Charter Twp of Lyon v Petty*, 317 Mich App 482, 490 (2016) (quotation marks and citation omitted). "The application of the doctrine of laches

requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Id.* (citation omitted). To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. *Id*. (citations omitted). Proof of prejudice is essential to the defense of laches. *Id*. In this case, the delay by Petitioners in raising their claims has prejudiced the ability of the Respondents to respond or even to comply with the relief they request.

Here, Petitioners unreasonably delayed raising their claims before this Court. Petitioners filed this action 20 days after the November 3 election. The canvassing of votes in Michigan was completed by the 83 boards of county canvassers on November 17, and by the Board on November 23. There is no reason why Petitioners' claims of irregularities on election day should not have been brought much sooner—if not promptly at the time of the purported events. Notably, Petitioner Johnson filed a similar lawsuit in federal court on November 15, but then voluntarily dismissed it. See *Johnson, et al v Benson, et al*, USDC-WD Mich, 20-1098 (Neff, J.).

As a general rule, late challenges to election procedures are disfavored. In *New Democratic Coal v Austin*, 41 Mich App 343, 356-57 (1972), the Court of Appeals observed in that apportionment case:

> We take judicial notice of the fact that elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. The state has a compelling interest in the orderly process of elections. Courts can reasonably endeavor to avoid unnecessarily precipitate changes that would result in immense administrative difficulties for election

> officials. In this case to grant the relief requested by the plaintiffs would seriously strain the election machinery and endanger the election process. [citation omitted.]

Federal courts have also long recognized that delays in bringing a challenge to election rules are inevitably prejudicial and pose special risks. *See, e.g.*, *Republican Nat'l Comm v Democratic Nat'l Comm*, 140 S Ct 1205, 1207 (2020) (per curiam); *Purcell v Gonzalez*, 549 US 1, 4-5 (2006) (per curiam). In *Crookston v Johnson,* 841 F3d 396, 398 (CA 6, 2016), the Sixth Circuit stayed an injunction affecting Michigan's election procedures, and the reasoning could apply in this case:

> There are many reasons to grant the stay. The first and most essential is that Crookston offers no reasonable explanation for waiting so long to file this action. When an election is "imminen[t] and when there is "inadequate time to resolve [] factual legal disputes" and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. See *Purcell v Gonzalez*, 549 US 1, 5-6 [ ] (2006) (per curiam). That is especially true when a plaintiff has unreasonably delayed bringing his claim, as Crookston most assuredly has. . . . Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.

But Petitioners' claims for relief here are not just last-minute—they are after the fact. Consequently, the rationale for laches is even more compelling. Now—after the votes have been counted and the results have been certified—Petitioners seek to raise claims of fraud and irregularities in election-day processes or even earlier. Petitioners delay is simply unreasonable. See *Stein v Cortes*, 223 F Supp 3d 423, 437 (ED Penn, 2016) (holding that "prejudicial and unnecessary delay alone provides ample ground" to deny emergency injunctive relief); see also *Golden v Gov't of the Virgin Islands* 2005 US Dist LEXIS 45967, *15-17 (D.V.I. Mar 1, 2005) (holding that plaintiffs lacked diligence by waiting to see whether their candidate of

choice won, and that the doctrine of laches bars post-election "sand-bagging on the part of wily plaintiffs.") The Ninth Circuit has also affirmed the application of laches in post-election lawsuits because doing otherwise would, "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." *Soules v Kauaians for Nukolii Campaign Committee,* 849 F2d 1176, 1180 (CA 9, 1988), quoting *Hendon v NC State Bd Of Elections,* 710 F2d 177, 182 (CA 4, 1983).

The Respondents have most certainly been prejudiced by Petitioners' delay as they have performed their duties and taken all steps to certify the election and the electors. And as noted above, the federal safe harbor is approaching in less than a week and the presidential electors will convene in less than two weeks. Respondents cannot reasonably be expected to fully respond to the over 200-numbered paragraphs of Petitioners' petition, or the over 300 pages of documents attached to it, in sufficient time to fully litigate and disprove their baseless allegations between now and December 14, much less December 8, a situation owing solely to Petitioners' own failure to act.

