

STATE OF MICHIGAN  
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHERYL A. COSTANTINO and  
EDWARD P. McCALL, Jr.,

Case: 20-014780-AW  
Hon. Timothy M. Kenny

Plaintiffs,

v.

CITY OF DETROIT; DETROIT ELECTION  
COMMISSION; JANICE M. WINFREY, in  
her official capacity as the CLERK OF THE CITY  
OF DETROIT and the Chairperson of the  
DETROIT ELECTION COMMISSION;  
CATHY M. GARRETT, in her official  
capacity as the CLERK OF WAYNE  
COUNTY; and the WAYNE COUNTY BOARD  
OF CANVASSERS,

Defendants.

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COUNTY RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

## INTRODUCTION

Plaintiffs weave a tale of mystery and conspiracy; unnamed individuals participated in nefarious activities to rob the citizens of Detroit of their sacred voting rights. Although superficially intriguing, this Court should reject that view for the sounder conclusion that election officials and workers appropriately performed their jobs.

Plaintiffs request a preliminary injunction to prevent the processing of absent voter ballots; stop certification of election results; preserve election records; and commence discovery.

This court should reject that request:

- There's no right to a special audit when the statute already mandates an audit.
- One can't get both an injunction and leave for quo warranto.
- Certain irregularities are not subject to an injunction
- Statutes are construed to prevent voter disenfranchisement
- Cathy Garrett should not be a party
- Other remedies prevent Plaintiffs' from suffering harm.

## QUESTION PRESENTED

An injunction is appropriate where the Plaintiffs are likely to prevail on the merits; there would be harm to the public interest; Plaintiffs would suffer irreparable harm; and the harm to them outweighs any public harm.

Are Plaintiffs entitled to an injunction where there's no right to a special audit; they can't get both an injunction and quo warranto; irregularities are not subject to an injunction; statutes are construed to prevent voter disenfranchisement; Cathy Garrett should not be a party; and Plaintiffs will suffer no harm.

Plaintiffs answer yes

Cathy Garrett and the Board of Canvassers answer no.

## ARGUMENT

### I. Standard For A Temporary restraining order/preliminary injunction

A temporary restraining order may be granted if it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued. MCR 3.310(B)(1)(a).

Plaintiffs cannot meet the elements for an injunction:

- they are likely to prevail on the merits
- there would be harm to the public interest
- they would suffer irreparable harm
- harm to them outweighs any public harm

*Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984).

### II. Plaintiffs are not likely to succeed on the merits

#### A. **The Plaintiffs do not have a right to request an audit separate from that provided by the State of Michigan pursuant to Mich Const art 2 §4 and MCL 168.31a.**

Plaintiffs cite Mich Const art 2 §4 for the proposition that they have the right to a special audit of the election. The constitutional provision provides for an audit according to Michigan Election law, i.e. a citizen has “The 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.” Mich Const art 2 §4(1)(h). (Emphasis added).

MCL 168.31a provides for this audit right:

- (1) In order to ensure compliance with the provisions of this act, after each election the **secretary of state may audit election precincts.**
- (2) 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.**
- (3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit.

Thus, the Secretary of state and Wayne County Clerk will conduct post-election audits after the November 4, 2020 election is certified and recounts are performed.

**B. Plaintiff cannot request both an injunction and leave for quo warranto.**

When it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or county township or municipality, the remedy by quo warranto applies. MCL §600.4545. It is unlikely that a petitioner for an injunction will prevail on the merits – the petitioner has a remedy at law, which is quo warranto and the petitioner will have no harm. *Wayne County Republican Committee v Wayne County Board of Commissioners*, 70 Mich App 620; 247 Nw2d 571 (1976).

In *Atty General v Ingham Circuit Judge*, 347 Mich 579; 81 NW2d 579 (1957), the Supreme Court of Michigan held that equitable relief may not properly be substituted for a statutory remedy prescribed for the determination of the validity of an election. Where the statutory remedy of quo warranto is available for determining the question of the validity of an election a court of equity may not properly take jurisdiction:

(T)he general rule is that an injunction will not issue to prevent the holding of an election whether or not the election is illegal, and that this is so whether the election relates to the filling of public office or other matters..there is an adequate remedy at law, by quo warranto and that the right involved is a strictly political right which cannot be enforced or protected by a court of equity but is cognizable only by a court of law

*Atty General v Ingham Circuit Judge, id*, at 583.

In *Grand Rapids City Clerk v Judge of Superior Court*, 366 Mich 335; 115 NW2d 112 (1962), plaintiffs asked for a temporary injunction restraining the election. In overturning the lower court's award of an injunction, the Supreme Court said:

Elections are a most vital part of government. The people are more closely involved with their government in elections than in almost any other process. Interference by the courts where, as here the proceedings are regular and legal in every respect, should be avoided. **Those complaining of the election have a clear and adequate remedy by quo warranto to test the constitutional issue in the event of a favorable vote.** (Emphasis supplied).

*Grand Rapids City Clerk v Judge of Superior Court, id* at 340.

