

IN THE SUPREME COURT OF THE
STATE OF MICHIGAN

ANGELIC JOHNSON, et al.
Petitioners,

v.

JOCELYN BENSON, et al.,
Respondents.

Case No. 162286

**PETITIONERS' REPLY IN SUPPORT OF PETITION FOR
EXTRAORDINARY WRITS & DECLARATORY RELIEF**

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INTRODUCTION

Petitioners Angelic Johnson and Dr. Linda Lee Tarver (collectively, “Petitioners”), by counsel, file this reply in support of their Petition. Given the exigency of the situation, Petitioners’ reply will be pithy. To begin, the Petition presents “matters of larger public import.” *Halbert v Mich*, 545 US 605, 607 (2005) (“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.”). Fair, honest, and transparent elections are the lifeblood of our republic. And they are guaranteed by the United States *and* Michigan Constitutions. *See, e.g.*, Mich Const 1963, art 2, § 4 (“(1) Every citizen of the United States who is an elector qualified to vote in Michigan *shall* have the . . . [t]he right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections.”); *see also id* (“[T]he legislature shall enact laws to regulate the time, place and manner of all nominations and elections, *to preserve the purity of elections*, to preserve the secrecy of the ballot, *to guard against abuses of the elective franchise*, and to provide for a system of voter registration and absentee voting. . . .”) (emphasis added).

Given their opposition, Respondents apparently believe that their only duty to ensure the “accuracy and integrity of elections” is to “rubber stamp” their results with no meaningful or impartial audit, investigation, or review, including when they are presented with “troubling and serious allegations of fraud and irregularities.”

Plaintiffs’ affidavits present evidence to substantiate their allegations, which include claims of ballots being counted from voters whose names are not contained in the appropriate poll books, instructions being given to disobey election laws and regulations, the questionable appearance of unsecured batches of absentee ballots after the deadline for receiving ballots, discriminatory conduct during the counting and observation process, and other violations of the law.

Order of Nov 23, 2020 in *Constantino, et al, v City of Detroit, et al*, Case No 162245 (Zahra, J, concurring, joined by Justice Markman)(describing similar allegations of election malfeasance in

the 2020 general election as “troubling and serious allegations of fraud and irregularities.”).

Moreover, based on Respondents’ view, this Court has no role to play when confronted with widespread and systemic election irregularities and malfeasance within the State of Michigan. Respondents are mistaken. Indeed, this Court has a primary role in safeguarding freedom, and that necessarily includes safeguarding the right to vote free from debasement and dilution caused by illegal votes and systemic election malfeasance. *See Reynolds v Sims*, 377 US 533, 555; 84 S Ct 1362 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”). The Petition should be granted.

ARGUMENT

The State’s response is a well-crafted study in misdirection and contradiction. Unable to explain why the Board of State Canvassers and the Secretary of State *rushed* to certify a canvass that they *knew* involved a county (the most populous in Michigan) where 71% of the precincts did not balance, two canvassers submitted affidavits stating that they did not certify the results, and an unexplained additional 14,000 votes that changed the results of an election were “found.” Respondents resort to attacking Petitioners and grouping this Petition with other lawsuits that do not involve Petitioners and do not assert the same claims. The Court should reject Respondents’ efforts to obfuscate the record and the cognizable legal claims presented by the Petition.

I. The Court Has Original Jurisdiction to Hear and Decide this Petition.

Respondents' boldly assert that "Petitioners' mandamus claims are a ruse." (Opp'n at 17). Petitioners' jurisdictional basis, however, is premised not on deception or trick but on a plain, fair, and honest reading of Michigan law. The Michigan Constitution expressly authorizes this Court to issue Writs of Mandamus. Mich Const, art 6, §4. Original jurisdiction is not foreign to this Court. Historically, the Court has accepted original jurisdiction over election matters about determinations of the Board of State Canvassers. *See, e.g., Belknap v Bd of State Canvassers*, 95 Mich 155; 54 NW 696 (1893) (granting a writ of mandamus to require the Board of State Canvassers to reconvene and canvass election returns and holding that the Board could not simply accept a return not certified in accordance with election law).