Petitioners have unreasonably delayed in raising their claims before this Court, and the consequences of their delay prejudiced Respondents. Petitioners' claims are barred by laches.

II. The petition must be dismissed where Petitioners have not met the requirements for granting mandamus relief.

Even if this Court determines that it has jurisdiction over Petitioners' claims, they have not met the requirements for granting mandamus relief, and their petition must be dismissed.

A. Standards for granting mandamus relief.

A court will issue a writ of mandamus only if the party seeking mandamus meets four requirements:

> (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. [*Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273, 283 (2008).]

The issuance of a writ of mandamus rests within the discretion of the court. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer,* 308 Mich App 498, 518 (2014). "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Board of State Canvassers,* 263 Mich App 487, 492 (2004).

B. Petitioners have not met the requirements for granting mandamus relief.

1. Petitioners have no clear legal right to the performance of any duty.

In relation to a request for mandamus, "a clear, legal right" is "one 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." *Univ Med Affiliates, PC v Wayne Co Executive,* 142 Mich App 135, 143 (1985)

(quotation marks and citation omitted). "Even where such a right can be shown, it has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Id.*, citing *Inglis v Public School Employees Retirement Bd,* 374 Mich 10, 12-13 (1964). See also *Wilson v Cleveland,* 157 Mich 510, 511 (1909).

The Court of Appeals has suggested that this principal does not apply in election cases and that "interested electors" may seek mandamus to enforce election duties without showing a special interest distinct from the public. *Helmkamp v Livonia City Council*, 160 Mich App 442, 472 (1987), citing *Amberg v Walsh*, 325 Mich 285 (1949). But Petitioners cannot be considered "interested electors" under *Amberg*. In *Amberg*, the plaintiffs, the sponsor of a recall petition and signers and supporters of the petition, sought mandamus to compel local officials to call a recall election. 325 Mich at 289-291. The defendants contended that the plaintiffs had no right as private citizens to institute suit for mandamus. *Id.* at 291. This Court held that "this is a matter within the discretion of the court. We hold that the suit was properly brought by interested electors." *Id.* Thus, the Court determined that the plaintiffs in *Amberg* were "interested electors," which is consistent with the fact that the plaintiffs were the petition sponsor and signers. See also *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 506 (2004) (citing *Helmkamp* but noting that plaintiffs in the case were not "ordinary citizens" but rather circulators and signers of the petition at issue).

Petitioners, by contrast, assert in their brief that, "as voters in the State of Michigan, Petitioners have the clear legal right to have their election officials, including Respondents, perform their duties in accordance with the United States and Michigan Constitutions and Michigan Election Law." (Pet Brf, p 21.) But as Petitioners surely recognize, all voters in Michigan have that same alleged right. Thus, Petitioners have not alleged an injury sufficiently particular from the injury suffered by the general public; in fact, they have alleged just the opposite. Petitioners cannot even be considered "interested electors" under *Amberg*. To the extent this Court has discretion to decide whether Petitioners' have pled a sufficient injury to seek mandamus, it should conclude Petitioners' have not. As a result, they fail to establish that they have a clear legal right to the performance of any duty by Respondents. *Univ Med Affiliates, PC,* 142 Mich App at 143.

2. Respondents have no clear legal duty to perform any act requested by Petitioners.

a. Secretary Benson has no clear legal duty.

In their brief, Petitioners assert that "Secretary Benson took an oath to support the United States and Michigan Constitution, Const Art 11, § 1, and has a clear legal duty to enforce Michigan Election Law, the United States Constitution, and the Michigan Constitution. This clear legal duty involves no exercise of judgment or discretion." (Pet Brf, p 22.) Secretary Benson admits to being at a loss as to what clear legal duty Petitioners believe she has failed to perform. As discussed above, the only specific allegations Petitioners make as to her is with respect to her purported "absentee ballot scheme" involving the mailing of

