IN THE STATE OF MICHIGAN
COURT OF CLAIMS

DONALD J. TRUMP FOR PRESIDENT, INC. and ERIC OSTERGREN,

Plaintiffs,

DNC,

Intervening Plaintiff,

v.

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

Defendant.

Civil Action No. 20-000225-MM

HON. CYNTHIA STEPHENS

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**Pro hac vice motion forthcoming*

PROPOSED INTERVENORS' AMICUS BRIEF

INTRODUCTION

At this point, nearly all of the votes in the election have been counted. The people of Michigan have clearly spoken, and the state has been called by multiple major news outlets for Vice President Joe Biden, including Fox News, *The Wall Street Journal*, CNN, *The New York Times*, and many others. And yet, the Trump Campaign makes a last-ditch effort to use the courts to delegitimize and threaten the votes of lawful Michigan voters. The lawsuit is baseless, both in law and fact. Emergency relief should be denied, and all outstanding ballots must be counted.

The issues with the Trump Campaign's complaint and briefing, as well as its extraordinary request for relief to which it is clearly not entitled, are myriad, and there are multiple grounds why its motion can and must be rejected. As a threshold matter, the complaint is based on rights conjured from whole cloth. The Trump Campaign seeks declaratory relief under MCR 2.605 but fails to meet its most basic requirement to establish an "actual controversy" based on facts rather than speculation. And it purports to vindicate rights that do not exist in law, including entirely fabricated claimed rights to unfettered video surveillance footage of voters. The lawsuit is also filed against the wrong defendant. Though it takes issue with purported action taken by county boards, the Trump Campaign sues the Michigan Secretary of State (the "Secretary") alone. But the Secretary has no authority in this particular dispute.

This Court should reject this lawsuit, which is just one more distraction advanced by the Trump Campaign to sow doubt and disrupt democracy. The people of Michigan have made their preference clear. The Trump Campaign may not be happy about their preference, but their baseless attempts interfere with the democratic preference through this lawsuit must be rejected.

BACKGROUND

Donald J. Trump for President, Inc. and Eric Ostergren (together, the "Trump Campaign") filed this lawsuit to obstruct the counting process of lawful ballots in Michigan. Specifically, the

Trump Campaign asks the Court to stop the counting of all absentee ballots and segregate those ballots that have already been cast. They do so based on entirely specious claims that their rights to observe are being obstructed, devoid of factual allegations to support such claims. This lawsuit is part of a continuing pattern of the Trump Campaign to create rights to interfere with the voting and counting process that do not actually exist in law. Over and over again, courts have rejected these baseless attempts. And for good reason. This case is no different; the Trump Campaign's motion should be similarly and decidedly rejected.

As a starting point, there is no constitutional right for campaigns or political parties to observe elections activity or "challenge" voter's ballots. The right to do so is created and defined by statutory law, which varies considerably from state to state. *Donald J Trump for President, Inc v Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *67 (WD Pa, Oct 20, 2020) ("'[T]here is no individual constitutional right to serve as a poll watcher.'" (quoting *Pa Democratic Party v Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa, Sept 17, 2020)); *Republican Party of Pa v Cortés*, 218 F Supp 3d 396, 413-414 (ED Pa, 2016) (similar); *Polasek-Savage v Benson*, No. 20-000217-MM, slip op (Mich Ct Cl, Nov 3, 2020) (similar); Order, *Kraus v Cegavske*, No. 20 OC 00142 (Nev Dist Ct, Oct 29, 2020) *motion to stay denied*, No. 82018 (Nev Sup Ct, Nov. 3, 2020) (denying mandamus because petitioners including Donald J. Trump for President and others failed to cite any constitutional provision, statute, rule, or case that supports . . . request" for increased access to mail ballot processing and counting).

Under the relevant Michigan law, a "challenger" may challenge the validity of an absent voter ballot at one of two locations: a precinct or an absent voter counting board. MCL 168.733. Challengers must be registered voters in Michigan who are not candidates or election inspectors, MCL 168.730(2), and appointed by political parties or other organized groups, MCL 168.730(1).