Additionally, Michigan Election Law specifically allows "any person who feels aggrieved by any determination made by the board of state canvassers [to] have the determination reviewed by mandamus or other appropriate remedy in the supreme court." MCL § 168.479(1) (emphasis added). This statute is not limited to challenging the Board of State Canvassers' determinations on petitions (nor is it limited to just mandamus), but authorizes original jurisdiction in the Michigan Supreme Court for "any determination" of the Board, and it allows for "mandamus or other appropriate remedy" in this Court. MCL § 168.479(1).¹

¹ In 2018, the Michigan Legislature amended MCL § 168.479. The previous version did not include subsection 2 pertaining to initiative petitions and simply stated: "Any person or persons, feeling themselves aggrieved by any determination made by said board, may have such determination reviewed by mandamus, certiorari, or other appropriate remedy in the supreme court." MCL § 168.479. The revised statute now includes subsection 2, which provides that when a petitioner is challenging the Board's determination pertaining to the sufficiency or insufficiency of an initiative petition, that challenge must be brought to the supreme court within seven days or sixty days before an election. Those time provisions do not affect when other determinations by the Board may be redressed.

Respondents argue, without clear explanation or legal support, that the *determination* by the Board here (*i.e.*, certifying the election with no audit or investigation into its legality) is distinguishable from the “*any* determination” that is expressly provided for in the statute and which provides original jurisdiction in this Court. And the reason Respondents cannot provide such an explanation or support is simple. They are wrong.

“The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, ‘[t]he words of a statute provide ‘the most reliable evidence of its intent.’” *Krohn v Home–Owners Ins Co*, 490 Mich 145, 156-57; 802 NW 2d 281 (2011) (citations and quotation marks omitted).

“Any’ is not defined by Michigan Election Law, so we turn to the dictionary. Meriam-Webster’s dictionary defines “any” as “[e]very,” “one, some, or all indiscriminately of whatever quantity,” “one or more—used to indicate an undetermined number or amount,” “all—used to indicate a maximum or whole,” “a or some without reference to quantity or extent,” “unmeasured or unlimited in amount, number, or extent,” and “appreciably large or extended.” (<https://www.merriam-webster.com/dictionary/any>) last visited Dec 6, 2020.

Here, the text of MCL § 168.479 broadly grants “any person” who “feels aggrieved” the ability to challenge “any determination” of the Board. The plain language of the statute is *not* limited to challenging initiative petitions which, according to subsection 2, are governed by their own particular time limitations.

Furthermore, the Board’s responsibility in certifying the results of an election, by law, involves a determination by the Board.² Pursuant to MCL § 168.841(1), a determination by the Board includes its responsibility to “canvass 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.” The Board is also responsible for recording the results of the county board of canvassers, but only when in “receipt of a properly certified certificate of determination.” MCL § 168.841(2). Respondents failed to answer why they immediately certified the Wayne County canvass given that two of the canvassers, Monica Palmer and William Hartmann, filed affidavits that the canvass was improper. Indeed, the Wayne County Board of Canvassers was not provided with Executive Summaries before the vote to certify, 71% of its precincts were imbalanced—many without explanation—and during the canvass, over 14,000 votes suddenly appeared, changing the results of a judicial race. These facts are uncontroverted by Respondents. Yet instead of following protocol and properly canvassing Wayne County, the Board voted to certify at its *first* meeting, which was held on November 23, 2020. This same-day determination was improper. This determination failed to follow Michigan Election Law. And this determination by the Board is what Petitioners contest, and they did so by filing their Petition within the early morning hours (2:44 a.m.) of November 26, 2020 (or within about 60 hours of being “aggrieved” by the “determination”).

² Petitioners also requested, via written submission, that the Board conduct a meaningful audit and investigation of the election results before certifying those results given the “troubling and serious allegations of fraud and irregularities” noted above. More specifically, as explained in the Petition, “Petitioners demanded that Respondent Board of State Canvassers (‘Board’) exercise their constitutional duty and refuse to certify the general election without first conducting an audit or first determining the accuracy and integrity of the underlying votes. **Appendix** 199 at ¶3, Ex A (Petitioners’ Demand Letter to Board).” Pet ¶ 24. The Board refused.