See also *Holland City Clerk v Ottawa Circuit Judge*, 368 Mich 479; 118 NW2d 250 (1962) (temporary injunction against holding an election on the question of annexation to the city was improvidently issued); *Edwards v Flint City Clerk*, 9 Mich App 367; 156 NW2d 153 (1968) (Court of Appeals reversed issuance of an injunction to prevent door-to-door registration of elections); *St Joseph Twp v Berrien County Supervisors* 363 Mich 295; 109 NW2d 826 (1961) (Court refused to enjoin an election to annex certain property in plaintiff's township on the

ground of adequacy of legal remedy under statute relative to quo warranto proceedings); and *Groh v City of Battle Creek*, 368 Mich 653; 118 NW2d 829 (1962) (Supreme Court upheld the board of canvassers' ruling on the number of signers on an annexation petition and determined that such question may be raised by quo warranto proceedings after the election).

This Court may not precipitously intervene in the political arena and preempt a vote of the people. *Senior Accountants Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263; 553 NW2d 679 (1996). Plaintiffs may not seek both a preliminary injunction and leave for quo warranto.

**C. Certification should not be enjoined for irregularities regarding the recording and returning of the votes.**

*Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193; 452 NW2 471 (1989) is a compelling case which involved a judicial election for the City of Grosse Pointe. Ms Gracey, the wife of a candidate, hand delivered a number of absentee ballots to the city clerk's office, although she was not a "member of the immediate family of the voter" within the meaning of the statute defining those who may return absentee voter ballots. For at least one absentee ballot, the city clerk's office had instructed Ms. Gracey to take it to the voter to obtain a signature on the ballot envelope, and then return it to the clerk's office.

The city clerk refused to canvass the ballots and the Wayne County Board of Canvassers ("Board") failed to canvass the ballots within the time allowed by statute. The Board of State Canvassers canvassed the ballots and certified the results. Mr. Casazza requested a recount. The Board conducted the recount and forwarded a written report of its findings to the county prosecutor and to the circuit judges. The Board took the position that it should not certify the recount results until the prosecutor completed its investigation. Mr. Gracey filed a mandamus

action to compel the Board to certify the recount results. Mr. Casazza filed for declaratory relief.

The appellate court held that the Board violated a clear legal duty to complete the recount:

[P]rovisions of an election statute which affect the time and place of the election and the legal qualifications of the electors are of the substance of the election, whereas those touching only the recording and returning of the legal votes received and the mode and manner of conducting the details of the election are directory. Irregularities not tending to affect results are not to defeat the will of the majority, which is to be respected, even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents.

*Gracey v Grosse Pointe Farms Clerk, id* at 209.

**D. Statutes should be construed to prevent the disenfranchisement of voters through the mistakes of others.**

Public policy requires that statutes controlling the manner in which elections are conducted be construed as far as possible in a way which prevents the disenfranchisement of voters through the fraud or mistake of others. *Kennedy v Board of State Canvassers*, 127 Mich App 493; 339 NW2d 477 (1983).

All doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election. *Charter Twp of Meridian v City of East Lansing*, 101 Mich App 805; 300 NW2d 703 (1981).

The general rule is that courts do not disenfranchise voters because of election officials' mistakes, negligence or misconduct. *Gracey v Grosse Pointe Farms Clerk, supra*. See *Stamos v Genesee County Board of Canvassers*, 46 Mich App 636; 208 NW2d 551 (1973) (Due to

unforeseen reasons, field supervisor was unable to deliver absentee ballots to precincts prior to 8:00 p.m. closing); *Rosenbrock v School District No 3, Fractional Tp of Williams and Monitor*, et al, 344 Mich 335; 74 NW2d 32 (1955) (Secretary of the school board incorrectly advised election inspectors that electors who were not taxpayers should be allowed to vote on a millage question); *Carnes v Livingston County Board of Education*, 341 Mich 600; 67 NW2d 795 (1954) (Board failed to provide written notice to members and moderator failed to preside at election meeting); *Toole v State Board of Dentistry* 300 Mich 180; 1 NW2d 502 (1942) (Text of referendum was not published in full on voting machine); *Miller v Miller*, 266 Mich 127; 253 NW 241 (Board failed to withdraw excess ballots from the ballot box during a recount and refused to recount the ballots in boxes containing no tally sheet); *Abbott v Board of Canvassers of Montcalm County*, 172 Mich 416; 137 NW 961 (1912) (Precinct inspectors did not place ballot numbers opposite the names in the poll book); *Horning v Burgess* 119 Mich 51; 77 NW 446 (1898) (Election inspector marked the ballots in the lower corner, rather than the upper left-hand corner); *People v Avery*, 102 Mich 572; 61 NW 4 (1894) (Candidate acted as an election inspector and notices of election posted, per repealed law); *Lindstrom v Board of Canvassers of Manistee County*, 49 Mich 467; 54 NW 280 (1893) (Ballots for city officers were placed in box for state officers).