unsolicited absent voter ballot applications and creating the online platform for requesting an absent voter ballot. Presumably, Petitioners believe the Secretary had a clear legal duty *not* to engage in those activities. But the law is not clear on that point. In fact, currently the law is that the Secretary's mailing was within her statutory and constitutional authority. Petitioners express disagreement with the *Davis* decision, (Pet Brf, pp 36-39), however, the correctness of that decision is not before the Court here. As for the online platform, it is *not* clear that the Secretary could not implement this process since it is the subject of ongoing litigation, and the Court of Claims denied a preliminary injunction. Thus, Petitioners have not shown that Secretary Benson had a clear legal duty to *not* perform these acts or has some present clear legal duty to re-perform these acts in a different manner, which of course would be impossible.

b. The Board of State Canvassers has no clear legal duty.

As to the Board, Petitioners allege that:

> The Board is required to "canvass the returns and determine the result of all elections for electors of president and vice president of the United States, state officers, United States senators, representatives in congress, circuit court judges, state senators, representatives elected by a district that is located in more than 1 county, and other officers as required by law." MCL 841. Further, the Board shall record the results of a county canvass, but only upon receipt of a *properly* certified certificate of a determination from a board of country canvassers. *Id.* (emphasis added). . . . The Board is supposed to certify Michigan election results when appropriate. [Pet Brf, pp 22-23.]

While not apparent from this passage, Petitioners' argument appears to be that the Board had a clear legal duty to certify only election results properly before them, and they failed in this duty by certifying results from Wayne County. (Pet

Brf, pp 40-43). Petitioners argue that the Wayne County Board of Canvassers' statement of results was not properly before the Board where the two Republican members of the county board purported to rescind their votes in favor of certification and did not sign the certification of the county's results. *Id.*

Respondent Board agrees that it has a clear legal duty to canvass the county returns and certify the statewide election results. MCL 168.845. But contrary to Petitioners' argument, the Board's clear legal duty here was to certify the results laid before the Board on November 23.

"The Board is an agency having no inherent power '[a]ny authority it may have is vested by the Legislature, in statutes, or by the Constitution.' " *Attorney Gen v Bd of State Canvassers,* 318 Mich App 242, 249 (2016), quoting *Citizens for Protection of Marriage,* 263 Mich App at 492. And the Board's task in canvassing the county returns and determining results of the election is a ministerial and clerical duty. *Dingeman v Bd of State Canvassers*, 198 Mich 135, 135-36 (1917). See also *People ex rel Attorney General v Van Cleve*, 1 Mich 363 (1850); *Attorney General v Bd of Canvassers of Iron County*, 64 Mich 607 (1887); *McQuade v Furgason*, 91 Mich 438 (1892); *May v Bd of Canvassers of Wayne County*, 94 Mich 505 (1893).

Under section 844, the Board's task is straightforward: it "*shall examine the statements* received by the secretary of state of the votes cast in the several counties *and prepare a statement* showing the total number of votes cast for all candidates for each office[.]" MCL 168.844 (emphasis added). The only information the Board

looks at in making its determination are the counties' statements, essentially tally sheets of all the votes cast in the county for state offices, and from those statements the Board prepares a final statement of the total number of votes for candidates for those offices.

This Court stated long-ago that boards of canvassers cannot look behind the returns in performing their duties. In *McQuade v Furgason*, election inspectors refused to canvass a precinct because they alleged numerous voters were improperly assisted in casting their votes. 91 Mich 438, 440 (1892). This Court determined that mandamus should issue to compel the inspectors to canvass and certify the returns. The Court recognized that if the claims were true, that "the election law of this state was most grossly violated." *Id*. at 440. However, the Court observed that:

> the return by a majority of the board was made, and 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. Their duties are purely ministerial and clerical. They must be governed by the return. . . . [*Id*. (internal citations omitted.)]

The Court concluded that the serious "charges must be investigated in the due course of the proper legal proceedings. The law furnishes ample remedy, both civil and criminal, for the correction and punishment of election frauds." *Id*. And, in fact, there were subsequent quo warranto proceedings that stemmed from this decision. See *Attorney General v McQuade*, 94 Mich 439 (1982).