Challengers may: 1) observe the manner in which election inspectors perform their duties, 2) challenge the validity of ballots, 3) challenge an election procedure not properly performed, or 4) bring various election code violations to the attention of the election inspectors. MCL 168.733(1). Challenged absent voter ballots are processed and tabulated in a routine manner pursuant to state guidance, whether the challenge occurs at the precinct or the absent voter counting board. Mich. Bureau of Elections, *Managing Your Precinct on Election Day*, 24 (Jan. 2020), https://www.michigan.gov/documents/sos/Managing_Your_Precinct_on_Election_Day_391790_7.pdf ("If an absent voter ballot being processed in the precinct is challenged, prepare the ballot as a challenged ballot and make a notation on the Challenged Voters page in the Pollbook. Proceed with routine processing and tabulation of the ballot."); Mich. Bureau of Elections, *Absent Voter Ballot Election Day Processing*, 14 (Oct. 2020), https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf (noting that the part of the absent voter counting board election-day procedure is to "process and tabulate challenged ballots").

Challengers may only challenge a voter who they have "good reason to believe is not a registered elector." MCL 168.733(1)(c). Challengers are prohibited from engaging in "disorderly conduct" or voter intimidation. MCL 168.733(4), 168.733(5). They may not "make a challenge indiscriminately," "handle the poll books . . . or the ballots," or "interfere with or unduly delay the work of the election inspectors." They also must take an oath not to communicate any information about the "processing and tallying of votes . . . until after the polls are closed." MCL 168.765a(9). Challengers' misbehavior may also result in criminal penalties. *Id.*

Michigan law limits the number of challengers at a precinct to "not more than 2" and at counting boards to "not more than 1." MCL 168.730. Just days ago, the Michigan Court of Claims ruled that "it is not apparent plaintiffs have a clear legal right to request that their chosen number

of election challengers be permitted at an absent voter counting board." *Polasek-Savage v Benson*, No. 20-000217-MM (Mich Ct Cl, Nov 3, 2020) (order denying plaintiffs' emergency motion for declaratory judgment). Once they are duly appointed and accepted into the precinct or absent voter counting board, election inspectors may not prevent their presence, MCL 168.734, and must provide challengers with a space where they may observe ballot counting, MCL 168.733(1)(c). The Legislature apparently recognized that its statutory guidance regulating the conduct of absent voter counting boards was not comprehensive, and therefore vested in the Secretary of State the authority to issue "instructions . . . for the conduct of absent voter counting boards or combined absent voter counting boards" MCL 168.765a(13). Pursuant to that authority, the Secretary delegated the authority to local jurisdictions to agree, for the purposes of combined absent voter counting boards, on "how and under what conditions challengers and other individuals permitted into the facility will be allowed in." Mich Bureau of Elections, *Absent Voter Ballot Election Day Processing*, 11 (Oct. 2020), https://www.michigan.gov/documents/sos/VIII_Absent_Voter_County_Boards_265998_7.pdf. This election, of course, concerns about the conditions under which individuals are allowed into the polling place have been paramount in light the COVID-19 pandemic and the social distancing required to prevent transmission of the virus.[1]

Through this action, the Trump Campaign asks this Court to rewrite Michigan's challenger laws, under the auspices of a claim for an equal protection violation under the Constitution. Its claims are meritless. Neither it nor its voters nor its candidates are suffering from or under any threat of suffering from a cognizable constitutional injury. If, however, the Trump Campaign were

[1] Dave Boucher and Christina Hall, Michigan clerks have 'deep concern' about violence, COVID-19 at polls on Election Day, Detroit Free Press, Oct. 30, 2020, https://www.freep.com/story/news/politics/elections/2020/10/30/michigan-clerks-unrest-covid-19-election-day/6037886002/.

to be successful in using this meritless and cynical action to obstruct the timely and lawful counting of ballots in Michigan, or to otherwise slow the certification of the election in any way, the Intervening Plaintiff and its members, voters, and candidates with whom it affiliates would suffer severe equal protection violations. This Court should issue a definitive order declaring that the counting of absentee ballots must continue and that any action by Defendant to stop counting the ballots will result in a violation of Michigan's Equal Protection Clause.