Public policy favors that any alleged errors committed by election officials should not be used to disenfranchise the voters of the city of Detroit.

**E. Cathy Garrett is not a proper party and should be dismissed from this matter.**

Individuals having such interests in the subject matter that their presence is essential to permit the court to render complete relief must be made parties. MCR 2.205. A party is “indispensable” to a case if that party has an interest of such a nature that a final decree cannot

be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Mather Investors, v Larson*, 271 Mich App 254, 257; 720 NW2d 575 (2006).

Plaintiffs have requested an Application For Leave To File Complaint for Quo Warranto (“Application”) under MCL §600.4545 and MCR 3.306(B)(2). (Complaint, pages 13 and 14). They ask for an order prohibiting Defendants’ from certifying the election results” (Complaint, page 20).

The Wayne County Board of Canvassers performs the canvass and certifies election results:

...the board of county canvassers shall meet at the office of the county clerk no later than 9 a.m. on the Thursday after any election held in the county.

MCL 168.821(1)

The **board of county canvassers shall then proceed without delay to canvass the returns** of votes cast for all candidates for offices voted for and all questions voted on at the election, according to the precinct returns filed with the probate judge or presiding probate judge by the several city and township clerks, or in case of local elections according to the precinct returns filed with the county clerk, and must conclude the canvass at the earliest possible time and in every case no later than the fourteenth day after the election. (Emphasis added).

MCL 168.822(1).

(1) A 4-member board of county canvassers is established in every county in this state. **All of the powers granted to and duties required by law to be performed by all boards of canvassers** established by law, other than the board of state canvassers, **are granted to and required to be performed by the board of county canvassers.**

MCL 168.24a.

Upon completion of the canvass under section 822, the board of county canvassers shall prepare a statement in detail of the number of votes cast for each office, the names of the persons for whom such votes were given, and the number

of votes given to each person, as shown by the returns of the boards of inspectors of election of the various voting precincts of the county. The board of county canvassers shall also prepare a statement in detail of the number of votes cast on any proposed constitutional amendment or other ballot question submitted to the electors at the election and the number of votes cast in favor of and the number of votes cast against such proposed amendment or other ballot question, as shown by such returns.

MCL 1681.824(1).

The County Clerk is not a member of the Board of Canvassers. She is not responsible for administering the election night tabulation or canvassing the precincts. She should not be a party to this matter.

A municipality is a necessary party to an action for quo warranto for fraud or error in an election at which a constitutional amendment, question, or proposition is submitted to the electors. MCL §600.4545. The presence of the county clerk is not necessary for this Court to determine this matter.

### **III. Plaintiffs will not be harmed if no injunction should issue.**

Assuming the Board did not certify election results within 14 days, MCL §168.822(2) mandates that the board of state canvassers shall “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.” Therefore, Plaintiffs would not be harmed from the Board’s failure to timely canvass and certify.

The Michigan Secretary of State is the chief elections officer in Michigan and has supervisory control over local election officials and investigates violations of election laws. MCL §168.21; MCL §168.31. Plaintiffs can request intercession by the Secretary of State. She has not been given the opportunity to apply her expertise prior to intervention by the courts. *Spalsbury v Richardson*, 347 F Supp 785 (WD Mich 1972).

A candidate for an election may petition for a recount of the votes of the election, if the candidate perceives there was fraud or mistake. MCL §168. 862; MCL §168.879. Any Republican candidate perceiving fraud or mistake has the right to request a recount.

The Supreme Court has emphasized that courts should not interfere with discretionary acts of municipal officials:

Where a municipality has the power to engage in an activity for a public purpose, the courts will not interfere with the discretionary acts of its municipal officials. **In order to warrant the interposition of a court of equity in municipal affairs, there must be a malicious intent, capricious action or corrupt conduct, something which shows the action of the body whose acts are complained of did not arise from an exercise of judgment and discretion vested by law in them. (Internal citations omitted) (Emphasis added).**

*Moran v Detroit Board of Election Commissioners*, 334 Mich 234, 240; 54 NW2 310 (1952).

In the instant case, the Plaintiffs have options. They will not suffer irreparable harm if no injunction should issue.

#### **IV. Plaintiffs have not met their burden of proof.**

An injunction represents an extraordinary act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity. The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4). This court's grant of a temporary injunction is a question of discretion. *L&L Concession Co v Goldhar-Zimmer Theatre Enterprises*, 332 Mich 382; 51 NW2d 918 (1952). The Michigan courts have not upheld the exercise of an injunction in quo warranto cases. Plaintiffs have not shown any extraordinary circumstances.

#### **CONCLUSION**

Defendants Cathy M. Garrett and Wayne County Board of Canvassers request this Honorable Court issue an order denying the preliminary injunction.

Respectfully submitted

/s/JanetAnderson-Davis\_\_\_\_\_

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Dated: November 11, 2020

#### PROOF OF SERVICE

I certify on November 11, 2020 I filed the foregoing with the clerk of the court via the court's electronic filing system which will serve all parties.

/s/Susan Sweetman\_\_\_\_\_