In *McLeod v Kelly*, this Court similarly described the Board's canvassing and certification duties as ministerial and concluded that the Board had a duty to certify the result of the election as shown by the returns in that case. 304 Mich 120, 126-

128 (1942). The Court acknowledged that the plaintiff claimed mistakes and irregularities occurred, but that those were issues "to be determined only by a recount." *Id*. at 129. See also OAG, 1983-1984, No. 6230 (June 14, 1984) (improper nomination of political party candidates was not reason for county board to deny certification).

Here, the Wayne County Board of Canvassers voted 4-0 to certify the county canvass. (Ex 17, Excerpt 11/17/20 Transcript.) The Wayne County Clerk delivered to the Secretary of State a certified copy of the county's statement with a certificate of authenticity as required by MCL 168.828. (Ex 18, Wayne County canvass.) As Petitioners note, the Republican members of the Wayne County Board declined to sign the canvass documents despite having voted to certify. The Secretary is the filing official for these documents, MCL 168.828, 168.843, not the Board, and she accepted the filing since there was no reason to believe that the certified statement received from Wayne County was not authentic.[9] Moreover, the law only requires that the "statements" be laid before the Board. MCL 168.843.

[9] The Secretary's decision to accept the filing is supported by case law. In *Rich v Board of State Canvassers*, 100 Mich 453 (1894), the county's return contained a technical error in that the number of votes was not written in words, and the statement sent to the Board was not signed by the county board chairman. The Court concluded that neither of these errors affected the record of the vote. The Court noted "provisions relating to the canvass and return are usually held so far directory as that if, from the returns, the true facts can be ascertained, they will not be excluded in the canvass." *Id*. at 463-464.

When the Board met on November 23, it had a duty to certify the election results. The statements for all 83 counties had been examined and a statement prepared showing the total results placed before the Board. MCL 168.844. Under section 845, barring any error in the tally of the votes, the Board had a duty to certify the statement and determine the results, which it did.

Claims of fraud and irregularities at the TCF Center, concerns over Detroit's out-of-balance precincts, the drama over the Republican members of the Wayne County Board of Canvassers' attempt to rescind their votes, the requests for some type of audit to be done before certification, the influx of private money into the election—none of these issues provided a lawful basis for the Board to refuse to certify the results of the election. Petitioners' argument that the Board had a clear legal duty to decline to certify the election is without merit.

c. The Governor has no clear legal duty.

Petitioners do not clearly articulate anywhere in their petition or in their brief what clear legal duty the Governor has failed to perform or has performed unlawfully. Presumably, Petitioners argument is that the Governor has a clear legal duty under MCL 168.46 to send only a lawful Certificate of Ascertainment to the federal Archivist, and that she did not or could not have done so where the Board improperly certified the election. But, as explained above, the Board properly certified the election. Thus, the Governor had a clear legal duty to send a Certificate of Ascertainment reflecting the results of the certified election to the Archivist, which she did. Thus, any argument that the Governor had a clear legal

duty to not send the Certificate of Ascertainment or to send one with different results, is without merit.

And regardless, generally mandamus will not issue against the Governor. Since Justice Cooley's opinion in *Sutherland v Governor*, 29 Mich 320 (1874), this Court has long held that mandamus will not lie to compel the Governor to act, regardless of whether the actions sought are discretionary or ministerial. See *Germaine v Governor*, 176 Mich 585 (1913); *Born v Dillman*, 264 Mich 440 (1933). In *Germaine*, this Court again recognized that no process of the court can be issued against the Governor seeking to review any action performed by them as governor under power conferred upon them either by the constitution or legislative enactment. *Germaine*, 176 Mich at 592. Thus, to the extent Petitioners allege mandamus claims against the Governor, the claims must fail for this reason as well.

3. Not all the Respondents' alleged duties are ministerial.

"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." *Hillsdale Co Senior Servs, Inc v Hillsdale Co,* 494 Mich 46, 58 n. 11 (2013) (quotation marks and citation omitted).