ARGUMENT

I. The Trump Campaign is not entitled to a declaratory judgment.

As the Trump Campaign acknowledges, this Court has the power to enter declaratory judgment only in cases where there is an "actual controversy." *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495 (2012); Michigan Court Rule 2.605(A)(1). "An 'actual controversy' under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to … preserve legal rights." *Id.* The requirement prevents a court from deciding hypothetical issues. *Id.* Plaintiffs bear the burden of proving that an actual controversy exists. *League of Women Voters of Mich v Sec'y of State*, Nos 350938, 351073, 2020 WL 423319, at *5 (Mich Ct App, Jan 27, 2020).

The Trump Campaign has not put forth even a modicum of persuasive explanation—let alone evidence—to support its conclusory allegation that the Michigan laws that govern the process by which duly appointed challengers may observe specific elections processes and challenge ballots. It has not presented evidence that the Trump Campaign has been denied the number of challengers permitted by law—two at a polling place and one at a counting board—or that its challengers have not been allowed to make challenges where they have a "good reason to believe" that the voter is not a registered voter. This deficiency in the evidence is a death knell to the Trump Campaign's declaratory judgment action because, to succeed on a Motion under MCR 2.605, it must "plead and prove facts," and may not merely rely on hypothetical injuries. *Mich*

State Police Troopers Ass'n, Inc v Dep't of State Police, No. 350863, 2020 WL 4039063, at *3 (Mich Ct App, July 16, 2020). On this ground standing alone, the request for declaratory relief should be denied.

II. The Secretary is not the proper Defendant.

As is clear from the face of the Trump Campaign's own Complaint, the Secretary is not the proper defendant for this lawsuit. The Trump Campaign complains that: (1) some absent voter counting boards have allegedly operated without the presence of inspectors from each political party; and (2) some election challengers have purportedly been denied the opportunity to review video surveillance of ballot drop-off boxes. Compl. ¶¶ 11, 18. Even if these claims were legally viable or factually supported (and they are neither), the Complaint fails to allege that the sole defendant in this matter -- *the Secretary* -- has taken any objectionable action. Instead, the complaint clearly alleges that unidentified "Michigan absent voter counting boards" are not complying with the requirement. Compl. ¶ 11.

Michigan's absent voter counting boards are created by *local governments* and are operated by the same. MCL 168.679(1). Thus, the Trump Campaign can only seek relief from the local government entities. But because this Court lacks jurisdiction over such parties, see MCL 600.6419 (describing this Court's jurisdiction); *Mays v Snyder*, 323 Mich App 1, 47; 916 NW2d 227 (2018) (noting this Court's jurisdiction does not extend to local governments), aff'd, *Mays v Governor of Michigan*, --- NW2d --- (Mich, July 29, 2020), joinder is impossible. Moreover, the Trump Campaign cannot overcome this incurable mistake by generally lodging vague allegations against the Secretary. *Polasek-Savage*, No. 20-000217-MM slip op (alleging the Secretary's general supervisory control over local election officials is insufficient to support an action for declaratory relief when the *county* is the responsible party). Thus, the Trump Campaign's

Complaint, which is solely addressed to the purported activity of the counting boards cannot be sustained and must be dismissed.

The Complaint's claims that election challengers have been denied the opportunity to review video surveillance are impermissible for the same reason, and then some. Michigan's Election Code does not give a person or organization the right to monitor video surveillance of voters casting ballots, whether in-person or by using drop-boxes. In support of the Trump Campaign's contention to the contrary, the Complaint and emergency motion cite only MCL 168.730, which permits political parties, incorporated organizations, or organized committees of interested citizens to designate challengers to serve at *precincts* or *counting boards*. Compl. at ¶ 12; see also MCL 168.730(1). But these provisions do not include any authority that gives anyone a right to monitor voters casting ballots—whether at a drop box or anywhere else. Thus, the Complaint fails to allege "what action, if any, was taken by the Secretary of State" that violated any right, or "how the relief [] requested against the Secretary of State can issue," nor could it, as no such right exists. *Polasek-Savage*, No. 20-000217-MM slip op.