Respondents argue that the Board held a clear legal duty to certify the election, but then argue that Petitioners' mandamus action involves no clear duty of the Board. (Opp'n at 29, 32, 34). Petitioners seek a writ ordering the Board to de-certify the election. The Board's certification was improper. Therefore, the Board failed to fulfill its duties to canvass the election. The canvass of Wayne County, Michigan's most populous county, was contested at the time of certification. The Board had a duty to follow Michigan Election Law, not simply to certify and thus "rubber stamp" the election.³ The Board should convene to correct its error through de-certification. Since the Board will fail to properly certify the election within the time constraints provided by MCL § 168.842, forty days following the election, the results of the election remain contested. Michigan election law requires that the matter go before a joint convention of the Michigan Legislature. MCL § 168.846. Petitioners are not requesting matters beyond this Court's power of mandamus. Petitioners are simply requesting a writ ordering the Board to de-certify the results because its certification of the election was improper because the Board failed to follow Michigan Election Law. The next step in the process, per election law, is for the matter to go before the Legislature in order for Michigan to stay on course for the timely selection of the State's electors.⁴

³ The Secretary of State and the Governor both knew that the results of the Wayne County Canvass were disputed on November 23, 2020. The Secretary of State even commented on Twitter about Canvassers Palmer and Hartmann's decision, and it was the Secretary of State who refused to perform the audit that the Canvassers sought to ensure accurate results of the election. Both officials are named as Respondents because, under Michigan Election Law, they also certified the election results knowing they were contested and without the Board properly completing its canvass under MCL § 168.822(1). MCL § 168.822(1) states that "[i]f the board of county canvassers fails to certify the results of an election for any officer or proposition by the fourteenth day after the election as provided, the board of county canvassers shall immediately deliver to the secretary of the board of state canvassers all records and other information pertaining to the election. The board of state canvassers shall meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records from the board of county canvassers."

⁴ Any other relief requested by Petitioners, such as declaratory and injunctive relief, is allowed

II. Neither Mootness nor Laches Bars the Court from Granting the Requested Relief.

This Court should reject Respondents' untimeliness arguments summarily. Indeed, within the same brief, Respondents argue that Petitioners cannot have the results of the election audited until the results are certified (*i.e.*, because the request would otherwise be premature). Respondents then argue that Petitioners' claims are moot because they waited too long because the results have now been certified. Based on Respondents' disjointed arguments, there would be no correct time to bring their claims into court because as soon as Petitioners wished to assert their constitutional right to audit the results of the election, their claims would be moot due to the passage of time. Then in the next breath, Respondents argue that Petitioners' claims are barred by laches because they waited too long. In other words, Petitioners are damned if they do and damned if they don't.

Respondents improperly certified the results of the election at their first meeting on November 23, 2020. As noted previously, Petitioners filed this Petition on November 26, 2020 at 2:44 a.m.—less than sixty hours after this triggering event—challenging the improper and illegal certification of the 2020 general election. This Petition was not only filed promptly and at the earliest possible time, but it seeks relief before the December 8, 2020 safe harbor provision and before the December 14, 2020 designation of electors. And under the U.S. Constitution, the state legislature's work in seating the electors for president need not be finished until inauguration day on January 2021. There is nothing untimely about this Petition.

pursuant to MCR 3.716(A)(7), which grants this Court broad authority to “enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require.”

III. Respondents Fail to Rebut Petitioners' Factual Presentation and Substantive Legal Claims that Require Immediate Relief from the Court.

Petitioners' factual assertions are well supported in the record before the Court,⁵ and their legal arguments are detailed in their accompanying brief. Thus, Petitioners will avoid needless repetition here and will simply highlight several of Respondents' glaring errors.