To the extent that Petitioners' claims against the Secretary are based on her decision to mail absent voter ballot applications and create the online platform, these are or were not ministerial acts. The Secretary's decision to engage in these activities plainly required the exercise of discretion and judgment on the part of the Secretary and her staff to determine whether these activities were consistent with

and supported by the Michigan Election Law and the Constitution. Thus, Petitioners cannot show that any duty was ministerial as to the Secretary.

4. Petitioners have other remedies, legal and equitable, that might achieve the same result.

Finally, Petitioners plainly have other remedies that would achieve the result Petitioners seek. As discussed above, Petitioners are already requesting declaratory relief, and are not seeking any traditional mandamus relief, but rather injunctive relief. Petitioners are not asking this Court to compel Respondents to perform any duties, but rather to enjoin determinations they have already made. Petitioners plainly have adequate and available remedies to them in the form of a declaratory judgment action under MCR 2.605(D) and a request for injunctive relief under MCR 3.310.

III. Petitioners are not entitled to declaratory relief regarding their constitutional claims.

This Court does not have original jurisdiction to consider Petitioners' claims for declaratory and injunctive relief. But if this Court determines that it has jurisdiction to hear the petition for writ of mandamus, this Court *might* consider the declaratory claims under its power to "enter other and further orders and grant relief as the case may require." MCR 7.316(A)(7). Respondents will thus briefly address Petitioners' constitutional claims.

A. Standards for granting declaratory relief.

With respect to requests for declaratory relief under MCR 2.605, "[t]he language in [MCR 2.605] is permissive, and the decision whether to grant declaratory relief is within the trial court's sound discretion." *Van Buren Charter*

Township v Visteon Corp, 319 Mich App 538, 545 (2017)*; see also Shield Global v Progressive Marathon Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued August 27, 2020) (Docket No. 34798), 2020 Mich App LEXIS 5643.

B. Petitioners' constitutional claims against Respondents are without merit.

1. The substantive due process claim is without merit.

In Count I, Petitioners allege a substantive due process claim under the federal and state constitutions, but they do not clearly identify how Respondents have violated their rights. At best, they allege that "Respondents have a duty to guard against the deprivation of the right to vote through the dilution of validly cast ballots caused by ballot fraud or election tampering. The Secretary of State and the Board failed in their duties." (Pet, ¶ 254.) Petitioners further state that the "Secretary of State's absentee ballot scheme ha[s] caused the debasement and dilution of the weight of Petitioners' votes in violation of the Due Process Clause of the Fourteenth Amendment, the Due Process Clause of the Michigan Constitution, and 42 USC § 1983." (*Id*., ¶ 255.) Petitioners make no specific claims against the Governor.

With respect to substantive due process, "[t]his state's constitutional provision is coextensive with its federal counterpart." *Cummins v Robinson Twp,* 283 Mich App 677, 700-701 (2009). The U.S. Supreme Court has never recognized the right to vote as a right qualifying for substantive due process protection. *Davis v Detroit Pub Sch Cmty. Dist*, 2017 US Dist LEXIS 114749, *37 (ED Mich, July 24, 2017), quoting *Philips v Snyder*, 2014 US Dist LEXIS 16097, *16

(ED Mich, November 19, 2014). Instead, the Supreme Court has held that "[w]here a particular Amendment provides an explicit source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Jon Jon's Inc v City of Warren*, 162 F Supp 3d 592, 605 (ED Mich 2016), quoting *Albright v Oliver*, 510 US 266, 273 (1994). Vote-dilution claims are typically analyzed under the Equal Protection Clause. Equal protection also applies when a state either classifies voters in disparate ways or places undue restrictions on the right to vote. *Obama for America v Husted*, 697 F3d 423, 428 (CA 6, 2012).

Because Petitioners also bring an equal protection claim, their vote-dilution claim should be analyzed in the context of that Amendment and not under the Due Process Clause. However, for the reasons stated below, Petitioners' claims under equal protection also fail.