III. The Trump Campaign's claims fail as a matter of law.

A. The Trump Campaign does not have a statutory right to the relief it seeks.

To remedy the violations of Michigan law alleged in its Complaint and emergency motion, the Trump Campaign seeks the extraordinary remedy of an immediate cessation of all counting "until an election inspector from each party is present at each absent voter counting board and until video is made available to challengers of each ballot box" and "the immediate segregation of all ballot that are not being inspected." Mot 8; *see also* Compl 8. This requested relief is entirely unprecedented and understandably so—it is wholly unmoored from statute and completely unjustified.

Even if the Trump Campaign could prove that the statutes upon which it relies were violated (which it has not and cannot), Michigan law provides a clear remedy for such violations and it does not include anything remotely like what the Trump Campaign requests. Specifically,

> [a]ny officer or election board who shall prevent the presence of any such challenger as above provided, or shall refuse or fail to provide such challenger with conveniences for the performance of the duties expected of him, shall, upon conviction, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison not exceeding 2 years, or by both such fine and imprisonment in the discretion of the court.

MCL 168.734. That is all. Conspicuously absent from this provision is *any* mention of cessation of tabulation or segregation of ballots. And neither MCL 168.765 nor Senate Bill 757, which amended MCL 168.761d to require video monitoring of drop boxes and on which the Trump Campaign also relies, contemplates these responses to perceived violations of the absent voter counting board or ballot drop-box protocols. In fact, MCL 168.761d, as amended by Senate Bill 757, states that it is "*[t]he city or township clerk*" who "must use video monitoring of [any outdoor] drop box to ensure effective monitoring of that drop box." MCL 168.761d (emphasis added). The Trump Campaign has manufactured these remedies from whole cloth, and they are without any precedent or authority in either Michigan statutes or caselaw. In addition to being procedurally improper, see supra Parts I-II, and wholly inappropriate at this late stage of the election, see infra Part V, the laws on which the Trump Campaign's suit is based simply do not provide a right to the relief they seek.

Nor, for that matter, do these statutes provide any private right for *these Plaintiffs* to challenge alleged violations of these observation rules. It might be true that the statutes convey privileges to individuals who are *actually permitted* to serve as challengers. See, e.g., MCL 168.733(1) (enumerating activities that "[a] challenger may do"). But it is not clear that either the

Trump Campaign or Plaintiff Ostergren were ever permitted to enter the absent voter counting board (indeed, his claim is premised on the idea that he was not).[2] It is theoretically possible that challengers have rights under Michigan statute to observe ballot processing *once they are admitted* inside absent voter counting boards (although even this is not clearly established by statute). But *putative* challengers who are not admitted to absent voter counting boards, which is the crux of Plaintiffs' claims, certainly possess not legal rights under Michigan law. *Polasek-Savage*, No. 20-000217-MM slip op (holding that "it is not apparent plaintiffs have a clear legal right to request that their chosen number of election challengers be permitted at an absent voter counting board."). The Trump Campaign does not—nor could it—point to any statute or authority conferring a right on Plaintiff Ostergren or anyone to serve as a challenger. See *Boockvar*, 2020 WL 5997680, at *67 ("[T]here is no individual constitutional right to serve as a poll watcher." (quoting *Pa Democratic Party*, 2020 WL 5554644, at *30); *Cortés*, 218 F Supp 3d at 408 (similar); *Polasek-*, No 20-000217-MM, slip op at 3 (Mich Ct Cl Nov 3, 2020) (similar); *Kraus v Cegavske*, No 20 OC 00142 1B, slip op at 10-11 (Nev Dist Ct Oct 29, 2020) (denying mandamus where petitioners, including Trump Campaign, failed to cite "any constitutional provision, statute, rule, or case that supports . . . request" for increased access to mail ballot processing and counting), stay denied, No 82018 (Nev Nov 3, 2020). Certainly, the Trump Campaign itself in its organizational capacity could not serve as a "challenger" under Michigan law. Accordingly, neither Plaintiff Ostergren nor the Trump Campaign has any rights under these laws that they can hope to vindicate through this suit, and therefore lack any claim to relief.