To begin, Respondents argue that Petitioners' due process claim fails as a matter of law because the right to vote is not protected by this constitutional provision. (Opp'n at 39-40). They are mistaken. *Harper v Va State Bd of Elections*, 383 US 663, 665; 86 S Ct 1079 (1966); *see also Reynolds v Sims*, 377 US 533, 554; 84 S Ct 1362 (1964) (stating that the Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections"). Respondents then concede the point by noting, "[a]lternatively, the Sixth Circuit has held that the Due Process Clause is "implicated" in "exceptional cases where a state's voting system is fundamentally unfair." (Opp'n at 40 [quoting *League of Women Voters of Ohio v Brunner*, 548 F3d 463, 478 (CA 6, 2008)]).

In *League of Women Voters*, the League supported its due process claim with specific factual allegations. *Id.* Here, the record before this Court demonstrates widespread electoral abuses in the most populous county in Michigan that led to "massive disenfranchisement and unreasonable dilution of the vote" in violation of the Due Process Clause of the Fourteenth Amendment. *See also Fla State Conference of NAACP v Browning*, 522 F3d 1153, 1183-84

⁵ Respondents rely on the Affidavit of Christopher Thomas, a paid consultant. (Opp'n at 5). While Mr. Thomas once held the position of elections director in the State of Michigan, Respondents never rebut the statements and conclusion of former Secretary of State Ruth Johnson (or the testimony of the many other affiants for that matter). Johnson served the State of Michigan with distinction for eight years as the Secretary of State and the State's Chief Elections Officer. Respondents have not explained why Secretary, now Senator, Johnson's findings should be ignored. Johnson unequivocally finds that this election's irregularities require court intervention. *See Affidavit of Ruth Johnson*, Appendix 16 at ¶¶ 3-7.

(CA11, 2008) (“When an election process reaches the point of patent and fundamental unfairness, there is a due process violation.”) (internal quotations, punctuation, and citations omitted); *Griffin v Burns*, 570 F2d 1065, 1077 (CA1, 1978) (“If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.”).

Even so, Respondents concede, as they must, that a “vote-dilution” claim is viable under the Equal Protection Clause. (Opp’n at 40 [“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.”]). From Petitioners’ perspective, whether the relief they seek is granted under the Due Process Clause or the Equal Protection Clause is of no moment.

As stated by the U.S. Supreme Court, “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. . . . It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Bush v Gore*, 531 US 98, 104-05; 121 S Ct 525 (2000) (internal quotations and citation omitted). Consequently, and contrary to Respondents’ arguments (*see* Opp’n at 43 [arguing that “Petitioners identify no group that has been given preference or advantage”]), an equal protection claim can be advanced in the election context without a suspect classification or invidious discrimination when legal votes are diluted by illegal ones, as in this case. Petitioners are voters who voted legally. They have been harmed by the illegal votes counted in this election. *See Anderson v United States*, 417 US 211, 227 (1974) (“Every voter in a federal . . . election . . . has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes”); *Black v McGuffage*, 209 F Supp 2d 889, 899 (ND Ill 2002) (“[a]ny voting

system that arbitrarily and unnecessarily values some votes over others” violates equal protection “[e]ven without a suspect classification or invidious discrimination”).

Finally, Respondents assert that Petitioners lack standing to bring a claim under Article II, section 1, clause 2 of the United States Constitution. They are wrong again. *Carson v Simon*, 978 F3d 1051 (CA8, 2020) (reversing denial of a preliminary injunction to enjoin actions of Minnesota’s Secretary of State and concluding that registered voters had standing to bring an action under Article II, Section 1 of the Constitution “because the Secretary extended the deadline for receipt of ballots without legislative authorization”).

CONCLUSION

The Petition should be granted forthwith.

On this 6th Day of December, 2020,

Respectfully submitted,

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PROOF OF SERVICE

I, Ian Northon, hereby affirm that on the date stated below I delivered a copy of the above Petitioners' Reply in Support of Writs on the State of Michigan, Attorney General's Office and specifically to Assistant Attorney General Heath Meingast, and all attorneys of record, by electronic mail via the MiFile electronic filing system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

Dated: December 6, 2020.

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