Alternatively, the Sixth Circuit has held that the Due Process Clause is "implicated" in "exceptional cases where a state's voting system is fundamentally unfair." *League of Women Voters of Ohio v Brunner*, 548 F3d 463, 478 (CA 6, 2008). *See also*, *Northeast Ohio Coalition for the Homeless v Husted,* 696 F3d 580, 597 (CA 6, 2012). But the *League of Women Voters* case involved "non-unform rules, standards, and procedures," involving missing names from voter rolls, inadequate numbers of voting machines, and refusal of assistance to disabled voters which resulted in "massive disenfranchisement and unreasonable dilution of the vote." *Id.* And *NE Coalition for the Homeless* involved "poll-worker error [that] cause[d]

thousands of qualified voters to cast wrong-precinct ballots from the correct polling locations." 696 F3d at 597. Neither circumstance is present in this case. Further, the Sixth Circuit in *Philips v Snyder,* 836 F3d 707, 716 (CA 6, 2016) instructed that these cases were to be interpreted narrowly, and that they "address[ed] whether states' entire election processes impaired citizens' abilities to participate in state elections on an equal basis with other qualified voters." *Phillips*, 836 F3d at 716. As a result, although case law recognizes that a substantive due process right to vote *may* come into play upon a showing of "fundamental unfairness," the necessary unfairness only arises when a profound irregularity comprises "non-uniform rules, standards, and procedures." Here, Petitioners do not allege non-uniform rules or standards, and instead premise their claim upon the existence of procedures with which they disagree but that were nonetheless uniformly applied, and alleged *violations* of the rules by unknown individuals. As a result, their claims fail to demonstrate any irregularity of such magnitude that it rises to a constitutional violation.

2. The equal protection claim is without merit.

In Count II, Petitioners again, vaguely, allege that "[b]ecause of the acts, policies, practices, procedures, and customs, created, adopted, and enforced under color of state law, Respondents have deprived Petitioners of the equal protection of the law guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Michigan Constitution's counterpart, and 42 USC § 1983." (Pet, ¶ 258.) Petitioners' then repeat the paragraph regarding the election officials conduct at TCF and the Secretary's

"absentee ballot scheme" and conclude that both "have caused the debasement and dilution of the weight of Petitioners' votes in violation of the equal protection guarantee of the Fourteenth Amendment and the Michigan Constitution." (*Id.*, ¶ 259.)

The Equal Protection Clause in the Michigan Constitution is also coextensive with the Equal Protection Clause in the U.S. Constitution. *Shepherd Montessori v Ann Arbor Charter Twp,* 486 Mich 311, 318 (2010). "Equal protection of the laws" means that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v Gore*, 531 US 98, 104-105 (2000). Voting rights can be impermissibly burdened "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, quoting *Reynolds v Sims*, 377 US 533, 555 (1964). "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds*, 377 US at 559, quoting *Wesberry v Sanders*, 376 US 1, 17-18 (1964). "[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be." *Reynolds*, 377 US at 557–58, quoting *Gray v Sanders*, 372 US 368, 379 (1963). Thus, "a law that would expressly give certain citizens a half-vote and others a full vote" would be violative of the Equal Protection Clause. *Wesberry*, 376 US at 19, quoting *Colegrove v Green*, 328 US 549, 569 (1946).

Here, Petitioners identify no group that has been given preference or advantage—indeed, it is impossible at this time to determine with any level of accuracy whether any supposed invalid or unlawful votes were cast for or against any candidate for whom Petitioners voted. Petitioners fail to identify by name a single voter who voted when they should not have—let alone anything resembling widespread election fraud. Similarly, Petitioners have not specifically identified any local election workers who supposedly engaged in misconduct or malfeasance. Upon information and belief, none of the affiants have submitted any complaints of election fraud to a law enforcement agency.

And while Petitioners allege that Secretary Benson engaged in misconduct by mailing unsolicited absent voter ballot applications to registered voters, that mailing did not violate any statutes and was consistent with her statutory and constitutional authority per the *Davis* decision. Petitioners' speculation that this mailing increased the opportunities for fraud in the absent voter process should not be countenanced.