B. The Trump Campaign's Purity of Elections Clause claim lacks merit.

The Trump Campaign's claim under the Purity of Elections Clause, Const 1963, art 2,

[2] Plaintiff Ostergren merely alleges that he was "certified and trained." Compl ¶ 2.

§ 4(2), too, lacks merit. The relevant clause states: "[T]he legislature shall enact laws . . . 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." "The phrase 'purity of elections' does not have a single precise meaning. However, it unmistakably requires fairness and evenhandedness in the election laws of this state." *McDonald v Grand Traverse Cnty Election Comm'n*, 255 Mich App 674, 692-693; 662 NW2d 804 (2003) (cleaned up). The "purity of elections" clause has been interpreted by the Michigan Supreme Court to embody two separate concepts: first, that the constitutional authority "to enact laws to preserve the purity of elections" resides in the Legislature; and second, that "any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm." *Wells v Kent Cnty Bd of Election Comm'rs*, 382 Mich 112, 123; 168 NW2d 222 (1969).

Here, however, the Trump Campaign makes no allegation that "any law enacted by the Legislature" "adversely affects the purity of elections"; to the contrary, it asserts that the Legislature enacted the statutes allowing for inspectors and challengers at AVCBs *pursuant* to the Purity of Elections Clause and thus that the Secretary must either direct local officials to comply with those statutes or be in violation of the Purity of Elections Clause herself. Motion at ¶¶ 21-24. The Trump Campaign cites no authority to support such a cause of action under the Purity of Elections Clause. See *id.* Moreover, "[t]his argument assumes that [the Secretary and local officials] violated provisions of the Michigan Election Law, a premise that is incorrect for the reasons already discussed. Therefore, plaintiffs have failed to establish that defendants violated the Purity of Elections Clause." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 676-677; 854 NW2d 489 (2014). Secretary Benson, along with Attorney General Nessel, have been clear

about the rules of this election,[3] even and especially when the Trump Campaign has urged voters to flout those rules.[4] When individuals have violated Michigan's election laws, the Attorney General has acted swiftly to protect the integrity of this election.[5] Plaintiffs present no evidence that this election has been anything but fair and evenhanded.

C. The Trump Campaign has not pled a viable equal protection claim.

The absentee ballot inspection and processing procedures described in the emergency motion reflect a rational, non-discriminatory approach to election administration. Contrary to the Trump Campaign's conclusory assertions, there are no equal protection violations to be found. The Trump Campaign does not even *attempt* to identify any fundamental right that has been violated or any disparate treatment of some voters over others, instead merely stating that "[m]ost United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause." Mot. ¶ 19 n 1. But this generalized statement gets them nowhere. Nothing about the procedures for reviewing, approving, or counting absentee ballots at issue in this case burdens the opportunity for any Michigander to cast a ballot and have it counted, and the Trump Campaign has thoroughly failed to make any showing to the contrary.

At bottom, the Trump Campaign's argument falls back on the notion that if some unlawful absentee ballots evade detection, then the lawful ballots of *all* other voters are diluted. Notably,

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[3] Dave Boucher, *Michigan leaders warn: Voting twice is a felony, even if Trump suggests it,* Detroit Free Press (Sept. 3, 2020), https://www.freep.com/story/news/politics/elections/2020/09/03/michigan-trump-voting-twice-illegal-absentee-ballot/5703359002/.

[4] Maggie Haberman and Stephanie Saul, *Trump Encourages People in North Carolina to Vote Twice, Which Is Illegal*, NY Times (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/us/politics/trump-people-vote-twice.html.

[5] Department of Attorney General, *AG Nessel Files Felony Charges Against Jack Burkman, Jacob Wohl in Voter-Suppression Robocalls Investigation* (Oct. 1, 2020), https://www.michigan.gov/ag/0,4534,7-359--541052--,00.html.

the Trump Campaign cannot identify a single precedent adopting this theory.[6] And, in fact, courts across the country have repeatedly *rejected* similar theories as a basis for plaintiffs to pursue election law challenges—including in other cases brought by the Trump Campaign itself. The conclusion of these courts is both correct and unsurprising: claims of vote dilution based on fears of potential fraud is fundamentally speculative *and* applies to all voters equally, making it an ill-fit for an equal protection challenge.