All of the procedural safeguards for absent voter ballots were in place for this election. Anyone who received an application in the mail was still required to complete it with the necessary information, including a certification, affix a signature to it, and return it to their local clerk's office. See MCL 168.759. Upon receiving an application, the city or township clerk will check to make sure the voter is registered in the jurisdiction and will then compare the voter's signature on the application to the voter's signature in the qualified voter file. MCL 168.761(1)-(2).

If the signatures match, the local clerk will mail the voter an absent voter ballot. *Id.* When the voter returns his or her marked absent voter ballot, the voter must sign the return envelope, MCL 168.764a, and when the local clerk receives the voter's absent voter ballot, the clerk will compare the voter's signature on the return envelope to the voter's signature on his or her application, and if the signatures match the ballot will be processed. MCL 168.766. This is the same process that would occur if a voter printed an application from the Secretary's website and mailed it to his or her local clerk, or if the voter received an application from a third-party organization, which is permissible, see MCL 168.759(7), and mailed that application back to his or her local clerk.

Moreover, contrary to Petitioners' statements, the Secretary did not mail applications to every registered voter in the State; rather, she mailed applications to voters in jurisdictions where the local clerk declined to do a mailing. And without examining the applications received by the local clerks themselves, it is impossible to know who or how many voters utilized the Secretary's mailing or some other available application. Further, she did not mail applications to registered voters in the City of Detroit, which is the jurisdiction Petitioners' principally target in this case.

Here, there has simply been no valuation of any person's—or group of persons'—votes as being more valuable than others. There has been no disparate treatment, and so nothing to violate "one-person, one-vote jurisprudence." *Bush*, 531 US at 107, citing *Gray*, 372 US 368. See, e.g., *George v Hargett*, 879 F3d 711

(CA 6, 2018) (method for counting votes on state proposal did not violate equal protection); *State ex rel Skaggs v Brunner*, 588 F Supp 2d 828 (SD Ohio 2008) (counting provisional ballots of otherwise eligible voters did not dilute vote). While Petitioners raise all sorts of irregularities such as lack of access by Republican challengers to TCF, improper processing or dating of ballots, improper storage or receipt of ballots, unsecured access to the qualified voter file, breaking secrecy seals, and so forth, that has no bearing on whether votes weigh equally.

Also, the Third Circuit in *Bognet v Sec'y Pennsylvania,* __ F3d __, 2020 US App LEXIS 35639 (CA 3, November 13, 2020), rejected this type of equal protection claim:

> Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. See *Rucho v Common Cause*, 139 S Ct 2484, 2501 [ ] (2019) ("'[V]ote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight." (emphasis added)); cf. *Baten v McMaster*, 967 F3d 345, 355 (4th Cir 2020), as amended (July 27, 2020) ("[N]o vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally."). As explained below, the Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And 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 (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Trump for Pres v Boockvar*, 2020 US Dist LEXIS 188390, 2020 WL 5997680, at *45-46. ***That is not how the Equal Protection Clause works.*** **[***Bognet*, at *31-32 (emphasis added).]

Similarly, the Eighth Circuit has held that, "[t]he Constitution is not an election fraud statute." *Minn Voters All v Ritchie*, 720 F3d 1029, 1031 (CA 8, 2013), quoting *Bodine v Elkhart Cnty. Election Bd*, 788 F2d 1270, 1271 (CA 7, 1986).

For the same reasons, this Court should conclude that Petitioners have failed to state a claim for violation of equal protection on a vote-dilution theory under the federal or state constitution.

3. The electors clause claim is without merit.

Finally, in Count III, Petitioners allege that "[t]hrough the absentee ballot scheme created, adopted, and enforced by the Secretary of State under color of state law and without legislative authorization, Respondent Benson violated Article 2, section 1, clause 2 of the United States Constitution." (Pet, ¶ 265.)

Article 2, section 1, clause 2 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

As an initial matter, Petitioners lack standing to bring claims under the Electors Clause. The Third Circuit recently held that private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause. *Bognet*, 2020 US App LEXIS 35639, *18. In that case, the Third Circuit also held that because the Elections Clause and Electors Clause have "considerable similarity," the same logic applies to alleged violations of the Electors Clause. *Id.* This Court should follow the Third Circuit and conclude likewise.

Even assuming Petitioners had standing, their claim based upon the Electors Clause would still fail. Petitioners contend that, because the Michigan Legislature has established laws for the administration of elections, including presidential elections, Secretary Benson violated the Electors Clause by failing to follow the requirements of the Michigan Election Law and acting "without legislative authorization" in implementing her alleged "absentee ballot scheme." (Pet, ¶ 265.) It is worth noting that Petitioners' theory here would effectively convert *any and every* claimed violation of state election law—no matter how minor, fleeting, or inconsequential—into a matter of constitutional review any time there was a presidential election. Petitioners offer no support for such an expansive reading of the Electors Clause, and no other court appears to have adopted this approach.

In *Bush v Palm Beach County Canvassing Bd,* 531 US 70, 76 (2000) the U.S Supreme Court held that state legislatures enacting laws governing the selection of presidential electors are acting under a grant of authority under article II, § 1, cl. 2 of the U.S. Constitution. The Supreme Court has also held that the power to define the method of selecting presidential electors is exclusive to the state legislature, *McPherson v Blacker,* 146 US 1, 27 (1892), and cannot be "taken or modified" even by the state constitutions. *Bush,* 531 US at 112-113 (2000) (C.J. Rehnquist, concurring). From this modest premise, Petitioners appear to contend that any violation of the Michigan Election Law is tantamount to a modification of the Legislature's enactments. But neither *Bush* nor *McPherson* holds as much. Indeed, no federal court has articulated the test or standard by which to determine whether

any particular violation of election law equates to a violation of the Electors clause. The absence of such a test in federal jurisprudence is telling.

The principal problem with Petitioners' argument, of course, is that the Respondents have done nothing to violate the Michigan Election Law. In Michigan, "[i]t is presumed that public officers perform their official duties." *Glavin v State Hwy Dep't,* 269 Mich 672, 675 (1934). Petitioners allege the Secretary violated the law in mailing unsolicited absent voter ballot applications to registered voters across the State for their optional use in requesting a ballot. But, as explained above, the Secretary's authority to mail applications was upheld in the *Davis* case. There simply was not anything unlawful or nefarious in the Secretary's exercise of discretion in conducting this mailing back in May. More pointedly, even if the mailing of applications were found to be unlawful in some way, it would not invalidate the votes of lawfully registered electors such as to conclude that the electors were not appointed in the manner determined by the Legislature.

Petitioners allege that this mailing resulted in the counting of illegal ballots in Michigan. But Petitioners have no proof of that relying instead on a bizarre statistical analysis. And how could they? There is no way of knowing which or how many voters utilized the Secretary's mailed application as opposed to obtaining one in any other way. The local clerks do not keep track of the types of applications voters used to apply for an absent voter ballot. Petitioners' claims of fraud related to this process are purely speculative.

Thus, Petitioners fail to demonstrate that the Secretary violated any provision of the Michigan Election Law—let alone the Elector Clause—as a consequence thereof. Similarly, Petitioners fail to show how the Governor or the Board of State Canvassers violated any part of the Election Law, let alone violated nay to such a degree so as to invalidate the election.

In *Bush v Gore*, Justice Rhenquist observed that federal courts' review of state court decisions affecting presidential electors under Article II was still deferential:

> In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law -- see, e.g., *Mullaney v. Wilbur*, 421 U.S. 684 [ ] (1975) -- there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

Bush, 531 US at 114. Here, neither the Governor, the Secretary, nor the Board have "infringed" upon the authority of "the Legislature."

Petitioners have failed to show that any Respondent failed to follow state law, or that the Electors Clause was violated.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Respondents Secretary Benson, Governor Whitmer, the Board of State Canvassers and Jeannette Bradshaw, respectfully request that this Court deny Petitioners' petition for mandamus relief.

Respectfully submitted,

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