For example, in *Boockvar*, 2020 WL 5997680, the court soundly rejected a challenge by the Trump Campaign and other Republican Party affiliates who challenged Pennsylvania's restrictions on poll watchers and ballot challenge opportunities under the theory, like here, that enhanced security measures were necessary to prevent fraud and the dilution of lawfully submitted votes. The federal court correctly ruled that the plaintiffs' purported fears of voter fraud that animated their claims were "based on a series of speculative events—which falls short of the requirement to establish a concrete injury." *Id.* at *33. The problem with the plaintiffs' theory of harm by fraud and vote dilution, the court explained, is that "it is almost impossible for them to present anything other than speculative evidence of injury. That is, they would have to establish evidence of a certainly impending illegal practice that is likely to be prevented by the precautions they seek. All of this sounds in 'possible future injury,' not 'certainly impending' injury." *Id.* at *34.

[6] Under the Trump Campaign's apparent theory that any discrepancy in opportunities for voter challenges violates equal protection, the Trump Campaign's *own requested relief* would inflict this very injury. Given that hundreds of thousands of mail ballots have already been approved without the Trump Campaign's requested inspection procedures, the prospective relief that the Trump Campaign demands would subject voters who cast absentee ballots to different treatment depending on whether their ballot was processed before or after this lawsuit was filed.

Similarly, in *Donald J Trump for President, Inc v Cegavske*, No. 2:20-cv-1445; JCM (VCF), 2020 WL 5626974 (D Nev, Sept 18, 2020), the Trump Campaign and others brought an equal protection challenge against a newly enacted Nevada statute that expanded mail-in voting. The court dismissed the complaint, holding that "Plaintiffs' alleged injury of vote dilution is impermissibly 'generalized' and 'speculative.'" *Id.* at *4. Plaintiffs, the court continued "never describe how their member voters will be harmed by vote dilution where other voters will not. As with other 'generally available grievances about the government,' plaintiffs seek relief on behalf of their member voters that 'no more directly and tangibly benefits them than it does the public at large.'" *Id.* (alterations adopted) (quoting *Lujan v Defenders of Wildlife*, 504 US 555, 573-74 (1992)).

Other cases have reached similar results. *See Martel v Condos*, No. 5:20-cv131, 2020 WL 5755289, at *3-5 (D Vt, Sept 16, 2020) (holding voters challenging a Secretary of State directive expanding vote-by-mail lacked the concrete and particularized injury necessary for standing); *Paher v Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *4-5 (D Nev, Apr 30, 2020) (same); *Am Civil Rights Union v Martinez-Rivera*, 166 F Supp 3d 779, 789 (WD Tex, 2015) ("[T]he risk of vote dilution" as a result of allegedly inaccurate voter rolls "[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."); cf. *United States v Florida*, No. 4:12cv285-RH/CAS, 2012 WL 13034013, at *1 (ND Fla, Nov 6, 2012) (rejecting motion to intervene).

So too here. The Trump Campaign's claimed injury—to the extent it even asserts one—is wholly speculative. It is also a generalized grievance that claims no "special injury or right or

substantial interest that would be detrimentally affected in a manner different from the citizenry at large," which is a prerequisite to standing. *Lansing Sch Educ Ass'n*, 487 Mich at 359.[7]

In any event, while vote dilution is a recognized violation of equal protection in certain contexts—such as when laws are crafted that structurally devalue one community's or group of people's votes relative to another's, see, e.g., *Reynolds v Sims*, 377 US 533, 563-64 (1964)—it is also true that "[t]he Constitution is not an election fraud statute." *Minn Voters Alliance v Ritchie*, 720 F3d 1029, 1031 (CA 8, 2013) (quoting *Bodine v Elkhart Co Election Bd*, 788 F2d 1270, 1271 (CA 7, 1986)). There is simply no authority for enlisting the judiciary to unilaterally amend the elected branches' chosen methods of securing the integrity of elections.[8]

To the contrary, courts have routinely—and appropriately—rejected such efforts on the merits as well. *See Minn Voters Alliance*, 720 F3d at 1031-32 (rejecting challenge grounded in vote dilution theory to decision by election administrators to allow same-day registrants to vote before verifying their voting eligibility to the satisfaction of plaintiffs); *Boockvar*, 2020 WL 5997680, at *67-68 (rejecting equal protection challenge to poll watcher restrictions grounded in vote dilution theory because restrictions on voter challenges did not burden a fundamental right,

[7] That Michigan courts have held that plaintiffs in a *mandamus* action relating to elections need not "show a substantial injury *distinct* from that suffered by the public in general" is of no moment. *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) (emphasis added). First, the Trump Campaign does not seek to enforce any rights by mandamus. Second, it has *no* injury (substantial or otherwise), so whether it is distinct from that of anyone else is irrelevant.

[8] *Bush v Gore*, 531 US 98 (2000) (per curiam) does not save the Trump Campaign's claims. In *Bush*, the U.S. Supreme Court considered "whether the use of standardless manual recounts" by some, but not all, Florida counties in the aftermath of the 2000 presidential election violated the Equal Protection Clause of the U.S. Constitution. *Id.* at 103. The Court specifically clarified that it was *not* deciding "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Instead, it was addressing a situation where the counting of ballots lacked even "minimal procedural safeguards." *Id.* Here, there are uniform requirements in place that provide those safeguards.

including the right to vote, nor discriminate based on a suspect classification); *Cook Co Rep Party v Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *4 (ND Ill, Sept 17, 2020) (denying a motion to enjoin a law expanding the deadline to cure votes because plaintiffs did not show how voter fraud would dilute the plaintiffs' votes); *Cortés*, 218 F Supp 3d at 406-07 (rejecting a requested expansion of poll watcher eligibility that rested on premise that voter fraud would dilute weight of the plaintiffs' votes); *see also Common Cause Rhode Island v Gorbea*, 970 F3d 11, 15 (CA 1, 2020) (enjoining a ballot witness signature requirement during pandemic notwithstanding arguments that doing so would allegedly increase the risk of voter fraud and put Republican candidates at risk); *Short v Brown*, 893 F3d 671, 679 (CA 9, 2018) (rejecting equal protection challenge to California practice of permitting voters in some counties to receive a ballot by mail automatically, while requiring voters in our counties to register to receive a ballot by mail); *Partido Nuevo Progresista v Perez*, 639 F2d 825, 827-28 (CA 1, 1980) (rejecting challenge to purportedly invalid ballots because the "case does not involve a state court order that disenfranchises voters; rather it involves a Commonwealth decision that en franchises them. [sic] [P]laintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting").

Finally, and importantly, there is no constitutional right for any party or individual to serve in a poll watching capacity to challenge ballots. In *Boockvar*, as one recent example, the court held that plaintiffs, including prospective poll watchers, did not have standing to assert a right to expanded opportunities to monitor the polls and lodge challenges because "there is no individual constitutional right to serve as a poll watcher," and a theory of harm that turns on "dilution of votes from fraud caused from the failure to have sufficient poll watchers . . . . rests on evidence of vote dilution that does not rise to the level of a concrete harm." 2020 WL 5997680, at *37, *67; *see also Cortés*, 218 F Supp 3d at 408; *Cotz v Mastroeni*, 476 F Supp 2d 332, 364 (SDNY, 2007);

Dailey v Hands, No 14-423, 2015 WL 1293188, at *5 (SD Ala, Mar 23, 2015) ("[P]oll watching is not a fundamental right protected by the First Amendment."); *Turner v Cooper*, 583 F Supp 1160, 1162 (ND Ill, 1983) ("Plaintiffs have cited no authority . . . , nor have we found any, that supports the proposition that [the plaintiff] had a first amendment right to act as a poll watcher."). Inspection processes are creatures of state law.

Michigan's challenge regime thus cannot impose a constitutional injury on the Trump Campaign because the only right to challenge ballots that the Trump Campaign has is what Michigan has decided to give them in its state law. And that state law applies equally to everyone—the Trump Campaign is not disadvantaged as compared to anyone else who would engage in the challenge process. Thus, Plaintiffs here lack a concrete and cognizable injury that would permit them to bring this action.

IV. The Trump Campaign's claims fail as a matter of proof.

Even if one were to accept that their legal theory is viable—it is not—the Trump Campaign failed to adduce proof of the factual predicate for its claims. The only factual support for its claims is the complaint verified by Plaintiff Ostergren and a late-filed affidavit reflecting a hearsay accounting of an incident at a single counting board location. Neither supports the Trump Campaign's claims.

The verified complaint states that "Eric Ostergren was excluded from the counting board during the absent voter ballot review process." Compl ¶ 2. The Trump Campaign does not claim that it designated Ostergren to be a challenger, a requirement under MCL 168.730(1). And, Ostergren's exclusion does not mean that the Trump Campaign or Republican Party was precluded from designating challengers to serve at the absent voter counting board in Roscommon County. Indeed, Ostergren has no individual or independent right to be a challenger; if anything, that right belongs to "[a] political party—or an incorporated organization or organized committee of

interested citizens." MCL 168.730(1). Exclusion from a counting board of a single individual, without more, is insufficient to suggest that the Trump Campaign or Republican Party and their representatives are being excluded from observing. See *Weymers v. Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997) (holding "a complaint be specific enough to reasonably inform the adverse party of the nature of the claims against him"); MCR 2.111(B)(1) (same).

The late-filed affidavit illuminates nothing. It is a double hearsay account of an incident involving a challenger at a counting board—and, indeed, suggests that the Trump Campaign *is* being granted access to observe the processing and counting of ballots. It also does nothing to support the claims that the Plaintiffs make in the Complaint. Instead it introduces brand new and entirely different allegations that are based entirely on a chain of rumor—not at all on personal knowledge—and thus cannot possibly serve as the basis for finding that Plaintiffs are likely to succeed on the claims they actually make in this case. To be clear, even if the Trump Campaign were to amend to add new claims based on these new third-party rumors, it could not succeed. The affidavit's baseless assertions of pre-dating ballots are easily explained by Michigan's process for tracking and processing ballots *after* the election, i.e. in the days after the ballots were actually received.

V. The counting of ballots must continue.

Ultimately, the Trump Campaign's lawsuit challenges the core principle of our electoral process—that every vote must be counted. See *Reynolds*, 377 US at 555 n 29 ("'There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.'") (quoting *South v Peters*, 339 US 276, 279 (1950) (Douglas dissenting). In light an unprecedented global pandemic and their newly enshrined constitutional right to vote absentee, more than 3 million Michiganders (over 60% of those who voted) chose to vote absentee in this year's general election.

The Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws." Const 1963, art 1, § 2. Thus, having adopted a system by which absentee voting is available to all voters, Michigan may not "'by later arbitrary and disparate treatment, value one person's vote over that of another.'" *Obama For Am v Husted*, 888 F Supp 2d 897, 910 (SD Ohio, 2012), aff'd, 697 F3d 423 (CA 6, 2012) (quoting *Bush v Gore*, 531 US 98, 104-105 (2000) (also holding Equal Protection Clause applies to "the manner of [the] exercise [of voting]").

All Michigan voters who cast lawful absentee ballots should have equal access to having their vote counted, but the Trump Campaign seeks relief that would jeopardize this right. The State does not have even a legitimate, much less a compelling, interest in the disparate treatment of similarly situated voters. See *Obama for America*, 888 F Supp 3d at 910 (holding a state had no compelling interest in setting an in-person early voting deadline, which valued the rights of military voters over nonmilitary voters). Thus, any order to stop the counting of ballots, as the Trump Campaign demands, would amount to a violation of Michigan's Equal Protection guarantee.

In short, every vote should be counted. "[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." *United States v Saylor*, 322 US 385, 387-88 (1944).

CONCLUSION

For the reasons stated, Intervening Plaintiff respectfully submits that this Court should deny the Trump Campaign's Emergency Motion for Declaratory Judgment.

Dated this 5th day of November, 2020.

Respectfully submitted,

/s/ *Scott R. Eldridge*
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PROOF OF SERVICE

Scott Eldridge certifies that on the 5th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *Scott Eldridge*
Scott Eldridge